

MINUTES OF THE MEETING
FINANCE AND CLAIMS COMMITTEE
MONTANA STATE SENATE

March 26, 1986

The first meeting of the Finance and Claims Committee of the Montana State Senate, Special Session # 2, met on the above date at 9 a.m. in room 108 of the State Capitol.

ROLL CALL: With Senator Keating excused, Senator Story absent, all other members were present.

CONSIDERATION OF HOUSE BILL 5: Representative Rex Manuel, House district 11, and chief sponsor of House Bill 5, said this is the result of the McCarty Farms case and the companion case concerning grain rail shipment rates before the Interstate Commerce Commission. He said this is an appropriation from the general fund. The McCarty Farms case originally was a class action suit and was joined with Farmers Union, Farm Bureau, the Grain Growers Association and WIFE.

Representative Manuel said the handouts that were being passed out did not tell about all the grain shippers that were in on this. Thousands of dollars were put together in the early 80's. The case was joined with the state and the McCarty Farms and they have been in it for quite a while. The case was based on unreasonable rates for grain shipped in Montana--the rates being considerably higher than grain shipped through Montana. So far the state has put in \$334,000 and this would ask for \$144,000 to, hopefully, finish it off. He said in 1982 the ICC had found that in the case of McCarty Farms the Burlington Northern possessed market dominance and determined that their rates were unreasonable. B.N. then appealed this decision to the full ICC. He explained that when the Staggers Act went in, they had only 6 months to file against the high rates, or they would be acceptable from that point on--set in concrete -- so to speak.

PROPOSERS FOR HOUSE BILL 5: Bill Fogarty, Administrator of the Division of Transportation, Department of Commerce, passed out information which is attached as exhibit 1, 2, 3 and 4. In addition to the information in the attached exhibits, he said Judge Hatfield had certified the case. The state of Montana in the 1980 Staggers 229 case allowed any shipper to protest a base rate within 6 months, and if not it became forever the same. He said the portion of money from the state was for mainly expert witnesses and was spent on the market dominance portion of the case. Pointing out costs to show money can be made from freight, he said the cost per ton per mile runs at 1.9¢, by truck barge 3 3/4¢, and by straight truck 4¢. The average freight rates in Montana run 240% of revenue variable, in some states 225%, and in others 114%. He said we are not asking for something impossible, only that we receive parity with other states instead of higher rates because of a market dominance. He said it is very encouraging since the ICC has ruled the railroads had over charged in the Omaha coal case--

a \$20 million overcharge and ordered them to reduce the coal rates to 175% of variable cost. In the other case, they ordered them to pay back on an overcharge of companies for shipments of coal that were hauled by BN from Power River Basin in Wyoming to near Ft. Worth and then to Elmendorf, Texas to an electric generating plant operated by the city of San Antonio. He said this all amounts to \$128 million.

Bob Stevens, Grain Growers Association, said they support the bill. He said they have been involved about 5 years, and that the farmers had contributed 230 to \$240,000 out of their pockets for the case and feels this could come to a successful conclusion with the state's support.

Jo Brenner, Montana Farmers Union asked that her name be added to the testimony given by Bob Stevens.

Senator Tveit, district 11, said he is a proponent of the bill. He said the concerns we have with shipping in Montana--really captive shippers to the dominance of the railroad-- is really putting a strain on the producers of Montana. Rates now are 1/3 of the price of a bushel of wheat, and if it goes up they will take about 1/2 of it. The case looks very positive and he would urge the support of the committee.

There were no further proponents, on opponents, and Chairman Regan asked if there were questions from the committee.

Senator Hims1: What happens to the overcharge that is won by this? Where does it go? Mr. Fogarty: The \$188 million. There is a couple ways to apportion it. We have proposed to the railroad a reduction and they could also agree to a further rate reduction through the years and take it out of this. The other way is cash. Probably the first is the easiest. Part of the settlement to reduce your rates and as a part of the rate case, to reduce it further.

Senator Aklestad: In the settlement, is there a penalty clause in it? Mr. Fogarty: The interest will run until the settlement is signed.

