

UNITED STATES OF AMERICA
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SURFACE TRANSPORTATION BOARD

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PUBLIC HEARING

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IN THE MATTER OF: :
:
COMPETITION IN THE : Docket No.
RAILROAD INDUSTRY : EP 705
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Thursday,
June 23, 2011

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 8:30 a.m.

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ANN D. BEGEMAN	Vice Chairman
FRANCIS P. MULVEY	Commissioner

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1 P-R-O-C-E-E-D-I-N-G-S

2 8:30 a.m.

3 CHAIRMAN ELLIOTT: Good morning.

4 Welcome to the second day of the hearing.

5 Good to see the crowd coming back, and just a
6 few procedural matters before we get started.

7 I thought we had a really good day
8 yesterday of useful testimony and some good
9 questions and answers, so hopefully we'll have
10 more of the same today.

11 First of all and most importantly,
12 I want to warn everyone about the chairs that
13 you're sitting in at the present time.

14 There's a lever on the side, I believe, so if
15 you hit that lever, you're going to go right
16 down, but it's very easy to get back up.

17 Don't panic. All you have to do
18 is take a little pressure off and hit the
19 lever and it will go back up. I do it all the
20 time up in our boardroom, and it's, I know,
21 very embarrassing when it does happen.

22 Second, if you have a PowerPoint,

1 just a reminder, we ask you, if you have not
2 done so already, to submit that to the Office
3 of Proceedings so that we can make it part of
4 the record, two copies.

5 You can do that I think
6 electronically also, if that poses a problem
7 for you to do it today, or you can mail it.

8 Also, the lights, for those of you
9 who haven't been here before, a yellow light
10 will come on when you have one minute to go.
11 You'll have a green light throughout.

12 When the yellow light comes on,
13 you'll have the warning. Red light will come
14 on, that means your time is up.

15 Don't stress out too much. As a
16 former practitioner, I know that's a stressful
17 thing. We won't scream at you if you go a few
18 minutes over or a few seconds over, but don't
19 push it.

20 Anyhow, we'll start off with our
21 first panel of the day, and we'll begin with
22 Ameren Corporation.

1 Mr. Sobule, you have ten minutes.

2 MR. SOBULE: Thank you.

3 Good morning, Chairman Elliot,
4 Vice Chairman Begeman, and Commissioner
5 Mulvey. My name is James Sobule. I am Vice
6 President Deputy General Counsel for Ameren.

7 On behalf of Ameren, I'd like to
8 thank the Board for taking comments and
9 holding this very important hearing on
10 competition in the railroad industry.

11 Ameren's the fifth largest
12 consumer of coal in the United States,
13 consuming approximately 39 million tons
14 annually, and is the largest purchaser of
15 Powder River Basin coal. Ameren owns or
16 leases approximately 7,500 rail cars and
17 spends approximately \$650 million annually on
18 rail transportation alone.

19 Rail transportation costs are
20 approximately 55 percent of the total
21 delivered cost of coal to Ameren's plants.

22 Ameren began spending millions of

1 dollars converting its power plants from high
2 sulphur Illinois Basin coal to low sulfur PRB
3 coal in the 1990s in response to the Clean Air
4 Act.

5 While the PRB is roughly ten times
6 further from the Ameren plants than the
7 Illinois Basin coal fields, the competition
8 amongst the railroads at that time provided
9 competitive rail rates that resulted in the
10 use of PRB coal being more economical than
11 using Illinois Basin coal when you added the
12 cost of emission controls.

13 As Ameren expanded its use of PRB
14 coal, the rail rates continued to drop as a
15 result of competition at that time between the
16 Western Rail carriers until about 2004. At
17 that time, there was a marked change in the
18 competitiveness of the Western Rail carriers,
19 which resulted in rates dramatically
20 increasing.

21 Prior to 2004, Ameren found that
22 the Western carriers were interested in

1 securing additional business and would compete
2 vigorously to maintain or be rewarded new
3 traffic.

4 Rail rates gradually decreased
5 from the time that Ameren commenced using PRB
6 coal in the 1990s, largely due to the non-
7 incumbent competing railroad taking contracts
8 as they came due by offering lower rates or
9 the incumbent carrier reducing its rates to
10 keep the building.

11 As shown on the graph which is in
12 our written testimony, Ameren's rail rates
13 increased dramatically after 2004. Starting
14 in 2004, Ameren found a very different
15 competitive environment among the Western
16 railroads. Railroads appeared to be no longer
17 interested in acquiring coal traffic that was
18 being hauled by the competing carrier.

19 In every instance from 2004 to
20 2010, when Ameren issued bids for rail quotes
21 for the UP and BNSF competitive rail supply
22 plants, not a single one of the plants

1 primarily using PRB coal at that time changed
2 carriers as a result of these requests for
3 rates.

4 In other words, the railroad that
5 was shipping the PRB coal at the time of
6 contract renewal retained the business.

7 The non-incumbent railroads at the
8 time of the quote or pricing tariff quoted a
9 rate which was on average 43 percent higher
10 than the rate of the incumbent railroad.

11 Because the non-incumbent rate or pricing
12 tariff on average was 43 percent higher than
13 the incumbent rate, the incumbent railroad was
14 able to consistently impose a substantial
15 increase from the prior rate.

16 Through this 2004 to 2010 time
17 frame, the incumbent carrier was able to
18 propose rate increases to Ameren that were up
19 to an 87 percent increase at the time of
20 contract renewal.

21 Another phenomenon which began
22 occurring after 2004 was what Ameren refers to

1 as non-responsive bidding. These are carrier
2 responses to rate requests, which indicated to
3 us that the carrier was really not interested
4 in the business.

5 These types of bids include no
6 responses, responses which imposed extreme,
7 one-sided contract conditions, or which varied
8 materially from Ameren's bid parameters.

9 During this time frame, Ameren received five
10 of these non-responsive types of bids.

11 Another type of non-responsive bid
12 is the refusal to quote to a non-physical
13 point. Prior to 2004, Ameren was very active
14 in acquiring and building competitive rail
15 access to its power plant.

16 Ameren's been very supportive of
17 self-help measures and shipper investment in
18 rail transportation infrastructure. In fact,
19 Ameren believes it's been one of the most
20 active shippers in undertaking such self-help
21 measures.

22 Since 1990, Ameren has constructed

1 four build-outs at our plants to allow second
2 rail carrier access and also from three short-
3 line railroads. Ameren also purchased a rail
4 line and built numerous barge facilities to
5 allow competitive access to three additional
6 plants.

7 These facilities were often built
8 by obtaining a favorable rate prior to
9 construction from the competing carrier, which
10 justified the significant investment.

11 However, after 2004, Ameren found
12 that both the Western carriers had adopted a
13 policy of not quoting to non-physical points.
14 In other words, the railroads would not quote
15 if the physical track had not been built.

16 This further stifled competitive
17 alternatives, as a shipper is unlikely to
18 invest in new facilities if the rate at the
19 time that they're going to get for doing that
20 is unknown.

21 I'd also like to take a minute to
22 quickly address a theme that was raised by AAR

1 yesterday in their testimony regarding the
2 value of this proceeding.

3 We recently heard a similar theme
4 from a railroad in another active docket, and
5 I can assure that Ameren does not view either
6 of those dockets as a waste of resources. We
7 think it's very valuable use of time.

8 I also want to respond to a few
9 comments made in the May 27th reply comments.
10 The UP stated that shippers have stopped
11 pursuing build-outs because they believe the
12 Board will provide regulatory benefits at a
13 lower cost in the build-out.

14 I will state emphatically, that's
15 not the reason that Ameren stopped pursuing
16 the build-outs. It's the reason I stated
17 earlier.

18 UP's reply comments also address
19 the Duck Creek build-out, which the Board is
20 aware, Ameren built in 2005. While the UP did
21 receive some traffic under the build-out,
22 after it was completed, the UP refused to

1 quote a rate until the physical turnout was
2 installed.

3 Then, in 2007, Ameren had to fight
4 to protect its build-out investment in the
5 proceedings before the Board when the BNSF
6 sought to undermine the benefit of the build-
7 out by actually leasing the BNSF track to the
8 same carrier to which the build-out was made.

9 Fortunately, the Board saw this
10 and agreed with Ameren and prohibited the
11 proposed railroad transaction.

12 Ameren would also like to provide
13 some experience in relation to BNSF's witness
14 statement that assertions that some coal
15 shippers that, after 2004, no coal business
16 has shifted between BNSF and UP, are
17 categorically false.

18 Obviously, we can't speak for all
19 the shippers, and we can't view UP's highly
20 confidential material that they submitted in
21 support of this statement.

22 However, I can speak to Ameren's

1 experience from 2004 to 2010, and will once
2 again emphasize that we issued bids for rail
3 quotes for 10 of our competitive rail supply
4 plants, and not a single one of those plants
5 changed carriers as a result of these
6 requests. Very different than the pre-2004
7 experience.

8 In addition to rate increases, at
9 the same time, the railroads began imposing
10 mandatory fuel surcharges. Ameren, as you
11 know, has filed comments in the STB proceeding
12 on rail fuel surcharges, and Ameren believes
13 that the diesel fuel surcharges, in
14 combination with the fuel amount that's
15 already embedded in the rates, are allowing
16 for over-recovery of fuel costs for the
17 railroads.

18 Ameren also notes that both the UP
19 and BNSF address as part of the reply that no
20 regulatory changes are needed because shippers
21 who believe they are being charged
22 unreasonable rates have an avenue of relief at

1 the Board.

2 That's exactly what Ameren would
3 like for all shippers, including Ameren at its
4 plants where it is invested in self-help
5 infrastructure investments such as build-outs
6 or barging facilities, the right to have a
7 backstop of relief to the Board if the
8 railroad charges or attempts to charge
9 unreasonable rates.

10 You had wanted some suggestions,
11 and I will give you those now. We've got
12 three of those.

13 Ameren offers these three
14 suggestions: one, competitive shippers are
15 not currently protected by the STB under the
16 assumption that competition among carriers
17 will protect shippers with competitive
18 options.

19 However, since 2004, this has not
20 been the case, as I have mentioned. As
21 competitive rates have often approached or
22 surpassed the 180 percent of variable cost

1 jurisdictional thresholds set for captive
2 shippers, the STB should move to interpret the
3 statute, which they can, so that if any rate
4 exceeds this threshold, that rate, prima
5 facie, demonstrates there's a clear lack of
6 effective competition, which could be
7 challenged under STB rate guidelines.

8 The bar for -- number two, the bar
9 for revenue adequacy is currently set too high
10 to provide meaningful guidance to rail rate
11 issues. This is demonstrated by the fact --
12 and we heard some testimony on this yesterday
13 -- that railroad financial performance and
14 stock price have remained high -- I'm going to
15 take about a minute here -- despite the
16 recession.

17 Privatization of the BNSF is
18 another indicator of railroad financial
19 success.

20 And third is that railroad fuel
21 surcharge recovery should be transparent. The
22 STB should use the cost data collected from

1 the railroads to determine if fuel surcharges
2 are allowing accurate recovery of the
3 railroad's fuel costs.

4 Thank you again, Commissioners,
5 for the opportunity for Ameren to provide this
6 testimony today on competition in the railroad
7 industry, and we stand ready to assist any way
8 we can.

9 CHAIRMAN ELLIOTT: Thank you.

10 We have a Senator approaching,
11 Senator Vitter, so why don't we move the panel
12 up and we'll just make a little time for him,
13 due to his busy schedule.

14 Good morning, Senator Vitter. You
15 have the floor, and if you run over, Ann's
16 going to tell you to stop.

17 SENATOR VITTER: Well, good
18 morning, Mr. Chairman. You're very kind.
19 Everybody's busy, but you're very kind to fit
20 me into the schedule so easily.

21 And Mr. Chairman and members, I am
22 David Vitter. I represent the State of

1 Louisiana and the U.S. Senate. Thank you for
2 initiating this proceeding to examine the
3 level of competition in the national freight
4 rail system and for providing me the
5 opportunity to visit with you briefly today.

6 My concern today is those rail
7 customers that are rail-dependent shippers.
8 These customers, for a variety of reasons,
9 can't use truck transportation economically,
10 and don't have available water transport.

11 And for these rail-dependent
12 customers, there's really no available
13 transportation competition unless they have
14 access to a competing major railroad for at
15 least a part of their transportation route.

16 In Louisiana, these rail-dependent
17 shippers include many of our chemical plants,
18 some of our coal-fired electric generating
19 plants, some agriculture manufacturing, forest
20 and paper products.

21 So it's a significant part of our
22 economy in several different sectors. And

1 their inability to access competing railroads
2 means that these rail customers are likely to
3 pay much higher railroad rates often to
4 significant economic detriment, and they
5 often, quite frankly, receive poor or
6 indifferent service because of this as well.

7 I understand that the record in
8 this proceeding contains a number of very
9 specific and powerful examples of this, and I
10 want to mention two specific ones in
11 Louisiana.

12 First, the city of Lafayette in
13 Louisiana is a town of about 120,000 people in
14 the heart of the southwest area of my state
15 known as Acadiana.

16 It has a municipal electric
17 utility that obtains its power from a coal-
18 fired electric plant located in central
19 Louisiana.

20 The plant uses Powder River Basin
21 coal from Wyoming to generate electricity, and
22 the coal is transported to the power plant in

1 Louisiana via unit trains and cars owned and
2 maintained by the city utility.

3 Only one of the two major freight
4 railroads serving the Western portion of the
5 US serves the power plant, although, and this
6 is very significant and powerful to me, access
7 to the second major freight railroad through
8 a large regional carrier is physically
9 available about 20 miles away.

10 If the city could obtain a rate
11 from its rail carrier for the movement between
12 the switching point with the large regional
13 carrier and the plant, the city would have a
14 chance for competitive rail transportation for
15 all but the last 20 of its 1500-mile coal
16 movement.

17 However, the rail carrier serving
18 the plant refuses to provide a rate between
19 this point of competition and the plant, thus
20 making the entire 1500-mile movement of the
21 coal to the power plant captive to that single
22 railroad.

1 According to Congressional
2 testimony by the manager of the city utility
3 system, this 1500 miles of captive coal
4 movement is a tax on a typical household of
5 four in Lafayette of about \$200 a year, and on
6 the Lafayette school system of about \$1.2
7 million a year.

8 This tax on the people of
9 Lafayette and the misallocation of our school
10 funds could be avoided if the railroads were
11 required to provide a so-called bottleneck
12 rate to their customers to move their goods to
13 or from a point where the customer would have
14 access to a second, competing railroad.

15 This is the way deregulation is
16 supposed to work. It's supposed to result in
17 competitive options. But, because of current
18 regulations, railroads would be required to
19 allow their customers access -- but for those
20 current regulations, railroads would be
21 required to allow access to competing rail
22 systems.

1 Today, you're also hear an example
2 from PPG Industries, a chemical producer with
3 plenty of facilities in Louisiana, about the
4 inflated freight rates paid on shipments from
5 Lake Charles, Louisiana to La Porte, Texas.

6 The ability of one railroad to
7 block access to another railroad has resulted
8 in 50 percent higher rail rates for captive
9 movements from Louisianan to Texas, compared
10 to that of similar movements within Texas.

11 This is another real world example
12 of how accessible reciprocal switching would
13 restore competitive access by giving PPG the
14 option of using a different carrier. This
15 also serves as yet another example of how
16 railroads have been able to protect themselves
17 from competitive markets through the current
18 regulatory policy.

19 Mr. Chairman, the Board asks if
20 there is a lack of rail-to-rail competition in
21 the rail industry. The testimony filed in
22 this proceeding trumpets what many of us know

1 from talking to our constituents for rail-
2 dependent shippers like the two I've
3 described. There is currently very little
4 rail-to-rail competition in the national
5 freight rail system.

6 Your record is already replete
7 with statements indicating the adverse effects
8 of this lack of competition on individual
9 companies and persons and local economies,
10 American exports, our national economy, and
11 American jobs.

12 It's important that the Board not
13 only find that there is a lack of rail-to-rail
14 competition, but also that the current
15 regulations and interpretation of law are part
16 of that problem that must be changed.

17 Indeed, in a network industry like
18 the national freight rail system, it's very
19 hard to imagine how competitive options can
20 exist for rail-dependent shippers, unless the
21 regulatory program allows rail customers
22 access to other railroads in the network.

1 Finally, Mr. Chairman and members,
2 I want to leave you with two more brief
3 thoughts. First, on competition issues, the
4 regulatory program today essentially protects
5 railroads from rail-to-rail competition, not
6 rail customers from railroad monopoly power.

7 This program, in my opinion, has
8 become a classic case of regulations
9 protecting the regulated industry more than
10 the customers of that industry who were the
11 intent of the original protection.

12 Rail-dependent shippers do not
13 have access to the rail-to-rail competition
14 that they were promised in the Staggers Rail
15 Act, and the rail industry is being protected
16 from operating in the competitive environment
17 that it told Congress it wanted when Congress
18 enacted that in 1980.

19 As a result, the rail industry is
20 now financially healthy, but the balance
21 between the interest of railroads and shippers
22 that Congress intended in the Staggers Act is

1 missing.

2 Second, I'm aware that the
3 railroads are making the argument that any
4 changes in the current regulatory system could
5 result in their failure to invest in their own
6 infrastructure.

7 Mr. Chairman, I simply don't
8 accept this when the proposition is moving an
9 industry from its protected, regulation-based
10 system to a competitive system. Your
11 proposals in ex parte number 705 propose to
12 remove the barriers to competition and move
13 the railroads into a more competitive
14 environment.

15 Of course, the railroads are also
16 arguing that somehow removing regulatory
17 barriers that prevent rail customers from
18 having access to another railroad system is
19 quote "re-regulation," close quote. That,
20 too, is novel to me, and simply isn't the
21 case.

22 The railroads asked Congress in

1 1980 to allow them to compete in the
2 transportation marketplace, rather than be
3 required to obtain prior approval for almost
4 all of their actions from a federal regulatory
5 body.

6 The railroads got what they asked
7 for, and by the way, I support that, but then
8 persuaded your predecessors to adopt
9 regulatory interpretations that shield them
10 from a lot of competition.

11 Today, our national interest will
12 be served if the railroads must compete with
13 each other as well as trucks, water transport,
14 and other modes of transportation.

15 I, for one, am confident that the
16 railroads will continue to invest in their own
17 systems, even if they must participate in a
18 competitive transportation marketplace. In
19 fact, that will be all the more reason for
20 them to have to continue to invest.

21 You have the authority under
22 current law to make changes to your policies

1 just as other regulatory agencies do, so I ask
2 you humbly, Mr. Chairman, and members, to
3 remove the railroad industry's undue
4 protections from competition by adopting pro-
5 competitive rules on those issues identified
6 in this proceeding.

7 Thank you very much for the
8 invitation to appear. Thanks for all of your
9 courtesies, Mr. Chairman, and members.

10 CHAIRMAN ELLIOTT: Thank you very
11 much, Senator.

12 Just a note, I did visit the PPG
13 facility in Lake Charles, where I happen to
14 have a cousin, and I'm very familiar with the
15 situation. And next week I'm going down to
16 your great state and New Orleans, so I'm
17 looking forward to that.

18 Thank you very much for coming
19 forward today and expressing your thoughts
20 with us. We greatly appreciate it.

21 SENATOR VITTER: Thank you very
22 much to all of you.

1 CHAIRMAN ELLIOTT: Okay. Thank
2 you very much for making time for the Senator.
3 And I believe we're going to start back up
4 with Mr. Oliver.

5 MR. OLIVER: Well, good morning,
6 Mr. Chairman Elliot, Vice Chairman Begeman,
7 and Commissioner Mulvey.

8 I appreciate the time being here
9 this morning, and I guess following a US
10 senator makes it a little bit nerve-wracking
11 here for an engineer.

12 CHAIRMAN ELLIOTT: I've done that
13 before.

14 MR. OLIVER: So excuse me if I
15 speak a little fast. But I am Vice President
16 of Engineering Construction and Operations for
17 Arkansas Electric Cooperative Corporation.
18 We're a generation and transmission
19 cooperative located in Little Rock, Arkansas,
20 and I'm here to give you AECC's views on the
21 current state of competition in the railroad
22 industry, and recommendations about what the

1 Board should do to enhance competition for the
2 benefit of not only the rail customers but for
3 the public interest and for the railroads
4 themselves.

5 So, in accordance with your
6 instructions, we've provided written comments
7 and won't try to summarize those too much this
8 morning, but more to give you a view of my
9 position as an executive responsible for fuel
10 procurement for our coal plants within the
11 state of Arkansas.

12 AECC owns interest in three major
13 coal plants in Arkansas. There's five units
14 there. We ship a little over 14 million tons
15 of coal annually to those plants, and provide
16 electric service to about half a million
17 consumers in Arkansas.

18 So, we're not huge, not quite the
19 size of Ameren, but we do have a significant
20 interest in PRB coal deliveries.

21 And although the rate paid for
22 that transportation is important, I want to

1 kind of point you into some other directions
2 today, too, as far as service. Service is
3 important to us as well, and like many rail
4 customers, we have spent a lot of money
5 investing in rail cars, not to have to be
6 using the railroad industry's rail cars, but
7 have purchased our own train sets.

8 Based on cycle time, we determine
9 how many train sets we need to provide the
10 service that's reliable to our plants.

11 And so if a railroad chooses a
12 circuitous route, it increases our maintenance
13 costs on those rail cars, so that's one thing
14 to consider as you look at this.

15 In addition, if we have poor
16 service from the railroads, we have to have a
17 large stockpile of costs, which the curing
18 costs for millions of tons of coal can get
19 rather expensive.

20 So even those these real costs are
21 substantial, they can be small in comparison
22 to a problem if we have disruptions to our

1 plant operations.

2 And in the past, when we've seen
3 disruptions to our plant operations, we've had
4 to go as far as Indonesia to find suitable
5 coal as a replacement for our plants.

6 And typically, what would happen
7 if we had a disruption in operations, we would
8 try to buy power on the market. And although
9 that seems like a legitimate way to do it, the
10 cost of that power on the market can be
11 substantial compared to our costs of coal
12 generated from our own plants, and in some
13 cases, more than three times the cost of that
14 power, so, that seems like some wildly -- wild
15 situations to where we would have to go to
16 better the service that's provided from the
17 railroads, but, they're real examples. But it
18 seems to be an inefficient way for us to spend
19 our money in order to compensate for the
20 service of the railroads.

21 Events like this can cost
22 significant increase to the cost of

1 electricity to our members, and we believe
2 that increased competition could improve that,
3 improve the service level to us and other
4 customers.

5 And if I understand the Board's
6 merger rules correctly, you -- the cost
7 changes experienced by the shippers must be
8 considered equally with the cost changes
9 experienced by the railroads in analysis of
10 the public interest, and to do otherwise would
11 be improperly disregarding the impacts of some
12 effective parties, and would give the wrong
13 overall assessment of the public interest.
14 So, yet that's exactly what happens in remedy
15 of hard economic costs imposed on rail
16 shippers and ultimately the economy.

17 So AECC believes the best way to
18 improve the reliability, timeliness, and
19 efficiency of rail service to our plants and
20 other plants is to ensure competition is
21 readily available to captive facilities, at
22 least where inadequate performance by the

1 serving carrier produces tangible harm.

2 The Board has well-defined
3 regulatory measures for addressing
4 unreasonable rates, but it has no equivalent
5 procedures for addressing inefficiency and
6 inadequate service of a serving railroad.

7 The Board's ability to address
8 rail service and performance problems stemming
9 from rail carrier market power can be found
10 primarily and exclusively in its authority to
11 unleash the forces of competition.

12 So in other words, we think a
13 strong, competitive railroad market is the
14 best way to ensure adequate service to our
15 facilities.

16 So we're not asking for increased
17 regulation, I think as the Senator just
18 mentioned. We're not talking about re-
19 regulating, but we are talking about enforcing
20 the competitive market.

21 So, in most industries other than
22 the railroad industry, when you talk about

1 competition and regulation, they seem to be
2 opposites, and, you know, the railroads, in
3 this proceeding, with all seriousness, seem to
4 be saying that asking for increased
5 competition is asking for re-regulation, and
6 that's not what we're trying to do. We just
7 want to see competition, and we want to see it
8 work effectively in our industry.

9 So, going back to the 1970s, and
10 it's all been talked about, you know, prior to
11 the Staggers Act, and we don't want to see
12 that go back to that situation either, but if
13 you look at, after the Staggers Act, the
14 railroads were able to become revenue-
15 sufficient. They were able to get back on
16 their feet, produce a vibrant industry, and
17 they were able to attract the capital and
18 investment needed to generate substantial
19 ongoing productivity improvements.

20 But since the Staggers Act, and
21 since the mega-mergers, what we've seen is a
22 decrease, or it's been pretty much harmful to

1 competition.

2 What we've seen is a decrease in
3 the rate of productivity improvement and
4 substantially measured adverse impacts to the
5 railroad costs. So, mega-mergers and the
6 bottleneck rule would be one of the problems
7 that has developed a lack of investment, a
8 lack of innovation.

9 And I think Commissioner Mulvey,
10 you questioned that yesterday about how can
11 you get into a situation with competition.
12 Competition does seem to improve innovation
13 for those industries that are involved in a
14 competitive market.

15 If I'm looking at a competitive
16 market, I want to distinguish my service or
17 distinguish my product from everybody else.
18 And one way to do that is through innovation,
19 and our written testimony gives evidence of
20 that.

21 Our expert witness, Mr. Michael
22 Nelson, discussed this further in detail of

1 the importance of innovation and productivity
2 improvement in ensuring the long-run health of
3 the railroad industry.

4 So a modest increase in
5 competition, that's all we're talking about
6 here is a modest increase, would not undermine
7 the railroads' ability to earn sufficient
8 revenues to attract the capital that they
9 need, and it would provide the needed
10 incentive to encourage the railroads to
11 provide good, reliable, and efficient service.

12 Now, I don't want to talk about
13 our recent case involving paper barriers, but
14 that recent experience does give evidence for
15 one of the reasons why we need to change the
16 rules.

17 In that particular case where our
18 co-owner Entergy and ourselves filed a
19 petition to provide service to the independent
20 steam electrics station, we asked the Board to
21 provide a through route.

22 And although the Board found that

1 the incumbent carrier had provided inadequate
2 service over extended periods of time, and
3 further found that the through route would
4 have been somewhat more efficient than the
5 existing route, the Board concluded that this
6 was not enough to justify prescribing the
7 through route, and I'm not going to argue
8 about that decision.

9 However, I have to presume that
10 your decision on that was an accurate
11 interpretation of the existing rules, which I
12 think is evidence of why the rules need to
13 change and provide a little bit more of an
14 obligation on the carrier to prove the reason
15 why competitive access should not be
16 prescribed in that case.

17 So here's the point I want to
18 make, and the primary purpose that I think the
19 railroads have missed, that the revised
20 competitive access rules would be to provide
21 an incentive for the railroads to improve
22 their service, and right now, the railroads

1 have no reason to fear if they provide poor
2 service, and have any adverse impact or any
3 adverse consequences if those controls are not
4 in place.

5 The Board has not been applying
6 competitive access remedies for poor service,
7 and therefore, no other railroads can threaten
8 to take that business away, so, but if
9 competitive access rules are modified such
10 that a railroad knows that the consequence of
11 providing poor service will be that another
12 railroad will be authorized to compete for
13 that business, then the incumbent railroad
14 will have a strong incentive to provide good
15 service, and I think that's the bottom line
16 today, that competition should provide strong
17 incentive for the railroads to provide good
18 service.

19 Sow we're asking that the Board
20 make its actions clear and credible that in
21 the future it would apply competitive access
22 remedies for inefficient, inadequate service,

1 and other specific circumstances. Then the
2 railroads would experience a greatly increased
3 incentive to ensure that those circumstances
4 do not occur.

5 And as I conclude, since I see my
6 yellow light, let me applaud you for taking on
7 this issue. I know it's going to be tough,
8 and I think what you've seen with the amount
9 of comments you received, the time spent here
10 over the last couple of days, that it's very
11 important.

12 And I think the charge was laid
13 out by Senator Rockefeller yesterday, as he
14 said it very well, be scrupulous in your
15 review of competition. And I have every
16 confidence that you will do that, and I look
17 forward to the results.

18 Thank you very much.

19 CHAIRMAN ELLIOTT: Next, we'll
20 hear from Mr. Wilcox, from Omaha Public Power
21 District.

22 MR. WILCOX: Mr. Chairman, Vice

1 Chairman, Commissioner Mulvey, I'm Tom Wilcox.
2 I'm with the law firm of GKG Law PC here in
3 Washington, DC, and I am here on behalf of
4 Omaha Public Power District.

5 UNIDENTIFIED SPEAKER: Is your
6 thing on?

7 CHAIRMAN ELLIOTT: Yes, just speak
8 up a little. Thank you.

9 MR. WILCOX: Is that better?

10 UNIDENTIFIED SPEAKER: Yes.

11 CHAIRMAN ELLIOTT: Yes.

12 MR. WILCOX: Okay. OPPD was part
13 of a group of four utilities who submitted
14 joint initial comments in this proceeding and
15 then submitted a final submission on June
16 10th, but I am here solely on the behalf of
17 OPPD.

18 OPPD is an electric utility, and
19 it's a Nebraska Public Corporation and
20 political subdivision. It's headquartered in
21 Omaha. It serves about 340,000 customers in
22 eastern and southeastern Nebraska.

1 OPPD commends the Board for
2 holding this hearing. It's a timely hearing,
3 and OPPD appreciates the opportunity to add to
4 the record of the proceeding.

5 OPPD is no Ameren, but its facts
6 are similar. It's a little bit smaller. OPPD
7 owns and operates two coal-fired generating
8 stations, the Nebraska City Station and the
9 North Omaha Station. These plants burn about
10 7 million tons of PRB coal per year between
11 them.

12 The initial comments summarized
13 how OPPD first utilized the tools available
14 under the Staggers Act to establish
15 competition between UP and BNSF at its two
16 plants, and there are articles attached to the
17 joint comments that during this time frame
18 that sort of explain how the bidding process
19 went, and how the competition was reported in
20 Omaha.

21 Nebraska City was captive to BN
22 since 1978, and BN had served North Omaha

1 since 1984. But starting in the early 1990s,
2 OPPD took advantage of the remedies before the
3 Board to create competition that included
4 seeking line construction authority to
5 construct a build-out to the UP down in
6 Nebraska City.

7 At the same time, OPPD obtained
8 authority to cross the Burlington Northern
9 track coming into Nebraska City over BN's
10 objection, and those two proceedings
11 eventually resulted in OPPD becoming the owner
12 of a common carrier line of rail, similar to
13 Ameren.

14 OPPD, in exchange for -- in lieu
15 of constructing the build-out, purchased the
16 56.7 mile line -- long line of railroad that
17 serves Nebraska City plant and was formerly
18 owned by BN. And that's an example of how the
19 tools under the Staggers Act allow for
20 regulatory relief, but they also provide a
21 regulatory backstop, because the end result
22 was a commercial solution, negotiated by BN

1 and UP -- excuse me, BN and OPPD, and
2 established the competitive access.

3 As part of that process, OPPD now
4 owns a common carrier line of rail and
5 services provided via tracker's rights or
6 operating rights.

7 Now, OPPD's efforts to create
8 competition facilitated the effective
9 competition OPPD believes was envisioned by
10 the Congress when it passed the Staggers Act.

11 OPPD's investment, for one thing,
12 created new opportunity for a fellow Omahan in
13 UP. And as the articles explain, you know, in
14 1998, UP competed very hard for OPPD's
15 business and came up a little bit short, and
16 it was awarded to BNSF. But UP came back in
17 2003 and underbid -- again, competed hard and
18 won the business from BNSF.

19 The result was, at this time
20 period, rail and total delivery of fuel costs
21 were significantly reduced. OPPD was able to
22 charge its customers fair prices for

1 electricity, and whichever railroad had the
2 business we believe still operated at
3 profitable levels. And OPPD and the railroads
4 operated under detailed contracts that were
5 tailored to OPPD's movements and the party's
6 respective commercial and operational needs.

7 In short, OPPD became the rail
8 shipper that Congress envisioned. It should
9 have done -- it should have little or no need
10 to seek STB intervention in its rail
11 transactions.

12 So, why is OPPD here? Well, it's
13 -- as the joint comments lay out, OPPD's
14 participating because in 2008, they undertook
15 the exact same competitive bidding process
16 that they did in 1998 and 2003, and at the end
17 of that process, it was apparent to OPPD that
18 the prior level of competition that it had
19 enjoyed or experienced at these plants was no
20 longer present.

21 And that process, combined with
22 higher coal prices, eventually resulted in

1 OPPD's delivered fuel costs increasing by over
2 \$100 million per year, starting in 2009, and
3 caused OPPD to impose the largest residential
4 and industrial rate increases on its customers
5 since 1973.

6 OPPD is very concerned that this
7 significant apparent change in the coal
8 transportation market -- about this change and
9 its effect on OPPD's ability to continue to
10 charge fair prices to its customers for
11 electricity.

12 So OPPD therefore reiterates, this
13 is a very timely hearing, and the Board should
14 carefully weight the extent of the material
15 that's been submitted to it, and actively look
16 for opportunities to modify its rules where
17 possible to facilitate effective competition
18 between the railroads.

19 Now, we, at the joint comments,
20 submitted several general policy ideas in
21 response to your request. But this group
22 mainly focused on providing anecdotal evidence

1 and left the specifics to some of the more --
2 the bigger groups, and spent a lot more time
3 on the actual specific proposals.

4 We also join Ameren and others,
5 asking the Board to clarify, in this
6 proceeding, that the rules concerning market
7 dominance permit a finding of qualitative
8 market dominance under Section 10707, even in
9 cases where the shipper has access to two
10 railroads and has enjoyed effective
11 competition in the past, provided that the
12 shipper can make the appropriate showing.

13 This is not a new proposal, but a
14 request for confirmation of the standard that
15 all market dominance determinations are made
16 on a case-by-case basis.

17 There is some uncertainty, as Mr.
18 Sobule discussed, uncertainty for dual-served
19 shippers now about the jurisdiction of the
20 Board over their rates, should they believe
21 that they are unreasonable.

22 Again, thank you very much for the

1 opportunity, and again, thank you for holding
2 the hearing.

3 CHAIRMAN ELLIOTT: Thank you, Mr.
4 Wilcox.

5 Thank you, panel.

6 I just have a couple specific
7 questions. I think I've already asked some of
8 the broader questions to the panel yesterday
9 that involve coal shippers, so I'll stick more
10 to the anecdotal stuff and examples that you
11 referenced in your testimony.

12 Ameren, I'm familiar with your
13 build-outs, and just so I'm clear, with
14 respect to the build-outs that have been built
15 and are in existence now, I wasn't clear if
16 you think the railroads are competing right
17 now where you've already built out, or if
18 they're not.

19 MR. SOBULE: We believe, based
20 upon responses to bids, that even that where
21 we had built out, we got the competition at
22 the time of the build-outs.

1 CHAIRMAN ELLIOT: Right.

2 MR. SOBULE: This was all pre-
3 2004. Post-2004, bids that came out, we do
4 not see that level of competition.

5 CHAIRMAN ELLIOT: Sure. And then
6 I understand your concern with respect to
7 future buildouts, because you're apparently
8 not getting a rate quote where the track
9 hasn't been built out.

10 Do you have any suggestions as far
11 as solutions for such situations where either
12 you've built out or you would like to build
13 out?

14 MR. SOBULE: Well, once again, we
15 would obviously like it very much if we could
16 go back to the way the railroads behaved when
17 we did our prior build-outs where there was a
18 willingness to quote a rate to a non-physical
19 point. We didn't have to actually go through
20 and spend the capital for the build-out.

21 You know, in terms of assistance
22 through the STB and what we could do, you

1 know, I would have to take a look and maybe we
2 could supplement with some ideas of how that
3 would maybe work so we could get back to the
4 level of competitiveness that would basically
5 encourage people to do build-outs again,
6 because frankly, based on both the Ameren
7 experience, the OPPD experience, some of the
8 other ones, I'm not sure you're going to see
9 many build-outs again.

10 CHAIRMAN ELLIOT: Thank you.

11 Just one other specific question,
12 Mr. Wilcox. I noticed in your testimony or in
13 your comments, you suggested raising the
14 limits on the simplified SAC. Am I
15 remembering correctly?

16 MR. WILCOX: That's right.

17 CHAIRMAN ELLIOT: Okay.

18 MR. WILCOX: Well, it's mainly
19 simplified SAC. I think there are some
20 utilities out there who have -- and this is
21 not the OPPD, their tonnages are sufficient
22 and they could justify probably the stand-

1 alone cost case. But the comment addresses
2 simplified SAC in that there are utilities
3 with volumes that are lower, yet they still
4 have possible -- a possible challenge of an
5 unreasonable rate, yet the prospect of
6 bringing a full-blown SAC case does not
7 justify the potential damages they could get,
8 considering that their volumes are low.

9 And so -- yet the \$5 million cap
10 that's on simplified SAC now is not, you know,
11 may not be enough in itself.

12 So that was the proposal in there.
13 And I think that's something the Board has
14 heard before in terms of the three-benchmark
15 caps and the simplified SAC, that maybe they
16 should be increased, too, and that there are
17 potential complaints out there, but the caps
18 are discouraging those type of actions.

19 CHAIRMAN ELLIOT: Thank you, Mr.
20 Wilcox. That actually perfectly answered what
21 I was going to ask next, so I have no further
22 questions.

1 Vice Chairman?

2 MR. WILCOX: It's always good when
3 I can answer two questions at once.

4 CHAIRMAN ELLIOT: We really
5 appreciate it; speeds up the thing.

6 VICE CHAIRMAN BEGEMAN: Thank you
7 all. Your testimony is somewhat enlightening,
8 informative, and alarming.

9 You know, we heard a lot yesterday
10 from the shipper interests, at least the coal
11 shipper interests, that reciprocal switching
12 was -- I'm not saying they said it was the
13 silver bullet, but that certainly is what
14 they're advocating.

15 I think the three of you, some of
16 you at least you have competition, and
17 competition isn't the silver bullet either,
18 given, at least what you're alleging is
19 happening with the industry.

20 So, if bottleneck relief and
21 reciprocal switching perhaps aren't the
22 answer, is the answer, from your perspective,

1 the ability to come to the Board to challenge
2 rates, and/or services, or perhaps service
3 issues?

4 MR. SOBULE: Vice Chairman, that
5 is exactly one of the three recommendations
6 that we made is that we should have the
7 ability, those that have supposed competition,
8 that once again, if we can make the same
9 jurisdictional prima facie case on that, that
10 as a backstop, we would have the ability to
11 say that in fact there is market dominance
12 which is the lack of effective competition.
13 Just because you have competition doesn't mean
14 it's effective, so, it's absolutely correct,
15 we would like to have that.

16 MR. WILCOX: I would modify that a
17 little bit. As a shipper like Ameren who has
18 invested a lot of time and money in
19 establishing competition, we want competition,
20 that would be the preferred way to establish
21 rates and service terms.

22 However, if you need to have some

1 avenue to try to challenge a rate, or if you
2 believe that it's unreasonable because you're
3 not getting the level of competition you need,
4 but I think the Board, you know, the coal rate
5 guidelines were initially designed to provide
6 a kind of a cookbook of a way to -- where
7 someone could calculate what a maximum rate
8 would be to encourage contractual -- you know,
9 solutions, and so I think by having a way you
10 can help competitive shippers, until
11 competition resumes.

12 And I agree with what was stated
13 yesterday that it's going to take time, it
14 probably will take time, to create a clear set
15 of rules for competitive shippers that would
16 provide that guideline or backstop to have the
17 parties come to the table rather than just
18 file a rate case, because the preferred way is
19 for people to --

20 VICE CHAIRMAN BEGEMAN: Sort of a
21 threat?

22 MR. WILCOX: Well, it's like what

1 was said yesterday. It's not re-regulation if
2 you establish the rules so people understand
3 them, and then so if you have a reciprocal
4 switching rule everybody understands, then the
5 parties can use those rules to come to an
6 agreement on the outside of the Board.

7 So -- and that's the same with
8 rate rules. If you can supply the parties
9 with the guidelines, then now they know, you
10 know, if you go to the Board, here's the
11 answer, and so let's work around that.

12 And for competitive shippers,
13 there's a lot of uncertainty now, too, in one
14 of the main issues, which is jurisdiction.

15 VICE CHAIRMAN BEGEMAN: Mr.
16 Oliver, have you had a chance to utilize the
17 Board's mediation process? You laid out a lot
18 of troubling issues, particularly having to go
19 to Indonesia for your coal.

20 MR. OLIVER: I'm not sure that we
21 --

22 VICE CHAIRMAN BEGEMAN: And if you

1 haven't, I encourage you, and I know the
2 Chairman would encourage you to reach out as
3 well.

4 MR. OLIVER: And I'm not familiar,
5 and I'm not sure that we have used the
6 mediation process. It does seem interesting.
7 I know in the coal dust decision, we've asked
8 to speak with the railroads and not been able
9 to get that done, so -- but it seems like a
10 good forum in which we could, perhaps,
11 negotiate some of those.

12 And yeah, going to Indonesia is a
13 far stretch. But I think with us, you know,
14 reliability of service is very important, and
15 so being able to have that coal on the pile is
16 important, too. So we'll exhaust no means --
17 or every means in order to provide that
18 service.

19 VICE CHAIRMAN BEGEMAN: Thank you.

20 CHAIRMAN ELLIOT: Commissioner?

21 COMMISSIONER MULVEY: Thank you.

22 Indonesia is far away. Of course, China's far

1 away, too, and they're using some of our coal.
2 So, it's a global commodity.

3 With regard to Mr. Sobule's
4 question about -- issue about the BN and the
5 UP and the failure to compete after 2004, you
6 said that there was a 43 percent differential,
7 and then you said that they raised the rates
8 by 87 percent.

9 But wouldn't that have allowed the
10 43 -- wasn't that more than the 43 percent
11 difference? And wouldn't that have allowed
12 for bidding or a shift again in the supplier
13 at that point, or did they both come back with
14 the same rate?

15 MR. SOBULE: The relation, and I
16 might have been a little bit unclear in how I
17 went through this, if I can try to go back on
18 that, is that the -- no matter where the
19 incumbent carrier came in, the non-incumbent
20 rate was, on average, obviously, 43 percent
21 higher than the incumbent rate.

22 What that is is that's the rate --

1 the 43 percent higher than incumbent rate is
2 not of the existing incumbent rate. That was
3 43 percent higher than the new rate proposed
4 by the incumbent shipper.

5 COMMISSIONER MULVEY: Okay.

6 MR. SOBULE: Did that --

7 COMMISSIONER MULVEY: That's more
8 clear.

9 MR. SOBULE: And I should have
10 clarified it a little better the first time
11 through. I'm sorry.

12 COMMISSIONER MULVEY: Well, one of
13 the things that was discussed was build-outs.
14 And I recall, many, many years ago, when I
15 worked for the Congress, the build-out option
16 was not so much that you were expecting the
17 shippers to build-out.

18 That was a possibility, it was
19 kind of a threat, and that the threat of going
20 to a build-out and going out and hiring
21 surveyors and beginning to make some inquiries
22 or even some acquisitions or rights-of-way in

1 order to accommodate the build-out generally
2 was sufficient to bring the incumbent railroad
3 to the table to say okay, okay, we don't want
4 you to build-out another railroad, let's talk
5 about what a fair rate might be.

6 And you're suggesting that while
7 that worked for a while, that it -- after
8 2004, stopped working, or after 2008, stopped
9 working. Or -- is it sort of a matter of that
10 the railroad got it and figured well, this is
11 -- you know, this is -- it's like poker, after
12 a while, you can tell when somebody's
13 bluffing? Would you characterize it that way?

14 MR. SOBULE: Well, I think that in
15 some instances, what you're saying was
16 correct, that there was -- that the railroads,
17 in some instances, realized well, maybe they
18 really aren't going to spend the capital to
19 build-out.

20 In Ameren's case, we actually
21 spent the capital and did the build-out, and
22 basically, the rate reductions we got was

1 because the railroads were, in fact, anxious
2 to potentially take market away from the
3 incumbent railroad.

4 We have, as an example, at our
5 Joppa plant, which was one of the ones where
6 we did the build-out, that contract actually
7 swapped back and forth a couple times after
8 the build-out, because we had created
9 competition.

10 And at that point, the railroads
11 were interested in competing as opposed to not
12 -- the change of -- whatever reason it
13 occurred after 2004.

14 So a little bit of what you said,
15 maybe calling the bluff with some folks. With
16 Ameren, we really did do the build-out, and it
17 did result in some change of service from one
18 rail carrier to another.

19 COMMISSIONER MULVEY: Mr. Oliver,
20 you mentioned about going to Indonesia, and
21 you talk about some of the problems that
22 utilities face with dealing with higher rates

1 or dealing with higher inventory costs and the
2 like.

3 But you said that the major cost
4 or the major problem would be if you actually
5 had to shut down. And have you ever had to
6 shut down the plants because of lack of coal
7 supplies?

8 MR. OLIVER: I've only been in
9 this position for a couple of years, but I can
10 speak to some extent, that we've had --

11 COMMISSIONER MULVEY: Or even
12 brownouts.

13 MR. OLIVER: We have had to lower
14 the output of the plants due to coal supply.
15 As you begin to look at -- primarily if you
16 look in 2005, after the joint line problems,
17 we had significant decrease in coal delivery.

18 COMMISSIONER MULVEY: Yes.

19 MR. OLIVER: You're going into the
20 summer, which is our peak period, and you're
21 having to balance those piles and make sure
22 you have enough inventory to make it through

1 the summer. You don't want to shut down the
2 plant completely.

3 And so we have had to decrease
4 output at the plants due to poor service.

5 COMMISSIONER MULVEY: But the 2005
6 problem was one that was due to things that
7 were beyond the railroad's control. Have you
8 had problems -- that is now six years ago.
9 Have you had problems with supplies since
10 then?

11 MR. SOBULE: Yes, sir. It hasn't
12 been quite to that extent, obviously. That
13 was a major issue.

14 And I'm going to speak a little
15 bit out of my element, but I will say this,
16 that from my understanding, there were times
17 when the economy was really booming, when
18 Intermodal traffic was significant, that our
19 cycle times, which is the time it takes for
20 the train set to get from the PRB mine to our
21 plant and back, those cycle times increase
22 significantly, and the delivery of coal was

1 less than the contract.

2 So was it to the extent of 2005?

3 No. Have we seen impacts, due to service?

4 Yes. We have seen poor service since 2005.

5 Now, as of 2005, it's fairly good,
6 and the cycle times are low. We are
7 attributing that primarily to the fact that
8 there was probably decreasing intermodal
9 traffic. We don't have that insight, but I
10 will say there have been times since 2005 when
11 we have experienced a decrease, so.

12 COMMISSIONER MULVEY: Every cloud
13 has a silver lining. We've noted that with
14 traffic down for the railroads, that the
15 average speeds up, cycle times go down.

16 So that's a good point, but that's
17 not necessarily good for the economy as a
18 whole that there are fewer, say, unit
19 intermodal trains out there.

20 MR. SOBULE: Yes, sir. I think
21 that's correct. And I mean, everybody hopes
22 that the economy's going to rebound. And so,

1 again, that's why we're looking at it from the
2 standpoint of not just rates, but to provide
3 some relief through competition, if we do see
4 a decrease in service, because we do have a
5 definite need for reliability of supply for
6 that energy. So, I'm hoping the economy
7 rebounds, but I hope the service level stays
8 good as well.

9 COMMISSIONER MULVEY: We're often
10 told that cars on line is a bad metric, that
11 more cars on line is not a good metric -- more
12 cars on line means there's traffic out there.
13 That's not a bad thing. But anyway.

14 Omaha Power District, Mr. Wilcox,
15 you had a successful build-out, and are you
16 still operating that short line railroad? Is
17 OPPD still operating that short line today?

18 MR. WILCOX: Well, not today, no,
19 because the UP is the current provider at
20 Nebraska City, and so they use a very small
21 piece of the 56-mile line to get into the
22 plant. The 56-mile line would come into play

1 if BNSF was to get the business back.

2 COMMISSIONER MULVEY: The Board,
3 when it looks at market dominance, has both a
4 qualitative and a quantitative measure for
5 market dominance.

6 And the qualitative-based looks
7 and sees whether or not there are other modes
8 that can be effective competitors. The
9 quantitative, of course, relies on our 180
10 percent of revenue to variable cost ratio to
11 decide market dominance.

12 Would you suggest that we drop the
13 qualitative one and focus only on a
14 quantitative measure? And is the 180 the
15 correct measure, or should it be lower?

16 Or -- I would think lower if you -
17 - but should it be higher? Or what would you
18 suggest?

19 MR. SOBULE: From our point of
20 view, we think we should still have a
21 qualitative and a quantitative measure. The
22 difference that we're saying is that for

1 quote-unquote competitive shippers, that
2 basically that whether it's 180 percent or
3 not, I'm not sure whether that's the
4 appropriate level, but that the jurisdictional
5 threshold, whatever it is, except for captive
6 shippers, that the statute be interpreted so
7 if any rate, including for quote-unquote
8 competitive shippers, exceeds the threshold,
9 that could prima facie demonstrate that
10 there's a lack of effective competition.

11 COMMISSIONER MULVEY: Anybody else
12 want to comment on that?

13 MR. WILCOX: Well, obviously, if
14 the jurisdictional threshold is lower, that's
15 beneficial. But I think this also relates to
16 the Board's review of its IRCs costing system
17 as well, in terms of what the number you end
18 up with.

19 But I do think that for dual-serve
20 shippers, that I agree with Mr. Sobule that
21 the RTC ratio, revenue to cost ratio, it
22 should be a good indicator of whether the rate

1 is presumptively or a rebuttable presumption
2 that it's unreasonable.

3 COMMISSIONER MULVEY: Thank you.
4 Thank you.

5 CHAIRMAN ELLIOTT: Thank you very
6 much for your comments today. We greatly
7 appreciate it.

8 MR. WILCOX: Thank you.

9 CHAIRMAN ELLIOTT: I now call
10 forward panel number two.

11 (Pause.)

12 Welcome. We will begin with Mr.
13 Marsh from CONSOL Energy, Inc., and I believe
14 you have five minutes.

15 MR. MARSH: I'll keep it very
16 short and brief for you. Thank you for the
17 opportunity.

18 I'm a Vice President with CONSOL
19 Energy. We're a coal and natural gas company
20 out of Pittsburgh. We move almost 35 million
21 tons on the railroads, and we're one of the
22 largest shippers on both the Norfolk Southern

1 and the CSX.

2 Our position is slightly different
3 than what I just heard. We've had an
4 excellent circumstance with both the Eastern
5 carriers over the last 15 years that I've been
6 involved with them, and over the last 130
7 years that my company has dealt with them.

8 The things I heard just a moment
9 ago would be very alarming if we experienced
10 them. We've not experienced that.

11 We've found them to be creative,
12 competitive, cooperative, and in my own
13 functionality and in our company's
14 competitiveness in the world marketplace,
15 we've benefitted significantly from these
16 partnerships.

17 So our position is, please be
18 cautious about any changes that would inhibit
19 investment, because we find this to be a
20 capital gain, a major infrastructure play, and
21 anything that would reduce the ability for our
22 product to move to market would be concerning.

1 Thank you.

2 CHAIRMAN ELLIOTT: Thank you.

3 Mr. Yeager?

4 MR. YEAGER: Very good. I
5 probably will not be quite as brief, but I'll
6 try to make this brief.

7 (Laughter.)

8 Mr. Chairman and Madam Vice
9 Chairman, Mr. Commissioner, we thank you for
10 this opportunity to speak to you today about
11 this very important subject.

12 A healthy and competitive rail
13 industry is critical to the economy of this
14 country, and also to the continued success of
15 Hub Group, of which I am Chairman and CEO.

16 Hub Group is a \$2.5 billion
17 transportation company employing 1600 white-
18 collar workers and contracting with 1800 truck
19 drivers. We arrange for the transportation of
20 trailers and containers on various Class 1
21 railroads.

22 In 2010, Hub Group shipped over 1

1 million truckloads. More than 700,000 of
2 those truckloads were transported by a rail
3 intermodal.

4 As a result of using rail
5 intermodal versus conventional over-the-road
6 services for these 700,000 truckloads, 3.1
7 billion pounds less carbon was emitted into
8 the atmosphere and over 68 million gallons of
9 fuel was saved.

10 It's obvious that it's in our
11 country's best interests to continue to
12 promote the use of the nation's rail system.

13 Hub Group, like the railroads, was
14 not always as prosperous as it is today.
15 Founded in 1971 by my father and mother, the
16 first Hub office had no windows and was on the
17 second floor over a flower shop in Hinsdale,
18 Illinois.

19 I joined this small family
20 business in '75 and have worked at Hub in the
21 intermodal industry for the last 36 years. In
22 the 1970s, unlike today, the rail industry was

1 not the model of the world. I remember well
2 when railroads offered poor service, and seven
3 railroads in the northeast were bankrupt.
4 Even worse for shippers, rates were high and
5 not very competitive with truck.

6 These difficult days for the rail
7 industry ended with the passage of the
8 Staggers Rail Act in 1980. While it took time
9 to heal this beleaguered industry, the
10 deregulation that followed this act helped
11 promote the healthy and vibrant rail network
12 that we enjoy today.

13 Since deregulation, I've seen the
14 railroads make substantial investments to
15 their infrastructure and promote new services
16 that have made rail intermodal a forceful and
17 highly efficient competitor to truck.

18 According to the Association of
19 American railroads, since 1980, average
20 inflation adjusted rail rates have fallen 55
21 percent, rail traffic volume has nearly
22 doubled, and railroads have invested \$480

1 billion in capital spending to improve those
2 networks.

3 And not only is rail less
4 expensive today, but service is much faster,
5 it's more consistent, and the loss and damage
6 claims are down substantially due to railroads
7 investing in updated tracks and rail cars.

8 The ability for the railroads to
9 continue to invest in improved service is
10 critical to the partnership that we have
11 developed with the rails. This partnership
12 has benefitted the environment, it's reduced
13 traffic on our nation's roads, it's saved
14 billions of dollars in shipping costs while
15 contributing to our country's economic growth.

16 The railroads have supported our
17 business, whether it's import, export, or just
18 purely domestic. Shippers, railroads,
19 consumers, motorists, and the environment are
20 all much better off today due to the far-
21 sighted policy that Congress implemented in
22 1980.

1 I know that a few railroad
2 customers in specific rail markets who ship
3 specific kinds of freight believe that
4 expanding rail regulation will benefit their
5 own self-interests.

6 However, such a shift will do harm
7 to many more companies and individuals in the
8 long run. Taking actions that could reduce
9 railroad efficiency will harm the interests of
10 intermodal customers, as well as the public at
11 large, who benefit from the railroads.

12 Shippers and the public at large
13 need railroads that are able to invest in the
14 infrastructure expansion, terminals, and
15 rolling stock. I'm very concerned that if the
16 Board makes changes to regulatory policies
17 that it will adversely affect the ability of
18 the railroads to continue investing in their
19 networks.

20 I'm also concerned that these
21 proposals could negatively affect rail service
22 to customers like us by reducing asset

1 utilization and otherwise impairing the rail
2 network.

3 Our national rail network has
4 improved dramatically over the past 30 years.
5 We currently have a highly efficient,
6 environmentally friendly, and cost-effective
7 rail system that's primarily funded by these
8 same railroads.

9 I believe our current regulatory
10 structure is working well for shippers and the
11 public at large, and for these reasons, I ask
12 the Board to reaffirm the current regulatory
13 regime.

14 Thank you very much.

15 CHAIRMAN ELLIOTT: Thank you, Mr.
16 Yeager.

17 We'll now hear from Mr. Rubin from
18 the Intermodal Association of North America.

19 MR. RUBIN: Thank you.

20 Chairman Elliot, Vice Chairman
21 Begeman, and Commissioner Mulvey, thank you
22 for allowing the Intermodal Association of

1 North America the time to express our views on
2 the current state of rail competition.

3 My name is Steve Rubin, Chairman
4 of the association commonly known as IANA,
5 whose members handle over 90 percent of the
6 freight moved in intermodal service.

7 I spent the last 20 years in the
8 intermodal industry as a senior operations
9 executive with a major ocean carrier, and most
10 recently as the President and CEO of TRAC
11 Intermodal, the nation's largest intermodal
12 chassis leasing company.

13 Over the last two decades, I've
14 worked very closely with all the Class 1
15 railroads as both a customer and a supplier of
16 intermodal services.

17 At the Board's February 24th
18 hearing to revisit exemptions for commodity,
19 box car, and intermodal, IANA's CEO, Joanne
20 Casey, and other rail executives provided
21 compelling arguments why the exemption on
22 intermodal should be preserved.

1 My remarks today will focus on how
2 the current regulatory environment for
3 railroads has fostered an era of powerful
4 competition for containerized supply chain
5 logistics that has provided significant
6 benefits to all stakeholders, including
7 shippers, ports and terminals, ocean carriers,
8 motor carriers, and third-party logistics
9 providers.

10 My core point is that for
11 intermodal rail, competition is a way of life,
12 and in the relatively near future, it will
13 only intensify as infrastructure improvements
14 from the build-out of the Panama Canal, as
15 well as the deeper dredging of our nation's
16 major seaports to handle the world's largest
17 container ships will increase the pressure on
18 the railroads to provide superior service at
19 reasonable, competitive, and market-driven
20 prices.

21 I've been negotiating service
22 contracts with the railroads for the past 20

1 years, and I've witnessed first-hand the
2 benefits of the current regulatory
3 environment.

4 First, mergers have created better
5 end-to-end products with faster, more reliable
6 transit times for service-sensitive shippers,
7 and there's been an unprecedented capital
8 spend invested in network, terminals,
9 technology, and human resources to meet not
10 just current container volumes and trailer
11 volumes but for expected growth far, far into
12 the future.

13 As both a shipper and a supplier
14 to the rail intermodal industry, I've also
15 experienced the intense competition --
16 competitive nature of the Class 1 railroads.
17 It's my perception that in the years following
18 the highly active merger period in the mid- to
19 late-1990s, the railroads have only increased
20 their focus on serving their customers and
21 heavily investing in the business to
22 accommodate freight growth.

1 Intermodal is a complex system of
2 interrelated transportation moves, and I
3 believe the railroad investments have been
4 critical to supporting the 5.7 percent
5 compound annual growth rate for containerized
6 imports and exports over the last 20 years.

7 Now, today, the railroads not only
8 compete against their geographical
9 competition, Union Pacific versus the BN, CSX
10 versus Norfolk Southern, but because of
11 container port infrastructure development and
12 the growth in canal traffic both through
13 Panama and the Suez, the railroads are now
14 competing quote-unquote across a divide for
15 cargo-rich areas of the Midwest, Ohio, and
16 Tennessee Valleys, the Southeast, and the Gulf
17 Regions.

18 Now, I know this last point was
19 also touched upon in the February 24th
20 hearing, but I think it bears reviewing, as it
21 speaks to how the current regulatory
22 environment encourages competition and risk-

1 taking investment in the context of market
2 forces.

3 To illustrate the increasing
4 competitive forces facing railroads in the
5 intermodal segment, let's take a container
6 shipment moving from Shanghai to Cleveland,
7 Ohio.

8 Their steamship line responsible
9 for bringing the goods from overseas has
10 routing options that span two countries, both
11 North American coasts, and six of the seven
12 Class 1 railroads.

13 If you also include the option of
14 trans-loading at the port of discharge into
15 the 53 foot domestic container, you not only
16 double the potential routings, but you have
17 introduced motor carrier competition into the
18 equation.

19 The bottom line is that the
20 railroads have more competition for intermodal
21 freight than ever before, and will only become
22 more so as new infrastructure will push the

1 boundaries of the traditional intermodal
2 supply chain.

3 While I cannot speak with
4 knowledge on the sole provider rate issues
5 here, the STB has properly identified one of
6 the emerging challenges facing the evaluation
7 of intermodal rate reasonableness, the global
8 multi-modal shipment.

9 In such instances, which will
10 become truly routine and not just
11 hypothetical, IANA believes the best course of
12 action for the Board would be to stay its
13 current course with regard to rate regulation,
14 and allow the market to establish the best
15 supply-chain routing for the American
16 producers and consumers.

17 Thank you very much for the
18 opportunity to present to you today.

19 CHAIRMAN ELLIOTT: Thank you, Mr.
20 Rubin.

21 Vice Chairman?

22 VICE CHAIRMAN BEGEMAN: Mr. Marsh,

1 could you explain what type of service you're
2 provided from the two carriers? Actually, what
3 I mean is, are they providing you a joint
4 rate, or do you operate over them on separate
5 lines, or are they giving you a bottleneck
6 rate?

7 MR. MARSH: No, our situation is a
8 little unique in the sense that our reach in
9 the East -- we're the largest Eastern coal
10 company, as a producer. And I actually run
11 our Baltimore terminal, which has been
12 tripling its volumes over the last couple
13 years and serving the international
14 marketplace.

15 So we have the good fortune of
16 having some mines that are served by both
17 railroads, some mines that are single-served,
18 and facilities like our Baltimore terminal
19 that are dual-served.

20 So having that mix, we are able to
21 work with them tactically at the local level,
22 and the mid-level regionally, and with their

1 executives, where we make joint capital
2 investments.

3 We support each other in terms of
4 strategies. We work with them to create
5 metrics that allow us to generate
6 efficiencies.

7 And so what we've seen is both in
8 the rate-making process, there's been
9 competition and creativity. And then more
10 importantly, on the investment and service
11 side, we've seen significant modern business
12 applications that make it to where we can grow
13 threefold in two or three years. So that's
14 been our experience.

15 VICE CHAIRMAN BEGEMAN: And Mr.
16 Yeager, do you provide service or transport
17 cars or arrange cars for all of the railroads,
18 or just particular Class 1s, or any short
19 lines?

20 MR. YEAGER: We do actually -- we
21 are strictly on one carrier within the West,
22 and within the East, we utilize both carriers,

1 both CSX and Norfolk Southern.

2 VICE CHAIRMAN BEGEMAN: And I'll
3 ask all three of you to respond to this.

4 And Mr. Marsh, you mentioned that,
5 if you were testifying such as the first panel
6 had, you probably would be asking for changes,
7 what are your thoughts on the proposal to
8 allow those with competitive options currently
9 to have access to the Board to challenge a
10 rate?

11 MR. MARSH: Having oversight and
12 having a general threat if someone gets
13 unreasonable and totally reasonable and
14 consistently reasonable is obviously a
15 benefit. I just don't know how you would do
16 it consistently.

17 Our biggest caution is simply,
18 please don't do anything that will create
19 enough uncertainty that capital investment
20 will be hesitant, because we've seen very
21 practically and on a day-to-day basis, if you
22 don't invest the capital, the capacity

1 withers, and as the capacity withers, our
2 product doesn't move.

3 And as important as rates are,
4 which is very important, our ability to move
5 product to market is critical. So I just
6 caution just, please be careful.

7 MR. YEAGER: I would agree with
8 Mr. Marsh. I do think that we would just be
9 very concerned about the railroads' intent and
10 capabilities of reinvesting in the
11 infrastructure.

12 In the intermodal industry, we
13 have seen tremendous strides forward from a
14 service perspective. That's make it very
15 truck-competitive.

16 And for the railroads to handle
17 more business and take it off the highways is
18 critically important, I think, to the future
19 of commerce within this country, and any
20 uncertainty that's thrown in there I think is
21 certainly a hindrance.

22 MR. RUBIN: Yes, I also follow --

1 agree with the previous two comments. My
2 entire history in this business of intermodal
3 has been basically in a deregulated
4 environment.

5 So, Vice Chair, it would be a
6 little difficult to put myself in someone
7 else's position other than it seems that these
8 are complex issues that really require a real
9 deep understanding of the specific facts for
10 each of the shippers.

11 Beyond that, you know, it's hard
12 for me to comment any further.

13 CHAIRMAN ELLIOTT: Commissioner?

14 COMMISSIONER MULVEY: Thank you,
15 Dan.

16 I recall of course the exemption
17 hearings back in February, I guess it was,
18 when Joanne was here testifying on behalf of
19 IANA.

20 Of course, we pointed out at the
21 time that intermodal is probably, by
22 definition, the most competitive kind of

1 traffic, and therefore, probably the most
2 warranting of exemption, by intermodal, it can
3 go by many, many modes or by multiple modes.

4 So, but I want to ask a question
5 about the Staggers Act. I mean, the Staggers
6 Act was passed -- when we passed Staggers Act
7 in 1980, it was part of a larger group of
8 bills that deregulated transportation,
9 aviation, but also in 1980, motor carriers
10 were also deregulated.

11 And motor carriers were, before
12 1980, back in the old days of tight
13 transportation regulation, the ICC tried to
14 balance the needs of the various modes, and
15 tried to allocate traffic, depending upon what
16 it saw as the inherent advantages of each
17 mode, etcetera.

18 And it didn't do a good job of
19 that, ultimately, and the railroads were in
20 serious financial -- it's been suggested that
21 what we need to do is to create the whole
22 promise of Staggers, and that is de-regulate

1 the railroad industry entirely, and let the
2 railroads behave as a competitive industry and
3 as competitive firms, as we do in any other
4 industry, with the probable continued limited
5 anti-trust immunity that they have right now.

6 Would you think that that would be
7 a proper way to go to just, more with this --
8 ultimately, I guess it's easier for me to say,
9 I'm finishing out my second term, but the
10 Board, then, would disappear, and you would
11 have a railroad industry that would compete
12 for traffic like any others, and we would rely
13 almost completely on market forces to
14 determine rates and the allocation of traffic.

15 MR. RUBIN: I guess it could also
16 be easy for me to answer, since I only have
17 six more months in my chairmanship, and Joanne
18 will actually be returning, the next time, I'm
19 sure, that IANA is asked to testify.

20 Again, sort of to reiterate my
21 answer to Vice Chair Begeman, Chairman Mulvey,
22 I've grown up in the basically deregulated

1 industry, and I've seen all the positive
2 benefits that occur when there really is
3 optimal or multiple choices for shippers of
4 rail services.

5 So having listened to the first
6 panel, as I answered before, it seems that
7 maybe not all the circumstances, depending on
8 the situation, allow for the same sort of, you
9 know, competition that we have in the
10 intermodal industry.

11 But certainly the railroads have a
12 fierce competitive spirit, and having a
13 regulatory regime that allows the railroads to
14 maintain that fierce competitive spirit, they
15 will take advantage of it, and they will work
16 extremely hard to serve their customers and to
17 certainly serve all their stakeholders
18 including their shareholders.

19 MR. YEAGER: Well, being the
20 oldest member of this panel, and having lived
21 through regulation and deregulation, I'm very
22 much -- the Staggers Act, I do think, was a

1 tremendous stride forward.

2 I do think that having a Board
3 that attempts to allocate competition and
4 weigh if truck is better than rail is not
5 appropriate. I do think that with what we
6 have today, that it's actually very effective
7 to Steve's point.

8 We do see within the intermodal
9 segment a tremendous amount of competition.
10 The railroads are very aggressive, very
11 creative in how, in fact, they go about with
12 their proposals. And so I would suggest that
13 again, maintaining as is would be my advice to
14 the STB.

15 MR. MARSH: The concern I'd have
16 if it went to just a wide-open, totally
17 different environment, is the barriers to
18 entry in terms of just building railroads,
19 getting the ability to get the land, to build
20 it, the capital involved, that would be -- I'd
21 be concerned a little bit if it just went to
22 a total Wild West environment.

1 But again, I just think we just
2 need to be cautious to make sure that whatever
3 changes, if any, occur, just do consider the
4 capital impact.

5 COMMISSIONER MULVEY: Well, the
6 railroads do have monopoly power where they
7 have single-served shippers, but there are
8 limits to how much they can charge.

9 And the limits are based upon the
10 fact that they need to have their customers,
11 as Mr. Hamberger said yesterday, they don't
12 want to put their customers out of business.
13 Mr. Young said the same thing.

14 That's who their -- that's where
15 their money comes from is serving customers,
16 so there are limits to what railroads can
17 charge.

18 The -- in other words, what I'm
19 really asking, is there a need for this Board
20 if you really want to have total competition?
21 Because at least that might generate more
22 innovation, more creativity, more services,

1 etcetera.

2 The alternative that's been
3 suggested or was suggested many, many years
4 ago was -- maybe perhaps Mr. Yeager and hardly
5 anybody else in this room remembers, that it
6 was suggested that railroads ought to be
7 treated like highways, and that is the
8 railroad network ought to be nationalized, and
9 the railroads -- private railroad companies,
10 then, would compete for the traffic on this
11 publicly owned highway system.

12 Those are kind of extreme
13 solutions, but they have been suggested.

14 Do you have any comment on any of
15 those?

16 MR. MARSH: Fortunately, I don't
17 have sufficient understanding and perspective
18 to comment intelligently.

19 COMMISSIONER MULVEY: Mr. Yeager?

20 MR. YEAGER: I would suggest that
21 was probably in times when, as far as the
22 suggestion that we nationalize the rail system

1 itself, that was probably at a time when the
2 railroads had not invested in infrastructure.

3 And I do think really that private
4 enterprise and the innovations and giving them
5 the ability to continue to earn their cost of
6 capital is certainly the best solution.

7 MR. RUBIN: Sort of my frame of
8 reference, Commissioner, is on the ocean
9 container side, and there you have some
10 examples where regulatory bodies, given proper
11 guidance and authorization, I think can help.

12 And look at the Federal Maritime
13 Commission. Look over in Europe where the EU
14 has fully deregulated the ocean shipping liner
15 rates, but yet, they still oversee it, and
16 they still continue to investigate.

17 So again, I look at those as I
18 think effective regulatory structures that
19 also can effectively promote competition.

20 COMMISSIONER MULVEY: Of course,
21 in ocean shipping, a large part of the
22 infrastructure, the ports, for example, tend

1 to be quasi-public institutions.

2 Thank you very much.

3 CHAIRMAN ELLIOTT: I don't have
4 any further questions. I just want to thank
5 you for bringing your perspective to the
6 hearing today. It's greatly appreciated, and
7 thank you very much.

8 (Pause.)

9 Okay. Welcome, everyone. We'll
10 now begin with panel number three, and leading
11 off will be Arkema.

12 And Mr. O'Leary, you have ten
13 minutes.

14 MR. O'LEARY: Good morning, Mr.
15 Chairman, Vice Chairman Begeman, and
16 Commissioner Mulvey.

17 My name is John O'Leary. I'm
18 director of Logistics for Arkema, Inc. On
19 behalf of Arkema, I greatly appreciate this
20 opportunity to appear before the Board today
21 to offer our views on competition in the rail
22 industry.

1 Arkema is a manufacturer of
2 specialty products, and currently operates 23
3 manufacturing and research facilities in 14
4 states with over 22 employees across the
5 United States.

6 Our US headquarters is in King of
7 Prussia, Pennsylvania, and our parent company
8 is headquartered in Europe with operations
9 throughout the world.

10 Here in the United States, we
11 routinely use rail carriers to move both raw
12 materials and finished products, and as such,
13 a strong, competitive rail industry is vital
14 to the success of our overall business
15 operations.

16 We also feel rail transportation
17 is the safest and most secure method of
18 transporting our materials and products.
19 Thus, we wholeheartedly welcome this effort
20 which will hopefully strengthen the rail
21 system for both the railroads and shipping
22 community.

1 By thoroughly examining this
2 critical area and acting on items that are
3 discussed, the Board can ensure that the rail
4 transportation sector is open, fair, and
5 competitive.

6 I plan to focus my comments today
7 on Arkema's experience regarding competition
8 in the rail industry and the effects of global
9 competition as it relates to the
10 transportation costs, and also, to discuss
11 some key issues and recommendations for ways
12 to improve the competitive balance in the rail
13 transportation area.

14 First and foremost, our ability to
15 have competitive rail service at our
16 facilities significantly affects the costs of
17 our products and materials, both in terms of
18 transporting raw materials and process the
19 manufactured products.

20 Without competitive service, we
21 invariably have higher transportation costs,
22 which directly affects our bottom line, and

1 often results in higher material and product
2 costs, which in turn, affects our ability to
3 compete domestically and globally, and it also
4 affects our ability to expand and grow our
5 business and hire more employees.

6 In the end, the issues surrounding
7 rail competition and rail access are about
8 jobs and economic costs. In these uncertain
9 economic times, anything that can be done to
10 make US manufacturing more competitive is
11 critical.

12 Ensuring that companies like
13 Arkema have access to competitive rail and
14 transportation services will help to keep our
15 business and our industry healthy,
16 competitive, and growing.

17 Currently, over 50 percent of
18 Arkema's finished product volume is shipped
19 via rail. Indeed, without reliable,
20 efficient, and safe access to the rail
21 network, key operations at some of our most
22 important facilities would be seriously

1 jeopardized.

2 In many cases, the rail access at
3 these facilities is often limited to only one
4 rail carrier. And as you might imagine, with
5 limited transportation options at hand, we
6 have found that our rail transportation costs
7 have increased greatly over the last decade.

8 Unfortunately, as the rail
9 shipping costs have risen, we have had to
10 either absorb these costs internally or
11 increase our prices to pay for the increased
12 shipping cost. Neither option is good, but
13 this has become our reality in recent years.

14 With regard to railroad profits,
15 although we are certainly not opposed to
16 industry's making a profit, we are concerned
17 when certain practices have a significant and
18 negative impact on other industries or
19 markets.

20 For many of our products and
21 materials, we are often unable to pass along
22 the increased shipping cost because

1 competitive forces have driven the individual
2 product prices down.

3 Thus, we are faced with having to
4 sell our products and materials at a lower
5 price while simultaneously having to absorb
6 increasing shipping costs.

7 As we evaluate our rail
8 transportation options that are available to
9 us today, we find that we have significantly
10 fewer options than there were 25 years ago.
11 This means fewer competitive-based checks and
12 balances and therefore, higher shipping costs.

13 Fewer rail options means less
14 competition. Less competition brings higher
15 rates and fewer service options. As noted,
16 higher rail freight costs affects our ability
17 to be competitive, and it affects our ability
18 to expand and grow our businesses and add
19 jobs.

20 But perhaps most compelling in how
21 captive many of our facilities have become to
22 only one rail carrier, at present, we have

1 true competition, competitive service at both
2 ends of the rail shipment, for only one
3 percent of our shipping lanes.

4 Further, a full 71 percent of our
5 lanes are captive at both ends of the
6 shipment, and 28 percent of our lanes have
7 competition at only one end.

8 When the rates for shipments to
9 and from our captive facilities are compared
10 to the shipping rates to and from facilities
11 that have competitive shipping options, we
12 find that the rates for our captive facilities
13 are significantly higher than those at non-
14 captive facilities. In one case, we have seen
15 rates increase as much as 150 percent just in
16 the last five years.

17 These rates far outpace normal
18 inflationary costs and railroad industry
19 costs. This directly affects our operations,
20 sales, and our ability to invest in our
21 manufacturing infrastructure.

22 It is also important to consider

1 our current business situation in the context
2 of the global competitive environment. We
3 must compete not only domestically, but also
4 with companies located in Asia, Europe, and
5 elsewhere.

6 Unfortunately, we are finding that
7 in many cases, our global competitors have
8 lower transportation costs than we do, despite
9 the fact that they are shipping their
10 materials or products from thousands of miles
11 away.

12 They can do this because they can
13 ship directly to a port that may be closer to
14 the end user, or to a port that enjoys greater
15 competitive rail service than we have.

16 Additionally, many global
17 manufacturers examine a myriad of issues when
18 citing new facilities. Transportation costs
19 are a critical component of any such calculus.
20 The competitiveness of American industry is
21 predicated upon an economical transportation
22 and intermodal environment.

1 The huge advantage the US has over
2 developing nations is that its rail
3 infrastructure network is in place and
4 accessible to all, allowing certain pricing
5 practices to destroy that competitive
6 advantage has to be avoided in the global
7 environment for goods, services and capital.

8 Therefore, we believe the effects
9 of these international shipping issues, and
10 their impact on competition and shipping
11 rates, should be examined as part of the
12 process as they are increasingly key
13 components of our overall competitiveness.

14 I would now like to discuss a few
15 key issues and some recommendations regarding
16 improving the competitive balance in the rail
17 industry that we offer for your consideration.

18 First, let me note, one, our
19 general support of the joint comments that
20 have been submitted by the American Chemistry
21 Council, the Chlorine Institute, CURE, and
22 other interested organizations.

1 We believe one of the key elements
2 of these joint comments is the discussion on
3 the Board's considerable authority and
4 discretion to take action to support rail
5 competition. And we hope the Board will use
6 this proceeding as a catalyst for improving
7 the competitive balance in the rail
8 transportation agreement.

9 One issue is the area of
10 reciprocal switching agreements, where we
11 support actions that would allow for increased
12 use of such agreements. These types of
13 agreements have the potential to reduce costs
14 and increase service options for all parties.

15 One suggestion the Board might
16 consider is developing a pilot program in one
17 or more selected geographical areas that would
18 allow for increased use of reciprocal
19 switching agreements that could be negotiated
20 by all parties.

21 The lessons learned from such a
22 pilot then could be applied to other parts of

1 the system.

2 We also support strengthening the
3 ability to use so-called Rule 11 rates where
4 each carrier is given through route quotes a
5 separate rate for their segment rather than
6 one carrier quoting a through rate.

7 It has been our experience that
8 using Rule 11 procedures has benefitted from
9 this process. This is particularly the case
10 with respect to toxic by inhalation hazard
11 products.

12 However, it has also been our
13 experience that Rule 11 process has not been
14 available for our non-TIH shipments. In fact,
15 in some cases, a request for such pricing to
16 apply has been denied by some carriers.

17 Therefore, we would support a
18 review of Rule 11 procedures with the aim of
19 ensuring consistency in the application across
20 the various types of shipments.

21 Lastly -- if I can have one -- we
22 believe it is also relevant to any review of

1 competition in the rail industry to examine
2 the current process for bringing a rate case.

3 A key part of the current system
4 of checks and balances in the rail competition
5 is the ability or non-ability of the shipper
6 to bring a rate case before the Board for
7 their consideration.

8 One factor in deciding whether or
9 not to bring a case is cost. In most cases,
10 the cost remains prohibitively high because of
11 the complicated process and procedures that
12 are required.

13 Thus, we would also welcome any
14 action that might simplify and streamline the
15 current rate case process.

16 Again, Arkema greatly appreciates
17 the opportunity to provide our views on
18 competition, and appreciate the Board's
19 looking at this procedure.

20 Thank you.

21 MR. BAKER: Good morning. My name
22 is Jeff Baker, and I'm responsible for Dow's

1 rail purchases. And I've replaced Brad Gray
2 today, due to illness.

3 So, Chairman, Vice Chairman, and
4 Commissioner, thank you for the opportunity to
5 allow Dow Chemical to provide our perspective
6 on this issue.

7 Dow operates a large fleet of
8 approximately 23,000 rail cars, so we have a
9 significant investment in rail. These cars
10 carry over 110,000 rail shipments each year
11 for multiple North American production
12 facilities.

