SENATE TAXATION
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BILL NO. HB 703

Testimony of Pat Keim, Director State Government Affairs for BNSF Railway
Opposing HB 703
Before the
Montana Senate Taxation Committee April 12, 2005

Good morning Mr. Chairman and members of the Committee. For the record my name is Pat Keim. I am the Director of State Government Affairs for BNSF Railway Company. I live in Helena, Montana. BNSF is in opposition to HB 703.

The goal of this bill to make sure the rates we charge grain shippers are reflected in our property taxes. They already are, because the revenues we generate are a part of the valuation of our company on which our property tax is then computed.

The value of BNSF's property is determined for tax purposes using a statutory formula to value BNSF's entire system as a going concern based upon economic performance. After the system-wide value is determined, a portion of the system wide value is allocated to Montana using a number of allocation factors. In the manner prescribed by statute, those factors include revenue ton miles, track miles, revenue, cost, and miles traveled.

So the revenue we collect in Montana is used in the method to determine the annual amount of BNSF's total value allocated to Montana for tax purposes. The system already says that the higher our rates in Montana, the higher our Montana revenue, the more our total value is allocated to Montana and the more taxes we pay here.

We also challenge the legality of this proposal. It would appear to fly in the face of at least three federal laws (the 4RAct, the Staggers Act, and the ICC Termination Act) as well as the Commerce Clause of the U.S. Constitution.

The bill attempts to address a situation that is already addressed, and tries to do so in a manner that appears to be a violation of federal laws.

There are some other glaring problems with this bill that I wish to point out to the committee. The bill uses the term "average agricultural commodity freight rates" as the basis for calculations. What commodities is it talking about comparing? Agricultural commodities include things not grown in great abundance in Montana but moved on BNSF, like soy beans, milo, sorghum, corn, rice, sunflowers, beans, potatoes, apples, sugar, and grapes, to name a few. So is Montana going to compare wheat and barley rates to averages including those commodities? That's what this bill calls for. BNSF Railway also moves other agricultural commodities such as meat, poultry, vegetable oils, hay, grain alcohol, wine, flour, animal feed, ethanol, and so on. These commodities could all move under some combination of tariff rates, contract rates, negotiated rates, or volume rates. By this bill, all these things and more should be in the comparison of "average agricultural freight rates". I'm not sure using average rates from other commodities is practical or valid.

But let's just assume the bill means wheat and barley only. For both of these commodities there are single car rates, multiple car rates, 26 car rates, 52 car rates, 110 car shuttle train rates. There are also Destination Efficiency Train rates for wheat. Within the shuttle rates there are also varying efficiency payments for quick load and unload and multiple trip incentive.

These all vary according to origin and destination pairs. There are scores of origin and hundreds of destination points out of Montana alone with different rates for each pairing. There are frequent rate adjustments, both increases and decreases, within each of these categories throughout the year. And the proportion of tonnage moved by the different combinations also varies constantly. All of this is driven by the market place with its constant fluctuations. The combination of rate factors required to be calculated by this bill just on BNSF Railway in Montana is mind boggling. Then the bill requires that same calculation for all the other 27 states on our system with their thousands of combinations and constant fluctuations. Then the same is going to have to be done to figure the Union Pacific tax and the Canadian Pacific tax (they control the DMVW into NE Montana), the MRL and the Central Montana Rail for their portions of their hauls.

Now look at the fiscal note, item 9 on page 2. "This bill has no administrative impacts on the Department of Revenue". It makes no note at to the number of FTE's needed to audit all this data. Nor does it make any provision for the costs of potential litigation. Many of you followed SB 210, the so called rails to trails bill. That fiscal note called for one FTE just to handle a one time real estate transaction.

It is also noted that this bill sets up a compounding tax. Each year compounds the factor on the next year. The result is increases in the 1000% range. I also wish to point out that this bill only provides for higher taxes if the differential of averages shows Montana rates to be higher. But there is no offsetting tax reduction if the rates Montana rates ever are lower.

According to the Grand Forks, ND Herald, on Feb. 14th, this bill is a mirror image to a companion bill before the North Dakota legislature this year. The article extensively quotes the sponsors in Montana and North Dakota and talks about the commonality of the concerns in both states. But that's where the commonality on this bill seems to end. The North Dakota bill came out of Committee on Feb. 11 with a do not pass recommendation by 10-3 and died on the House floor on Feb. 14 by 27 yeas, 65 nays.

In so doing North Dakota left Montana out there all by itself on this idea. I respectfully urge that you not pass this bill.

A couple of final points. Any tax on a business is really ultimately not a tax on that business but is instead a cost that must be passed through to the customers and users of that business' products or services just the same as all other costs of running a business. If a business cannot pass through its cost of doing business it will soon go out of business. BNSF does not intend to go out of business. At the same time where we choose to invest our resources is directly influenced by the cost associated with doing business in that area. BNSF operates in a capital intensive industry in which it constructs and maintains its own transportation infrastructure with limited capital resources. Added costs like those proposed in the form of a punitive and discriminatory tax like that proposed in HB 703 will inevitably impact investment and operational decisions here in Montana

There has been much discussion in this session about tax fairness and also about the fairness of our rates. Be that as it may, there is another element of tax fairness and rate fairness to keep in mind here. Just as it would not be fair to expect Montana shippers to share in the cost of a punitive tax passed by some other state, neither would it be fair and reasonable for our customers in those states to bear any part of the cost of this punitive Montana tax measure.