Senator Aklestad: What percent? Mr. Fogarty: About 10%. We used the treasury bill interest rate.

Senator Bengtson: On what basis, or how do they prorate the participation of 5 organizations and what was agreed about the state of Montana participating in it? The grain growers, etc-- What other participation? Mr. Fogarty: The states participation was in paying for the expert witness fees. Legal fees are on a contingency basis. We are hopeful that they will be the last defense. If proven market dominance, it will affect all freight rates in Montana.

Senator Regan: At the end of the testimony, the plaintiff has discussed a settlement. If you settle out of court you would

negate any chance of establishing the case. Even assuming you would have less, the significance of the case may be so important it would be better to have the ruling. Mr. Fogarty: That is correct. It is more important until we get a market dominance ruling. The only other way we would agree, would be a stipulation in iron clad agreement that it was a good settlement for the producers so that there would be no other problems. It would not have the benefit for the coal and lumber producers.

Senator Regan: Can you get market dominance agreement and still get it established out of the court? Mr. Fogarty: The ICC should make a decision on the market dominance soon. The B.N. told Judge Hatfield it would probably be out in January, so we should be getting it soon.

Senator Gage: Was the market dominance in making the future changes done by rule change or congress, or what? Mr. Fogarty: The ICC made the changes. Initially they came out with one, they came out with market dominance.

Senator Haffey: I am confused. The McCarty thing and the rates for hauling grain. Perhaps a settlement or decision on that--that is fine. Are you saying that at the same time, notwithstanding a settlement, their decision and other things happening that could apply to the hauling of coal, lumber and other commodities out of Montana? There are some other things going on that might affect the rates? Mr. Fogarty: True. If market dominance was ruled the others would not have to go through this long case.

Senator Haffey: Where does the market dominance exist? Mr. Fogarty: Through the Staggers Act. Before you can even say it is reasonable, or unreasonable, the first thing you have to prove is market dominance.

Senator Haffey: If the McCarty case did not exist there might be, in the future, an adjustment of rates to the items through a market dominance case in some other case?

Representative Manuel: If you did not put in a protest in 6 months it was forever in. Any adjustment hinges on this.

Senator Smith: When they put in the Railroad Act and McCarty filed and 2 years later other farm organizations joined--if not filed at that time it was all right. If this is not followed through, no way can the others get a break. This one has to be followed through.

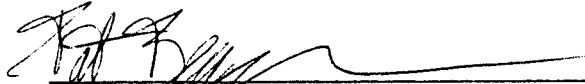
Senator Gage: Is there any money help through lumber or coal? Mr. Fogarty: they are not in the suit.

Senator Boylan: What if you don't take a cash settlement and take a freight settlement. How do you reimburse the state? Mr. Fogarty: The state rate is set. Plus 10% interest.

Senator Regan asked if Representative Manuel would like to close and he said he felt it had all been covered. Senator Regan said since there were no opponents it was her intention to move on the bill and she would entertain a motion.

DISPOSITION OF HOUSE BILL 5: Motion by Senator Aklestad that House Bill 5 be concurred in. Second by Senator Smith. Voted, passed, unanimous vote of all present. Senator Smith to carry the bill.

The meeting was adjourned at 9:45 a.m.



Senator Pat Regan, Chairman

ROLL CALL

SENATE FINANCE AND CLAIMS COMMITTEE

49th LEGISLATIVE SESSION - - 185

Date 3-26-86

NAME	PRESENT	ABSENT	EXCUSED
SENATOR REGAN	✓		
SENATOR HAFTEY	✓		
SENATOR JACOBSON	✓		
SENATOR AKLESTAD	✓		
SENATOR HAMMOND	✓		
SENATOR LANE	✓		
SENATOR CHRISTIAENS	✓		
SENATOR GAGE	✓		
SENATOR HIMSL	✓		
SENATOR STIMATZ	✓		
SENATOR BOYLAN	✓		
SENATOR STORY		✓	
SENATOR SMITH	✓		
SENATOR MANNING (Dick)	✓		
SENATOR BENGTON	✓		
SENATOR KEATING			✓

VISITORS' REGISTER

BILL NEF

DATE 5-26-86

SPONSOR _____

[illegible]

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.



