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December 7, 2012

VIA E-FILING

Ms. Cynthia Brown
 Chief, Section of Administration
 Office of Proceedings
 Surface Transportation Board
 395 E Street, S.W.
 Washington, DC 20423

RE: STB Docket No. EP 715 - Rate Regulation Reforms

Dear Ms. Brown:

Enclosed for e-filing in the above-captioned case, please find the Reply Comments of the National Grain and Feed Association ("NGFA").

Please feel free to contact the undersigned if you have any questions.

Very truly yours,

Thomas W. Wilcox
 Attorney for The National Grain and Feed Association

Enclosure

cc: Counsel, Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. EP 715

RATE REGULATION REFORMS

**REPLY COMMENTS
OF THE
NATIONAL GRAIN AND FEED ASSOCIATION**

Pursuant to the Decision served in this proceeding on July 25, 2012, the National Grain and Feed Association (“NGFA”) submits these Reply Comments addressing several aspects of the opening submissions of Class I railroad parties on October 23, 2012 commenting on the proposals contained in a Notice of Proposed Rulemaking (“NOPR”) to make several modifications to the Board’s rate reasonableness rules.

**I.
INTRODUCTION**

In its Opening Comments, the NGFA commended the Board for initiating this and other recent proceedings designed to improve upon its current rules and processes in an effort to protect rail shippers against unreasonable rail practices. NGFA also expressed its appreciation that the Board continues to recognize that its rail rate reasonableness rules require improvement, and that the agency is willing to consider changes designed to provide a more accessible and workable system for rail shippers to challenge unreasonably high rail rates – a protection afforded under current law.

The NGFA also explained how it has actively participated in all previous Board proceedings addressing freight rate rules and competition in the railroad industry, and how it has commented previously that the Board’s current rules do not provide a meaningful way for rail shippers of agricultural commodities to challenge rail rates they believe are unreasonably high.¹ Indeed, the Board’s rate-reasonableness rules arguably never have provided a workable mechanism for grain shippers to challenge rates they believe to be unreasonable, as evidenced by the lack of a single grain shipper rate case being brought since the 1981 commencement of *McCarty Farms, Inc., et al., v. Burlington Northern Inc.*, where relief was denied after 17 years of litigation.

Because of their complexity and cost, the Board’s Full-SAC rules simply are not a practicable option to test the reasonableness of rail rates for the vast majority of rail shippers of grains, oilseeds, feed, feed ingredients and other grain products (hereafter collectively referred to as “grain shippers”) – despite the breadth and scope of grain rail movements and the significant revenues they generate for railroads. For this reason, the NGFA’s Opening Comments did not address the NOPR’s proposed change to the Full-SAC rules governing the use of “cross-over traffic” in stand-alone cost models in Full-SAC cases. Instead, the NGFA’s Opening Comments focused on the NOPR’s proposed changes to the Board’s Simplified Stand-Alone Cost (“SSAC”) and Three Benchmark Methodology (“3B”) rules. The NGFA explained why it believes both of

¹ Ex Parte No. 646, *Rail Rate Challenges in Small Cases*, Testimony of Dr. Kendell W. Keith on Behalf of NGFA, filed April 16, 2003; Ex Parte No. 646 (Sub. No. 1) *Simplified Standards for Rail Rate Cases*, Joint Opening Comments of NGFA and numerous other grain shipper organizations, filed October 24, 2006 and Joint Opening Comments of NGFA and numerous other associations), Ex Parte No. 665, *Rail Transportation of Grain*, Comments of NGFA, filed October 30, 2006; Ex Parte No. 680, *Study of Competition in the Freight Rail Industry*, Joint Comments of NGFA and other agricultural interests filed December 22, 2008; Ex Parte No. 705, *Competition in the Rail Industry*, Reply Comments of NGFA, filed May 27, 2011, and Testimony to the Surface Transportation Board, filed June 10, 2011.

these methodologies require significant changes beyond those proposed by the NOPR, again as evidenced by the fact no grain shipper has ever sought to utilize these rules to challenge the reasonableness of rail rates despite the 3B rules first being promulgated in 1996 and the Board's assurances in 2008 that that the promulgation of the SSAC rules and revised 3B rules in EP 646 (Sub-No. 1) *Simplified Standards for Rail Rate Cases* in 2007 meant "grain shippers should have more meaningful access to the regulatory process to contest rates and practices where competition is lacking" STB Ex parte No. 665, *Rail Transportation of Grain*, (served January 14, 2008) at 5.