13 Our large facilities are captive
14 to a single railroad. That's over 58 percent
15 of our original rail shipments. And then 80
16 percent of all of our destination rail
17 shipments are also captive to a single
18 railroad.

19 Less than 25 percent of Dow's
20 total annual US rail shipments are served by
21 more than one railroad.

22 You've already heard about the

1 impact carrier consolidation has had on
2 competition. I'd like to focus on several
3 points made by the railroads yesterday, in
4 light of Dow's experience since 2004.

5 You heard -- you have heard it
6 said that it's not about competition, it's
7 about rates. But is competition precisely
8 about rates, safety and service?

9 Dow has experienced dramatic
10 increase in our rates for our captive
11 facilities. While the average annual distance
12 and the average tons for Dow's rail
13 transportation since 2004 has been relatively
14 constant, the increases have been greater than
15 45 percent over that six-year period.

16 Also, without effective
17 competition, Dow has been unable to negotiate
18 any service-level agreements with the
19 railroads.

20 The rail rate increases
21 experienced by Dow have been based on business
22 practices which have shown typical monopoly

1 pricing behavior. Contrary to what was said
2 yesterday, we're not claiming that increase in
3 rates is evidence of monopolistic behavior,
4 but it's the way in which the price increases
5 are imposed that make them unfair or
6 unreasonable.

7 Taking advantage of the fact that
8 a shipper is captive, railroads have used
9 numerous methods to increase rates. This
10 includes a take it or leave it attitude, a
11 refusal to enter into long-term contracts,
12 sometimes even insisting on a 30-day
13 cancellation provision in contracts, fuel
14 surcharges that are not based on any changes
15 in fuel costs, large increases in rail car
16 storage, and increases in track lease charges.

17 Also, railroads' rates continued
18 to go up even when demand went down. All
19 other modes of transportation at Dow reduced
20 their rates.

21 In response to these facts, the
22 railroads have made two arguments. First,

1 there are the forms of competition, mainly
2 truck, and the second, the current STB
3 regulatory system, provides an adequate remedy
4 to shippers in the face of unreasonable rates.

5 Taking these in order, in most
6 cases, the use of trucks is not a viable
7 alternative for Dow or many of its customers.
8 Dow and its customers have built their
9 production facilities around rail
10 transportation. Rail cars reduce the need for
11 permanent storage facilities, which are very
12 costly.

13 In addition, the volume of
14 commodities that Dow ships creates unique
15 challenges for trucks. Using trucks would
16 result in increased traffic and congestion,
17 increase handling costs, and safety concerns.

18 The efficiency and safety of rail
19 transportation, especially on the average long
20 distance that Dow ships, which is greater than
21 1,000 miles, makes trucks not competitive.

22 As to the adequacy of existing STP

1 regulatory procedures, as has been pointed
2 out, it's extremely expensive and complicated
3 to file a rate case, especially large rate
4 cases. In addition to the fees for lawyers
5 and experts, the preparation and prosecution
6 of a rate case takes an enormous amount of
7 time and company resources.

8 These resources would be spent --
9 provide -- better spent providing goods and
10 services to our customers.

11 On top of these rate case costs,
12 there's enormous penalty that a company pays
13 for simply bringing a rate case, starting with
14 contract rates that a shipper finds
15 unreasonable. The alternative, then, is to
16 pay significantly higher tariff rates during
17 the rate case.

18 The railroads know this is a big
19 disincentive to filing a rate case. The
20 recent increases in rate cases is not due to
21 the recognition that it's an effective remedy.
22 The rates imposed by the railroads have become

1 so unreasonable that the companies see no
2 choice but to incur the costs and risks of a
3 rate case.

4 So what to do? Dow believes that
5 enhancing rail competition will support the
6 growth of US manufacturing. This can be done
7 by making rail competition more available at
8 origin destinations through reciprocal
9 switching and allowing bottleneck rates.

10 The success of these measures of
11 course depends upon the reasonableness of
12 switching and bottleneck rates.

13 In conclusion, Dow has experienced
14 dramatic reduction in US rail competition.
15 This has resulted in significant rate
16 increases, cost shifting, and rail franchise
17 protectionism.

18 Dow, American companies, and
19 American workers need better access to rail
20 competition.

21 Thank you for your time.

22 CHAIRMAN ELLIOTT: Thank you, Mr.

1 Baker.

2 We'll now hear from Mr. Smith from
3 E.I. DuPont de Nemours and Company.

4 MR. SMITH: DuPont is fine.

5 (Laughter.)

6 CHAIRMAN ELLIOTT: I appreciate
7 that.

8 MR. SMITH: Chairman Elliot, Vice
9 Chairman Begeman, and Commissioner Mulvey,
10 good morning.

11 My name is Keith Smith. I'm the
12 Chief Procurement Officer and Vice President
13 of the sourcing and logistics for DuPont.
14 Thank you for your time to share DuPont's
15 experiences on the current state of rail
16 competition and also to advocate for some
17 policy changes.

18 America's freight railroads have
19 been vital to DuPont since 1858. Last year
20 alone, we shipped and received over 24,000
21 rail cars of 100 different commodities.

22 Therefore, despite the rail

1 industry's attempt to portray DuPont and other
2 interested shippers as self-interested parties
3 with short-term perspective, DuPont, in this
4 fact, has very strong interest in the long-
5 term success of the American rail industry,
6 because our success depends on a healthy and
7 vibrant rail transportation system.

8 DuPont, however, does not believe
9 that a healthy and vibrant rail system
10 continues to require regulatory protection
11 from competition, if it ever indeed did.

12 As the industry has matured and
13 overcome its former financial difficulties, it
14 no longer requires the same degree of
15 regulatory protection, had it been justified
16 based on the facts that have significantly
17 changed over the last decade.

18 The fundamental question that the
19 Board should be asking in these proceedings
20 is, why are the railroads afraid to compete
21 with one another?

22 The rail industry has presented --

1 you know, we're confused. The rail industry
2 has presented two inherently contradictory
3 messages to the Board in this proceeding. On
4 the one hand, they claim that there's no need
5 for the Board to change its competition
6 policies, and that they already are subject to
7 extensive competition from non-in-kind modes
8 of transportation such as trucking.

9 On the other hand, they claim that
10 enhancing in-kind rail-to-rail competition
11 would reverse their financial progress since
12 the Staggers Act by reducing rail rights.

13 If trucks have introduced true
14 competition, how can enhanced rail competition
15 have such a dramatic impact upon rail rates?
16 The industry cannot have it both ways.

17 Furthermore, the rail industry
18 creates a false choice between differential
19 pricing and competition. Differential pricing
20 exists in many competitive industries, such as
21 our own competitive industry with many, many
22 competitors.

1 It's ludicrous to suggest that
2 competition between just two railroads in the
3 East and two railroads in the West will render
4 both railroads unprofitable. Each railroad
5 should have sufficient knowledge and
6 discipline to know how to price their traffic
7 and remain profitable.

8 Following the major rail
9 consolidations that ended a decade ago, DuPont
10 has witnessed significant changes in the
11 competitive landscape for rail transportation.

12 A couple of these changes are,
13 one, railroad mergers have resulted in greater
14 portion of production capacity for many
15 industries that rely on point-to-point
16 shipping to become captive to just one
17 railroad. This has substantially reduced
18 geographic competition.

19 Consequently, a single railroad
20 that serves a majority of the production
21 points and delivery points for a commodity can
22 establish price and service terms without fear

1 of losing that business to another railroad.

2 Secondly, as more production
3 capacity has become concentrated in just a few
4 railroads, more traffic is subject to the
5 exercise of bottleneck pricing to ensure that
6 the bottleneck railroad's single-line movement
7 prevails over a joint line movement.

8 With these two competitive
9 changes,

10 DuPont has also witnessed railroad behavior
11 that is inconsistent with a competitive
12 marketplace. These behaviors include take it
13 or leave it contract proposals.

14 Rather than negotiating based on a
15 partnering of the railroads with DuPont to
16 grow our respective businesses, we have seen
17 rates dramatically increase with no benefits
18 or service enhancements that increase
19 downstream customer value and increase the
20 American industry's competitiveness.

21 For example, we looked at price
22 and transit times for several of our highest-

1 volume lanes. Since 2003, the average rate
2 has gone up 100 percent, and the average
3 transit time has gone up 17 percent.

4 Competition drives innovation.
5 That results in either lower costs and/or
6 higher value. We see neither one here.

7 I've run many different businesses
8 in the DuPont company over the last 31 years
9 in very competitive industries. We have to
10 innovate, and we've been successful in
11 lowering the cost for our customers and
12 improving service at the same time. We see
13 neither in these cases here.

14 Secondly, contract negotiations
15 based on revenue demands for DuPont's full
16 book of business, rather than market-based
17 determinants, in those rare occasions where a
18 railroad has to -- has competition and does
19 have to react to a competitive offer, they
20 simply take that reduction in revenue and move
21 it to a place where there's not competition.
22 So the total revenue coming from DuPont

1 remains the same.

2 Thirdly, dissociation of contract
3 terms and conditions from rates. In typical
4 negotiations in most industries, there's
5 trade-offs between price and terms. In our
6 contracts here in this industry, we see -- we
7 rarely see that.

8 Finally, we get fuel surcharges
9 that are not linked to changes in actual fuel
10 costs.

11 Reduction in rail competition has
12 been detrimental to DuPont's ability to
13 compete against foreign imports. Our foreign
14 competitors can choose strategically where
15 they enter the country and thus where their
16 imports enter the US rail system in order to
17 generate rail competition.

18 In contrast, DuPont's domestic
19 production that is accessible by rail, 40 of
20 our sites, 80 percent are captive -- or 32 --
21 to a single railroad, 80 percent of our sites.

22 As domestic facilities age or

1 reach capacity, companies like DuPont must
2 decide whether to upgrade their plants or
3 expand their capacity in this country. Just
4 as railroads must justify their infrastructure
5 investment decisions in order to attract
6 capital, so must their customers.

7 Several railroads witnessed in
8 this proceeding have questioned whether
9 transportation costs in the chemical industry
10 are truly significant enough to drive
11 investment decisions. One of our largest
12 movement of chemicals in the United States has
13 its transportation costs 25 percent of the
14 revenue, not only the cost, but 25 percent of
15 the revenue.

16 Even when the percentage is
17 smaller, the combination of the transportation
18 cost plus one other factor can significantly
19 hurt business competitiveness, both for DuPont
20 and our downstream customers, and change our
21 investment decisions.

22 The chemical industry generates

1 the type of high-skilled and high-paying jobs
2 that this country needs. This country and
3 American workers cannot afford to have
4 railroads drive off DuPont and the chemical
5 industry by stubbornly refusing to compete.
6 This lack of competition is an insidious drag
7 on the American economy.

8 Today's rail rates are less
9 competitive than they were upon the passage of
10 the Staggers Act. DuPont strongly believes
11 that the reduction in rail competition over
12 the last decade warrants changes in the
13 Board's policy toward enhanced rail
14 competition. The Board has the tools to
15 enhance rail competition, and we humbly
16 believe that now is the time to act.

17 One of these tools is reciprocal
18 switching. DuPont asks the Board to make
19 reciprocal switching more widely available at
20 reasonable rate levels in order to create
21 competition for captive shippers located in
22 terminal areas that are served by two or more

1 railroads.

2 Secondly, another tool is de-
3 bottleneck rates. DuPont asks the Board to
4 require railroads to quote de-bottleneck
5 rates.

6 De-bottleneck rates merely permit
7 shippers to tap into the rail competition that
8 already exists by preventing a bottleneck
9 carrier from using its control over a short-
10 term bottleneck segment to extend its monopoly
11 to the entire through movement.

12 If necessary to obtain reasonable
13 rates over the bottleneck segment, the shipper
14 can challenge just the bottleneck rate. That
15 would significantly reduce the complexity of
16 rate cases like the one we currently have
17 before the Board between DuPont and Norfolk
18 Southern.

19 The rail industry protests that
20 the Board should reject these two competitive
21 measures, and instead, continue to rely upon
22 regulation to address the lack of competition.

1 DuPont is well-versed in these
2 regulatory remedies and is currently pursuing
3 its fifth rate case in as many years.

4 This process, which is cumbersome,
5 expensive, time-consuming, is not how the
6 American business should have to expend its
7 resources. We'd much rather rely on true rail
8 competition and competitive negotiations with
9 rail carriers.

10 In a country where our economy is
11 based on free markets and competition, it's
12 ludicrous that we are even engaged in a debate
13 over the merits of competition in the rail
14 industry.

15 Enhancing rail competition, in
16 conclusion, will have a positive effect on the
17 competition with the industry and customer
18 benefits. As a result of the railroad market
19 power, parts of American industry are
20 disadvantaged not just today, but in the
21 future.

22 Industries such as bio-fuels will

1 depend on a competitive and efficient rail
2 system. Without competition, competitive rail
3 rates, and service, the development of such
4 industries in the United States could be
5 delayed to our long-term economic detriment.

6 Accordingly, greater competition
7 is needed in the US to ensure DuPont and other
8 US manufacturers and the American consumers
9 are not unfairly shouldering excessive rail
10 rates to the benefits of our national
11 railroads.

12 Thank you for your time.

13 CHAIRMAN ELLIOTT: Thank you, Mr.
14 Smith. We'll now hear from Ms. Burns, from
15 Occidental Chemical Corporation.

16 MS. BURNS: Okay. My name is
17 Robin Burns. I'm the Vice President of Supply
18 Chain for Occidental Chemical.

19 OxyChem is the leading North
20 American manufacturer of basic chemicals and
21 vinyl resins, including chlorine, caustic
22 soda, and polyvinyl chloride, the building

1 blocks for a range of products.

2 The chemicals we manufacture are
3 used in water purification, medical supplies,
4 pharmaceuticals, construction materials, and
5 agricultural chemicals. Our products are
6 vital to the economy of the United States.
7 They are manufactured at 21 domestic
8 locations, employing 3,000 people across the
9 central to eastern United States.

10 In 2010, we shipped 63,000 loaded
11 rail cars, and incurred more than \$220 million
12 in rail freight charges. In the five years
13 between 2005 and 2010, which included a
14 sustained period of general economic
15 recession, OxyChem rail rates increased from
16 30 percent to 160 percent on average.

17 During this same time, rail costs
18 as reflected in the fourth quarter RCAF's
19 unadjusted and adjusted increased 19 percent
20 and 11 percent respectively. However, in the
21 last two years, from 2008 to 2010, the RCAFU
22 and RCAFA decreased by eight percent and ten

1 percent respectively.

2 We believe the rail rates
3 increases imposed on OxyChem are directly
4 related to the market dominance of the
5 railroads. Over 70 percent of our origin-
6 destination pairs are served by only one
7 railroad, and many of our products can only be
8 served by rail.

9 This lack of options effectively
10 provides the railroads with monopoly pricing
11 power.

12 As a shipper of chlorine, we are
13 well aware of the concerns related to the
14 shipment of TIH materials. However, let me be
15 clear. My comments today have nothing to do
16 with TIH materials. My comments and real-life
17 examples are taken from the greater than 90
18 percent of our non-TIH moves, including
19 shipments of KOH, caustic soda, PVC plastic
20 pellets, silicates and calcium chloride.

21 Rail competition effects every
22 single shipper, regardless of commodity. I'd

1 like to take a few minutes to discuss how rail
2 industry rules, agreements, and protocols
3 limit competitive options and illustrate the
4 impact on our business.

5 Railroad restrictions take many
6 forms, including paper barriers, routing
7 protocols, bottleneck rates, and access
8 pricing. Although the Board has asked for
9 input regarding several areas, I would like to
10 focus on those areas that are particularly
11 problematic for OxyChem.

12 OxyChem is interested in pursuing
13 an opportunity in Scranton, Pennsylvania. The
14 customer has two locations in Scranton, one
15 served by the DL railroad and the other by the
16 RBMN railroad. Both short-lines interchange
17 with the NS and CP railroads, so multiple
18 routes should be possible.

19 However, a paper barrier, a true
20 paper barrier, prevents the RBMN from
21 receiving freight from the CP unless the CP
22 originates the freight. Our freight

1 originates in Texas, not served by the CP,
2 meaning the only bridge carrier allowed to
3 interchange to the RPBM is the NS.

4 This restriction is significant to
5 our business. The door-to-door rates using
6 the CP bridge route to the open DL locations
7 are nearly 19 percent less expensive than the
8 NS bridge route.

9 It's reasonable to conclude that
10 the paper barrier increases our costs by at
11 least 19 percent. This restriction on
12 competition adds more than \$1,800 to the cost
13 of each and every rail car we ship to the
14 closed destination.

15 As another example of paper
16 barriers, we wanted to consider all routes for
17 800 rail car per year move of calcium chloride
18 between Ludington, Michigan, and Opelousas,
19 Louisiana.

20 We sought rates using both the UP
21 and BNSF as a bridge carrier to the AKDN.
22 Although a BNSF route option should be

1 possible, we were told that a paper barrier
2 existed and restricted service to UP routes,
3 and we were unable to get the AKDN to provide
4 rates from their BNSF interchange.

5 With the help of the STB's Rail
6 Office of Public Assistance, we confirmed
7 that, in fact, no paper barrier exists, and we
8 compelled the AKDN to finally provide their
9 numbers for the BNSF route.

10 This example illustrates how
11 poorly paper barriers are understood and
12 applied, even by the largest US railroads, and
13 how this lack of transparency can further
14 limit competition.

15 In requesting this hearing, the
16 STB not only asks for competitive issues, but
17 also for solutions. Shippers benefit from the
18 continuation of rail service to areas that
19 Class 1 railroads might not otherwise support.
20 It's not in the public interest to eliminate
21 all paper barriers, as these can facilitate
22 the start-up of small rail companies that

1 otherwise might not be able to compete.

2 However, an outright ban on route
3 options is unnecessarily restrictive. Paper
4 barriers need to be reasonable. They should
5 not guarantee the full merge into a railroad
6 that has chosen to divest of their tracks and
7 operations in an area. They should not be
8 evergreen, as the justification for a barrier
9 is probably no longer valid 10 or 20 years
10 after a track sale.

11 Shippers and even carriers are
12 confused on whether paper barriers are in
13 place. They should be made publicly available
14 to shippers.

15 A listing of which barriers are in
16 place and for what duration of time would make
17 these arrangements more transparent and
18 prevent short lines from arbitrarily declining
19 to quote competitive business.

20 Routing protocols also limit our
21 transportation options. While we understand
22 and support the railroads' need for efficient

1 operations, protocol objectives don't always
2 promote the most efficient route.

3 For example, protocol dictates
4 that shipments between UP-served southern
5 Louisiana and New Jersey CSX and NS-served
6 destinations be interchanged in Salem,
7 Illinois.

8 Without this protocol restriction,
9 the freight could route via New Orleans,
10 eliminating 484 unnecessary miles from the
11 transit. Additional miles add cost, wear and
12 tear to our rail cars, and inflate our fuel
13 surcharges.

14 The increase in fuel alone is
15 approximately \$200 per car per trip. UP
16 claims that routing even a minor additional
17 amount of additional traffic over New Orleans
18 will cause the system to break down in a
19 matter of days. They also acknowledge that it
20 is the single worst congestion point in the UP
21 system.

22 However, by detouring traffic and

1 not dealing with underlying capacity and
2 operating issues, we are using a band-aid to
3 treat a decades old problem.

4 This is not in the best interest
5 of shippers or the economy, but there are
6 solutions. Years ago, congestion in Chicago
7 was the cause of similar delays. Since then,
8 Class 1's Belt Railroads and shippers have
9 worked to mitigate issues, and today, Chicago
10 interchanges are much more efficient for
11 shippers and carriers alike.

12 In the Chicago example, some
13 freight was diverted to other gateways, but
14 this was done in a way that didn't
15 significantly detour the freight.

16 The New Orleans situation is
17 different in that the prescribed solution
18 through Salem adds hundreds of miles to some
19 of our loads. We would like to see open
20 dialogue regarding these and similar issues.
21 Historically, we have been told there is a
22 routing protocol, and that's where the

1 dialogue ends.

2 We recognize there are challenges,
3 but without working together through open,
4 transparent dialogue, nothing will change.

5 Although more shippers have taken
6 advantage of the revised rate case guidelines,
7 railroads continue to make it difficult for
8 shippers to benefit from them.

9 For example, most railroads will
10 only offer contract rates as a bundled
11 package, eliminating the option of shipping a
12 few high-cost, high-volume lanes under tariff
13 rates to allow the option of requesting STB
14 review.

15 Effectively, the railroads use the
16 threat of much higher tariff rates on our many
17 small-volume lanes to prevent us from filing
18 a small or any rate case.

19 In 2008, OxyChem contacted the
20 Board's informal rail customer and public
21 assistance program, and were told, quote,
22 "unfortunately, the railroads can and

1 frequently do bundle rates in contract rate
2 proposals. They are required to provide a
3 tariff rate to a shipper upon request, but the
4 decision to offer contract rates is the
5 railroad's alone."

6 Quite frankly, this is the reason
7 that many shippers have not been able to seek
8 relief from the Board. Shippers cannot afford
9 to pay tariff rates on all lanes while a rate
10 case is tried.

11 In closing, I want to again
12 illustrate how our shipping costs effect our
13 business. Recently, we shut down several
14 OxyChem plants. These decisions were partly
15 due to our rapidly escalating rail freight
16 rate.

17 We made these difficult decisions
18 after much deliberation, and after weighing
19 all options. We know from personal experience
20 that the unrestrained escalation in rail rates
21 impacts our ability to compete.

22 CSX, in their comments, claimed

1 that rail rates constitute less than 3 percent
2 of the delivered price of ammonium phosphates.

3 A recent analysis of OxyChem's
4 freight rates show that rail freight accounts
5 for 10 to 15 percent of the delivered price of
6 our products, and up to 25 percent of our
7 manufacturing costs.

8 For OxyChem, rail freight rates
9 are material and directly impact our ability
10 to compete nationally and globally.

11 We are grateful for the
12 opportunity to comment on competition in the
13 rail industry. It's time for the Board to
14 revisit these items. Times have changed.
15 Today, we have an unbalanced playing field.

16 Anti-competitive behavior and
17 artificial barriers limit our choices and
18 compound the inequities. We are hopeful that
19 the specific examples cited by OxyChem will
20 help the Board understand the current state,
21 and find reason to move to a more balanced
22 future state.

1 CHAIRMAN ELLIOTT: Thank you, Ms.
2 Burns.

3 We'll now hear from Mr. McIntosh
4 from Olin Corporation.

5 MR. McINTOSH: Good morning.
6 Thank you. Mr. Chairman, Madam Vice Chairman,
7 Commissioner, we're pleased to be here today
8 on behalf of Olin to comment on the issues
9 that are in this docket relating to
10 competition.

11 I've been a corporate officer at
12 Olin for 12 years and have been in the
13 industry for many more years than that. And
14 our view of competition in the rail industry
15 is very simple. For a captive shipper, there
16 is no competition in the rail industry.

17 Because of that, for a captive
18 shipper, we are faced every day and at every
19 renewal of contract or discussion with the
20 railroads with rates that exceed what would be
21 reasonable for the railroads to earn a
22 reasonable profit.

1 In addition to the excessive
2 rates, captive shippers are subject to onerous
3 terms and conditions, and we recently have
4 experience with an indemnity obligation and a
5 tariff that we would be subject to that would
6 essentially force us to be an insurer of the
7 railroads against the negligence of potential
8 third parties.

9 We appreciate the Board's effort
10 to address these issues today and hope that as
11 a result of all the facts that you uncover
12 that there will be some changes so that
13 competition can be returned to a very
14 important part of our business.

15 Our company is headquartered in
16 Clayton, Missouri. I'm testifying today on
17 behalf of our Chlor Alkali products division,
18 which has plants stretched across the
19 continental US, including a site in Canada.
20 And as a result of that, we deal with
21 predominantly and many of the Class 1
22 railroads.

1 We've been involved in the US
2 chlor alkali industry for over 100 years, and
3 were one of the first commercial suppliers of
4 chlorine in the United States. We're a
5 publicly traded company, been listed on the
6 stock exchange since 1917, and it's our intent
7 to continue to grow and service the public for
8 another 100 years.

9 As a producer of chlorine, we
10 produce an essential chemical, and a chemical
11 essential to everyday life. And Robin
12 mentioned some of the uses.

13 I would say that in summary, for
14 the majority of the applications for chlorine
15 that we serve in our customer portfolio, there
16 are no reasonable substitutes for the product
17 that we make and produce and transport to
18 them.

19 Chlorine products and their
20 derivatives have a substantial impact on the
21 US economy. This is an industry of
22 consequence contributing more than \$46 billion

1 per year. We contribute many billions of
2 dollars directly to the US economy, directly
3 as the industry itself.

4 Chlorine is vital to our security.
5 It's been deemed an essential asset to
6 critical infrastructure. It's used in
7 materials that are significant and part of the
8 defense establishment, including such things
9 as bulletproof vests, helmets, parachutes,
10 etcetera. It is essential to our nation's
11 health, to our nation's economy, and to our
12 nation's security.

13 For Olin, the importance of rail
14 transportation can be measured by the fact
15 that we've been in the transportation of
16 chemicals for more than a hundred years. We
17 ship each year more chlorine by rail, we
18 believe, than any other producer in the world.
19 The importance of reasonable transportation
20 rates for that commodity and all of the other
21 commodities that we ship cannot be overstated.

22 Due to the nature of the chemicals

1 we ship and the volume of the chemicals that
2 are part of our portfolio, there is no
3 reasonable economic alternative to shipping by
4 rail.

5 Rail transportation is critical to
6 the safe shipment of our chemicals,
7 particularly chlorine, as it keeps large
8 volumes of these chemicals off the nation's
9 highways for what in our system are mostly
10 long-distance routes that cannot be
11 economically served by any other mode besides
12 rail.

13 Rail executives have indicated
14 that this is a TIH issue, or this is an issue
15 associated with the kinds of chemicals that
16 we're transporting. We disagree strongly.

17 And consistent with Robin's
18 comments, we find that the issues with rail
19 competitiveness, for our business, are not
20 commodity-specific, but apply to every
21 commodity that we ship, and cannot then accept
22 the railroads' position.

1 And even if we accepted it, it's
2 our belief that Class 1 railroads shouldn't
3 really be allowed to decide which industries
4 in the United States should succeed and which
5 shouldn't.

6 Because there's no reasonable
7 alternative to shipping our products by rail,
8 rail rates are a critical concern to us. An
9 increase in rail rates has a direct effect on
10 the prices that our customers pay for not only
11 our products, but for downstream goods that
12 are made with the products we produce through
13 other manufacturers.

14 In some instances, we have
15 manufacturers with supply contracts that set
16 prices, and the cost of unreasonably high rate
17 -- rail rates are directly born by the
18 manufacturer.

19 Obviously, manufacturers such as
20 Olin can take steps to protect itself from
21 risks, and we do that every day in terms of
22 buying insurance for natural disasters and

1 other events like that. But there is no means
2 to ensure ourselves from unreasonably high
3 rail rates that a captive shipper is subject
4 to today.

5 Our facilities, every one of our
6 facilities, 100 percent, are accessible only
7 by a single railroad, so we are truly the
8 poster child for the impact of a totally
9 captive company to the rail industry.

10 Because of that lack of
11 competition, we are subject to whatever rates,
12 terms, or conditions the monopoly railroad
13 chooses to impose on us at our locations.

14 In our written submission in
15 Exhibit A, we documented what we thought was
16 a series of events associated with our
17 experience in moving chlorine from our plant
18 in Alabama to a customer location in Texas.

19 The entity, Sunbelt, is the
20 producing location, and we feel it describes
21 and is a perfect example of how the lack of
22 competition has skewed the reasonableness of

1 the entire process, and penalizes a captive
2 shipper such as Sunbelt in this case.

3 The numbers are, we believe,
4 compelling, not more than -- or less than 15
5 years ago, the initial rate of movement of
6 this commodity over this route was less than
7 \$1,500 a car. Today, the tariff rate for that
8 same movement is almost \$12,000 a car, an
9 increase of over 800 percent from the original
10 rate, the greatest rate increase we have
11 really seen since 2002. And during that
12 period of time, the line haul rate for this
13 specific route has gone up 600 percent.

14 Further, as we documented, there
15 has -- we have been systematically denied,
16 when small windows of opportunity were created
17 by other actions, either as a result of STB
18 rulings, or other actions in the rail
19 industry, we've been systematically denied the
20 ability to compete by using different routing
21 protocols or a possibility of Rule 11-type
22 shipments.

1 We believe the dramatic increase
2 in rates is clearly the result of the current
3 regulatory scheme, and there is nothing that
4 is based on preventing captive shippers such
5 as Olin from being subject to this, you know,
6 rate abuse and the unrealistic burdens that we
7 face every day.

8 There are tools available to us,
9 and we understand those tools, but we consider
10 that those tools do not adequately address our
11 concerns.

12 There have been comments made
13 about the fact that some of the tools create
14 a long period of time between the filing of a
15 rate case, as an example, with the findings.
16 There are cases where the cost is estimated to
17 be very high. For our Sunbelt rate, it's
18 estimated to be more than \$12 million to
19 prosecute that.

20 We believe that our experience in
21 Sunbelt provides a pointed illustration in the
22 way that captive shippers are treated, and

1 there is really no current adequate avenue of
2 relief.

3 We're not the only shipper that's
4 captive, and others have testified as to the
5 similar situations that they find themselves
6 in.

7 We have commented in our
8 submissions that we believe a rate variable
9 cost ceiling may be the simplest solution to
10 the unreasonable rate request imposed on
11 captive shippers. We still believe that to be
12 the case, and we noticed in commentary by the
13 Department of Agriculture that they had a
14 corresponding sense of that as a potential
15 remedy for this situation.

16 We also believe that there's one
17 key message that really summarizes the
18 situation we're in. There have been comments
19 by the AAR characterizing that these hearings
20 were not necessary, that it was a whack the
21 pinata event where chemical shippers were
22 really just looking for a windfall and a

1 reduction of chemical rates.

2 I consider that to be, nothing
3 could be any further from the truth than that.
4 What we're talking about, for a captive
5 shipper, a company like mine, is survival.

6 We cannot, in the business model
7 we have, continue to survive the rate
8 increases that we have seen over recent
9 history. And for us, it is a matter of
10 survival.

11 We thank the Board for initiating
12 this proceeding and hearing the comments from
13 all the interested parties.

14 CHAIRMAN ELLIOTT: Thank you, Mr.
15 McIntosh.

16 We'll now hear from Mr. McGarry
17 from PPG industries.

18 MR. MCGARRY: Thank you, Chairman
19 Elliot, Vice Chairman Begeman, and
20 Commissioner Mulvey.

21 Michael McGarry, Senior Vice
22 President for PPG. And we appreciate the

1 opportunity to testify, as well as to
2 supplement the testimony you've already heard
3 from Senators Rockefeller and Vitter.

4 PPG was founded in 1883, so when
5 you talk long-term, we're one of six companies
6 that has been paying dividends for more than
7 100 years. We're a global manufacturer of
8 chemicals, protective coating, glass, and
9 fiberglass, with over 14,000 employees in the
10 United States and 60 countries with sales
11 exceeding \$13 billion.

12 Like John and others at this
13 table, we're also one of the largest
14 manufacturers of chlorine, a commodity
15 classified as TIH. In our facilities, we have
16 four, as well as two other facilities that
17 receive chlorine by rail.

18 And as you know, chlorine is
19 almost exclusively transported by rail. It's
20 the safest overland shipment method. We do
21 not ship chlorine by truck. Although we can
22 ship chlorine to a limited extent by barge,

1 it's less than 1 percent of all volume in the
2 US, and less than 1/10th of 100 percent of all
3 customers in the US can receive it by barge.
4 Thus, our company is highly dependent upon the
5 rail transportation system.

6 At our captive facilities, PPG has
7 experienced skyrocketing rates. The cost of
8 shipped chlorine from our Natrium, West
9 Virginia plant is 85 percent, 85 percent
10 higher, than Lake Charles, where we have three
11 railroads.

12 The railroads have openly
13 communicated their desire not to haul our
14 chlorine. Ironically, they would not be able
15 to be in business without chlorine chemistry,
16 which I continue to remind them of that. The
17 lack of desire to haul chlorine has caused the
18 railroad to price this traffic at many times
19 higher than our non-TIH traffic.

20 We've seen our overall costs to
21 ship increase by more than 100 percent in six
22 years, which I think we can all agree is

1 slightly higher than inflation. And recently,
2 PPG has had to forgo a business opportunity in
3 our Natrium plant where the cost to ship was
4 higher than the product's selling price.

5 In effect, the railroads are
6 trying to dictate to whom we can sell chlorine
7 to and which chlorine producer wins the
8 business. This is totally unacceptable.

9 Unreasonable rail rates should not
10 dictate business opportunities. The shipper
11 should be able to choose which business to
12 pursue or forgo, not the railroads.

13 Even where PPG has competition at
14 the origin, we are still forced to pay
15 inflated rail rates. For example, at La Porte
16 Texas, where we ship out of Lake Charles'
17 three railroads and Lake Charles, captive at
18 La Porte, we pay 50 percent higher costs on
19 the chlorine that goes to Houston, exact same
20 routes, exact same distances. So we're
21 definitely being hindered.

22 As a captive rail shipper, we also

1 have little chance to control or prevent the
2 cumulative effect of raising rail rates.

3 While the railroads argue that the chemical
4 companies are adequately protected by the
5 current regulatory system because they can
6 file a rate case with the STB, let me assure
7 you that we do not agree that lengthy,
8 uncertain, and expensive litigation is the
9 proper solution.

10 For a large rate case, we've
11 estimated that the litigation costs and tariff
12 premiums that we would have to pay would be
13 upwards of \$20 million, which prevents many
14 companies from filing a rate case.

15 In addition, the artificially high
16 tariff rates published by the railroads don't
17 offer a lot of benefit even for small and
18 medium rate cases, so the effect of the relief
19 would be minimal.

20 And thus, PPG supports a
21 regulatory system that would allow it access
22 competitive rail service, for our

1 transportation rates to be established by
2 working in a competitive market environment.

3 As many speakers before me have
4 said, the contract rates and terms are rarely
5 negotiated with railroads. Rather, they are
6 dictated to the customer. This is especially
7 true for TIH traffic.

8 The normal checks and balances
9 established by the laws of supply and demand
10 do not apply to the railroads. PPG believes
11 that our ability to compete effectively in the
12 chemical industry is being hamstrung by a lack
13 of competitive rail service.

14 We are currently investigating a
15 significant opportunity in our Natrium, West
16 Virginia plant, with the Marcellus Shale
17 opportunities, where there's an opportunity
18 for a billion dollar chemical plant, and it's
19 being delayed by competitive rail access.

20 We believe the Board should
21 resoundedly change its policies to facilitate
22 greater competition. We believe that increase

1 in access to more than one rail carrier at our
2 captive facilities would help address this
3 problem.

4 And our company believes the Board
5 should open one or more proceedings
6 immediately after this hearing to modify its
7 policies, specifically, one, expanding
8 reciprocal switching agreements; two, a
9 reversal of the Board's current bottleneck
10 rule; three, a mechanism to put in place to
11 cap the RVC ratio on TIH products to avoid the
12 expensive and time-consuming rate cases.

13 According to the historical AAR
14 statistics, TIH products are only .25 percent
15 of shipment, but .5 percent of revenue, so the
16 railroads would not be materially harmed by
17 this offer.

18 And fourth, although the railroads
19 are required to quote tariff rates for an OD
20 pair, the railroads' use of their market power
21 and leverage to only provide all-tariff or
22 all-contract rates do negatively affect

1 shippers' ability to file a rate case.

2 Therefore, we would offer and
3 advocate a simplification of changes to the
4 Board's large rate case procedures that would
5 reduce the timing and the complexity and cost
6 associated with that.

7 And finally, I appreciate your
8 time. And obviously, we're open for
9 questions.

10 CHAIRMAN ELLIOTT: Thank you, Mr.
11 McGarry.

12 Thank you, panel, for all your
13 comments.

14 Commissioner?

15 COMMISSIONER MULVEY: Thank you.
16 These estimates as to the cost of bringing a
17 complaint before the Board or a case before
18 the Board are very different from what we
19 usually quoted. We usually hear it costs
20 between \$3 million and \$4 million to bring a
21 case before the Board, and we estimate the
22 time it takes.

1 And we have made some efforts to
2 simplify our large rate case procedures, where
3 we have tried to lower the cost and reduce the
4 time to make our processes more available.

5 But these estimates of \$12 million
6 and \$20 million are truly alarming to me,
7 because that suggest that our processes are
8 not available. And I know we have our Office
9 of Consumer Affairs, and I'm glad to hear that
10 some of you have taken advantage of that and
11 been successful. But I was wondering if it is
12 possible for you to explain to us why you
13 think that the costs are so high. You do not
14 necessarily need to do it here, but provide
15 some documentation as to why you believe it
16 costs so much and why the estimates are so out
17 of line with what we've experienced in the
18 course of bringing the large coal rate cases
19 brought by the utilities? Could you gentlemen
20 do that, PPG and Olin?

21 MR. McINTOSH: We'd be happy to.

22 COMMISSIONER MULVEY: Thank you,

1 because that is disturbing.

2 I mean, there's a lot of pressure
3 on the Board to make its procedures, its
4 processes more open to shippers, and when we
5 hear that we're becoming -- according to you
6 and according to these numbers, less open
7 rather than more open. That is, in fact,
8 truly disturbing.

9 MR. McGARRY: If I could tell you,
10 the biggest reason why is you have to go from
11 a contract rate to a tariff rate, so your rate
12 goes up an exponential amount. And you have
13 to pay that tariff rate until such time as the
14 Board --

15 COMMISSIONER MULVEY: But you get
16 reparations on the tariff rate, then, don't
17 you?

18 MR. McGARRY: We have some, but
19 typically, they won't quote you just a tariff
20 rate.

21 COMMISSIONER MULVEY: Okay. Olin
22 again, too, Olin proposed in its testimony

1 that the Board revisit its merge decisions and
2 impose new conditions on the mergers.

3 And although the Board has the
4 authority to issue supplemental orders in
5 merger cases, what you suggest would actually
6 be making major changes to access and
7 piggybacking them on the mergers that were
8 approved long ago.

9 What would be the most
10 straightforward way to address competition
11 issues today? It's very, very difficult to
12 unscramble the eggs, as you might say.

13 MR. McINTOSH: It would be nice if
14 I could sit here and tell you that we believed
15 that the answer to -- for a captive shipper
16 like Olin, was just to change some of the
17 Board's policies to create competition.

18 In our industry, that works,
19 because as I sit here at the table with other
20 companies that I compete with day in and day
21 out, competition works. Competition does
22 provide better services and lower prices to

1 the customers we serve.

2 Our Amendment -- or appendix to
3 our original filing, though, talked about the
4 Sunbelt situation in a manner in which quite
5 honestly, there is the potential for
6 competition in that move now.

7 And the railroads will not step
8 forward and avail themselves of the
9 opportunity to compete for a multi-million
10 dollar lanes of potential revenue. We don't
11 understand that.

12 So the changing of policies to
13 create competition, while that may work for
14 some industries, it may not work for the rail
15 industry in this situation, because I'm facing
16 a real-life case where Class 1 railroads are
17 refusing to quote on business that they have
18 an opportunity to attempt to quote on and
19 compete with with other Class 1 railroads.

20 So, for us, I believe that in
21 order to get a remedy that works for a captive
22 rail shipper, that it's going to take not only

1 things which create competition but it's going
2 to create incentives such as the revenue cap -
3 - revenue over variable cost cap that we have
4 advocated in our testimony and that Professor
5 Pittman has advocated in some work he's done
6 for the Department of Justice in his study of
7 these issues.

8 It's going to create things like
9 that as well, and quite honestly, from our
10 perspective as a captive shipper, that may be
11 the easiest place to start.

12 COMMISSIONER MULVEY: Putting caps
13 on rates is something that would be a real
14 departure from -- I mean, 180 rail -- revenue
15 variable cost is a rate which decides whether
16 or not we should bring a case when it is not
17 really a cap.

18 And so I think there's always some
19 concern about what economists would call
20 effectively crass regulation, but at any rate,
21 it is a suggestion.

22 You also notice the size and the

1 importance of the chlorine industry. We had
2 the Chlorine Institute here yesterday, and
3 they gave a very good testimony.

4 And you point out that the
5 revenues or the economic impact, rather, of
6 chlorine on the economy is \$43 million a year.
7 I find that interesting that that's
8 approximately the revenues of all the Class 1
9 railroads together.

10 So it's an important commodity,
11 and it's an important industry, and I would
12 think it's important for the railroads to
13 continue to move it. But the railroads, as
14 you know, are concerned about the potential
15 liability, should there be a TIH spill.

16 We had a serious one, for example,
17 a while back, in Graniteville, South Carolina,
18 where several people were killed. And I --
19 while we haven't had anything that's
20 catastrophic, thank goodness, there's always
21 that concern.

22 Now, the railroads also move spent

1 nuclear materials, and those are also of
2 course potentially very, very dangerous.
3 There hasn't been an event yet, but if there
4 is an event, the liability is limited by the
5 Price-Anderson Bill, which covers -- protects
6 railroads from catastrophic liability in
7 moving spent nuclear materials.

8 Would you be supportive of a
9 Price-Anderson kind of legislation, protecting
10 the railroads and moving TIHS or PIHS?

11 Any one of you can answer that, I
12 think.

13 MR. McINTOSH: Well, you know,
14 under a separate docket, when the STB was
15 looking at this issue, I believe there were
16 several comments made that that was one option
17 that would potentially solve or potentially
18 deal with the liability issue that the
19 railroads were raising about TIH shipments.

20 But I want to emphasize again that
21 when I look at competitiveness, this is much
22 broader for our business than just TIH

1 shipments. And in all honesty, we ship more
2 volume of chemicals that are non-TIH chemicals
3 than we do TIH chemicals, in my company.

4 And when we look at rail
5 competitiveness, it is not commodity non-
6 competitiveness. It is rail as a mode non-
7 competitiveness. And it applies whether we're
8 talking about shipping chlorine or caustic or
9 KOH or bleach or any of the other chemicals
10 that we make in our basic commodity chemical
11 business.

12 So although the liability piece,
13 you know, is a part of it, and may also
14 require some solutions that don't exist in the
15 marketplace today, I would again respectfully
16 submit that this competitiveness is a broader
17 and more far-reaching issue than the issue of
18 TIH.

19 COMMISSIONER MULVEY: Anyone else
20 want to comment on that?

21 MR. MCGARRY: Commissioner Mulvey?

22 COMMISSIONER MULVEY: Yes?

1 MR. McGARRY: If I could, a couple
2 of things to comment on. First of all, if you
3 look at the two unfortunate and tragic
4 accidents, both of those were 100 percent
5 within the control of the railroads'
6 operation.

7 So in this case, everybody sitting
8 at this table has invested millions and
9 billions of dollars into process safety in our
10 own facilities, and we have pipelines that
11 extend hundreds of miles to transport our
12 product, and we take that.

13 So, there were conscious decisions
14 along the way to have, you know, dark track.
15 There were conscious decisions to have product
16 moved in such a manner that allowed these
17 accidents.

18 So you have to say, where does
19 that lie? But when the railroads come to us
20 and say, they want us to indemnify us, for
21 your actions, your gross negligence actions?
22 That doesn't make sense. Who in a normal,

1 competitive environment would ever accept a
2 statement like that?

3 COMMISSIONER MULVEY: The
4 railroads, of course, all get that but for the
5 presence of these materials, we wouldn't have
6 the liability.

7 So, simply because they're
8 carrying them or have to carry them under
9 their common carrier obligation, that
10 therefore, that's -- that that's a problem
11 they want to share with the -- they want the
12 industry to share.

13 MR. McINTOSH: I go back to actual
14 testimony I made during one of the STB dockets
15 on liability, and I would say this again. If
16 -- and I've made this offer before to the
17 railroads, and so far have had no takers.

18 If the railroads want to come to
19 me and demonstrate to me what the incremental
20 cost of liability is associated with TIH
21 shipments and allow me to make a business
22 decision comparing that with the supposed

1 incremental cost in rail freight for that
2 commodity that I have seen since the early
3 part of this decade or last decade, then I
4 would be willing to enter into a business
5 discussion about, is there an appropriate way
6 to resolve that issue? I made that offer back
7 then, had no takers. I still have had no
8 takers in dealing with that issue.

9 COMMISSIONER MULVEY: Thank you.

10 Paper barriers, although not a
11 part of this hearing, and I've been outspoken
12 on the paper barrier issue in the past, and I
13 do have some concern about paper barriers, but
14 my understanding of paper barriers from the
15 railroad industry agreement is that it relates
16 to traffic that is on the line at the time the
17 new railroad is spun off and created, and that
18 the paper barrier refers to the requirement of
19 delivering that traffic to the railroad, the
20 parent railroad, or the spinning-off railroad.

21 But I thought I heard you, Ms.
22 Burns, suggest that this was a situation where

1 this was new traffic that was going to be
2 precluded by a paper barrier, and that,
3 according to my understanding, is not -- is
4 not consistent with what I believe to be the
5 Railroad Industry Agreement.

6 MS. BURNS: That's correct. Our
7 example was new business. But I think it gets
8 to my point that there's a lot of confusion.
9 You know, we don't know if it's past business,
10 new business, future business. We don't even
11 know if they exist. You know, it's the
12 perception of one, in one case, so.

13 COMMISSIONER MULVEY: Well, we
14 didn't know they existed either. We were told
15 at a previous hearing that nobody knew how
16 many paper barriers were out there.

17 Then we discovered in testimony,
18 and we verified yesterday, that in fact, the
19 short line association had done a poll of its
20 members and determined how many paper barriers
21 were extant.

22 We do know that they do give

1 waivers to those paper barriers, they say
2 very, very frequently, so we do know that
3 happens.

4 At any rate, so, I think
5 information about these should be forthcoming.
6 They have said they're going to supply them to
7 us, so that will be, I suppose, ultimately in
8 the record.

9 But yes, if it's a new business,
10 it should not be precluded by a paper barrier.
11 At least, that's my understanding.

12 MS. BURNS: We would be very
13 interested in seeing the list, so.

14 COMMISSIONER MULVEY: So are we.

15 I think, I want to be clear that a
16 little earlier, before the last panel, I
17 didn't mean to suggest. I was being more
18 theoretical, I didn't mean to suggest that
19 shippers do not need to be protected from
20 potential monopoly abuses.

21 One of the reasons why the
22 Staggers Act did carve out and create -- one

1 of the reasons why they did create some
2 railroad regulation is that though we do
3 recognize that there is certain potential for
4 railroads to have monopoly power and be able
5 to exploit monopoly positions. It is our job
6 to balance the need for railroad revenues
7 versus the need to protect shippers from
8 abuse.

9 Let me ask the group as a -- how
10 would you create better access. I've heard
11 many proposals, including eliminating
12 bottlenecks, requiring reciprocal switching,
13 et cetera. If any of those proposals were
14 adopted by the Board, how would they change
15 your day-to-day dealings with the railroads,
16 if we adopted, say, reciprocal switching?

17 How would that -- and would we be
18 able to make sure that the railroads continue
19 to invest in their facilities, if indeed they
20 had to engage in reciprocal switching?

21 Or would there be a concern that
22 railroads might reduce the amount that they're

1 willing to invest in a facility where they had
2 to do reciprocal switching?

3 Anybody want to take that one on?

4 Mr. Smith?

5 MR. SMITH: Yeah, frankly, you
6 know, day-to-day, obviously, there'd be a lot
7 more give and take. And, you know, the cause
8 and effect, as we put it forward, is that
9 would create more interest, more detailed
10 understanding of the actual costs.
11 Competition, I truly believe in the long term,
12 causes innovation.

13 The innovation is going to make
14 improvements that will creatively bring
15 parties together to come up with solutions
16 that will reduce costs, that will reduce
17 transit times, and so, you know, exactly how,
18 on a day-to-day basis, yes, we'd be much more
19 intimate, much more open.

20 And our belief is that would
21 create more competition, that would create
22 more innovation. At the end of the day, they

1 would be more successful, and we would be more
2 successful as an American industry because of
3 those more detailed interactions.

4 Our belief as well, we talked
5 about the millions of dollars of -- you know,
6 causing, you know, these cases. We've been
7 through that. We're in one now.

8 And our belief is that it takes a
9 long time, and it's very, very complicated.
10 And one of the reasons it's so complicated is
11 because of the current policies around
12 reciprocal switching and bottleneck pricing.

13 And we believe our current case
14 and the past cases would be simplified greatly
15 if those were in, if we did have these day-to-
16 day negotiations, interactions.

17 A lot of the line -- the lanes and
18 the rate cases we're bringing together would
19 not be there, because of this competition. So
20 they would simpler, they would be quicker.

21 You know, right now, we're
22 estimating several million dollars over the

1 next period of time to, you know, prepare and
2 litigate this upcoming case. But that doesn't
3 include the increases in price and the tariffs
4 in the meantime that we may get back, but we
5 may not.

6 So, you know, it is -- these order
7 of magnitude estimates, I can believe.

8 COMMISSIONER MULVEY: We can't
9 discuss your case before us right now, but of
10 course, as you know, it is different from most
11 of the utility cases, because it represents so
12 many more lanes of traffic than we're normally
13 dealing with when we're dealing with a utility
14 case. But is before us right now, and so we
15 can't really discuss it here.

16 MR. SMITH: Yes.

17 COMMISSIONER MULVEY: I'm going to
18 have a few more questions, but I'm going to
19 pass it on to somebody else, and maybe we can
20 come back, if you want, Mr. Chairman.

21 CHAIRMAN ELLIOTT: Okay. Yes, I
22 just have one question. I do want to, you

1 know, note that I've been to many of your
2 plants across the country.

3 In fact, I've been to the Natrium
4 plant and the Lake Charles plant, so I've seen
5 especially the amount of effort you put into
6 safety. I commend you for it, and it's
7 incredible what you do.

8 I'm going to go to Arkema. As you
9 -- if you were here yesterday, I asked a
10 question to the railroad CEOs about your
11 proposed pilot program and was very, very
12 warmly received.

13 (Laughter.)

14 I'm being -- for the record --
15 being facetious. Yes, I don't want to be
16 misquoted. And, but, as you could tell, I took
17 an interest in it.

18 And you discussed it a little bit
19 in your testimony, but could you give me a
20 little bit more detail of what you had in mind
21 with respect to a pilot program, if you have
22 gone that far? I mean, I know that's --

1 MR. O'LEARY: Well, first of all,
2 one of the things that we have to remember is
3 that reciprocal switching agreements already
4 exist, you know, in a number of places.

5 CHAIRMAN ELLIOTT: That was going
6 to be my next question.

7 MR. O'LEARY: So, I can't sit here
8 and tell you which ones, or where, but -- and
9 they're successful, and they do save money.
10 And the railroads have figured out how to
11 operate in that environment.

12 When we were bouncing around the
13 ideas of, you know, well, let's pick a
14 geographical area, you know, personally,
15 Houston, or something like that, but --

16 (Laughter.)

17 -- and look at, just a pilot,
18 maybe even pick a particular product. Maybe
19 there's a limit on the volume, you know, that
20 you know, because the railroads have talked
21 about their investments and all of that, but
22 that's pretty much as far as we've gotten with

1 it.

2 But, you know, again, what has
3 made the agreements that are in place today
4 successful? I mean, you know, does the Board
5 look at that and then move forward and say,
6 we're going to try a pilot program?

7 CHAIRMAN ELLIOTT: Thank you.
8 That's very helpful.

9 Vice Chairman?

10 VICE CHAIRMAN BEGEMAN: Mr.
11 O'Leary and Mr. McIntosh, you touched just
12 very briefly on Rule 11 rates, and suggesting
13 that maybe the Board could do more to, I
14 guess, promote them, could you just comment,
15 and help educate me on what the Rule 11 rates
16 are? I'm also going to ask this of the next
17 panel.

18 I've read a little bit about them,
19 and I don't know that what I've read is giving
20 me the full picture. But if you could help
21 give me some clarity.

22 MR. O'LEARY: Well, first of all,

1 normally, you get a through rate. So the
2 origin railroad, let's say, goes to the
3 delivering railroad, and they get their
4 division, and they put together a rate, and
5 you get a rate.

6 So you don't really know the cost
7 or the rate factor associated with each
8 railroad. You have one rate.

9 What Rule 11 does is basically,
10 each rail would give you a separate rate.

11 VICE CHAIRMAN BEGEMAN: So is it
12 sort of like a bottleneck rate?

13 MR. O'LEARY: No, it's -- you
14 basically get two rates instead of one. And
15 there's issues around paying freight bills and
16 doing like, you know, things like that.

17 But if you have a route that goes
18 from Houston to Florida, you know, and you
19 have two railroads, instead of getting one
20 rate, you will get two rates. You know,
21 you'll have two separate rates.

22 VICE CHAIRMAN BEGEMAN: And you go

1 to the carriers separately --

2 MR. O'LEARY: Yes.

3 VICE CHAIRMAN BEGEMAN: -- to get
4 the rate, and you say, take me from, I don't
5 know, Florida to New Orleans?

6 MR. O'LEARY: Right. Yes. And
7 then New Orleans to Houston. So --

8 VICE CHAIRMAN BEGEMAN: And does
9 the origin carrier know you're going further?

10 MR. O'LEARY: Most of the time,
11 yes. Yes.

12 VICE CHAIRMAN BEGEMAN: Do they
13 always give you a rate?

14 MR. O'LEARY: No.

15 (Laughter.)

16 There has been a reluctance to do
17 that, on the case of some railroads. And some
18 railroads, they've very willing to do that.

19 Our experience on TIH products is
20 that they are willing to break that up.

21 VICE CHAIRMAN BEGEMAN: Yeah, I
22 guess so, but --

1 MR. McINTOSH: Madam Vice

2 Chairman, let me just comment.

3 In a lot of cases, a request for a
4 Rule 11 rate flies in the face of the railroad
5 wanting to give you a rate to a destination
6 that is not the final destination of the
7 shipment, or to a destination in which there
8 is competition and in which that competition
9 could create a situation where the originating
10 carrier could lose the rest of the route to a
11 competing carrier.

12 And so they are very reluctant to
13 give you a Rule 11 rate into a competitive
14 situation, which could potentially impact
15 their ability to move, you know, a shipment
16 through either its entire route, or through a
17 majority of the route.

18 And they would rather, in my
19 experience, chose to give you a inter-line
20 rate, in which case -- in most cases in which
21 the originating carrier maximizes the amount
22 of the route that is theirs before they hand

1 it off in an inter-line rate, you know, a
2 joint rate situation, to the delivering
3 carrier.

4 There are some cases where Rule 11
5 rates exist, but they're not very frequent.
6 And again, they're not typically -- they
7 create a situation where a railroad could, in
8 essence, walk into a competitive situation,
9 which they're very remiss to do.

10 MS. BURNS: And as a shipper, our
11 preference for Rule 11s is two-fold. One is,
12 today, we're relying on the originating
13 carrier to negotiate on our behalf. We feel
14 much more comfortable negotiating on our own
15 behalf, and feel like that's much more
16 effective.

17 The other is that when you
18 challenge that rate, there's a lot of finger-
19 pointing, and we don't have visibility to
20 figure out, is it really the first part of the
21 move, or the second part?

22 So, to us, it provides visibility,

1 and we know exactly where we need to start
2 negotiating, and where we need to go for
3 improved pricing.

4 VICE CHAIRMAN BEGEMAN: Mr. Smith,
5 as you know, I'm new to the Board, and I am
6 aware that you've had a number of -- I think
7 you said five cases in five years.

8 Could you just sort of give me a
9 recap of what that experience has been like
10 for you, what the outcome has been? I think
11 that you have been utilizing some of the
12 smaller procedures. Has it been successful?

13 MR. SMITH: I guess the --

14 VICE CHAIRMAN BEGEMAN: Not about
15 the one that's pending, but --

16 MR. SMITH: Right, we've had three
17 smaller cases and one large rate case. The
18 three smaller cases, you know, got to a
19 certain point in the process. The larger rate
20 case came in and intervened, went to
21 mediation, and then there was a settlement we
22 can't talk about.

1 So at the end of the day, getting
2 the facts on the table, having the Board look,
3 you know, using their -- the rules and the
4 boundary conditions there, did force
5 reasonableness in the process, and therefore -
6 -

7 VICE CHAIRMAN BEGEMAN: And your
8 mediation was outside of the context of the
9 Board? Is that correct?

10 MR. SMITH: Right. Right. Right.
11 And you know, so at the end of the day, we saw
12 the investment in the litigation and the
13 preparation of the case and the increased
14 tariffs in the short term outweighed or -- you
15 know, outweighed the risk, and so we went
16 ahead and moved ahead with that.

17 That's why we're doing the case
18 today, but again, repeat that if we had some
19 of these other changes in policies, that would
20 have made them all a bit simpler and a bit
21 quicker.

22 VICE CHAIRMAN BEGEMAN: Mr. Baker,

1 has Dow utilized the processes at the Board?
2 You've talked a lot about the rates, and --

3 MR. BAKER: We're watching a
4 couple of the rate cases very closely, but we
5 have not proceeded with a case at this time.

6 VICE CHAIRMAN BEGEMAN: And I
7 think I really just have one final comment or
8 question for anybody who would like to respond
9 to it.

10 On the one hand, we're hearing, we
11 need more competition. We need the Board to
12 act to inject competition.

13 Equally, we're hearing from other
14 shippers who have competition that the
15 carriers are not competing.

16 But if the carriers, if it's true,
17 aren't competing, you know, to do something on
18 reciprocal switching or bottleneck may not
19 give you the solution that you're hoping for.

20 So, I'm just -- I'm struggling
21 with what the right thing to do is. I know
22 maybe we all are, but I'd just appreciate your

1 comments. I mean after hearing from the
2 shippers that have competitive options, you're
3 still advocating for reciprocal switching and
4 bottleneck.

5 Do you have any new concerns based
6 on the testimony of what you're hearing that
7 that may not be the solution?

8 Anybody?

9 MR. SMITH: You know, again, we
10 see the reciprocal switching and the de-
11 bottleneck, not going to solve all of the
12 problems.

13 They will increase competition,
14 which is a good thing, but it's not going to
15 cover all of the issues. So there has to be
16 some means to go in and say, is this
17 reasonable competition, you know, through a
18 Board process.

19 And again, that does increase
20 competition. Every industry I've been in,
21 when competition steps up, innovation,
22 creativity comes in and forces solutions,

1 versus being able to rest on a monopolistic
2 situation that says, okay, to meet my
3 earnings, I can move prices as I see fit,
4 versus, if I don't compete here, if I don't
5 compete here, if I don't get creative and
6 improve my efficiency, my innovation, and my
7 service, I'm not going to, I'm not going to
8 survive.

9 So, you know, again, make these
10 policy changes, continue to have the
11 accessibility and maybe a more streamlined
12 process is necessary to increase the overall
13 competition. I don't have any further
14 concerns.

15 The only concern I would have
16 about a pilot and reciprocal switching is if
17 you did go for a pilot -- you know, pilots
18 work if everybody's incentive is to make it
19 work. If you've got one of the parties'
20 incentive to make it fail, you know, they can
21 make it fail. So we have to be very careful
22 the way we design any pilot.

1 MR. McGARRY: I think from PPG's
2 perspective, we'd be interested in more
3 options, because we think more options lead to
4 more competition, and I don't think it could
5 be worse than what we have now.

6 CHAIRMAN ELLIOTT: Thank you.
7 Commissioner?

8 COMMISSIONER MULVEY: Just
9 briefly, I agree with you about competition
10 spurring innovation. I mentioned yesterday the
11 experience in Japan, for example, where most
12 of the analyses done in economics looking at
13 what spurred Japanese innovation in
14 automobiles and cameras, etcetera, was, in
15 fact, the competition between all the firms.

16 But, competition -- and in your
17 industries, too, even though many of your
18 companies have been around a long time, many
19 of your products are relatively new.

20 But the railroads are a very, very
21 mature industry, and a lot of the
22 opportunities for innovation, a lot of the

1 opportunities for productivity gains, seem to
2 have been captured. The rate of growth of
3 productivity gains has very much slowed down,
4 especially in the last three or four years.

5 Do you think that the railroads
6 are still able to innovate, and to reduce
7 costs, become more efficient, etcetera, given
8 the fact that they are a mature industry?

9 Or do you think that it's going to
10 be difficult for them to become more
11 competitive and become more efficient, and
12 that any loss of any competition might simply
13 mean a loss of revenue, and therefore, make it
14 difficult to attract capital?

15 Could you --

16 MR. SMITH: I give an example.
17 You know, one of our very successful products
18 is sulfuric acid. I mean, that's as old as
19 dirt, much older than the rail system. It's
20 one of the first chemicals realized and
21 invented.

22 We've reinvented that product many

1 times. You can imagine over the course of
2 the year, DuPont does portfolio management,
3 says, you know, why are we in this true
4 commodity chemical?

5 But over the years, we've been
6 able to look at that, find ways through, you
7 know, difficult times where margins were low,
8 where competition was in there, where we
9 didn't see the way to make money, sit back,
10 you know, look at it differently.

11 We're looking at it now as more of
12 a service-type industry for the refining
13 industry. So there are ways -- I mean, you
14 have no idea, in my mind, you know, with a
15 commodity product, what its possibilities are
16 until you're forced to compete and innovate.

17 MR. McINTOSH: I would comment, I
18 can't speak for what the railroads can or
19 can't do from where they currently sit today,
20 but you can make an argument that many of us
21 at this table represent industries that are
22 just as mature and have been around just as

1 long as the railroads have been in their
2 business.

3 And what I find hard to believe is
4 that in today's world of technology and
5 information and of all of the other
6 opportunities that are out there that didn't
7 exist 15 years ago, in some cases, five years
8 ago, that there aren't opportunities for any
9 industry, regardless of how mature it is, as
10 just evidenced by the example of sulphuric
11 acid, to compete, to improve productivity.

12 And I think the constraint isn't
13 the mature industry or anything else. I think
14 the constraint is the fact that they don't
15 have to compete.

16 They don't have to compete, so
17 there's not a drive to innovate and improve.
18 And I think if they had to compete, they'd
19 figure out a way to do it, just like the rest
20 of us have to figure out how to do it.

21 COMMISSIONER MULVEY: Thank you.

22 Mr. Smith, you also mentioned

1 about fuel surcharges not being tied to cost.

2 And we had a hearing on fuel surcharges a
3 couple of years ago, and we issued a ruling
4 requiring that the railroads no longer tie
5 fuel surcharges to the rate that they charge,
6 which disproportionately fell on captive
7 shippers who paid higher rates because of
8 differential pricing.

9 But we told them that it had to be
10 tied to cost. And now we're hearing, and not
11 just from this panel today, but elsewhere,
12 that in fact, the fuel surcharges still are
13 not tied to cost.

14 Could you give an example as to
15 why they're not tied to cost, and how they're
16 being levied at DuPont?

17 MR. SMITH: Yes. My
18 understanding, and I don't have a deep,
19 detailed understanding of this, but, you know,
20 the fuel surcharges come in, and they're not
21 required to give us the logic and the
22 justification about, okay, bring it back to

1 say, okay, fuel oil moved, and therefore, how
2 does this -- does it reflect directly in the
3 rate? So it's a mystery, so to speak.

4 MR. McGARRY: I can add to that.
5 Especially where it's embedded in a contract,
6 they say they don't have to follow the FCB
7 because it's a contract.

8 COMMISSIONER MULVEY: Oh, okay.
9 Thank you. Thank you.

10 On rates, many of you cited that
11 rates have gone up substantially, much more
12 than the overall inflation rates, no matter
13 how that's measured.

14 But what I don't understand is
15 what the period has been. Very often, there
16 are these contracts that go on for 10 or 20
17 years, and then the rate goes up, but -- and
18 it's always reported, well, the rate was this
19 last year, and next year, it's that. But it
20 also often reflects the fact that the rate had
21 been fixed for a long time.

22 So on some of these cases where

1 quoted 151 percent increase in rates are such
2 as you talked about at Arkema, I don't know
3 what the time period was, what that was
4 reflecting. Was it reflecting one, two, five,
5 ten, or 15 years?

6 Obviously, over a 20 year period,
7 151 percent rate increase might not be that
8 extreme. Could you comment on that? Many of
9 you had examples.

10 MR. O'LEARY: Yes, when I
11 mentioned 150 percent, that's over a five-year
12 period. That is specific to a TIH move, so
13 I'll be honest about that.

14 COMMISSIONER MULVEY: Okay.

15 MR. O'LEARY: And it was coming
16 off a four-year contract. But it wasn't just
17 the first year. I mean, it was the second,
18 you know, and then you have one-year
19 agreements. So, it's the first year, the
20 second year, the third year, we saw
21 significant double-digit increases.

22 COMMISSIONER MULVEY: Anyone else

1 want to comment on that?

2 MS. BURNS: The time frame that we
3 quoted was also five years, 2005 to 2010. We
4 have come off some longer-term agreements.
5 However, during that time frame, the majority
6 of our contracts were shorter-term, from one
7 to two years, so these are year over year
8 increases.

9 COMMISSIONER MULVEY: And finally,
10 also, to Occidental and Ms. Burns, you
11 indicated that Occidental shut down some
12 plants because of rising rail rates.

13 We received four or five feet
14 worth of testimony on these issues. So, I
15 don't recall necessarily whether or not you
16 identified those and why, precisely why the
17 increase in rail rates was the straw that
18 broke the camel's back, so to speak, in terms
19 of having to close them down.

20 MS. BURNS: They were not in our
21 written comments.

22 COMMISSIONER MULVEY: If you could

1 provide some of those, you know, that would be
2 helpful.

3 MS. BURNS: And give you those
4 details? It was one of many factors, but I
5 can tell you that they were captive locations,
6 and we had seen significant increases, and
7 they were part of a decision of making the
8 ultimate decision.

9 COMMISSIONER MULVEY: Okay. Thank
10 you very much. That's all I have.

11 CHAIRMAN ELLIOTT: Thank you very
12 much for your comments and your responses
13 today.

14 Thank you, Arkema, for your idea.
15 And we'll bring up the next panel.

16 Okay. Now, we'll begin with panel
17 number four for the day. I think we're going
18 to start out with BNSF.

19 Mr. Lanigan, you have ten minutes.

20 MR. LANIGAN: Thank you, Chairman
21 Elliott, Vice Chairman Begeman, and
22 Commissioner Mulvey.

1 I'm John Lanigan, Executive Vice
2 President and Chief Marketing Officer of BNSF
3 railway. I'm responsible for sales,
4 marketing, customer service, economic
5 development, and additionally, I'm responsible
6 for intermodal and automotive operations and
7 the rail car management for our corporation.

8 As I move to the first slide, this
9 was a vision statement that was created
10 shortly after the merger of Burlington
11 Northern and Santa FE.

12 And I won't read it to you, but
13 what it really implies is that we want to
14 serve customers, and we want our customers to
15 grow. And that's a mantra that has been true
16 at our company for well over a hundred years,
17 but certainly since the merger of the two
18 companies.

19 You've seen different versions of
20 this slide before. This is the revenue
21 version of the transportation pie in the
22 United States. You can see, obviously, that

1 motor carriers are the dominant provider from
2 a revenue perspective, and railroads are the
3 second-largest.

4 And from a public policy
5 standpoint, and also from a standpoint of the
6 opportunity for our industry to grow, clearly,
7 moving freight from the highway to rail is a
8 critical aspect of the future of our industry.

9 When we talk about competition, we
10 talk about it many forms. Obviously, we
11 compete with other railroads. We also compete
12 vigorously with trucking and the intermodal
13 world. Also in ag, as you heard yesterday,
14 the majority of ag business moves by truck,
15 and also in many of the industrial products'
16 areas that we serve.

17 Pipelines, interestingly enough,
18 have become a bigger competitor of late with
19 the finding of the shale oil and shale gas
20 reserves in this country and the exploration
21 of those reserves.

22 For example, we're hauling full

1 unit trains of crude oil out of North Dakota
2 from the Bakken shale because there is no
3 pipeline in the Bakken shale at this point.
4 And so it's created a tremendous opportunity
5 for us, and one in which we hope to compete as
6 they consider putting pipelines in that area
7 as well.

8 And then we also compete on the
9 inland and coastal waterways with barges in
10 our ag, coal, and bulk areas.

11 There's been a lot of discussion
12 about the lack of competition since 2004.
13 This slide is from AARCS 54 data from the
14 mergers in the late '90s through the week
15 ending 5/29/2011.

16 The orange line is the market
17 share of BNSF. The grey line is the market
18 share of UP. You can see clearly that we
19 compete. You can see clearly that the market
20 share has shifted over time, and continues to
21 shift today.

22 There have been many assertions

1 made by the coal shippers at this proceeding,
2 and we wanted to address it head-on. There's
3 been many comments that there's been a lack of
4 competition in the West since 2004, and we
5 believe that's just simply not true, and these
6 statistics back that up.

7 In 2004 alone, BNSF won new
8 business to 13 plants and lost business to
9 four plants. From 2005 to 2011, we've won new
10 business or increased share to 30 plants, and
11 lost business to 21 plants.

12 And during that period of time
13 from 2004 to 2011, coal delivery to 11 plants
14 changed hands more than once. We serve about
15 75 different coal-generating plants, and if
16 you added up all those numbers, that's a
17 significant portion of the total plants that
18 we serve that we've either won or loss
19 business or the business has changed hands
20 since 2004.

21 And finally, we believe that it's
22 not true that competition does not exist where

1 a shipper awards business to the incumbent
2 railroad.

3 In fact, I was profoundly dismayed
4 this morning by the comments of one of the
5 coal shippers who has asserted that we have
6 not competed for business. And in fact, after
7 this proceeding, we'll send you a confidential
8 letter detailing an opportunity that we bid on
9 earlier this year that went multiple rounds in
10 which we lowered our price twice and still did
11 not gain the business. We will demonstrate to
12 you that competition is alive and well in the
13 coal market in the Western U.S.

14 As you look at what's happened to
15 BNSF since the merger, growth was slow in the
16 early years of the merger, and then in the
17 2003/2004 time frame, our growth really
18 accelerated at unprecedented rates.

19 Shippers enjoyed declining rates
20 from the implementation of the Staggers Act
21 into the early 2000s. Excess capacity and
22 cost reductions were absolutely critical for

1 the railroads as we attempted to heal our
2 networks, but also, dealing with the aftermath
3 of the mergers and taking out redundancies
4 caused by the mergers, back office
5 consolidation, redundant lines, the sale of
6 low-density lines to short line organizations,
7 etcetera.

8 We worked for 25 years to take
9 those costs out of the network, and the
10 shippers benefitted greatly by reduced rates
11 over that 25-year period of time.

12 As you can see, our productivity
13 was increasing still dramatically from the
14 time of the merger of BN Santa Fe all the way
15 into the 2003/2004 time frame, and then you
16 can see that it's kind of evened out. And
17 this is a productivity measure, a thousand
18 GTMs, gross ton miles per employee.

19 So, our efficiency was really
20 dramatically improving over time, but we kind
21 of ran out of the low-hanging fruit that
22 Commissioner Mulvey talked about in the fact

1 that we had taken into consideration all of
2 the merger efficiencies that we could ring out
3 of it, that the elimination of low-density
4 lines, etcetera, crew consists haven't changed
5 in quite some time, so we've had the same
6 labor situation for a long period of time.

7 So you can see from 2004 through
8 2008, although we've made incremental gains in
9 productivity, certainly nowhere nearly what we
10 had seen in the past when we really had the
11 low-hanging fruit that we could go after.

12 But as far as innovation, there
13 were some comments made by the last panel
14 about spurring innovation. At BNSF, we have
15 an innovation process.

16 In fact, every year, we create a
17 series of initiatives that are designed to try
18 to find some of the next big things that will
19 help us be more efficient and more effective.

20 This year, we have 21 separate
21 large initiatives that we're working on that
22 are the responsibility of senior leaders in

1 the organization to lead and put teams
2 together to prosecute those initiatives.

3 Some of them bear no fruit, but
4 each year, a number of them do bear fruit.
5 And our goal is to at least off-set 50 percent
6 of any inflation factors through these
7 initiatives. And we're also hoping at some
8 point to get big bangs so that we can see
9 greatly improved productivity in the future.

10 This is a picture of our
11 investment in the network. Another thing that
12 you've heard from many of the panelists over
13 the two days thus far is that our service has
14 gotten better over time, and this is why. If
15 you look at the investment in the network,
16 particularly from 2004 on, and compare it with
17 the investment in the network prior to that,
18 we have invested significantly more capital
19 over the last six or seven years than we had
20 in years preceding.

21 And that has allowed us to provide
22 better service to our customers by renewing

1 existing assets, building new assets, new
2 terminals, additional track, in some cases,
3 double, triple, and even quadruple track in
4 the Powder River Basin following the weather
5 events in 2005.

6 And we have greatly improved our
7 service because we've been able to invest in
8 the network and our owners, both when we were
9 a public company and now that we're a private
10 company have supported that, because of our
11 improving returns over time.

12 I think this slide tells a very,
13 very telling story. This is indexed to one,
14 in 2000, the relative movement of our
15 operating expense per thousand gross ton miles
16 and the growth rate of our freight revenue.
17 And as you can see, they mirror each other
18 very, very closely.

19 There's a little deviation in the
20 2009/2010 time frame, and that's easily
21 explainable. During the recession, we took
22 out assets very, very quickly, and downsized

1 our business in response to what was going on
2 in the recession and the loss of traffic
3 because of the recession.

4 And as we are building the network
5 back up, traffic has come on faster than we've
6 been rebuilding assets, but this year, you'll
7 see that cost curve go back to the historic
8 norm.

9 The other thing you should take
10 away from this is the fact that you can see
11 that our costs per GTM increased dramatically
12 starting in that 2004 time frame.

13 Finally, I won't read these slides
14 to you because many of the comments made here
15 were made by the rail panel yesterday, but I
16 think I bring a different and unique
17 perspective to this hearing.

18 I spent 16 years with Schneider
19 National, one of the largest truckload motor
20 carrier groups in the United States.
21 Arguably, the truckload motor carrier industry
22 is the most competitive industry in America

1 from a standpoint of transportation, freight
2 transportation, thousands and thousands of
3 competitors, all of whom can serve every
4 customer.

5 When I think about how we competed
6 when I was a Schneider versus how we compete
7 today at BNSF, I see no difference. We
8 compete hard for our business. We look at
9 each opportunity as an opportunity for us to
10 grow and an opportunity for us to help our
11 customers grow.

12 CHAIRMAN ELLIOTT: Thank you, Mr.
13 Lanigan.

14 We'll now hear from Norfolk
15 Southern. I believe we're starting with Mr.
16 Manion.

17 And you have ten minutes.

18 MR. MANION: Well, good morning,
19 Commissioners. On behalf of Norfolk Southern
20 Railway, I'm Mark Manion, Executive Vice
21 President and Chief Operating Officer. And
22 with me today is Jim Hixon, Executive Vice

1 President of Law and Corporate Relations.

2 Two major points Norfolk Southern
3 has made in this proceeding are that number
4 one, any policy change would undermine past
5 rail investment in infrastructure, future
6 investment in infrastructure, innovation, and
7 the economic benefits of rail throughout the
8 US. And secondly, that proposals such as
9 forced access and forced interchange would
10 adversely affect the rail network, rail
11 operations, and accordingly, the shipping
12 community generally.

13 First, the Board should take care
14 not to undermine the substantial investment
15 railroads like Norfolk Southern have made in
16 this nation's rail infrastructure and the
17 innovation that is underway.

18 It's been widely documented that
19 there's a crisis in transportation
20 infrastructure looming. Railroads, however,
21 are private companies spending their private
22 dollars to make sure that efficient and safe

1 rail transportation remains a competitive
2 advantage for the United States.

3 Now, Norfolk Southern itself has
4 invested billions of dollars over the last ten
5 years. The uncertainty in traffic flows that
6 forced access and forced interchange would
7 create would make investment more problematic
8 and harder to justify.

9 The ability for customers to shift
10 traffic would make it difficult to predict
11 whether a particular investment could be
12 justified. In addition, Norfolk Southern's
13 developing or implementing numerous
14 innovations to improve its service, so that it
15 can compete even more aggressively against
16 other railroads and other modes of
17 transportation in the surface transportation
18 marketplace.

19 An example of this is our unified
20 train control system. This is analogous to an
21 air traffic control system on steroids. Where
22 an air traffic control system allows a

1 controller to coordinate and manage plane
2 movements, UTCS safely and efficiently
3 coordinates train movements and maintenance
4 work into a dispatch system.

5 It allows dispatcher to see trains
6 well in advance of their arrival in the
7 dispatcher's territory. But UTCS does more
8 than air traffic control systems, because it
9 prioritizes trains and determines the optimal
10 place for them to meet and pass each other.

11 Norfolk Southern is the only
12 railroad in the world pursuing movement
13 planning at this level of sophistication.
14 Importantly, UTCS is only as good as the
15 information it's provided, including
16 infrastructure, resource capabilities,
17 operating objectives, and operating plan.

18 One of the critical pieces of
19 information that must be provided are train
20 flows. Because forced access or forced
21 interchange removes predictability in rail
22 movements by allowing shippers to alter

1 movements on a whim, one of the key UTCS
2 inputs, that being the operating plan, would
3 be undermined.

4 Second, forced access and forced
5 interchange would generate serious adverse
6 network effects. Running a massive network is
7 incredibly complex, with multiple types of
8 traffic, such as intermodal, coal trains,
9 grain, and others, all using the same set of
10 limited resources.

11 Norfolk Southern's rail operations
12 are designed to both meet customer needs and
13 to function effectively, efficiently. We
14 should meet the different needs, we must meet
15 the different needs of different customers.

16 To be able to hone operations to
17 get the most out of our resources, Norfolk
18 Southern must be able to make reliable
19 predictions about its future operating
20 patterns. We go to great effort to go into
21 the future and predict traffic flows to plan
22 our resources. Forced access and forced

1 interchange would undermine our ability to
2 plan ahead and adequately place resources
3 where they'll be needed.

4 Now OPD, or our operating plan
5 developer, is a technological tool that allows
6 us to plan the movement of each of more than
7 170,000 rail cars currently on the NS system.
8 It uses algorithms to evaluate a host of
9 variables, such as the least handlings for
10 cars, the fewest crew districts to operate,
11 the shortest distance, in order to determine
12 the most efficient and safest route for each
13 of the cars or blocks of same destination cars
14 and trains.

15 If the shortest route has curves
16 or speed restrictions, it takes that into
17 account and finds the most efficient route,
18 even if it's a longer distance. Forced access
19 and forced interchange proposals would nullify
20 the decades of effort Norfolk Southern has put
21 into streamlining its network.

22 Forced access would create

1 operation problems. With two railroads
2 operating on the same infrastructure, it would
3 increase the number of locomotives and cars
4 needed. It would create new crew
5 qualification issues.

6 Now similarly, forced interchange
7 would create operational problems by altering
8 traffic flows inefficiently. I'd like to
9 compare two interchanges. One, my example I'm
10 using, is one in Cleveland, Ohio, and the
11 other in Marion, Ohio.

12 And here on the map, you're
13 looking at an efficient interchange at
14 Cleveland and an example of an inefficient
15 interchange at Marion.