JUDY RIPPINGALE
LEGISLATIVE FISCAL ANALYST

STATE OF MONTANA

Office of the Legislative Fiscal Analyst

STATE CAPITOL
HELENA, MONTANA 59620
406/449-2986

March 20, 1986

TO: Legislative Finance Committee

FROM: Carl Schweitzer *Carl Schweitzer*
Senior Analyst

SUBJECT: Rail Litigation Supplemental

The Department of Commerce is requesting a supplemental of \$144,314 of general fund for the continuing litigation of the McCarty Farm/Staggers 229 Case. Complimenting this supplemental request is a request by the Department to transfer general fund of \$70,000 which is appropriated for fiscal 1987 to fiscal 1986. The \$214,314 of funds would be used to pay expert witness costs for the "rate unreasonableness" portion of the case.

HISTORY OF THE McCARTY FARMS/STAGGERS 229 CASE

The McCarty Farms Case (filed in March 1981) is a class action suit that was filed by the Ag Coalition (Farmer Union, Farm Bureau, Women Involved in Farm Economics, The National Farmers Organization, Montana Grain Growers Association, etc.) charging Burlington Northern with unreasonableness of rates for the period of 1978 through 1980. The State's Staggers 229 Case was filed in March 1981 under the provisions of the Staggers Act. The Staggers Act gave all interested parties the opportunity to protest rail freight rates in effect as of December 1980. The December 1980 rates were designated to be the basis for all future rates and if they weren't protested by March 1981, they were forever unprotestable.

In 1982, an Interstate Commerce Commission (ICC) Administrative Law Judge found that in the case of McCarty Farms, the Burlington Northern possessed market dominance and determined that their rates were unreasonable. The Burlington Northern then appealed this decision to the full ICC.

Late in 1982, the ICC determined there were enough similarities between the McCarty Farms and the State's Staggers 229 Cases that the cases were combined. In 1984, after waiting nearly two years for an ICC decision, the McCarty Farms attorneys filed a motion in Federal District Court in Great Falls to force the ICC to proceed with the case. The ICC decided to reopen the entire case and to proceed under the rules and regulations currently in effect. This meant that both "market dominance" and "rate unreasonableness" would both have to be re-proven. The ICC decided to first make a ruling on the "market dominance" portion of the case before proceeding with the "rate unreasonableness" portion. By July 1985 all parties had filed their briefs on the "market dominance" portion of the case.

The amount of time and financial resources necessary to resolve this issue has taken longer than the Department of Commerce estimated. In December 1984 the Department had estimated that by early spring 1985 the ICC would have to make a ruling on the "market dominance" portion of the case. They also estimated that by fall 1985 or spring 1986 the "rate unreasonableness" portion would be decided. As of March 1986 the ICC has yet to rule on the "market dominance" portion of the case.

To date the state has spent \$334,497 on the "market dominance" portion of the case. Table 1 details the expenditures on "market dominance." In April 1985 the legislature approved a \$253,144 general fund

supplemental entitled Burlington Northern legal costs. Part of that supplemental was \$110,600 for expert witness testimony in the "market dominance" portion of the case. The remainder of the supplemental was for other cases being litigated with the Burlington Northern. The legislature also appropriated \$200,000 for the 1987 biennium for the expert witness costs of the case. With the proposed supplemental of \$144,344 the total cost for the 1987 biennium would be \$344,144.

Table 1
McCarty Farms/Staggers 229 Case
Expenditure History

<u>Fiscal Year</u>	<u>Amount Expended</u>
1982	\$ 9,614
1983	46,251
1984	16,431
1985	137,075
1986 (through Feb.)	<u>125,026</u>
Total Expended on Market Dominance	\$334,497
Remaining 1987 Biennium Appropriation	74,974
Supplemental Request	<u>144,344</u>
Total Expenses Anticipated	<u><u>\$553,815</u></u>

The Department expects an ICC ruling on the "market dominance" portion of the case any day now. From the date of the ruling on market dominance, the department will have 60 days to submit its briefs on rate unreasonableness.