III ARGUMENT

A. The Railroad Commenters' Responses to the NOPR's Proposals Would Make the Board's SSAC Rate Standards Even Less Accessible to Rail Shippers

Collectively, the positions of the Class I railroads submitting Opening Comments in this proceeding can be summarized as either (1) maintaining the unacceptable *status quo*, or (2) making the SSAC rate standards even more complicated, expensive and less accessible to rail shippers. Either outcome would perpetuate the railroads' current ability to significantly increase grain rail rates without STB review. For example, in the NOPR the Board proposes to remove the \$5 million limit on relief that could be obtained over a five-year period in cases brought under the SSAC test and procedures, but also to "link" that removal to the removal of a current simplifying element of the SSAC rules. Specifically, the Board proposes to replace the current use of average cost amounts from prior Full-SAC cases with the requirement that the complainant calculate the full replacement costs of the facilities of the rail system used to serve the affected shipper, as determined by the SSAC rules. The NGFA and other commenters

pointed out to the Board in their opening submissions that it *already* is infeasible for grain shippers and many other rail shippers to use the SSAC rules as currently formulated, and by the Board's own admission in the NOPR, the proposed "linked" change will *increase* the costs and complexity of a SSAC case. This is directly contrary to the statutory directive to the Board to adopt regulations for less expensive and less complex ways to test the reasonableness of rates when a Full-SAC analysis is not feasible, as well as the Board's stated intent in this proceeding. See Opening Comments of the Kansas City Southern Railway at 6 ("The Board's proposal here goes in the opposite direction" of establishing a methodology that was less costly than Full-SAC and "far simpler" to process). In the view of the NGFA, expressed in its opening comments, the Board's "linked" proposal to remove the relief limit would make it even less likely for most grain shippers to ever utilize the SSAC rules to test the reasonableness of their rates.

In their respective opening comments, the Class I railroad parties all take the position that the Board should not raise or remove the relief limit for SSAC cases. KCS argues that the Board does not have sufficient information and experience with the SSAC rules to make that decision at this time. KCS Op. at 5. The AAR, NS and CSXT, however, argue that to do so would violate 49 U.S.C. §10701(d)(3). AAR Op. at 12, NS/CSXT Op. at 3. BNSF, NS and CSXT go a step further, and argue that the Board should keep the current damage limit, but *still* modify the rules to require the full assessment of road property costs for the SSAC stand-alone railroad. BNSF Op. at 15; NS/CSXT Op. at 2, 13. Under this latter proposed modification, the litigation costs of the shipper, the complexity of the case, and the time for obtaining a decision would all increase, as anticipated by the Board, yet the shipper's damages still would be capped at \$5 million over five years. BNSF also states it would not be opposed to doubling the relief limits in SSAC and 3B cases if the Board was to modify its rules to (1) eliminate the use of cross-over traffic in Full-

SAC cases; and (2) modify the calculation of cross-over traffic revenues in SSAC cases and require a full RPI analysis. BNSF Op. at 17. BNSF speculates that such changes would result in complainants incurring only a “modest increase in costs to pursue relief.” *Id.* This statement is not supported by any facts and should therefore be given no credence by the Board.

In its opening comments, UP states generally that the Board should not increase the relief limit for SSAC cases, but then states its reason for such a blanket position for all cases is to ensure that “large” claims are pursued under the Full-SAC test, and to prevent shippers with “large” claims from “gaming” the rules. UP at 17-18. UP does not offer a definition of “large” cases, which is significant since the current SSAC threshold is a claim over the adjusted \$1 million relief cap for Three Benchmark cases, and reparations and prescribed rate relief in some recent coal rate cases have exceeded many tens of millions of dollars. Despite not defining what it considers to be a case large enough to incentivize “gaming” by a complainant, UP does, however, infer that it would be amenable to raising the relief limits in SSAC cases, but only if rules were adopted to prevent alleged “gaming” by shippers with “large” claims, such as increased filing fees, rules where the shipper would pay the railroad’s discovery costs if it lost a SSAC case, and rules that would prevent a complainant from withdrawing a SSAC case and filing a Full-SAC case after discovery. *Id.* at 18.