16 Rockport Yard, which is the yard
17 in Cleveland, is on the lower left of the
18 slide, and it is an interchange point between
19 Norfolk Southern and CSX. That yard has ample
20 capacity to interchange hundreds of cars. It
21 is secure. It's very efficient.

22 Importantly, cars received are

1 immediately classified in the yard and
2 forwarded on outbound trains. As you can see,
3 there's been substantial investment in
4 infrastructure at this facility.

5 All right. Now, turn to Marion,
6 Ohio. The interchange at Marion is a single
7 track. There is little infrastructure in
8 place. Only about 35 cars can be interchanged
9 here, and even then, they must be forwarded to
10 Columbus to be classified.

11 Furthermore, any trains working
12 this interchange block the main line.

13 In this comparison between a
14 Cleveland interchange and a Marion
15 interchange, under forced interchange,
16 customers could opt for Marion. You clearly
17 see Marion's less efficient interchange point,
18 and in fact, it would result in congestion and
19 delay.

20 While a modest amount of
21 interchange is currently handled by local
22 trains today at Marion, you can see that

1 increased interchange would be very
2 inefficient, stopping through trains, blocking
3 the main line, adding work events, and in the
4 end, delaying all our customers' freight.

5 Finally, as the safest Class 1
6 railroad for the 22nd year, a benefit of
7 reduced handlings and work events is the
8 reduction of injuries and accidents. Adding
9 more work events increases the risk of
10 injuries and accidents, and that is something
11 that we and the government should strive to
12 avoid.

13 MR. HIXON: Good morning. Norfolk
14 Southern has submitted to the Board
15 substantial comments on opening and reply, and
16 we'll not repeat all those points that we've
17 made.

18 Now, unsupported allegations have
19 been made in the papers that do not withstand
20 scrutiny.

21 Some say that railroads harm
22 export. The actual facts tell a very

1 different story. There we go.

2 As you can see, exports have grown
3 steadily since 1992, except during times of
4 recession. In fact, US exports in March 2011
5 were the most reported in history.

6 For Norfolk Southern, export
7 traffic excluding import traffic, even when
8 you exclude the -- even excluding truck work
9 traffic -- even exceed import track even when
10 you remove the export coal -- I'm sorry, if
11 you get to that slide -- shows that even our,
12 if you take out the export coal, our exports
13 are growing faster than our imports.

14 Now, in conclusion, Norfolk
15 Southern urges the Board to recognize a lack
16 of justification for proposing changes to
17 existing regulations dealing with access to
18 the rail network, and we ask that you
19 terminate this proceeding.

20 Thank you.

21 CHAIRMAN ELLIOTT: Thank you, Mr.
22 Hixon, Mr. Manion.

1 Thank you, panel, for your help
2 today, especially with the operational
3 matters. I know that matters that it came up
4 quite often yesterday, so it's nice to hear
5 those thoughts.

6 Mr. Manion, just with respect to
7 the charts that you had, you pointed to the
8 Cleveland interchange facility and the Marion.
9 And I think I've seen both of them, just
10 because I used to live near there.

11 Now I could see where there would
12 be a dilemma having some form of forced access
13 at the Marion facility. Obviously, it's not
14 fit for any additional traffic.

15 But what if, instead, that we had
16 a forced access only in facilities where there
17 are proper facilities, like the Cleveland
18 yard? Would that pose a problem
19 operationally?

20 MR. MANION: We don't want to stop
21 a shipment to switch it, to handle it to
22 another train, unless it's absolutely

1 necessary to do so, and that's why we've spent
2 so much time and so much investment on our
3 computerized planning capability.

4 When -- and I referred to our
5 operating plan developer before, and that has
6 allowed us to get to a point where, when we
7 route a shipment from origin to destination,
8 this planner takes into its calculation all
9 the different efficiencies and inefficiencies
10 that are out there and it's going to route it
11 in the most effective way to get the shipment
12 to the customer.

13 Now, if part of that has to do
14 with changing from one train to another,
15 keeping in mind that for most of general
16 merchandise traffic, to get from origin to
17 destination, you know, going across country in
18 many cases, most cars don't ride on one train
19 the whole way.

20 And so it's necessary to, in a lot
21 of cases, as many as three different times
22 during the course of a car's trip, they will

1 change from train to train, and we have the
2 cars do that at the most efficient points.

3 But we don't do it with any more
4 frequency than we have to, because these
5 terminals, like the one that we're talking
6 about at Cleveland, these are absolute cost.
7 They cost us money.

8 There's no revenue that comes out
9 of stopping and handling a car at these
10 locations, so we certainly don't do it any
11 more often than we have to.

12 So, to your question, if we have
13 to stop a place like Cleveland is where we
14 will do it, but we're certainly not going to
15 do it anymore than we have to.

16 CHAIRMAN ELLIOTT: What about the
17 counterpoint that I think one of the shipper
18 groups made with respect to reciprocal
19 switching; that, because they're not going to
20 be taking the train, they're just going to get
21 off, their crew's going to get off and your
22 crew's going to get on, would that alleviate

1 some of your concerns?

2 I have to say, I'm not an
3 operations expert here, although I worked with
4 guys that did it for 16 years. One of the
5 shippers' arguments, that says that it's not
6 less efficient in reciprocal switching, said
7 that if they pull their train in, and then
8 you're taking a train from there because it's
9 reciprocal switching, that it would just be a
10 matter of switching crews.

11 So, if a CSX train pulled in, the
12 NS train -- NS crew would get on.

13 MR. MANION: I think there -- I
14 have heard some of the dialogue surrounding
15 reciprocal switching, and honestly a lot of
16 what is being discussed is really foggy to me.
17 I think there's -- I don't know how a good an
18 understanding there is as to what reciprocal
19 switching is, frankly.

20 I think people are talking outside
21 of what current-day reciprocal switching is.
22 And, you know, just briefly, to help clarify,

1 when reciprocal switching is in place, that is
2 taking -- the traffic is being conveyed from
3 one railroad to the other, either at the
4 origin point or the destination point.

5 And in most cases, that is taking
6 place because one or the other railroad
7 doesn't have a route, or doesn't have a good
8 route to wherever the shipment is going.

9 So, that's reciprocal switching.
10 Now, this business about -- I think some of
11 these other things that are being discussed
12 really are more what we would call forced
13 interchange, where there is some kind of an
14 interchange of traffic mid-route. And any
15 time you change horses mid-route, you have got
16 inefficiencies.

17 Something that is center to
18 operations on a railroad is velocity. It is
19 all about velocity. And we spend a tremendous
20 amount of money on systems and on
21 infrastructure to be as seamless as we can to
22 continually increase our velocity. Because

1 when we increase velocity, when we do the type
2 of things that keep shipments from having to
3 stop, whether it's at the origin or the
4 destination or the mid-way point, when we do
5 that, everybody wins.

6 The customer wins, because they
7 get their shipment more promptly. It's a
8 faster through-route. And, it's more
9 predictable, because we are better able to
10 stay on the schedule that we have promised our
11 customer, and we do that.

12 I mean, we tell our customers,
13 when we sign up for the business, we say, you
14 will get your -- you'll get your shipment in
15 x number of days, and increased velocity very
16 much allows us to meet those targets.

17 So the customer wins when we
18 increase velocity. But the other great thing
19 about it is is that the costs drop out when we
20 increase velocity, because our assets turn
21 more quickly. We get more turns out of
22 equipment, and we get more turns out of our

1 locomotives and our cars.

2 And when you get more turns out of
3 your assets, you either, a, don't have to buy
4 as many of them in the first place, or b,
5 you've got more assets for increased business
6 down the road.

7 So it's all about velocity when it
8 comes to operating a railroad. And these
9 things we're talking about, whether it's the
10 forced interchange, or the forced access, or
11 stopping at Cleveland and finding another
12 crew, another railroad to take it over, which
13 is not something we want to happen, because it
14 flies right in the face of increased velocity.
15 All these things that are being discussed
16 about stopping traffic slows velocity.

17 CHAIRMAN ELLIOTT: Thank you.
18 Actually, I think at some point in there, I
19 think I got the answer I was looking for, so
20 I do appreciate that.

21 MR. LANIGAN: Mr. Chairman, could
22 I add something to that?

1 CHAIRMAN ELLIOTT: Sure.

2 MR. LANIGAN: I think most of the
3 customers have talked about reciprocal
4 switching were single-car type customers, not
5 unit train customers like the example that you
6 gave.

7 Each and every day, we take unit
8 trains of coal, of ag, etcetera, through
9 gateways. Our crew gets off and the Norfolk
10 Southern crew or a CSX crew jumps on and
11 continues on to destination. That's a normal
12 part of our operation every day.

13 CHAIRMAN ELLIOTT: Let me follow
14 up on that with respect to your operations.
15 Are there voluntary reciprocal switching
16 agreements in place now that you believe are
17 working effectively, operationally speaking?

18 MR. MANION: There are about 13
19 percent of our traffic is open to switching,
20 and it's open to switching. It doesn't
21 necessarily mean that it's taking place, but
22 it's open to switching.

1 And as I said, those are cases in
2 most instances -- those are cases where one or
3 the other railroad doesn't have a good route
4 to get to destination.

5 So, current-day reciprocal
6 switching arrangements are what I would call
7 more a matter of necessity, just from a
8 practical standpoint, because one railroad
9 can't get all the way where the car needs to
10 go.

11 So, do they work? Yes. We make
12 them work. Do they work as well as if you
13 didn't have to have those additional handlings
14 at the origin or destination? You're darn
15 right.

16 It doesn't work nearly as well,
17 because you've got to take -- you've got more
18 crews involved, you've got more infrastructure
19 involved, you've got one crew that has to
20 deliver to a siding or a spur track or
21 whatever the arrangement is.

22 Those cars are going to sit there

1 for some period of time, and it's not as slick
2 as one might think. Maybe they're going to
3 sit there for 12 hours. Maybe they're going
4 to sit there for more than two days.

5 And then they get picked up by
6 another crew, and they get re-handled. So
7 it's not -- it's something we try to avoid,
8 but it can't be avoided in all cases.

9 CHAIRMAN ELLIOTT: Okay, I think
10 that probably answers my follow-up question,
11 which was, why wouldn't it also work in a
12 forced access situation? But you explained
13 that it's not as practical to have the extra
14 switch or whatever is involved in a
15 connection.

16 MR. MANION: Well, and the
17 reciprocal arrangement, while it is
18 inefficient, it is not as onerous as the
19 forced access concept, because under forced
20 access, you not only have this same
21 arrangement with inefficiencies, with the
22 extra infrastructure you have to have, with

1 the coordination of crews, but now you are
2 into a situation where you've got two
3 different parties, two different railroads,
4 both working their operation over the same set
5 of railroad tracks, having to coordinate, and
6 that sets up a whole new layer of
7 inefficiencies.

8 CHAIRMAN ELLIOTT: Thank you.
9 That's very helpful.

10 I'll give one softball to Mr.
11 Lanigan, since he's a Cleveland Indian fan.

12 On one of your charts, with
13 respect to efficiencies, I noticed in 2010,
14 you had a significant increase, I thought
15 almost even more than -- and I wasn't even
16 comparing it to 2009, but overall. And I was
17 just wondering, it seemed quite significant,
18 and if you could explain how that happened.

19 MR. LANIGAN: Well, as you know,
20 Mr. Chairman, during the recession, we stored
21 a lot of cars, we furloughed people, we took
22 a lot of cost out of the business very, very

1 quickly. And in 2010, we were slow to bring
2 a lot of the assets back on because we
3 couldn't predict the recovery. We couldn't --
4 customers were reluctant to give us forecasts,
5 because they couldn't forecast their markets.

6 So we spent the entire year -- I
7 would call chasing the demand and coming up
8 short from a standpoint of having the
9 appropriate assets.

10 This year, you're going to see
11 that reversed because one, we're hiring 5,000
12 people this year. We're adding rail cars,
13 we're adding locomotives, our record capital
14 expenditures this year, etcetera. That
15 curve's going to bend again.

16 It was really just a function of
17 the timing of the recession and coming out of
18 the recession.

19 CHAIRMAN ELLIOTT: Thank you.

20 Vice Chairman?

21 VICE CHAIRMAN BEGEMAN: Thank you.

22 Mr. Manion, Chairman Elliot asked

1 a number of the questions that I wanted to
2 ask, and probably everyone in the room except
3 me understood something that you said, so just
4 bear with me, if you don't mind.

5 I thought what you said was that
6 typically, there can be maybe three switches
7 from your origin to destination. But then I
8 thought you also said when you were describing
9 to us what reciprocal switching really is,
10 versus an interchange, that it only happens at
11 an origin or a destination.

12 So, I guess I'm -- how can it
13 happen three times if it's only in two places?

14 MR. MANION: Right. Let me try to
15 do a better job of explaining that.

16 During the course of business for
17 traffic that we'll say is just totally within
18 Norfolk Southern's control, in most cases, for
19 general merchandise traffic, our shipments
20 aren't able to ride one train all the way from
21 the origin to the destination point. And, you
22 know, it's -- we're kind of a big spiderweb in

1 the East, if you will.

2 And to get a shipment cross-
3 country to its destination, on the average, it
4 will ride on three different trains. Does
5 that make any sense so far?

6 VICE CHAIRMAN BEGEMAN: Yes.

7 MR. MANION: Okay.

8 VICE CHAIRMAN BEGEMAN: So they're
9 interchanging?

10 MR. MANION: And that is not
11 referred to as -- interchange is between two
12 different railroads. When we stop at -- we
13 have major terminals, major what we call hump
14 yard terminals throughout our system, and
15 they're designed to reclassify or to classify
16 cars to put same-destination cars all together
17 in blocks and ultimately in a train where they
18 all want to go to the same location.

19 So, as we move those cars and
20 trains through our system, we're simply what
21 we call making connections, and that's
22 something we put a lot of emphasis on.

1 Within our own railroad, we are
2 operating trains on time, on schedule, so they
3 get -- and every single car has a -- every
4 shipment has a schedule. Not to get too deep
5 detailed about it, but it is, it's a detailed,
6 complex business.

7 Every car has a schedule, and
8 across the railroad, it has a schedule of how
9 it is going to route, what blocks it's going
10 to be on, what trains it's going to ride.

11 And so it's necessary that we keep
12 trains on time so that they will get to the
13 next yard or terminal point and connect -- I
14 said connections -- connect to the right
15 train, right car on the right train, in order
16 to, again, get to the next terminal, if that's
17 where it's going, and go through this process
18 again.

19 Now, all of that is separate and
20 distinct from reciprocal switching and
21 interchanges that go on between two different
22 railroads, and they are two distinctly

1 different things.

2 And with your reciprocal
3 switching, that's just a case where one
4 railroad is not able to handle it the whole
5 way, and they either -- maybe they have a
6 reciprocal switching arrangement at one end of
7 the railroad or the other, and, we -- and in
8 other cases, we will interchange a car from
9 one railroad to the next because we may not be
10 going where that car needs to go.

11 Does that help?

12 VICE CHAIRMAN BEGEMAN: Yes.

13 Thank you.

14 And you also mentioned 13 percent
15 of your traffic is open to reciprocal
16 switching.

17 MR. MANION: Right.

18 VICE CHAIRMAN BEGEMAN: I think
19 that's what you said. Do you happen to know
20 what the general percentages would be for the
21 other carriers, how much it is system-wide?

22 MR. MANION: I really don't. I'm

1 not inclined to think it would be radically
2 different, but I don't know the answer to
3 that.

4 MR. LANIGAN: Ours is a little bit
5 higher than that. It approaches 20 percent.

6 VICE CHAIRMAN BEGEMAN: Would both
7 of you respond regarding the testimony from
8 the intermodal representative, why is it that
9 the carriers seem to compete so heavily for
10 the intermodal traffic?

11 Is it because that's where the
12 money is versus what we're hearing about the
13 coal traffic?

14 MR. LANIGAN: Well, for openers, I
15 think we compete for all traffic, so I want to
16 make sure that that's clear.

17 VICE CHAIRMAN BEGEMAN: And your
18 testimony did make that clear.

19 MR. LANIGAN: I think the
20 difference with intermodal is that a truck can
21 go anywhere. And I spent 16 years in the
22 trucking industry, and a truck can go

1 anywhere.

2 But a single truck, single driver,
3 is more expensive than a train, economics, to
4 haul containers or trailers.

5 We have two individuals on the
6 train hauling up to 300 or so containers, 150
7 trailers, depending on the configuration of
8 the train, which would take 300 or 150 truck
9 drivers to do the same work.

10 So we have a distinct cost
11 advantage against truck, but we're not as
12 flexible. We can't go door-to-door like a
13 truck can, and I think what's happened over
14 time is that we've developed the density of
15 the networks, both in the West and in the
16 East, to provide frequent enough service that
17 we can work with our trucking partners to
18 develop a service that is very close to truck-
19 like from an overall timing standpoint, but
20 yet has the economics of rail embedded in
21 them, and that's what's created that
22 competitive environment in intermodal.

1 VICE CHAIRMAN BEGEMAN: I sort of
2 gave you a heads up that I was going to ask
3 about Rule 11 rates. Could I get your
4 perspective as far as how it works with your
5 system, and when you offer them, and when you
6 don't?

7 MR. LANIGAN: We do Rule 11 rates
8 all the time. In some cases, we offer them to
9 customers, and some customers prefer them, and
10 some don't. In other cases, customers will
11 ask us to quote a Rule 11, and we'll do it
12 anytime a customer asks us to do it.

13 VICE CHAIRMAN BEGEMAN: And are
14 they utilized more frequently now, or are they
15 less so?

16 MR. LANIGAN: Much more frequently
17 than, say, five years ago. I don't know what
18 the percentage is, but it's a significant
19 increase in Rule 11 rates over the last five
20 years.

21 VICE CHAIRMAN BEGEMAN: And do you
22 have a sense of why that might be? I know

1 that the chemical shipper mentioned that
2 they'd like to have control over -- and like
3 to know what they're paying for from each
4 carrier, but --

5 MR. LANIGAN: I think that nails
6 it on the head. The customer wants more
7 transparent information on how their shipment
8 is moving.

9 VICE CHAIRMAN BEGEMAN: And are
10 there times when you won't provide one?

11 MR. LANIGAN: I'm not aware of
12 any, when we've been asked to provide one.

13 VICE CHAIRMAN BEGEMAN: Did you
14 want to comment on, from your perspective?

15 MR. MANION: Well, I would comment
16 on the fact that we compete so heavily in all
17 the different modes of business, and just like
18 John said, I don't care if it's your general
19 merchandise, your ag, your automobile
20 business, coal business, intermodal business,
21 and we're living proof of it, because we lose
22 business.

1 Fortunately, we gain business,
2 too, but it is fiercely competitive out there.
3 And, you know, it goes back to the point I was
4 trying to make about how we try to maintain a
5 scheduled operation and increase our velocity
6 so that we can provide the kind of service
7 that a customer needs, because if we can't
8 provide the service, we lose it.

9 And even our -- I mean, even our
10 employees are involved in this, as strongly
11 involved as they are in our safety process,
12 which we take a lot of pride in, they are well
13 aware that their paycheck comes from the
14 customer, and if we don't provide service like
15 we promise, we'll lose it.

16 VICE CHAIRMAN BEGEMAN: That's all
17 I have for now.

18 CHAIRMAN ELLIOTT: Thank you.

19 Commissioner?

20 COMMISSIONER MULVEY: Thank you.

21 Adjectives mean a lot. I know that we hear
22 about captive shippers from one side, and we

1 hear about singly-served shippers from the
2 other side.

3 So -- the word forced access is
4 interesting. Basically, we're talking about
5 open access. That's the term that's usually
6 used. No one is forcing a railroad to
7 interchange. You may be forcing the owning
8 railroad to accept interchange, but you're not
9 forcing the other carrier to enter into the
10 agreement.

11 A question for Norfolk Southern.
12 You said that forced access or open access
13 would be harmful because it would make traffic
14 flows unpredictable. But the railroads
15 already have had reciprocal agreements for
16 years and years and years, albeit, they have
17 been going down in recent years on most lines.
18 And that presumably also would alter traffic
19 flows.

20 So what would make a Board-
21 regulated rule on reciprocal switching
22 requiring more open access so much more worse

1 than what you have today?

2 MR. MANION: Well, Commissioner,
3 the reciprocal arrangements we have today are
4 ones that we have agreed to. They're ones
5 where we have -- we have ourselves said
6 customer x is open to switching. So under
7 that arrangement, we plan around that. It's
8 less efficient, but we plan around that.

9 And with an open access
10 arrangement, traffic would be routing through
11 another carrier, through this open access
12 arrangement, I presume, in one instance, and
13 in another instance, the customer may find it
14 more desirable not to route through that
15 interchange point, and we'd be handling it.

16 And the uncertainty leaves us at -
17 - or would leave us at a point where we never
18 know where to invest our money in
19 infrastructure. Are we going to be handling
20 that business and consequently be able to get
21 a viable return on our investment in
22 infrastructure? Or not? And so it would make

1 the whole thing very unpredictable.

2 COMMISSIONER MULVEY: But
3 investments in infrastructure are always
4 unpredictable. You invest because you believe
5 the business is going to be there.

6 Hopefully, you get lucky, as in
7 the case of one person at that one railroad on
8 that panel. You make an investment, and
9 eventually, they come, and you have the
10 advantage of having made it.

11 And sometimes, the investments are
12 made a little earlier, and they don't come
13 when expected, and so you lose. So there's
14 always that risk when you invest in
15 infrastructure, that you're going to get the
16 business or be able to accommodate the
17 business.

18 You mentioned also --

19 MR. LANIGAN: Commissioner, if I
20 might add --

21 COMMISSIONER MULVEY: Yes.

22 MR. LANIGAN: -- but you're making

1 that investment based on your best projections
2 about the business that you have and the way
3 that business is going to grow, and if that
4 becomes completely unpredictable, you won't
5 make the investment.

6 COMMISSIONER MULVEY: But shippers
7 or consumers, however you want to label them,
8 they always have a choice of who they're going
9 to go to, not always, obviously, but often
10 have a choice of where they're going to go,
11 and that's one of the things that makes our
12 capitalist market society work, that there are
13 effective suppliers and effective demanders
14 who have some choice.

15 So as we said before that for
16 example, reciprocal switching or open access
17 can lead to inefficiencies and take longer to
18 shift a car to another railroad, et cetera,
19 but those all increase transport cost, and
20 increase the time for transport.

21 And those would be decision points
22 that a shipper would look into and say, well,

1 I can maybe have an interchange, or I can have
2 open access, but it's going to take me a day
3 or two longer, and I don't want that, so, I'm
4 going to stay with my existing railroad --
5 continuing to have, say, have Norfolk Southern
6 do it, rather than take advantage of the open
7 access, because it would take longer, and it
8 would increase the cost.

9 Wouldn't that be true? Wouldn't
10 some of those things be caught up in the rate
11 structure?

12 MR. MANION: Commissioner Mulvey,
13 what I come back to is this open access
14 arrangement in any situation builds in
15 additional costs, and it flies right in the
16 face of what we're trying to accomplish.

17 Excuse me for the somewhat
18 pedestrian analogy, but if I want to use UPS
19 to ship a package from my home in Virginia
20 Beach up to my mother in Boston, and I go to
21 the UPS counter and say, well, I'd like to
22 ship this to Boston, but when that package

1 gets to Boston, I'd like you to transfer it to
2 the United Postal Service and have them
3 deliver it to her, that doesn't make any sense
4 whatsoever, because we all know how disruptive
5 and costly that is. But that is not far away
6 from what we're talking about here.

7 COMMISSIONER MULVEY: Right. But
8 if you wanted to pay, and if UPS said, well,
9 we can do that, we'd have to call the postal
10 service, they would have to send a truck over,
11 pick it up, and move it out and that's going
12 to cost an extra \$20, and you said, fine, I'll
13 pay the extra \$20, because that's how I want
14 it to go, wouldn't that be your right? Why
15 should you be denied that right, then?

16 MR. MANION: I don't think there's
17 a lot of -- could that be done? Yes, it
18 could. Is that logical? I don't think it's
19 logical at all.

20 COMMISSIONER MULVEY: And then you
21 wouldn't do it, because it's not logical, nor
22 would a shipper do it, if indeed, it didn't

1 make some sense.

2 We're presuming here, I think,
3 that with open access, that the shipper would
4 see a benefit and do it, not that the shipper
5 would just ignore the fact that it was going
6 to take longer, or ignore the fact that there
7 are additional inefficiencies and additional
8 costs, no?

9 MR. MANION: Commissioner, I
10 really don't think that's the case. I'm
11 getting the sense that -- you know, with all
12 good intentions, I think this is a case of
13 individual customers who see a one-off
14 possibility to get a lower rate in their
15 instance, but the reality is is that the
16 overall costs in terms of our infrastructure
17 costs, in terms of our not being able to
18 provide good service anymore, in terms of a
19 downward spiral of overall service, all that
20 would deteriorate, while this individual
21 customer is saying, hm, I think I can create
22 a situation here where I can lower my rate by

1 a little bit.

2 COMMISSIONER MULVEY: So you're
3 suggesting the road to Hades is paved with
4 these good intentions.

5 MR. MANION: I couldn't have said
6 it better, actually.

7 COMMISSIONER MULVEY: Well, I
8 couldn't have said it differently, because
9 there's a mixed group here.

10 A couple of the charts I had some
11 questions about. All the charts were in
12 nominal terms, in terms of the capital
13 expenditures, rather than in real terms? In
14 other words, they're in current dollars rather
15 than constant dollars?

16 MR. LANIGAN: They were the
17 dollars in the year that they were --

18 COMMISSIONER MULVEY: That's
19 current dollars.

20 MR. LANIGAN: Current dollars.

21 COMMISSIONER MULVEY: If it would
22 have been constant dollars, there might have

1 been a little less draconian changes from year
2 to year, or --

3 MR. LANIGAN: A little bit, sure.

4 COMMISSIONER MULVEY: With regard
5 to one of the Norfolk Southern capital, the
6 last one was 2011, which was B, and what does
7 the B stand for? Was that a projection, or
8 was that a year-to-date, or what? I didn't
9 see -- I didn't quite catch it on that, the
10 capital expenditures for 2011 for Norfolk
11 Southern?

12 MR. MANION: Budget.

13 COMMISSIONER MULVEY: Oh, budget.
14 Oh, okay. Thank you. So we don't know what
15 the actual expenditures were, or would be for
16 that year?

17 MR. MANION: No, I mean --

18 COMMISSIONER MULVEY: Are you on
19 budget on that?

20 MR. MANION: -- historically, I
21 mean, historically, that will be about where
22 it comes in, and frankly, in a good year, it

1 might bump up a little from the --

2 COMMISSIONER MULVEY: Well, that's
3 quite a bit higher than in 2010. That's quite
4 good.

5 One last question and that was in
6 regard to the UCTS program that you have,
7 would that be able to be what the PTC -- a
8 full PTC system would do. Would that be a kind
9 of a prelude? Or, if you have to adopt to
10 adopt PTC, would that replace UTCS, or would
11 UTCS complement PTC?

12 MR. MANION: No, they are two
13 different things, and what UTCS does not do is
14 take over control of the movement and have the
15 ability to stop it if the engineer isn't doing
16 -- isn't handling their train the way they
17 should.

18 COMMISSIONER MULVEY: But PTC does
19 that. My question, I guess, is, does PTC --
20 especially if it's a full system of PTC, would
21 that give you some of the same things you're
22 getting now with UTCS?

1 MR. MANION: No, it doesn't. In
2 fact, it doesn't give you any of those same
3 things.

4 COMMISSIONER MULVEY: Okay. So
5 they are two separate, hopefully
6 complementary, but not competing, but
7 certainly they're systems that accomplish --

8 MR. MANION: They're two separate
9 things. The big difference is that with UTCS,
10 there is a lot of efficiency built in.
11 Efficiencies allow us to do a better job with
12 a scheduled railroad, efficiencies for fuel
13 saving and handling environmental concerns,
14 and so when we spend money on UTCS, we are
15 getting a big return on our investment. When
16 we spend money on PTC, we're not getting a
17 return on investment. And you're familiar
18 with the stats.

19 COMMISSIONER MULVEY: We all know
20 the numbers. Would UTCS improve your ability
21 to handle open access if that came down the
22 road? Would UTCS be something that would

1 enable -- facilitate your ability to handle an
2 open access requirement?

3 MR. MANION: No, actually, UTCS
4 would be quite disrupted by any kind of an
5 open access or open interchange type scenario,
6 and I'll tell you the reason for that.

7 UTCS is only as good as --- like
8 any computer system, it's only as good as the
9 information that you give it.

10 And with open access or open
11 interchange, all of a sudden, you are throwing
12 in a wide variety of permutations as far as
13 different flows for traffic, and when you
14 throw all that in the mix, UTCS is going to
15 have a much harder time being efficient.

16 And you know, simply put, what
17 UTCS and the movement planner portion of UTCS
18 does, what it does is it looks at all the
19 different variables going on around it,
20 whether it's other trains that are hours away,
21 as much as eight hours out.

22 It looks at what the topography of

1 the railroad is. It looks at what trains are
2 entering the system, and if there suddenly
3 are, I'll just say, unplanned or unknown
4 movements that are showing up through open
5 access points or open interchange points, it
6 is disrupting to the planning function of
7 UTCS.

8 COMMISSIONER MULVEY: So it
9 wouldn't allow UTCS to optimize the efficiency
10 of the yard?

11 MR. MANION: You said it better.

12 COMMISSIONER MULVEY: It would be
13 sub-optimal.

14 John, one last thing for you, and
15 that is you were talking about the evidence of
16 competitiveness in the coal fields, changing
17 of service to plants between the major
18 railroads.

19 Hasn't there also been some of
20 that too on the intermodal side in the West
21 Coast, that haven't there been changes from
22 one railroad to another for large amounts of

1 intermodal movements at the same time, over
2 the last few years?

3 MR. LANIGAN: Yes, there has been
4 some shifting of business between us and UP on
5 the West for intermodal as well.

6 COMMISSIONER MULVEY: So that also
7 suggests that there's also some
8 competitiveness out there.

9 MR. LANIGAN: We've shifted
10 businesses, Commissioner, in every one of our
11 lines of business, coal, ag, industrial, and
12 intermodal on a year-to-year basis.

13 We have to replace ten to fifteen
14 percent of our business through losses,
15 etcetera, on an annual basis. So, yes,
16 there's competition all the time across all of
17 our businesses.

18 COMMISSIONER MULVEY: Okay. Well,
19 thank you very much. Thank you very much.

20 VICE CHAIRMAN BEGEMAN: I have one
21 last question for you, Mr. Lanigan. I know
22 you were here yesterday, certainly during the

1 afternoon when Western Coal testified, and I
2 asked them about the chart that indicated that
3 the competitive traffic was actually at a
4 higher rate than the captive traffic. And I'm
5 wondering if you care to comment on that
6 chart.

7 MR. LANIGAN: For our total book
8 of business, captive traffic remains higher
9 than competitive traffic overall on an average
10 basis.

11 VICE CHAIRMAN BEGEMAN: But not on
12 Powder River Basin coal?

13 MR. LANIGAN: I can't specifically
14 answer that, Vice chairman. I don't have that
15 information at my fingertips.

16 VICE CHAIRMAN BEGEMAN: All right.
17 Thank you.

18 CHAIRMAN ELLIOTT: Thank you very
19 much. We appreciate you coming today.

20 We'll bring forward panel number
21 five. Just for everyone's information, I
22 think we're just going to plow ahead and not

1 have lunch today, because we're making pretty
2 good progress here, and I think that will just
3 prolong things, especially for people who have
4 flights to catch or maybe want to catch an
5 earlier flight to get home.

6 Also, for this panel, we may have
7 another speaker come in where you'll have to
8 get up again. So I just wanted you to be
9 aware of that. But you will have your full
10 speaking time.

11 Okay. Why don't we get going with
12 panel number five? We'll start out with
13 Diversified CPC International.

14 Mr. Frauenheim, you have ten
15 minutes.

16 MR. FRAUENHEIM: Thank you, Mr.
17 Chairman.

18 CHAIRMAN ELLIOTT: We need you to
19 get that mike, speak into the mike, otherwise,
20 the court reporter can't --

21 MR. FRAUENHEIM: Thank you, Mr.
22 Chairman.

1 CHAIRMAN ELLIOTT: Great.

2 MR. FRAUENHEIM: My name is Bill
3 Frauenheim. I am Vice President of Operations
4 at Diversified CPC International --

5 CHAIRMAN ELLIOTT: I see I've been
6 abandoned by my fellow board members here, so
7 --

8 MR. FRAUENHEIM: -- a leading
9 manufacturer and distributor of liquified gas,
10 aerosol propellants, and specialty gas liquids
11 in North America.

12 I'm responsible for the operations
13 of Diversified CPC's liquified gas processing
14 facilities in the US.

15 My role as Vice President of
16 Operations includes the Diversified CPC's
17 transportation function that reports to me.
18 For the past 13 years, Hydro Consulting
19 Limited has helped us manage our rail
20 transportation. They keep me informed on
21 transportation issues, and I frequently
22 participate in meetings with carriers.

1 Diversified CPC has filed initial
2 comments and reply comments in this
3 proceeding, and we endorse initial comments
4 and reply comments submitted by interested
5 parties and by West Lake Chemical Corporation.

6 Diversified CPC is headquartered
7 in Channahon, Illinois, and has six
8 manufacturing and distributing facilities in
9 North America, with 48 employees. Even though
10 Diversified CPC is considered a leader in the
11 aerosol propellant industry, Diversified is
12 considered a small shipper.

13 We have 37 rail lanes. Volumes in
14 those lanes range from 1 to 181 tank cars
15 annually. Between inbound tank cars and
16 outbound product tank cars, we ship about
17 1,000 tank cars per year.

18 Diversified CPC relies on Class 1
19 railroads for inbound shipments and raw
20 materials to deliver products to customers.
21 While we also ship by truck for shorter
22 distances, some customers request rail

1 deliveries, and truck transportation is not
2 always a practical alternative for long-haul
3 moves.

4 Therefore, rail is a critical part
5 of our operation and the ability for
6 competition to be competitive.

7 The railroads have adopted a
8 position that rail rates declined in real
9 terms during a 30-year period following
10 enactment of the Staggers Act, and that
11 shippers have benefitted from the cost
12 savings. Further, they try to justify
13 aggressive pricing practices based on the need
14 to build and maintain their infrastructure.

15 I cannot comment on the general
16 statement by railroads that rail rates have
17 declined since enactment of the Staggers Act.
18 What I do know is our cost of doing business
19 with the railroads have increased, and we
20 frequently need to remind the railroads that
21 Diversified CPC has also invested capital for
22 infrastructure improvements so that we can

1 increase freight volumes with the railroads.

2 For example, Diversified CPC has
3 invested more than \$2.2 million at its rail-
4 served plants for infrastructure improvements
5 required to maintain and increase rail
6 shipments.

7 We cannot always pass those costs
8 through to our customers. These projects
9 included rail infrastructure improvements and
10 storage at our Petal, Mississippi facility;
11 installation of additional rail car unloading
12 stations, rail car risers, and bulk storage
13 tanks at our Anaheim, California, Petal
14 Mississippi, and Miami, Florida and Sparta,
15 New Jersey plants.

16 The Channahon, Illinois plant was
17 originally constructed with three sidings and
18 eight tank car loading and unloading stations.
19 Prior to the latest expansion to add a fourth
20 siding, we added four additional tank car
21 loading and unloading stations, and bulk
22 storage for a new product blend shipped

1 exclusively by rail.

2 The plant now has 16 tank car
3 loading and unloading stations, effectively
4 doubling the loading and unloading facilities
5 of the regional plant design. The plant can
6 now handle up to 24 tank cars on its four
7 sidings.

8 While Diversified CPC has invested
9 capital in infrastructure to increase rail
10 shipments, the railroads seem to have a one-
11 sided view of the need to earn adequate return
12 on investments.

13 In 2004, one of our customers
14 asked our company to develop a new product for
15 our customer's foam packaging operations. We
16 developed the new product, which was accepted
17 by our customer. Diversified CPC acquired
18 additional tank cars, and we invested more
19 than \$500,000 in construction of a storage
20 tank farm, blending system, and associated
21 pumps and piping for the new commodity.

22 During the three years that we had

1 the business, rail costs for this move
2 increased more than 41 percent. We're in a
3 very competitive business in the aerosol
4 propellant industry, and in our other business
5 units as well.

6 The railroads disregarded our
7 warnings, and ultimately priced Diversified
8 CPC and the railroads out of the business.
9 After we lost the business, the carriers asked
10 what they could do to help in the recovery of
11 the business.

12 They re-established the rate that
13 applied prior to the last increase, but
14 unfortunately, it was too late.

15 While we understand the need for
16 the railroads to earn an adequate return, it
17 was extremely unfair for the railroads to
18 encourage us to develop business that required
19 capital investment and then subsequently chase
20 the business away with irresponsible pricing
21 practices.

22 We believe that this example

1 demonstrates that the competition in the
2 railroad industry may be inadequate. For this
3 particular lane, both origin and destination
4 are classic bottlenecks. 100 percent of
5 Diversified CPC's rail lanes have bottlenecks
6 at origin and/or destination.

7 While we do not have an agenda to
8 request competitive access at all locations,
9 I believe it possible that simply having an
10 option to open industries to reciprocal
11 switching would create a competitive
12 environment that will serve the public
13 interest.

14 We have one plant that is not
15 operating according to plan that could benefit
16 if served by a second carrier. Our plan when
17 locating that plant was to serve customers by
18 rail and truck. However, outbound rail rates
19 proposed from that plant have not been
20 competitive, so we've been forced to serve
21 those customers from other origins.

22 We believe it likely that rail

1 volumes and production at that plant would
2 increase if served by another carrier.

3 Diversified CPC does not have an
4 agenda to file complaints with the STB to seek
5 relief from unreasonable rates. First of all,
6 we prefer to resolve issues directly with the
7 railroads, where possible. Second, current
8 procedures are not practical alternatives for
9 small shippers like Diversified CPC.

10 The railroads contend shippers do
11 not need competition, so long as we have
12 regulations. In other words, if we do not
13 like rates, we can file a rate case with the
14 STB.

15 This clearly indicates that the
16 railroads are out of touch with customers, or
17 maybe they simply don't care about our
18 business.

19 When the Board developed new
20 proceedings and standards for small rate
21 cases, it was a step in the right direction.
22 However, they offer no practical recourse for

1 small shippers like Diversified CPC as the
2 litigation costs would outweigh the potential
3 gain.

4 This is evident by the fact that
5 recent rate cases have been filed by very
6 large companies, including DuPont, Total
7 Petrochemicals, and M&G Polymers.

8 The cost of litigating a rate case
9 under current procedures, including the small
10 rate case and simplified SAC procedures,
11 prohibits most shippers, and especially small
12 shippers like Diversified CPC, from seeking
13 relief at the STB, leaving us little or no
14 recourse.

15 Small shippers like Diversified
16 CPC should have access to seek Board
17 protection from unreasonable rates and unfair
18 practices.

19 Mr. Chairman, in conclusion,
20 competition in the railroad industry, in our
21 view, is inadequate. We commend the Board for
22 initiating this proceeding.

1 We encourage the Board to create
2 some additional competitive marketing
3 alternatives to shippers, including practical
4 solutions for small shippers.

5 Potential alternatives include
6 simple access to reciprocal switching and
7 variable cost thresholds for switching costs.
8 Finally, the Board should review current rate
9 reasonableness standards and rate case
10 procedures and consider changes that may be
11 necessary to establish a simple procedure that
12 would give small shippers like Diversified CPC
13 the ability to seek Board relief from
14 unreasonable rates and unfair practices.

15 I appreciate the opportunity to
16 comment on the competition in the railroad
17 industry, and we're hopeful that this
18 information that we have submitted will
19 contribute to the process that will lead to a
20 comprehensive decision that will address these
21 difficult and challenging issues.

22 Thank you.

1 CHAIRMAN ELLIOTT: Thank you very
2 much. We'll next hear from M&G Polymers.

3 You have ten minutes.

4 MR. FOURNIER: Thank you.
5 Chairman Elliot, Vice Chairman Begeman, and
6 Commissioner Mulvey, good afternoon.

7 My name is Fred Fournier, and I'm
8 the Global Marketing and Sales Director for
9 M&G Polymers USA. I'm here to testify on the
10 current state of rail competition as
11 experienced by M&G, and to support changes in
12 the Board's policies that would enhance rail-
13 to-rail competition.

14 M&G Polymers is the North American
15 operation of M&G Group, which is a global
16 producer of polyethylene terephthalate, or
17 PET. PET is a plastic that's used in
18 packaging applications. It's used in making
19 plastic bottles, food packaging, carpet
20 fibers, among many others.

21 Despite our global presence, M&G
22 is a family-run business that manages to

1 compete on the highly competitive world stage
2 through technological innovation and lean
3 operations.

4 We produce PET at two plants in
5 North America. One is located in Altamira,
6 Mexico, and the second in Apple Grove, West
7 Virginia.

8 We also recently have just
9 announced plans to construct a new facility at
10 a location in the Gulf Coast that is yet to be
11 determined.

12 M&G has a strong commitment to
13 investing in the United States, but that
14 commitment has been sorely tested by our
15 experience as a rail captive shipper in our
16 West Virginia facility.

17 As I'm sure you're well aware, M&G
18 is in the midst of a rate case against CSX,
19 which is the sole rail carrier at our West
20 Virginia plant.

21 Our decision to pursue that case
22 was not made lightly or without lengthy

1 discussions with CSX, and this is because of
2 the significant cost and time associated with
3 rate cases.

4 Before we decided to construct a
5 new plant on the Gulf Coast, we had focused
6 our attention on expanding the West Virginia
7 facility, which also would have significantly
8 increased the number of rail shipments from
9 that plant.

10 However, we could not justify that
11 expansion based on our rail costs. Despite
12 sharing that fact with CSX, we still cannot
13 obtain rates for a contract for a term that
14 made sense to us.

15 Although we are challenging our
16 existing rail rates at the Board, we cannot
17 defer our investment, that decision, for two
18 to three years while waiting for an uncertain
19 outcome, nor could we have challenged CSX
20 rates on movements several years into the
21 future to locations to be yet determined.

22 Therefore, we were forced to

1 search for other sites for this project.

2 In M&G's experience, railroads
3 routinely inhibit or restrict competition even
4 where such competition may appear to exist, at
5 least on paper.

6 For example, when M&G has
7 attempted to use rail to truck trans load to
8 get around a bottleneck destination carrier,
9 the railroad serving the bulk terminal
10 frequently asks us, wanting to know, what is
11 the ultimate destination of the subsequent
12 truck shipments before they quote a price.

13 The railroad has no need for that
14 information except to determine whether the
15 trans load is being used to bypass another
16 railroad.

17 Railroad marketing personnel have
18 told us on more than one occasion that they
19 have no interest in trans load traffic when we
20 have the option to ship by rail directly on a
21 competitor.

22 When railroads lose competitive

1 business, they make up for the lost revenue
2 through the remaining captive traffic.
3 Despite railroad arguments that shippers can
4 leverage their competitive traffic to get rate
5 concessions on their captive traffic, the
6 reality is that the railroad really enters
7 into negotiations with a revenue target that
8 it's going to hit, whatever combination of
9 captive or competitive rates will get it
10 there.

11 At competitive destinations,
12 another example, railroads will use the needs
13 of M&G's customers for storage tracks to
14 foreclose competition. The customer, our
15 customer, will direct M&G to ship to its lease
16 track on railroad A, which precludes M&G from
17 using railroad B.

18 Because M&G, not its customer,
19 pays the freight, M&G is left holding the bag
20 for the higher line haul freight bill.

21 Some other evidence that
22 competition is lacking includes the following:

1 rail rates have steadily and significantly
2 increased, even through the recent severe
3 recession, while other supposedly competition
4 modes decreased rates.

5 The second one is, despite the
6 potential for significant additional traffic
7 from Apple Grove expansion, CSX was unwilling
8 to offer rates and a contract term that would
9 provide reasonable rates for a sufficient
10 length of time to justify the expansion at
11 West Virginia.

12 Because CSX serves a majority of
13 the PET production in the United States, there
14 also is very little geographic competition.
15 Moreover, where geographic competition still
16 exists from foreign production, CSX has been
17 non-responsive.

18 For example, PET shipments to the
19 Pacific Northwest are equidistant from M&G's
20 Mexico plant and from our West Virginia plant.
21 We source those customers from our Mexico
22 plant, and this is because the rates are much

1 lower getting it from Mexico to the Northwest.

2 Moreover, M&G has lost business to
3 foreign imports at destinations that were as
4 far as 400 miles from the nearest port because
5 our transportation costs were not competitive.

6 The rail industry contends that
7 trucks provide adequate competition, even when
8 rail may not. This simply is not true for the
9 plastics industry. Over 85 percent of M&G's
10 North America production is delivered to our
11 customers in rail cars.

12 Most of the remaining 15 percent
13 is delivered by truck, goes to customers that
14 don't have rail access, customers that
15 purchase less than rail car quantities, or
16 they're rail-served customers where they
17 require expedited shipments.

18 This is because our customers have
19 a choice between rail and truck. They almost
20 uniformly require rail.

21 Rail cars are not just
22 transportation vessels. They are storage

1 vessels as well. Like most PET producers, M&G
2 does not have an extensive storage silos field
3 at our production plants. Since most of our
4 customers receive rail deliveries, we use the
5 rail cars for storage.

6 Even when we ship by truck, the
7 truck is trans-loaded from a rail car into the
8 truck. Even when we ship -- excuse me.
9 Likewise, our customers, they also rely on
10 rail cars for storage because they also do not
11 have extensive storage silos.

12 This is the predominant industry
13 practice. Consequently, trucks are rarely
14 competitive alternatives to rail for M&G.

15 When it comes to the changes to
16 enhance rail competition, although we are
17 availing ourselves of the regulatory remedies
18 for unreasonable rates, even as we speak, its
19 costs are enormous. You've heard that before.

20 Our case right now just came to
21 the one-year anniversary, and we're looking at
22 another one or two years before it will be

1 settled.

2 Right now, we've spent \$7.3
3 million in the first year, or through May of
4 this year. Over 60 percent of that is in the
5 tariff rates. So as Commissioner Mulvey had
6 said, it is quite an expensive process, and I
7 think it far exceeds what you originally
8 thought might be the cost of doing it. To be
9 honest, it exceeded what I thought it would
10 cost.

11 We were prepped and told that it
12 could cost \$10 or \$11 million. I think you'll
13 see that we're looking that it may cost us
14 between \$15 and \$20 million before we're done.
15 And this is -- and this again is responsible
16 for consultants, attorneys, but overwhelming,
17 this tariff rate that we have to pay during
18 the meantime.

19 So, the opportunity cost to go
20 through your process is going to cost me \$15
21 million, and I think that's too much.

22 So if the Board cannot streamline

1 its rate case process, it needs to find ways
2 to enhance competition where it does not
3 exist, and to allow competition to work more
4 effectively where it does exist.

5 M&G would much prefer to allow a
6 competitive market for rail service to
7 determine reasonableness of its rail rates.
8 The Board can and should modify its existing
9 policies to facilitate such competition
10 through the requested reciprocal switching and
11 bottleneck rates that you've been hearing
12 about for the last two days.

13 Reciprocal switching enhances
14 competition by eliminating very short
15 bottleneck segments that are the only barrier
16 to competition rail service.

17 Bottleneck rates simply unlock
18 competition that already exists over non-
19 bottleneck segments. It also has the
20 potential to greatly simplify the
21 determination of reasonable bottleneck rates.

22 In closing, I thank the Board for

1 the opportunity to share M&G's perspective on
2 rail competition and the policy changes that
3 could foster greater competition in the rail
4 industry.

5 M&G stands prepared to work with
6 the Board, with the railroads, and others in
7 the industry to enhance rail competition,
8 improve its efficiency of the rail
9 transportation system wherever possible, on
10 which our nation's economic well being, we
11 understand, so much depends. Thank you.

12 CHAIRMAN ELLIOTT: Thank you very
13 much for your comments.

14 We'll next hear from United States
15 Gypsum. You have ten minutes.

16 MR. MACKO: Thank you.

17 Chairman Elliott, Vice Chairman
18 Begeman, and Commissioner Mulvey, thank you
19 for the opportunity to offer comments to you
20 today on ex parte 705 covering competition in
21 the railroad industry.

22 My name is George Macko, and I'm

1 manger of transportation for the United States
2 Gypsum company, a subsidiary of USG
3 Corporation, headquartered in Chicago.

4 For brevity, we'll refer to
5 ourselves as USG in our comments.

6 I'd first like to provide a few
7 qualifying statements on who we are, what we
8 ship, and the scope of our rail operations in
9 North America, and then offer comments
10 specific to the subject of this meeting.

11 USG is North America's leading
12 producer of gypsum wallboard, joint compound,
13 and a vast array of related products for the
14 construction and remodeling industries. We
15 are also the global leader in the manufacture
16 of ceiling suspension systems and are
17 recognized as the premier manufacturer of
18 acoustical panels and specialty ceiling
19 systems.

20 Through our subsidiary L&W supply,
21 we are also the nation's largest distributor
22 of drywall and related building products,

1 serving the trade via a network of more than
2 160 distribution centers throughout the US.

3 USG ships an array of raw
4 materials and finished products throughout the
5 US, Canada, and Mexico via the North American
6 rail and intermodal networks. We are a
7 manifest, unit-trained, intermodal and export
8 shipper with total rail network activity
9 exceeding 25,000 shipments per year.

10 33 of our 36 manufacturing
11 facilities are rail-served by a combination of
12 five Class 1 railroads and 11 short lines, and
13 we lease approximately 400 rail cars to
14 support inbound raw materials and unit train
15 operations.

16 The subject of this hearing is
17 strategic in nature, and very important not
18 only to USG but to our country as a whole.
19 When distilled down, it's really about two key
20 issues: one, managing the country's
21 transportation infrastructure into the future,
22 and rail's critical role in that process, and

1 two, reaffirming the fundamental value of
2 America's free market economy and
3 understanding the dynamics of supply and
4 demand.

5 Over the last five to seven years,
6 the railroad industry has clearly turned the
7 corner on profitability. Much to our
8 satisfaction, they've been very diligent and
9 have prioritized investing those profits back
10 into the railroad resulting in higher
11 productivity and expansion of operations.

12 Some observers have referred to
13 these profits and operating improvements as a
14 rail renaissance, and we couldn't agree more.
15 This increased profitability has been the
16 focus of intense debate, and has resulted in
17 a call for change by a number of shippers.
18 The calling of this hearing is but one
19 example.

20 It's USG's position that this
21 renaissance was the intended objective of the
22 Staggers Act. One only need look at the

1 before and after picture. Prior to Staggers,
2 the railroad industry was dying and
3 systematically broken, with no means for
4 reinvesting.

5 Although it's been a long journey
6 since Staggers, we've seen Class 1 mergers,
7 consolidation in the short line industry, work
8 rule changes, falling and rising rail rates,
9 innovation in technology all culminating in
10 the momentum of the last five to seven years.

11 Unmatched by any industry in the
12 country if not the world, the railroad
13 industry is now voluntarily investing almost
14 20 percent of sales back into the business to
15 make itself more reliable, more competitive,
16 and to answer the growing transportation needs
17 of the country.

18 As a shipper, we cannot afford to
19 see this progress stopped or throttled. The
20 US economy and our transportation network
21 needs the railroads profitable, growing,
22 investing, and hauling more freight for our

1 country.

2 In our opinion, the issue here is
3 not about the level of railroad profits, are
4 they fair, but rather, are the railroads
5 responsibly reinvesting those profits for the
6 benefit of the shipper community and the
7 country.

8 Our answer to that is
9 emphatically, yes, and they should continue.

10 We're going to combine our
11 comments on a number of related issues
12 identified by the Board, including alternate
13 through-routes, terminal facility access --

14 CHAIRMAN ELLIOTT: Mr. Macko? We
15 have Senator Franken here, so if you could
16 just hold that thought, and we'll have you up
17 here shortly. I appreciate your
18 understanding.

19 SENATOR FRANKEN: Where would you
20 like me?

21 CHAIRMAN ELLIOTT: Right here up
22 front, right where you are, that would be

1 great.

2 SENATOR FRANKEN: Thank you, Mr.
3 Chairman, for accommodating me.

4 Chairman Elliott, members of the
5 Board, thank you for holding this hearing on
6 competition in the rail industry, and for
7 giving me the opportunity to testify today.
8 I want to thank the gentleman who just
9 interrupted their own testimony.

10 I can't tell you how important
11 railroad -- rail-to-rail competition is for
12 shippers in Minnesota. Whether you're talking
13 about agricultural products or electric
14 utilities or manufacturers, they all depend on
15 rail for shipping.

16 It's critical that we have a
17 competitive rail industry that provides
18 affordable rates and reliable service for
19 American shippers, both to keep jobs here in
20 America and to keep American industries
21 competitive in the global marketplace.

22 This issue is deeply personal to

1 me. I moved to Minnesota when I was four
2 years old. My dad didn't graduate from high
3 school, and he didn't have a career as such,
4 but my grandfather, my mom's dad, owned a
5 quilting factory out East, and he gave my dad
6 a chance to start up a new factory in the
7 Midwest.

8 So he moved to Albert Lea,
9 Minnesota, a small town in southern Minnesota,
10 to start a quilting factory.

11 My Dad was a great dad, but he
12 wasn't a great businessman, and the factory
13 failed after only two years, and then my Dad
14 decided to move us all up to the Twin Cities
15 where, essentially, I grew up.

16 Years later, I asked my Dad, why
17 Albert Lea? And he said, well, your
18 grandfather -- and that's how he talked, he
19 was from New York -- your grandfather wanted
20 to open a factory in the Midwest, and the
21 railroad went through Albert Lea.

22 So, I said, well, why did the

1 factory fail?

2 He said, well, it went through
3 Albert Lea, but it wouldn't stop.

4 (Laughter.)

5 Basically, the railroad shook him
6 down to ship his goods, and it was so
7 expensive that the factory failed.

8 Now, I'm going to date myself
9 here. That story is 50 years old, and sadly,
10 I don't think things have changed all that
11 much for shippers in Minnesota over those 15
12 years.

13 The railroads may be doing a heck
14 of a lot better, but in my two years in
15 office, as I've traveled around Minnesota,
16 I've heard nothing but terrible stories from
17 shippers, companies in a variety of different
18 industries in Minnesota who all are struggling
19 to get big Class 1 railroads to play fair and
20 quote them equitable and reasonable rates.

21 These businesses have come into my
22 office in DC and told me stories of rate hikes

1 and unreliable service and of unexpected
2 tariffs being tacked on to their normal bills.

3 I've also heard from some
4 companies who have decided that it's cheaper
5 to import products from overseas into the US
6 rather than producing them and shipping them
7 out of a plant in Minnesota where they are
8 captive to a single railroad that's charging
9 them an arm and a leg for transportation.

10 That's just not right, and you
11 don't need to be an economist to see that. It
12 isn't just bad for small business and for
13 farmers in this country. It's absolutely
14 terrible for our nation's economy.

15 Most of these shippers don't want
16 to say anything publicly, because they realize
17 it would be a fight between David and Goliath,
18 and that they fear retaliation. And that
19 alone should tell you that there is something
20 unfair going on here if a shipper can't come
21 in and publicly say something for fear of
22 retaliation.

1 These businesses need to maintain
2 their relationship with the one railroad that
3 serves them, and they've got no other way to
4 ship their goods.

5 In my view, that's one of the most
6 telling signs that we don't have a competition
7 rail industry in America today, this fear that
8 these shippers have, that they are too scared,
9 as I said, to speak for fear of retaliation.
10 We've got a major problem, and if we don't fix
11 it, we're being complicit in handicapping US
12 industries in the global economy.

13 That's the point I want to really
14 drive home today. And I realize I am not
15 alone on this point. The President's Export
16 Council, chaired by the CEO of Boeing, agrees
17 with me on this.

18 In a letter to the President back
19 in March, the Council identified Surface
20 Transportation Board reform as part of a
21 national strategy to make American industries
22 more competitive in the global marketplace.

1 And I know the Department of Justice and
2 Department of Transportation and USDA and GAO
3 are all saying exactly the same thing.

4 It's the responsibility of this
5 Board to protect shippers from anti-
6 competitive practices in the rail industry.
7 Congress has given you broad authority and the
8 flexibility to take action. It's time to
9 examine the STB's policies and make necessary
10 changes to protect shippers from unreasonable
11 rates.

12 Now, there is no question that we
13 need a financially healthy rail industry to
14 have a strong economy, and thanks to STB
15 policies over the last three decades, we've
16 got a profitable rail industry today. Class
17 1 railroads are some of the most profitable
18 businesses in our country today.

19 Despite a sluggish economy, over
20 the last several years, railroads are
21 announcing record earnings that have allowed
22 them to more than double their dividend

1 payments to stockholders and spend billions
2 more repurchasing stock.

3 We have a very healthy rail
4 industry, and that is a good thing. But it's
5 only one side of the coin. We can't have a
6 healthy rail industry at the expense of
7 shippers, and there are things that the STB
8 can do now to make sure shippers remain
9 competitive.

10 The GAO has laid out several
11 possible open-access policies that the STB
12 should strongly consider to increase
13 competition in the rail industry. I know that
14 USDA and others have laid these out in detail
15 in their filings, so I won't spend a lot of
16 time or any time delving into these right now.

17 But I hope the STD -- sorry, STB -
18 -

19 (Laughter.)

20 -- Surface Transportation Board,
21 absolutely a clean, healthy group --

22 (Laughter.)

1 -- so far as I know --

2 (Laughter.)

3 -- will take a serious look at
4 these overdue proposals.

5 I'd also like to encourage the STB
6 to reconsider its current accounting policies
7 that allow the inclusion of acquisition
8 premiums in a railroad's asset base.

9 I led a bipartisan group of
10 senators in a letter to the Board in March on
11 this topic, and I appreciated your reply
12 indicating that you would consider a shift in
13 this policy.

14 The Board's treatment of
15 acquisition premiums put captive shippers at
16 risk because they have no choice but to pay
17 higher rates passed on to them by the
18 railroad. And ultimately, it means that a
19 smaller number of shippers will meet the 180
20 percent threshold that's required to challenge
21 rates before the STB.

22 I strongly urge you to address

1 this issue when you're considering ways to
2 improve competition in rail markets.

3 In closing, I'll just say that
4 contrary to how this issue is often portrayed,
5 rail competition isn't about shippers versus
6 the rail industry. It's about the health of
7 the American economy and keeping America
8 competitive in the global economy.

9 That's in everyone's interest,
10 shippers, railroads, and the millions of
11 people that work in these industries.

12 I hope the Board will act soon to
13 make sure that American industries can stay
14 competitive in our increasingly global
15 marketplace.

16 Thank you once again for the
17 opportunity to testify, and for taking --
18 accommodating my schedule, and I appreciate
19 your careful consideration on these issues.

20 Thank you.

21 CHAIRMAN ELLIOTT: Thank you,
22 Senator Franken. We appreciate you taking the

1 time and sharing your views with us.

2 SENATOR FRANKEN: Appreciate it.

3 Thank you.

4 CHAIRMAN ELLIOTT: We've been

5 called much worse, so.

6 (Laughter.)

7 SENATOR FRANKEN: Sorry. I'm

8 sorry about that slip.

9 CHAIRMAN ELLIOTT: That's okay.

10 (Laughter.)

11 SENATOR FRANKEN: It will never

12 happen again.

13 (Laughter.)

14 CHAIRMAN ELLIOTT: Okay. We can

15 bring up the prior panel.

16 Mr. Macko, I believe we were in

17 the midst of your testimony.

18 MR. MACKO: I'll pick up wherever

19 I left off.

20 CHAIRMAN ELLIOTT: I'm sure you

21 can't match the prior testimony, but give it

22 your best shot.

1 MR. MACKO: I'll do my best.

2 The subject of this hearing is
3 strategic in nature, and very important not
4 only to USG but to our country as a whole.

5 When distilled down, it's really
6 about two key issues -- managing the country's
7 transportation infrastructure into the future
8 and rail's critical role in that process, and
9 reaffirming the fundamental value of America's
10 free market economy in understanding the
11 dynamics of supply and demand.

12 We're going to combine our
13 comments on a number of related issues
14 identified by the Board including alternate
15 through routes, terminal facility access,
16 reciprocal switching agreements, bottleneck
17 rates, and access pricing.

18 When we look at this combination
19 of subjects, it would be humanly impossible
20 for a shipper not to get excited about the
21 prospects of totally opening up the existing
22 rail network.

1 Shipping from an origin with
2 access to multiple carriers to destinations
3 served by multiple carriers could be viewed in
4 some circles as nirvana. While it's easy to
5 get swept up into the thrill of the thought,
6 we have to pause and remember, these are
7 private rail networks owned and built by the
8 railroads.

9 Investments to grow and expand
10 were made on the basis of what these
11 investments would return to the railroad in
12 terms of productivity, profits, or new
13 business. They were not made on the basis of
14 investing for the entire railroad industry and
15 competitors.

16 As a free market driven company,
17 we at USG would struggle with the notion of
18 investing not only for ourselves and our
19 customers but also for the benefit of our
20 competitors.

21 The railroad industry should not
22 be viewed any differently. Efforts to open

1 the system will directly impact the railroad
2 investment decisions of the future by adding
3 a very awkward decision element of how would
4 our competitors expect to benefit from our
5 investment.

6 In our opinion, in a free market
7 economy, that concept defies any level of
8 logic. There have been many published studies
9 that project the condition of the nation's
10 transportation network over the next 20 to 30
11 years, and a few were referenced in
12 yesterday's testimonies.

13 These subjects all have a common
14 thing. Without significant investment, the US
15 transportation network's productivity and
16 capacity relative to demand will decline,
17 particularly in our metropolitan centers.

18 The challenges are distributed
19 amongst all modes of transportation. The
20 highway issues are extremely complex, and
21 indicate the need for staggering amounts of
22 money and coordination at the federal, state,

1 and local levels.

2 In our opinion, our highway system
3 has no clear direction or solution in sight,
4 and the future is not bright.

5 While rail has a similar large
6 investment need, the actions necessary to move
7 forward are significantly different. As a
8 private network, the railroad industry funds
9 its own maintenance of business and capacity
10 growth.

11 Over the last few years, they've
12 also created a number of unique private/public
13 partnerships to enhance and accelerate this
14 investment process.

15 The bottom line is that the
16 railroad industry is poised to address the
17 growing needs of the country's transportation
18 network, and do it primarily by itself, and
19 most importantly, without a burden to the US
20 taxpayer.

21 It is USG's fundamental belief
22 that a dollar invested in rail for the future

1 will move more freight, move it safer, and
2 move it more environmentally friendly than
3 that same dollar invested in any other
4 competing mode.

5 We cannot afford to do anything
6 that will stymie this process. We could
7 surely go into significant detail on each of
8 the operational issues identified by the
9 Board. It's USG's view that as attractive as
10 some of these ideas may sound on the surface,
11 they cannot be pursued and implemented at the
12 potential expense of the railroads investing
13 for the shipping community and the nation's
14 future.

15 Our future ability to efficiently
16 and cost-effectively move our goods to market
17 is far too important and critical to the long-
18 term success of our business than the short-
19 term revenue shift that these changes may
20 bring.

21 Railroad profits should not be
22 shifted to other parts of the supply chain,

1 but rather retained and invested in the growth
2 of the existing rail network.

3 We use a variety of transportation
4 modes to serve our business. With the total
5 transportation spent of approximately \$400
6 million annual, rail represents about 15
7 percent of our total spend.

8 While predominantly a truckload
9 shipper, we use rail and lanes where it offers
10 us the best value. Rail is the most efficient
11 and safest mode for moving our products in
12 those lanes.

13 Let me emphasize this point. We
14 utilize rail in select lanes because it's the
15 most competitive mode when compared against
16 alternatives. The process has served us well
17 since Staggers, and we see no basis for
18 changing these market-based rail solutions
19 into the future.

20 In summary, America's free market
21 system is unmatched anywhere in the world.
22 The fundamental objective of companies

1 operating in a free market is to be
2 profitable, so one can invest in one's
3 business's future and the future of one's
4 customers.

5 Since returning to profitability,
6 that's exactly what the railroads have done
7 and continue to do. As stated earlier, the
8 shipping community and our transportation
9 needs the railroads profitable, growing,
10 investing, and hauling more freight for our
11 country.

12 The railroad system is not broken.
13 It's not in need of a tweaking, and it does
14 not need a shift towards regulation. The
15 objectives of the Staggers Act are being met
16 and fulfilled every day.

17 The industry has adapted. It's
18 healthy. It's reinvesting in itself and is
19 growing to meet the future needs of the
20 nation.

21 True to the act's original intent,
22 the objective now is to let the progress

1 continue, and to let our valued business
2 partners continue to grow the best railroad
3 network in the world.

4 Thank you.

5 CHAIRMAN ELLIOTT: Thank you,
6 panel.

7 Vice Chairman?

8 VICE CHAIRMAN BEGEMAN: Sir, I
9 think you just mentioned that 15 percent of
10 your transportation is via rail. Is that what
11 you said?

12 MR. MACKO: Yes.

13 VICE CHAIRMAN BEGEMAN: And I know
14 you also mentioned that you're from Chicago.
15 When you choose to utilize rail, do you have
16 competitive options, or are you -- I mean,
17 Chicago certainly is a big gateway.

18 MR. MACKO: We review all modes.
19 We review modes between rail carriers --

20 VICE CHAIRMAN BEGEMAN: But I mean
21 as far as rail-specific, do you have multiple
22 carriers that you utilize?

1 MR. MACKO: We do have facilities
2 that are multi-served, shipping to facilities
3 in some cases that are multi-served.

4 And I think the important thing to
5 notice or to reference is to be careful that
6 we don't misinterpret open access. I can cite
7 several examples where we have an open access,
8 multi-carrier solution. But you know what, no
9 two railroads are built alike.

10 I can cite an example of our
11 facility in West Texas that routinely ships
12 rail to the Denver market, on both railroads.

13 One railroad's route is 800 plus
14 miles. The other railroad's route is 1400
15 miles. The rates are not the same, nor should
16 they be. Open access does not guarantee the
17 same route to destination.

18 And so when we look at -- when we
19 look at routes, we look at, what are our
20 available rail alternatives, available truck
21 alternatives, and available intermodal
22 alternatives, and we work with all three

1 modes.

2 VICE CHAIRMAN BEGEMAN: Well, I
3 think you're in a lucky position compared to
4 a lot of the shippers that have testified,
5 because they truly are captive, particularly
6 the chemical guys in one of the previous
7 panels, who was strictly had no option other
8 than rail.

9 Sir, you indicated that the
10 processes that the Board for bringing rate
11 complaints just still are sort of out of reach
12 for you. Do you have any specific
13 recommendations of what the Board could do,
14 should do, to address you concerns?

15 MR. FRAUENHEIM: Our outbound rail
16 shipments, rail spend, annually is about \$2.6
17 million, so trying to litigate a rate case for
18 a company of my size, as Fred said, it costs
19 a lot of money. It's just not open for us.

20 Our revenue to variable cost
21 ratios for our average shipment is about 400
22 percent, which is more than twice what the 180

1 percent that would allow us to potentially put
2 through a rate case.

3 I really don't have an answer for
4 you of what you can do. I did pick up this
5 handy little brochure coming in this morning--

6 VICE CHAIRMAN BEGEMAN: Good.

7 MR. FRAUENHEIM: -- the Rail
8 Customer and Public Assistance Program. I
9 wasn't aware of this program.

10 It sounds like it may be a very
11 good alternative for small shippers like
12 myself, so, I'll look into that further. So
13 it might be that my coming here, that this was
14 very beneficial, so, we'll see.

15 COMMISSIONER MULVEY: Yes, I'm
16 glad that might be helpful to you, because our
17 group has been successful on numerous
18 occasions, and hopefully, that will be helpful
19 for you.

20 You made the point for M&G that
21 the tariff rate is one of the real problems,
22 having to pay the tariff rate while the case

1 is being pursued.

2 Unfortunately, one of the problems
3 historically was that that was not always the
4 case. What the ICC used to do was, it would
5 suspend a rate. And so the railroad could not
6 charge the rate that it was proposing until
7 the ICC decided.

8 Well, then, and unfortunately I
9 would say perhaps as now -- some of these
10 cases did drag on longer than you would like.
11 And meanwhile, the railroad had to forgo all
12 the revenues. And so even if the railroad won
13 the case and was eventually able to raise the
14 revenues, it was not able to raise them
15 retroactively, and so that was lost revenue
16 for the railroad.

17 It was one of the things that
18 contributed to the railroad's financial
19 debilitation over the years. And I think
20 that's one of the reasons why we allow the
21 railroads to put the tariff into effect, and
22 then we will give reparations if indeed the

1 shipper ultimately wins.

2 So I think that shippers need to
3 understand, there's a reason -- there's sort
4 of a method to the madness, if you like, while
5 you --

6 MR. FOURNIER: It's totally unfair
7 today, though.

8 COMMISSIONER MULVEY: But
9 Unfortunately, that's the approach. Perhaps
10 there's a way of splitting the baby. I don't
11 know, to put half the tariff in, or part of
12 the increase in, or -- I just don't know how
13 you would deal with that.

14 Obviously, if we could processes
15 the cases more quickly, that would certainly
16 mitigate against the shipper paying the rate
17 for an abnormally long period of time.

18 You mentioned that the cost of
19 litigation was \$15 million to \$20 million you
20 were looking at, I thought you were saying,
21 someone said that, \$11 million?

22 You said that, yes. And I was

1 wondering again if indeed that was -- if you
2 had any documentation for that, and again,
3 what part of that was paying the tariff, and
4 what part of that was the litigation cost.

5 MR. FOURNIER: We ran out -- we
6 ran out of here when you raised that question
7 with one of the other panels to find out what
8 we had spent, because I remembered yesterday
9 with our attorney, he said that basically,
10 we're right on the anniversary of one year
11 since we filed.

12 So, I said, okay, let's see how
13 much we've spent so far. So we went out
14 there, and we got it, and now this
15 documentation, I'll sign.

16 (Laughter.)

17 But it's small. I'm just going --
18 legal and consulting, \$2.6 million.

19 Pretty heavy, right? But that's
20 what it costs these days.

21 Tariff, \$4.7 million.

22 And it isn't one lawyer or one

1 consultant. I mean, you know, to do one of
2 these things is rather involved, as you know
3 better than I --

4 COMMISSIONER MULVEY: Right.

5 MR. FOURNIER: -- whereas I'm
6 finding out. But really, so it's \$2.6 and
7 \$4.7, that's through May. So, that's
8 considerable.

9 In fact, I came in here thinking
10 that, okay, we'd do this reciprocal switching,
11 we'd do this open lane, wonderful.

12 Then I'm hearing, my God, that
13 doesn't guarantee you anything, right? It may
14 be an avenue that someone said yesterday
15 could, over a period of time, maybe a couple,
16 three years, people will start to compete.

17 But these railroads are great.
18 They can just sit back and just not take it --
19 you know, take advantage of the opportunity,
20 you know, and we're dead.

21 But I think the speed of getting
22 this thing done, I mean, right now, we're very

1 confident of our case. It's one that is
2 before you. Speed is the big thing.

3 I don't know if this could go down
4 to a six month process, but then your staff
5 would probably want to throw stuff at you,
6 because you'd have 1,000 cases, you know?

7 So I don't know the answer, but I
8 do know one thing. The speed needs to be
9 there, and the expense, it is prohibitive for
10 a lot of companies.

11 And ours, we finally -- I mean,
12 and we discussed this a long time, and it was
13 a very tough decision, but I think it had to
14 be the right one, based on the options.

15 COMMISSIONER MULVEY: We will
16 admit that it's a complex process, but we'll
17 also point out that it is one that has been
18 approved by the courts. I think the ICC in
19 the past, did have approaches that were
20 simpler, quicker, but did just not pass
21 muster.

22 And this SAC process that we use,

1 the stand-alone cost process, is one which
2 makes use of accepted economic theory and
3 analysis, and has been blessed by the courts.

4 Just one more question I have.
5 You talked about this new plant you're
6 building on the Gulf Coast?

7 MR. FOURNIER: Yes.

8 COMMISSIONER MULVEY: Now, is that
9 being built in America, or is that being built
10 -- the Gulf Coast is a big place, so is it
11 being built in Mexico/Central America, or is
12 it being built in the Gulf Coast of the United
13 States?

14 MR. FOURNIER: Gulf Coast of the
15 United States.

16 COMMISSIONER MULVEY: Okay. Well,
17 thank you very much.

18 CHAIRMAN ELLIOTT: I just have one
19 question. It's a question I've asked pretty
20 much all the shipper panels, and just, we've
21 heard a lot of testimony that the railroads
22 really aren't competing, even where there's

1 competition available, and the conclusion
2 that's been drawn by various groups is if
3 they're not competing, access isn't going to
4 help.

5 So my question has been, if you
6 had your preference, if this is applicable to
7 you, would you rather the Board pursue open
8 access, or look towards improving the rate
9 process? Like you said, Mr. Fournier, you
10 know, speeding up the process, something like
11 that, that might make it a little more useful
12 to you?

13 MR. FOURNIER: Speeding it up
14 would definitely be the big key. But when
15 you're paying, you know, 300, 400 percent of
16 variable cost, it's -- it's not hard to figure
17 out that these guys don't want to negotiate
18 very much.

19 And they like your process, as you
20 heard, because it is so lengthy, because they
21 can do a rope-a-dope with us. I mean, they
22 can just sit back and let is flail away and

1 spend like crazy. And it just goes on and on.

2 So I think anything to expedite it
3 in a proper fashion, as you say, one that's
4 careful, and it's correct, so it's got to be
5 the right decision type of process. But I
6 think that definitely is needed.

7 CHAIRMAN ELLIOTT: And I might not
8 have -- the question might kind of lost a
9 little bit, but would you prefer us to improve
10 that process as opposed to -- if we went one
11 way or another, would you rather us work on
12 improving the regulatory process through rate
13 cases, or would you rather us look more
14 towards open access?

15 MR. FOURNIER: If we could do open
16 access and it resulted in competition, or if
17 you did the other and it resulted in
18 competition, I'd be happy with either.

19 Right now, I'm getting very
20 concerned. Two days ago, before I walked in
21 here, I think it was an easy answer for me.
22 I'd have said the open access.

1 After listening today and
2 understanding that some people that are dual-
3 served, they're in worse shape than I am,
4 because they can't even come to you, whereas,
5 as captive shipper, at least I can come to
6 you.

7 So, you know, it's a tough
8 question. I don't have a right answer, but
9 whichever one can get me to competition faster
10 would be the one I would chose, and
11 unfortunately, I'm not the judge of that. I
12 don't know.

13 CHAIRMAN ELLIOTT: Thank you.

14 Anybody else care to take a crack?

15 MR. FRAUENHEIM: Mr. Chairman, I
16 had mentioned that one of our plants is
17 underperforming versus our plan for that
18 facility, and that facility has -- there's
19 another railroad that's only about six miles
20 away from that facility.

21 If that facility was served by two
22 different railroads, it's our estimation we

1 could increase our volumes from that plant.
2 We've had rate offers at that facility as high
3 as 1076 percent RVC, and obviously, we're not
4 shipping on that lane, because frankly, we
5 couldn't afford it.

6 CHAIRMAN ELLIOTT: Thank you.

7 MR. MACKO: One quick comment.
8 You know, as I listened to comments over the
9 last day and a half, it's clear there are a
10 number of shippers who have rate concerns.
11 Obviously, a rate process in front of the STB
12 I think would be well served.

13 As a shipper and other shippers in
14 the marketplace who are thriving under the
15 existing network setup, we are concerned about
16 across the board changes that have the
17 potential impact on capacity and the ability
18 of the railroads to operate for our benefit.

19 And so we would be very, very
20 concerned about broad-based operational
21 solutions that could negatively impact
22 concerns like USG has relative to the railroad

1 networks' capabilities and future needs.

2 This issue of transportation
3 network for the country, to us, is extremely
4 big, extremely significant.

5 CHAIRMAN ELLIOTT: Thank you.
6 Those were actually very helpful answers. And
7 thank you very much for your comments. And I
8 think we're going to head on to the last
9 panel.

10 COMMISSIONER MULVEY: Thank you.
11 We can begin. Let me see. Are all of the
12 panelists here? I see Mr. Strohmeier, Mr.
13 Varda here.

14 Is Mr. Dickman here, and Mr. Kemp?

15 Okay. Well, Mr. Varda, do you
16 want to begin? Jim will be back in a few
17 minutes.

18 MR. VARDA: Vice Chairman Begeman
19 and Commissioner Mulvey, thank you for
20 undertaking this proceeding and for the
21 opportunity to speak today.

22 I am setting aside our previously

1 submitted written testimony to simply
2 summarize the main points and to provide a
3 couple of observations prompted by testimony
4 given by others over these two days.

5 As background, the associations
6 and shippers in our group were present in the
7 1980s for the collapse of the Class 1s serving
8 what became the Wisconsin Central Lines,
9 principally in Wisconsin and upper Michigan.

10 We were present for the formation
11 of the Wisconsin Central and its competitive
12 successes through the 1990s, and we have been
13 present for the failure of the competitiveness
14 under the control of Wisconsin Central by
15 Canadian National over the last decade.

16 We've participated in all of the
17 related ICC and STB proceedings.

18 Our initial comments and written
19 testimony describe this experience, including
20 specific examples that demonstrate that the
21 independent WC, to have been a competitive
22 model for non-captive freight, and since

1 controlled by the CN, an ongoing example of
2 the failure to compete for non-captive
3 freight.

4 Our principal point is this: the
5 Board cannot effectively review the state of
6 competition in the railroad industry without
7 addressing more broadly the current state and
8 future prospects of the railroad industry's
9 competitiveness for non-captive freight.

10 The burden carried by those
11 subject to differential pricing is, after all,
12 and perhaps, in large part, a function of the
13 effectiveness of the industry's competition
14 for non-captive freight. And by that, we mean
15 freight which contributes to going concern
16 value with revenue-variable cost ratios
17 between 100 and 180.

18 The few allusions to non-captive
19 freight in the record thus far are simply
20 insufficient. Mr. Hamberger's last comment
21 yesterday, leaving on a high note, as it were,
22 suggested railroads work with their shippers

1 to move the available freight. His testimony,
2 his comment was echoed by Mr. Lanigan today.

3 Mr. Burkhardt said, and I'm
4 paraphrasing, an intelligent railroad will not
5 let truck-competitive freight get away if the
6 railroad feels able to quote a rate that will
7 move the freight.

8 Indeed, Mr. Burkhardt's statement
9 was absolutely and positively true of the
10 Wisconsin Central on his watch and until
11 Wisconsin Central came under the control of
12 Canadian National.

13 Speaking to the Wisconsin
14 Department of Transportation annual freight
15 rail conference, November 19, 2008, Mr.
16 Burkhardt described a skew in the North
17 American railroad industry between Class 1s on
18 the one hand and regional railways and short
19 lines on the other.