If the supplemental is approved and the \$70,000 is transferred from fiscal 1987 to 1986 the Department will have \$30,000 available in fiscal 1987 to complete the case. The department has verbally stated that the remaining \$30,000 should be sufficient to complete the case.

There are two objectives the state is pursuing in continuing litigation of this case. First and foremost the state is trying to get the Burlington Northern to lower its shipping rates on wheat and barley by approximately 20 percent. Second the reparation cost to date that the state is contending the Burlington Northern has overcharged rail users and the cost of litigation to date is \$188 million. Language was included in House Bill 500 which stated: "The department shall seek to recover the general fund expenditures plus interest at a rate of 10 percent from any settlement in this case."

The big unknowns on the cost side are: (1) How much longer will it take the ICC to make a ruling in the case? (2) Will the ruling be in the states favor? and (3) If the ruling is in the states favor will the Burlington Northern pursue the case through the federal court system? The supplemental is based on the assumption the ICC rules quickly and there is no further appeal of the action.

3/2/84

The Washington Post

BUSINESS

ROUNDUP

ICC Orders 2 Railroads To Repay Overcharges

■ The Interstate Commerce Commission has ordered Burlington Northern Railroad Co. and Southern Pacific Co. to refund \$40 million, plus at least \$19 million in interest, to the city of San Antonio for what the ICC said were overcharges for coal shipments to a city-owned utility.

The ICC announced its ruling yesterday, but the full order will not be issued until next week, according to an ICC spokesman. Spokesmen for both railroads said they were unable to comment or say whether the companies planned an appeal until rail officials see the text of the order.

The ICC found that the companies overcharged for shipments of coal that were hauled by Burlington Northern from the Power River Basin area of Wyoming to a point near Fort Worth, and from there to the Elmendorf, Tex., electric generating plant operated by the city of San Antonio. The shipments in question took place between Oct. 1, 1980, and March 31, 1984.

Since 1980, railroads have been prohibited from charging more than 162 percent of their costs for shipments. The commission found that the base rate for the shipments as of Oct. 1, 1980, exceeded that ratio, as did increased rates later on.

Stockholders Take a Big Bite at Denny's

■ Denny's restaurant stockholders are hopeful they will enjoy the food as much as their investment.

Under terms of an unusual settlement approved yesterday, people who held stock in Denny's before a merger last year will try to recoup their losses with discount coupons on meals.

The 4,000 stockholders will be issued scrips worth 20 cents a share, redeemable at the nation's 1,000 Denny's restaurants over the next three years. But the scrips cover only half the cost of the food, so stockholders will have to pick up the rest of the tab.

The idea of accepting food instead of cash did not settle well on the stomachs of some stockholders, who had filed a class action after the public company went private.

They were paid \$43 a share for their holdings, but they felt they should have gotten more money.

One couple who owned 8,500 shares faced eating a veritable mountain of food to redeem their scrips. A Vermont stockholder objected to

Market Br

'Triple Witching Hour' Expected to

By Stan Hinden and David A. Vise
Washington Post Staff Writers

Some stock brokers are advising small investors to be wary of Wall Street today because big traders will be making some multimillion-dollar buying and selling decisions that could cause stock prices to gyrate wildly.

The predictions of potentially erratic stock prices have little to do with the stock market boom that drove the Dow Jones industrial average up 400 points in the last four months and sent it over the 1,800 mark yesterday.

The threat comes from computer-driven trading programs that tell big professional investors to buy or sell stocks or other investments in hundreds of companies at once in coordination with massive trades in the futures and options markets.

Computer trading programs have made the stock prices more volatile, but the situation isn't bad enough to require any sweeping changes in

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Bill Frydrych ✓
coal outlook

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January exports... page 6
Metallurgical coal prices... page 7

March 10, 1986... Vol. 10 No. 10 1986

Shamrock may sell coal unit

Diamond Shamrock Corp. last week said it will consider selling Diamond Shamrock Coal Co. but not because of the currently depressed coal market or the coal unit's 39% decline in operating profit in 1985.