In addition to arguing that the relief limit in SSAC cases should not be removed, *and* that complainants in SSAC cases should be required to present a full road property investment presentation, NS and CSXT argue further that the Board’s SSAC rules *also* should be modified to eliminate the railroad’s Second Disclosure requirement and instead require shippers to assume the burden now found in Full-SAC cases to develop their case-in-chief entirely through discovery requested from the railroad. NS/CSXT Op. at 13. The AAR similarly argues that the

burden should be shifted “[i]f the Board removes (or significantly increases) the cap in Simplified SAC” AAR Op. at 14.

The NGFA reiterates its position in its Opening Comments that maintaining the \$5 million relief limit in SSAC cases without making *any* changes to the current rules will result in perpetuation of the *status quo*, which has resulted in no SSAC cases being pursued to a final decision at the STB, and only two complaints being filed during a five-year period where railroad rates have dramatically increased for all commodities. The railroads’ various positions would only erect additional, higher hurdles to rate relief under these rules. Rather than creating additional hurdles for utilizing the SSAC methodology, the NGFA believes the Board should be exploring in this proceeding ways to make the SSAC rules *less* expensive, *less* complicated and *more* expedited. Accordingly, the NGFA reiterates its belief that the Board *at a minimum* should remove the SSAC relief cap and not require that a shipper submit a Full-SAC replacement cost-evidentiary presentation as part of a SSAC proceeding. In addition, the NGFA urges the Board to clarify that removal of the relief limit under SSAC is for a 10-year period – commensurate with a Full-SAC prescription period – rather than retaining a five-year period for SSAC.

B. The Damage Limit for 3B Cases Should be Not Less than \$4 million if the NOPR’s SSAC Proposal is Adopted

The opening comments of the Class I railroad parties, with the exception of the joint comments of CSX and NS, contain little discussion of the Board’s proposal to double the relief limit in 3B cases. Most objected to the increase based on the assertion that the Board does not have sufficient evidence of the costs of pursuing a 3B case, or that because they object to raising the SSAC relief limit, they also object to raising the 3B methodology limit. The opening comments of the NGFA and other shipper parties in this proceeding have provided the Board

with evidence and testimony it requested in the NOPR concerning the actual costs of pursuing a 3B case under the current rules, and this prior information confirms previous assertions by shippers that the Board significantly underestimated the costs of these cases, and, therefore, that a significant increase in the relief cap is warranted. In its Opening Comments the NGFA proposed that this level should be not less than \$4 million for the reasons discussed therein.

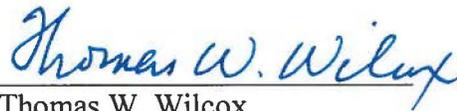
The opening comments of NS and CSXT take the additional, unreasonable view that even the current 3B cap is too high, and that the more appropriate cap should be \$200,000, based on their view that the 3B rules purportedly are “marked by multiple serious flaws.” NS/CSXT Op. at 22-24. NS/CSX predict, even though only a few 3B cases have been filed since the adoption of the current Simplified Standards over five years ago, that raising the relief limit in 3B cases at all above the current level will result in “downward rate ‘ratcheting’” of all rail rates “to jurisdictional threshold,” presumably because raising the limit to any degree allegedly will result in a surge of new complaints. *Id.* at 23. However, this same “ratcheting” claim was made by railroad parties in the proceeding that led to the *Simplified Standards*, and has been shown to have no validity, as very few cases have been filed even though railroad rates have “ratcheted” higher since 2007 due to aggressive railroad pricing behavior.

III. CONCLUSION

In conclusion, the Board’s SSAC rules and 3B rules currently are not practicable or useable by the majority of grain shippers, so any changes to the rules must be for the purpose of improving them such that they henceforth provide a meaningful way to test the reasonableness of railroad rates when a Full-SAC presentation is not viable or feasible. The opening comments of the Class I railroad parties would, at a minimum, retain the unacceptable *status quo*, or they

would make the SSAC and 3B rules even less accessible and useable by increasing the costs, complexity, and uncertainty of such cases. The NGFA reiterates that the Board should at a minimum remove the rate relief cap for SSAC and raise the relief cap for 3B cases as explained in its Opening Comments, and the Board should take additional steps to make these rules less expensive and less complicated for rail shippers, and a useable means to test the reasonableness of railroad rates.

Respectfully submitted,



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*Attorneys for The National Grain and Feed
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December 7, 2012

Certificate of Service

I hereby certify that on December 7, 2012, I served a copy of the foregoing Reply Comments of The National Grain and Feed Association via U.S. mail on each of the Parties of Record in this proceeding.


Thomas W. Wilcox