20 He characterized the Class 1s as
21 having quote, "restructured into plain
22 vanilla, high-volume trunk operations with

1 scant interest in running distribution
2 networks and light-density lines."

3 You might juxtapose Mr.
4 Burkhardt's statement to the passionate
5 description by Mr. Manion today of the
6 importance of velocity, the importance of the
7 efficiency of the operation, and maybe
8 consider, would Mr. Manion's train stop in
9 Albert Lea for the quilts, or deliver supplies
10 to Albert Lea merchandise freight? There is a
11 tension between the trunk line operations and
12 merchandise.

13 In contrast, much like the
14 testimony of General Timmons and Mr. Ogborn
15 yesterday, Mr. Burkhardt characterized
16 successful regional and short lines as
17 concentrating management efforts on rebuilding
18 single-car networks and containerization,
19 focused on customer's requirements, service,
20 and price, and keeping unremitting pressure on
21 cost.

22 This latter description is how the

1 independent Wisconsin Central successfully
2 took lots of trucks off the highways.
3 Examples are provided in our initial comments.

4 It has not been that way for most
5 of the last ten years under CN control, though
6 we are, since our previous testimony in
7 February, cautiously optimistic that the CN is
8 now or may now be ready to address some of
9 those problems we described to you.

10 The Midtec mill that gave its name
11 to the precedent and the standard for
12 competitive access discussed in testimony
13 yesterday is located at Kimberly, Wisconsin,
14 on the Wisconsin Central lines.

15 It has been closed due to the
16 recession. Before closing, among other
17 railroad service problems, the mill was
18 receiving only approximately 60 percent to 80
19 percent of the boxcars it ordered, despite the
20 fact that the railroad had similar cars in
21 storage.

22 The 60 to 80 percent means that

1 the railroad's rates for the mill's non-
2 competitive -- non-captive, highway-
3 competitive freight would have moved at least
4 20 percent to 40 percent more carloads.

5 The railroad had already sold the
6 freight. The freight was not taken away by
7 vigorous truck competition. Trucking the
8 freight was the default when the railroad
9 failed to serve.

10 What does not to compete or
11 failure to compete mean? From our
12 perspective, one way to answer the Chairman's
13 question is, not to compete means that the
14 railroad has set a rate or negotiated a rate,
15 but fails to provide the equipment and the
16 service.

17 Could we make a case of failing to
18 deal or foreclosure under the Midtec
19 competitive use standards? Maybe, but of
20 course, only after a successful petition to
21 revoke the boxcar and commodity exemptions.

22 That's not going to happen. The

1 Board is not going to hear about this type of
2 railroad competitiveness problem, at least not
3 until fuel prices or other factors make
4 trucking prohibitive.

5 Again, from our -- the perspective
6 of our experience, a better standard or an
7 element of the standard for granting
8 competitive access for non-captive freight
9 might be if the incumbent railroad is not
10 moving the freight, let the other guy have a
11 chance to compete the freight off the highway.

12 That's why we said in our initial
13 comments and testimony that the
14 competitiveness problem, from our perspective,
15 has more to do with the service than rates.
16 We provide a number of other examples in our
17 written testimony.

18 Rail carloads, for example, from
19 Packaging Corporation of America's Tomahawk
20 Mill, as well as three others around the
21 country, down from 70 percent to 50 percent
22 since 2005. 2,400 carloads per year from

1 another mill, which WC's competitiveness had
2 increased from 1,000 a year, now down to as
3 few as 20 per year, since about 2003, with the
4 difference having been returned to truck.
5 There are many other examples in the written
6 testimony.

7 Talk about rising rates yesterday,
8 rising rail rates yesterday. The question we
9 think that you should address is, are Class 1
10 rates rising because as a result of the
11 consolidations, the railroads' differential
12 pricing of relatively captive freight has
13 become more effective, allowing them to pick
14 and choose when to accept or to simply forgo
15 the challenges and risks of capturing
16 contribution to going concern value from non-
17 captive freight?

18 Or, in Mr. Burkhardt's words,
19 allowing the Class 1s to focus their attention
20 on plain vanilla, high-volume, trunk line
21 operations with scant interest in running
22 distribution networks and light-density lines,

1 retail railroading that competes with trucks?

2 This is why we are skeptical about
3 the Board's changing its access rules or its
4 policies until it has fully investigated and
5 understands the state of competitiveness in
6 the railroad industry for non-captive freight.

7 Thank you.

8 CHAIRMAN ELLIOTT: Thank you.

9 We'll now hear from Mr. Dickman
10 from the Mercury Group.

11 I believe you have ten minutes.

12 MR. DICKMAN: Chairman Elliot,
13 Vice Chairman Begeman, Commissioner Mulvey,
14 staff and interested parties, my name is Craig
15 Dickman. I would like to thank you for the
16 opportunity to appear before you today.

17 The Board has asked for ideas to
18 improve the competitive marketplace, and at
19 the same time, have a minimum negative impact
20 on the financial health of the industry.

21 With that charge in mind, I would
22 like to discuss an option, bringing

1 transparency of fuel and energy cost to the
2 rail industry that we believe will improve the
3 competitive marketplace for both rail shippers
4 and the rail industry alike, provide for the
5 financial health of the industry and do so in
6 a sustainable way, allow some of the inherent
7 benefits of rail transportation, improved fuel
8 economy, lower emissions, to move from being
9 an interesting concept to actually creating a
10 competitive advantage for the rail and for US
11 shippers.

12 And I believe that this can be
13 advanced through a spirit of collaboration and
14 cooperation, and doesn't require intervention
15 or regulation.

16 With that in mind, I wanted to
17 share some information with you today, and
18 I've got some slides, if I can touch on them
19 for a moment.

20 As part of the Mercury Group, and
21 for background, we're a shipper group focused
22 on managing energy costs across the supply

1 chain. So we work not only with rail and
2 intermodal, but work with truck and work with
3 marine and energy costs in total.

4 And we were asked by a group of
5 our clients to provide insight on the energy
6 costs of some intermodal movements. This
7 specific study we completed focused on 184,674
8 unique freight movements, and included
9 movements between 1,000 and 2,000 miles, and
10 used dry freight containers, just to narrow
11 the study.

12 I'd like to share some of that
13 data. The first chart in what we have
14 indicates really why this is an important and
15 timely issue. Intermodal fuel costs have
16 grown, and the chart highlights the time
17 period from January of 2010 through yesterday,
18 actually. And you can see that it's grown to
19 be a quarter of the total cost, actually more
20 than a quarter of the total cost of moving
21 goods is now the fuel surcharge component of
22 intermodal.

1 For shippers, they need to be able
2 to understand these costs to make effective
3 decisions on how to move their products. For
4 railroads, this is a significant cost, most
5 likely, their most volatile cost, and they
6 must capture and recover it in order to
7 maintain their financial well-being.

8 The challenge, however, is that
9 today's marketplace makes it virtually
10 impossible for a shipper to understand the
11 fuel consumption, the fuel costs, or the
12 energy-related emissions associated with
13 moving their goods, and which are so critical
14 to their decision-making process.

15 It's also a challenge for the rail
16 providers and the intermediaries involved in
17 intermodal transactions. Inherent economic
18 distortion is embedded in today's practices,
19 and requires transportation providers to know
20 that virtually every movement has the
21 incorrect fuel cost, and then folks hope by
22 magic that at the end, it all works out

1 relatively close.

2 That's why we always see
3 transportation providers qualify their earning
4 statements by saying that fuel costs and
5 misalignment of fuel surcharges distort
6 earnings, and that's why we heard at your
7 February 24th hearing, one of the economists
8 mentioned that some of the data that's looked
9 at is difficult to digest because some of the
10 timing issues associated with fuel cost.

11 Now, as we explore the data
12 further and look at the next chart, what I'd
13 like to highlight here is the real fuel market
14 behavior that's taking place.

15 There's three aspects to this
16 chart. The green line is the daily pricing
17 for crude, which some folks use to manage
18 their fuel economy. The blue line is the
19 Department of Energy that is used by many
20 folks to capture fuel surcharge costs. And
21 then the real diesel market price, updated
22 daily, is highlighted in the red, and that

1 gives you an idea of the behavior as it exists
2 for compared to those other indexes.

3 A couple of things we see as we
4 look at this. You know, first you see the DOE
5 index both mutes the daily price changes and
6 frankly misses some of it, and the crude
7 behavior, while an interesting underlying
8 indicator of the raw material of diesel, has
9 a different supply/demand characteristic, and
10 doesn't really represent the costs as they
11 occur.

12 So, if we shift for a moment and
13 take a look at these in change terms, going
14 back to that January 2010 time frame, what we
15 see is that a surcharge that's based on the
16 DOE index, such as if we look particularly --
17 it's a little hard to see, but around the June
18 10th time frame, you can see a separation of
19 the real fuel market behavior from the DOE
20 index, and that creates a distortion in the
21 underlying cost.

22 Conversely, if you look at crude

1 and look at market cost and move out to
2 September, you can see a real separation of
3 those costs, and that change would not allow
4 for reasonable or fair reimbursement. And
5 that's just one of the examples of the
6 economic distortions that underlie fuel
7 surcharges and creates problems for the
8 shipper and rail community alike.

9 When you look at individual
10 movements, those problems become even more
11 exacerbated.

12 And now as we move to the fuel
13 charges associated with those movements, this
14 next chart, I pull forward the two lines that
15 cover the Department of Energy index as well
16 as the real fuel market behavior, and then we
17 add to it the 184,000 movements that we had
18 and what the rail fuel surcharges that
19 accompany those movements were, based on the
20 price mechanisms.

21 What you can see when we look at
22 that is that the relationship between real

1 fuel costs and what the rail fuel surcharges
2 were become exaggerated and distorted when
3 there's movements.

4 This happens to be in about an 18-
5 month period, whereby fuel costs were largely
6 rising. And so what happened is you see that
7 separation of real fuel cost from fuel
8 surcharges, and how it grew during this period
9 of time.

10 If we would look at a time when
11 fuel prices dropped dramatically, and it's a
12 little hard to see, but if you look around
13 that March 2010 time frame, you can see one of
14 the few times that fuel dropped during this
15 period.

16 The surcharge numbers actually
17 fell below real market costs, and would have
18 resulted in under-recovery.

19 So it really highlights some of
20 the challenges that exist with the current
21 methodology and with the behavior that takes
22 place, and it's really artificial behavior

1 that challenges both the shipper and the
2 carrier.

3 So I wanted to highlight today
4 just a couple of the challenges that we see
5 with the current methods. Because of this
6 exaggerated behavior, when compared to the
7 actual fuel marketplace, it ends up being a
8 winner and loser in virtually every movement
9 and every fuel transaction.

10 That does not set up for a healthy
11 relationship between the shipper and carrier
12 when it comes to fuel programs.

13 The fact that fuel surcharges are
14 detached from the underlying markets also
15 creates significant challenges for the
16 shipper. It's difficult for them to budget,
17 because even if they are able to guess what
18 fuel prices will be, they can't necessarily
19 understand the impact of fuel surcharge on how
20 that relationship is.

21 It makes mode decisions difficult.
22 Ironically, shippers make decisions every day

1 between truck and rail, and in this period,
2 you can have times when the fuel prices are
3 going down, fuel surcharges are going up, and
4 the mode that should be the most fuel-
5 efficient, rail or rail intermodal, actually
6 is at a disadvantage.

7 And we've seen folks shift freight
8 to truck, not because of the real behavior
9 that's taking place, but because the truck
10 market adjusts fuel costs differently than the
11 rail industry does.

12 And we also see problems that
13 shippers have had with hedging and managing
14 their risk cost. This price distortion, the
15 fact that there's a disconnection between the
16 real fuel market costs and the fuel
17 surcharges, creates a situation where it
18 doesn't qualify for hedge accounting, and many
19 companies are either not able to hedge in a
20 way they would because of this separation, or
21 have found in the past that they thought they
22 were hedged, but the underlying market's

1 behavior didn't mirror what their charges
2 were, and they ended up paying increased costs
3 and losing the benefits of a hedge.

4 It's our belief that this analysis
5 indicates that the current marketplace
6 methodology is inefficient and does not
7 support an open and competitive marketplace.

8 At the same time, we believe the
9 opportunity to do so exists today. We believe
10 that, you know, bringing energy life cycle
11 transparency and a common view of fuel costs,
12 both pricing and consumption related to fuel
13 movements, will enable better decision-making.

14 It's possible to have an accurate
15 reflection of fuel cost and price movements
16 that will ultimately build trust between the
17 shipper and the carrier, and alignment of the
18 fuel market with the reimbursement provided to
19 transportation providers will also ensure that
20 their earnings aren't distorted, that they're
21 recovering this most volatile cost, and that
22 the shippers are able to make adequate

1 decisions.

2 Further, we believe the result
3 will be that rail and rail intermodal
4 movements will become more competitive, and
5 when we have these principles applied, lead to
6 more conversion of freight to rail.

7 We also don't believe that these
8 movements will take place organically. We
9 believe it will take a clear and decisive
10 public policy to move the industry toward a
11 more open and transparent --

12 (Coughing.)

13 Sorry.

14 (Pause.)

15 Oh well. I think I'm okay.

16 CHAIRMAN ELLIOTT: You're back.

17 MR. DICKMAN: Yep. So we think
18 there's a real opportunity here, and believe
19 that an operation of -- excuse me. Thanks,
20 John.

21 Again, we believe there's an
22 opportunity for public policy to create this

1 change. And what we'd like to see is not
2 necessarily a quest for regulation, but a
3 movement to create a dialogue, and would like
4 to participate -- that members of our
5 organization and our shipper community would
6 like to participate in that, and believe that
7 we can really bring an open and transparency
8 of fuel, one of the most difficult costs to
9 manage, and one of the areas that brings some
10 real consternation between the two parties
11 into one where real collaboration can be
12 fostered.

13 Thank you.

14 CHAIRMAN ELLIOTT: Thank you, Mr.
15 Dickman.

16 Mr. Strohmeier, I believe you have
17 two minutes.

18 MR. STROHMEYER: Thank you, Mr.
19 Chairman, and thank you for giving me the
20 opportunity to speak today.

21 I had not originally intended to
22 participate in this proceeding, but I'm

1 grateful to the Board for the opportunity.

2 I've provided the Board with some
3 written comments. Unlike some people, I
4 actually enjoy going last, because it allows
5 me to depart from some of my written testimony
6 and talk about a little bit about what I
7 heard.

8 And there were two points that I
9 felt more than what I wrote in my written
10 testimony that may need -- I wanted to
11 address. One was the Chairman's idea of a
12 pilot project. A couple of ideas that had been
13 circulated, and one point for the new Vice
14 Chairman on some of the representations that
15 had been made with regards to reciprocal
16 switching and open access.

17 So the first point I'd like to
18 briefly make, aside from the fact that I don't
19 think regulation or looking at stuff at this
20 point in time with regards to open access or
21 reciprocal switching necessary, a pilot
22 project, I think, would suffer from some

1 severe legal challenges, one of which I think
2 is fatal.

3 But I do believe that a partial
4 project is somewhat possible without creating
5 a legal headache. And one of the issues that
6 had been raised previously, and for some
7 reason, nobody talked about it, was, as a
8 result of the Conrail merger, we had the
9 creation of two of the largest open access
10 areas as part of the process, along with all
11 the associated operational headaches. The
12 Board had direct monitoring of that for almost
13 ten years, in fact, just recently gave that up
14 in 2008.

15 So, for some reason, the Class 1s
16 completely decided to ignore discussing
17 anything about the trials and tribulations of
18 the competitive access issue that occurs
19 within over 400 miles of track in some of the
20 most important markets in the United States
21 with regards to competitive rail access. And
22 that issue had not been addressed prior to

1 that.

2 So subsequently, I felt that it
3 was something that the Board may want to
4 consider. And I know my time is up here. But
5 I did have some ideas on what you might be
6 able to do for a potential pilot project, if
7 the Board is interested in hearing about them.

8 CHAIRMAN ELLIOTT: Thank you very
9 much.

10 Commissioner?

11 COMMISSIONER MULVEY: Nothing too
12 much. In terms of the Wisconsin Central, I
13 was privileged to work for the state Wisconsin
14 on the first state Wisconsin rail plan, and
15 Wisconsin has always been very much involved
16 in rail. And in fact, back in those days, the
17 WC was pretty much one of the best Class 2
18 railroads in the country, and it gave very,
19 very good service. So I do follow what's
20 happening with Wisconsin and Wisconsin Central
21 and the CN with particular interest. So
22 that's pretty much all I wanted to say on

1 that.

2 With regard to the fuel
3 surcharges, do you feel that what the Board
4 tried to accomplish, back when it had its
5 hearing and its rules, that that we had -- we
6 were going in the right direction? We're
7 trying to tie the fuel surcharges to fuel
8 consumption.

9 Do you have any way that you think
10 that we can actually do a better job of that?
11 There seems to be a lot of shippers saying
12 that the fuel surcharges still aren't
13 reflecting consumption of fuel, and it's still
14 unclear what -- because we have these indices.

15 You had the West Texas crude
16 measure as well as the DOEs. Would it be
17 better to just tie it to that, as opposed to
18 a case-by-case analysis?

19 MR. DICKMAN: Well, a couple of
20 thoughts. You know, first off, I think the
21 Board definitely moved in the right direction
22 with the move away from percentage-based fuel

1 surcharges. You know, when you look at
2 percentage-based surcharges, they really do
3 blow out, and so I think the fact that you
4 made that change is very positive.

5 I think the fact that the industry
6 as a whole didn't move to it across all
7 commodities and for intermodal as an example,
8 continue to use percentage-based programs, is
9 a sign really that the industry doesn't move
10 easily, and I think it would be helpful if the
11 industry frankly moved on intermodal and
12 others to -- away from the percentage-based
13 movements first. So I think it is moving in
14 the right direction.

15 I do think that it used to be very
16 difficult from a technology standpoint to
17 capture fuel costs, capture fuel consumption,
18 but in this day and age, with information
19 availability, with real-time access to data,
20 we find the ability to capture fuel costs and
21 consumption in real-time as something that's
22 very possible.

1 The organization that we're part
2 of actually has processed so far over 14
3 million movements on the day of the shipment
4 to identify the rail costs and the rail
5 consumption in order to get down to a very
6 specific movement level of what the behavior
7 is of fuel costs.

8 And so we think there's a number
9 of things that can be done to start moving
10 toward a more accurate measure, start
11 eliminating the economic distortion, whether
12 it's the timing, the geography, the fuel tax,
13 the different impacts of the market, there's
14 some real opportunities to move toward a very
15 transparent marketplace.

16 And it's amazing when you think
17 of, you know, really the underlying mechanisms
18 haven't changed from the times back in the
19 `70s when the first fuel programs started in
20 with the fuel crisis, and all the advances of
21 technology haven't really been applied to
22 something that's now 25 percent of the cost of

1 moving these goods.

2 COMMISSIONER MULVEY: Thank you.

3 One point on the revocation of exemptions.

4 When you mentioned that, you sounded as though
5 you said it's not going to happen, that the
6 Board wouldn't entertain that.

7 The problem was, we really don't
8 get many requests for revocation of exemptions
9 unless they're specific revocations in order
10 to deal with a specific problem. In my time
11 here at the Board, I can recall one
12 revocation, and that was to deal with a
13 problem in Texas with cottonseed oil.

14 But I think the Board would
15 entertain a revocation of exemption if it was
16 put forward. But it's not as though the Board
17 would dismiss those out of hand. And I'm not
18 sure if you're indicating that in your
19 statement.

20 Mr. Varda?

21 MR. VARDA: I was referring to
22 revocation relative to a competitive access

1 problem, not the fuel --

2 COMMISSIONER MULVEY: No, and
3 that's what I meant. I didn't mean with the
4 fuel. I meant revocation of exemption with
5 regard to a class exemption or a commodity
6 exemption, or a --

7 MR. VARDA: I think when you look
8 at a shipper like Midtec Mill, and you look
9 around, similar facilities, similar problems,
10 in our experience.

11 The shipper's not going to
12 petition and come here. They're going to put
13 it on truck, you know, until trucking is so
14 prohibitively expensive -- in other words,
15 until the non-captive person move towards
16 being more captive, you're not going to hear
17 about it. And there's a lot of opportunity
18 cost and waste in between this time and that
19 time, and that's what we're concerned about.

20 COMMISSIONER MULVEY: Okay.
21 That's all I have. Thank you very much.

22 VICE CHAIRMAN BEGEMAN: Just a

1 question, Mr. Dickman. As far as the
2 collaboration and what the data points are
3 that you ultimately conclude, where does that
4 information go?

5 How is that information then made
6 public or transparent to the shipper, or to
7 the carrier, to whoever needs to know what the
8 rate impact is?

9 MR. DICKMAN: That's a great
10 question. We started working with shippers in
11 2005. And what we do is calculate the price
12 on every given day for every given movement,
13 and then provide it to the shipper and to the
14 rail provider, so it's part of an agreement
15 between the two.

16 So what's happened is we've got
17 shippers who have decided to move toward this
18 more market-based fuel program. We've had
19 meetings with all their providers.

20 So, as an example, we may have one
21 shipper whose connected with 250 different
22 transportation providers. We're connected

1 electronically with all of them. Everybody
2 agrees on the rules in advance.

3 And then every time a freight
4 movement is moved, we're calculating,
5 auditing, and providing that data to the
6 people who are involved in the transaction.

7 So there's absolute transparency.
8 So now the shipper has an understanding of
9 what's the fuel cost, what's the consumption,
10 what are the emissions. It's the same
11 information the transportation provider has,
12 frankly, in many occasions, the same
13 information that the fuel provider has,
14 because they're part of this transaction as
15 well. And it really has changed decision-
16 making a great deal.

17 If I can share one example, we
18 have a shipper who was making a decision
19 between trucking movements and intermodal
20 movements, and their customer was concerned
21 about intermodal because of the additional
22 transit time and the fact that it would take

1 some additional inventory.

2 But by providing this
3 transparency, they were able to go to their
4 end customer and say, we've got a real
5 opportunity here. If you're able -- if you
6 allow us to move this on intermodal, we can
7 take out this much fuel. It will remove this
8 many emissions, and that is a tradeoff that
9 we'd like to discuss around whether it's worth
10 a little bit more inventory or not.

11 So it changes the whole discussion
12 and the dialogue when everyone has that
13 transparent information, and we've seen some
14 really interesting innovative decisions made
15 from having it, where now, those get hidden.

16 You know, the rail industry talks
17 about improved fuel economy and emissions.
18 It's absolutely correct. But if the shipper
19 can't see the benefit and move it out to their
20 marketplace, behavioral change doesn't take
21 place.

22 And what we want to do is connect

1 that -- the facts with that behavioral change.
2 And then again, I think we find that rail is
3 more competitive, and it enhances the
4 competitive position of those individual
5 shippers as well.

6 VICE CHAIRMAN BEGEMAN: One final
7 thing. I know that you wanted to mention
8 something to me, and your time ran out. If
9 you could briefly just touch on that.

10 MR. STROHMEYER: Oh. You've heard
11 a couple of discussions today about three
12 terms, reciprocal switching, open stations for
13 switching, and open access.

14 And in listening to your questions
15 over the time and many of the answers that you
16 have been previously given, you sort of got
17 the -- I was given the impression that you
18 sort of were lumping this all into one
19 category.

20 And I didn't know if you were
21 aware, they are three very distinctively
22 different types of access, each with their own

1 little nuance, and I was kind of surprised
2 that the Class 1s couldn't better articulate
3 what the various versions were between the
4 two.

5 Reciprocal switching has always
6 been, if you're interested in knowing, the --
7 reciprocal means to reciprocate. You give me
8 something, I give you something.

9 It was voluntary agreements within
10 -- where two railroads would cross, let's say,
11 if Senator Franken's plant was a mile up the
12 road or two miles up the road from where these
13 two rail lines would intersect, and he was on
14 carrier A, and a grain mill would open up on
15 carrier B two miles from the junction and
16 where it was mutually beneficial, instead of
17 building independent branch lines to go serve
18 each of those respective customers, the
19 railroads would open, through reciprocating,
20 I will switch the facility on your behalf, and
21 you can switch this facility on my behalf, and
22 the customers would have access at both those

1 points.

2 And they were done basically
3 through mutual reciprocation, and that was a
4 voluntary agreement amongst the railroad as
5 opposed to a forced access.

6 The next portion that you hear
7 would sometimes, you know, it's the give and
8 take that was given for various uses of their
9 system, and they would prescribe that in their
10 rates and how it was structured.

11 The other one was where they would
12 open a station for switching, which is usually
13 at the request of a specific customer, a
14 particular customer would -- the railroad
15 would say, you know, customer A, in order to
16 locate the plant on my facility, he had
17 certain moves that, let's say, went -- tended
18 to lead to going to a natural carrier.

19 So what would happen is, as an
20 inducement to locating the plant, the railroad
21 would open a station to competitive access
22 through that.

1 And then of course, the third
2 process, which is one that every railroad will
3 have a cringe over, which is true open access,
4 which means any carrier can come in and
5 actually service a facility, and that sends
6 chills down every railroad's spine, including
7 my own.

8 And I didn't know if anybody had
9 adequately explained that to you, and what the
10 various components were.

11 VICE CHAIRMAN BEGEMAN: I think I
12 got it after I asked the question; I was a bit
13 confused the first time.

14 MR. STROHMEYER: Yes. There were
15 three distinctive types of services and how
16 they got into the marketplace, and I was
17 hearing people talk about one size fits all.
18 They were usually negotiated amongst the
19 railroads themselves, and that was simply to
20 avoid buildouts primarily through mutual
21 agreement. It was a much more efficient way
22 of doing it.

1 But I just thought I would bring
2 that to your attention in case you weren't
3 clear -- nobody had given a clear explanation
4 as to what it was.

5 CHAIRMAN ELLIOTT: Thank you very
6 much. I don't have any questions.

7 I just wanted to note,
8 coincidentally, I will be in Tomahawk,
9 Wisconsin in August, so I look forward to --
10 actually, I went to camp in Rhinelander, so,
11 it will bring back bad memories.

12 Anyhow, I am very thankful for
13 your participation and for everyone's
14 participation. I think it's been a successful
15 hearing.

16 Two procedural notes before we
17 adjourn and take all the comments under
18 advisement. First of all, for those of you
19 who haven't heard, if you have presented any
20 type of PowerPoint, we ask you to provide two
21 copies of that to the Office of Proceedings in
22 the appropriate manner for filing.

1 Also, final procedural comment, we
2 will keep the record open for 30 days.

3 There's been a lot of questions and answers,
4 and sometimes people weren't able to answer
5 questions or maybe want to clarify some of the
6 questions -- I mean answers that they gave.

7 So we will keep the record open
8 for 30 days to give people the opportunity to
9 supplement with respect to those matters. I
10 think that will be helpful to the Board and
11 probably helpful to yourself.

12 So, with nothing further, thank
13 you very much, and the hearing is now
14 adjourned.

15 (Whereupon, the above-entitled
16 matter was concluded at 1:58 p.m.)
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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Competition in the RR Industry

Before: STB

Date: 06-23-11

Place: Washington, DC

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230158

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 705

COMPETITION IN THE RAILROAD INDUSTRY

TESTIMONY OF AMEREN CORPORATION

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June 23, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AMEREN CORPORATION

Competition in the Railroad Industry

Ex Parte 705

TESTIMONY OF AMEREN CORPORATION

Good morning, Chairman Elliott, Vice Chairman Begeman and Commissioner Mulvey. My name is James A. Sobule, and I am Vice President and Deputy General Counsel for Ameren Services Company, a subsidiary of Ameren Corporation which I will refer to as "Ameren." Ameren Services Company provides legal and other services to all of Ameren's affiliates including its generating affiliates, and therefore represents all such affiliates with this Testimony.

In response to the Board's January 11, 2011 decision, Ameren filed comments in this docket on April 12, 2011. Ameren is testifying today in response to the Board's decision to conduct a public hearing on competition in the railroad industry. On behalf of Ameren, I would like to thank the Board for taking comments and holding a hearing on competition in the railroad industry.

Ameren Corporation is a public utility holding company headquartered in St. Louis, Missouri and provides energy service to 2.4 million electric customers and 1.0 million natural gas customers. Ameren's subsidiaries have an electric generating capacity of 16,400 MW and generate 85% of its electricity from coal. Ameren's operating subsidiaries collectively own eleven coal fired generating stations.

Ameren is the 5th largest consumer of coal in the United States, consuming approximately 39 million tons annually, and is the largest purchaser of Powder River Basin Coal. As a result, Ameren is a very large shipper of coal by rail, operating approximately 55 trainsets in continuous service, and spends approximately \$650 million annually on rail transportation.

Ameren began spending millions of dollars converting its power plants from high sulfur Illinois Basin coal to low sulfur Powder River Basin coal in the early 1990's in response to the Clean Air Act. While the Powder River Basin is roughly ten times further from Ameren plants than the Illinois Basin coal fields, the competition among railroads at that time provided competitive rail rates that resulted in the use of Powder River Basin coal being more economical than using Illinois Basin coal with the required emission controls.

As Ameren expanded its use of Powder River Basin coal, the rail rates continued to drop as a result of competition between the western rail carriers until about 2004. At that time, there was a marked change in the competitiveness of the western rail carriers which resulted in rates dramatically increasing.

Prior to 2004, Ameren found that the western carriers were interested in securing additional business and would compete vigorously to maintain or be awarded new traffic. Rail rates gradually decreased from the time that Ameren commenced using Powder River Basin coal in 1990 largely due to the non-incumbent competing railroad taking contracts as they came due by offering lower rates, or the incumbent carrier reducing its rates to keep the business. As shown on the graph in our written testimony, Ameren's rail rates increased dramatically after 2004.

Starting in 2004, Ameren found a very different competitive environment among the western railroads. Railroads appeared to be no longer interested in acquiring coal traffic that was already being hauled by a competing carrier. In every instance from 2004 to 2010 when Ameren issued bids for rail rate quotes for their UP and BNSF competitive rail-supplied plants, not a single one of the plants primarily using Powder River Basin coal at the time changed carriers as a result of these requests for new rates. In other words, the railroad that was shipping the Powder River Basin coal at the time of contract renewal retained the business. The non-incumbent railroad, at the time of the quote or pricing tariff, quoted a rate, on average, that was 43% higher than the rate of the incumbent railroad.

Because the non-incumbent rate or pricing tariff, on average, was 43% higher than the incumbent rate, the incumbent railroad rate was able to consistently impose a substantial increase from the prior rate. Through the period 2004-2010, the incumbent carrier was able to propose rate increases to Ameren that were up to an 87% increase at contract renewal.

Another phenomenon which began occurring after 2004 was what Ameren terms "non-responsive bidding." These are carrier responses to rate requests which clearly indicate that the carrier is not interested in the business. This type of bid includes no responses, responses which impose extreme one-sided contract conditions which make the quote unacceptable, or varying from Ameren's material bid parameters. During the 2004 to 2010 timeframe, Ameren received five non-responsive bids of these types.

Another type of non-responsive bid is the refusal to quote to a non-physical point. Prior to 2004, Ameren was very active in building and acquiring competitive rail access to its power plants. Ameren has fully supported self-help measures and shipper investment in the rail

transportation infrastructure to assist in fostering alternative opportunities for fuel transportation. In fact, Ameren believes it has been one of the most active shippers in undertaking such self-help measures. Since 1990, Ameren constructed four build-outs at plants to allow second rail carrier access, and also formed three short line railroads. Ameren also purchased a rail line and built barge facilities to allow competitive access to three additional plants. These facilities were often built by obtaining a favorable rate prior to construction from the competing carrier which justified investment in physical facilities. However, after 2004, Ameren found that both western carriers had adopted the policy of not quoting to "non-physical" points. In other words, railroads would not quote a rate if the physical track had not already been constructed. This further stifled competitive alternatives as a shipper is unlikely to invest in new facilities if the rate at the connection is unknown. During the 2004 to 2010 timeframe, Ameren received three non-responsive bids of this type.

I also want to respond to a few comments made in the May 27 reply comments. The UP stated¹ that shippers have stopped pursuing build-outs because they believe the Board will provide regulatory benefits at a lower cost than a build-out. I can state emphatically that is not the reason that Ameren stopped pursuing build-outs. UP's reply comments also addressed the Duck Creek build-out, which as the Board is aware, Ameren built in 2005. While the UP did receive some traffic after the build-out was completed, the UP refused to quote a rate until the physical turnout was installed. Then in 2007, Ameren had to fight to protect its build-out investment at Duck Creek in a proceeding before the Board when the BNSF sought to undermine Ameren's benefits of this build-out by leasing the BNSF track to the same carrier to which the

¹ "In other words, if coal shippers are not pursuing viable build-outs, it is because they believe the Board will provide benefits through regulation at a lower cost than if they follow a market-based approach and construct a new line." UP Reply Comments at page 11.

build-out was made. Fortunately the Board agreed with Ameren and prohibited the proposed railroad transaction.²

Ameren would also like to provide its experience in relation to BNSF's witness statement that "assertions of some coal shippers ... that after 2004 no coal business has shifted between BNSF and UP are categorically false."³ Obviously, Ameren cannot speak for all shippers and I cannot view UP's highly confidential material submitted in this case. However, Ameren's experience is that from 2004 to 2010, Ameren issued bids for rail rate quotes for ten of its competitive rail-supplied plants and not a single one of these plants changed carriers as a result of these requests for new rates.

In addition to the increases in rates, the railroads began imposing fuel surcharges. Ameren has since filed comments in the STB proceeding on Rail Fuel Surcharges in Ex Parte 661. And, Ameren still believes that diesel fuel surcharges, in combination with the fuel amount imbedded in rates, are allowing for over recovery of fuel costs for the railroads.

Ameren also notes that both UP and BNSF addressed as part of their reply comments that no regulatory changes are needed because shippers who believe that they are being charged unreasonable rates have an avenue of relief at the Board.⁴ This is exactly what Ameren would

² STB Finance Docket No. 34974, Keokuk Junction Railway Company D/B/A Peoria and Western Railway – Lease and Operation Exemption – BNSF Railway Company; STB Finance Docket No. 34918, Keokuk Junction Railway Company D/B/A Peoria & Western Railway – Lease and Operation Exemption – BNSF Railway Company Between Vermont And Farmington, IL, STB served December 6, 2007.

³ BNSF Reply Comments, Verified Statement of John Lanigan at 13.

⁴ "[S]hippers can seek relief if they believe that their rates exceed a reasonable maximum." UP Reply Comments at 5. "If a shipper believes that it is being charged an unreasonably high rate

like for all shippers, including Ameren at its plants where it has invested in self-help infrastructure investments such as build-outs or barging facilities- the right to have a backstop of relief at the Board to challenge unreasonable rates.

Ameren respectfully offers the following suggestions for alternative policy at the STB:

1. Competitive shippers are currently not protected by STB statute under the assumption that competition among carriers will protect shippers with competitive options.

However, since 2004, this has not been the case, as competitive shippers rates have often approached or surpassed the 180% of variable cost jurisdictional threshold set for captive shippers. The STB should move to interpret the statute so that if any rate exceeds this threshold, that rate prima facie demonstrates that there is a clear lack of effective competition and can be challenged under the STB rate guidelines.

2. The bar for revenue adequacy is currently set too high to provide meaningful guidance to rail rate issues. This is demonstrated by the fact that railroad financial performance, and stock price have remained high despite the recession. Privatization of BNSF is another indicator of railroad financial success.

3. Railroad fuel surcharge recovery should be transparent. The STB should use the cost data collected from the railroads to determine if fuel surcharges are allowing accurate recovery of the railroads fuel costs.

Thank you again, Chairman Elliott, Vice Chairman Begeman and Commissioner Mulvey, for the opportunity for Ameren to provide testimony today on competition in the railroad industry.

for the through service it receives, then its remedy lies in the Board's rate reasonableness standards." BNSF Reply Comments at 7.

BEFORE THE SURFACE TRANSPORTATION BOARD

Ex Parte No. 705**COMPETITION IN THE RAILROAD INDUSTRY**

**ENTERED
Office of Proceedings****JUN 21 2011****Part of
Public Record****TESTIMONY OF CURT H. WARFEL
AKZO NOBEL INC.****On Behalf Of**

230175

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

I. INTRODUCTION

Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey, I am Curt Warfel, Sourcing Manager for bulk transportation for Akzo Nobel Inc.'s North American operations. I am here today on behalf of The National Industrial Transportation League, the nation's oldest and largest organization of shippers. Accompanying me is Ms. Karyn Booth, the League's General Counsel.

The League represents approximately 600 member companies that range from some of the largest to the smallest users of the nation's transportation systems. Rail transportation is vitally important for many League Members and especially for those who ship chemicals, petroleum, agricultural, cement, and paper and forest products. Some of our Members are "captive shippers" operating facilities or shipping to customers that have access to only a single rail carrier. I am very familiar with the rail competition issues that are most important to the League's members, as I have been a member of the League and its Rail Committee for 25 years. I also served as Chairman of the Rail Committee from 1998-2001; served on the League's Board

of Directors from 1998 to the present; and acted as the Chairman of the League's Board of Directors from November 2006 to November 2008.

The League applauds the Board for its willingness to evaluate the effects of dramatic reductions in rail competition over the past decades, and for considering whether changes to its current policies are needed to increase competitive rail service to sole-served shippers.

II. SUBSTANTIAL CHANGES IN THE RAIL INDUSTRY

A. Loss of Rail Competition

It is beyond dispute that the railroad industry looks and operates very differently today than it did 25 years ago when the Board adopted its competitive access policies. Bankruptcies and mergers have left just 7 Class I railroads operating today, with four dominating the industry. This major structural change has provided the railroads with substantial market power over their captive customers, and resulted in steadily rising freight rates and mediocre service for many such companies.

A survey of NITL rail shippers showed our members faced rates up to 50% higher at captive facilities than at dual-served facilities. For a number of reasons, these captive companies cannot readily shift their traffic to other modes of transport. Thus, even during our recent recession, captive shippers were forced to endure rising rail rates, despite depressed freight volumes. Year-after-year rate increases prevent rail-dependent companies from competing effectively against their domestic competitors and thwart efforts to increase exports, negatively impacting job creation in the U.S. Although a shipper may file a rate case at the Board in the hopes of achieving reduced rates, for most, this is not the preferred solution. Rather, the League believes that rail rates should be established by a competitive marketplace and not the government. This view mirrors the policies in the Staggers Act to "minimize the need for Federal

regulatory control" and "to allow, *to the maximum extent possible*, competition and the demand for services to establish reasonable rates for transportation by rail."

The lack of sufficient competition allows railroads to raise rates unchecked, for the most part, and to dictate contract terms to their customers. Although many League members use rail contracts, the railroads often are unwilling to engage in meaningful negotiations. Illustrative of their dominant market position, many railroads simply present shippers with "take it or leave it" terms.

B. Changes in the Railroads' Financial Health

Over the past 30 years, the freight rail industry has also transformed itself into one of the most prosperous industries in America, as noted in both the 2010 Senate Commerce Committee's Report on the railroad industry, and the 2009 *Fortune* magazine article ranking railroads fifth on their list of the "most profitable industries." In fact, nothing demonstrates the financial success of the railroads better than the purchase of the BNSF Railway by Berkshire Hathaway.

This Board has asked whether the competition policies created in the mid-1980s are able to effectively address the dramatic losses in rail competition that have occurred in our nation; and whether those policies have swung the pendulum too far in favor of the railroads' need to earn adequate revenues. For the League, the answer is clear: The Board's policies have not and cannot function to fulfill the pro-competitive mandates of the Staggers Act. The simple fact is that no shipper has ever obtained competitive access under the Board's rules.

III. CHANGES IN THE STB'S COMPETITION POLICIES

So what policy changes should the Board make? Despite the railroads' attempts to mischaracterize the League's and other shippers' positions, we do not desire radical open access remedies nor do we desire change that would return the railroads to a state of financial weakness.

As rail customers, we understand that the carriers need to remain vibrant and healthy and to earn revenues that will permit them to reinvest in their networks. The railroads, on the other hand, have distorted the shippers' positions as extreme, and presented doomsday scenarios if there is any policy change.

The Board has asked parties to put aside their rhetoric and to present specific recommendations that will help guide the Board in solving today's problems. The League is ready to assist you and here is how.

We recently surveyed our diverse Rail Committee members to determine what competition policies are most important to their company, and what policies should be changed by the Board. They responded that greater access to reciprocal switching and changes to the Board's bottleneck rule would help their companies achieve more efficient, reliable and cost-competitive rail transportation and improve their ability to compete. Changes to reciprocal switching policies were rated as most important.

The League's captive rail shippers want to increase their access to a second rail carrier, while still respecting the railroad revenue policies of the Staggers Act. However, given that the Board's present competitive access rules have failed to provide any captive shipper with any access to competition, we believe the Board should open a proceeding promptly after this hearing for the purpose of developing new, administratively simple reciprocal switching rules that would provide for competitive access, where appropriate.

The League also supports the other recommendations set forth in its opening comments and the Joint Comments of Interested Shipper Parties, including that the Board should open one or more future proceedings regarding bottleneck rates and merger conditions, among other potential policy changes.

IV. CONCLUSION

The time has come for this Board to modify its policies to make them more current, relevant and responsive to the competitive challenges affecting today's railroad marketplace.

The League stands ready to assist you. Thank you for allowing me to provide this testimony on behalf of the League, and I would be happy to answer any questions you may have.

230272

BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD

STB DOCKET # EP 705

COMPETITION IN THE RAILROAD INDUSTRY

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PUBLIC HEARING SCHEDULED
FOR JUNE 22nd and 23rd, 2011

WRITTEN TESTIMONY OF
Mr. ERIC S. STROHMEYER

VICE PRESIDENT, COO

CNJ RAIL CORPORATION

WRITTEN TESTIMONY OF**ERIC S. STROHMEYER**

Good Afternoon, My name is Eric S. Strohmeyer. I am the Vice President, and COO of CNJ Rail Corporation, a small NJ based transportation firm. I have been blessed to have been able to have appeared previously before the Board on numerous occasions, and I am grateful to have the opportunity to appear before you again today.

It was my original intent to not participate in this proceeding today. Why? I felt strongly that the positions stated in the American Short-line and Regional Railroad Association's comments where more than adequate to express my principle concerns with the Board's inquiry into the status of competition in the railroad industry. In short, I certainly wish to adopt all the positions they, and the other ASLRRA presenters, took in this proceeding. While I might have gone a tad bit further in talking about the principles they brought to the Board's attention, I felt their stated positions were certainly adequate enough to address all of my concerns.

In addition, I have been heavily involved in some litigation¹ in the US Bankruptcy Court for the District of Maryland in Baltimore, which has taken up a large amount of my time. I have also been preparing our organization for CNJ Rail's return to active railroading, as we are finishing the agreements which will soon lead to a filing of a Petition for Exemption² with this Board for permission to acquire and operate a line of railroad in our home state of New Jersey. In short, I just didn't feel I'd have had the time to really address the issues the Board was seeking comment on.

¹ See *James Riffin, Debtor, Case No. 10-11248-DER (Chapter 7)*

² While not yet filed with the Board, a petition for exemption is expected to be filed in July of 2010. The following docket number was reserved and the petition is currently being prepared:

STB Docket # FD 35527- *Central Railroad Company of New Jersey, LLC - Notice of Exemption - Acquisition and Operation Exemption - Valstir, LLC - In Middlesex and Union Counties, New Jersey.*

So what changed so much that I felt a desire to talk to you directly? As I spent the better portion of this past weekend reading the many pleadings of the various interested parties, I began to notice the arguments breaking into two categories, neither of which seemed to address the concern that I felt the Board really wanted to get to. It wasn't until I read the oral argument exhibit of High-Roads Consulting that my old "shipper's agent" hat started to look really good to wear to this proceeding. In short, I found the point in which I wanted to address with you today.

The two positions

In short, there appears to be two simple positions. The first group appears to advocate for no changes at all in the current regulatory scheme. In various ways, and for various reasons, the first group appears to argue the system is not flawed, and all should be left alone. The second group, appearing to be lead primarily by captive shippers fed up with paying higher rates, who seem to be advocating that the Board undo years of regulatory policies and decisions in order to provide them some relief from what they feel to be excessive / oppressive rates.

For a number of years now, a significant amount of time and effort was put into a concerted push by certain shipper organizations to effect change to the way railroads are regulated by seeking new Congressional legislation. Many of the those same shipper groups are participating in today's hearing. In the later part of the last decade, these groups vigorously lobbied Congress for change. The American Association of Railroads (AAR) and others vigorously lobbied against the proposed changes. Legislation actually got introduced that might have led to changes. However, that legislation never got passed.

When Congress failed to act

In 2010, the voters in the country appeared to have signaled they wanted change in Washington. The election that year produced the current Congress, with both houses split, Republicans controlling the House, and Democrats controlling the Senate.

What is the correlation between the election and this proceeding?

It appears to CNJ that any hope of railroad regulatory reform (or re-regulation, as the AAR would have all believe) would appear to be incapable of getting approved in one house, or the other. The result? A stalemate, for lack of a better word, between those that want re-regulation, and those that don't. This Board, appearing to react to the potential impasse, appears to be investigating ways that the Board itself, if possible, might be able to address certain matters that the previous Congress was thinking about, but failed to act upon, before the 2010 elections.

Prior to 2010, legislation which was previously contemplated, appeared to possibly alter the regulatory framework for dealing with railroad rate and other competitive access issues. Advocates for railroad regulatory reform were lead primarily by former House member - the Honorable James Oberstar (D-MN), and the Honorable Sen. John Rockefeller (D-WVa), in the Senate. The Board appears to be analyzing whether or not it can effect some of those changes previously contemplated by Congress. In certain circumstances it may very well be able to do so. However, I do feel the executive branch should not legislate, just as I feel the legislative branch should not administer the day to day operations of the country. I would simply ask that the Board clarify its motives and refrain from attempting to legislate.

I would simply like to point out to the Board that I do believe this agency can, in fact, do a lot more than it does within the current regulatory scheme. While I applaud the current policy of reviewing Board policies, I want to make sure the Board does not react to the wrong problem. In short, any change, especially those made in a vacuum, can produce unintended results which can be disastrous. At this point, the changes being proffered, if acted upon, would be disastrous to the rail industry.

In looking at the specific questions that the Board posed in its request for comments in this proceeding, it appears that the Board is also contemplating implementing a few of the changes suggested in the Board's recent study produced by the Christensen Associates, Inc. While those changes appear small, they can be truly devastating to small railroads if implemented haphazardly and without regard to real market power abuses. There is also doubt that those same changes would produce better results for shippers when the two carriers involved are both Class 1 carriers.

What CNJ Rail believes to be the real issue that the Board should be addressing at this time is not competition in the rail industry, but rather performing an adequate study and analysis of the **market power of Class 1 rail carriers**. In short, as stated by the ASLRRRA, the small carriers have no market power what so ever. There are many ways to reduce and curtail any market power a small carrier may have. However, the same can not be said for today's Class 1 railroads. Class 1 railroad's today, may in fact, have no real competition effectively able to curtail the railroad's market power. In addition, very few competing modes have the ability to compete with the railroads in many areas and for certain commodities there is no road, but the railroad.

What is the "true" market power of today's Class 1 railroads?

The stated purpose of this proceeding is to analyze competition in the railroad industry. This concept is a noble goal, but it may not be possible to ever achieve true "competition" in the rail industry. Consolidation in the rail industry has reduced the number of Class 1 carriers to just 7 carriers in total. Two carriers, Union Pacific, and BNSF Railway, cover two thirds of the nation with their respective rail properties. It would be virtually absurd to believe a third Class 1 carrier could ever be constructed from scratch to compete effectively with either of the western carriers. Trying to thread a new carrier through the east would also be extraordinarily difficult as well. With fuel costs rising, and numerous recent changes to Federal regulations regarding the trucking industry, there can be no doubt that the ability to curtail and restrain the market power

of Class 1 railroads by competition alone grows dimmer by the minute.

One person, who ironically was in a position to do something about the state of competition in the rail industry, produced one of the most blistering public commentaries on the idea of "competition" in the rail industry this presenter can recall hearing. Stating his belief that the idea of competition in the rail industry was the equivalent of "indulging in legal fiction", then STB commissioner W. Douglas Buttrey's commentary at the public hearing marking the completion of the Christensen study was actually quite surprising. Since the opening remarks from that hearing encompass 5 pages, I have included a copy of the transcript of his remarks, in its entirety, because I feel they do reflect the current state of competition, or lack thereof, in the rail industry. (See Exhibit #1)

While the Christensen study was truly comprehensive, its purported focus was on the state of competition in the rail industry. I felt the study lacked enough statistical data however to lead this Board toward reaching a complete understanding of the strength of the Class 1 railroads market power that exists today. While the Board seems to be toying with the idea of implementing some of the minor changes suggested in the report, I would like to direct the Board's attention to the following areas of the study I feel need to be addressed first, before trying to levy disastrous new regulations on the railroad industry.

The Christensen Study

This Board is certainly well aware of the findings and conclusions the study makes. I just wanted to point out a couple of critical points it made that seemed to have gotten lost in this proceeding. While I do admit I was not the best student of mathematics in school, I certainly was able to understand the implications of this one finding. The study found :

The ratio of revenue to URCS variable cost (R/VC) is weakly correlated with market structure factors that affect shipper

“captivity,” and is not a reliable indicator of market dominance. (Emphasis added)

I am not going to profess here today I understand completely just how URCS works. I will admit I have publicly referred to URCS as “voo-doo mathematics” for the Class 1 railroads. However, I’m not so ignorant that I do understand that this agency, as well as the ICC before it, relies very heavily on URCS in analyzing a wide variety of critical commercial transactions which are necessary to protect the shipping public from abuse, as well as other critical computations needed to administer proper oversight of the nation’s rail network. In short, its very important. Having said that, when a study, commissioned by this Board, finds that a portion of the URCS formula **“is not a reliable indicator of market dominance”**, it catches my attention.

In addition, one Board member, ever since he was appointed to this Board, has repeatedly, for well over five plus years, stated his belief that URCS needed to be updated. Commissioner Mulvey has long appeared to have been the only champion of that cause on this Board. There can be no doubt of the importance of URCS to this Board. It is a critical component to many functions the Board undertakes in order to determine critical market power issues. All of this leads into my next question :

How can the Board start making changes to the competitive landscape without fully addressing completely the issue of market power first?

In short, I can’t help but feel that we may in fact be putting the cart before the horse if we start making changes to the competitive landscape without addressing the market power questions first. The Christensen study , recalling an earlier GAO report made the following statement in its executive summary I thought was interesting. It said :

While the GAO posed the question of whether recent

performance of the U.S. freight railroad industry is indicative of “a possible abuse of market power,” our analysis provides evidence on whether there has been a change in the exercise of market power by U.S. railroads. By definition, the setting of price above marginal cost is what economists consider to be an exercise of market power, **but exercise does not imply abuse.** To address the question of whether there has been an “abuse of market power” would require **judgments as to the fairness of the distribution of value between the railroads and the shippers,** and on the distribution of the overhead cost collection among the shippers. **These judgments are policy questions and not resolvable through economic analysis alone.** Instead, we have answered the economic questions of the extent to which recent railroad pricing behavior reflects changing cost conditions, and the extent to which it represents an increase in the overall exercise of market power. Furthermore, our analysis sheds light on how recent railroad pricing behavior has shifted the burden of overhead cost collection among the different sets of shippers. (Emphasis added)

It would appear to this mathematically challenged individual that market power determinations may in fact be subjective, more than analytical, and would therefore require a lot more input into determining what appropriate balance might need to be struck between the competing sides. In addition, where issues become more subjective, it might be appropriate to consider such issues on a case by case basis. However, there is a significant downside to that approach. Without developing first a clearly stated policy for dealing with market power issues, future decisions of this Board could become quite arbitrary and capricious. In short, relief could be granted in one place, and not in another, yet the facts may be virtually identical. Add in the whims and politics of Washington DC and there can be no doubt that any changes, without a clear policy, will be fodder for legal challenges for years to come.

Without addressing the policy questions of how to address market power issues first, any changes made today to enhance competition, however minor, just are not appropriate at this time. In addition, if a critical tool (URCS) this Board uses is found not to be adequate enough to determine market dominance, how can the Board determine if a competitive remedy is even necessary with any degree of assurance?

It's not a lack of competition, it's the early signs of abuse of market power

As I mentioned earlier in my testimony, I was not planning on participating in today's hearing. However, as I read the various pleadings of both High Roads Consulting and the Wisconsin Central Group, I couldn't help but notice the issues they were raising. They refer to it as a lack of interest in "competing" for business. Their issues are not competition issues. They are market access and market power issues. It is those very issues that this Board must be vigilant in recognizing and remedying. I am seeing a lot more of these issues being raised in a larger number of pleadings before this Board .

I have seen for myself Class 1 railroads intentionally raising prices to push certain traffic out of the marketplace. For short-lines, the single carload shipper is their bread and butter. They have long enjoyed this traffic. It is essential for them to maintain this traffic. Yet, they watch the traffic they fought so hard to capture return back to trucks because the Class 1 carriers have made a number of strategic decisions to pursue other opportunities and forgo this traffic. This is beginning to lead to shipper resentment. Even the larger shippers are feeling these issues with the Class 1's.

I want to re-emphasize this point. These issues are not competition related issues. Its **MARKET POWER** driven. For many shippers, they appear to be misinterpreting the Class 1's refusal to handle their traffic as a competition issue. IT IS NOT. It is an abuse of market power and on this issue, the Board needs to be quite clear.

I absolutely urge the Board to make the following statement to all the Class 1 carrier's. Instruct them to **HANDLE ALL THE TRAFFIC** reasonably presented to them and stop playing games. It is my opinion that 99.9% of all the issues related to railroad re-regulation will disappear the minute the Class I carrier's either fully recommit themselves to handling loose car freight or this Board swiftly moves to punish those carriers that do not fulfill their common carrier obligations to move such freight.

In addition, I do want to urge the ASLRRA to wake up and take a stronger stand against the Class 1's when it comes to allowing the Class 1's to continually run off their members bread and butter traffic. We, the small railroad industry are small ourselves. We do a great job serving the small market shipper. The more small shippers start complaining to Congress about the Class 1's refusal to handle their traffic, the more likely disastrous re-regulation will occur. I can appreciate my fellow short line companies desire to work with their Class 1 partners, but there comes a point in time when you have to put your foot down and question the wisdom of certain decisions of the Class 1's, especially when they turn you into a one or two customer railroad because they, the Class 1's, only want to deal with your largest customers and the rest be dammed.

Course of action the Board should take

It is the opinion of this presenter today that before the Board considers any changes to enhance competition, it should first adequately study, and determine the extent and form of the Class 1 carriers market power. Reiterating the question asked earlier, how can the Board say that changes to competition need to be made, without first determining the scope and extent of the Class 1 carrier's market power?

It should be fairly obvious that today's Class 1 railroad's indeed have tremendous market power. It is also fairly obvious today that motor carrier transportation is experiencing considerable upward pressure on their costs. Waterway transportation service options are only

available in certain parts of the country. Air transportation is not a viable option for many shippers. As a result, there can be no doubt that today's Class 1 railroads' market power is considerable. Interestingly, it was recently brought to the Board's attention in a couple of high profile abandonment cases that a couple of Class 2 rail carrier's may in fact have some limited market power as well. However the vast majority of small railroads have no market power what so ever.

While some of the shippers today have made a number of compelling cases that there are issues in the rail industry, a fairly large number of them are really complaining about abuses of market power, not necessarily a lack of adequate competition. Many of the shipper respondents seem to be directly pointing a finger at the Class 1 railroads. It is my hope, that this Board decides not to implement those minor little changes proposed in the Christensen study, but rather decides to tackle the tough job of determining the extent and scope of the Class 1 carrier's true market power. Only then can a true dialogue about competition and rate relief be had with all the stake holders.

I thank the Board for the opportunity to speak with you today.

On Behalf of CNJ Rail Corporation

Respectfully Submitted by

Eric S. Strohmeyer

Eric S. Strohmeyer
Vice President, COO
CNJ Rail Corporation
Dated: June 21st, 2011

Written Testimony of

Eric S. Strohmeyer

STB Docket # EP 705

Competition in the Railroad Industry

EXHIBIT # 1

U.S. DEPARTMENT OF TRANSPORTATION

+ + + + +

SURFACE TRANSPORTATION BOARD

+ + + + +

STUDY OF COMPETITION IN THE
FREIGHT RAILROAD INDUSTRY

+ + + + +

PUBLIC MEETING

+ + + + +

THURSDAY,
NOVEMBER 6, 2008

+ + + + +

The meeting was convened in the first floor hearing room at 395 E Street, SW, Washington, D.C. at 10:00 a.m., Charles Nottingham, Chair, presiding.

SURFACE TRANSPORTATION MEMBERS PRESENT:

CHARLES NOTTINGHAM, Chairman
FRANCIS MULVEY, Vice Chairman
W. DOUGLAS BUTTREY, Commissioner

PANELISTS:

MARK MEITZEN, Christensen Associates, Inc.
KELLY EAKIN, Christensen Associates, Inc.

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Adjourn	

1 to replicate what you've done and check it can do
2 so. Everything is laid out, including all the
3 econometric methodologies of how things were
4 done, and the results. It's just a first class
5 piece of work, so I want to thank you.

6 And with that, I'll turn it back over
7 to you, Mr. Chairman.

8 CHAIRMAN NOTTINGHAM: Commissioner
9 Buttrey.

10 COMMISSIONER BUTTREY: Thank you, Mr.
11 Chairman. Good morning, everyone. The long
12 awaited Christensen Association study competition
13 of the freight rail industry is on the street and
14 I might add that it's so popular it's also
15 available in DVD already, so you can it get it
16 either way.

17 Those working on the study should be
18 commended for documenting an impressive number of
19 interview responses and producing some very
20 interesting graphic presentations. While I had
21 no input into the study, I have read the
22 Executive Summary and appreciate the effort that

1 went into its completion. In fact, I think it is
2 quite remarkable.

3 With this in mind and while I have a
4 somewhat captive audience, I thought I might
5 share some purely personal thoughts about the
6 presumed subject of the study. In my humble
7 opinion, the thought of a study conducted to look
8 into the state of competition in the freight rail
9 industry strikes me as almost humorous.

10 Now, why is that you say? Because in
11 my view to say that there is or is likely to be
12 competition, real classical competition in the
13 freight rail industry, is to indulge in a legal
14 fiction. The fact is that freight rail has
15 become so efficient that it has virtually no
16 effective competition.

17 So we're presuming to study something
18 that essentially in my view doesn't exist. Only
19 in Washington would we be studying something that
20 does not exist. This is one of the reasons why
21 the Christensen study is so remarkable to me.

22 We actually have before us a document

1 whose unstudied conclusion is that the subject of
2 the study does not exist. Are we in New Mexico?
3 The basic conclusions I have drawn from the study
4 are three.

5 That competition in the classical
6 sense does not exist in the current freight rail
7 industry and when there is market dominance there
8 is the potential for misbehavior in the
9 marketplace. And when there is misbehavior there
10 should be an accessible process to address that
11 misbehavior.

12 That process resides here at the
13 Surface Transportation Board. In a perfect
14 world, there would be no need for the STB, but we
15 do not live in a perfect world. And as the
16 Austrian economists, often quoted economist,
17 Joseph Schumpeter, warned, "There is always the
18 temptation for monopolies to act like
19 monopolies."

20 So what is monopolistic behavior?
21 Mr. Justice Potter Stewart was once asked,
22 "What's hard core pornography?" He responded by

1 saying, "Well, it's hard to define, but I know it
2 when I see it."

3 So when is monopolistic behavior in
4 the rail industry? Well, there are a lot of
5 folks running around town who say they know what
6 it is and they've seen it and someone needs to
7 stomp it out before it spreads, like Smokey Bear
8 stomping out a forest fire.

9 But they have another name for it and
10 that name is "profit," but profit is not a bad
11 word. How much profit is enough? How much
12 capital investment is enough? How much in
13 dividends is enough? How many dedicated railcars
14 is enough? How much liability limitation is
15 enough? How many customers on the line is
16 enough? How much coal or grain or intermodal
17 traffic is enough?

18 Do we really want the Congress
19 answering these questions? I don't think so. I
20 think a lot of folks are asking the wrong
21 question. The question is not how do we get more
22 competition, it's how do we get more

1 infrastructure and more efficiency where we need
2 it and thereby get better results for everyone?

3 So how do we get better results?

4 Well, one answer is this. We have a process at
5 the Surface Transportation Board where applicants
6 can come in and get authority to build a new rail
7 line to compete with existing rail line.

8 And I can assure you that any entity
9 that avails itself of that process will get a
10 fair hearing. That is not pie in the sky. It is
11 reality evidenced by recent Board actions.

12 The regulatory barriers to entry are
13 minimal and there are not regulated rates of
14 return like those in other regulated industries.
15 Is that a feasible answer to the lack of
16 competition in the freight rail industry?
17 Perhaps, although the cost is high.

18 Short of that, I would suggest that
19 the parties who feel they are aggrieved by
20 monopolistic behavior, that is market dominate
21 behavior, would be much better off working
22 together with their rail partners for the common

1 good rather than conducting guerilla warfare,
2 which is just dilutes everyone's financial
3 resources and energy.

4 But, of course, the problem is that
5 the rail competition issue has been very good
6 business for lobbyists. The patient never dies
7 and it never gets well. On the other hand, I'm
8 beginning to sound like an economist, there is a
9 process in place at the STB.

10 It is being used and it is working.
11 If you are a shipper that has problems with your
12 rail provider that cannot be worked out through
13 private negotiations, come see us. Of course, if
14 you are happier spending your hard earned money
15 to hire lobbyists to run around pursuing remedies
16 which have virtually no hope of being
17 implemented, go for it.

18 But if you have the courage of your
19 convictions, which means to me that you actually
20 have an evidentiary case, then file it. In the
21 meantime, we have yet another study. Thank you,
22 Mr. Chairman.



Surface Transportation Board Ex Parte No. 705

Kansas City Southern Testimony of Michael Haverty Executive Chairman

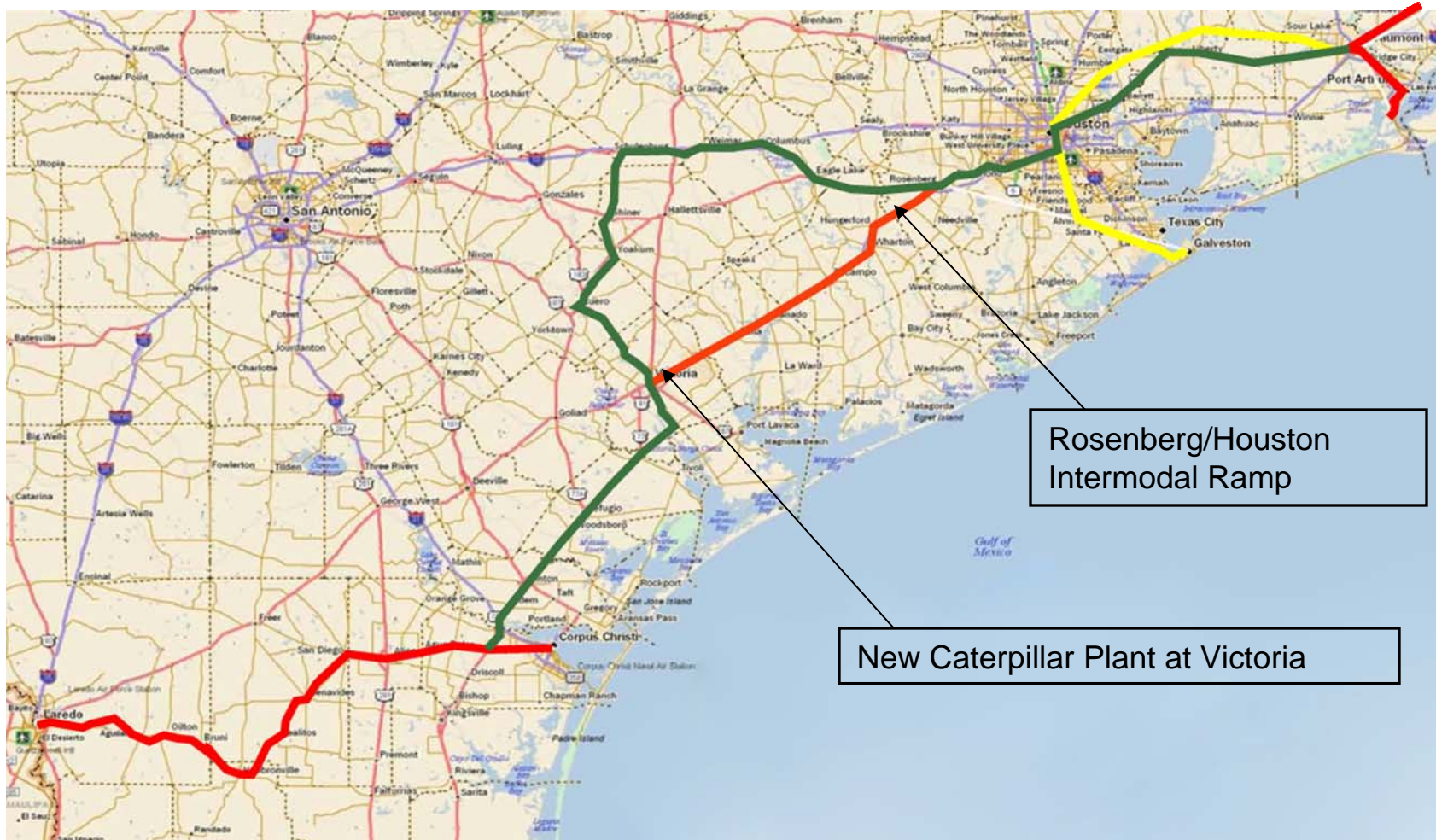
June 22-23, 2011



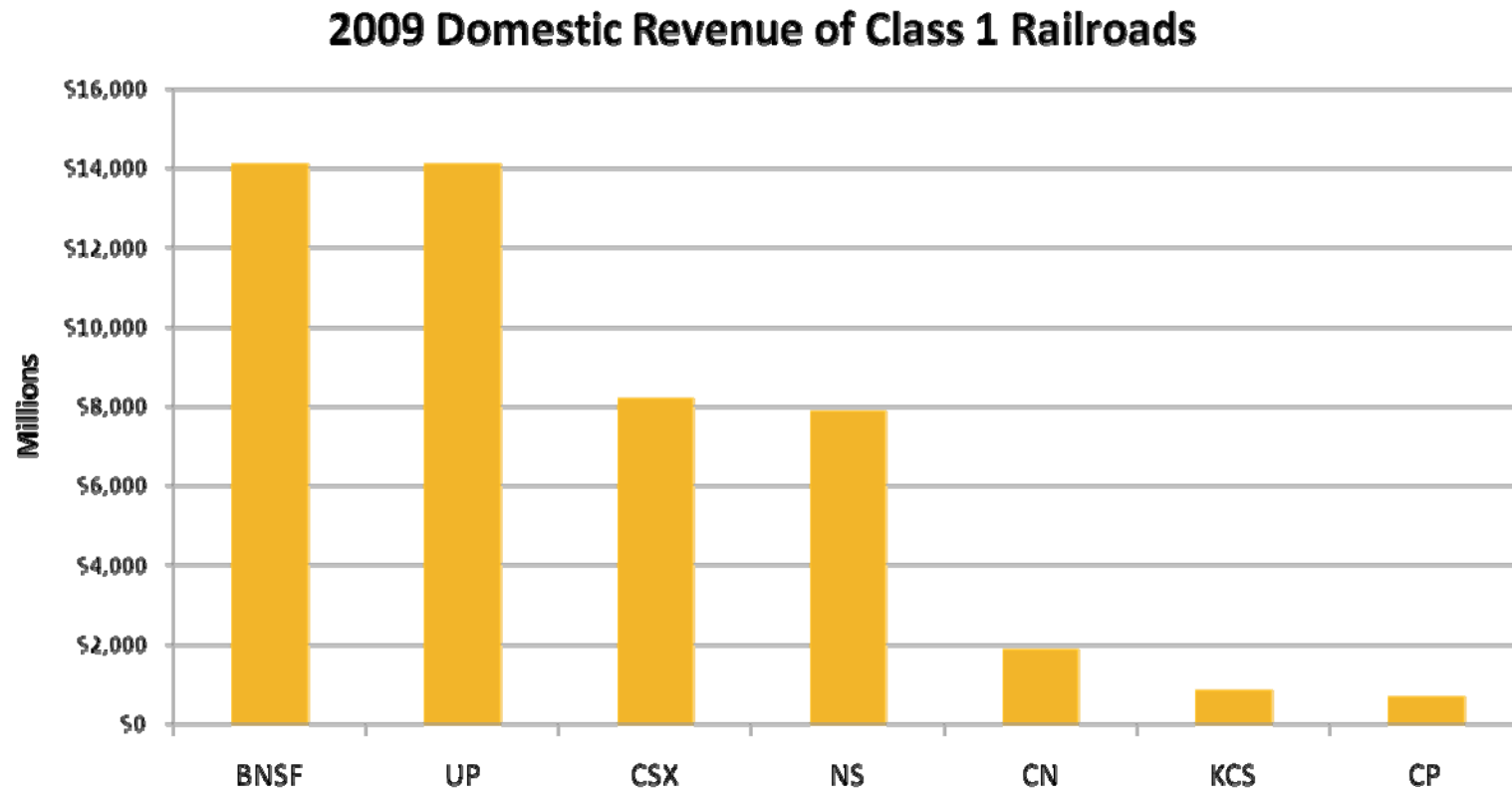
KCS Today



Victoria-Rosenberg Line



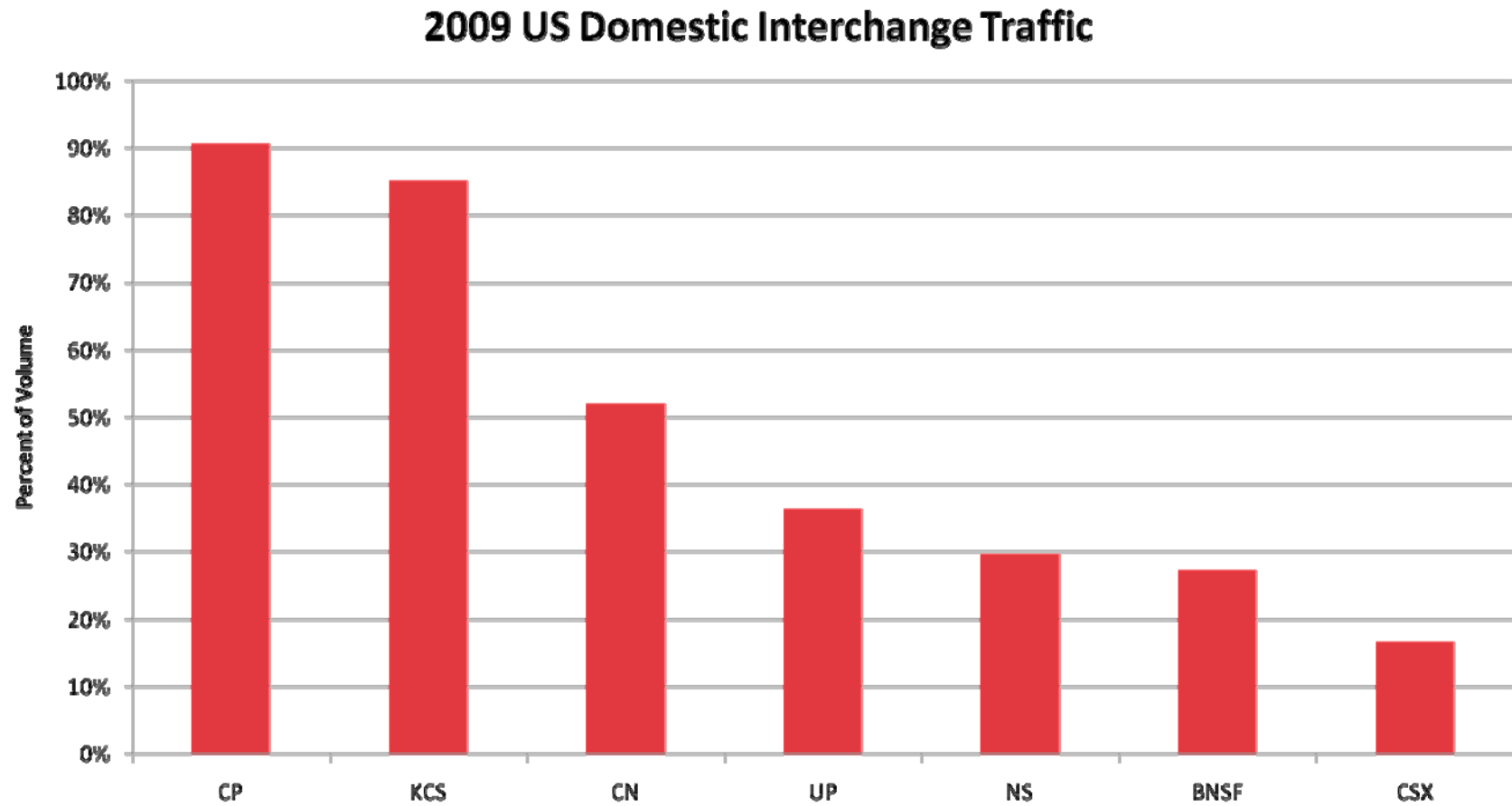
2009 Domestic Revenue



SOURCE: *Railroad Facts*, 2010 Edition (Association Of American Railroads)(2009 revenues).



2009 US Domestic Interchange Traffic



SOURCE: 2009 Freight Commodity Statistics (FCS)



KCS Today

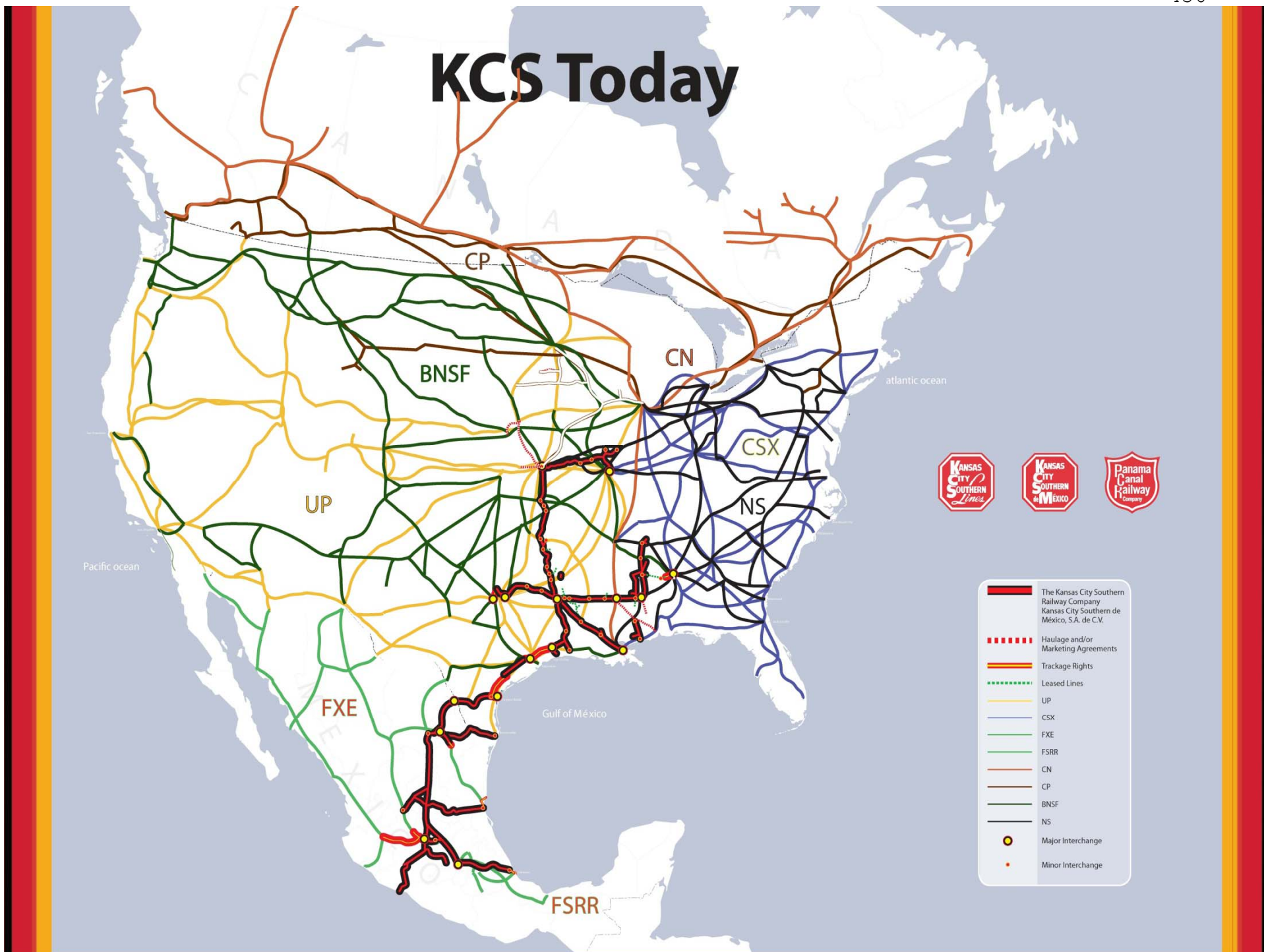
Pacific ocean

atlantic ocean

Gulf of México



-  The Kansas City Southern Railway Company
Kansas City Southern de México, S.A. de C.V.
-  Haulage and/or Marketing Agreements
-  Trackage Rights
-  Leased Lines
-  UP
-  CSX
-  FFE
-  FSRR
-  CN
-  CP
-  BNSF
-  NS
-  Major Interchange
-  Minor Interchange





Surface Transportation Board Ex Parte No. 705

David Konschnik
Former Director
Office of Proceedings
Surface Transportation Board

June 22-23, 2011



June 22, 2011

Railroad Competition Hearing

Testimony for the Hearing on Ex Parte 705 at the Surface Transportation Board

Airfreight and Surface Transportation

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Bloomberg: JPMA WADEWITZ<GO>

J.P. Morgan Securities LLC

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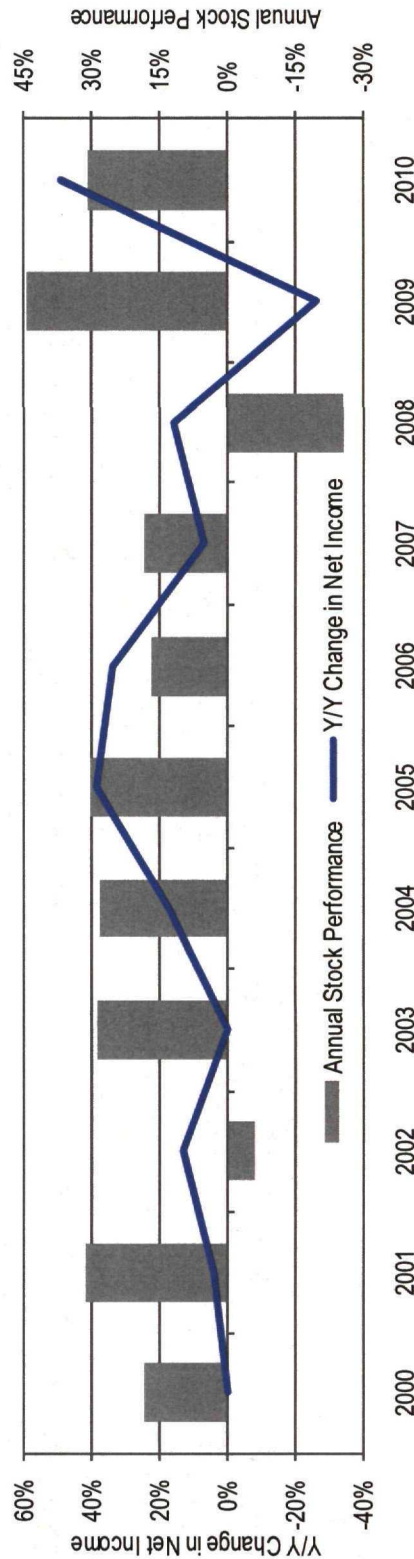
Introduction and Disclosures

- Chairman Elliott, Vice Chairman Begeman and Commissioner Mulvey, thank you for providing the opportunity to testify today. My name is Tom Wadewitz and I am an equity research analyst covering the Airfreight and Surface Transportation industry in the J.P. Morgan Research Department. I have been a senior analyst covering railroad stocks for nine-and-a-half years.
- The views and opinions I share on the industry today are my own personal views as a research analyst and do not necessarily reflect the views or opinions of J.P. Morgan, my department, or others at my firm.
- In addition, the Firm may have real or perceived conflicts in matters related to the topic or any companies I may mention during the course of my testimony. If you would like more details regarding any conflicts or conflicts with specific companies in the industry, please contact me at 212-622-6461 or email research.disclosure.inquiries@jpmorgan.com.