The Dallas-based company wants to streamline its operations and focus the corporation's resources on the oil and gas business. Though "solidly profitable," the coal and chemical operations "are not consistent with the more focused emphasis on oil and gas and therefore will be considered for divestiture," the company said.

But the company's newest coal venture, Diamond Alaska Coal Co., is not on the block. Assuming contracts can be obtained with Pacific Rim utilities, the firm still plans to begin mining its Chukchi reserves in Alaska's Beluga field by 1989.

Diamond Shamrock's production fell by more than 1 million tons to 5.86 million tons in the year ending Sept. 30, due in part to contract cutbacks by the Tennessee Valley Authority. Its major TVA contract, which expires in late 1988, accounts for 60% of company production.

W.Va. trackage rights bill signed

West Virginia Gov. Arthur Moore signed into law late last week what apparently is the nation's first trackage rights bill, which would in some cases give the state Public Service Commission power to set rail rates.

The law will likely be questioned in the courts, although no lawsuit has been filed yet by the state's rail carriers, Chessie, Norfolk & Western and Conrail. A spokesperson for Chessie parent CSX Corp. said, "We are disappointed in the law and fully intend to challenge its validity."

The issue is emotional in West Virginia, and as a result state Senate President Dan Tonkovich, who pushed the trackage rights bill, plans a pow-wow of sorts in his office between the rail and coal industries later this month.

Essentially the law would allow a producer or shipper captive to one carrier to petition the PSC to set a reasonable rate if the carrier and a connecting carrier can't agree on a rate. The obvious examples are West Virginia coal mines served by Chessie, but aimed at Conrail-served utilities in the Northeast.

Since the carrier accused of not allowing a reasonable rate would have right of last refusal in private talks before a challenge is filed, the legislation obviously is designed to encourage private negotiations.

But the West Virginia Railroad Assn. has fought the legislation because it allows "somebody else other than the railroad" to run tracks, according to a spokesperson.

Energy competition gets hotter

There is new evidence that coal may face intense short-term competition from oil and natural gas, but some observers caution that the coal industry need not push the panic button just yet.

Coal from the Powder River Basin may be displaced by natural gas in Oklahoma, while a "worst case scenario" for oil prices could have a marked effect on demand and prices for coal traded on the world market.

Oklahoma Gas & Electric has received word from some of its 2,700 in-state producers of natural gas that they are willing to match the spot price of Powder River Basin coal moving to the Muscogee No. 6 unit.

OG&E in late February announced that, pending regulatory approval, it would back off the unit, the only one supplied by spot coal, if its natural gas suppliers could match or beat the price. A spokesperson said last week that it had received "positive feedback" from its inquiry but he did not know how much gas had been offered.

Coal and natural gas each account for 50% of OG&E's installed generating capacity. Last year the average price of gas was \$3.11/mmBtu, compared to \$1.61/mmBtu for spot and contract coal. Mobil Coal Producing Co. supplied the spot coal for a price in the \$1.40/mmBtu range, and that is the price the gas suppliers must match, OG&E said.

Meanwhile, a study completed recently for Chase Econometrics indicates that a sustained low level of oil prices from 1987 through the early 1990's would affect price and demand for coal traded on the world market.

Michael Elliot-Jones, who conducts research in international coal markets for Chase, said the study compares the results of two oil price scenarios — termed "baseline" (BL) and "very low oil price" (VLOP) — on the international coal market.

VLOP is defined as crude oil declining to \$12-\$13/barrel in current dollars by 1987 and staying at that level until the early 1990's. At that point, prices in nominal terms begin to rise as depletion sets in, Elliot-Jones said. "In real terms, this means that crude prices fall to average levels last seen in 1974," he added.

(Continued on page 8)

Conrail tactics may divide rails

The railroad industry, long considered a formidable lobbying force, is facing a tactical headache if captive-shipper changes in the 1980 Staggers Rail Act are attached to legislation selling Conrail to Norfolk Southern Corp.

