



Wheat Growers, National Barley Growers Association, National Rural Electric Cooperative Association, Oklahoma Wheat Commission, South Dakota Wheat Commission, Texas Wheat Commission, Washington Wheat Commission, and Western Coal Traffic League (collectively "Subscribing Shippers") hereby submit the appended Subscribing Shippers' Joint Statement of Principles in this proceeding. Many of the Subscribing Shippers will be separately submitting individual statements.

Respectfully submitted,

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Consumers United for Rail Equity  
Edison Electric Institute  
Idaho Barley Commission  
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Montana Wheat & Barley Committee  
National Association of Wheat Growers  
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**SUBSCRIBING SHIPPERS' JOINT STATEMENT OF PRINCIPLES**

- The decisions in recent SAC cases have been uniformly unfavorable to captive shippers. These decisions have resulted in the transfer of hundreds of millions of dollars in rate increases from railroad customers and the public to four (4) dominant coal-carrying railroads.
- As a direct result of the Board's recent decisions, many captive shippers are paying considerably higher rates and charges than had been in place as little as three years ago. The burdens associated with these rate increases have been compounded by poor service, thus exacerbating the harm experienced by captive shippers and their customers.
- Railroad managements have interpreted these recent STB decisions as a "green light" for even greater increases in rail rates and charges, with the net effect that the bargaining power between railroads and their customers has become significantly biased towards the railroads. The railroads have been so emboldened that many captive shippers have now been forced into a new era of "take-it-or-leave-it" negotiations, in which carriers even have refused to enter into contracts.
- Although the Board properly has stated that it is not the "umpire, blandly calling balls and strikes" when adjudicating rate cases, and that "the right of the public must receive active and affirmative protection at the hands of the [Board]," these principles have been applied inconsistently in recent decisions and there is little evidence of meaningful protection.
- The Board has recognized that major case-specific problems exist in its current approach to SAC and these problems are leading to skewed results. The failure to resolve such problems in individual cases -- the context in which they arose -- threatens to deprive captive shippers for which a SAC case is even theoretically possible of any meaningful regulatory review.
- In a related context, small and non-coal captive shippers currently are experiencing particular harm. STB Chairman Nober testified before Congress that "[I]f no small cases are brought, this means that in practice, only about 75 coal shippers have a meaningful opportunity to challenge rail rates. This is unacceptable." Yet the Board has not offered any meaningful solution to the particularly acute difficulties faced by the 99%+ of captive shippers in the nation that cannot bring cases under the SAC constraint.
- The statutory requirement that captive shippers' rail rates must be "reasonable" needs to be implemented in a manner that ensures that captive rail shippers of all sizes and in all locations are protected by effective remedies to limit monopoly pricing by market dominant railroads. This includes non-coal shippers who have no tested or approved methodology for rate relief.

- If private-sector solutions are to be preferred, there must be more effective rail-to-rail competition. Private-sector solutions equate to a free hand for monopoly railroads where there is neither effective competition nor effective regulation.
- Using notice-and-comment proceedings to consider issues of SAC implementation which arose in individual SAC cases serves the railroads' interests in making rate cases even more difficult and expensive. The SAC problems which have arisen by Board action or inaction in individual cases should be resolved by Board remedial actions in individual cases.
- The Board is urged not to use rulemaking or other notice-and-comment procedures to address issues of SAC implementation, for four interrelated reasons:
  - First, the Coal Rate Guidelines clearly provide that complex SAC issues are best left to case-by-case resolution.<sup>1</sup> See Guidelines at 542-43 (SAC computations are "left to the parties to make in each case"). See also PPL Montana, et al. at 5 (Board denied request by BNSF and UP to institute separate proceedings, citing the policy of addressing SAC issues "as they arise in individual adjudications.")<sup>2</sup>
  - Second, the SAC standards themselves are not hard-and-fast "rules." See OPPD at 142 (the Guidelines "are styled guidelines precisely because they do not contain rules").<sup>3</sup> The STB does not need to initiate rulemakings to change guidelines that are not rules. All SAC implementation issues can – and should – be addressed in individual cases.
  - Third, side-bar proceedings will divert the Board's attention from correcting case-specific SAC implementation issues where they should be corrected – in pending coal rate cases. Many coal rate cases were left in limbo for years as the ICC struggled to develop the Guidelines. Reopening the Guidelines for rulemaking proceedings raises the specter of similar delays and added expense, as coal shipper-complainants get caught in the cross-fire between their cases and the generic rulemaking proceedings.
  - Fourth, any SAC-related rulemaking proceedings paralleling pending complaint cases are likely to be complex, time-consuming and expensive. If past is prologue, any STB decisions are likely to be appealed, resulting in further delays and uncertainty.<sup>4</sup> It took the Board's predecessor, the ICC, almost a decade to promulgate the Coal Rate Guidelines, and the appeals took another two years. Shippers have no assurance that any new "rulemaking" proceedings concerning the Guidelines will be on a faster track or produce meaningful results.

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<sup>1</sup> See Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520 (1985) ("Coal Rate Guidelines" or "Guidelines"), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3rd Cir. 1987).

<sup>2</sup> PPL Montana, LLC v. Burlington Northern and Santa Fe Ry., STB Docket No. 42054, et al. (STB served Nov. 27, 2001).

<sup>3</sup> Omaha Public Power District v. Burlington Northern R.R., 3 I.C.C. 2d 123 (1986).

<sup>4</sup> See, e.g., Ass'n of Am. R.Rs. v. STB, 146 F.3d 942 (D.C. Cir. 1998) (denying as unripe the AAR's challenge to the STB's small rate case standards).