Investor Perspective on the Railroads

- My experience as a sell side analyst in formulating recommendations on transport stocks and speaking with institutional investors over the years leads me to believe the following about what investors value in transportation stocks: (1) Investors value growth in net income and earnings per share. (2) Investors value both strong absolute financial returns, such as return on capital, and also a trend of improvement in financial returns. Favorable EPS growth performance and a broader trend of improving financial returns have been key factors that have attracted equity investors to the railroad stocks over the past seven years. The following charts show annual performance of the railroad stocks versus earnings growth and versus return on invested capital. The equity market is forward looking and so in the second chart we show performance of the rail stocks versus EPS performance pulled forward one year. As seen in the third chart, the rail stocks have generally performed well during trends of improving financial returns.

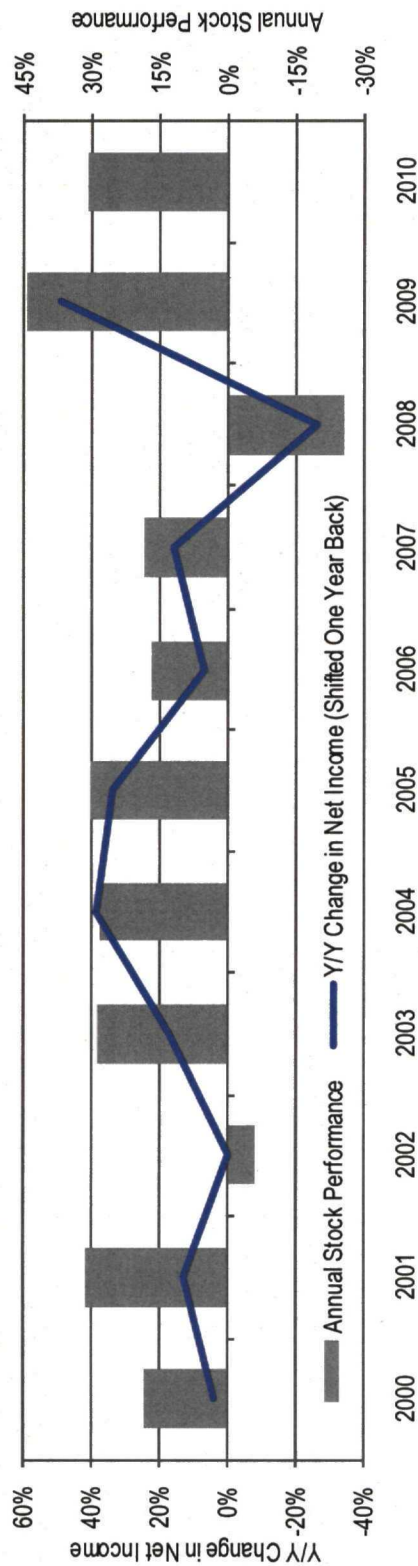
Y/Y Change in Rail Industry Earnings vs. Annual Stock Performance 2000-2010



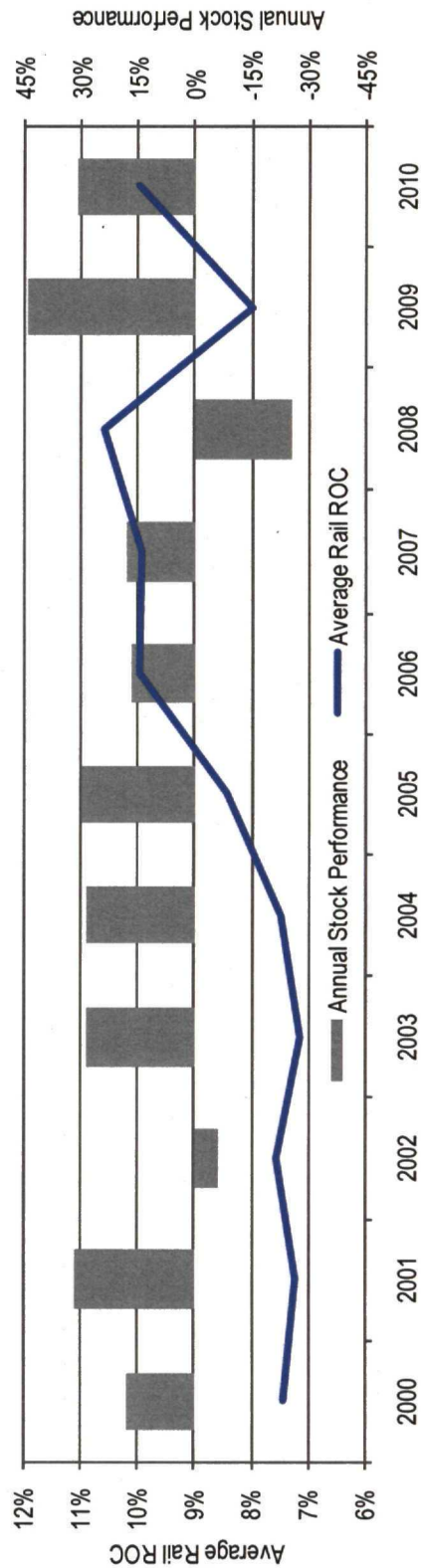
Source: Bloomberg, company reports and J.P. Morgan estimates.
Note: Past performance is not indicative of future returns.

Investor Perspective on the Railroads

Y/Y Change in Rail Industry Earnings (Shifted One Year Back) vs. Annual Stock Performance 2000-2010



Y/Y Change in Class I Rail Stock Performance vs. Average Rail ROC 2000-2010



Source: Bloomberg, company reports and J.P. Morgan estimates.
Note: Past performance is not indicative of future returns.

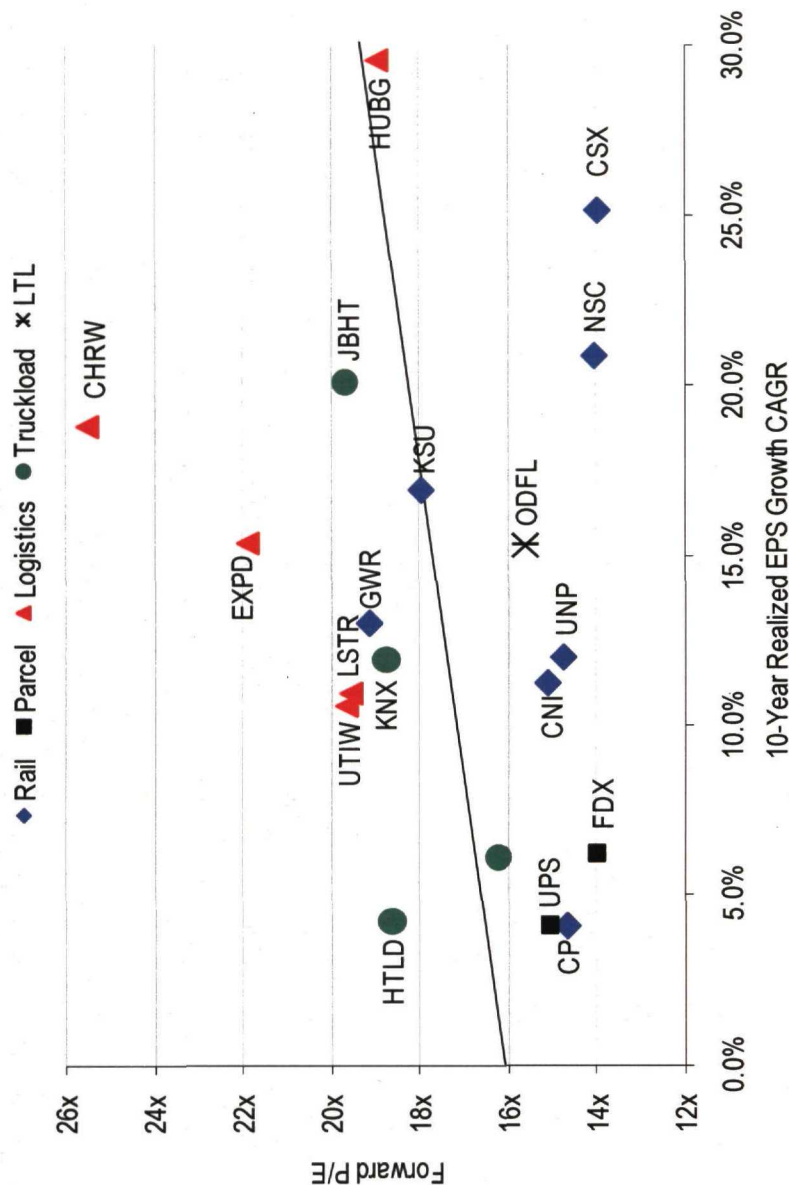
Investor Perspective on the Railroads

- Volume growth, pricing improvement, and productivity gains are underlying drivers of earnings growth and financial returns. In addition to cyclical factors such as growth in the economy, we believe that the railroads can benefit from secular growth opportunities to convert truckload freight to rail intermodal freight. In the medium term, intermodal volume growth typically requires rail capital expenditures and capacity expansion in terms of new terminals as well as sidings and double track. Even though it requires meaningful capital investment, we believe the secular volume growth potential of the intermodal segment is attractive to investors in the railroads.
- Historically, productivity improvement was a significant factor supporting rail financial performance but the pace of improvement in some productivity metrics such as RTMs / employee has been slower over the past five years relative to the significant gains realized after the Staggers Act in 1980. Since 2004 we believe that a favorable pricing trend has been an important factor that has attracted investors to the railroads. In our opinion, significant changes to the railroad's favorable pricing trend would negatively affect the attractiveness of the railroad industry to equity investors.

Drivers of Transport Stock Valuation

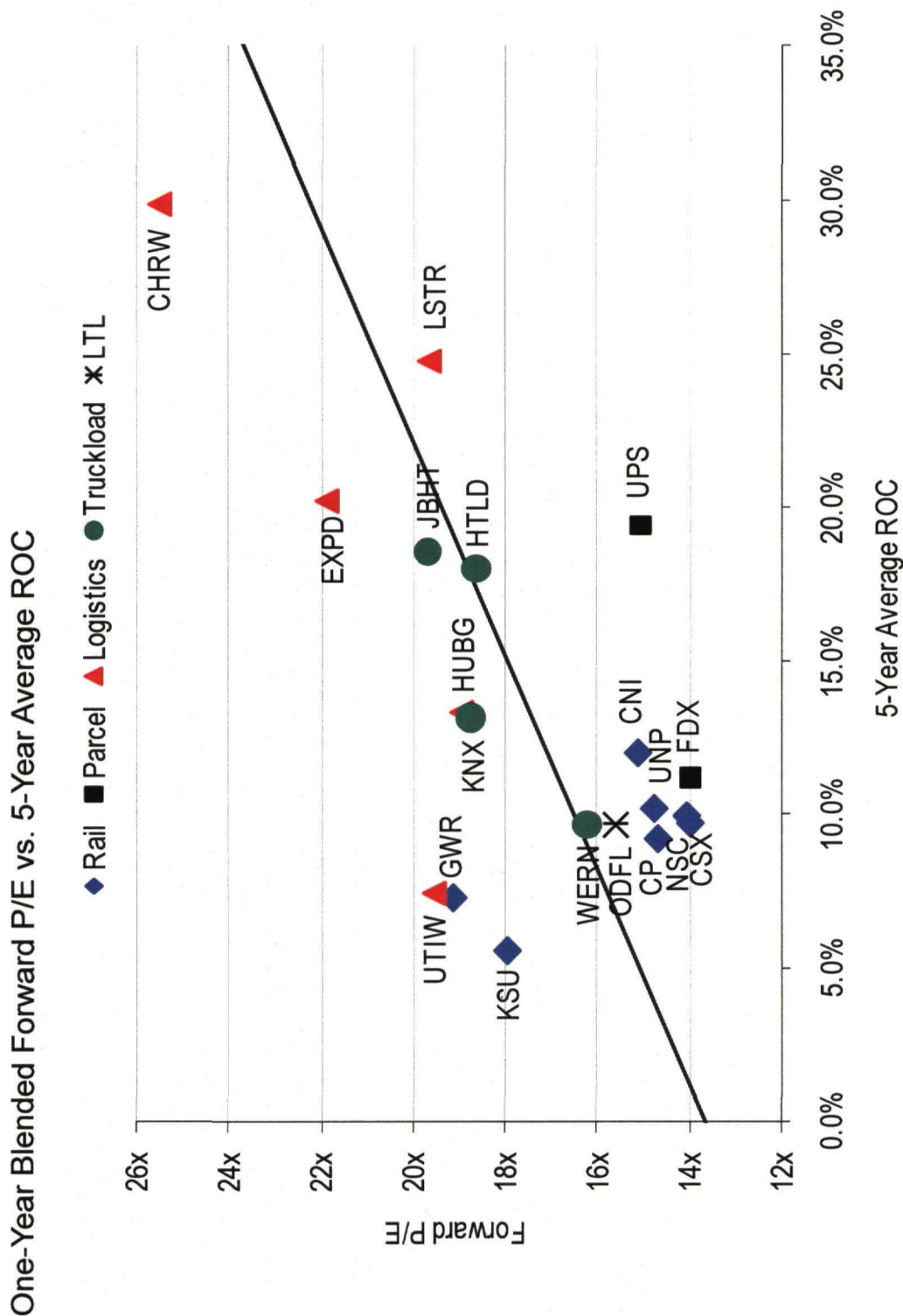
- The following two charts show scatter plots of railroad one year forward price-to-earnings ratio versus 10-year earnings CAGR and versus Return on Capital. The transports which realize the highest valuation are those with a combination of both strong earnings growth and strong financial returns such as CH Robinson, Expeditors International, and JB Hunt.

One-Year Blended Forward P/E vs. 10-Year Realized EPS Growth CAGR



Source: Company reports and J.P. Morgan estimates. Note: Forward P/E as of June 21, 2011.
 Note: Past performance is not indicative of future returns.

Drivers of Transport Stock Valuation



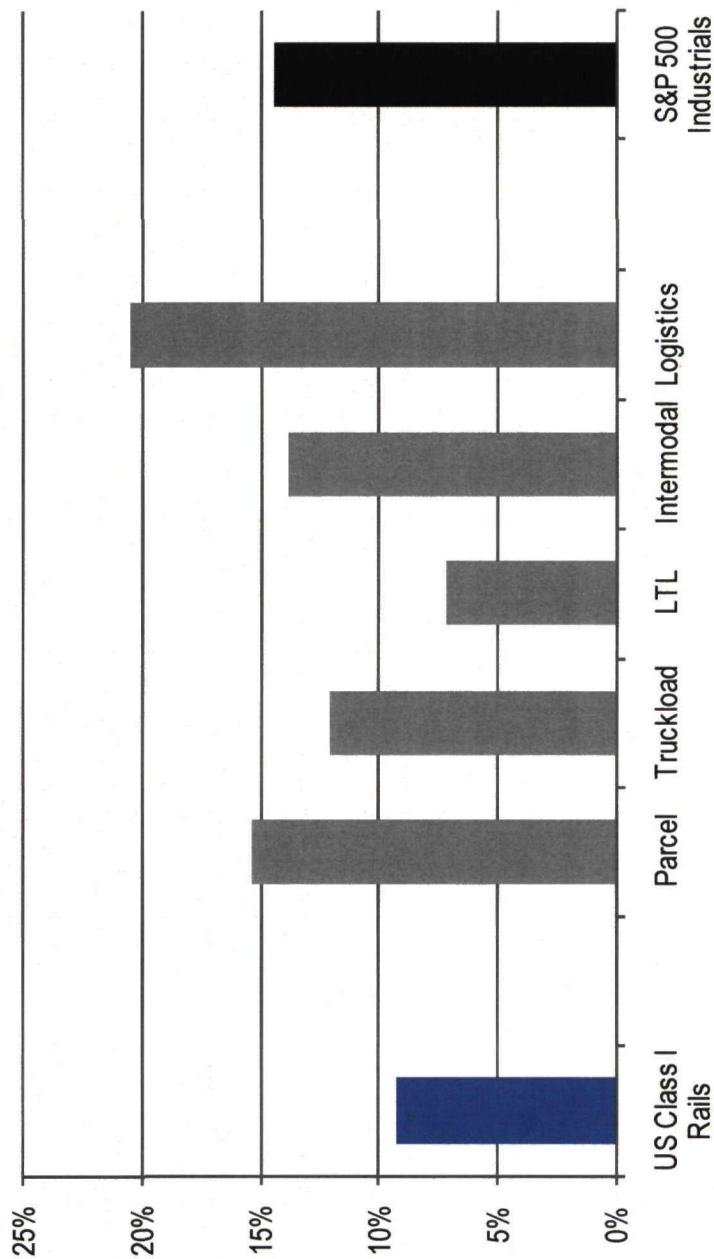
Source: Company reports and J.P. Morgan estimates. Note: Forward P/E as of June 21, 2011.
 Note: Past performance is not indicative of future returns.

Railroad ROC Relative to Other Transports and Industrials

- The railroad industry has realized improvement in its financial performance over the past seven years but its financial returns are still lower than four of five other groups of transport stocks that we cover including small package, truckload, logistics, and intermodal names. Average ROC for the US Class I railroads in 2010 was about 9%, which was only higher than financial returns for the depressed LTL group. On the following bar chart we also show ROC for the industrial companies in the S&P 500. Average ROC for this group of large cap industrials was slightly below 15% which was well above the 9% average ROC for the Class I US railroads. Based on our comparison of financial return performance, railroad returns do not appear to be particularly strong relative to other large industrial companies or relative to other transport groups. We also note that these returns are calculated on current book value, which is significantly lower than replacement cost of the rail systems. In our view, a trend of improving financial return performance provides a key consideration for many investors in the railroad stocks.

Railroad ROC Relative to Other Transports and Industrials

5-Year Average ROC of the US Class I Rails Compared to Other Industrials



Source: Bloomberg, company reports and J.P. Morgan estimates.
 Note: Past performance is not indicative of future returns.

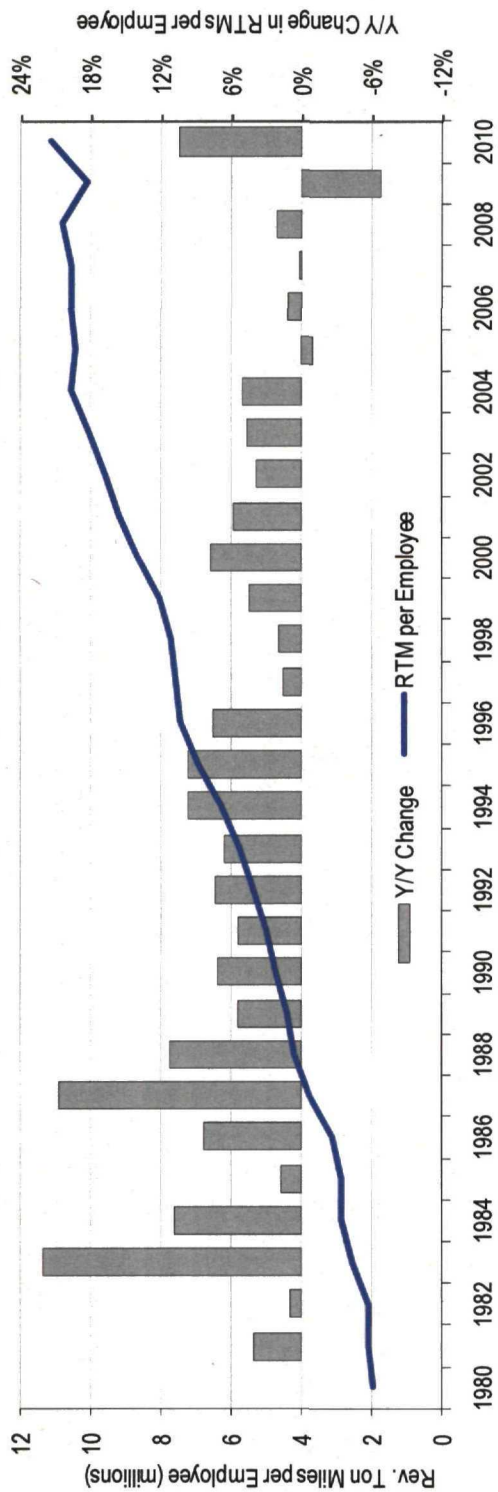
Conclusions

■ In conclusion, following are some of the key considerations I would like to mention with respect to the analyst and investor perspective on potential changes to the STB's approach to regulation and rail access.

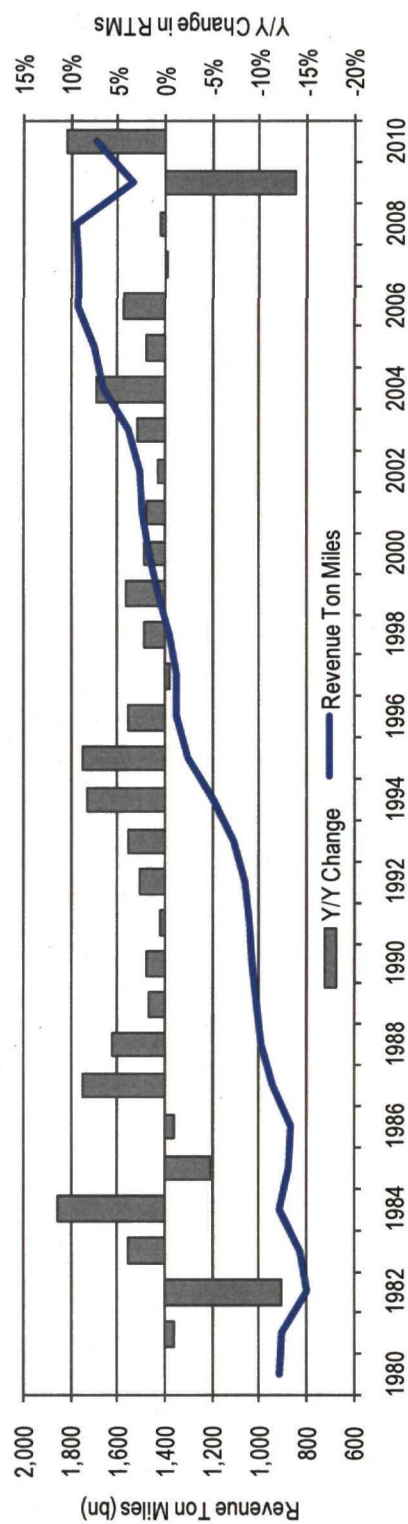
1. **Regulatory Stability Provides Support for Rail Investor Interest and Investment in the Rail network.** In our view, regulatory stability provides greater visibility to expected growth in railroad financial performance, which in turn encourages investors to own railroad stocks. This stability also provides an environment where investors tend to support management decisions to invest in capacity in order to grow volume.
2. **Uncertainty is a Source of Risk to Rail Investment.** While the outcome could be favorable, an extended process of considering significant change in regulation could also act as a headwind to railroad equity investors and to railroad management investment decisions.
3. **Railroad Financial Returns are Not Particularly Strong vs Other Transport Segments and the S&P 500 Industrial companies.** Railroad financial performance has improved significantly over the past seven years, which has been driven in part by favorable pricing trends. However, railroad return on invested capital performance lags most of the other transport groups and rail returns are also significantly below the average returns of large cap industrial companies.
4. **Investors Value EPS Growth but Also Financial Return Performance.** Transport stock valuations show that investors value both EPS growth and financial returns. Long -term incentive plans for the major railroads either include or are primarily based on improving financial returns. A stable regulatory environment that enables improving financial performance will also be one that facilitates strong railroad investment in infrastructure and capacity expansion.

Appendix

Railroad Productivity (Revenue Ton Miles per Employee) and Y/Y Change



Railroad Annual Revenue Ton Miles and Y/Y Change



Source: Association of American Railroads. Note: 2010 data is preliminary.
Note: Past performance is not indicative of future returns.

Tom Wadewitz covers the following companies in J.P. Morgan equity research (all prices as of market close on 20 June 2011):

Arkansas Best (ABFS/\$21.97/Underweight), C.H. Robinson Worldwide (CHRW/\$77.30/Neutral), CSX (CSX/\$25.11/Overweight), Canadian National Railway (CNI/\$75.66/Neutral), Canadian Pacific Railway (CP/\$60.82/Neutral), Con-way (CNW/\$36.99/Underweight), Expeditors (EXPD/\$47.55/Neutral), FedEx Corp (FDX/\$87.50/Overweight), Genesee & Wyoming (GWR/\$55.55/Neutral), Heartland Express (HTLD/\$15.88/Neutral), J.B. Hunt Transport Services, Inc. (JBHT/\$45.04/Overweight), Kansas City Southern (KSU/\$54.00/Overweight), Knight Transportation, Inc. (KNX/\$16.37/Neutral), Landstar (LSTR/\$45.17/Overweight), Norfolk Southern (NSC/\$71.61/Overweight), Old Dominion (ODFL/\$35.38/Neutral), RailAmerica (RA/\$14.01/Overweight), Swift Transportation (SWFT/\$13.39/Overweight), UTi Worldwide (UTIW/\$19.28/Neutral), Union Pacific (UNP/\$101.80/Overweight), United Parcel Service (UPS/\$69.30/Overweight), Werner Enterprises (WERN/\$24.32/Overweight), YRC Worldwide (YRCW/\$0.60/Neutral)

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JPM Equity Research Coverage IB clients*	50%	45%	33%
	43%	49%	8%
	70%	62%	56%

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June 23, 2011

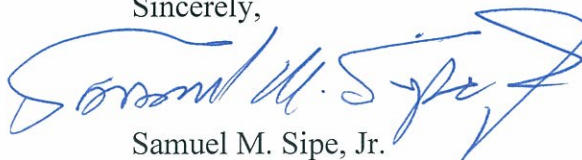
Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington DC 20423

Re: STB Ex Parte 705 - Competition in the Railroad Industry

Dear Ms. Brown:

Please find included with this letter a copy of the PowerPoint presentation that accompanied the testimony of Association of American Railroads witness William J. Rennie at the hearing in the above-referenced proceeding on June 22, 2011.

Sincerely,

A handwritten signature in blue ink, appearing to read "Samuel M. Sipe, Jr.", with a stylized flourish at the end.

Samuel M. Sipe, Jr.

*Counsel for Association of American
Railroads*

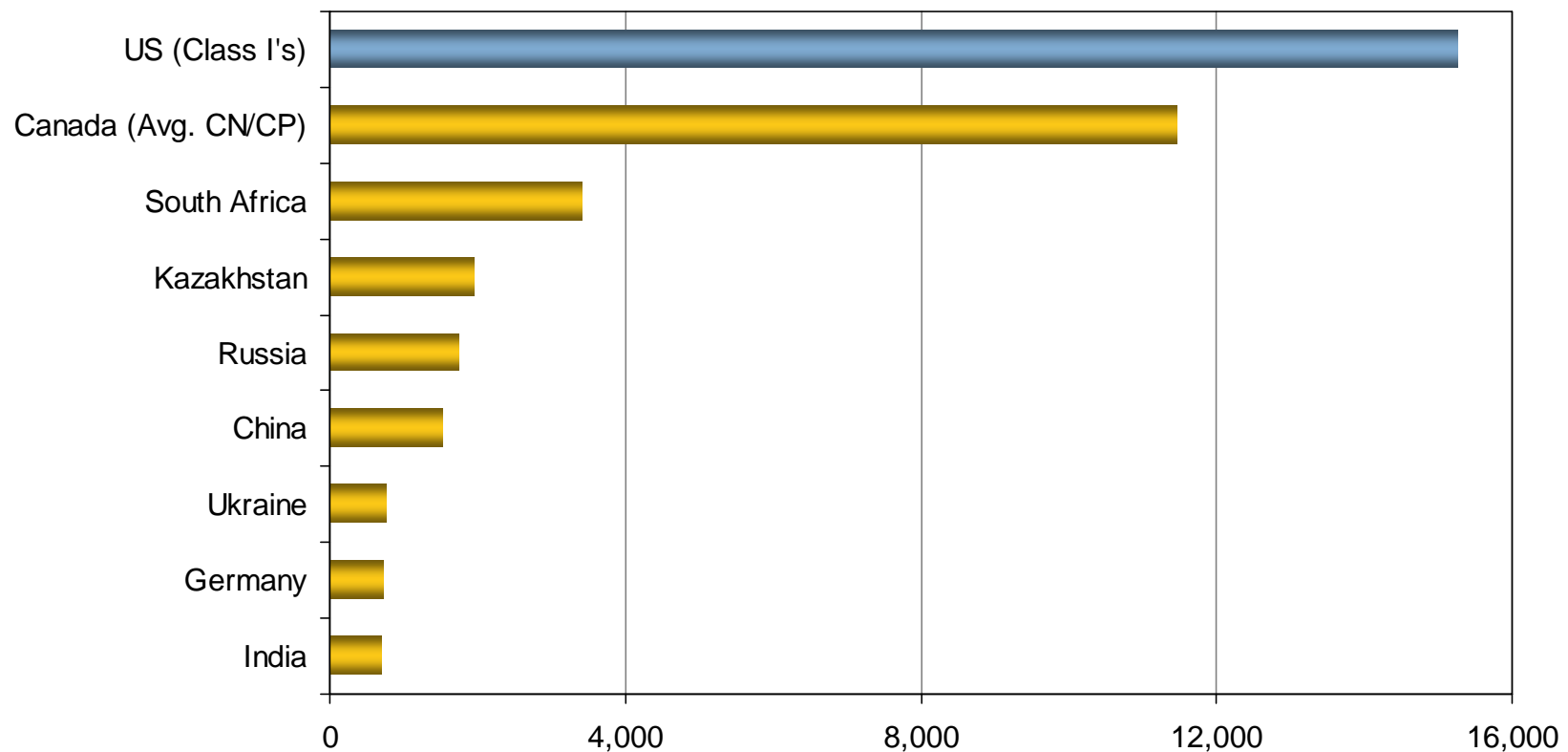
OLIVER WYMAN

June 22, 2011

STB Ex Parte No. 705 Competition in the Railroad Industry

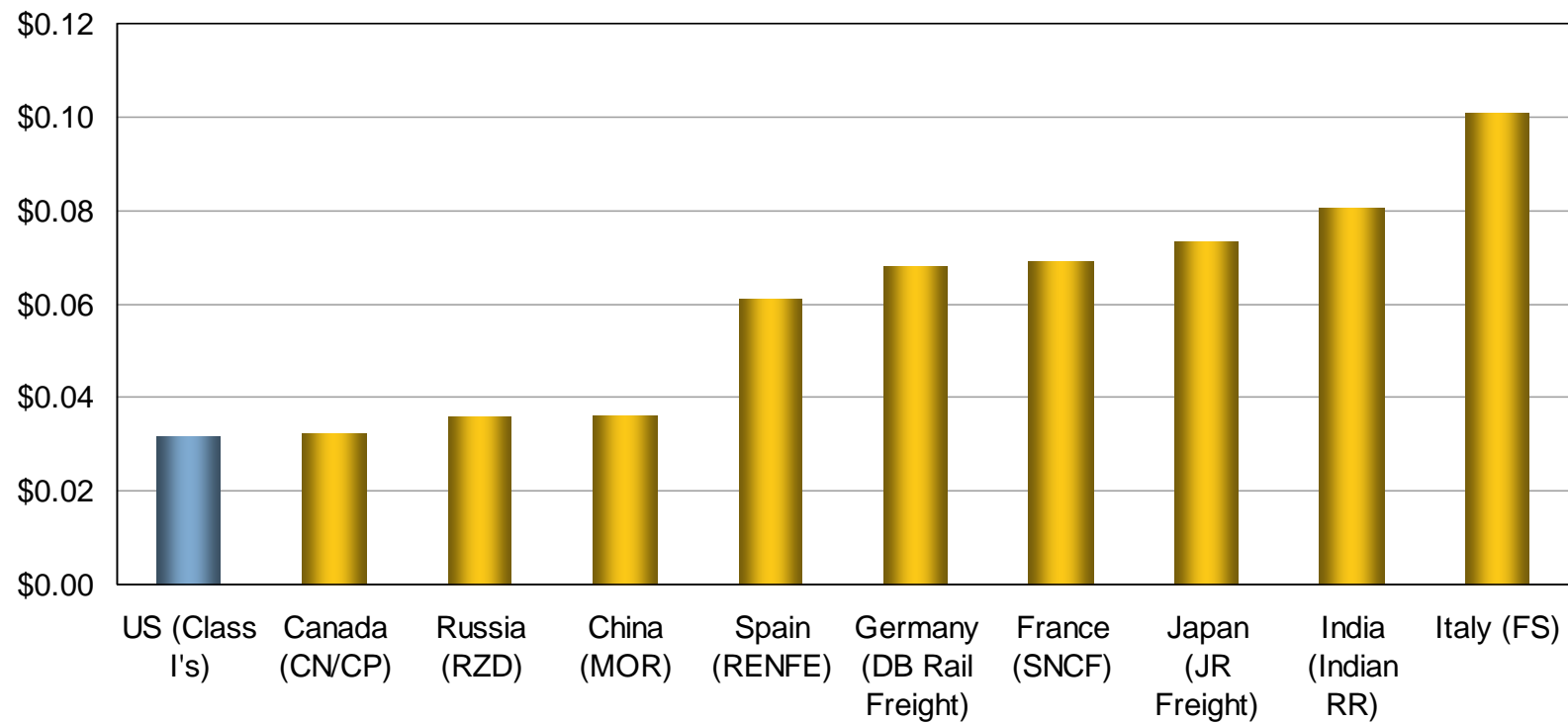
Exhibits in Support of Statement
by William J. Rennie

Major World Rail Systems (by tkm): Employee Productivity



Source: World Bank Railways Database, May 2007. Employee productivity = tkm+pkm per employee.

International Rail Freight Charges: PPP Freight Revenue per TKM

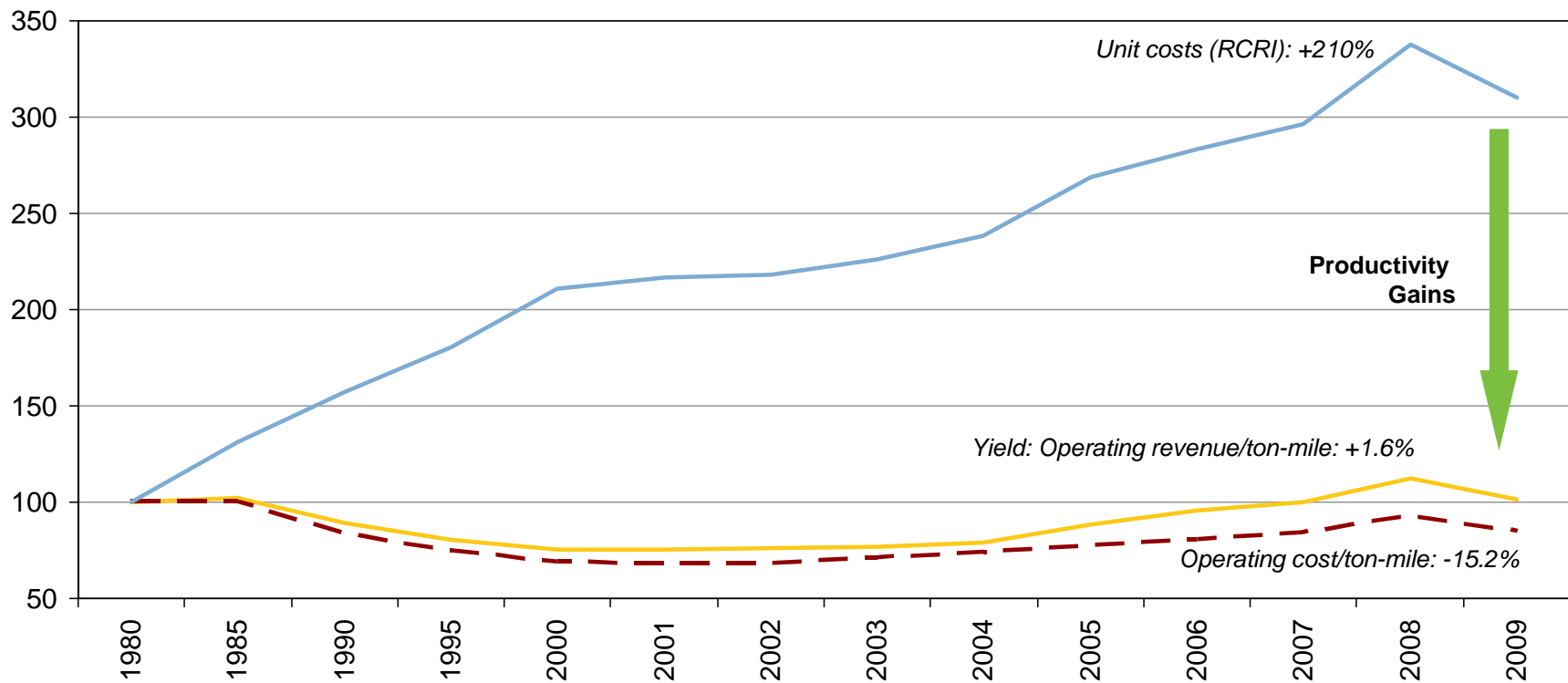


Data for named rail systems only, adjusted for purchasing power parity and based on 2006-2008 averages.
Source: Various international railroads and rail associations, World Bank.



Indexed Average Revenues and Unit Costs, 1980-2009

1980=100

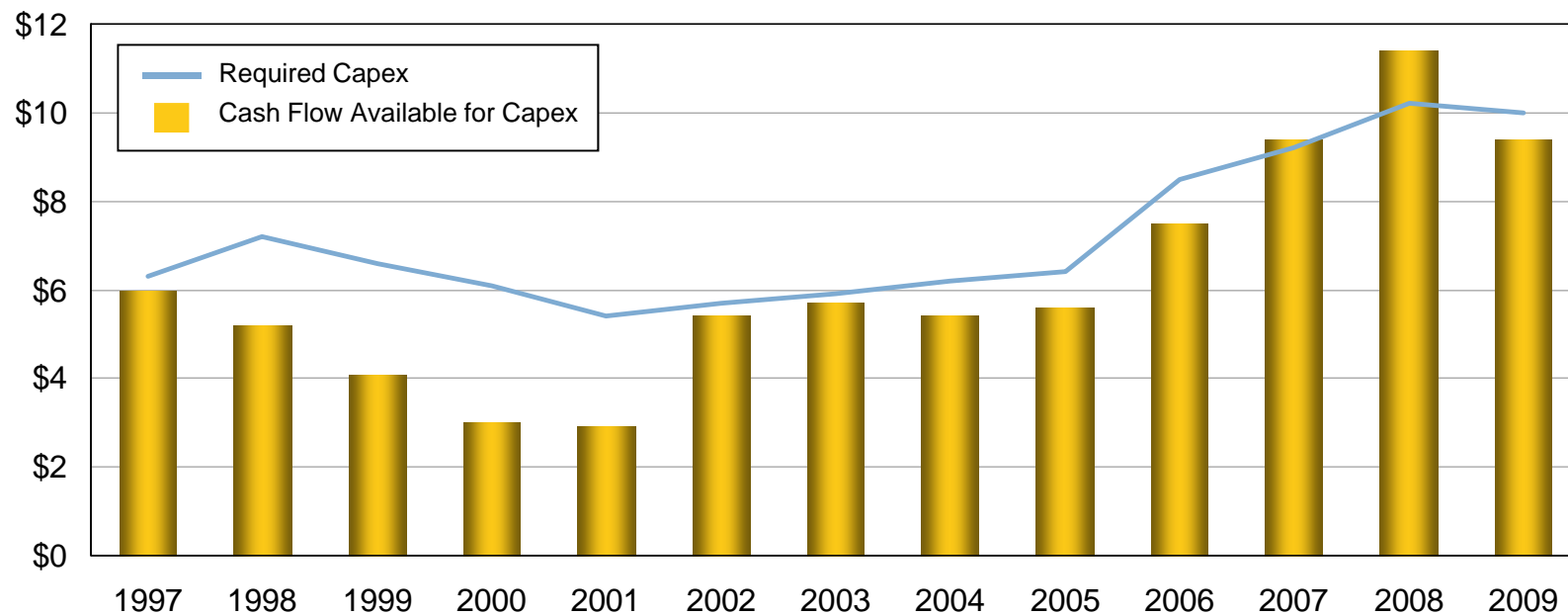


Note: RCRI= rail cost recovery index.

Source: AAR Analysis of Class I Railroads, AAR Railroad Fact Book 2010, Oliver Wyman analysis.



Funding for Rail Capital Expenditures from Cash Flow vs. Required Capex \$ billions

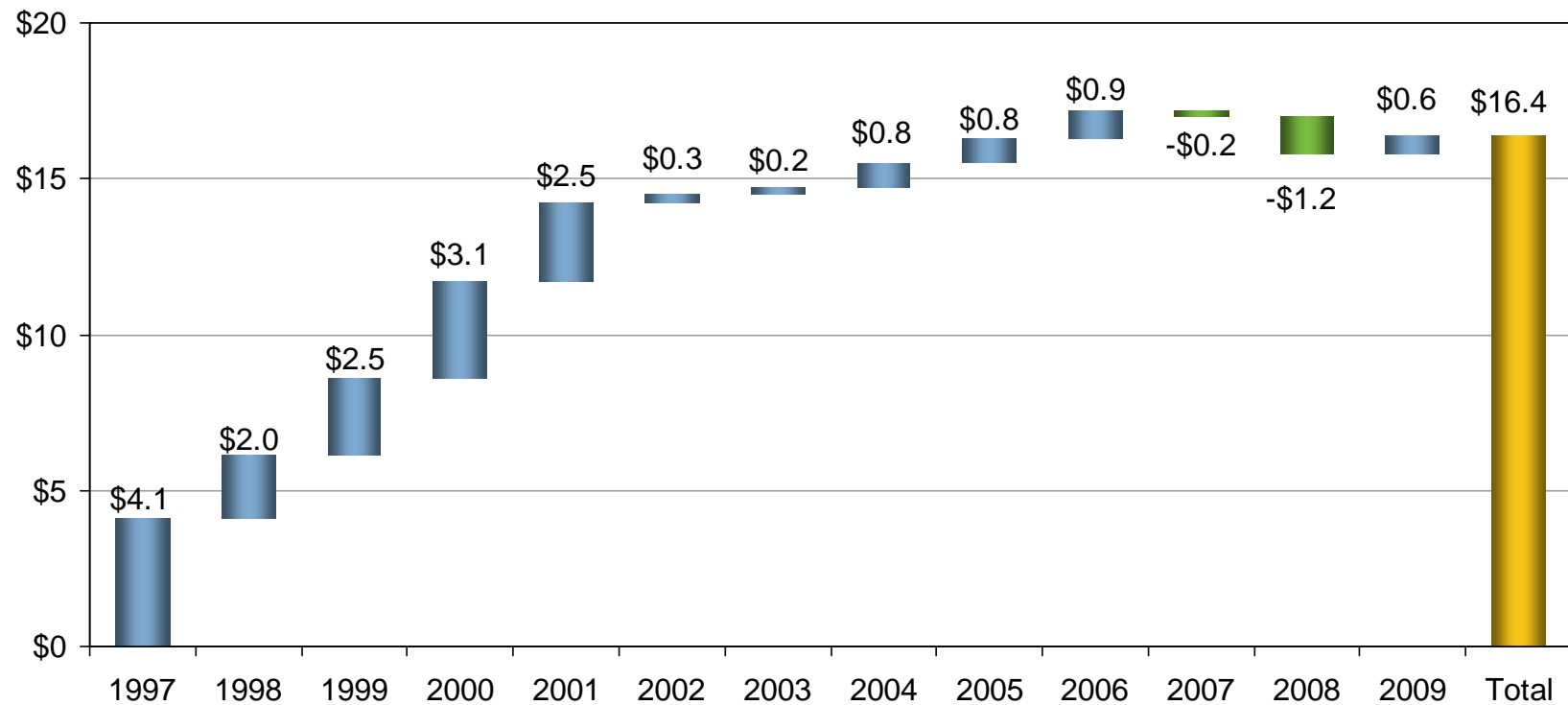


Note: Cash Flow = Net Income + Depreciation + Deferred Taxes +/- Subsidiary Adjustment – Dividends – Debt Repayment. Capex = Equipment and roadway and structures only.
Source: AAR Ten Year Trends, Oliver Wyman analysis.



Cumulative Operating Cash Flow Shortfall to Fund Class I Railroad Capital Spending, 1996-2009

\$ billions



Source: AAR Railroad Ten-Year Trends, AAR Analysis of Class I Railroads, and Oliver Wyman analysis.

OLIVER WYMAN

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June 23, 2011

VIA HAND DELIVERY

Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Competition in the Railroad Industry
Ex Parte No. 705

Dear Ms. Brown:

Enclosed for filing are an original and two copies of the color PowerPoint slides accompanying the presentation of John P. Lanigan of BNSF Railway Company on June 23, 2011, in the above-captioned proceeding. Please date-stamp the extra copy and return it to our representative.

Sincerely yours,

Robert M. Jenkins III
Robert M. Jenkins III

RMJ/bs

Enclosure

cc: Richard E. Weicher
Jill K. Mulligan

BNSF Railway

Ex Parte No. 705: Competition in the Rail Industry

**John Lanigan
Executive Vice President and
Chief Marketing Officer**



June 23, 2011

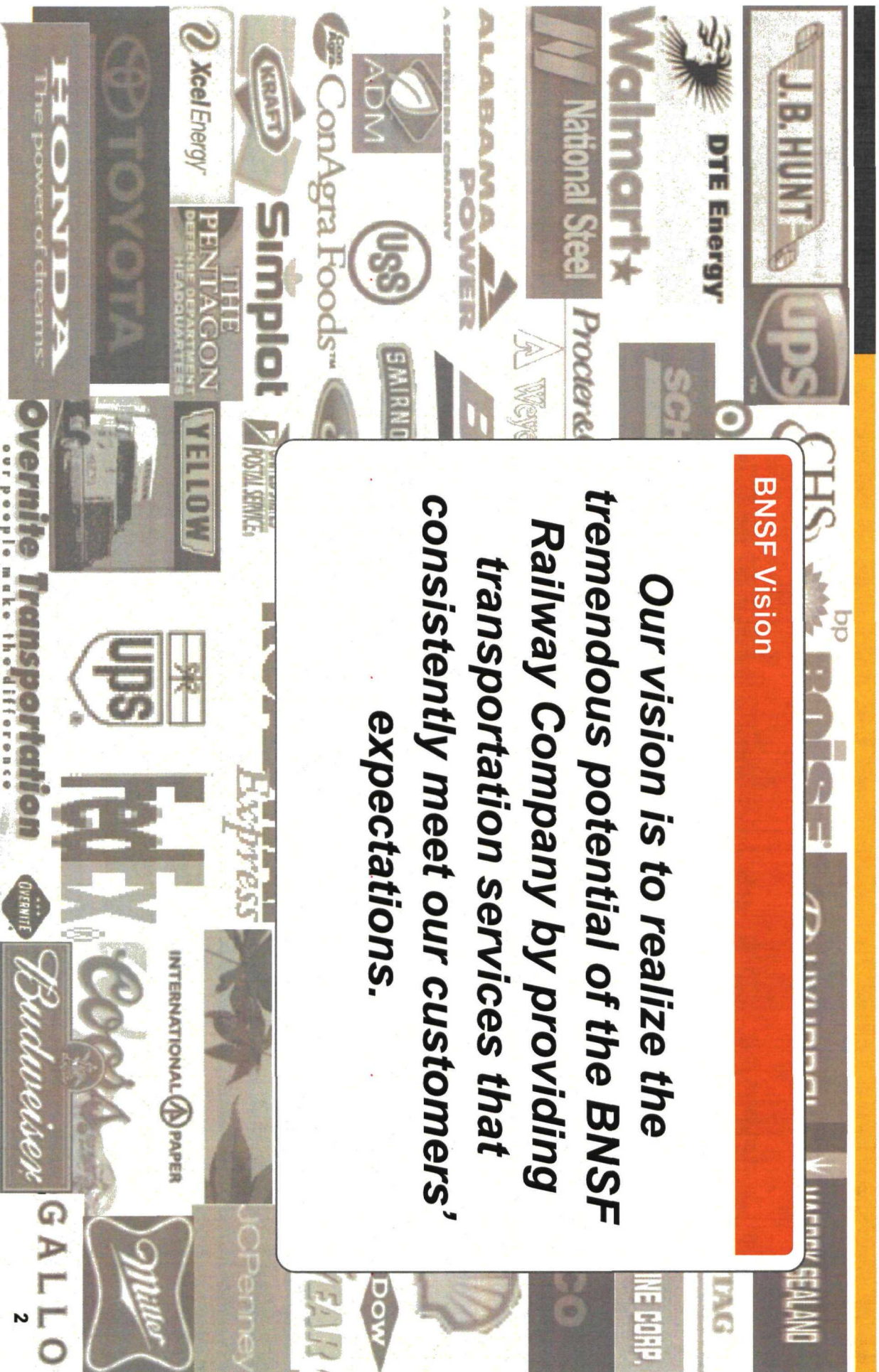
BNSF

Creating a Competitive Environment

Major Customers and Our Vision

BNSF Vision

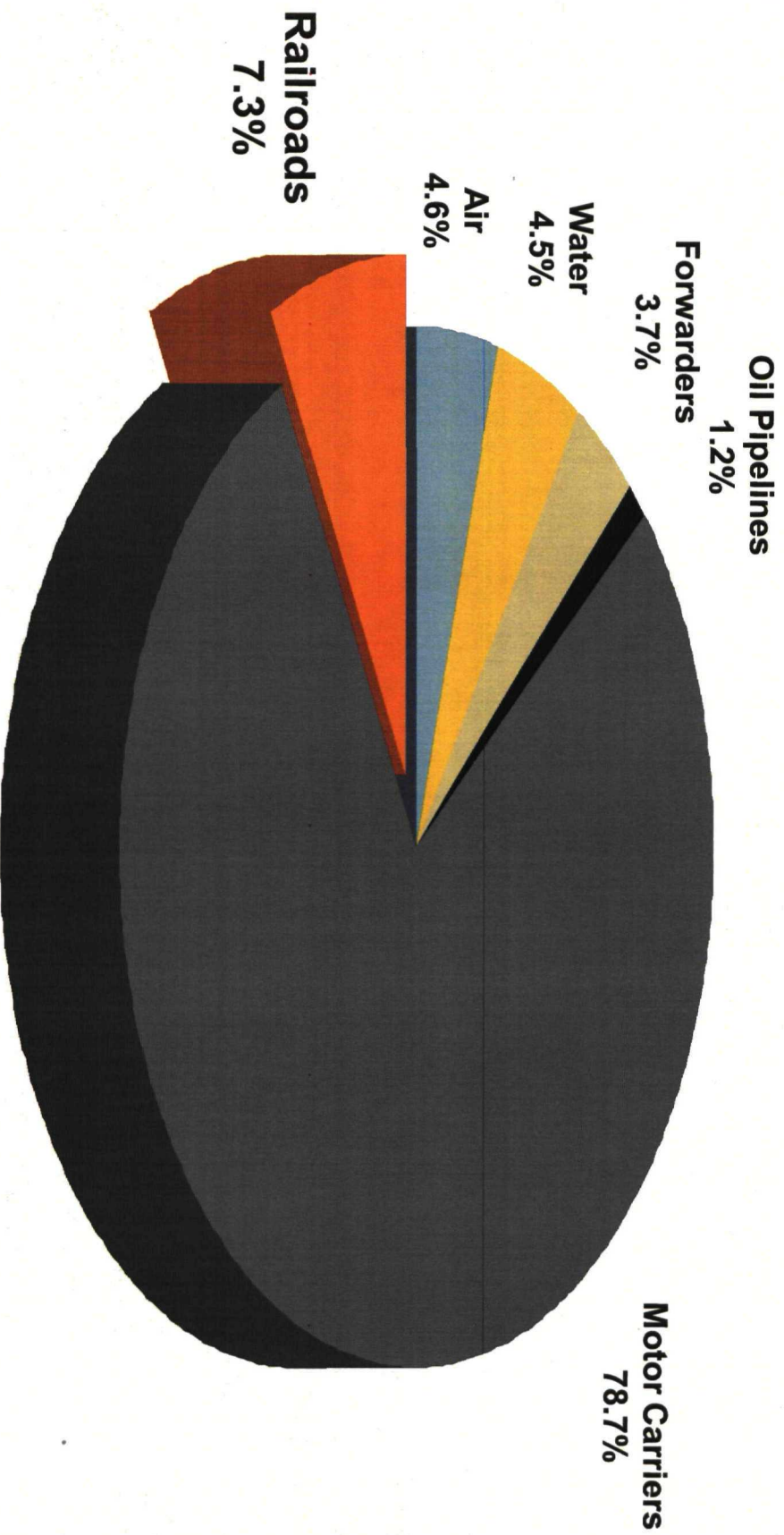
Our vision is to realize the tremendous potential of the BNSF Railway Company by providing transportation services that consistently meet our customers' expectations.



U.S. Transportation Modal Share

Based on Revenue

Mode and % of Total Share



Source: 2010 CSCMP Annual State of Logistics study (2008 data)

Creating a Competitive Environment **Our Competition**



**Freight
Railroads**



Trucking



Pipelines



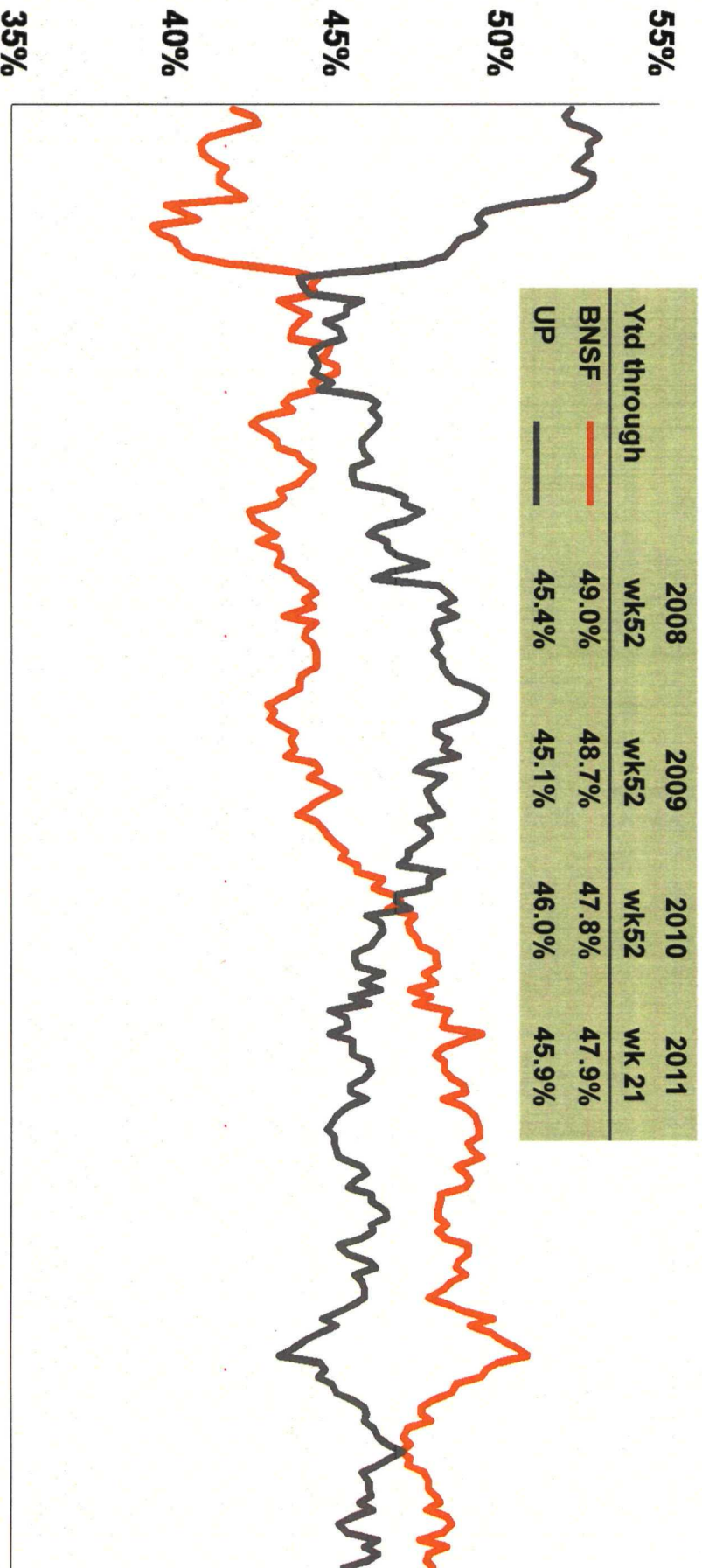
**Inland/Coastal
Waterways**

Creating a Competitive Environment

Western U.S. Rail Market Share

BNSF-UP Share Trend

Percent of Western Rail Units
Four Week Rolling Average



1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011

Value of a share point in the West = \$350M (2008 \$)

Source: Association of American Railroads (AAR); CS54 Data thru week ending 05/28/2011

BNSF

Western Coal Markets Are Competitive

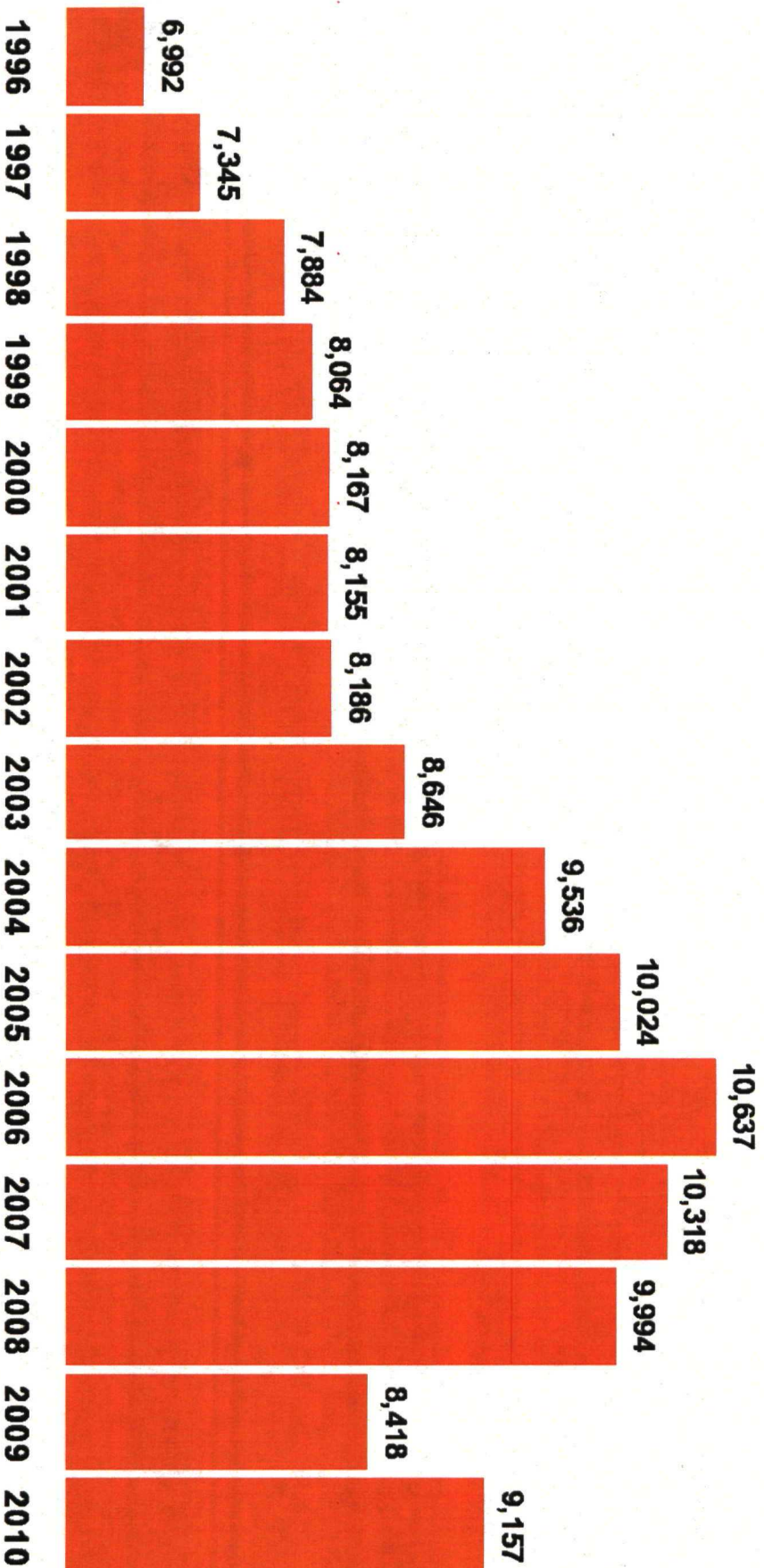
- **WCTL claim: Competitive coal accounts no longer change hands....**
- **2004: BNSF won new business or increased share to 13 plants and lost business to 4 plants**
- **2005-2011: BNSF won new business or increased share to 30 plants; BNSF lost business to 21 plants**
- **2004-2011: coal delivery to 11 plants changes hands more than once**
- **It is not true that competition does not exist where a shipper awards the business to the incumbent railroad**

Creating a Competitive Environment

Historical Volume

BNSF Units

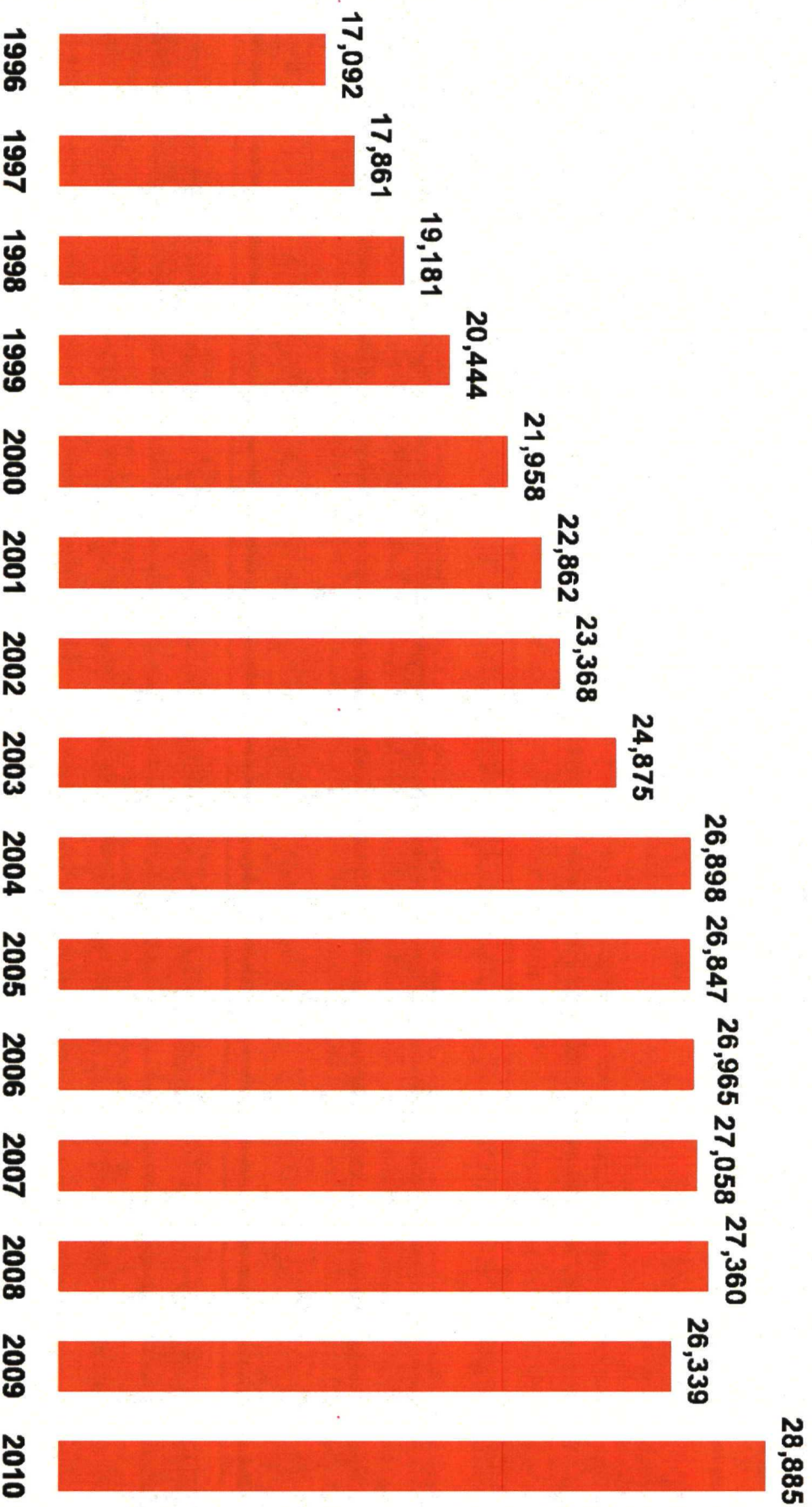
Thousands



Creating a Competitive Environment

Improving Efficiency of Operations

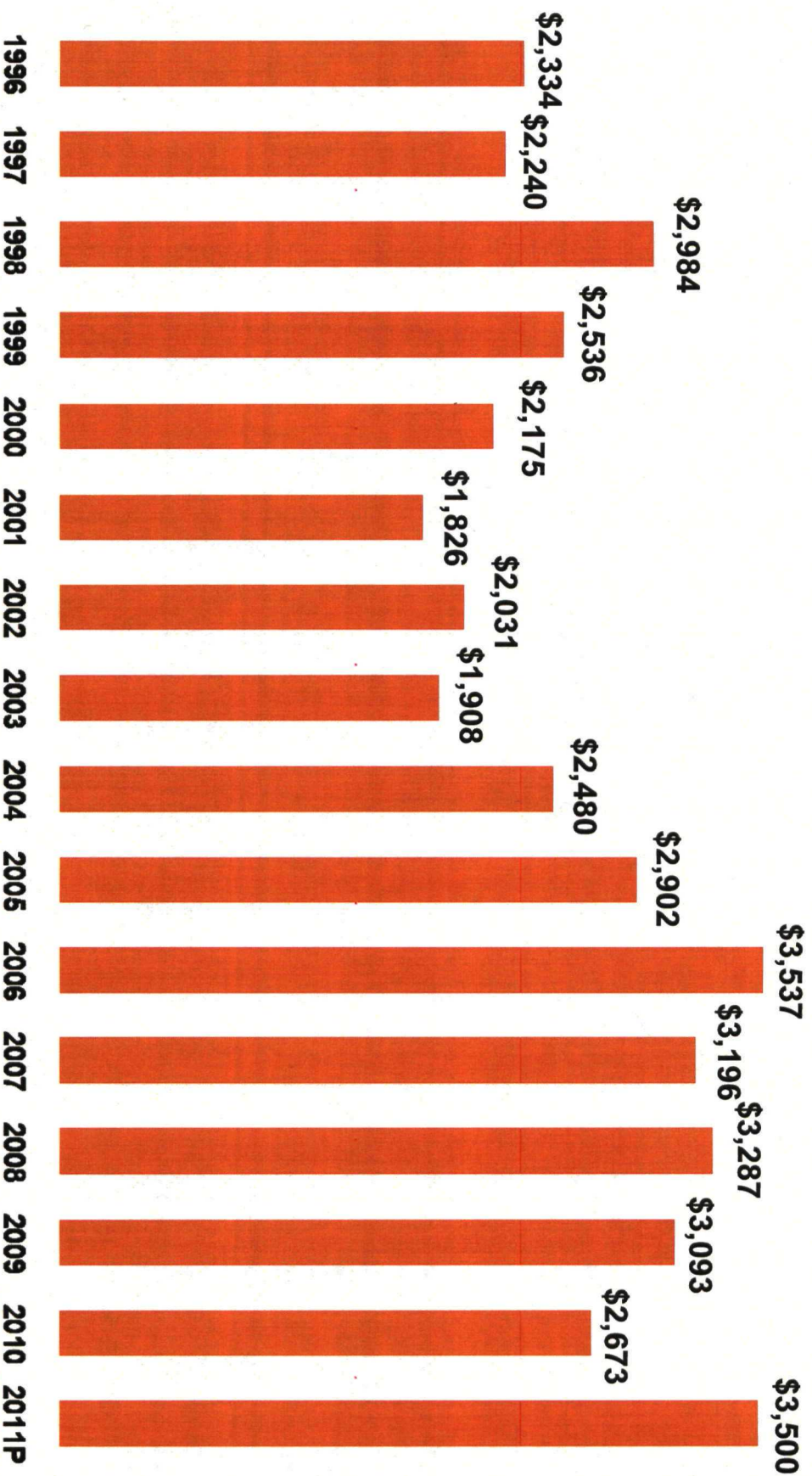
Thousand GTMs per Employee



Creating a Competitive Environment **Reinvesting in Our Network - Capital Commitments**

BNSF Total: \$39 Billion Invested From 1996-2010

\$ Millions

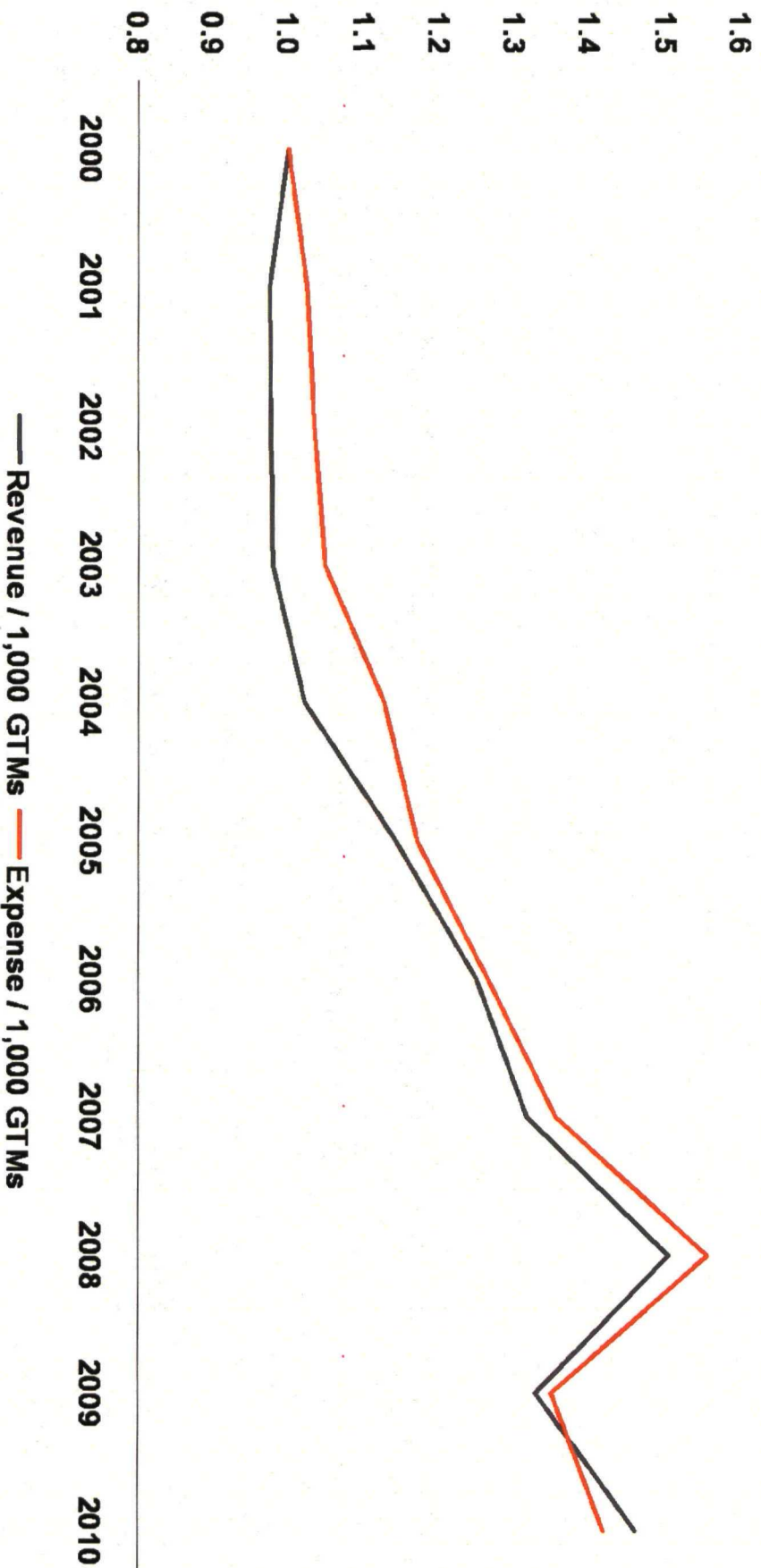


Note: Commitments restated to include equipment full amount regardless of financing method and timing.

Creating a Competitive Marketplace

Revenue & Cost Curves Closely Aligned

Cumulative Growth Rate of BNSF Freight Revenue and Operating Expense per 1,000 GTMs (Indexed to Year 2000)



Conclusion

- Our continuing investment to maintain and expand our network has enabled us to provide better service at lower prices.
- The rail marketplace is highly competitive across modes. BNSF competes every day with other railroads, trucking companies and barge companies for business.
- Railroad assets are long lived and the railroad industry needs to invest now to meet unprecedented future demand for our services.
- Rational regulation provides certainty and stability and allows railroads to earn a return that can sustain investment to replace and expand our networks.
- The Board should not adopt the proposals for new “access” regulation that jeopardize the ability and incentive of railroads to make future investments in the Nation’s freight rail system.

230316
475

NEVADA CENTRAL RAILROAD

BASE OF OPERATIONS: 2741 - Pinewood Avenue, Henderson, Nevada 89074
(702) 914-7796

ROBERT ALAN KEMP, D/B/A:

NEVADA CENTRAL RAILROAD



VIA - IMMEDIATE FAX FILING

Cynthia T. Brown

Chief, Section of Administration
Surface Transportation Board
395 - E. Street, S. W., Room: 100
Washington, D.C. 20423-0001

- CERTIFIED -

[IITLS: PROTOCOL - 2000 -TM.]

BY EMERGENCY FAX FILING: 202-245- 0461 - 0464

RE: Docket No.

EX PARTE - 705

(Wednesday), June 22, 2011

PETITIONERS PRELIMINARY ORAL EXHIBIT: 1-A.

COMPETITION IN THE RAILROAD INDUSTRY

Ms. Brown:

Despite the unlawful failure by the Board on June 21st, 2011 to Grant Petitioner sufficient time with which to Testify June 23rd, 2011, I have e-filed an original copy of: ROBERT ALAN KEMP, D/B/A; NEVADA CENTRAL RAILROAD's (PETITIONERS PRELIMINARY ORAL EXHIBIT: 1-A.), along with this cover sheet specifically relating to the provision of testimony within the hearing on June 22nd, thru June 23rd, 2011, noticed within STB Docket: EX-705.

If You or Your Staff have any questions or comments, please feel free to contact me personally.

Very truly yours,

Robert Alan Kemp (702) 914- 7796

Sole Proprietor D/B/A, NEVADA CENTRAL RAILROAD, Henderson, NV 89074

**ENTERED
Office of Proceedings**

JUN 23 2011

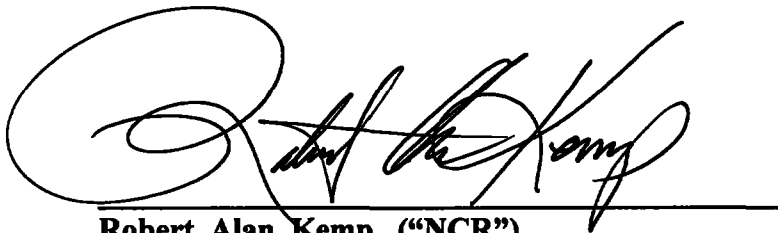
**Part of
Public Record**

Enclosures: Petitioners Preliminary Oral Exhibit: 1-A., Certification of Service

cc Mr John T Digiho, Jr., Vice Chairman - Director/President, IITLS
Mr Joseph Anthony McNulty, III - Director/Vice President, IITLS

CERTIFICATE OF SERVICE

I, **Robert Alan Kemp**, hereby certify that (3-EA.) copies of the instant (47 -Page): PETITIONERS PRELIMINARY ORAL EXHIBIT: 1-A., along with the enclosed Proof of Service Sheet filed by Robert Alan Kemp to the SURFACE TRANSPORTATION BOARD, was personally mailed by the undersigned this 22nd., day of June, 2011, via First Class US-Mail.

A handwritten signature in black ink, appearing to read 'Robert Alan Kemp', is written over a horizontal line.

**Robert Alan Kemp, ("NCR")
(702) 914- 7796**

1 Robert Alan Kemp
 2 9084 - East Arbab Court
 3 Tucson, AZ 85747
 4 (520) 574 - 2262

5 **In the United States Court of Appeals**
 6 **for the Ninth Circuit**

7 **ROBERT ALAN KEMP - D/B/A:**

No. **09 - 70576**

8 **NEVADA CENTRAL RAILROAD**

STB No. **AB-33 (Sub-No.230X)**

9 Appellant/Petitioner

10 vs.