And increasingly it appears that a volatile combination of groups interested in changing or preserving Staggers — which substantially deregulated the rail industry — could wind up doing battle by way of the Conrail sale bill, now pending in the U.S. House of Representatives.

Although the impact of such a battle on coal is impossible to predict, so many coal-related problems are involved — rail rates, the

DEPARTMENT OF COMMERCE



TED SCHWINDEN, GOVERNOR

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SUMMARY OF MONTANA DEPARTMENT OF COMMERCE AND McCARTY FARMS, INC. ET AL SUIT AGAINST THE BURLINGTON NORTHERN

HISTORY OF THE CASE

In September, 1980, Richard McCarty initiated a proceeding in U.S. District Court in Montana (Great Falls) alleging exorbitant rates being charged by the Burlington Northern Railroad Company (BNRR) for Montana grain. The District Court certified the class then referred the case to the Interstate Commerce Commission (ICC) for determining rate reasonableness. On December 14, 1981, an ICC Administrative Law Judge found the BNRR had market dominance in Montana and that present and past rates were unreasonable and determined that a rate of 200 percent of revenue to variable cost was the maximum reasonable rate.

On March 25, 1981, the Montana Department of Agriculture and the Montana Wheat Research and Marketing Committee initiated a separate complaint proceeding before the ICC stating that the base rates in effect on October 1, 1980 were excessive.

The ICC, in July, 1982, reopened the McCarty case for taking additional evidence. At the same time, the ICC consolidated the separate complaints. Since the July 1982 consolidation, the ICC has reopened these proceedings on two additional occasions. The current consolidated complaints continue to be referred to as the McCarty Farms case.

ICC PROCEDURES

Although the ICC Administrative Law Judge found the BNRR market dominant in Montana, and their rates unreasonable, the reopenings by the Commission required both the plaintiffs and the BNRR to resubmit arguments. First, the ICC required evidence from both parties on market dominance. Upon the proof of market dominance, both parties will address the question of reasonableness of rates.

The latest reopening of the proceedings on September 11, 1984, was in response to a Writ of Mandamus filed by the complainants in U.S. District Court in June, 1984, seeking ICC action on the market dominance aspect of the case.

In their September, 1984, reopening order, the ICC directed the parties to submit additional evidence on new market dominance guidelines.

On November 9, 1984, the BNRR filed its market dominance evidence alleging competition is the overriding factor in setting its rail rates.

On July 19, 1985, in reply to the BNRR's evidence, complainants have prepared an exhaustive analysis which conclusively shows that in fact the BNRR is market dominant in the transportation of wheat and barley from Montana to the PNW.

NEED FOR SUPPLEMENTAL FUNDS

The Department of Commerce is requesting \$144,314 in supplemental funding for expert witnesses and data collection for the rate reasonableness phase of the case. An ICC decision on market dominance is expected soon and the Department would only have a limited time (30-90 days) to submit their rate reasonableness case.

As with all of the funds appropriated for McCarty Farms by the Legislature, the amount plus ten percent will be returned to the General Fund upon successful resolution of the case.

OUT-OF-COURT SETTLEMENT NEGOTIATIONS

In December, 1985, the plaintiffs at the request of BNRR, met to discuss a settlement prior to any ICC or court decision. Although the parties have considerable disagreement over a settlement at this time, the dialogue is continuing.

STANDING COMMITTEE REPORT

.....March 26..... 19.36...

MR. PRESIDENT

We, your committee on.....**FINANCE AND CLAIMS**.....

having had under consideration.....**HOUSE BILL**..... No. **5**.....

third..... reading copy (blue)

Manuel (Smith) color

**APPROPRIATION TO DEPARTMENT OF COMMERCE FOR ICC MCCARTY FARMS GRAIN
SHIP RATE CASE**

Respectfully report as follows: That.....**HOUSE BILL**..... No. **5**.....

DO PASS

DO NOT PASS

.....**Senator Regan**.....

Chairman.