11 **APPELLANT'S (INFORMAL)**

12 **SURFACE TRANSPORTATION**
 13 **BOARD**

OPENING BRIEF

14 Respondent

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 25 COMES NOW Petitioner [Robert Alan Kemp, D/B/A: NEVADA CENTRAL
 26 RAILROAD, hereinafter ("APPELLANT" or "Appellant," and or "PETITIONER" or
 27 "Petitioner")] as a non learned ignorant individual person Pro-Per, the undersigned, as and
 28 against the United States Surface Transportation Board, and therefore hereby respectfully files
 his INFORMAL OPENING BRIEF in the instant proceeding as follows.

COPY

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1. JURISDICTION

a. The instant appeal was timely filed within 30-Calender Days of the rendering and service of a Final Decision by the Surface Transportation Board, hereafter ("STB").

(I) Entry of Judgment by the STB denying both of Petitioners appeals was executed January 27th., 2009. [SEE ATTACHED EXHIBIT - M]

(ii) No Motions were filed by any Party subsequent to Entry of Judgment identified as Docket Entry: # 53., by the STB. [SEE ATTACHED EXHIBIT - N]

(iii) Notice of Appeal along with the applicable Fee in the amount of: \$ 450.00 was filed by this Petitioner on February 26th., 2009, and was subsequently docketed by the Clerk of the Court, one working day later on February 27th., 2009.

(iv) Petitioner obtained an Extension of time to file the instant Opening Brief from the Court by Telephone following oral notification to opposing Counsel at the STB, resulting in a mutual stipulation to extend time, thereby extending the Due Date for filing to: April 22nd., 2009.

2. BACKGROUND AND FACTS LEADING UP TO THIS CASE

Petitioner doing business as: NEVADA CENTRAL RAILROAD hereafter ("NCR"), has engaged continuously for the last 34-Years to develop the necessary combined elements in terms of Financing, Configuration, and Technology, to construct a Heavy High Speed

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Mainline Freight/PAX (North-South) Railroad System within the state of Nevada, extending into California and Arizona south to the Mexican border, then further north through the states of Oregon, Washington, finally terminating in Vancouver, Canada. Most important is the fact that the entire NCR - Rail Track and Rail Car Configuration will be technologically superior to any Railroad System ever constructed in any country of the world. Critically important is the fact that the New COMPLETELY PROVEN and COMPLETELY SCALABLE High Technology Rail System, now publically identified as the: NCR-By-Pass-™. construction project, is virtually Pollution-less and will initially utilize 68% Less Fossil Fuel, and within 5-Years 100% Less Fossil Fuel to operate, while traveling 300% faster than a any conventional Diesel Locomotive powered Freight train currently in operation. As a byproduct of its own power production technology and configuration, it will render the Majority of (all) Coal Powered Generating Systems within the United States as virtually Obsolete essentially eliminating over 30% of all US emissions, as well as an additional 20% of total overall National emissions now created resulting from the operation of the National Railroad/Truck System, itself. Bottom Line is that it will effectively eliminate at least 85% of the requirement for the Transportation of Heavy High Polluting Coal by the entire National Railroad System once the NCR Railroad and its Power Generating Technology is integrated into all Class-I and Class-II Railroad operations, and will convert all remaining distributed Coal based Electrical Power Generation Systems solely to Local Power Production as facilities located adjacent to specific Coal Production Sites. The PROVEN NCR Proprietary Electrical Power Production and Transmission Technologies will effectively eliminate the current critical construction requirement for the majority of all New ecologically devastating High Voltage AC-Electrical Power Generating Power Line Transmission Systems within the entire United States.

This current case of National Security and Critical National Public Interest now before this Honorable Circuit Court involves one of the most Essential Initial Key Elements of the initial overall development of the NCR-By-Pass-™. Railroad Construction Project by this Petitioner. For over 29-Years Petitioner has been planning and analyzing the most

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ABSOLUTELY CRITICAL ROUTING REQUIREMENTS for the construction of the NCR-By-Pass-TM (North-West Fork), and by 1989 had identified a historic abandoned Western Pacific Railroad route running in a Northwest direction from the Town of Tonopah, NV, through Wadsworth, and then continuing further Northwest to an intersection with the Union Pacific Railroad National Main Line System in Northwest Nevada, to a location Point identified as: ("FLANIGAN").

Unfortunately, as part of an unlawful criminal covert plan by Union Pacific Railroad Company, acting in conjunction with the BNSF as a means to completely eliminate ALL Alternative Clean Burning Power Production Facilities in the US that don't require the Heavy Transportation of massive amounts of Heavy-High Polluting Coal, based on a Strategic Theory violating long standing Anti Trust precedents identified within the NORTHERN SECURITIES CO. Vs. U.S. Case, decided March 14th, 1904, UP decided to Defraud Petitioner and thus execute unlawful actions within the scope of the UP Abandonment Petition identified as: AB-33 (Sub No. 230X) filed by UP October 10th, 2006, for which to abandon an Appx: 21.77-Mile Rail Line from Flanigan, Nevada, to Wendell, California, so that the New High Technology Railroad owned by this Petitioner, "NEVADA CENTRAL RAILROAD," could Never Successfully Acquire this **ABSOLUTELY CRITICAL** existing Essential Rail Route Connection to the historic ("MODOC") Line, extending due North from Wendell, CA, through Oregon and Washington State, to Vancouver, Canada, as well as to block the NCR from connecting its New Heavy High Speed, High Technology Mainline (Electrified) Railroad System, to the existing clean Alternative Fuel/Geothermal ("HL-ELECTRIC POWER-PRODUCTION PLANT") facility, also located in Wendell, CA. As part of multiple Predicate Criminal Acts in Racketeering, Union Pacific proceeded to criminally engage in a number of unlawful acts including but not limited to, the Interference of Interstate Commerce by Rail, as well as violations of the "Supremacy Clause" within the United States Constitution by failing to operatively comply with all of the provisions of STB Regulations under section: 1152.27-(a)(2), and -(a)(3), as a direct means to effectively terminate Petitioners ability to obtain necessary

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financing to support his OFA for the acquisition of the Entire (21.77-Mile) Rail Line, as well as the further execution of multiple acts of FRAUD, by virtue of the provision of Knowingly False Information and False Assertions. documented by UP within the subject: AB-33 (Sub.No. 230X) abandonment docket, as and about Petitioner, D/B/A: NEVADA CENTRAL RAILROAD, and further as necessary to operatively destroy Petitioners Offer of Financial Assistance, ("OFA"). The bottom line, is that in order to successfully destroy (NCR) and all of its New Transportation and Non-Polluting Electrical Generating Technology, that is **Not** based on the Mining, Transportation, and Utilization of Heavy-High Polluting Coal, UP very well knew that it had to secretly take any and all action necessary to ultimately include the execution of multiple criminal acts within the scope of a Federal Railroad Abandonment Proceeding, in order to Target and Destroy any and all **NON: Heavy-High Polluting Coal Fired Power Plants**, specifically in the instant case in the form of the **RELATIVELY CLEAN BURNING** and or **VIRTUALLY POLLUTION-LESS Alternative Electrical Power Generating Facilities** within the Unites States, such as but not limited to, the **HL-Power Plant** in Wendell, CA., that this Petitioner is presently in the process of Lawfully Condemning, that require Rail Access to the National Railroad Transportation Network, thus UP proceeded to systematically abandon strategic Rail Lines, and thus Salvage these Critical Tracks to the Alternative Power Plants, and in this case effectively through their unlawful acts, to Terminate the only connection to the MODOC Route by NCR, as a means to Permanently Terminate and thus Destroy the entire NCR-By-Pass-TM., Railroad Construction Project. However in the instant case, None of the Criminal Objectives by the Union Pacific Railroad Company could ever have been accomplished, without first obtaining the expressed cooperation of individuals employed within the STB: Office of Proceedings, and Office of General Counsel, as well as specific Members of the Board. UP, ultimately requires Significant Exclusive Insider Assistance at the highest levels within the STB, in order to operatively and financially destroy this Petitioner, and as such All Future Competition in the form of the: **NEVADA CENTRAL RAILROAD.**

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ORIGINAL REQUESTS BY PETITIONER WITHIN PREVIOUS APPEALS TO STB
AND
PREVIOUS MOTION PRACTICE

Petitioner on behalf of the NEVADA CENTRAL RAILROAD corporation, "a Railroad Corporation of Nevada," initially engaged in the (Offer of Financial Assistance) Process, hereafter the ("OFA") Process, concerning the Union Pacific Railroad Abandonment Case Filing publically conducted by the STB within AB-33 (Sub. No. 230X); on (Friday), October 30th, 2006 by first filing by Certified US-Mail, NCR's PUBLIC NOTICE OF INTENT TO ACQUIRE AND PROVIDE FOR THE MAINTENANCE OF INTERSTATE COMMERCE AND OPERATION OF RAIL TRANSPORTATION SERVICES IN WASHOE COUNTY, NEVADA, AND LASSEN COUNTY, CALIFORNIA, thereby lawfully Noticing the STB of the Intent by NCR, and I quote as further described in the same Notice; " to initially institute and maintain Class - III Railroad Operations on the subject lines for which the Union Pacific Railroad Company wishes to dispose, publically described by the Union Pacific Railroad Company as identified for ABANDONMENT in Washoe County, Nevada, and Lassen County, California, within the Union Pacific Railroad Company's, hereinafter (UP or UP's) Petition for Exemption Docket: AB-33 (Sub-No. 230X)." Please see Petitioners EXHIBIT: [A], attached hereto which is a copy of the: NCR Public Comment Letter of: October 13, 2006. This same Public Comment Letter was subsequently lawfully ENTERED by the STB: Office of Proceedings, on October 30, 2006, as part of the: "Public Record."

Petitioner on behalf of NCR, timely filed NOTICE OF INTENT TO FILE OFA on (Wednesday), November 8th, 2006. As quoted within NCR's Notice,: "NCR, pursuant to 49 C.F.R. 1152.27(a), asks the Union Pacific Railroad Company to provide it with copies of the most recent report on the physical condition of the line, the carriers estimate of the net liquidation value of the line, with supporting data including, but not limited to identification of the parcels of land underlying the rights-of-way which are owned in fee and those which are

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easement grants including [US-Government Granted Rights of Way], the lengths, weight, age and condition of the relay, reroll and scrap rails, the reusable and scrap ties, the speed limits on the line, and any other restrictions which pertain to use of the line by Milepost, and any other information including Engineering Diagrams and Drawings, or Maps, deemed relevant to enable NCR to calculate the net liquidation value of the line and the minimum purchase price which the Union Pacific Railroad seeks for the property." Please see Petitioners EXHIBIT: [B], attached hereto which is a copy of the: NCR NOTICE OF INTENT TO FILE OFA of: November 8th, 2006

Petitioner on behalf of NCR, timely filed MOTION TO STRIKE on (Tuesday), April 29th, 2008. Within the Motion, NCR provided incontrovertible evidence that UP had been deliberately engaging in the Unlawful Salvaging and Alteration of the subject 21.77-Mile rail line, following UP's action to file for Abandonment of same. In a Nut Shell, UP was using a Subcontractor to come in on the line and pick up all of the most valuable rail and switch material on the system, then systematically replace same with "TRASH, in terms of what would be needed in the case of an Operating Railroad, factually defrauding NCR. This Age Old Rail Scheme is based on most cases in within the Mainline Railroads ability to (first); knowingly lure in an Interested Party that they already know are going to file an OFA for a specific line of rail, and (second); to then covertly come in for purposes of deny-ability with a "SPECIAL" Sub-Contractor Hit Team like: Kern Schumacher/Fritz Kahn at A&K - Railroad Materials, or RTI/John Heffner; (in an attempt to generate and thus be capable of then claiming an omission), and direct the Sub-Contractor to criminally Rob the Interested Party under Hobbs, (18 - U.S.C. 1951), and Civil-RICO (18 - U.S.C. 1962c & 62d), by unloading all of the Mainline Railroad's TRASH RAIL in the form of Worn Out Rail Sections by first picking up all of the Useful Rail from a specific targeted rail line, and then replacing same with the TRASH after the OFA is filed. The result is that STB staff within the Office of Proceedings, will knowingly RUN COVER, and authorize the sale of the line based on the Price of Salvage by virtue of Weight, as opposed to Useful Rail in terms of useful sections of rail for which a

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Railroad may factually operate, thus defrauding the entity executing the OFA as the Interested Party must then automatically complete the salvage operation previously initiated, and rehabilitate the entire line thus experiencing a Massive Financial and Operational Loss, (All within long established STB rules for Abandonments), unless of course in the case of NCR where NCR uncovers the Criminal Cartel and catches UP in the Criminal Act of Racketeering. This is precisely why UP could never have provided a Condition Report to NCR in accordance with the mandatory STB Rules under 1152.27, and instead filed, and as such Pawned Off, an Operational Exception Report used as the basis with which to generate a Speed Chart, that would of course: NOT IDENTIFY (ANY) of the necessary details of the Actual Condition of the TRACK, TIE'S, TIE PLATES, SPIKES, ROADBED, BRIDGES, and any and all other remaining Railroad Materials related thereto. UP already knows that NCR can utilize the information contained within the Condition Report as sufficient incontrovertible evidence in the NCR Federal Court Action, as and against UP, thus "No Condition Report" can ever be provided to NCR in direct contravention of Board Regulations, by UP. This is precisely why the Director of Proceedings documented the Key Words within his Original Decision to Reject the NCR OFA, when he states: "It Appears" that UP has provided NCR with the Condition Report. No matter what, the Director just as in the case of UP, also needs to generate the basis of an omission on behalf of himself and the Board, thus the inclusion of the words; "It Appears" as opposed to a simple statement of confirmation of Fact. Please see Petitioners EXHIBIT: [C], attached hereto which is a copy of the: NCR MOTION TO STRIKE of: April 29, 2008.

Petitioner on behalf of NCR, timely filed MOTION TO STRIKE on (Tuesday), May 13th, 2008. Within the Motion, Petitioner confirmed to the Board, through the provision of incontrovertible evidence, that UP on May 5th, 2008, had filed a Procedurally Impermissible SUPPLEMENT to their previous Reply filed 25-Days Prior, on April 11th, 2008. Even UP in their own filing on May 5th, 2008 documented that the information contained within the same filing, was a (SUPPLEMENT) to their own previous Reply of: April 11th, 2009. NCR clearly

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3 and precisely pointed out to the Board the incontrovertible fact that virtually NONE of the
4 Information provided in the May 5th., filing by UP, addressed nor in any way even remotely
5 related as a Reply, to the NCR - MOTION TO STRIKE previously filed on April 29th., 2008.
6 The most important Point of the inclusion by Petitioner of this element of evidence, is the
7 ABSOLUTE FACT that the Board knowingly and deliberately extended time to UP, and as
8 such the opportunity by UP, to file a SUPPLEMENT unlawfully disguised as a Reply even
9 beyond the Statutory and Administrative Practice of the 21-Day Time Limit for filing of any
10 such motion. UP effectively filed: ABSOLUTELY - NO SUBSTANTIVE RESPONSE to the
11 NCR - MOTION TO STRIKE on April 29th., 2008, and yet, All of the Totally Unsubstantiated
12 and Unrelated Information contained within the UP filing of May 5th., 2008 was accepted by
13 the Board. Please see Petitioners EXHIBIT: [D], attached hereto which is a copy of the: NCR -
14 MOTION TO STRIKE of: May 13th., 2008.

15 Petitioner on behalf of NCR, timely filed NOTICE OF SUBSTITUTION on
16 (Wednesday), August 27th., 2008. Petitioner notified the STB that the NEVADA CENTRAL
17 RAILROAD Corporation of Nevada, had transferred Assets in the form of: Title, Name, and
18 All Rights of the NCR as a "Railroad" to Petitioner, thus Petitioner assumed legal possession
19 and ownership to all STB; filings, applications, petitions, motions, and business development
20 activities presently and active on file by the STB specifically but only relating to the Railroad
21 operated under the name of NEVADA CENTRAL RAILROAD, as previously owned by the
22 Nevada Corporation. The ownership of the Original Corporate Entity as an independent
23 distinct qualified legal entity within the state of Nevada as a wholly owned subsidiary division
24 of AVIATION TECHNOLOGIES LTD., hereafter ("ATL") was Not Conveyed as a result of
25 the Substitution by Petitioner to the STB. Petitioner lawfully conveyed a license to the distinct
26 Corporate Entity in Nevada, owned by ATL, to continue to contemporaneously utilize
27 Petitioners intellectual property in the form of the Trade Mark/Name: NEVADA CENTRAL
28 RAILROAD. Following receipt of the NOTICE OF SUBSTITUTION by the STB, the STB
Granted the Substitution by Petitioner, and therefore

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Petitioner lawfully proceeded within the scope of AB-33 (Sub. No. 230X), in Person D/B/A: NEVADA CENTRAL RAILROAD, as the lawful owner of the NCR. All equipment presently in possession through contractual agreement by the Independent Nevada Corporation, operating through License Agreement under the name and style of: NEVADA CENTRAL RAILROAD, is owned by: AVIATION TECHNOLOGIES LTD. Please see Petitioners EXHIBIT: [E], attached hereto which is a copy of the: NCR - NOTICE OF SUBSTITUTION of: August 27th., 2008.

Petitioner, D/B/A: NCR, timely filed OFFER OF FINANCIAL ASSISTANCE (PURCHASE) on (Monday), September 15th., 2008. Petitioner also contemporaneously by and through contractual agreement with the Banks Family Trust, filed his NOTICE OF FINANCIAL GUARANTEE on September 15th., 2008. The Financial Guarantee provided by the Banks Family Trust was a legally qualified Verified Financial Guarantee that met All Requirements of the STB., and was issued by the "TRUSTEE" of the Banks Family Trust: by Kevin M. Banks, as further verified by his lawfully Notarized Signature. The Guarantee was specifically executed to Guarantee Immediate Funds in the amount of: \$ 13,000.00, (Thirteen Thousand-USD.), which would more than cover the: \$ 5,750.00 identified by Petitioner in his Bonafide Offer for the (220-Linear Feet) of rail North-West of the UP Switch at Flanigan. The Financial Guarantee was specifically designed to provide immediate funds in the amount of: \$ 5,750.00 for the acquisition of the 220' line of rail from UP, as well as to provide additional funds in the amount of: \$ 7,250.00 to rehabilitate the 220' line, into Operable Condition, so Petitioner could immediately proceed to lawfully obtain an FRA Railroad Operating Certificate, and Pass FRA Track Inspection. The \$ 7,250.00 funds to Rehabilitate the Track, would also cover the installation of any necessary Replacement Ties, Signals, Markers, and Support Equipment, to render the 220' line of rail as Operationally Safe, especially considering the fact that Petitioner has already identified such excess material as available at NO COST, but for fuel/oil to transport and materials to install same, for which Petitioner would personally engage with the Truck and Trailer Equipment already owned by the NCR, and or

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ATL, Nevada Corporations. The subject Financial Guarantee, specifically guaranteed "ADDITIONAL FUNDS" as necessary to maintain operation of the line, for a (5-Year) period in addition to the: \$ 13,000.00, as previously identified therein. Please see Petitioners EXHIBIT: [F], attached hereto which is a copy of the: NCR - OFFER OF FINANCIAL ASSISTANCE (PURCHASE) and NOTICE OF FINANCIAL GUARANTEE of: September 15th, 2008.

Petitioner, D/B/A: NCR, timely filed an APPEAL on (Monday), September 29th, 2008. Within Petitioners APPEAL, Petitioner clearly explained in a precisely detailed manner, that UP on September 17th, 2008, had in fact filed a MOTION as opposed to a REPLY as then stated by the STB. Petitioner also requested in his APPEAL that the information presented therein be included, and by AMENDMENT be made part of the Original OFA filed by Petitioner on September 15th, 2008, as a result of the fact that Petitioner did NOT have the ability to file any RESPONSE to what was in fact for reasons stated therein, was in fact a MOTION filed by UP, nor at a Minimum an allocation of time to have filed a MOTION TO STRIKE the false information contained within the UP filing of September 17th, 2008. Further, Petitioner clearly explained that he had already called Mr. Rudy St. Louis at the STB., in order to obtain instructions for which to file a SUPPLEMENT to the OFA the very next day. This was before UP had responded on September 17th, 2008, as well as before the response in the form of the Decision by the Board was entered as and against Petitioner on September 19th, 2008. Petitioner also notified the Board within his APPEAL that UP deliberately FAILED to identify the fact that the HL-Power Plant was located within 1-Mile of the end of the 21.77-Mile rail line at Wendell, California, who's operation is critically impacted by it's ability to receive Fuel Deliveries via Rail, as opposed to Overland Truck.

Petitioner also clearly and precisely identified the Fact that the case DEFECTIVELY cited by both UP and the Board did Not Apply to the 220' rail line that was being acquired by Petitioner in the instant case at Flanigan. Petitioner clearly and precisely identifies potential shippers that will be supplied by NCR following the acquisition of the 220' rail line, as well as

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3 upon the completion of the appx: 21+ Mile Extension to the 220' rail line at Flanigan.

4 Petitioner also clearly notified the Board that the 220' rail line existed as a Critical Link
5 and Connection to the National Railway System.

6 Petitioner clearly and precisely indicated to the Board the specific characterization and
7 structure of the BANKS FAMILY TRUST, constituting the more than reasonable basis upon
8 which the subject Investment Partnership in the form of a "TRUST" is Financially Capable.

9 Petitioner stipulated to the provision of any additional information required by the
10 Board as necessary proof in the event that the Board requested same, within 10-Days following
11 the granting of a Protective Order to Petitioner and the BANKS FAMILY TRUST, to ensure
12 that Petitioner does Not experience further damage resulting from the execution of further
13 unlawful acts by UP.

14 Petitioner agreed to if necessary: Actually BOND FUNDS to the STB, as
15 Incontrovertible Proof of his Financial Responsibility. Petitioner also identified the inclusion
16 of All Filings within the instant proceeding in direct support of his APPEAL.

17 Petitioner cited another OFA proceeding in: STB AB-1081X as evidence in support of
18 his APPEAL, as a result of the fact that the Board accepted the Alleged Financial Guarantee
19 in the case of Sonora, regardless of the fact that the subject Guarantee in that case, knowingly
20 did Not Exist as a Direct Financial Guarantee to Sonora, but instead was an INDIRECT
21 alleged Financial Guarantee to an Independent Partner for which Sonora only "Inferred" was
22 supporting his Program to acquire the rail line. In actual practice, said support was rendered
23 through an unlawful: Enterprise. Further and critically important, is the fact that Petitioner
24 clearly and precisely identified the fact within his STB Appeal, that the Board accepted the
25 Financial Information alleged by Sonora to be sufficient for purposes of determining Financial
26 Responsibility, NOT BASED on the FACT that it was confirmed, but rather that it passed what
27 the Director of Proceedings described, as the so called: "ON ITS FACE" Appearance Test,
28 which was a completely different standard as directly applied to Petitioner within the instant
case by the very same: STB - Director of Proceedings. In the case of Sonora, the Board

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determined Financial Capability, based "on the Face" of the appearance of documents, as opposed to the provision of a Direct, Verified and Legally Certified: FINANCIAL GUARANTEE by a reputable financial organization as in the case of this Petitioner, D/B/A: NCR. Petitioner just discovered last week, while executing research necessary to complete the instant APPEAL to the Ninth Circuit Court using the Computer Driven Search Function of the Public STB Web Site that a MOTION TO REJECT OFA was also filed to the STB confirming direct statements by witnesses employed by the very same Bank, for which the alleged Letter of Credit was indicated to have been confirmed, clearly indicating that the said Letter of Credit submitted by Sonora was in fact a False Forged Document and did Not in fact comport in any way with the established format utilized by the same Bank. Most important was the fact that the Director of Proceedings had already confirmed receipt of this same MOTION TO REJECT OFA, one day PRIOR to his decision on behalf of the Board, to officially render Sonora as Financially Responsible within the scope of an OFA. It is also important to note that the Principal of Sonora had executed a Telephone Conversation with Petitioner subsequent to the date and his possession of the alleged Multi Million Dollar "Letter of Credit" and personally confirmed to this Petitioner that he did Not have sufficient financing to support the provision of his OFA. What the STB failed to mention within its decision relating to the Sonora OFA is that the Director, then acting as the Covert ARM of the NEVADA-UP/REID Cartel, was Criminally Motivated to ensure that Sonora would gain control of the subject 73-Mile Line in Arizona, as the Board already knew that this was the Southern Link of the NCR-ByPass, to an absolutely vital connection with the Pacific National Railroad of Mexico. Ultimately in precise compliance with the Plan hatched by the NEVADA-UP/REID Cartel, that upon information and belief was coordinated from an unknown secret location in Salt Lake City, Utah, the Vital 73-Mile rail line was: SALVAGED.

Petitioner also clearly and precisely identified to the Board that his appeal was made with the inclusion of All information Published as Public Record by the Board concerning the Execution, Standards, and Acceptance of OFA's, as well as All Documents filed within the

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proceeding. Please see Petitioners EXHIBIT: [G], attached hereto which is a copy of the:
NCR - APPEAL of: September 29th., 2008.

Petitioner, D/B/A: NCR filed a MOTION TO STRIKE on (Monday), October 27th., 2008. Within Petitioners MOTION, Petitioner clearly and precisely confirmed to the Board that UP was deliberately deceiving the Board, with at best, the provision of a False Assessment, and at worst, a Misleading Assessment of the Operational Viability of the subject 220' rail line, for which Petitioner identified within his OFA in comparison to another abandoned line by UP located in Los Angeles, California, identified by UP within STB AB-409 (Sub. No. 5X). In this Motion to Strike, Petitioner Factually Confirmed that the information provided by UP in their previous Reply was ABSOLUTELY FALSE based on the incontrovertible evidence provided by Petitioner to include FACTUAL Confirmation of Prospective Shippers that have a critical necessity to use the subject line, before and after it is extended back North-West to the town of Wendell, California. Most important is that Petitioner confirmed that the Current Power Generating Customer for which Petitioner already possess a lawful binding contract, can be successfully serviced with the existing 220' rail line being acquired by Petitioner, as this Customer only requires a Maximum of (3)-Rail Cars to be delivered at any time by UP to the UP/NCR rail connecting point to enable NCR to take delivery of same and switch said rail cars back in a North-West direction back onto the NCR 220' Mainline Track System. None of the Rail Cars accepted by NCR at the UP/NCR connecting point will ever need to be switched as they are downloaded by virtue of individual Flexible High Pressure Hose Systems that are simply Reeled Out and Remain Connected to each individual Tanker Car, thus extracting said Fuel Products contained within each Car when needed. Once the Cars are Emptied, the NCR Electrified Switch Locomotive simply travels Appx: 185' and returns the Cars back to the UP Line at the UP/NCR connecting point. UP then accepts the Empty Cars and comes back with three additional Rail Cars that are Full. The Total Cost incurred by NCR to operate on the subject line, is more than covered by the operation of the Electrical Power Generating Facility co-located adjacent to the 220' Mainline System, as the Electric Locomotive does Not consume

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Any Fuel as an expense. The Power Generating Customer has already agreed to construct a drive through Engine House/Locomotive Barn that will be located on the North-West end of the subject 220' Main Line, and this will enable NCR to Permanently Secure the Locomotive from Vandalism, in addition to the Secured Fencing that will be utilized to protect the Entire Power Generating Facility encompassing the Entire 220' Main Line. Funds for the Construction of the High Technology Blended Fuel Power Plant co-located over the NCR Mainline have already been appropriated by Congress, and as such will exist as funds to totally eliminate the initial cost of construction of the New High Technology Pollution-less Electrical Power Generating Facility, thus virtually All Monies generated from the Operation of the Power Generating Facility are virtually Pure Profit and will more than permanently cover the Continuing Operation of the 220' line, including the permanent operation of the future 21-Mile extension all the way back to the Town of Wendell, to then service the HL-Power Plant which Petitioner clearly identified as pending Condemnation by NCR. Petitioner has clearly identified Existing Shippers ready to fully utilize the line being acquired by NCR. Please see Petitioners EXHIBIT: [H], attached hereto which is a copy of the: NCR - MOTION TO STRIKE of: October 27th., 2008.

Petitioner, D/B/A: NCR, filed a MOTION TO STRIKE on (Tuesday), November 11th., 2008. Within Petitioners MOTION, Petitioner clearly and precisely notified the Board that documented statements by UP contained in their October 21st., 2008 Reply, were False, Defective, and or Misleading, specifically relating to the continued assertion by UP that it had provided NCR with a Condition Report. Petitioner clearly and precisely explained to the Board, precisely what UP had FACTUALLY provided, which was a SPEED CHART, as opposed to a CONDITION REPORT, within this MOTION TO STRIKE. The documented information provided by Petitioner in the form of Incontrovertible Facts, was Not based on Speculation, but Confirmed FACTS. Please see Petitioners EXHIBIT: [I], attached hereto which is a copy of the: NCR - MOTION TO STRIKE of: November 11th., 2008.

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Petitioner, D/B/A: NCR, filed a MOTION TO STRIKE on (Monday), November 24th., 2008. Petitioner's authorized warranted Financial Agent, (BANKS FAMILY TRUST) also contemporaneously filed EVIDENCE on (Monday), November 24th., 2008, as part of and in direct support of Petitioners MOTION TO STRIKE, in the form of a lawfully Certified Verification Statement to the Board, confirming AUTHORIZATION by the Board; (to only be exercised at the option of the Board), to Draw and thus Transfer Funds in the amount of: \$ 5,750.00, to be held in TRUST for NCR, for future Payment to UP for the acquisition of the 220' Rail Line at Flanigan, Nevada. This EVIDENCE in the form of an AUTHORIZATION FOR IMMEDIATE CONVEYANCE OF BOND TO THE STB., was - Only - an "AUTHORIZATION" lawfully contemporaneously filed by Petitioners Agent, in the form of admissible EVIDENCE in direct support of Petitioners MOTION TO STRIKE. Petitioner clearly and precisely entered Incontrovertible Evidence of his Financial Capacity in the form of the submission of the Certified Verification Statement to the Board, confirming the **ABSOLUTE FACT**, that Petitioner was at all times Financially Responsible within this proceeding, in order to confirm the MOTION TO STRIKE filed on November 24th., 2008. Please see Petitioners EXHIBIT: [J], attached hereto which is a copy of the: NCR - MOTION TO STRIKE of: November 24th., 2008.

Petitioner's authorized warranted Financial Agent, (BANKS FAMILY TRUST) again filed EVIDENCE on (Wednesday), December 3rd., 2008, as part of and in direct support of Petitioners previously filed MOTION TO STRIKE of November 24th., 2008, in the form of a second lawfully Certified Verification Statement to the Board, confirming AUTHORIZATION by the Board; (to only be exercised at the option of the Board), to Draw and thus Transfer Funds in the amount of: \$ 5,750.00, to be held in TRUST for NCR, for future Payment to UP for the acquisition of the 220' Rail Line at Flanigan, Nevada. This EVIDENCE in the form of an AUTHORIZATION FOR IMMEDIATE CONVEYANCE OF BOND TO THE STB., was - Only - an "AUTHORIZATION" lawfully contemporaneously filed by Petitioners Agent, in the form of admissible EVIDENCE in direct support of Petitioners MOTION TO STRIKE.

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Petitioner clearly and precisely entered Incontrovertible Evidence of his Financial Capacity in the form of the submission of the Certified Verification Statement to the Board, confirming the **ABSOLUTE FACT** that Petitioner was at all times **Financially Responsible** within this proceeding in order to confirm the **MOTION TO STRIKE** filed on November 24th., 2008. Please see Petitioners **EXHIBIT: [K]**, attached hereto which is a copy of the: EVIDENCE filed by the **BANKS FAMILY TRUST** on: December 3rd., 2008.

Petitioner, D/B/A: NCR, timely filed an APPEAL on (Tuesday), December 16th., 2008. Within Petitioners APPEAL, Petitioner clearly explained in a precisely detailed manner, the **FACT** that the **EVIDENCE** filed by the **BANKS FAMILY TRUST** was first filed for the specific purpose of confirming Petitioners Financial Capacity, and second, for the expressed purpose of providing the Board with the Authorization to Affirmatively and Administratively Draw and thus Transfer Funds to the Board as necessary to be held in **TRUST** for NCR as payment to UP, or at the option of the Board, to Not Draw and thus Transfer Funds within the **SCOPE** of Petitioners **OFA**. Regardless of the decision by the Board to Affirmatively Draw, or (Freely Not Draw), funds as a result of the provision of the Authorization by **BANKS FAMILY TRUST**, the submission by the **TRUST** of this filing in the form of **EVIDENCE** was at a minimum lawfully submitted for evidentiary purposes. Please see Petitioners **EXHIBIT: [L]**, attached hereto which is a copy of the: APPEAL filed by **PETITIONER** on: December 16th., 2008.

PETITIONERS REQUEST FOR RELIEF

AND

SUPPORTING POINTS AND AUTHORITIES

Petitioner hereby requests that the following Specific listed Defects and or False Information, as contained within the Docket Filed by the Acting Secretary of the STB, Anne Quinlan recently submitted within the instant proceeding, as further identified below, be

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corrected by Lawful Court Order of this Honorable Court, to accurately read as follows;

A. Docket Entry Line # 20. NCR - [Request to Remove Tolling Period], is **FACTUALLY Defective**, and should be corrected to read: REPLY TO UP REQUEST TO REMOVE TOLLING PERIOD FOR FILING SUBMISSIONS OF OFFERS OF FINANCIAL ASSISTANCE

B. Docket Entry Line # 23. UP - [Reply to Motion to Strike], is **FACTUALLY Defective**, and should be corrected to read: REPLY TO NCR REPLY AND MOTION TO SUPPLEMENT

C. Docket Entry Line # 33. NCR - [Notice of Financial Guarantee], was **DEFECTIVELY DOCKETED** on September 16th., 2008, and should have been Docketed as received on September 15th., 2008.

D. Docket Entry Line # 39. NCR - [Letter to Inform Board], is **FACTUALLY Defective**, and should be corrected to read: NOTICE OF INTENT TO FILE MOTION TO STRIKE

E. Docket Entry Line # 44. UP - [Reply to Motion to Strike], was **DEFECTIVELY DOCKETED** on November 3rd., 2008, and should have been Docketed as received on November 4th., 2008.

F. Docket Entry Line # 48. NCR - [Evidence of Provision of Bond], is **FACTUALLY Defective**, and should be corrected to read: EVIDENCE

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3 **G. Docket Entry Line # 52. NCR - [Appeal to Reject Evidence filed on November**
4 **24th, 2008], is FACTUALLY Defective, and should be corrected to read: APPEAL OF**
5 **DECISION TO REJECT EVIDENCE**

6
7 **H. Docket Entry Line # 53. STB - DECISION: DECISION DENIED AN APPEAL**
8 **OF A DECISION WHICH REJECTED ROBERT ALAN KEMP'S OFFER OF FINANCIAL**
9 **ASSISTANCE IN THE PROCEEDING, BECAUSE: (1) THE RECORD SHOWS NO**
10 **CURRENT OR FUTURE TRAFFIC TO SUPPORT CONTINUED RAIL SERVICE; AND (2)**
11 **KEMP FAILED TO SHOW THAT HE WOULD BE ABLE TO FINANCE THE PURCHASE**
12 **AND OPERATION OF THE SEGMENT. ALSO, THIS DECISION REJECTS ANOTHER**
13 **APPEAL FILED BY KEMP AND ADDRESSES SEVERAL MOTIONS FILED BY KEMP.]**
14 **is FACTUALLY Defective, and should be corrected to read: DECISION: DECISION**
15 **DENYING APPEAL OF A DECISION WHICH REJECTED ROBERT ALAN KEMP'S**
16 **OFFER OF FINANCIAL ASSISTANCE IN THE PROCEEDING, AND DECISION**
17 **DENYING APPEAL OF A DECISION REJECTING KEVIN M. BANKS FILING OF**
18 **EVIDENCE IN THE PROCEEDING, AND DECISION DENYING APPEAL OF A**
19 **DECISION DENYING SPECIFIED MOTIONS FILED BY ROBERT ALAN KEMP IN THE**
20 **PROCEEDING**

21 **A. Petitioner on behalf of the NEVADA CENTRAL RAILROAD corporation, "a Railroad**
22 **Corporation of Nevada," initially engaged in the (Offer of Financial Assistance) Process,**
23 **hereafter the ("OFA") Process, concerning the Union Pacific Railroad Abandonment Case**
24 **Filing publically conducted by the STB within AB-33 (Sub. No. 230X); on (Friday), October**
25 **30th, 2006 by first filing by Certified US-Mail, NCR's PUBLIC NOTICE OF INTENT TO**
26 **ACQUIRE AND PROVIDE FOR THE MAINTENANCE OF INTERSTATE COMMERCE**
27 **AND OPERATION OF RAIL TRANSPORTATION SERVICES IN WASHOE COUNTY,**
28 **NEVADA, AND LASSEN COUNTY, CALIFORNIA, thereby lawfully Noticing the STB of the**

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Intent by NCR, and I quote as further described in the same Notice; "to initially institute and maintain Class - III Railroad Operations on the subject lines for which the Union Pacific Railroad Company wishes to dispose, publically described by the Union Pacific Railroad Company as identified for ABANDONMENT in Washoe County, Nevada, and Lassen County, California, within the Union Pacific Railroad Company's, hereinafter (UP or UP's) Petition for Exemption Docket: AB-33 (Sub-No. 230X)." Please see Petitioners EXHIBIT: [A], attached hereto which is a copy of the: NCR Public Comment Letter of: October 13, 2006. This same Public Comment Letter was subsequently lawfully ENTERED by the STB: Office of Proceedings, on October 30, 2006, as part of the: "Public Record." Union Pacific Railroad did Not file any objections and or opposition to any information contained within NCR's PUBLIC NOTICE OF INTENT TO ACQUIRE AND PROVIDE FOR THE MAINTENANCE OF INTERSTATE COMMERCE AND OPERATION OF RAIL TRANSPORTATION SERVICES IN WASHOE COUNTY, NEVADA, AND LASSEN COUNTY, CALIFORNIA, thus according to long accepted Board Practices under APA, All information as contained within said Public Notice filed by NCR was accepted by the Board within the instant proceeding as FACT, for which any and all subsequent decisions must then be considered. Petitioner now requests that the information provided within NCR's Public Notice of Intent dated: October 13th., 2006 be adjudicated and declared by the Court, as uncontested and be made part of the record in this proceeding as the factual declared and factually accepted and confirmed record of facts and intent of NCR, as neither the Board, nor UP objected at time of filing, to any element of and or any information as contained therein.

B. Petitioner on behalf of NCR, timely filed NOTICE OF INTENT TO FILE OFA on (Wednesday), November 8th., 2006. Within NCR's Notice: NCR, pursuant to 49 C.F.R. 1152.27(a), asks the Union Pacific Railroad Company to provide it with copies of the most recent report on the physical condition of the line, the carriers estimate of the net liquidation value of the line, with supporting data including, but not limited to identification of the parcels

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2
3 of land underlying the rights-of-way which are owned in fee and those which are easement
4 grants including [US-Government Granted Rights of Way], the lengths, weight, age and
5 condition of the relay, reroll and scrap rails, the reusable and scrap ties, the speed limits on the
6 line, and any other restrictions which pertain to use of the line by Milepost, and any other
7 information including Engineering Diagrams and Drawings, or Maps, deemed relevant to
8 enable NCR to calculate the net liquidation value of the line and the minimum purchase price
9 which the Union Pacific Railroad seeks for the property." Please see Petitioners EXHIBIT: [B],
10 attached hereto which is a copy of the: NCR NOTICE OF INTENT TO FILE GFA of:
11 November 8th., 2006. Petitioner now requests that the information provided within NCR's
12 Notice of Intent to File OFA dated: November 8th., 2006 be adjudicated and declared by the
13 Court, as uncontested and be made part of the record in this proceeding as the factual
14 confirmed request for specific defined information by NCR within Board Rules as defined by
15 1152.27(a), as neither the Board, nor UP objected at time of filing, to any element of and or any
16 information as contained therein.

17 C. - Petitioner on behalf of NCR, timely filed MOTION TO STRIKE on (Tuesday), April
18 29th., 2008. Within the Motion, NCR provided incontrovertible evidence that UP had been
19 deliberately engaging in the Unlawful Salvaging and Alteration of the subject 21.77-Mile rail
20 line, following UP's action to file for Abandonment of same. In a Nut Shell, UP was using a
21 Sub-Contractor to come in on the line to pickup all of the most valuable rail and switch
22 material on the system and systematically replace same with TRASH, in terms of what would
23 be needed in the case of an Operating Railroad, factually defrauding NCR. This Age Old Rail
24 Scheme is based in most cases on the Mainline Railroads ability to (first); knowingly lure in an
25 Interested Party, that they already know are going to file an OFA for a specific line of rail, and
26 (second); to then covertly come in for purposes of deny-ability with a "SPECIAL" Sub-
27 Contractor Hit Team like Kern Schumacher/Fritz Kahn at A&K - Railroad Materials, or
28 RTI/John Heffner, (in an attempt to generate and thus be capable of then claiming an

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omission), and direct the Sub-Contractor to criminally Rob the Interested Party under Hobbs, (18 - U.S.C. 1951), as a defined Predicate Act within the scope of Civil-RICO (18 - U.S.C. 1962c & 62d), by unloading all of the Mainline Railroad's TRASH RAIL in the form of Worn Out Rail Sections, by first picking up all of the Useful Rail from a specific targeted rail line, and then replacing same with the TRASH after the OFA is filed. The result is that STB staff within the Office of Proceedings, will knowingly RUN COVER, and authorize the sale of the line based on the Price of Salvage by virtue of Weight, as opposed to Useful Rail in terms of useful sections of rail for which a Railroad may factually and safely operate, thus defrauding the entity executing the OFA, as the Interested Party must then automatically complete the salvage operation previously initiated, and rehabilitate the entire line thus experiencing a Massive Financial and Operational Loss, (All within long established STB rules for Abandonments), unless of course in the case of NCR where NCR uncovers the Criminal Cartel, and catches UP in the Criminal Act of Racketeering. This is precisely why UP could never have provided a Condition Report to NCR, in accordance with the mandatory STB Rules under 1152.27, and instead filed, and as such Pawned Off, an Operational Exception Report used as the basis with which to generate a Speed Chart, that would of course: NOT IDENTIFY (ANY) of the necessary details of the Actual Condition of the TRACK, TIES, TIE PLATES, SPIKES, ROADBED, BRIDGES, and any and all other remaining Railroad Materials related thereto. UP already knows that NCR can utilize the information contained within the Condition Report as sufficient incontrovertible evidence in the NCR Federal Court Action, as and against UP, thus "No Condition Report" can ever be provided to NCR in direct contravention of Board Regulations. This is precisely why the Director of Proceedings documented the Key Words within his Original Decision to Reject the NCR OFA, when he states: "It Appears" that UP has provided NCR with the Condition Report. No matter what, the Director just as in the case of UP, also needs to generate the basis of an omission on behalf of himself and the Board, thus the inclusion of the words; "It Appears" as opposed to a simple statement of confirmation of Fact. Please see Petitioners EXHIBIT: [C], attached hereto which is a copy of the: NCR MOTION

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TO STRIKE of: April 29, 2008. Petitioner requests that the Court accept entry of Exhibit C., into the record as Evidence confirming the basis upon which Petitioner asserts UP has failed to ever comply with Board Regulations and provide a Condition Report regarding the subject 21.77-Mile line of rail. If procedurally permissible, Petitioner requests that the Court also REVERSE the factually defective decision of the Board to Deny NCR's MOTION TO STRIKE, and as a result to thereby Direct the STB to Affirmatively Strike UP's Reply of April 11th., 2008, and Supplement of April 4th., 2008. Further to Remand and order the Board to Direct UP to fully comply with the requirements of 1152.27(a)., and provide a Complete Comprehensive Condition Report as opposed to an Operational Exception Report, for which a Speed Chart is based by UP engineering division.

D. Petitioner on behalf of NCR, timely filed MOTION TO STRIKE on (Tuesday), May 13th., 2008. Within the Motion, Petitioner confirmed to the Board, through the provision of incontrovertible evidence, that UP on May 5th., 2008, had filed a Procedurally Impermissible SUPPLEMENT to their previous Reply filed 25-Days Prior, on April 11th., 2008. Even UP in their own filing on May 5th., 2008 documented that the information contained within the same filing, was a (SUPPLEMENT) to their own previous Reply of: April 11th., 2009. NCR clearly and precisely pointed out to the Board, the incontrovertible fact that virtually NONE of the Information provided in the May 5th., filing by UP, addressed nor in any way even remotely related as a Reply, to the NCR - MOTION TO STRIKE previously filed on April 29th., 2008. The most important Point of the inclusion by Petitioner of this element of evidence, is the ABSOLUTE FACT, that the Board knowingly and deliberately extended time to UP, and as such the opportunity by UP, to file a SUPPLEMENT unlawfully disguised as a Reply, even beyond the Statutory and Administrative Practice of the 21-Day Time Limit for filing of any such motion. UP effectively filed: ABSOLUTELY - NO SUBSTANTIVE RESPONSE to the NCR - MOTION TO STRIKE on April 29th., 2008, and yet, All of the Totally Unsubstantiated and Unrelated Information contained within the UP filing of May 5th., 2008, was accepted by

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the Board. Please see Petitioners EXHIBIT: [D], attached hereto which is a copy of the: NCR -
MOTION TO STRIKE of: May 13th., 2008. Petitioner requests that the Court REVERSE
the factually defective decision by the Board to Deny NCR's Motion to Strike, and as such
Remand and affirmatively Direct the Board to Strike the UP Reply of: May 5th., 2008. Not only
was the UP filing an impermissible: Reply to Reply, but it also contained information
specifically identified by UP in the form of a Supplement, that could Not be entered after the
prescribed 21-Day Period for such a Motion to be submitted by UP. In addition, Petitioner
requests that the unlawful alleged Reply be entered into the instant proceeding as Evidence
indicating that the Board Arbitrarily and Capriciously Granted UP the ability to both enter a
Supplement to a Prior Filing past the date for provision of such Supplement, as well as the Fact
that UP Replied within the alleged Reply specifically to information submitted by NCR in its
previous Reply, which under Board Rules and APA, is administratively impermissible.

E. Petitioner on behalf of NCR, timely filed NOTICE OF SUBSTITUTION on
(Wednesday), August 27th., 2008. Within the Notice of Substitution, Petitioner notified the STB
that the NEVADA CENTRAL RAILROAD Corporation of Nevada, had transferred Assets in
the form of: Title, Name, and All Rights of the NCR as a "Railroad" to Petitioner, thus
Petitioner assumed legal possession and ownership to all STB; filings, applications, petitions,
motions, and business development activities presently and active on file by the STB specifically
but only relating to the Railroad operated under the name of NEVADA CENTRAL
RAILROAD, as previously owned by the Nevada Corporation. The ownership of the Original
Corporate Entity as an independent distinct qualified legal entity within the state of Nevada as
a wholly owned subsidiary division of AVIATION TECHNOLOGIES LTD., hereafter
("ATL") was Not Conveyed as a result of the Substitution by Petitioner to the STB. Petitioner
lawfully conveyed a license to the distinct Corporate Entity in Nevada, owned by ATL, to
continue to contemporaneously utilize Petitioners intellectual property in the form of the Trade
Mark/Name: NEVADA CENTRAL RAILROAD. Following receipt of the NOTICE OF

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SUBSTITUTION by the STB, the STB Granted the Substitution by Petitioner, and therefore Petitioner lawfully proceeded within the scope of AB-33 (Sub. No. 230X), in Person D/B/A: **NEVADA CENTRAL RAILROAD**, as the lawful owner of the NCR. All equipment presently in possession through contractual agreement by the Independent Nevada Corporation, independently operating through License Agreement under the name and style of: **NEVADA CENTRAL RAILROAD**, is owned by: **AVIATION TECHNOLOGIES LTD.** Please see Petitioners **EXHIBIT: [E]**, attached hereto which is a copy of the: **NCR - NOTICE OF SUBSTITUTION** of: August 27th., 2008. Petitioner requests that the Court declare and thus confirm the Boards previous decision as legally complaint with Board Regulations to Grant Robert Alan Kemp's Motion for Substitution, thereby enabling Robert Alan Kemp to proceed within the scope of Exclusive Federal Preemption under 49 U.S.C. 10101 and 10901, as an individual person and railroad owner, D/B/A: **NEVADA CENTRAL RAILROAD**, ("NCR").

F. Petitioner, D/B/A: NCR, timely filed **OFFER OF FINANCIAL ASSISTANCE (PURCHASE)** on (Monday), September 15th., 2008. Petitioner also contemporaneously by and through contractual agreement with the Banks Family Trust, filed his **NOTICE OF FINANCIAL GUARANTEE** on September 15th., 2008. The Financial Guarantee provided by the Banks Family Trust was a legally qualified **Verified Genuine Financial Guarantee** that met All Requirements of the STB., and was issued by the "TRUSTEE" of the Banks Family Trust: by Kevin M. Banks, as further verified by his lawfully Notarized Signature. The Guarantee was specifically executed to Guarantee Immediate Funds in the amount of: \$ 13,000.00, (Thirteen Thousand-USD.), which would more then cover the: \$ 5,750.00 identified by Petitioner in his **Bonafide Offer** for the (220-Linear Feet) of rail North-West of the UP Switch at Flanigan. The Financial Guarantee was specifically designed to provide immediate funds in the amount of: \$ 5,750.00 for the acquisition of the 220' line of rail from UP, as well as to provide additional funds in the amount of: \$ 7,250.00 to rehabilitate the 220' line, into Operable Condition, so Petitioner could immediately proceed to lawfully obtain an FRA

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Railroad Operating Certificate, and Pass FRA Track Inspection. The \$ 7,250.00 funds to Rehabilitate the Track, would also cover the installation of any necessary Replacement Ties, Signals, Markers, and Support Equipment, to render the 220' line of rail as Operationally Safe, especially considering the fact that Petitioner has already identified such excess material as available at NO COST, then for fuel/oil for transportation of and materials to install same, for which Petitioner would personally engage to undertake with Truck and Trailer Equipment already owned by the NCR, and or ATL, Nevada Corporations. The subject Financial Guarantee, specifically guaranteed "ADDITIONAL FUNDS" as necessary to maintain operation of the line, for a (5-Year) period in addition to the: \$ 13,000.00, as previously identified therein. Please see Petitioners EXHIBIT: [F], attached hereto which is a copy of the: NCR - OFFER OF FINANCIAL ASSISTANCE (PURCHASE) and NOTICE OF FINANCIAL GUARANTEE of: September 15th., 2008. Following the review by the Court of Petitioners Motions, for which Petitioner has Appealed in the instant proceeding which had a Material Effect on the previously adjudicated Substance and Procedural Compliance of said OFA and the subsequent Decisions related thereto, Petitioner hereby requests that the Court declare and thereby confirm, that Petitioner's OFA filed contemporaneously along with the Certified Genuine Verified Financial Guarantee filed by the BANKS FAMILY TRUST, was fully compliant with Board Regulations, as it also specified therein as being filed along with the provision of All filings within the Record of Proceedings, and would have included additional information to have been provided by Petitioner in the event that the Director of Proceedings had Not Unlawfully Interfered in the Proceeding, and knowingly and deliberately entered a Premature Decision, thus Procedurally Preempting Petitioners Ability to Perfect any Potential Defects. The OFA as written when taken into consideration with the Certified Financial Guarantee, met and exceeded ALL of the requirements under ICA and ICC regulations now administered by the STB, of what constitutes an OFA under Exempt Proceedings Rules. NCR is a Class-III Railroad, and as such is thus Exempt from Class-I and Class-II. OFA Standards. The Guarantee specifically and in the instant Case FACTUALLY ASSURED the funds for

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the Acquisition Price, and Costs to place the rail into Operation, as well as providing an Additional Open Ended Funding Guarantee, above and beyond the specific stated amount of: \$ 13,000.00 to ensure that NCR can Sustain Operations for a 5-Year Time Period, which is well beyond the Minimum 2-Year statutory requirement. Petitioners OFA in financial terms, was a Reactive Mirror Image of and thus Precisely Accounted for, the Operational Estimates necessary to meet STB requests for Financial Proof's relating to Operations under the 2-Year Statutory Congressional Requirement. Under the ICA and ICC Regulations, US-CONGRESS intended that the Exempted OFA process was very carefully designed with "the specific purpose to foster continued common carrier rail service on lines that otherwise would be abandoned, the OFA rules are construed liberally in favor of the offeror, and this precisely why US-CONGRESS determined that offers need not be detailed." "An offeror need only show that it is financially responsible and that its offer is Bona fide." Further, "the standard for finding of financial responsibility is that the offeror has, or within a reasonable period of time will have, the financial resources to fulfil contractual obligations related to the intended acquisition or subsidy of the subject line." In the instant case, Petitioners OFA was Not Only Bona fide, but was factually Financially Guaranteed beyond the shadow of any doubt. It must be noted, that at No Time, did UP in its alleged efforts to investigate the validity of the BANKS FAMILY TRUST - FINANCIAL GUARANTEE, ever even attempt to establish direct contact with the TRUSTEE for same, in order to substantiate availability of funds as extended by the TRUSTEE on behalf of the Investment Partnership to Petitioner despite the fact that the TRUSTEE'S Cell Phone Number was listed right on the Genuine Documented Verified Financial Guarantee. This is because, if UP did in fact at any time establish contact with the TRUSTEE, they very well knew that they would be confirming the FACT that the Guarantee was GOOD.

G. Petitioner, D/B/A: NCR, timely filed an APPEAL on (Monday), September 29th., 2008. Within Petitioners APPEAL, Petitioner clearly explained in a precisely detailed manner, that UP on September 17th., 2008, had in fact filed a MOTION as opposed to a REPLY as then

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stated by the STB. Petitioner also requested in his APPEAL, that the information presented therein be included, and therefore by AMENDMENT be made part of the Original OFA filed by Petitioner on September 15th., 2008, as a result of the fact that Petitioner was not afforded sufficient time to file any RESPONSE to what was in fact for reasons stated therein, a MOTION TO REJECT OFA filed by UP, nor at a Minimum a sufficient allocation of time to have filed a MOTION TO STRIKE false information contained within the UP filing of September 17th., 2008, prior to the Decision by the Board to REJECT OFA. Petitioner requests that the Court to REVERSE the STB Decision Denying Petitioners APPEAL filed on September 29th., 2008, for reasons previously stated herein and as follows;

Petitioner clearly explained that he had called Mr. Rudy St. Louis at the STB., in order to obtain instructions for which to file a SUPPLEMENT to the OFA filed on September 16th., 2008. This was before the discovery by Petitioner of the Decision by the Board entered as and against Petitioner on September 19th., 2008. Petitioner also notified the Board within his APPEAL, that UP knowingly and deliberately FAILED to identify the fact that the HL-Power Plant was located within 1-Mile of the end of the subject 21.77-Mile rail line at Wendell, California, who's operation is critically impaired by it's inability to receive Fuel Deliveries via Rail, as opposed to Overland Truck.

Petitioner also clearly and precisely identified the Fact that the case DEFECTIVELY cited by both UP and the Board in AB-409 (Sub. No. 5X), did Not Apply to the 220' rail line that was being acquired by Petitioner in the instant case at Flanigan.

Petitioner clearly and precisely identifies potential shippers that will be supplied by NCR following the acquisition of the 220' rail line, as well as Additional Shippers upon the completion of the appx: 21+ Mile Extension to the 220' rail line at Flanigan.

Petitioner also clearly notified the Board that the 220' rail line existed as a Critical Link and Connection to the National Railway System.

Petitioner clearly and precisely indicated to the Board, the specific characterization and structure of the BANKS FAMILY TRUST, constituting the more then reasonable basis upon

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which the subject Investment Partnership in the form of a "TRUST" is Financially Capable.

Petitioner stipulated to the provision of any additional information required by the Board as necessary proof in the event that the Board required same, within 10-Days following the granting of a Protective Order to Petitioner and the BANKS FAMILY TRUST, to ensure that Petitioner does Not experience further damage, resulting from the execution of further unlawful acts by UP. It is most Critical to Note at this juncture, that at NO-TIME has the Board uttered even a Single Sentence, and in Fact Not even a Single Word, in response to the CONSISTENT DOCUMENTED REQUESTS BY PETITIONER for a Decision or Communication by the Board for the provision by Petitioner of ANY NECESSARY ADDITIONAL INFORMATION THAT MAY BE REQUIRED BY THE BOARD, nor any communication what so ever regarding Petitioners continuing requirement and requests for a Protective Order. Petitioner requests that the Court Remand and Direct the Board to Grant a Protective Order so that Petitioner can lawfully SUPPLEMENT his OFA without incurring additional damage as a direct and proximate result of criminal actions taken by UP.

Petitioner agreed to if necessary within his APPEAL; to Actually BOND FUNDS to the STB, as Incontrovertible Proof of his Financial Responsibility. Petitioner also identified the inclusion of All Filings within the instant proceeding in direct support of his APPEAL. Petitioner requests that the Court Declare that Petitioner provided the STB as TRUSTEE, with the Option to Receive Funds as BOND for Cash Payment to UP within the scope of his OFA on September 29th, 2008 to demonstrate Financial Responsibility necessary to acquire the subject 220' rail line.

Petitioner cited another OFA proceeding in: STB AB-1081X, as evidence in support of his APPEAL, as a result of the fact that the Board accepted the Alleged Financial Guarantee in the case of Sonora, regardless of the fact that the subject Guarantee in that case knowingly did Not Exist as a Direct Financial Guarantee to Sonora, but instead was an INDIRECT alleged Financial Guarantee to an Independent Partner for which Sonora only "Inferred" was supporting Sonora's Program to acquire the rail line. In actual practice, said support was

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3 rendered through an unlawful: Enterprise. Further and critically important, is the fact that
4 Petitioner clearly and precisely identified the fact within his STB Appeal, that the Board
5 accepted the Financial Information alleged by Sonora to be sufficient for purposes of
6 determining Financial Responsibility, NOT BASED on the FACT that it was confirmed, but
7 rather that it passed what the Director of Proceedings described, as the so called: "ON ITS
8 FACE" Appearance Test, which was a completely different standard as directly applied to
9 Petitioner within the instant case by the very same: STB - Director of Proceedings. In the case
10 of Sonora, the Board determined Financial Capability, based "on the Face" of the appearance
11 of documents, as opposed to the provision of a Direct, Verified and Legally Certified:
12 GENUINE FINANCIAL GUARANTEE, by a reputable financial organization, as in the case
13 of this Petitioner, D/B/A: NCR. Petitioner just discovered last week, while executing research
14 necessary to complete the instant APPEAL to the Ninth Circuit Court using the Computer
15 Driven Search Function of the Public STB Web Site, that a MOTION TO REJECT OFA was
16 also filed to the STB, essentially identical to that filed by UP September 17th, 2008 in the instant
17 case, confirming direct statements by witness's employed by the very same Bank, for which the
18 alleged Letter of Credit was indicated to have been confirmed in Sonora, clearly indicating that
19 the said Letter of Credit submitted by Sonora, in fact APPEARED as a False Forged
20 Document, and did Not in fact comport in any way with the established format utilized by the
21 same Bank. Most important, was the fact that the Director of Proceedings, had already
22 confirmed receipt of this same MOTION TO REJECT OFA, one day PRIOR to his decision
23 on behalf of the Board, to officially render Sonora, as Financially Responsible within the scope
24 of an OFA. It is also important to note, that the Principal of Sonora, had executed a Telephone
25 Conversation with this Petitioner, subsequent to the date and his possession of the alleged Multi
26 Million Dollar "Letter of Credit" and personally confirmed to this Petitioner that he did Not
27 have sufficient financing to support the provision of his OFA. What the STB failed to mention
28 within its decision relating to the Sonora OFA, is that the Director then acting as the Covert
ARM of the Criminal NEVADA-UP/REID Cartel, was Criminally Motivated to ensure that

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Sonora would gain control of the subject 73-Mile Line in Arizona, as the Board already knew that this was the Southern Link of the NCR-ByPass, to an absolutely vital connection with the Pacific National Railroad of Mexico. Ultimately in precise compliance with the Plan hatched by the Criminal NEVADA-UP/REID Cartel, that upon information and belief was coordinated from an unknown secret location in Salt Lake City, Utah, the Vital 73-Mile rail line was: SALVAGED. Petitioner requests that the Court declare that the actions by the Board in the instant case in AB-33 (Sub. No. 230X) to REJECT on APPEAL, the provision by Petitioner of the Certified Genuine Verified Financial Guarantee from the BANKS FAMILY TRUST, using a completely different standard as that applied in Sonora, was Arbitrary and Capricious.

Petitioner also clearly and precisely identified to the Board, that his appeal was made with the inclusion of All information Published as Public Record by the Board concerning the Execution, Standards, and Acceptance of OFA's, as well as All Documents filed within the AB-33 (Sub. No. 230X) proceeding. Please see Petitioners EXHIBIT: [G], attached hereto which is a copy of the: NCR - APPEAL of: September 29th, 2008. Petitioner submits to the Court in support of this Appeal the assertion that both UP and the Board are Barred by Collateral Estoppel as a function of procedure within this proceeding from making any claim or assertion that Petitioner does Not Intent to Operate the subject 220' rail line, based on both the Board and UP's previous actions for which they are both bound, when they Failed To Object In Any Way, to the stated intent of NCR as clearly and precisely described within NCR's PUBLIC NOTICE OF INTENT TO ACQUIRE AND PROVIDE FOR THE MAINTENANCE OF INTERSTATE COMMERCE AND OPERATION OF RAIL TRANSPORTATION SERVICES IN WASHOE COUNTY, NEVADA, AND LASSEN COUNTY, CALIFORNIA, a copy of which is attached hereto and as previously identified as Exhibit A.

H. Petitioner, D/B/A: NCR, filed a MOTION TO STRIKE on (Monday), October 27th, 2008. Within Petitioners MOTION, Petitioner clearly and precisely confirmed to the Board, that UP was deliberately deceiving the Board, with at best, the provision of a False Assessment,

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3 and at worst, a Deliberate Misleading Assessment of the Operational Viability of the subject
4 220' rail line, for which Petitioner identified within his OFA in comparison to another
5 abandoned line by UP located in Los Angeles, California, identified by UP within STB AB-409
6 (Sub. No. 5X). In this Motion to Strike, Petitioner Factually Confirmed that the information
7 provided by UP in their previous Reply was ABSOLUTELY KNOWINGLY FALSE by UP,
8 based on the incontrovertible evidence provided by Petitioner, to include FACTUAL
9 Confirmation of Prospective Shippers that have a critical necessity to use the subject line,
10 before and after it is extended back 21+ Miles North-West to the town of Wendell, California.
11 Most important, is that Petitioner confirmed that the Current Power Generating Customer for
12 which Petitioner already possess a lawful binding contract, can in Fact, be Operationally
13 Served without the necessity to execute any Switching Operations on the subject 220' Mail Line
14 being acquired by Petitioner, as this Customer only requires a Maximum of (3)-Rail Cars to be
15 delivered at any time by UP, to the UP/NCR rail connecting point to enable NCR to then take
16 delivery of same, and transport said rail cars back in a North-West direction onto the NCR
17 220' Mainline Track System. None of the Rail Cars accepted by NCR at the UP/NCR
18 connecting point, will ever need to be switched as they are downloaded by virtue of individual
19 Flexible High Pressure Umbilical Hose Systems, that are simply Reeled Out and Remain
20 Connected to each individual Tanker Car, thus automatically extracting said Fuel Products
21 contained within each Car when needed. Once the Cars are Emptied, the NCR Electrified
22 Switch Locomotive, simply travels Appx: 185' and returns the Cars back to the UP Line at the
23 UP/NCR connecting point. UP then simply accepts the Empty Cars, and comes back with three
24 additional Rail Cars that are Full. The Total Cost incurred by NCR to operate on the subject
25 line, is more then covered by the operation of the Electrical Power Generating Facility co-
26 located adjacent to the 220' Mainline System, as the Electric Locomotive does Not consume Any
27 Fuel as an operating expense. The Power Generating Customer has already agreed to construct
28 a drive through Engine House/Locomotive Barn, that will be located on the North-West end of
the subject 220' Main Line, and this will enable NCR to Permanently Secure its Electric Switch

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3 **Locomotive from Vandalism, in addition to the Secured Fencing that will be utilized to protect**
4 **the Entire Power Generating Facility encompassing the Entire 220' Main Line. Funds for the**
5 **Construction of the High Technology Blended Fuel Power Plant co-located over the NCR**
6 **Mainline, have already been appropriated by Congress, and as such will exist as funds to totally**
7 **eliminate the initial cost of construction of the New High Technology Pollution-less Electrical**
8 **Power Generating Facility, thus virtually All Monies generated from the Operation of the**
9 **Power Generating Facility are Profit, and thus the generated revenue will more then**
10 **permanently cover the Continuing Operation of the 220' line, including the permanent**
11 **operation of the future 21-Mile extension all the way back to the Town of Wendell, to then**
12 **service the HL-Power Plant which Petitioner clearly identified as pending Condemnation by**
13 **NCR. Bottom Line, is that Petitioner has clearly identified Existing Shippers ready to fully**
14 **utilize the line being acquired by NCR. Please see Petitioners EXHIBIT: [H], attached hereto**
15 **which is a copy of the: NCR - MOTION TO STRIKE of: October 27th, 2008. Petitioner**
16 **requests that the Court Declare that the subject 220' Main Line at Flanigan, is Not Physically**
17 **Constrained as described by UP, as in the case of AB-409 (Sub. No. 5X). And further to**
18 **Declare that this Petitioner can in fact Physically Operate the subject 220' Mail Line, just as in**
19 **the case of: 1999 United Transportation Union - Vs. - STB Decision in 7th. U.S. Court of Appeals**
20 **concerning Effingham, wherein the Federal Appeals Court factually determined from both a**
21 **Legal and Operational Standpoint, that the 216-Foot line of rail acquired in the STB**
22 **Effingham docket constitutes a sufficient rail line necessary to institute the execution of**
23 **Interstate Commerce by Rail, and further in that same decision that said initial 216-Foot rail**
24 **line was both Legally and Operationally Sufficient to constitute a MAIN LINE of rail, precisely**
25 **as now in the instant case. Petitioner further requests that the Court REVERSE the**
26 **DEFECTIVE, ARBITRARY and CAPRICIOUS Decision to Deny Petitioners MOTION TO**
27 **STRIKE dated: October 27th, 2008.**

28 **I. Petitioner, D/B/A: NCR, filed a MOTION TO STRIKE on (Tuesday), November 11th,**

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2008. Within Petitioners MOTION, Petitioner clearly and precisely notified the Board that documented statements by UP contained in their October 21st, 2008 Reply, were False, Defective, and or Misleading, specifically relating to the continued assertion by UP that it had provided NCR with a Condition Report. Petitioner clearly and precisely explained to the Board, precisely what UP had FACTUALLY provided, which was a SPEED CHART, as opposed to a CONDITION REPORT, within the MOTION TO STRIKE. The documented information provided by Petitioner in the form of Incontrovertible Facts, was Not based on Speculation, but Confirmed FACTS. Please see Petitioners EXHIBIT: [I], attached hereto which is a copy of the: NCR - MOTION TO STRIKE of: November 11th, 2008. Petitioners request that the Court Declare that RTI had never intended to operate the line as a Common Carrier executing Interstate Commerce by Rail, and that UP knew the operative intent of RTI to SALVAGE the entire 22-Mile rail line in direct contravention of the intent for which the STB institutes and authorized the OFA Process as a means to preserve a Federally Active Line of Railroad. Further Petitioner requests that the Court Declare that UP has never provided the Condition Report as requested by Petitioner as clearly confirmed within the MOTION TO STRIKE dated November 11th, 2008, and to REVERSE the DEFECTIVE, ARBITRARY and CAPRICIOUS Decision by the Board to Deny Petitioners MOTION TO STRIKE.

J. & K. Petitioner, D/B/A: NCR, filed a MOTION TO STRIKE on (Monday), November 24th, 2008. Petitioner's authorized warranted Financial Agent, (BANKS FAMILY TRUST) also contemporaneously filed EVIDENCE on (Monday), November 24th, 2008, as part of and in direct support of Petitioners MOTION TO STRIKE, in the form of a lawfully Certified Verification Statement to the Board, confirming AUTHORIZATION by the Board; (to only be exercised at the option of the Board), to Draw and thus Transfer Funds in the amount of: \$ 5,750.00, to be held in TRUST for NCR, for future Payment to UP for the acquisition of the 220' Rail Line at Flanigan, Nevada. This EVIDENCE filed in the form of an AUTHORIZATION FOR IMMEDIATE CONVEYANCE OF BOND TO THE STB., was -

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3 **Only - an "AUTHORIZATION" lawfully contemporaneously filed by Petitioners authorized**
4 **Agent, in the form of admissible EVIDENCE in direct support of Petitioners MOTION TO**
5 **STRIKE. Petitioner clearly and precisely entered Incontrovertible Evidence of his**
6 **Financial Capacity in the form of the submission of the Certified Verification Statement to**
7 **the Board, confirming the ABSOLUTE FACT, that Petitioner was at all times Financially**
8 **Responsible within this proceeding, in order to confirm the MOTION TO STRIKE filed on**
9 **November 24th., 2008. Please see Petitioners EXHIBIT: [J], attached hereto which is a copy**
10 **of the: NCR - MOTION TO STRIKE of: November 24th., 2008. Petitioner's authorized**
11 **warranted Financial Agent, (BANKS FAMILY TRUST) again filed EVIDENCE on**
12 **(Wednesday), December 3rd., 2008, as part of and in direct support of Petitioners previously**
13 **filed MOTION TO STRIKE of November 24th., 2008, in the form of a second lawfully Certified**
14 **Verification Statement to the Board, confirming AUTHORIZATION by the Board; (to only**
15 **be exercised at the option of the Board), to Draw and thus Transfer Funds in the amount of:**
16 **\$ 5,750.00, to be held in TRUST for NCR, for future Payment to UP for the acquisition of the**
17 **220' Rail Line at Flanigan, Nevada. This EVIDENCE in the form of an AUTHORIZATION**
18 **FOR IMMEDIATE CONVEYANCE OF BOND TO THE STB., was - Only - an**
19 **"AUTHORIZATION" lawfully contemporaneously filed by Petitioners Agent, in the form of**
20 **admissible EVIDENCE in direct support of Petitioners MOTION TO STRIKE. Petitioner**
21 **clearly and precisely entered Incontrovertible Evidence of his Financial Capacity in the**
22 **form of the submission of the Certified Verification Statement to the Board, confirming the**
23 **ABSOLUTE FACT, that Petitioner was at all times Financially Responsible within this**
24 **proceeding, in order to confirm the MOTION TO STRIKE filed on November 24th., 2008.**
25 **Please see Petitioners EXHIBIT: [K], attached hereto which is a copy of the: EVIDENCE filed**
26 **by the BANKS FAMILY TRUST on: December 3rd., 2008. Petitioner requests that the Board**
27 **REVERSE the DEFECTIVE, ARBITRARY and CAPRICIOUS Decision to Deny Petitioners**
28 **MOTION TO STRIKE, the Reply of UP dated November 4th., 2008, and to note within the**
Order, that UP did Not file any OBJECTIONS nor OPPOSITION to Petitioners MOTION

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3 **TO STRIKE, lawfully filed November 24th, 2008.**

4
5 **L. Petitioner, D/B/A: NCR, timely filed an APPEAL on (Tuesday), December 16th, 2008.**
6 **Within Petitioners APPEAL, Petitioner clearly explained in a precisely detailed manner, the**
7 **FACT that the EVIDENCE filed by the BANKS FAMILY TRUST was first filed for the**
8 **specific purpose of confirming Petitioners Financial Capacity, and second, for the expressed**
9 **purpose of providing the Board with the Authorization to Affirmatively and Administratively**
10 **Draw and thus Transfer Funds to the Board as necessary to be held in TRUST for NCR as**
11 **payment to UP, or at the option of the Board, to Not Draw and thus Transfer Funds within**
12 **the SCOPE of Petitioners OFA. Regardless of the decision by the Board at its Option to**
13 **Affirmatively Draw, or (Freely Not Draw), funds as a result of the provision of the**
14 **Authorization by BANKS FAMILY TRUST, the submission by the TRUST of this filing in the**
15 **form of lawfully Admissible EVIDENCE, was at a minimum lawfully submitted for**
16 **evidentiary purposes. Please see Petitioners EXHIBIT: [L], attached hereto which is a copy of**
17 **the: APPEAL filed by Petitioner on: December 16th, 2008. Petitioner requests that the Court**
18 **REVERSE the DEFECTIVE, ARBITRARY and CAPRICIOUS Decision by the Board to**
19 **Deny Petitioners APPEAL of: December 16th, 2008, and to also note within said Order, that UP**
20 **Failed to file any Objections and or Opposition to Petitioners APPEAL.**

21 **M. Petitioner requests that the Court REVERSE the DEFECTIVE, ARBITRARY &**
22 **CAPRICIOUS Decisions of January 27th, 2009, Denying both of Petitioners previous Appeals**
23 **of September 29th, 2008, and December 16th, 2008. Petitioner have already established the Fact**
24 **that UP has NEVER provided all of the information for which they are required to provide to**
25 **any potential Offeror upon request within the scope of STB 1152.27(a), including but not**
26 **limited to a Condition Report of the rail line. This deliberate act by UP to knowingly violate**
27 **Board Regulations was motivated as previously stated herein, by the fact that in the event that**
28 **UP were to document the actual Condition of each section of; Length, Weight and Age of Relay,**

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Re-roll, Scrap Rail, Re-usable Rail, Re-usable and Scrap Ties, Rail and Joint Bars, Spikes, Ballast, Drainage, Bridges, Tie Bars, Frogs, Switches, Tie Plates, Rail Anchors, Gauge Rods, Crossings, and Track Bolts, then Petitioner could take that Documented Report and literally HANG Union Pacific Railroad Company. Further, UP deliberately Refused to provide the Condition Report as they very knew that Petitioner could utilize the Report, in order to substantiate the true value existing of the existing line of rail as collateral in order to obtain financing sufficient to acquire the entire line, thus No Report, just a Lie based on the provision of an Operational Exception Report, and Speed Chart. This action by the Board to knowingly enable UP to ignore and thus fail to comply with the requirements of 1152.27(a) exists as a Fatally Defective Error in Mandatory Procedure under the ICA and ICC Regulations, absolutely barring the STB from having ever proceeded with the decision to compel Petitioner to file his OFA. This is precisely what happens when the Director of Proceedings, becomes a willing participant within the Scope of Criminal-RICO. The Board states in its Decision that UP was negotiating with RTI for the Sale of the Line for a period of Appx: 18-MOS., when in fact UP Legal-Staff have already personally confirmed that UP at all relevant times, intended to sell the subject line based on RTI's stated intent as confirmed personally by telephone to this Petitioner, to SALVAGE the line, thus the statement that UP was negotiating with RTI within the Scope of the OFA Process by the Board in its Decision of: January 27th., 2009, was Absolutely Knowingly FALSE.

On September 12th., 2008, the Board stated that it had Reviewed the Additional Information submitted by UP, and that UP appeared to have met the requirements in 49 1152.27(a), which this Petitioner has already proven was a Complete and Utter Lie by the Director of Proceedings. For example, where in any of the information submitted by UP can the Board now convey to this Petitioner, the Condition of the; Ties at Mile Point 338.35, the Tie Plates at 339.50, the Ballast and Drainage at 344.63, and All of the Bridges on the line. Petitioner can go on and on and on, with the explanation of Incontrovertible Proof that the Director of Proceedings was acting as part of the NEVADA-UP/REID Criminal Cartel, working

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24/7 to Destroy Petitioner and the NCR.

The Board in its Defective Decision, incorrectly based its findings that Petitioner based the Price of his OFA on the NLV previously provided by UP. In Fact, Petitioner did Not base his OFA on the UP-NLV, as Petitioner already knew that the NLV provided by UP was a Criminal Fraud, that Knowingly Mis-characterized the Value of the Line, as that as based on the value of a viable rail line, as opposed to 22-Miles of SALVAGE Steel by Weight. This is precisely why, Petitioner clearly and precisely confirmed in effect that the Price for which his OFA was set in order to Exceed the Deliberate Inflated Price provided by UP for the Track System, only to ensure that the OFFER as set within the Petitioners OFA, would be statutorily deemed as Bona-Fide by both the Board, and the Ninth Circuit Court.

Petitioner hereby respectfully directs the Circuit Court to carefully note that the Boards Decision on September 19th, 2008, ONLY cited a single Case in Los Angeles, California in relation to the Operational Capacity of NCR on the subject 220' rail line as: AB-409 (Sub. No. 5X). Later in the Decision of January 27th, 2009, the La Case in AB-409 is No Where to be found. This is precisely because Petitioner has already filed incontrovertible evidence of his ability to Factually Operate the subject 220' rail line, as a Main Line of Rail by citing Effingham in 1999 United Transportation Union - Vs. - STB in 7th, U.S. Court of Appeals. Effingham Railroad successfully obtained Board Approval for an Operating Exemption within FD-33468 to operate 206.05-Linear Feet of railroad line. Effingham Railroad then continued to eventually successfully maintain and operate in excess of 2-Miles of railroad line, through a combination of Extensions linking multiple sections of Existing rail lines. Bottom line, is that the Board could No Longer Hang Its Hat on the fabricated story previously proffered by UP upon which the Board had in SIGNIFICANT PART already based its Decision to Defectively execute the Wholesale Adoption of the impermissible disguised UP MOTION TO REJECT OFA., filed on September 17th, 2008. This issue was also factually defused within one of Petitioners previously executed MOTIONS TO STRIKE, prior to the Execution by the Board to Deny both of Petitioners Board APPEALS.

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3 Petitioner prior to the Decision by the Board to Deny both of Petitioners APPEALS, had
4 clearly provided more than sufficient information as necessary to confirm Existing and Future
5 Shippers for use for the 220' rail line, as well as the 21-Mile line extension back to the Town of
6 Wendel, California. The Decision by the Board to Deny both APPEALS by Petitioner as well
7 as Critical MOTIONS TO STRIKE, was not only Defective, but was Arbitrary and Capricious,
8 as the Board failed to either cite nor base its Decisions for Denial on any facts whatsoever
9 other than bare unsupported assertions of characterization. Virtually No Relevant Facts were
10 relied upon by the Board as the basis upon which to Deny Petitioners APPEALS. The only
11 actual facts as contained within the Decision that have absolutely No Bearing on Petitioners
12 APPEAL, were the Recent Traffic Statistics that were supplied by UP. Petitioner has already
13 confirmed within previous Motions, that UP did Not Engage in discussions with the HL-Power
14 Plant concerning the provision of Rail Service, despite that fact that the Power Plant is the
15 largest Employer in Lassen County, and literally ship's Millions of Tons of Fuel Products
16 annually to its facility. At No Time did UP ever agree to extend its Track in Wendel, California
17 just one mile in order to serve the Power Plant, as UP in FACT does Not Want TO Rail Serve
18 the Power Plant, as the Plant is Not Powered By Heavy Polluting COAL, for which UP obtains
19 more than [5-X] in Revenue based on Volume, as opposed to Renewable Wood Products as in
20 the case of the Power Plant. The Truth in this case is Not based on Complex Rocket Science.
21 This is PRECISELY why UP just Abandoned another 11-Mile Rail Line, less than 15-Miles
22 from the Plant in Wendel, in the town of Loyalton, California to another CLEAN BURNING
23 Renewable Fuel Power Generating Plant. This case is about Public Corporate Fraud, on the
24 grandest Scale since the construction of the Transcontinental Railroad.

25 Within the Board's Decision of January 27th, 2009, the Board states (in effect), that
26 Petitioner Failed to PROVIDE JUSTIFICATION to Strike the UP Reply of October 7th, 2008,
27 but No Where in the Decision by the Board, does the Board refer to any Specific Element as
28 Factually Identified within Petitioners MOTION TO STRIKE wherein Petitioner Fails to
Provide Justification, other than the bare unsupported assertion by the Board that Petitioner

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simply attempts to provide a Rebuttal to UP's Reply. This is a disturbing TREND throughout the entire Case, as it Begs the Question: Where are ANY FACTS for which the Board bases Any Decision as contained within the Denial of both of Petitioners APPEALS. The only Party within this Case that provided ANY RELEVANT FACTS, was Petitioner/NCR. Procedurally and Factually Speaking, VOID any Relevant Substantive Facts in Objecting in Opposition to Petitioners Motions in the instant case, the FACTS as stated in Petitioners Motions will absolutely Prevail in terms of both Fact, as well as Procedure. These Facts alone exist as further evidence that the Decisions by the Board in the instant case were at best DEFECTIVE, and at worst ARBITRARY and CAPRICIOUS. The Incontrovertible FACTS as contained within Petitioners MOTIONS TO STRIKE filed on November 10th., 12th., and 24th., 2008, were NEVER DIS-PROVED by the Board nor UP, and thus must in terms of Fact and Procedure Stand as Valid Facts upon which Petitioners MOTIONS TO STRIKE should have been GRANTED. Petitioner again requests that the Decisions by the Board to Deny each of Petitioners MOTIONS TO STRIKE be REVERSED and that the case be Remanded back to the Board with an Order to GRANT All of Petitioners MOTIONS TO STRIKE.

The Boards Decision to Deny Petitioners request to AMEND his OFA was as previously discussed, Fatally Defective in terms of both Substance and Board Procedure. Petitioner has already Clearly Established that FACT that the UP filing of September 17th., 2008, was only an Un-cleverly Disguised: MOTION TO REJECT OFA, and was Not a Reply as cited by the Board in its January 27th. Decision to Deny Petitioners request to AMEND his OFA. The decision of the Board in this instance is another clear example of Defective, Arbitrary and Capricious behavior, as the Director of Proceedings Deliberately Preempted Petitioners ability to Supplement his OFA, within the well established time period with which to do so. Most important is the Fact that by the Decision to Deny both of Petitioners Appeals on January 27th., 2009, that Board had already accepted incontrovertible EVIDENCE from Petitioner and or Petitioners Authorized Direct Agents, Confirming every issue of Financial Responsibility, as well as the Operational Viability of Petitioners plan to place the 220' rail line into sustained

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operation for 50 to 100-Years as a Critical element of the only dedicated Pollution-less North-South Heavy High Speed Transcontinental Railroad in the world, let alone the 30 to 50-Year Viability of sustained Local Class-III Operations.

In the January 27th. Decision, the Board explains its Decision to Deny the APPEAL filed by Petitioner on December 16th., 2008, but FAILS to explain that it only received an AUTHORIZATION to access funds for the expressed purpose of establishing BOND, as opposed to the actual provision by Petitioner of funds to post BOND. The filing of EVIDENCE on November 24th., by Petitioners Direct Authorized Agent, BANKS FAMILY TRUST as preciously addressed within this APPEAL to the Court, was executed (First) in the Form of EVIDENCE, and (Second) in the form of Authorization to the Board, ONLY AT THE OPTION OF THE BOARD, to execute same and thus access funds in the form of a BOND. NO ONE HELD A GUN TO THE HEAD OF THE BOARD, and said TAKE THE MONEY OR ELSE. This is another PERFECT example of how the Board is Twisting the Truth with its seemingly cleaver Staff Attorneys, in order to BARR Petitioner from the execution of Interstate Commerce by Rail. What is MOST disturbing about the Decision on the Point of the Financial Guarantee filed in the form of EVIDENCE, is that the Board in its own Decision admits that Petitioner by and through BANKS FAMILY TRUST, has Factually Incontrovertibly Demonstrated his Financial Capability as revealed in Footnote (2)., prior to the Boards Decision to Deny Petitioners OFA, on the alleged basis that Petitioner failed to prove Financial Capacity.

As to the argument by the Board that there is NO CURRENT or FUTURE TRAFFIC, Petitioner points out to the Court, that No Where in the ICA and ICC Regulations, is an Offeror required to Divulge the Specific Details of his Contracts and of Future Prospective Shippers for which he has worked diligently for more than 33-Years to Develop on the subject rail line, to a Criminal Competitor such as Union Pacific Railroad. This is precisely why CONGRESS has explicitly stated; "that Offers Need Not Be Detailed." The Board states that Petitioner has Failed to address a number of issues, including how the line ending at Wendel, is going to be Connected to the HL-Power Plant, but this is ABSOLUTELY FALSE.

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3 Petitioner clearly explained in his Motion Practice, that NCR would file for an Exempted
4 Construction Authority from the Board to Re-Construct the Line back to the Town of Wendel,
5 but No Where did Petitioner state nor imply that NCR would Not Construct the Line to the HL
6 Power Plant, which is Factually Located In Wendel, California. Obviously the Legal-Staff
7 supporting the Director of Proceedings and within the General Counsel's Office, are literally
8 Scrapping the Barrel for any potential to Mis-Characterize the stated intent of this Petitioner.

9 Most Important, is that Petitioner is Not Required to divulge the Fact that Petitioner has
10 already Noticed the HL-Power Plant as well as affected Land Owners for more than a Year
11 Prior to Board Decision, of Petitioners action to lawfully Condemn both the Power Plant, as
12 well as the necessary property for a Right of Way for Track Construction. If he Board
13 required additional information from Petitioner, all the Board had to do was to Respond with
14 a Request for Additional Information, as well as the Multitude of Documented Stipulations by
15 Petitioner for the necessity for the Granting of a Protective Order by the Board, and Petitioner
16 would have immediately provided further Details. Petitioner is Not Required by virtue of the
17 OFA Process to literally HAND UP the most Confidential and Proprietary elements of his
18 business development activities further threatening the Legal Viability of his Patented New
Heavy High Speed Railroad Technology.

19 Petitioner only stated that Parallel Tracks could be constructed adjacent to the existing
20 220' Main Line of rail, that did Not relate in any way to the 21+ Mile Extension of same back
21 to the Town of Wendel. The Board absolutely knows that Side Tracks can be constructed
22 within an existing Right of Way, so long as they don't expand the reach of the Main Line of rail.
23 I wonder how long it took for a high paid Federal Civil Servant to devise the knowingly FALSE
24 Mis-Characterization of Petitioners intent as to the construction of Parallel Tracks adjacent to
25 the existing 220' Main Line of Rail.

26 The Board very well knows that NCR has factually executed its Pre-Construction Notice
27 within FD-34382, and has met with STB Staff for the last 5-Years in Las Vegas, Reno, and
28 Washington D.C., in order to lawfully confirm the definition and notice requirements for

1 Case No. **09 - 70576**

2
3 Construction of the NCR-ByPass. Petitioner is now preparing to execute the Deposition of STB
4 Staff, including specific Legal-Staff in order to confirm that the STB is being utilized as an
5 Enterprise within the scope of RICO, as further defined under 18 U.S.C. 1961.

6 Petitioner hereby submits to the Court, that his evidence lawfully submitted to the Board
7 as contained within his Motion Practice to the Board, more then confirms that ALL Issues
8 brought up by the Board in its Defective Decision of January 27th., 2008, are in Fact FALSE.
9 As an Example, the Board goes on to state that Petitioner has FAILED to Show that he could
10 finance the purchase and operation of the subject 220' rail line, as well as the Extensions. This
11 is Absolutely FALSE, as Petitioner has already clearly confirmed to the Board that Petitioner
12 has a Contract Guaranteeing funding for the Construction of the 21+ Mile Extension, as well
13 as the Acquisition and Operation of the 220' rail line, which was clearly explained with the
14 provision of Incontrovertible Evidence by prior submissions to the Board within the Scope of
15 prior Motion Practice. Just because the Board denied Petitioners Motions to Strike, the
16 Documented Incontrovertible Factual Evidence provided by Petitioner entered into the Record,
must still be considered by the Board prior to its Decision.

17 Petitioner asserts that the issues raised by the Board in opposition to the submission of
18 his OFA can be compared and determined as False, through the citation of a number of Case's
19 for which the Board has previously decided. He STB was charged by CONGRESS as a
20 FINDER OF FACT, NOT CONVOLUTED MYTH, COMPOUNDED BY PREDICATE ACTS
21 OF CRIMINAL CONSPIRACY AND FRAUD.

22 Petitioner asserts that his OFA is essentially in most critical aspects, explained and
23 sustained by previous actions taken by the Board, in; STB FD-33468, Redmond-Issaquah
24 Railroad Preservation Association - Vs. - STB., Borough of Columbia; Shawnee Run
25 Greenway, Inc. - Vs. - STB., and STB AB-1081X.

26 As in the case of Effingham STB FD-33468 as previously stated, Effingham was found
27 to be a viable line of Rail, that did Not have any Confirmed Shipper located within its 206.50'
28 of line, as in the case of the NCR on the 220' line. Effingham could only have proceeded to

Case No. **09 - 70576**

engage in Interstate Commerce by Rail, with the subsequent execution of an Extension to its 206.50' line. Never the less, the Board approved Effingham, and a Federal Court upheld the decision of the Board, and further Declared that the 206.50' line acquired by Effingham was sufficient in terms of length, physical access, and operational characterization, to exist as a Main Line of rail. In Redmond-Issaquah Railroad Preservation Association - Vs. - STB., the Board despite the provision of Evidence of Potential Shippers on the Line, Denied the OFA proffered by the Home Owners Association, on the basis of Evidence that overwhelmingly and factually proved that the Home Owners Association did Not In Fact, intent to Operate the line, as is Absolutely the Precise Opposite in the instant case of the 220' Main Line, at Flanigan. In the instant case, the Board has every indication of Petitioners intent to institute Class-III Operations on the subject 220' Line, as well as to MASSIVELY EXPAND those Operations following the Re-Construction of the line back to the HL-Power Plant in Wendel, California. Plaintiff has already within this filing, asserted that neither the STB nor UP had executed the provision of any Objections in Opposition to Petitioners Stated Intent to operate the line of rail as clearly described in his Very First Filing, within AB-33 (Sub. No. 230X). In Borough of Columbia; Shawnee Run Greenway, Inc. - Vs. - STB., the STB approved the OFA proffered by Sahd, despite the fact that Sahd admitted that the potential use of the Rail was purely speculative on specific directed shipments, and that No Action would be taken by Sahd to immediately place the line into operation. In the instant case, Petitioner is ready this very second to access Guaranteed Federal Funds to immediately construct a Critical Pollution-less High Technology Power Generating Facility on the 220' line of rail. In STB AB-1081X, the San Pedro filed in Motion Theory, a Virtually Identical MOTION TO REJECT OFA, as was factually filed by UP on September 17th, 2008, and at no time did the Board Deny the MOTION TO REJECT OFA, based on the fact that the STB characterized the MOTION TO REJECT BY San Pedro, as a REPLY. The decision by the Board to Deny both of Petitioners APPEALS to the Board, published on January 27th, 2009, was Blatantly DEFECTIVE, ARBITRARY and CAPRICIOUS. Attorney Thomas McFarland in the: Redmond-Issaquah Railroad

Case No. **09 - 70576**

Preservation Association case correctly summed it all up, in that the actions by the Board to go beyond the Statutory Requirements of the ICA and ICC Regulations for OFA Procedures were actions to **FACTUALLY CONSTRUCT BARRIERS TO ENTRY**, as opposed to actions by which the Board, by which the Board could confirm the intent and capability to acquire and operate a line of rail. In the instant Case, Petitioner has more then demonstrated that the Board is simply in this case, using its own concocted Requirements beyond Statutory Authority as a Barrier to Entry, as the Record is Replete with Massive Material Defects, and Arbitrary and Capricious Activity by the Board, further compounded by the fact that the Board fails to ever GRANT Petitioner nor Petitioners Direct Agent a Protective Order based on Petitioners unflinching requests for same, as well as lawfully binding stipulations for the provision of additional information should the Board Require Same. In this case, the Board REMAINED SILENT as to any requirement for the provision of additional information, as well as Petitioners Motion to Supplement his OFA within the APPEAL PROCESS which is a Well Established Long Standing Practice by the Board. In summary, the Entire Regulatory Process by the Board in this case, is a Total and Complete Closely Coordinated CRIMINAL FRAUD. This Petitioner defies the Court to identify any OFA case's laced with Fraud by both a Class-I Railroad with the Full Assistance and Internal Criminal Cooperation of Internal Board-Staff, then exists within the instant case.

For reasons as clearly stated herein and above, Petitioner respectfully requests that the Court REVERSE the Board Decisions to Deny both of Petitioners Board APPEALS, as well as the Decisions to Deny the MOTIONS TO STRIKE included within those Board Appeals, and to REMAND this case back to the STB along with an Order Directing the Board to Reopen the Abandonment Case, and Proceed with and order the sale of the line to Petitioner, D/B/A: NEVADA CENTRAL RAILROAD within 60-Days of the rendering of said Decision by the Court, and for any and all further relief as this honorable Court may deem appropriate including but not limited to the Return by the Board of any and All Filing Fee's for APPEALS as were assessed by the Board in this case back to Petitioner, upon submission of necessary

1 Case No. **09 - 70576**

2
3 Proofs of same by US-MAIL upon notice for submission from the Court.

4
5 Respectfully Submitted this 22nd. Day of April, 2009 by Petitioner Pro-Per:

6
7 
8
9 Robert Alan Kemp, D/B/A: NEVADA CENTRAL RAILROAD.

10
11 CERTIFICATE OF SERVICE

12
13 I, Robert Alan Kemp, D/B/A: NEVADA CENTRAL RAILROAD certify that on this 22nd. day
14 of April, 2009, I made service of the attached original Informal Opening Brief and Attached
15 Exhibits, upon the United States Court of Appeals for the 9th Circuit at: PO Box: 193939, San
16 Francisco, CA, 94119 and upon the Surface Transportation Board, (STB), C/O: Ronald
17 Molteni, 395 E Street, SW, 12th Floor, Washington, D.C. 20423-0011 by depositing same into
18 the United States First Class Mail with prepaid postage.

19 
20
21 Robert Alan Kemp, D/B/A: NEVADA CENTRAL RAILROAD.

STB Ex Parte No. 705

Competition in the Railroad Industry

Concerned Captive Coal Shippers

American Electric Power Service Corporation

The City of Grand Island, Nebraska

Duke Energy Corporation

Dynegy, Inc.

Intermountain Power Project

Progress Energy Carolinas, Inc. and Progress Energy Florida, Inc.

Seminole Electric Cooperative, Inc.

South Carolina Public Service Authority (Santee Cooper)

South Mississippi Electric Power Association

CCCS Proposals

1. Adopt simple, readily ascertainable bright-line standards for administering 49 U.S.C. 10705
2. CCCS's proposals recognize the statutory consideration of carriers' revenue needs
3. Prescribe an alternative through route under Section 10705 where the R/VC ratio for an existing routing exceeds the STB's RSAM level (or where the new routing would be shorter, the $R/VC_{>180}$ level) for the subject carrier
4. The most recent RSAM and $R/VC_{>180}$ levels for Class I carriers average 280% and 240%, respectively

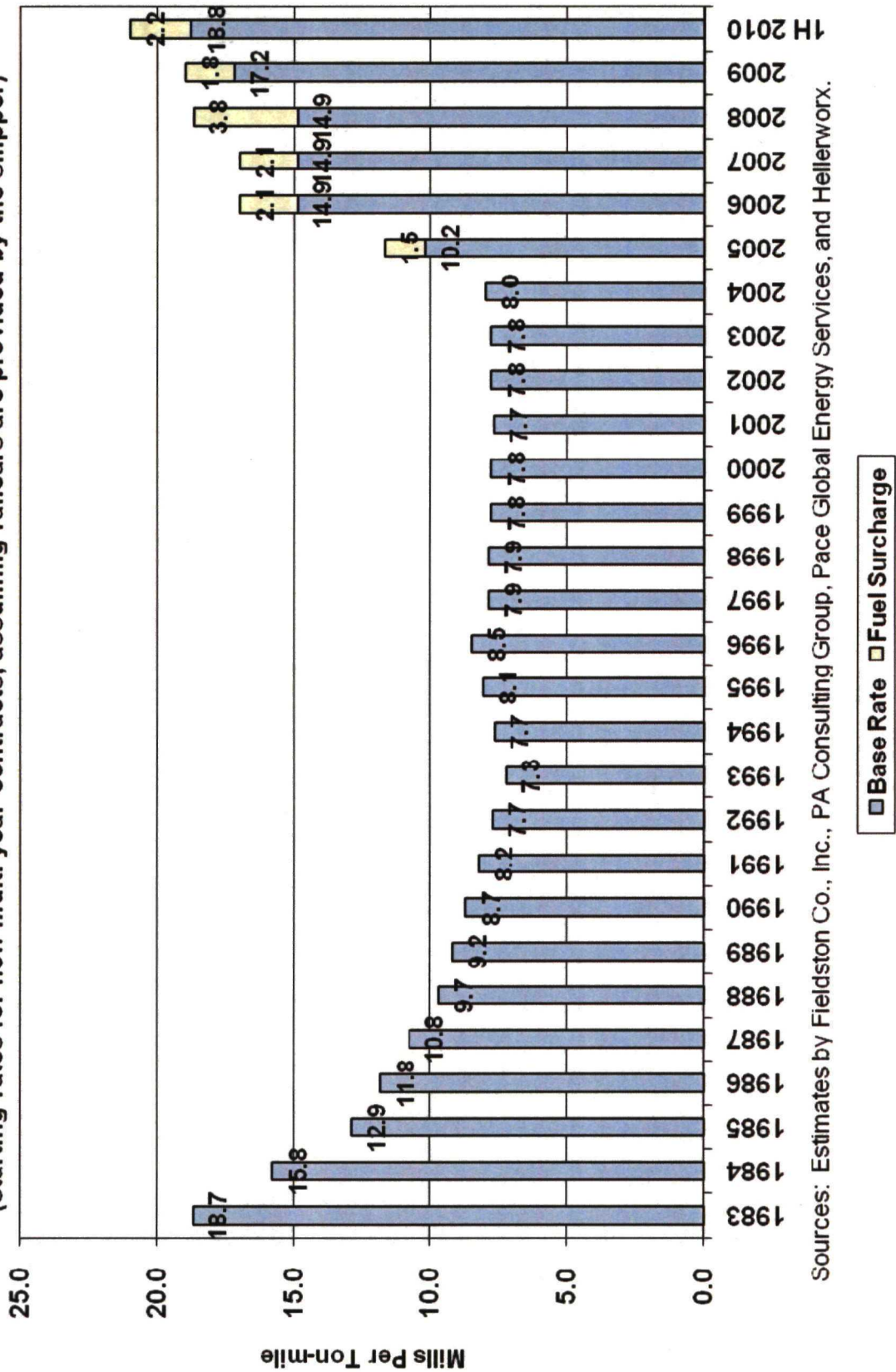
Source: STB Ex Parte No. 689 (Sub-No. 1) (STB served July 27, 2010). The identified RSAM and $R/VC_{>180}$ percentages are simple averages of the 2008 results in Tables I and II of the Board's decision.

STB EX PARTE NO. 705
COMPETITION IN THE RAILROAD INDUSTRY

WESTERN COAL TRAFFIC LEAGUE
STB PUBLIC HEARING EXHIBITS
JUNE 22, 2011

Richards Chart III

Rail Rates for Shipments of PRB Coal to Competitively-Served Destinations on BNSF or UP
(starting rates for new multi-year contracts, assuming railcars are provided by the shipper)

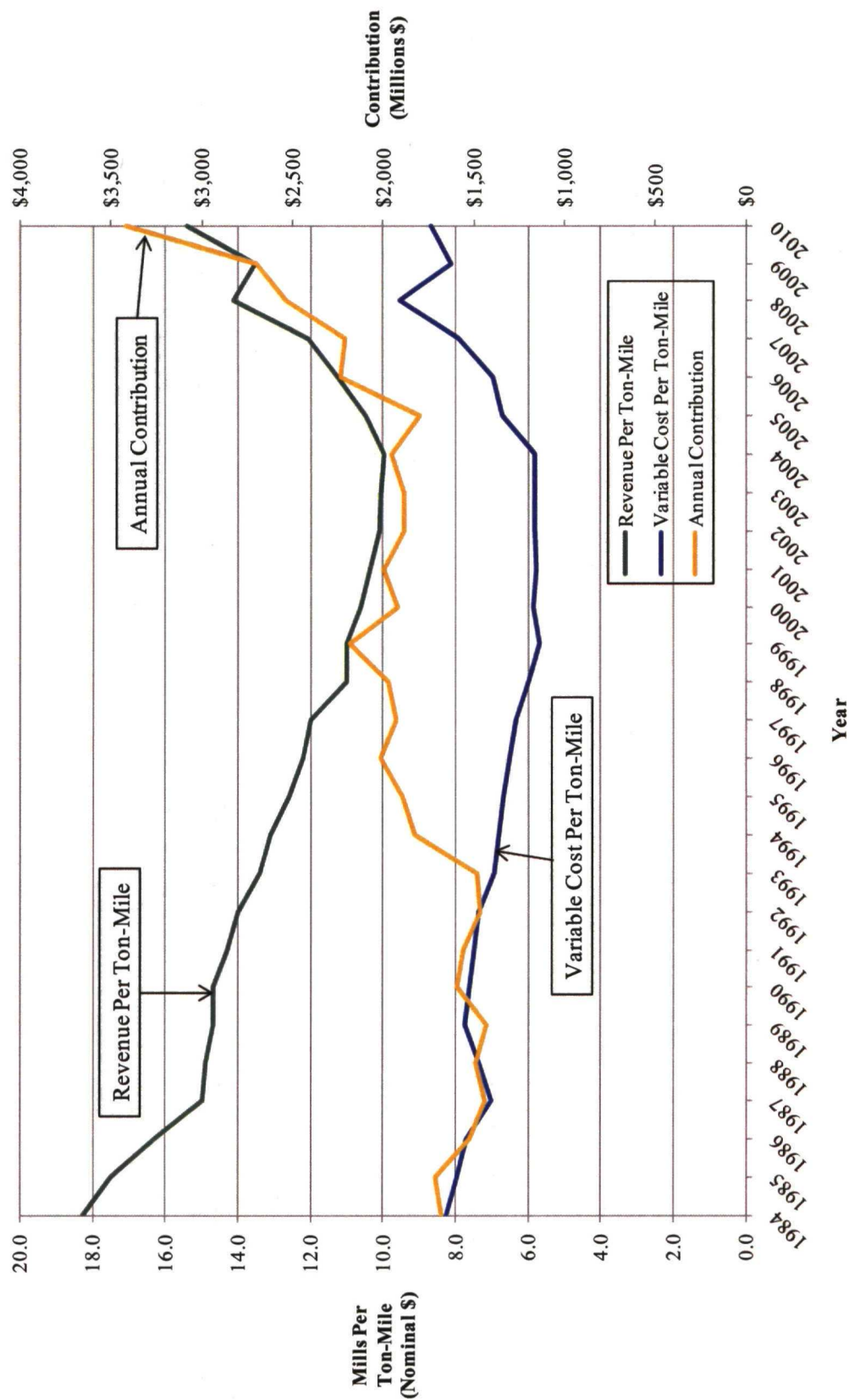


Sources: Estimates by Fieldston Co., Inc., PA Consulting Group, Pace Global Energy Services, and Hellerworx.

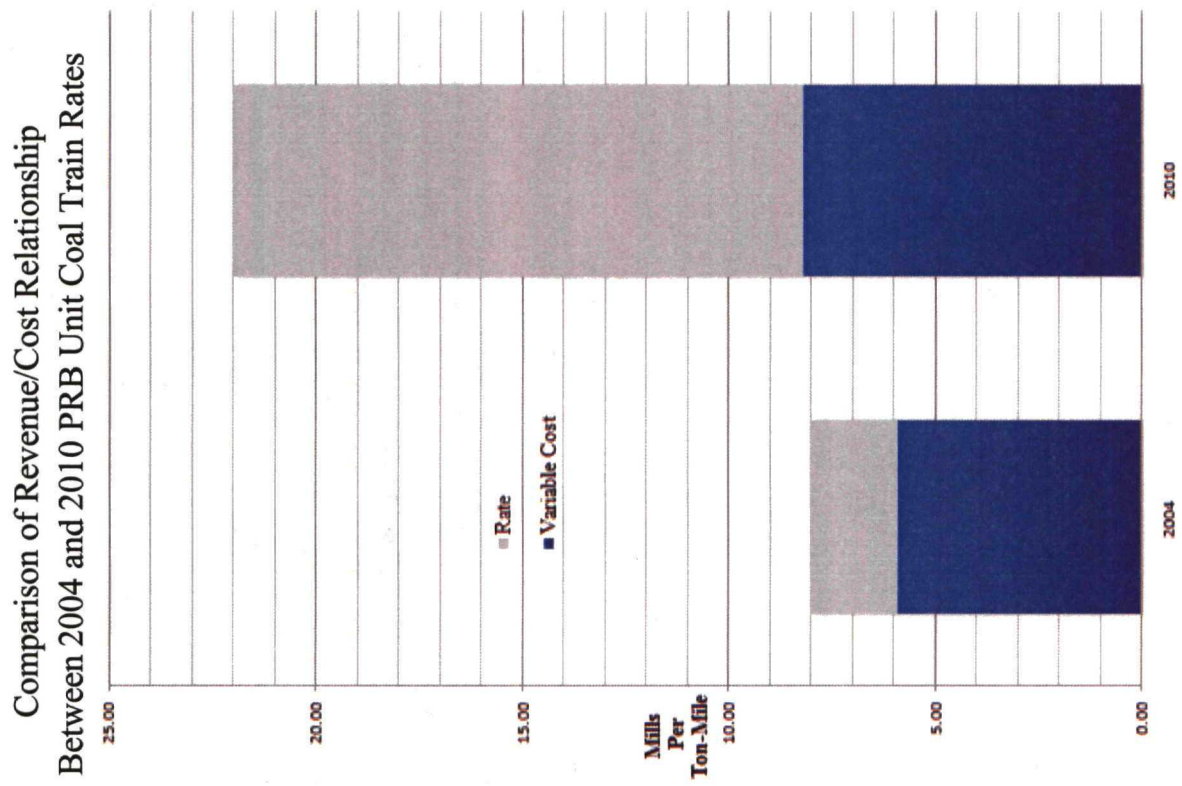
■ Base Rate ■ Fuel Surcharge

Richards Chart VI

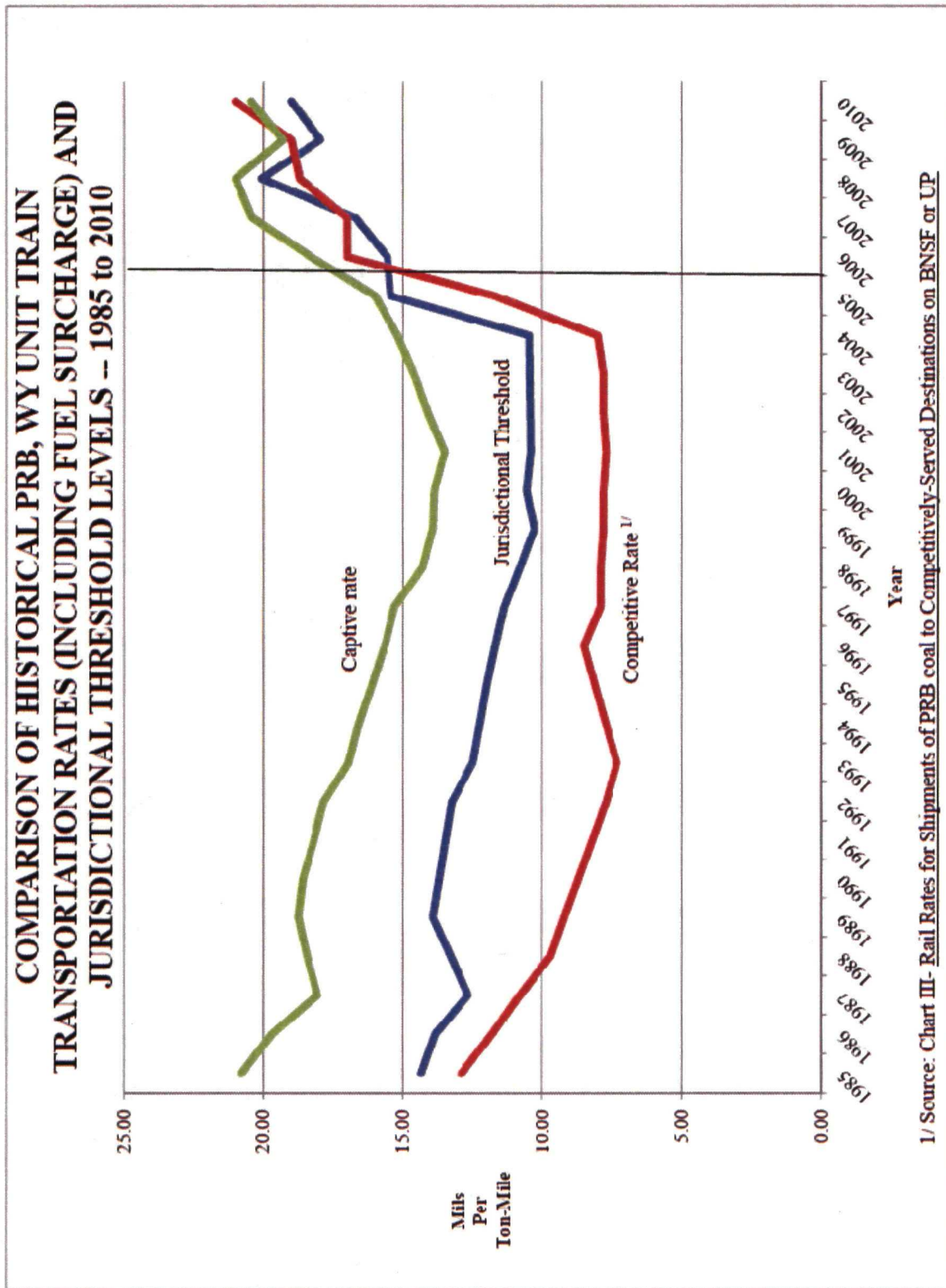
**Average Revenue And Variable Cost Per Ton-Mile,
And Annual Contribution For Western Coal Transportation
1984 - 2010**



Richards Chart IX



Richards Chart VII





June 22-23, 2011

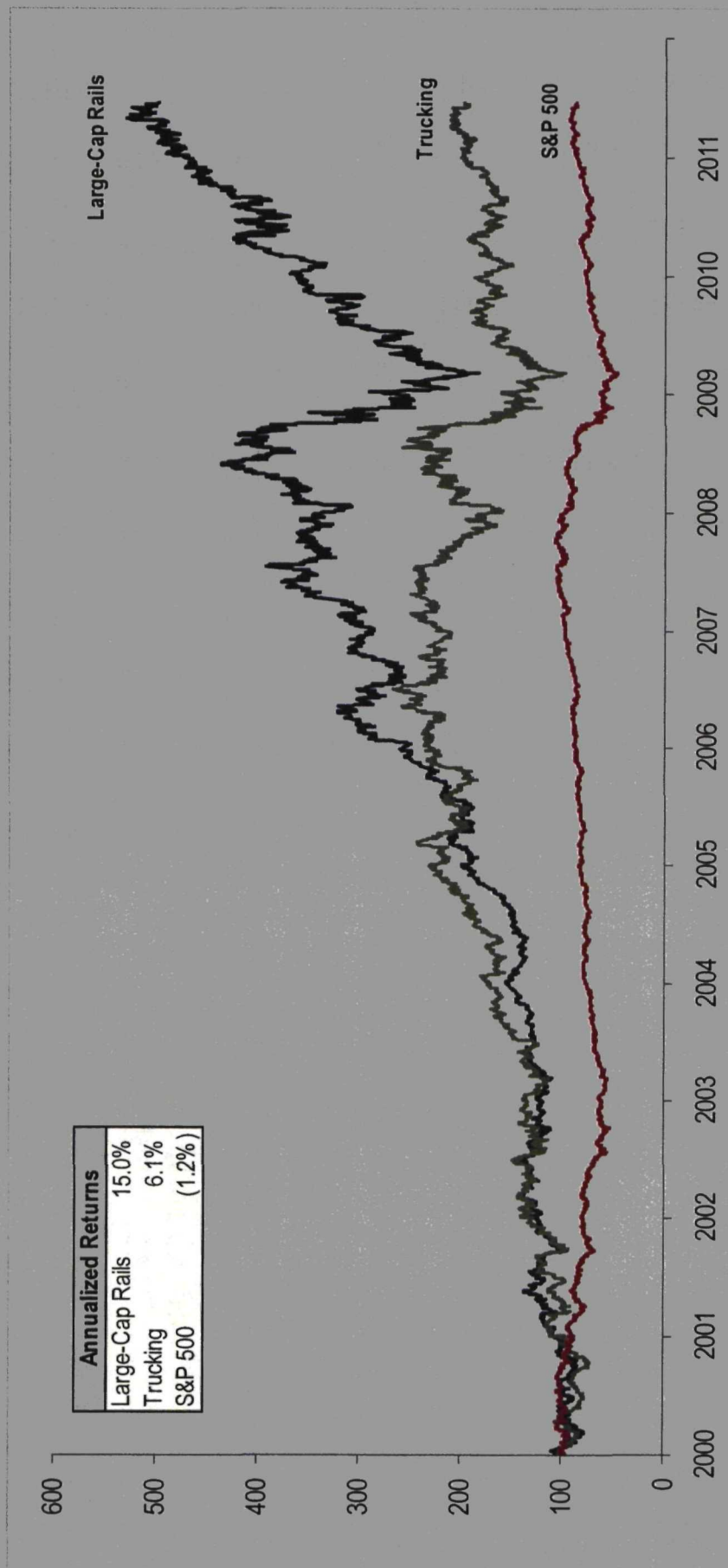
Surface Transportation Board

Hearings on Competition in the Railroad Industry

Scott Group
Wolfe Trahan & Co.
Director, Senior Transportation Analyst

Transport Stock Performance vs. the S&P 500

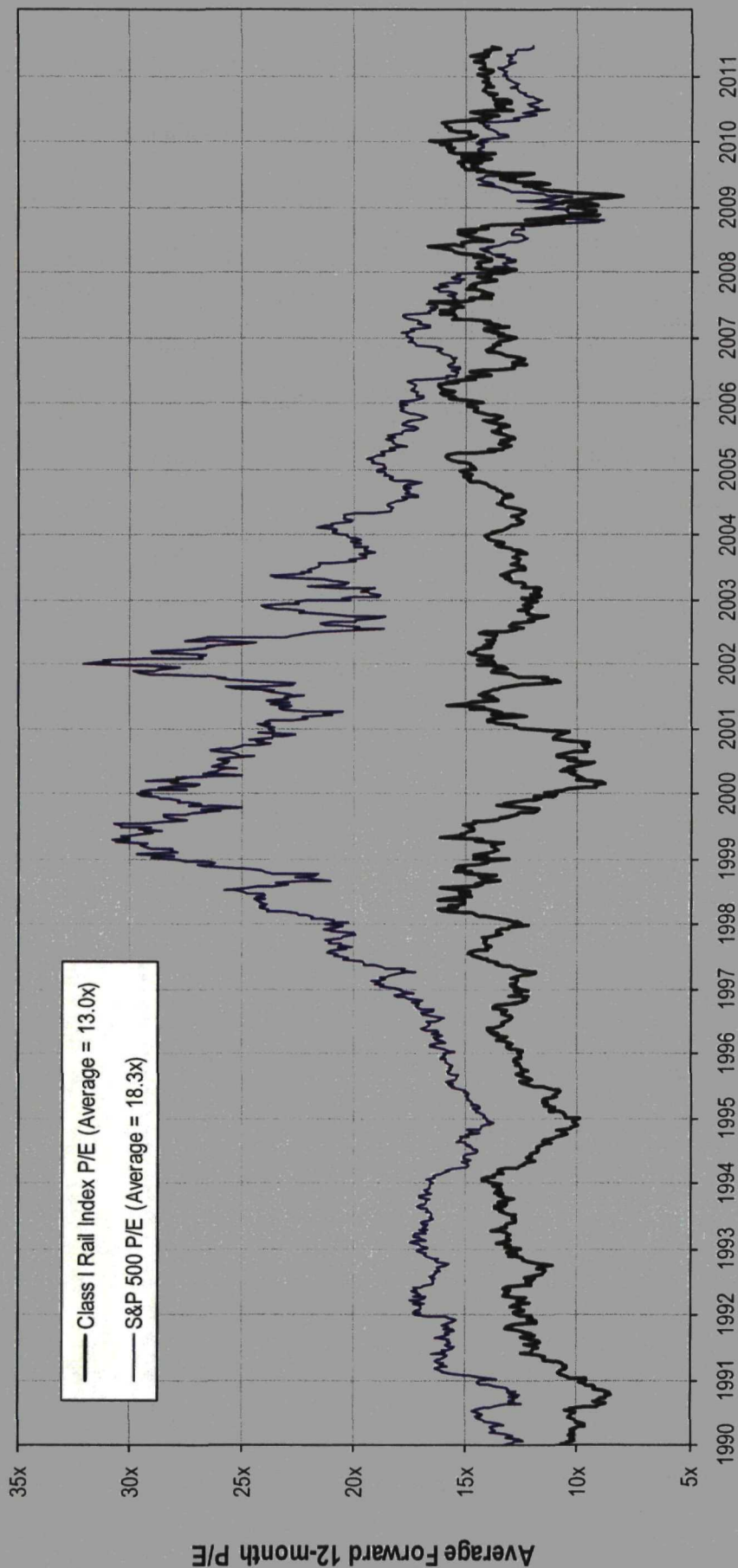
- ▶ Rail Stocks Have Materially Outperformed Other Transports and the S&P 500 Since 2005



Note: Rail index includes BNI, CNI, CP, CSX, NSC, UNP, CRR, RSP. Trucking index includes CVTI, HTLD, JBHT, KNX, SWFT, WERN, ABFS, AFWY, CNW, ODFL, ROAD, USFC, YRCW, R.
Source: FactSet Research Systems Inc.; Wolfe Trahan & Co.

Rail Forward P/E Valuations vs. the S&P 500

► The Rails Have Consistently Traded Below a Market Multiple



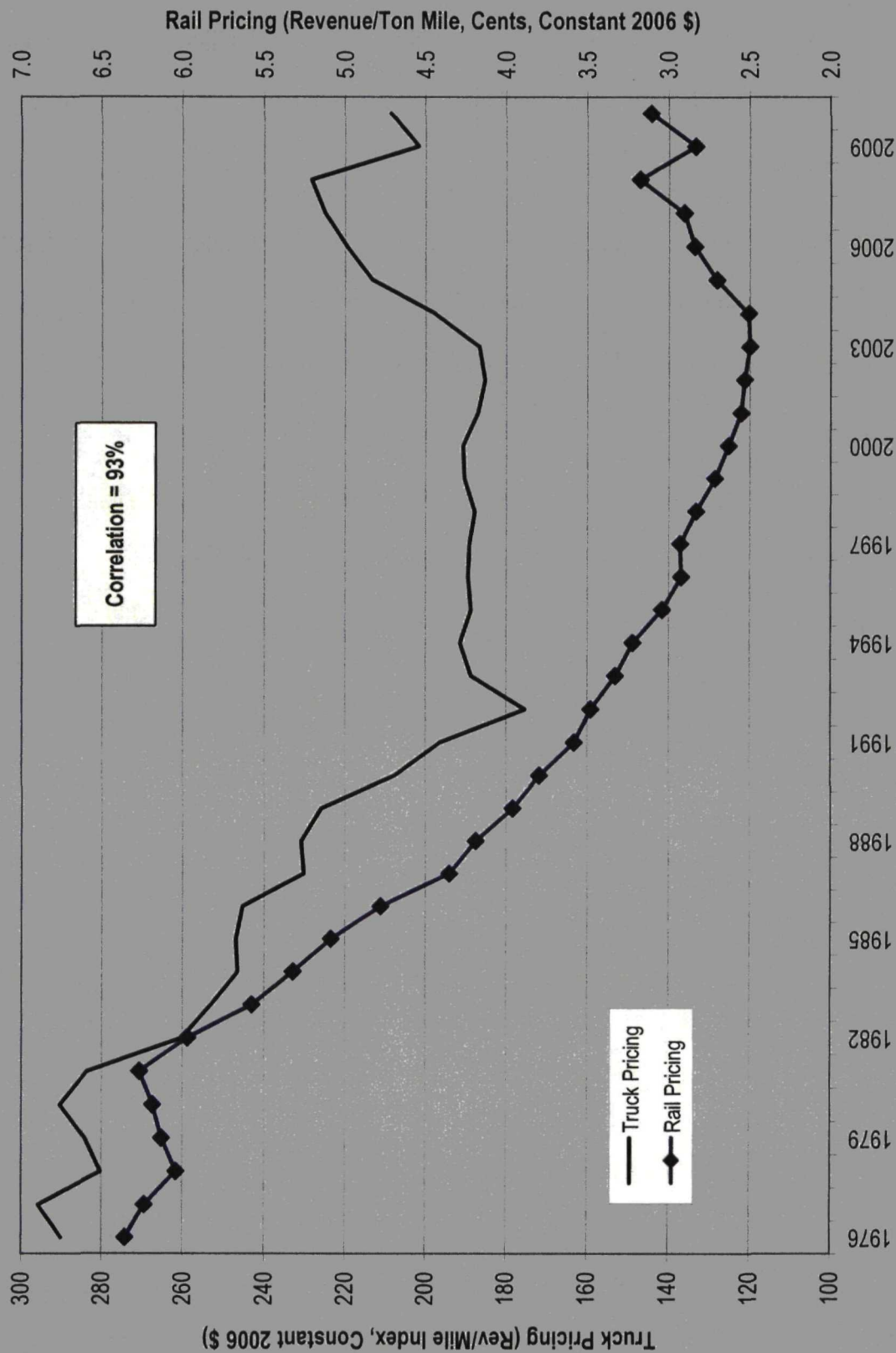
Note: Rail Index includes BNI, CNI, CP, CSX, NSC, and UNP.
Source: FactSet Research Systems Inc.; Wolfe Trahan & Co.

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Rail vs. Truck Pricing

- Rail Rate Increases Have Materially Lagged Truck Rate Increases Since Deregulation



Source: AAR; ATA; Wolfe Trahan & Co.

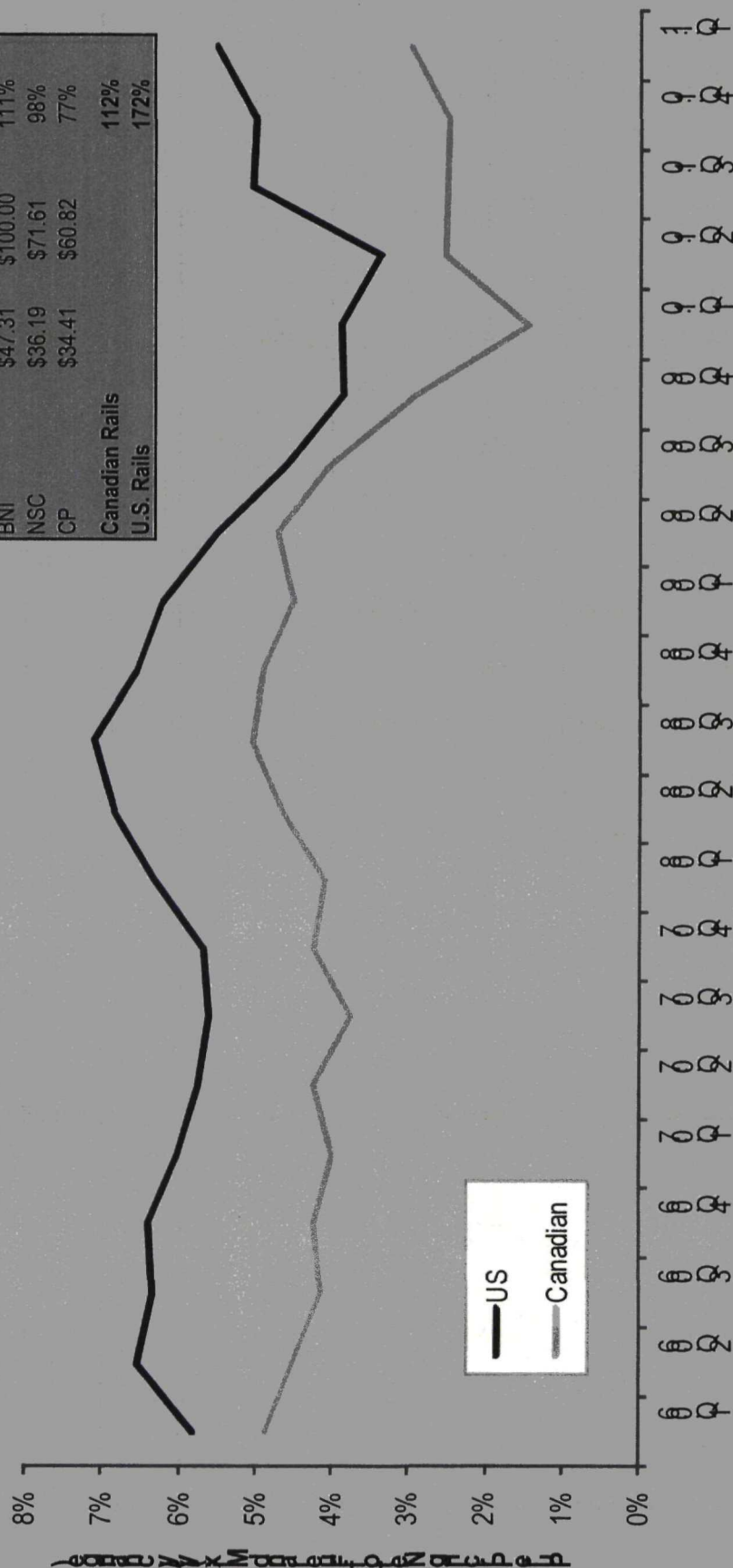
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U.S. vs. Canadian Rail Pricing

- U.S. Rail Pricing Gains Have Consistently Outpaced Canadian Rail Pricing Gains

U.S. vs. Canadian Rail Stock Performance			
	12/31/2004	Current	% Change
CSX	\$6.68	\$25.11	276%
UNP	\$33.63	\$101.80	203%
CNI	\$30.63	\$75.66	147%
BNI	\$47.31	\$100.00	111%
NSC	\$36.19	\$71.61	98%
CP	\$34.41	\$60.82	77%
Canadian Rails			112%
U.S. Rails			172%

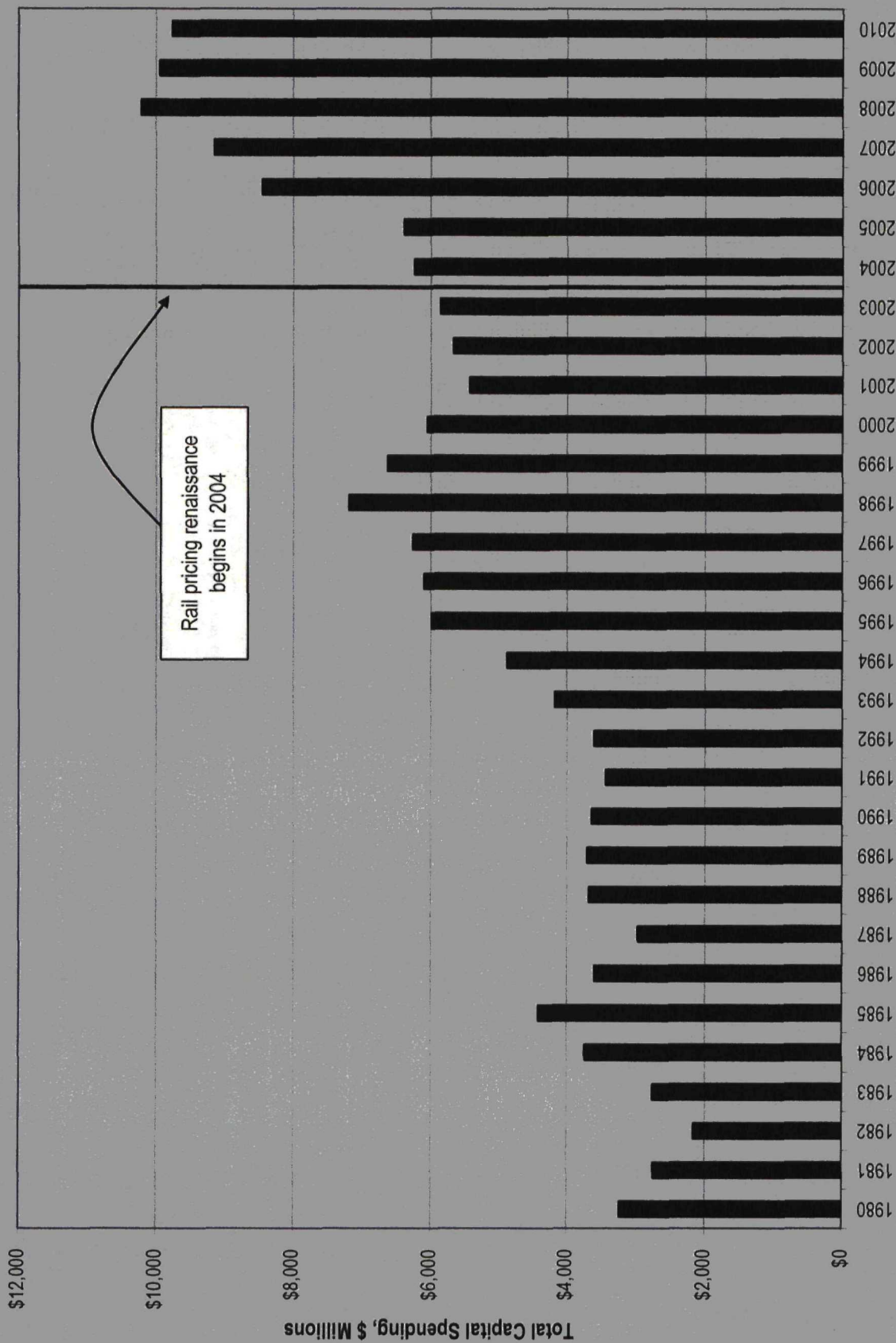


Note: Priced as of June 20, 2011; U.S. Rails include BNI, CSX, NSC, and UNP. Canadian Rails include CNI and CP. Stock performance for BNI based on \$100 acquisition price paid by Berkshire Hathaway on 2/12/2010; Source: FactSet Research Systems Inc.; Company reports; Wolfe Trahan & Co.

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Rail Capital Spending Has Increased Materially in Recent Years



Source: AAR; Wolfe Trahan & Co.

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Rail Capital Expenditures

► Rail CapEx is Materially Higher Than Other Large Companies in the U.S.

Total Capex (US\$ M)	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011E	5-Yr Avg 2006-2010	10-Yr Avg 2001-2010
BNSF	\$2,666	\$2,598	\$2,767	\$2,526	\$1,762	\$1,608	\$1,505	\$1,726	\$1,988	\$2,179	\$2,671	\$2,592	\$2,850	\$2,640	\$2,400	\$3,500	\$2,631	\$2,216
CNI	398	663	724	738	743	684	598	749	825	975	1,141	1,296	1,347	1,237	1,538	1,757	1,312	1,039
CP	393	620	738	567	385	359	356	493	519	731	698	834	791	634	704	1,018	732	612
CSX	1,424	1,187	1,479	1,517	913	930	1,080	1,059	1,030	1,136	1,639	1,773	1,740	1,447	1,825	2,107	1,685	1,366
NSC	957	960	956	912	731	746	695	720	1,041	1,025	1,178	1,341	1,558	1,299	1,470	2,223	1,369	1,107
UNP	2,076	2,101	2,110	2,158	2,315	2,196	2,359	2,071	2,402	2,860	2,729	3,096	3,100	2,500	2,500	3,267	2,785	2,581
Total	\$7,915	\$8,128	\$8,774	\$8,418	\$6,849	\$6,523	\$6,593	\$6,818	\$7,805	\$8,905	\$10,056	\$10,932	\$11,386	\$9,758	\$10,438	\$13,871	\$10,514	\$8,921
Canadian Rails	792	1,283	1,462	1,305	1,128	1,043	954	1,242	1,344	1,705	1,839	2,130	2,138	1,872	2,243	2,774	2,044	1,651
US Rails	7,123	6,846	7,312	7,113	5,721	5,480	5,639	5,576	6,461	7,200	8,217	8,802	9,248	7,886	8,195	11,096	8,470	7,270
Y/Y % Change																		
BNSF	37.8%	(2.6%)	6.5%	(8.7%)	(30.2%)	(8.7%)	(6.4%)	14.7%	15.2%	9.6%	22.6%	(3.0%)	10.0%	(7.4%)	(9.1%)	45.8%	2.6%	3.7%
CNI	(2.9%)	66.5%	9.2%	1.9%	0.7%	(8.0%)	(12.6%)	25.2%	10.2%	18.1%	17.1%	13.5%	4.0%	(8.2%)	24.3%	14.2%	10.2%	8.4%
CP	(24.2%)	57.6%	19.1%	(23.2%)	(6.7%)	(6.7%)	(0.8%)	38.4%	5.2%	40.9%	(4.5%)	19.6%	(5.2%)	(19.8%)	11.0%	44.5%	0.2%	7.8%
CSX	4.4%	(16.7%)	24.6%	2.6%	(39.8%)	1.9%	16.1%	(1.9%)	(2.7%)	10.3%	44.3%	8.2%	(1.9%)	(16.8%)	26.1%	15.4%	12.0%	8.3%
NSC	2.0%	0.3%	(0.4%)	(4.6%)	(19.8%)	2.1%	(6.8%)	3.6%	44.6%	(1.5%)	14.9%	13.8%	16.2%	(16.6%)	13.2%	51.2%	8.3%	8.3%
UNP	9.1%	1.2%	0.4%	2.3%	7.3%	(5.1%)	7.4%	(12.2%)	16.0%	19.1%	(4.6%)	13.4%	0.1%	(19.4%)	0.0%	30.7%	(2.1%)	1.5%
Total (US\$)	12.0%	2.7%	7.9%	(4.1%)	(18.6%)	(4.8%)	1.1%	3.4%	14.5%	14.1%	12.9%	8.7%	4.2%	(14.3%)	7.0%	32.9%	3.7%	4.7%
% of Revenue																		
BNSF	32.6%	30.9%	30.9%	27.5%	19.1%	17.5%	16.8%	18.3%	18.2%	16.8%	17.8%	16.4%	15.8%	18.8%	14.2%	NA	16.6%	17.1%
CNI	10.5%	17.5%	20.9%	20.9%	20.3%	18.7%	15.4%	17.7%	15.9%	15.8%	16.4%	17.6%	16.8%	19.0%	19.1%	19.0%	17.8%	17.2%
CP	14.5%	24.5%	31.5%	24.1%	15.6%	15.0%	15.2%	18.8%	17.3%	20.1%	17.3%	19.0%	15.6%	16.3%	14.6%	19.4%	16.6%	16.3%
CSX	25.5%	19.6%	26.4%	23.0%	12.6%	12.9%	15.0%	14.2%	12.8%	13.2%	17.1%	17.7%	15.5%	16.0%	17.2%	18.0%	16.7%	15.2%
NSC	15.3%	15.0%	14.9%	14.4%	11.9%	12.1%	11.1%	11.1%	14.2%	12.1%	12.5%	14.3%	14.6%	16.3%	15.4%	20.4%	14.6%	13.4%
UNP	20.5%	21.0%	22.3%	21.2%	21.4%	20.3%	21.1%	17.9%	19.7%	21.1%	17.5%	19.0%	17.3%	17.7%	14.7%	17.0%	17.2%	18.6%
Total Large-Cap Rails	19.8%	21.4%	24.5%	21.9%	16.8%	16.1%	15.8%	16.4%	16.3%	16.5%	16.4%	17.3%	15.9%	17.4%	15.9%	18.7%	16.6%	16.4%
Dow Jones Industrial Average	6.8%	7.1%	7.2%	7.2%	7.1%	7.4%	6.1%	5.1%	5.0%	5.3%	5.5%	5.6%	5.6%	5.2%	4.9%	4.9%	5.4%	5.6%

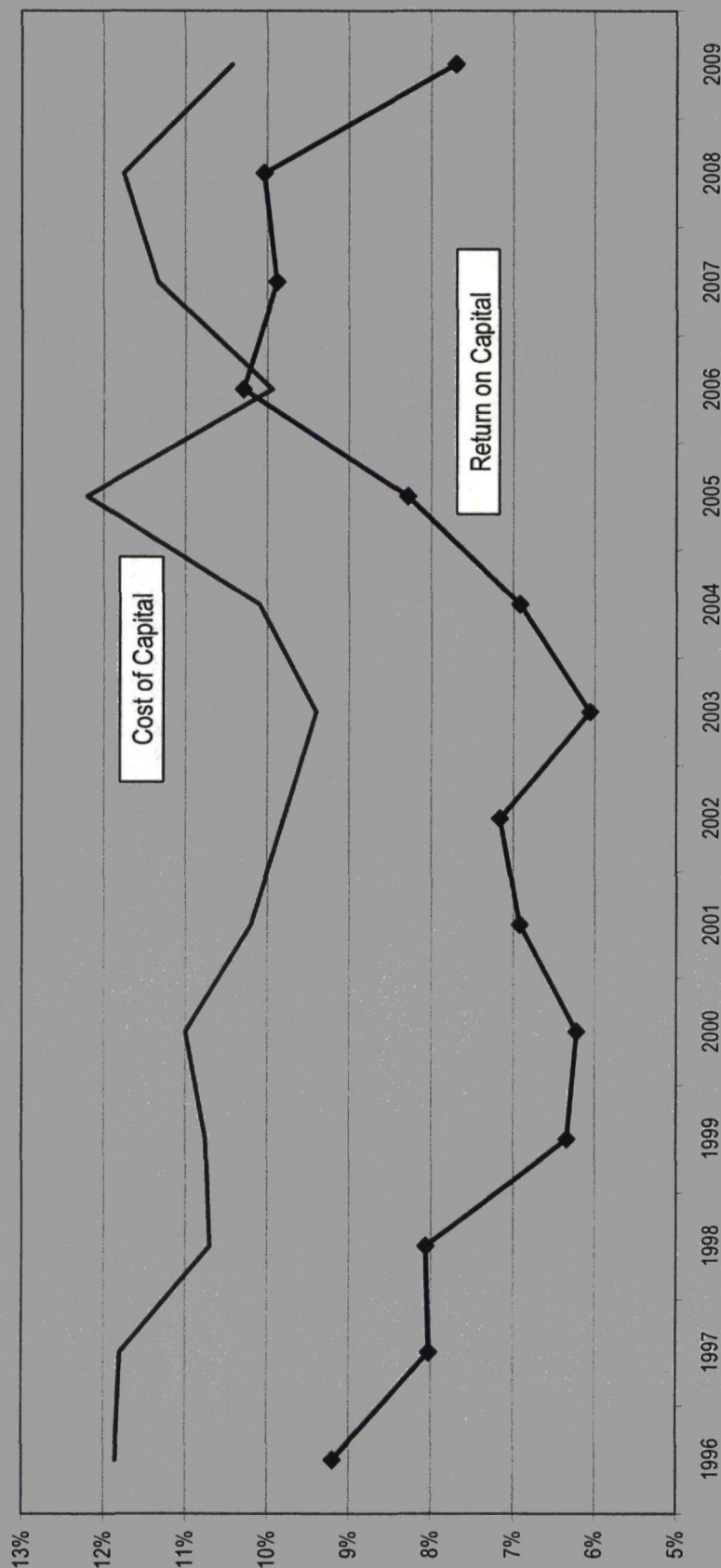
Note: Rail capital expenditures include operating lease commitments for locomotives, cars, and other equipment. DJIA uses current constituents for all periods - MMM, AA, AXP, T, BAC, BA, CAT, CVX, CSCO, KO, DD, XOM, GE, HPQ, IBM, INTC, JNJ, JPM, KFT, MCD, MRK, MSFT, PFE, PG, HD, TRV, UTX, VZ, WMT, DIS. DJIA estimates are Consensus for 2011.
Source: FactSet Research Systems Inc.; Wolfe Trahan & Co. estimates.

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Rail Returns on Capital vs. Cost of Capital

- Rails Consistently Do Not Earn Their Cost of Capital...Even on a Historical Book Value Basis



	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
BNI	8.6%	8.4%	9.7%	9.5%	8.8%	7.1%	6.4%	6.2%	5.8%	9.8%	11.4%	10.0%	10.2%	8.7%
CSX	8.9%	9.8%	8.1%	3.8%	3.6%	4.6%	5.2%	4.0%	4.4%	6.2%	8.2%	7.6%	9.2%	7.3%
KSU	7.2%	3.6%	9.1%	6.4%	6.3%	7.0%	6.5%	3.7%	8.3%	5.9%	9.3%	9.4%	7.2%	6.5%
NSC	13.0%	13.1%	10.5%	5.2%	5.5%	8.3%	9.1%	9.1%	11.6%	13.2%	14.4%	13.6%	13.4%	7.7%
UNP	8.3%	5.2%	2.9%	6.8%	6.9%	7.6%	8.6%	7.3%	4.5%	6.3%	8.2%	8.9%	10.2%	8.6%
Average Rail ROIC	9.2%	8.0%	8.1%	6.3%	6.2%	6.9%	7.2%	6.1%	6.9%	8.3%	10.3%	9.9%	10.0%	7.7%

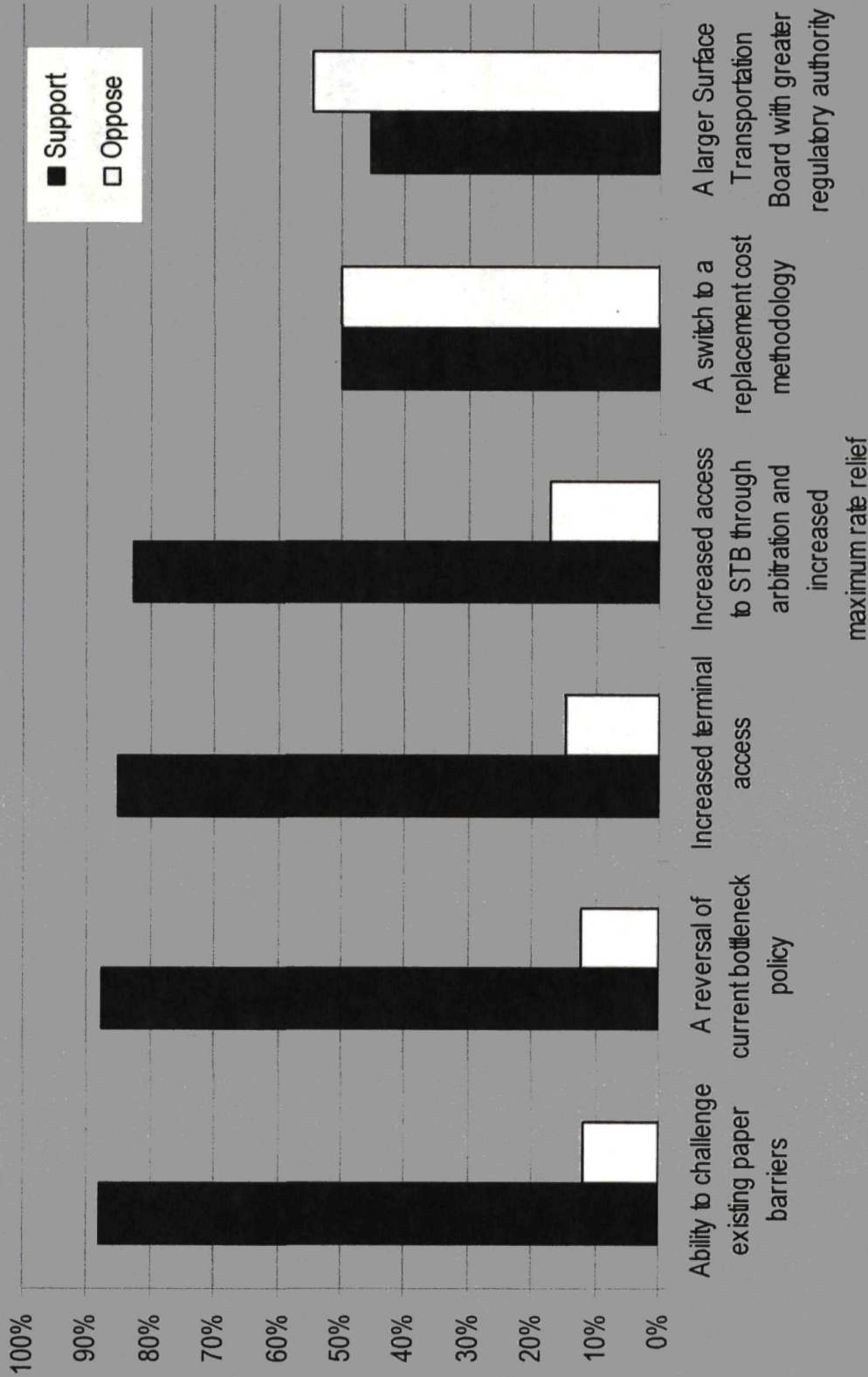
Source: STB; Wolfe Trahan & Co.

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Shippers Strongly Support Rail Regulatory Reform

► Shipper Survey Question: What Rail Regulatory Changes Do you Support and Oppose?



Source: Based on Wolfe Trahan *The State of the Freight shipper survey report* conducted in 2010; Wolfe Trahan & Co.

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Investment In Rail Infrastructure Is Critical

- ▶ Rails are a fuel efficient way to move bulk commodities such as coal, grain, steel, etc.
 - ▶ Rails can move 1 ton of freight 450-500 miles per gallon of fuel – about 4x more fuel efficient than trucks
- ▶ Our channel checks reveal that Railroad rates are about 10%-15% cheaper than comparable lane-by-lane Truck rates
- ▶ Rails can help relieve highway congestion – 1 double-stack Intermodal train can take up to 280 trucks off the nation's congested highways
- ▶ Rails are a pipeline for offshore goods to move within the U.S.
 - ▶ Large shipments of consumer freight that are produced well in advance in Asia and transported by ocean to U.S. ports lend themselves to longer-haul, Rail shipments throughout the nation
- ▶ Rails are increasingly serving export markets including coal and grain
- ▶ Safety – Railroads provide a safe way to move hazardous materials, mitigating the risk of an accident with civilians.
 - ▶ The Rails continue to improve their safety levels
- ▶ Laying 1 mile of rail track is about 1/5 the cost of laying 1 mile of highway.

Major Capacity Expansion Projects by Railroad

- ▶ Rails are guiding to higher capital spending above historical averages as a percent of revenue
- ▶ CSX: National Gateway – public/private partnership to create link between Mid-Atlantic ports and the Midwest; recently opened state of the art Intermodal facility in Northwest Ohio
- ▶ Norfolk Southern: Heartland Corridor – route between Norfolk, VA and Chicago where NSC raised the height of 28 tunnels to allow for double-stack container trains; Crescent Corridor – \$2.5 billion infrastructure investment targeting at moving freight off of several congested truck routes between New York and New Orleans;
- ▶ Union Pacific: Sunset Corridor – double-tracking project between Los Angeles and El Paso, TX; Blair double track project to increase capacity on its Central Corridor in the Midwest
- ▶ Kansas City Southern: Recently completed Victoria-Rosenberg build-out creates more efficient cross-border route between the U.S. and Mexico
- ▶ Canadian National: Mid-America Corridor – joint initiative with Norfolk Southern to create shorter and more efficient routes to move coal from the Illinois Basin to electric utilities in the Southeast; Recent EJ&E Rail acquisition provides long-term solution to Chicago congestion problems
- ▶ Canadian Pacific: Recently announced infrastructure upgrade in the U.S. Midwest to add new and extended sidings; Possible build-out into the Powder River Basin coal mines

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(646) 845-0721

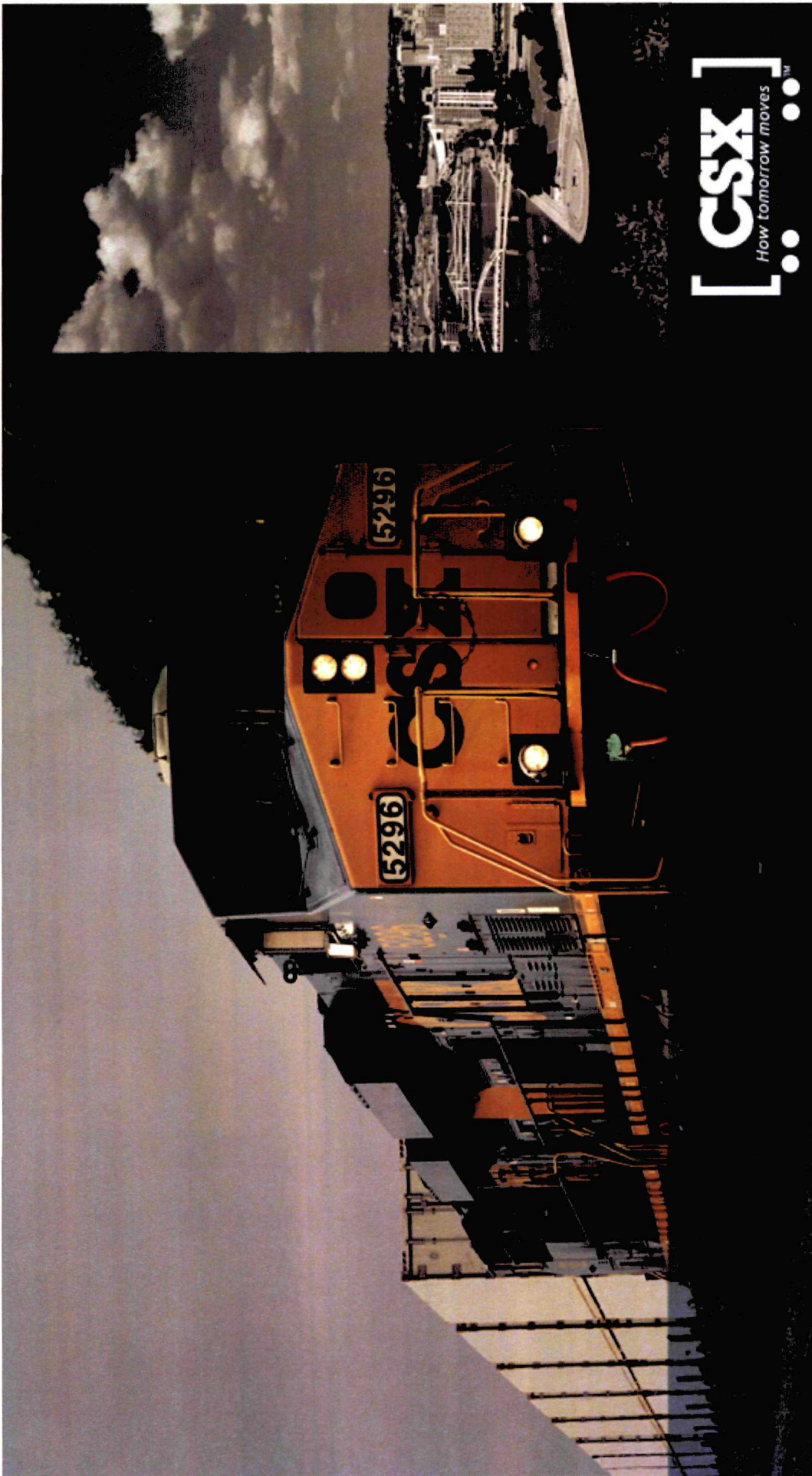
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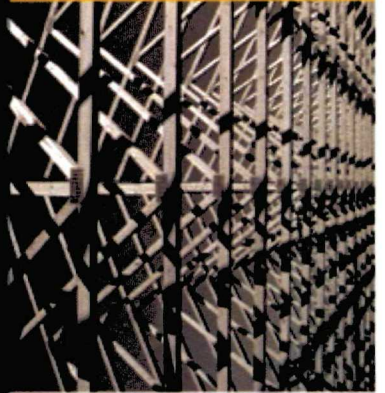
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[CSX]
How tomorrow moves



COMPETITION IN THE RAILROAD INDUSTRY

Michael Ward
CSX Chairman, President and CEO

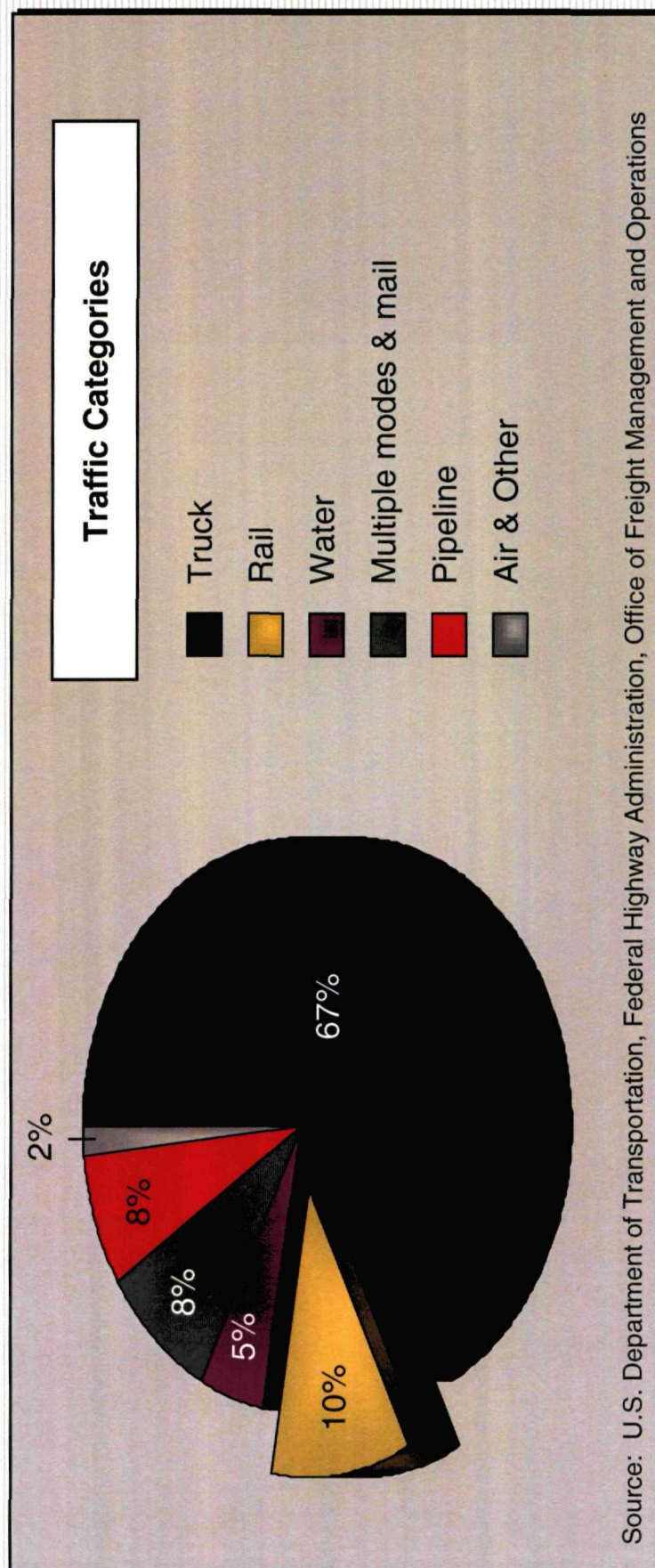
June 22, 2011

Rail viability is critical to the economy

- **Public policy is served by a strong rail system**
 - *U.S. rail system is best and most efficient in the world*
- **Rail capital investment requires cost of capital returns**
 - *CSX is investing 18% of revenue in capital through 2015*
- **Rail profitability depends on long-haul freight moves**
 - *Shorter hauls will constrain profitability, decrease investment*

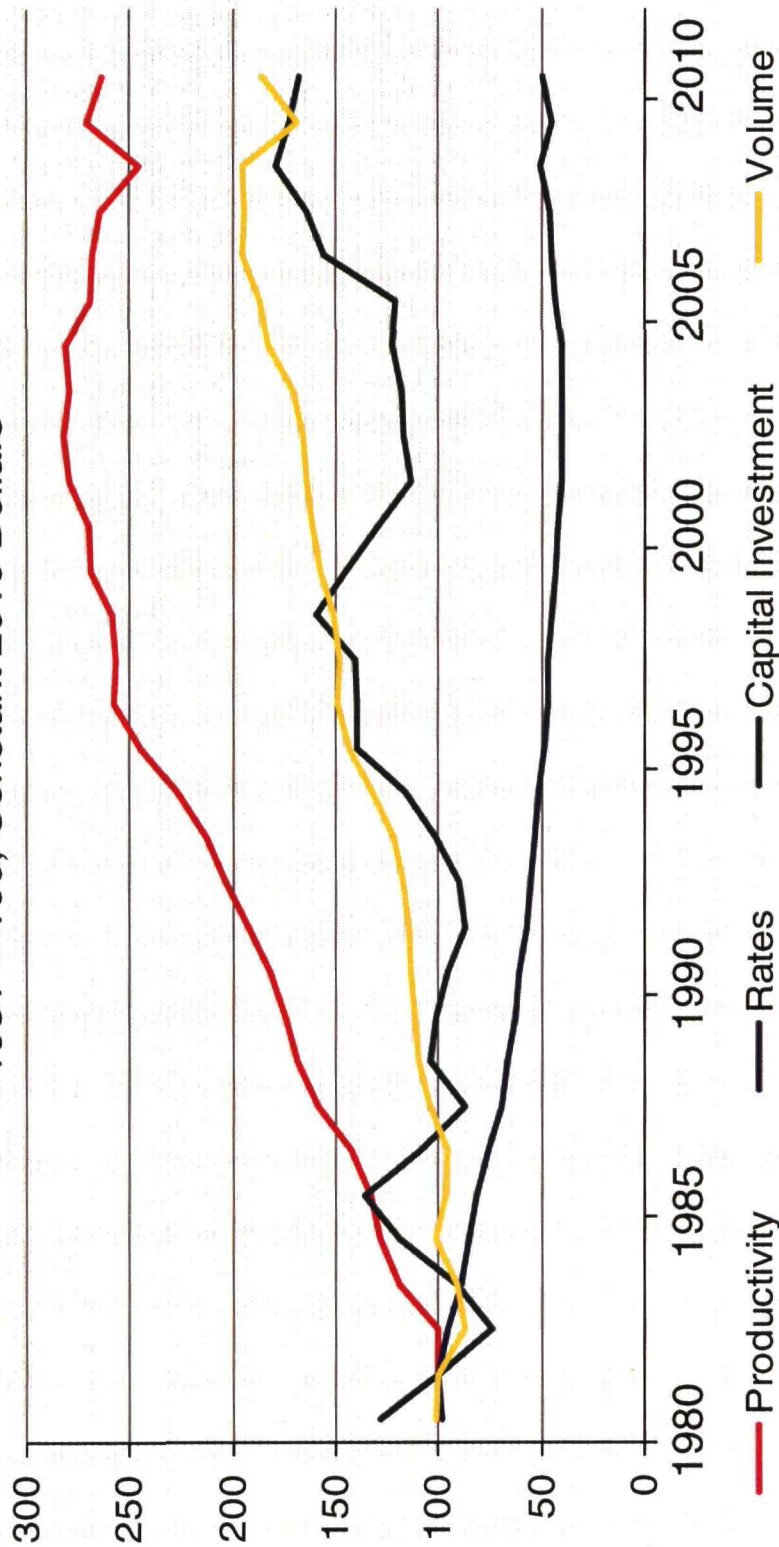
Competition for freight traffic is pervasive

Shipments by Transportation Mode 2009 (millions of tons)



U.S. rails are safe, efficient and investing for growth

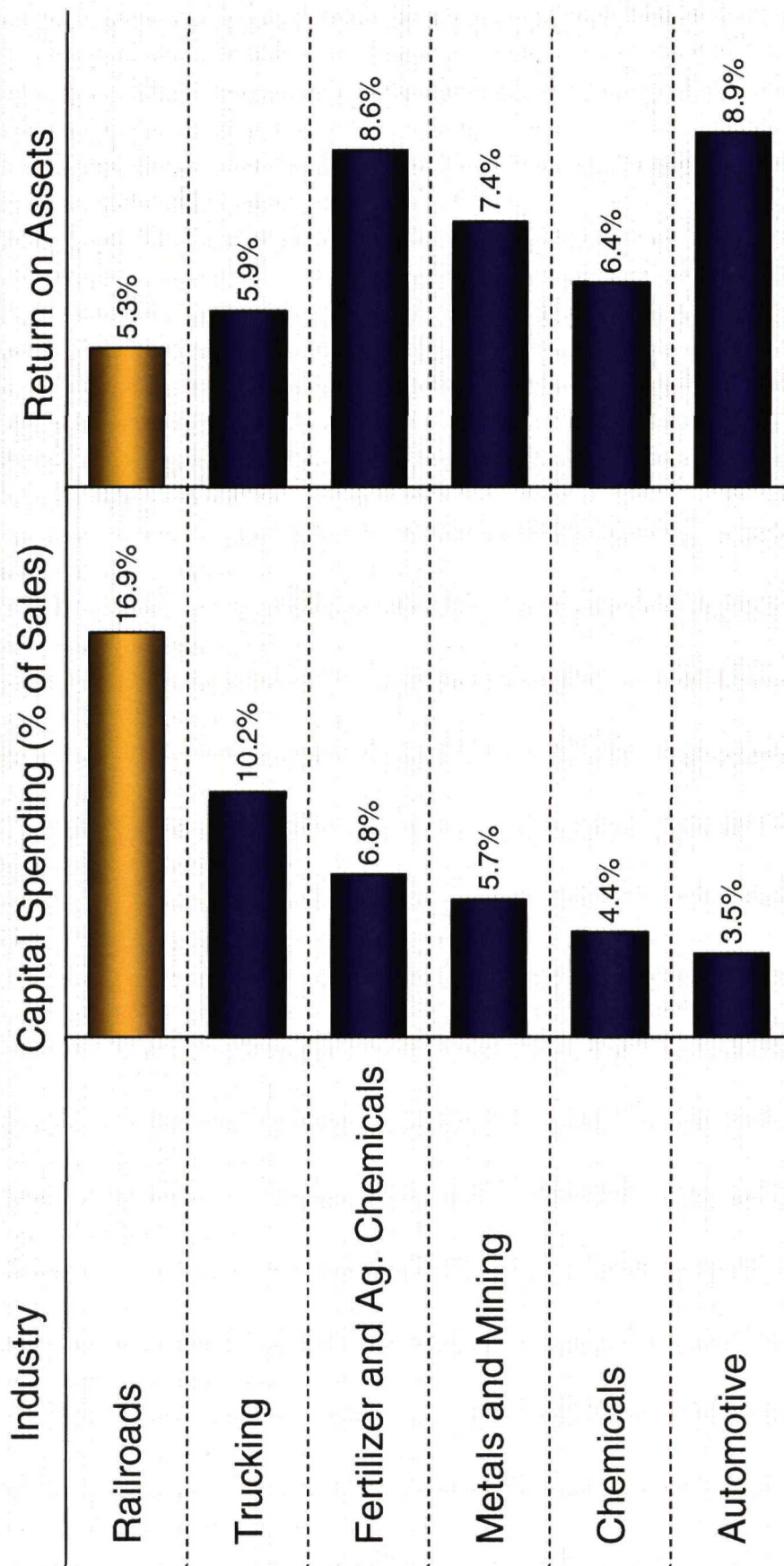
Rail Performance Indicators
1981 = 100; Constant 2010 Dollars



Source: AAR; "Rates" are revenue per ton mile; volume is ton-miles

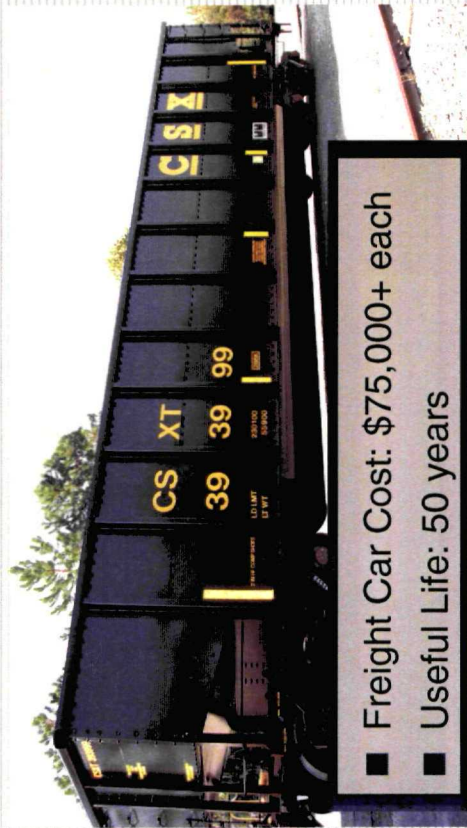
The ability of rails to invest depends on a solid return

Median Company Five Year Average (2006 – 2010)

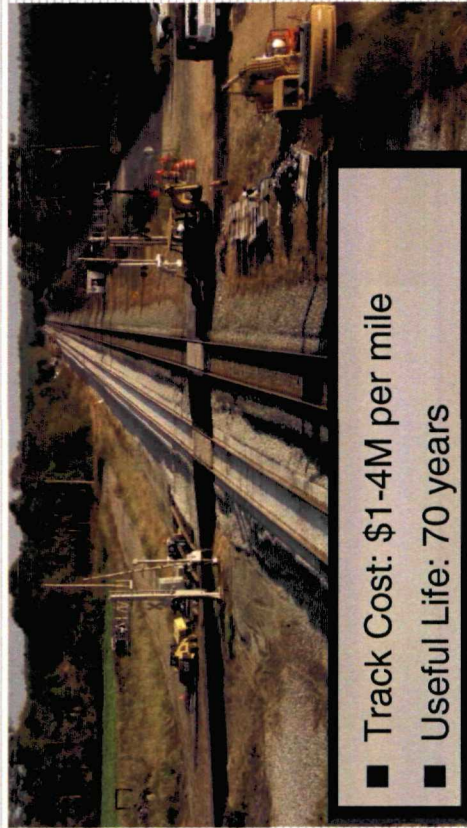


Source: Boston Consulting Group

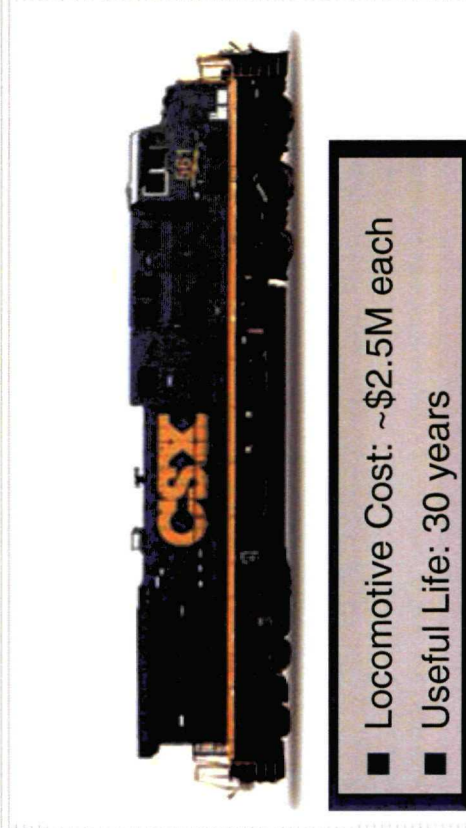
Rail capital investments are costly and long-lived



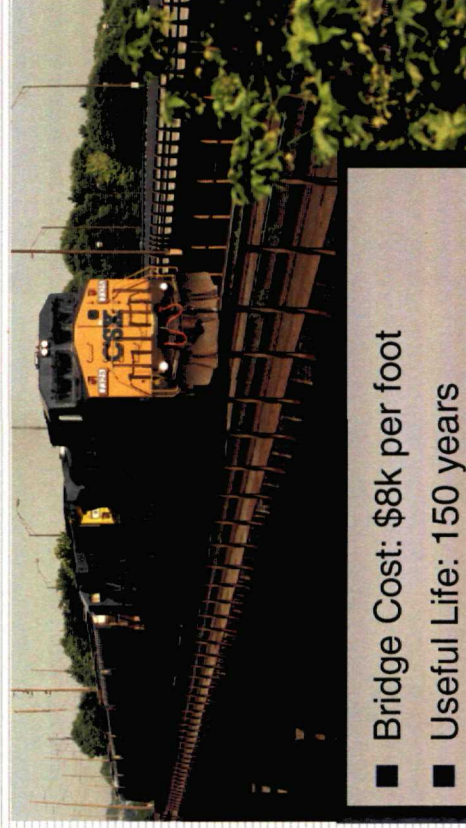
- Freight Car Cost: \$75,000+ each
- Useful Life: 50 years



- Track Cost: \$1-4M per mile
- Useful Life: 70 years



- Locomotive Cost: ~\$2.5M each
- Useful Life: 30 years

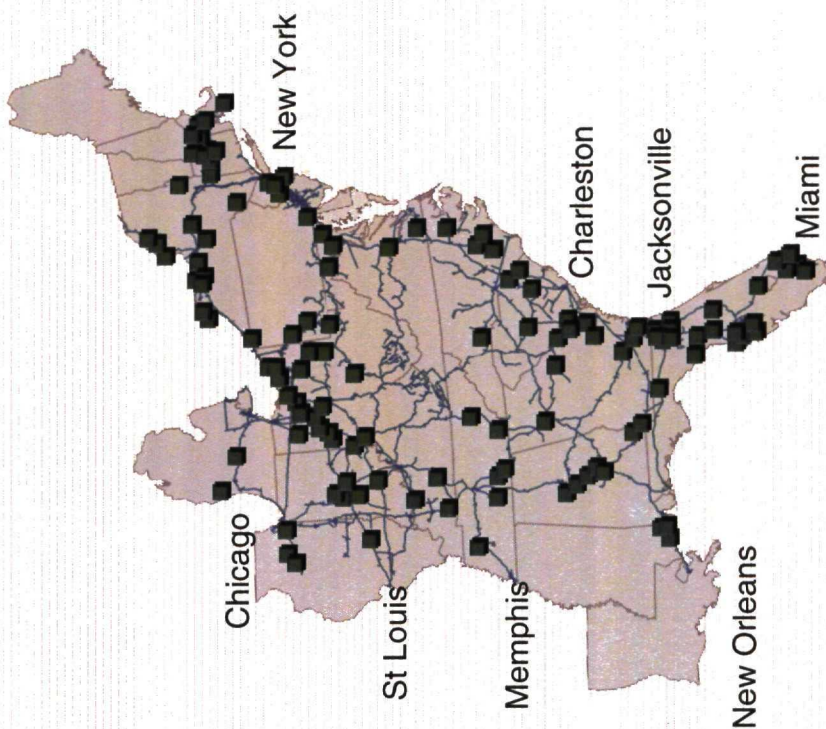


- Bridge Cost: \$8k per foot
- Useful Life: 150 years

Note: Useful lives are a function of proper maintenance

More customers are choosing to invest in rail

2010 Industrial Announcements on CSX

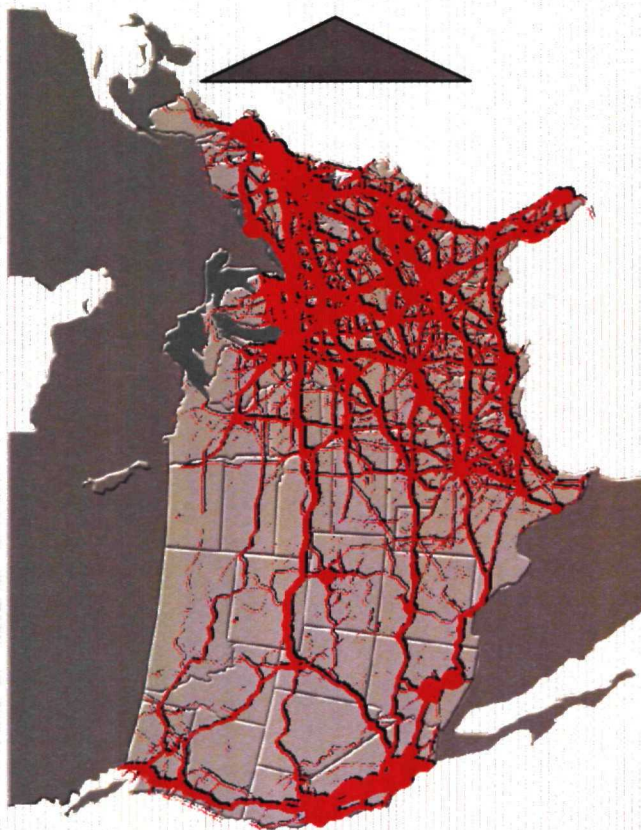


In 2010, CSX announced:

- Opening of 130 new or expanded customer facilities
- \$3.6 billion of customer private capital investment
- Over 5,000 new customer jobs created

Rails must continue to serve critical freight needs

2020 Highway Congestion



Freight demand
projected to grow more
than 60% by 2040

Changes to balanced regulation will hurt rail's competitive position

Source: USDOT FHWA Freight Analysis Framework

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 705

COMPETITION IN THE RAILROAD INDUSTRY

ORAL TESTIMONY
OF
LANCE M. FRITZ

**STB Ex Parte No. 705
Competition in the Railroad Industry**

**Oral Testimony of Lance M. Fritz,
Executive Vice President-Operations for Union Pacific Railroad Company**

Good afternoon. I am Lance Fritz, Executive Vice President-Operations for Union Pacific Railroad. I provided written testimony twice in this proceeding, and I appreciate the opportunity to appear before you today.

The access remedies proposed in this proceeding would have profound and adverse effects on rail safety, productivity, service, capacity, and investment. They are not merely economic and regulatory arrangements. They would change how rail cars and trains move. They also would transfer control of rail moves from railroads to shippers or the Board. The proposals would be destructive to decades of investment and hard work to improve rail safety, service, and productivity on Union Pacific and across the nation. They are inconsistent with everything railroads have been trying to do to compete and to provide efficient service for the last 30 years.

As your own experts have told you, the railroad industry achieved spectacular gains in productivity, efficiency, and safety after 1980, providing huge benefits to shippers. Those improvements were possible only because we gained control over how cars and trains move over our networks. Prior to 1980, shippers could choose any plausible route, and they divided their shipments into inefficient traffic flows that guaranteed an unproductive rail system. Without traffic density, routes could not attract investment, and many carriers either went bankrupt or were headed that way.

The Staggers Act overturned that regime. It allowed railroads to consolidate traffic flows onto fewer routes and achieve much higher densities. We achieved even more productivity gains thanks to the mergers that allowed us to expand control geographically. Recall that the ICC and the Board approved those mergers because they provided the public benefits of single-line service and reduced costs, while maintaining or enhancing competition as well. We delivered on all scores.

In effect, Union Pacific created rail pipelines on which we maximize traffic flows and density. These pipelines are productivity machines. They allow cars and trains to move further without time-consuming delays, such as en-route switching. We call those work events, and we do everything we can to reduce them. With greater densities, we can reduce transit time, improve reliability, reduce costs, and improve safety.

At Union Pacific, we always begin with safety, so I want to explain why density is essential to safety. As you know, railroads have reduced employee injuries by more than 80 percent since

the Staggers Act, and we have eliminated a similar percentage of derailments. This year Union Pacific is again achieving record-breaking safety results.

Well-planned, high-density operations help drive this improvement in two ways. First, although we do all that we can to make rail yards and switching safe, anytime we require employees to conduct a switching operation we add risk to the operation. The more we can move cars without stopping and switching them, the safer we can be. Density allows us to move more cars from origin to destination with fewer switching events.

Second, by consolidating traffic on high-density routes, we are able to justify major innovations and investments in safety on those routes. For example, on our highest density lines, especially those that carry large amounts of coal, we have installed premium rail, concrete ties, and new defect detection technologies that find defects before they find us.

At Union Pacific, by running a well-planned, controlled network we deliver not just on safety, but on service and value as well. These three priorities are co-dependent – by pursuing one we pursue all three. In my opening testimony, I explained how we use traffic density to improve service. In all of our major corridors, we take advantage of volume to run trains that don't have to stop as often, which reduces transit time, improves reliability, and reduces costs. Using those efficiencies, Union Pacific service is earning record high marks for customer satisfaction.

Since 1999 we have invested some \$30 billion in our network. We are using high-quality rail and ties to improve maintainability and reliability; we are replacing and strengthening bridges; we are rebuilding our switching yards and the industrial leads that reach customer facilities, and installing technology that eliminates service interruptions. We tailor our capacity to the demand we expect on each corridor and at each terminal. We strive to maintain enough capacity to provide consistent, high-quality service, which includes surge capacity to handle temporary disruptions such as weather events or maintenance work.

As the pre-Staggers Act world showed, all of these gains can be destroyed by regulation that deprives railroads of the ability to control traffic movements. Think about it. With this agency's encouragement, we spent decades and tens of billions of dollars to build a rail network that maximizes single-line service and productivity, funneling interchange traffic with other railroads over the most efficient gateways. Proposals to change the access rules tell us to turn around and move in the opposite direction. They tell us to reduce traffic density, reduce single-line service, and increase interchanges and make them less efficient. They tell us to under-utilize the investments we have made and to have no confidence that future investment will be justified. They tell us to be less productive and to incur higher costs. This makes no sense and can't be in the public interest.

The specific proposals that will lead us backwards include forced reciprocal switching and forced interchange points. Reciprocal switching consumes limited terminal capacity and reduces efficiency. Expanding reciprocal switching inevitably results in at least one additional

movement between railroads and one additional switching classification that delays shipments, adds costs, and increases safety risks. Track capacity within terminal areas is not designed for additional interchange movements. If we add more movements, we create more delay and more congestion, delaying all shipments. In many major terminals, the additional switching load could exhaust capacity and require capital expansion, an investment that may not be justified economically. Houston, for example, is vulnerable to congestion. The terminal configuration is over a hundred years old, with little room for expansion. The same risks apply in many other terminals, such as Chicago. Any significant increase in terminal switching presents a large risk to the national rail system.

Changing interchange locations, whether by changing the bottleneck rules or creating new through routes, presents a different set of risks. I provided examples in my opening testimony of how Union Pacific carefully structures its train movements to let trains move without stopping and switching. If we instead spin off cars for interchange at various points en route, we will create delays at those points and block other trains serving other shippers. The existing operating plan might not be supportable. In addition to the loss of efficiency, track structure in many places is inadequate for increased interchange. For example, several shippers say that we should interchange more traffic in New Orleans. New Orleans has a lot of trouble handling the traffic it's facing already, and it is the number one gateway for delays on the Union Pacific system today.

For both reciprocal switching and changes in junction points, the ability to make changes quickly would present enormous problems and risks for the railroad. We use a robust business planning process to plan for future traffic volumes. The result is a transportation plan that includes the necessary locomotives, crews and capital investments to meet our three objectives – safety, service and efficiency. Obviously, we adapt to changes in markets and competitive traffic patterns. But we don't take traffic until we are ready to handle it.

If a shipper can make sudden changes in routes, planning would be impossible. All of our services would suffer. We need visibility of future traffic as far in advance as possible.

Introducing another railroad also undermines the planning process. Here's an example: For many years, BNSF – which uses some Union Pacific lines in Texas – handled export grain trains on our line south of Houston, interchanging them to KCS at Robstown. Recently, and with no notice to UP, BNSF shifted a train or two per day to a different route via San Antonio and Eagle Pass. The new operations are causing congestion in San Antonio, where we must stage BNSF trains that can't move to Eagle Pass, and also near Eagle Pass, a Mexican border crossing, where we don't have capacity for these additional trains. If this sort of unexpected change were the norm instead of the exception, our rail service would be crippled.

The Board also needs to understand that today's interline services between willing railroads work a lot better than forced interchanges between competitors, one of which is losing business.

Take the example of coal trains coming from Colorado mines through Denver. Union Pacific spent over \$30 million to create a through route in Denver. If a shipper were to decide that it wanted those eastbound trains interchanged to BNSF, both railroads would be blocked with reverse movements in the center of Denver. Our \$30 million investment would be underused or wasted. We would have no incentive to spend millions more to improve interline service to help a competitor win business from us.

While shippers are likely to see the negative impact of access remedies on service and investment, I remain most disturbed by the safety implications. As I discussed above, more switching and more work events mean more risk. In addition, less incentive and ability to invest means less innovation and less new technology to improve safety even further. None of the shippers even mention the potential safety risks that are inherent in their proposals.

Finally I want to address a brief statement by Richard McDonald which asserts that my concerns do not apply to unit coal train traffic.

First, as Mr. McDonald should recall, Union Pacific and CNW merged into one system because their service was trouble-plagued and not good enough, even though they had every advantage available to interline moves. They built their facilities as an integrated whole and they had every incentive to cooperate. But they disagreed about the number of locomotives on coal trains, which required that trains be stopped to add and remove locomotives, and CNW delayed trains to and from mines that it did not service.

Second, one of the major problems we face today is that connecting railroads will not take coal trains when they arrive at interchange points. When this happens, we often must stage the train on one of our busy tracks for hours or more, where they block other trains. Locomotive and car utilization both suffer, as does service to our joint customer.

CONCLUSION

Railroads have done what Congress expected when it enacted the Staggers Act. They became highly efficient and passed along many of the benefits to customers in lower rates. They became amazingly safer. They improved infrastructure. They invested hundreds of billions of dollars to carry out their objectives of providing more reliable on-line service and the best service possible over limited interchanges. The ICC and the Board encouraged them to build larger systems that have invested more and improved safety and service. The Board should not destroy these successes by moving backwards to reduce rates for some shippers.



EP 705 - Competition

Norfolk Southern Railway Company

June 23, 2011

James Hixon, EVP – Law and Corporate Relations

Mark Manion, EVP & Chief Operating Officer

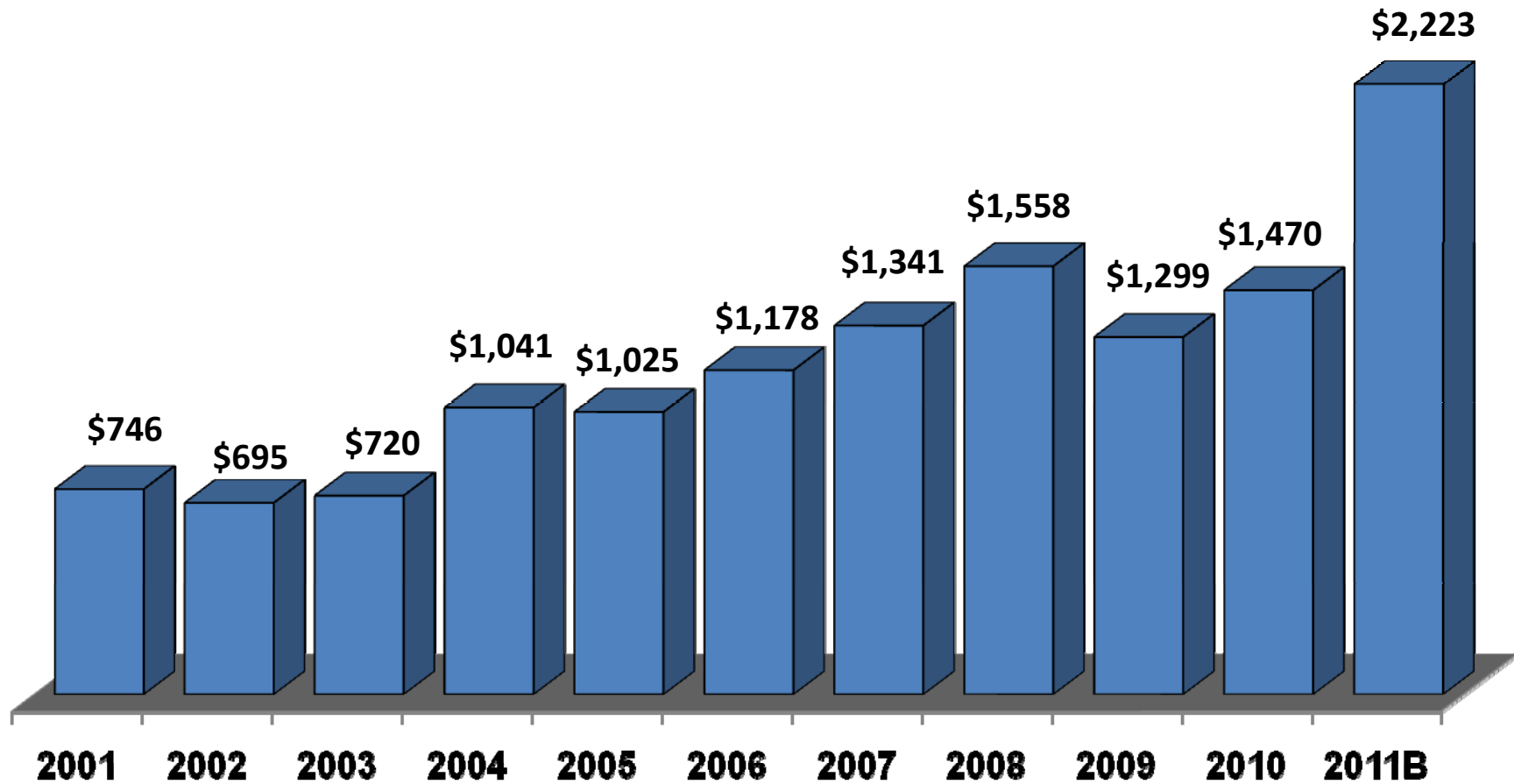


Record Investment and Innovation

- NS' projected investment in cap ex in 2011 is at a record level.
- NS is developing new technologies to improve service, efficiency, and the environmental benefits of rail.

NS Capital Expenditures

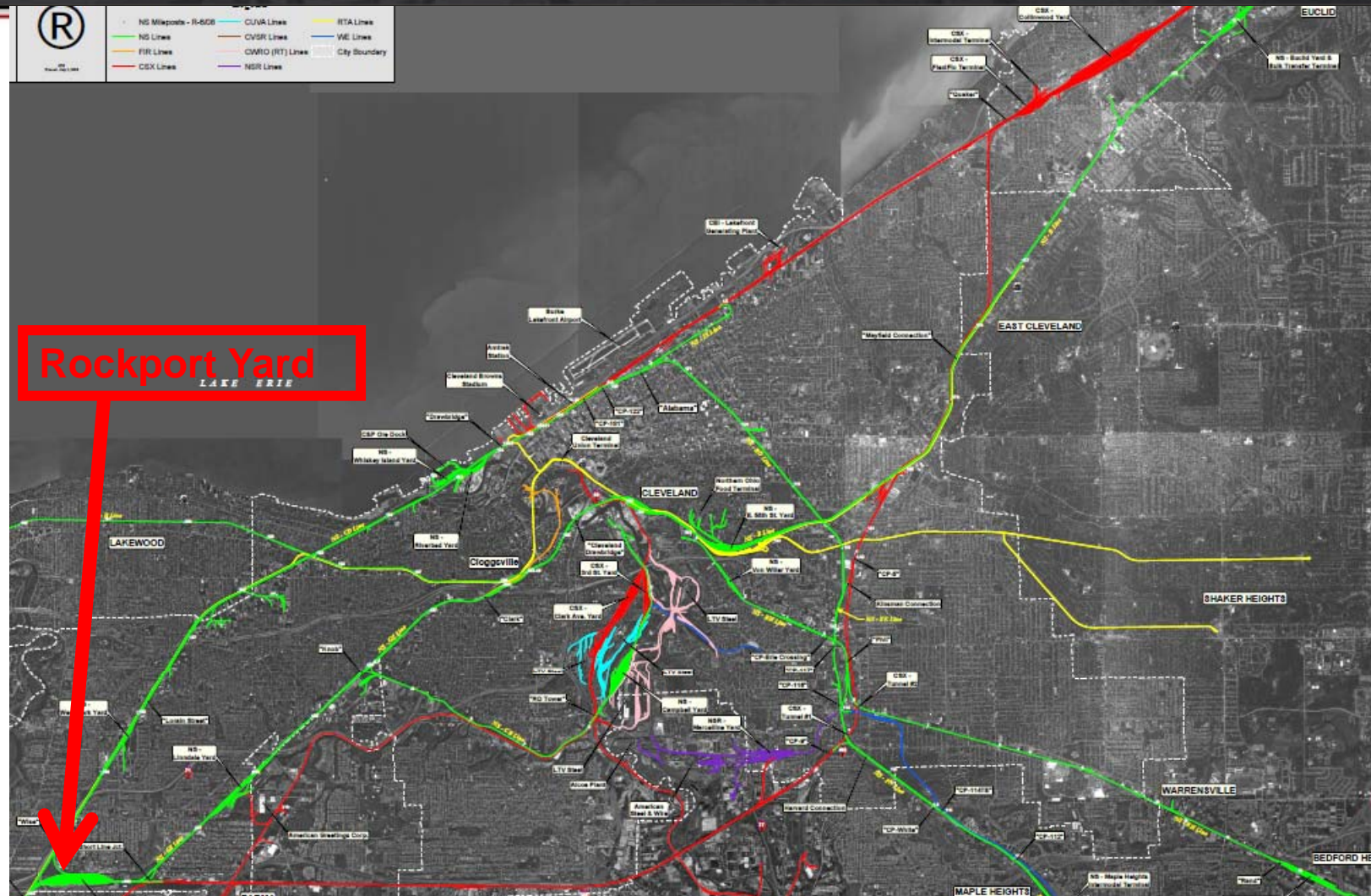
(\$ millions)



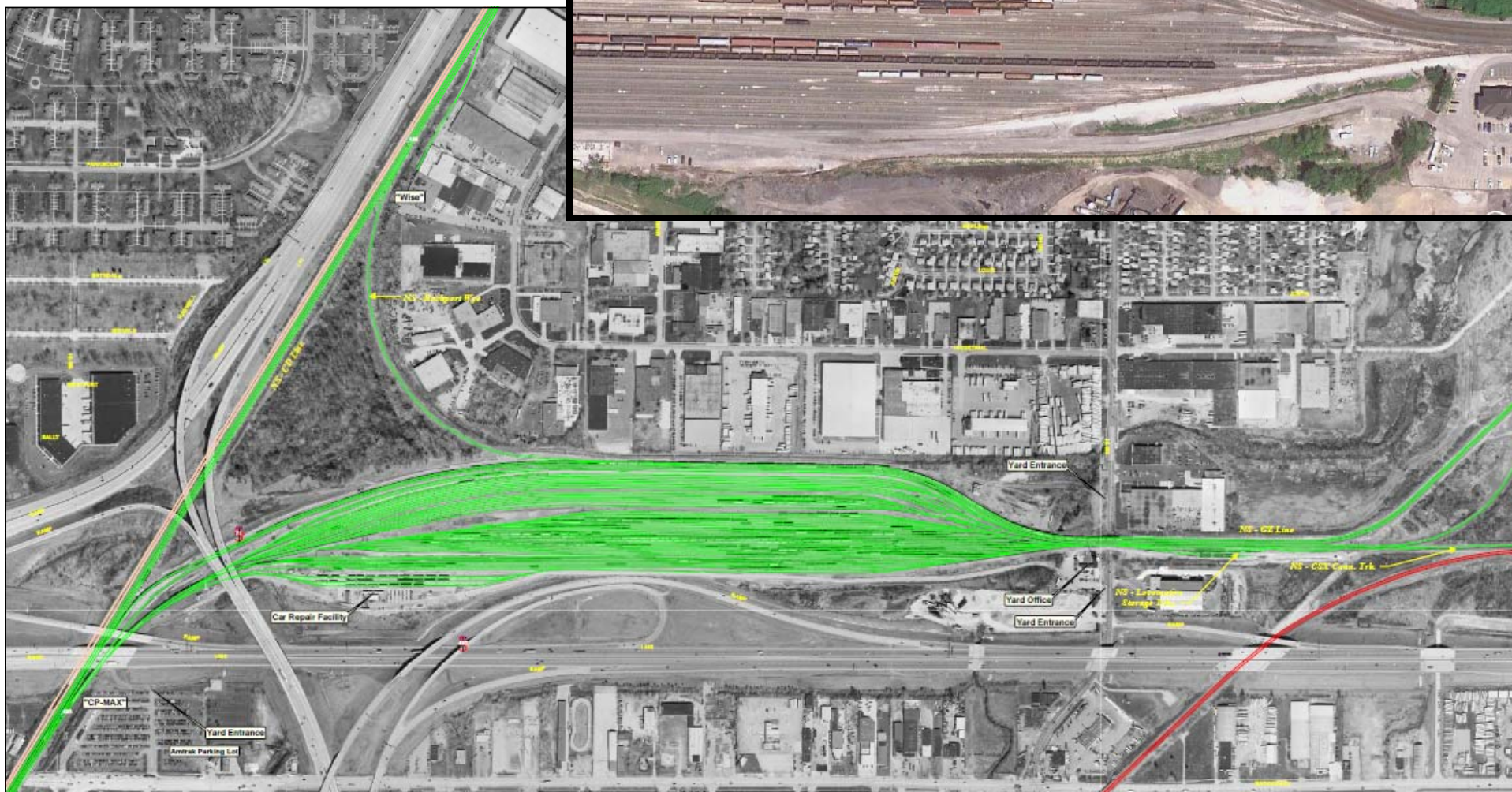
NS Innovations

- Operating Plan Developer (OPD)
- LEADER (a fuel efficiency technology)
- Unified Train Control System (UTCS)
 - 15 years in making
 - NS is only railroad in world pursuing
- Top of Rail Friction Modification
- Remote Control Locomotives
- Wayside Detection Systems
- Remote Intelligent Terminals (RIT)
- Wireless Event Recorder

Cleveland, Ohio



Rockport Yard



Efficient Interchange



- High capacity
- Secure

- Efficient because:
 - Sufficient infrastructure
 - Cars switched onto outbound trains in yard



Marion, Ohio Interchange Track



**NS NORFOLK
SOUTHERN**
One line, infinite possibilities.

Inefficient Interchange

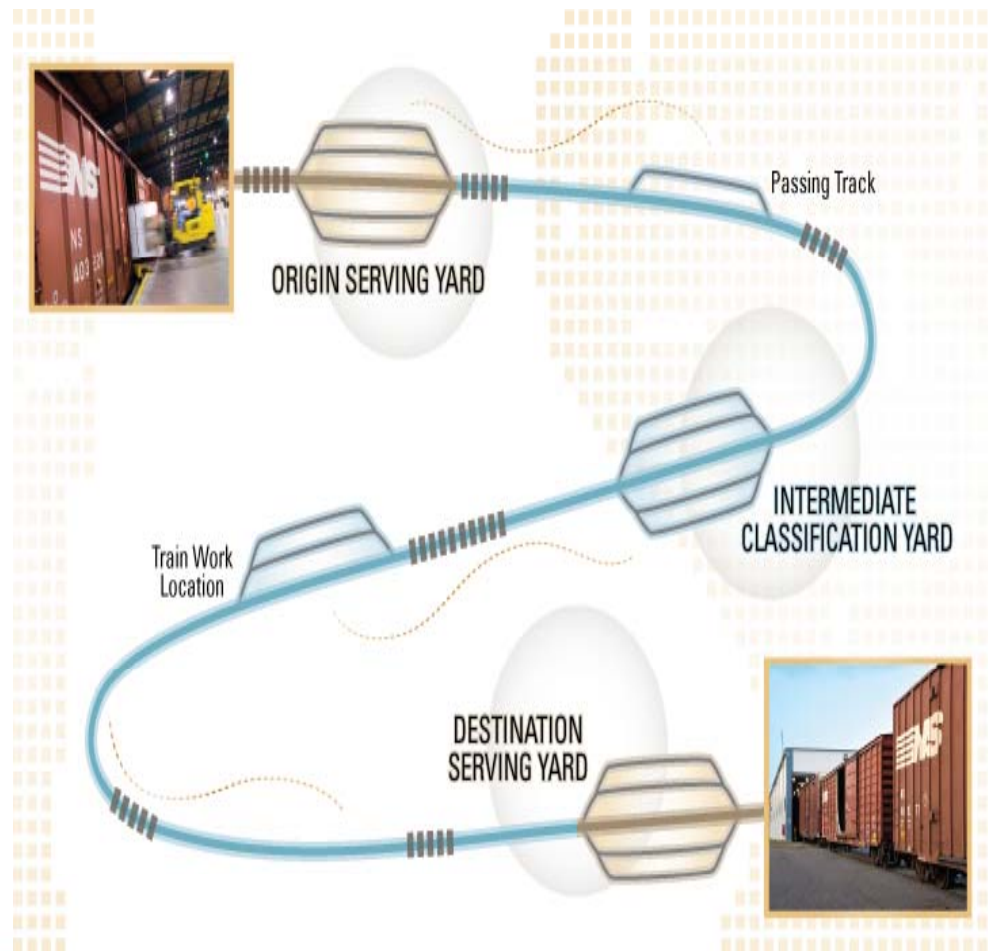
- Low capacity (35 cars max.)
- Little infrastructure
- Non-secure
- Cars must be picked-up and moved to Columbus to be classified
- Extra handlings



Interchange Track

Harm to Rail Operations

- Upset the balance needed to serve all customers or various commodities and needs.
- Inject extra complexity in operations.
 - Extra handlings
 - Extra interchanges
- Undermine asset (crews, locomotives, cars, and track capacity) allocation and utilization.
- Inefficient or operationally-unjustified routings

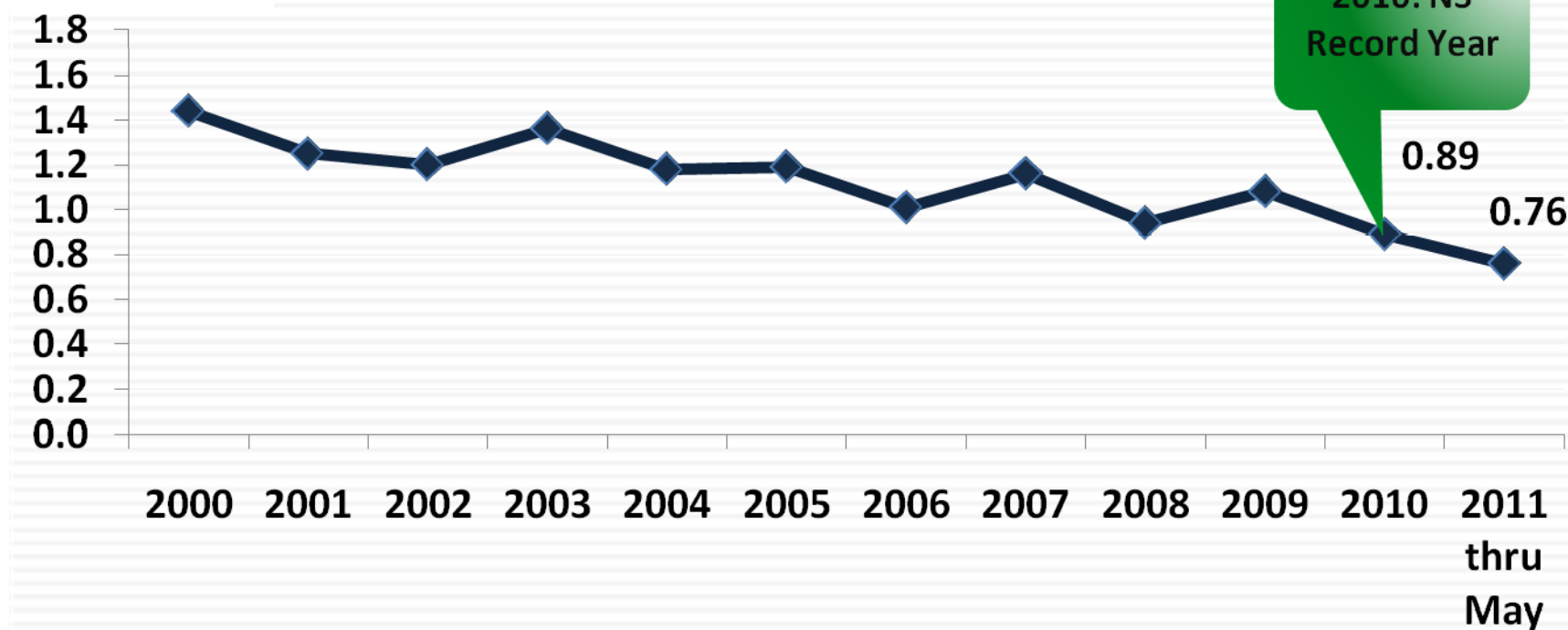


Don't Jeopardize Safety



NS Earns 22nd Consecutive
Harriman Gold Medal in 2010

Injury Ratio per 200,000 Employee Hours



NS Written Submissions

- Substantial legal hurdles exist.
- Many rail customers are rightfully concerned about the effects of regulatory changes. They know that changes to benefit the pecuniary interests of some shippers will adversely affect all rail customers.
- For that subset of customers which seeks forced access or forced interchange, it is really all about rates.

Statements Do Not Withstand Scrutiny

- Allegations are not factually supported by commenters.
- Statements are undercut by facts about:
 - Exports
 - Chemical industry

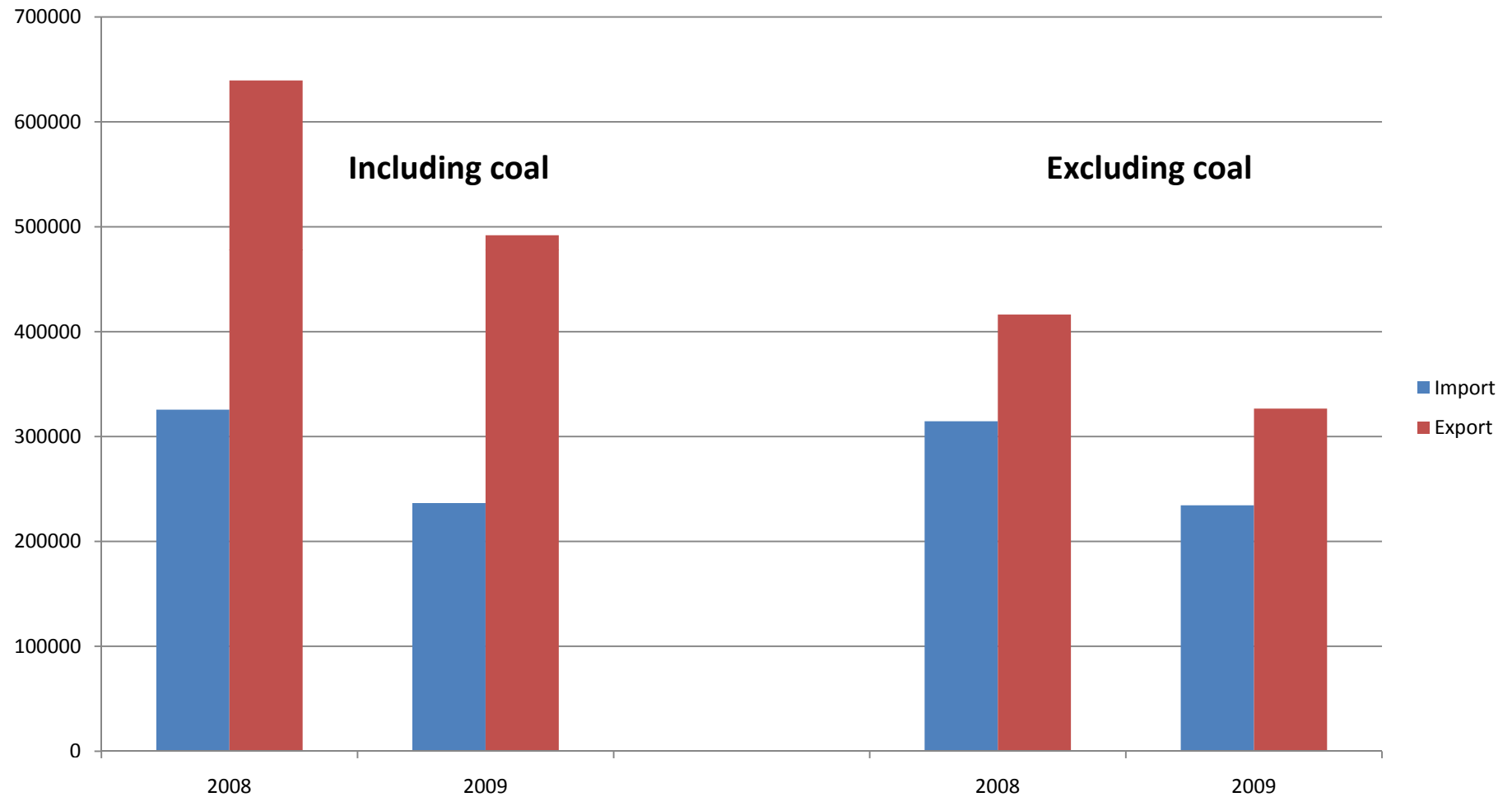
U.S. Exports

[millions of dollars] U.S. Bureau of Economic Analysis, last updated May 2011



NS NORFOLK SOUTHERN
One line, infinite possibilities.

NS Import/Export Traffic (in carloads)



Railroads Not Harming Chemical Industry

- Natural gas is what the chemical industry tells everyone -- except the STB -- drives the industry.
- In 2005, the American Chemistry Council testified before Congress that “higher natural gas prices shift chemical industry investment overseas.”

Chemicals Driven By Fuel Prices

- “U.S. natural gas markets have seen a dynamic shift over the past five years as a result of increased capacity to extract natural gas from organic shale deposits. Reserves have risen by one-third, resulting in lower prices and greater availability of ethane, a feedstock material derived from natural gas that is the basis for hundreds of manufactured products. **This low price for natural gas compared to oil has enabled U.S. chemicals manufacturers to become more competitive than producers in much of the rest of the world. ‘Shale gas extraction has been a ‘game changer’ for America's chemical manufacturers, enabling us to remain highly competitive in a global market,’** Dooley [ACC President] said.”
- Link on ACC web page to press release was removed subsequently. Nevertheless, it is available at <http://www.prnewswire.com/news-releases/economic-outlook-for-us-chemistry-industry-improving-accs-year-end-report-reveals-111264279.html>

April 21, 2011 08:30 AM Eastern Daylight Time

Dow Announces Plans to Fully Integrate and Grow North American Performance Businesses with Shale Gas Liquids



MIDLAND, Mich.--(BUSINESS WIRE)--The Dow Chemical Company (NYSE: DOW) today announced comprehensive plans to increase the Company's ethylene and propylene production -- and to integrate its U.S. operations into feedstock opportunities available from increasing supplies of U.S. shale gas in the Marcellus and Eagle Ford shale regions.

"The improved outlook for U.S. natural gas supply from shale brings the prospect of competitively priced ethane and propane feedstocks to Dow -- and the promise of new manufacturing jobs to America," said Jim Fitterling, Dow executive vice president and president of Corporate Development & Hydrocarbons. "Our plan is to further integrate Dow's businesses with the advantaged feedstocks, based on shale gas deposits and long-term ethane and propane supply agreements. These actions will strengthen the competitiveness of our Performance Plastics, Performance Products and Advanced Materials businesses, for example the Elastomers product family and the full Acrylates chain, as we continue to capture growth in the Americas."

Dow Increases Ethylene Supply and Ethane Cracking Capabilities in U.S. Gulf Coast

Dow is currently finalizing plans to increase the Company's ethylene supply and increase its ethane cracking capabilities at existing U.S. Gulf Coast facilities by:

- Re-starting an ethylene cracker at the Company's St. Charles Operations site near Hahnville, LA by the end of 2012;
- Improving ethane feedstock flexibility for an ethylene cracker at the Company's Louisiana Operations site in Plaquemine, LA in 2014;
- Increasing ethane feedstock flexibility for an ethylene cracker at the Dow Texas Operations site in 2016;
- Constructing a new, world-scale ethylene production plant in the U.S. Gulf Coast, for start-up in 2017.

Dow Increases Propylene Supply

Dow is currently finalizing plans to increase the Company's propylene supply by:

- Constructing a new, world-scale, on-purpose propylene production facility at Dow Texas Operations, for start-up in 2015;
- Exploring an option to commercialize its own technology to produce propylene from propane, with the potential start-up of a new production unit in 2018.

Dow Pursues Additional Feedstocks from the Eagle Ford and Marcellus Shale Regions

Dow plans to supply the required ethane and propane for these projects through a variety of supply arrangements, including: a possible joint venture fractionator in Texas, supply from existing fractionators, supply from future new fractionators to be built within the industry, and potential supply deals from various shale gas opportunities such as the Eagle Ford and Marcellus shale regions. Dow has signed ethane and propane supply contracts based on the Eagle Ford shale gas and is pursuing several more agreements from this area.

In addition, Dow has signed a Memorandum of Understanding (MOU) with a wholly-owned subsidiary of Range Resource Corporation (NYSE: RRC), stating plans to enter into a long-term supply agreement for the delivery of ethane from the Marcellus Region in southwest Pennsylvania to Dow's existing operations in Louisiana.

"As the largest consumer of propylene in North America, Dow has a unique opportunity to invest aggressively for on-purpose propylene production from propane. Additionally, Dow is the largest producer of ethylene in North America, which provides capabilities to increase our use of ethane in existing ethylene production units -- and to grow," Fitterling said. "All of these investments, combined with Dow's planned agreement with Range Resources, will dramatically increase our capability to consume ethane, while maintaining our industry-leading feedstock flexibility."



STB EP 705ORAL ARGUMENT TESTIMONY

Mark Manion:

[Slide 1 - Cover page]

Good morning Commissioners. On behalf of Norfolk Southern Railway, I am Mark Manion, Executive Vice President and Chief Operating Officer. With me today is Jim Hixon, Executive Vice President – Law and Corporate Relations.

Two major points Norfolk Southern has made in this proceeding are (1) that any policy change would undermine past rail investment in infrastructure, future investment in infrastructure, innovation, and the economic benefits of rail throughout the U.S. and (2) that proposals such as forced access and forced interchange would adversely affect the rail network, rail operations, and accordingly the shipping community generally.

[Slide 2 – “Record Investment and Innovation”]

First, the Board should take care not to undermine the substantial investments railroads like Norfolk Southern have made to this Nation’s rail infrastructure and the innovation that is underway. It has been widely documented that there is a crisis in transportation infrastructure looming. Railroads, however, are private companies spending their private dollars to make sure that efficient and safe rail transportation remains a competitive advantage for the United States.

[Slide 3 – “NS Capital Expenditures”]

Norfolk Southern itself has invested billions of dollars over the last ten years.

The uncertainty in traffic flows that forced access and forced interchange would create would make investment more problematic and harder to

justify. The ability for customers to shift traffic would make it difficult to predict whether a particular investment could be justified.

[Slide 4 –“NS Innovations”]

In addition, Norfolk Southern is developing or implementing numerous innovations to improve its service so that it can compete even more aggressively against other railroads and other modes of transportation in the surface transportation marketplace.

As an example, Unified Train Control System is analogous to an air traffic control system on steroids. Whereas an air traffic control system allows a controller to coordinate and manage plane movements, UTCS safely and efficiently coordinates train movements and maintenance work into a dispatch system. It allows dispatchers to see trains well in advance of their arrival in the dispatcher’s territory. But UTCS does more than an air traffic control system because it prioritizes trains and determines the optimal place for them to meet and pass each other. Norfolk Southern is the only railroad in the world pursuing movement planning at this level of sophistication.

Importantly, UTCS is only as good as the information it is provided, including infrastructure, resource capabilities, operating objectives, operating plan, One of the critical pieces of information it must be provided are train flows. Because forced access or forced interchange removes predictability in rail movements by allowing shippers to alter movements on a whim, one of the key UTCS inputs – that being the operating plan – would be undermined.

Second, forced access and forced interchange would generate serious adverse network effects.

Running a massive network is incredibly complex, with multiple types of traffic – such as intermodal, coal trains, grain and others -- using the same set of limited resources. Norfolk Southern’s rail operations are designed both to meet customer needs and to function efficiently. We must meet the different needs of different customers.

To be able to hone operations to get the most out of our resources, Norfolk Southern must be able to make reliable predictions about its future operating patterns. We go to great efforts to look into the future and predict traffic flows to plan our resources. Forced access and forced interchange would undermine our ability to plan ahead and adequately place resources where they will be needed.

Operating Plan Developer is a technological tool that allows us to plan the movement of each of the more than 170,000 rail cars currently on the Norfolk Southern system. It uses algorithms to evaluate a host of variables – such as the least handling, the fewest crew districts, and shortest distance – to determine the most efficient and safest route for each of the cars, blocks of same-destination cars, and trains. If the shortest route has curves or speed restrictions it takes that into account and finds the most efficient route even if it is longer in distance. Forced access and forced interchange proposals would nullify the decades of effort Norfolk Southern has put into streamlining its network.

Forced access would create operational problems with two railroads operating on the same infrastructure, would increase the number of locomotives and cars needed, and would create crew qualification issues.

[Slide 5 – “Contrasting Interchanges”]

Similarly, forced interchange would create operational problems by altering traffic flows inefficiently. Compare two interchanges – one in Cleveland and the other in Marion. Here you are looking at an efficient interchange at Cleveland and an inefficient interchange at Marion.

[Slide 6 – “Cleveland, Ohio”]

Rockport Yard in Cleveland is on the lower left and is an interchange point between Norfolk Southern and CSX.

[Slide 7 – “Rockport Yard”]

That yard has ample capacity to interchange hundreds of cars.

[Slide 8 – “Efficient Interchange”]

It is secure and is very efficient. Importantly, cars received are immediately classified in the yard and forwarded on outbound trains. As you can see, there has been substantial investment in infrastructure at this facility.

[Slide 9 – “Marion Ohio Interchange Track”]

The interchange in Marion, on the other hand, is a single track. There is little infrastructure in place.

[Slide 10 – “Inefficient Interchange”]

Only about 35 cars can be interchanged here and even then, they must be forwarded to Columbus to be classified. Furthermore, any trains working this interchange block the main line.

[Slide 11 – “Harm to Rail Operations”]

In this comparison between a Cleveland interchange and a Marion interchange, under forced interchange, customers could opt for Marion. You clearly see Marion is a less efficient interchange point and in fact would result in congestion and delay.

While a modest amount of interchange is currently handled by local trains today at Marion, you can see that increased interchange would be very inefficient – stopping through trains, blocking the main line, adding work events and, in the end, delaying all our customers’ freight.

[Slide 12 – “Don’t Jeopardize Safety”]

Finally, as the safest Class I railroad for the 22nd year, a benefit of reduced handlings and work events is the elimination of risks of injury. Adding more work events increases the risk of injury and that is something we and the government should strive to avoid.

Jim Hixon:

[Slide 13 – “NS Written Submissions”]

Good morning. Norfolk Southern has submitted to the Board substantial comments on opening and reply, and we will not repeat all the points we made.

[Slide 14 – “Statements Do Not Withstand Scrutiny”]

Now, unsupported allegations have been made in the papers that do not withstand scrutiny.

Some say railroads harm exports. The actual facts tell a different story.

[Slide 15 – “U.S. Exports”]

As you can see exports have grown steadily since 1992, except during times of recession. In fact, U.S. exports in March 2011 were the most reported in history.

[Slide 16- “NS Import/Export Traffic”]

For Norfolk Southern export traffic has exceeded import traffic even when we remove export coal from the data.

[Slide 17- “Railroads Not Harming Chemical Industry”]

Some say railroads have harmed the chemical industry and forced them offshore. The story they tell outside the STB is much different. Outside the STB, the story is about the price of natural gas.

[Slide 18 – “Chemicals Driven By Fuel Prices”]

Recently, the ACC issued a press release noting that, and I quote, “this low price for natural gas compared to oil has enabled U.S. chemicals manufacturers to become more competitive than producers in much of the rest of the world. ‘Shale gas extraction has been a ‘game changer’ for

America's chemical manufacturers, enabling us to remain highly competitive in a global market.” This press release has been removed from the ACC website.

[Slide 19 – Dow]

That game changer has led Dow, like many other companies, to announce expansions in the United States, which undercuts the story chemical interests have told in this proceeding.

In conclusion, Norfolk Southern urges that the Board recognize the lack of justification for proposing changes to existing regulations dealing with access to the rail network and terminate this proceeding.

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June 24, 2011

BY HAND

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings

JUN 24 2011

Part of
Public Record

Re: Ex Parte No. 705 – Competition in the Railroad Industry

Dear Ms. Brown:

On behalf of Union Pacific Railroad Company, I have enclosed for the record two copies of the slides that were presented by James R. Young at the Board's hearing on June 22, 2011, in the above captioned proceeding. Please let me know if you have any questions.

Sincerely,

Michael L. Rosenthal

Enclosures

Ex Parte No. 705 Competition in the Railroad Industry

June 22, 2011

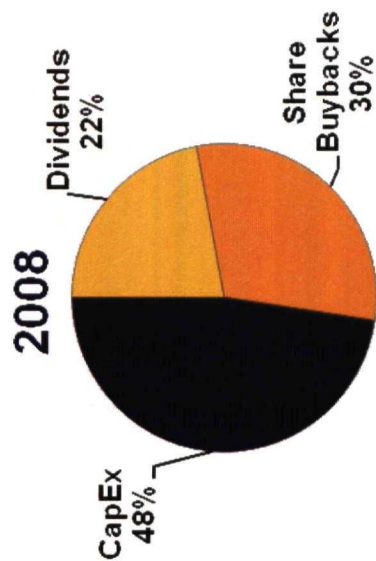
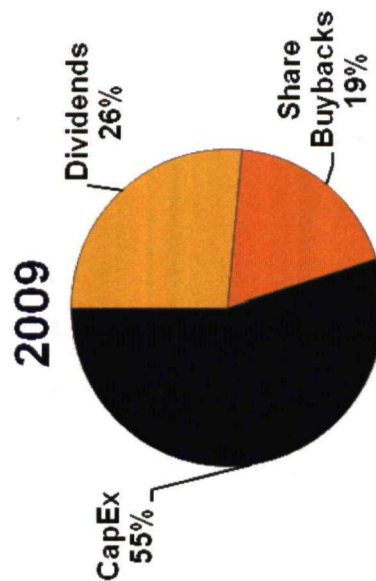
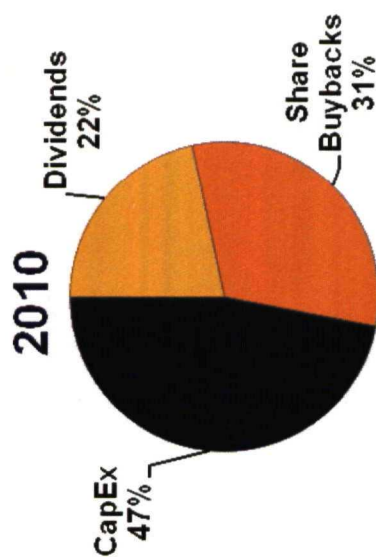
James R. Young

Chairman, President & Chief Executive Officer of Union Pacific Corp. & Union Pacific Railroad Co.

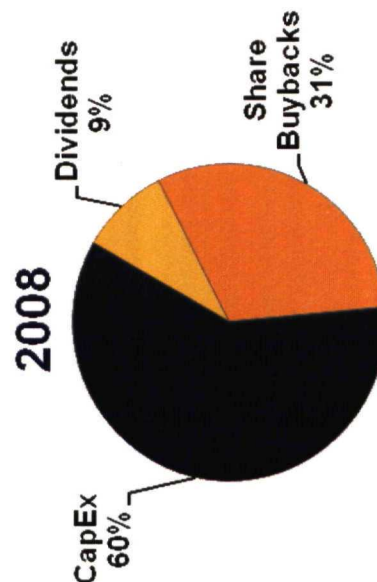
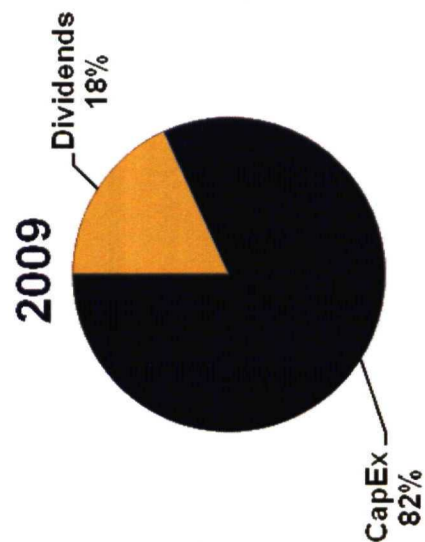
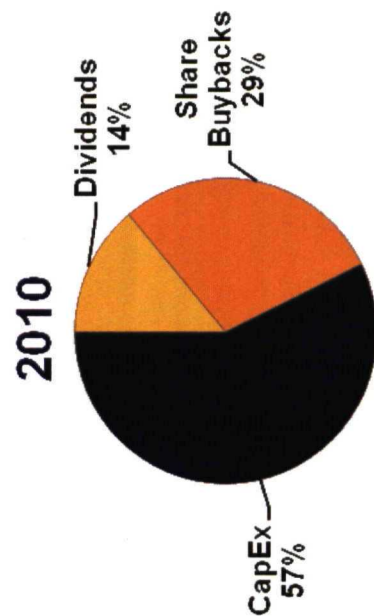


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S&P 500 Cash Allocation



Union Pacific Cash Allocation



Source: Standard & Poor's



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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

COMPETITION IN THE RAILROAD INDUSTRY

STB Docket No. EP 705

**THE MERCURY GROUP
A Shipper-Based Mobile Energy Study Group**

**POWERPOINT EXHIBITS PRESENTED AT HEARING
JUNE 23, 2011**

John Duncan Varda
Attorney for The Mercury Group

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Dated: June 27, 2011
Due: June 27, 2011

CHART 1
INTERMODAL FUEL AS A PERCENTAGE OF TOTAL FREIGHT
January 2010 – June 22, 2011

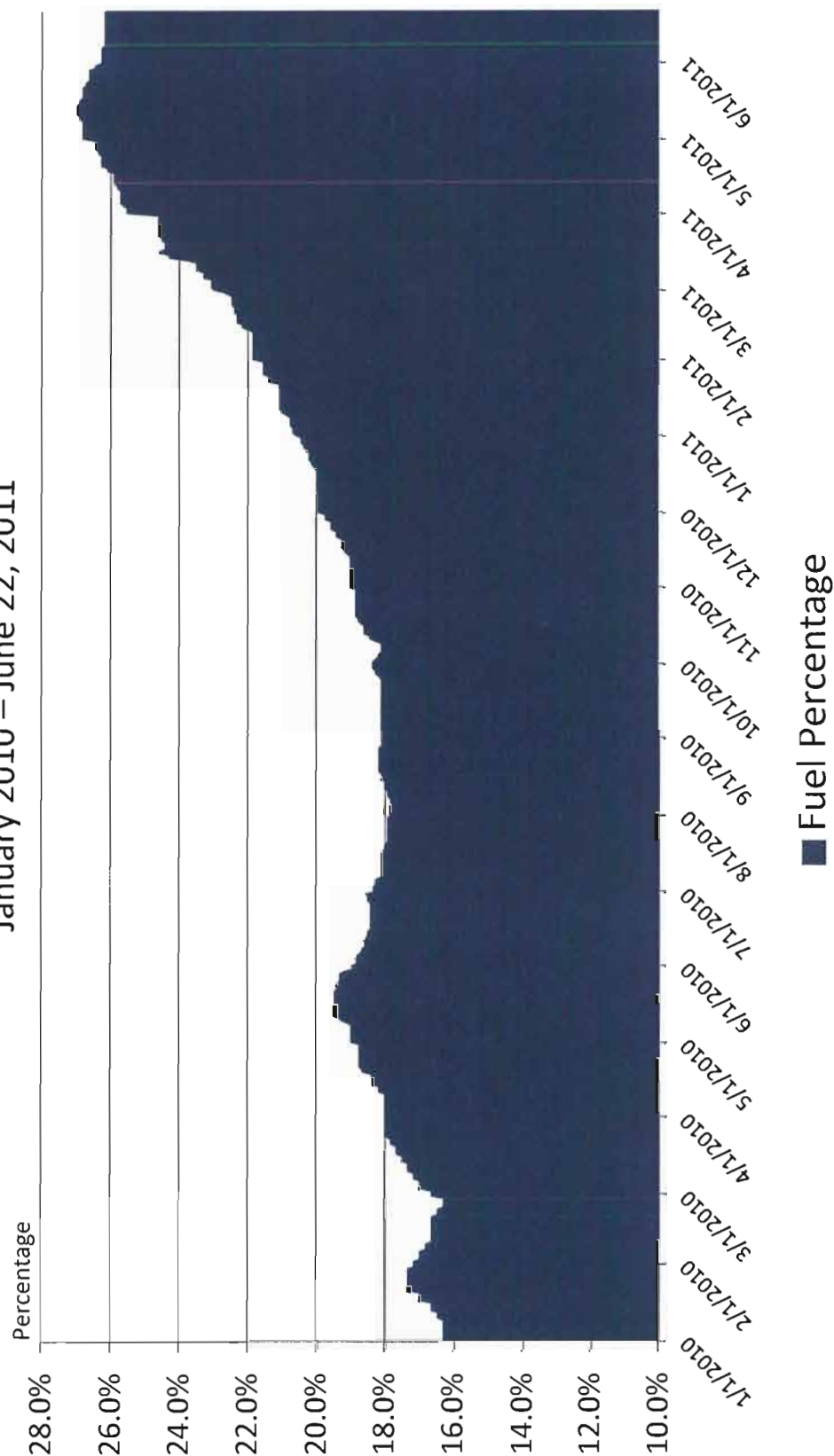


CHART 2
DIESEL FUEL & OIL MARKET PRICE BEHAVIOR

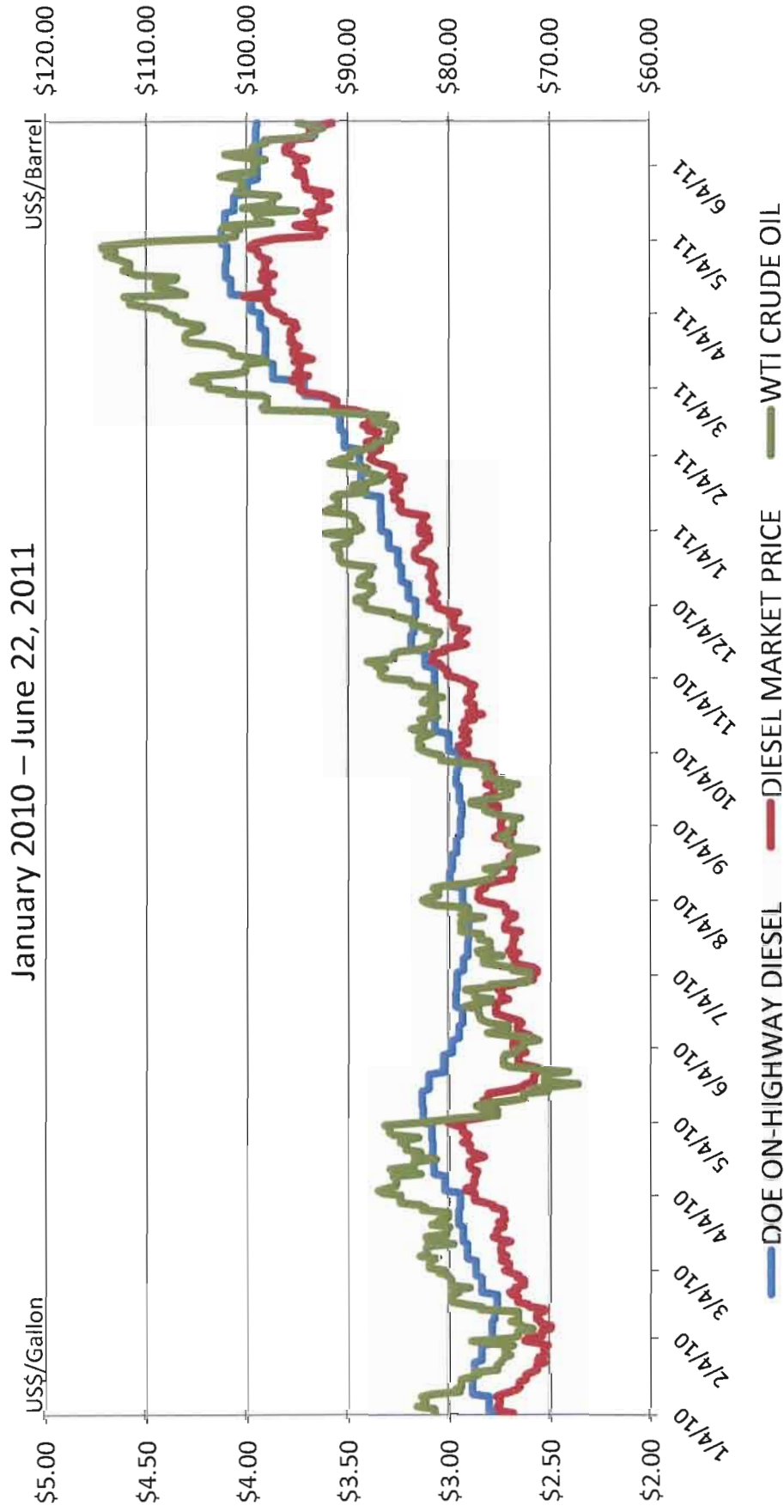


CHART 3 DIESEL FUEL & OIL MARKET PRICE CHANGE BEHAVIOR

January 2010 – June 22, 2011

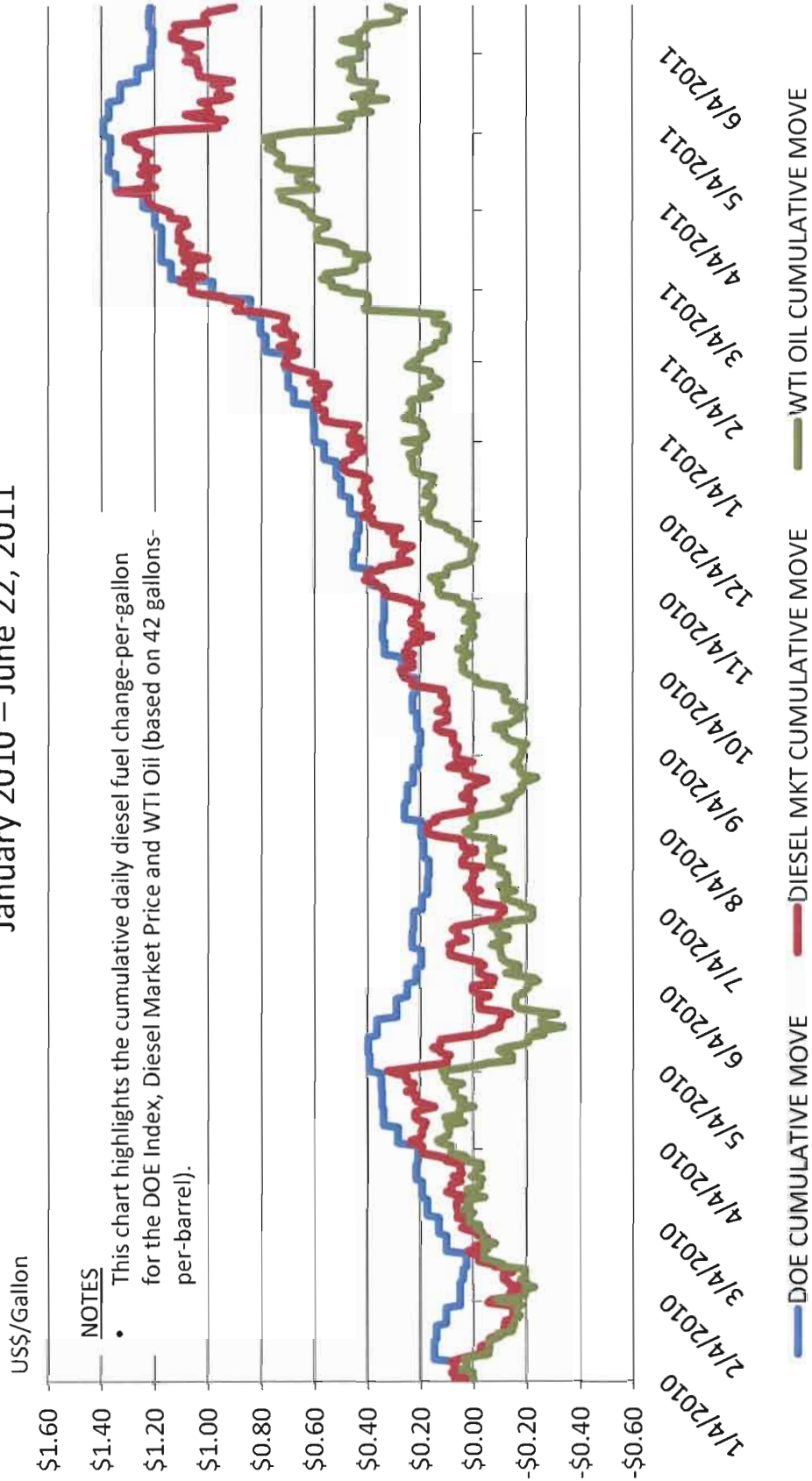


CHART 4
DIESEL FUEL & RAIL% FUEL SURCHARGE PRICE BEHAVIOR
January 2010 – June 22, 2011

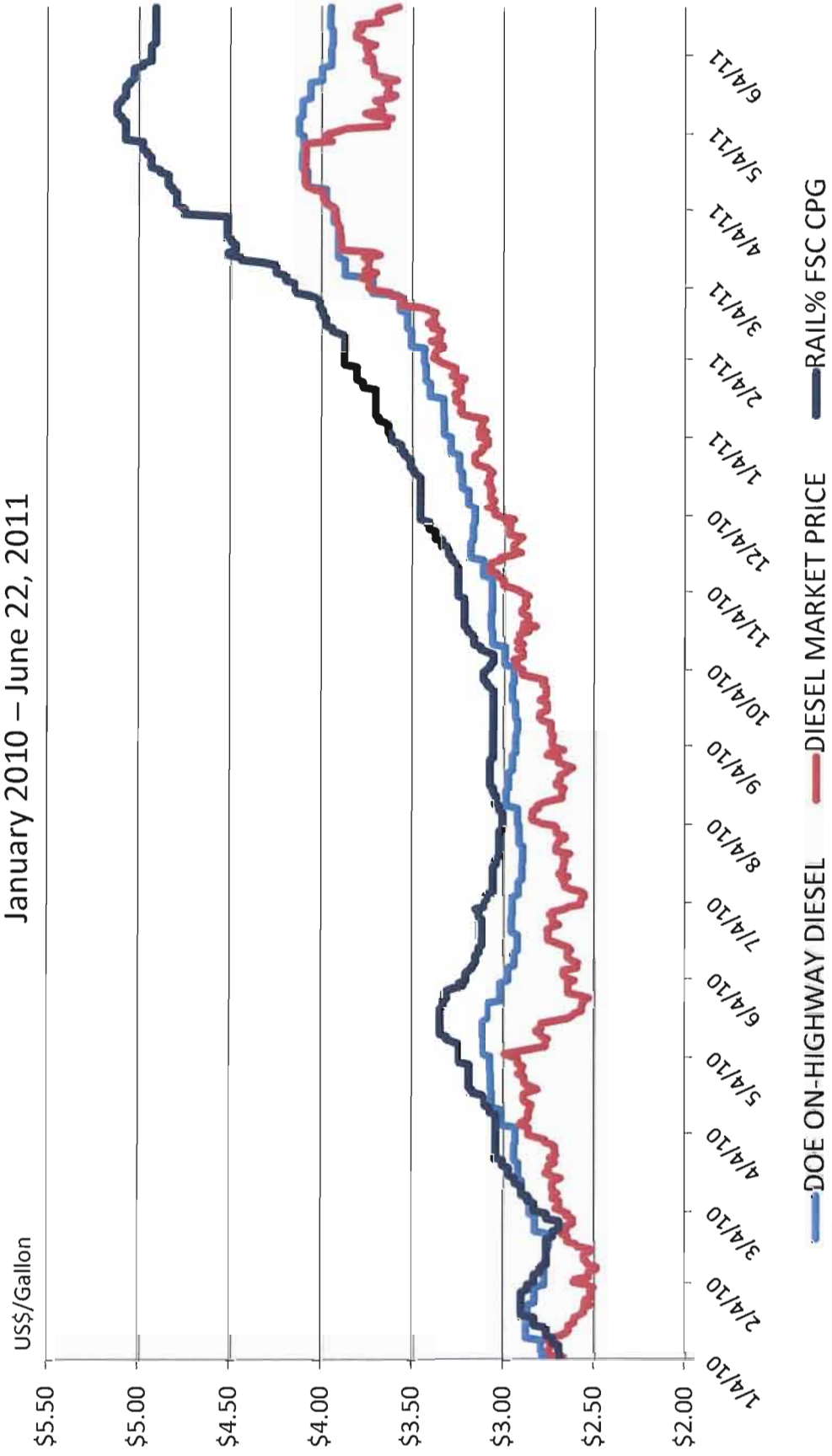


CHART 5
DIESEL FUEL & RAIL% FSC PRICE CHANGE BEHAVIOR
January 2010 – May 2011

