

ENTERED  
Office of Proceedings  
March 9, 2012  
Part of  
Public Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

---

DOCKET NO. FD 35557

REASONABLENESS OF BNSF RAILWAY COMPANY COAL DUST  
MITIGATION TARIFF PROVISIONS

---

STATEMENT OF  
NATIONAL GRAIN AND FEED ASSOCIATION AND  
NORTH AMERICA FREIGHT CAR ASSOCIATION IN SUPPORT  
OF THE JOINT APPEAL OF WESTERN COAL TRAFFIC LEAGUE, ET AL.

---

Andrew P. Goldstein  
McCarthy, Sweeney & Harkaway, PC  
1825 K Street, N.W., Suite 700  
Washington, DC 20006

Thomas W. Wilcox  
GKG Law, P.C.  
1054 31<sup>st</sup> Street, N.W., Suite 200  
Washington, DC 20007

Attorneys for  
National Grain and Feed Association  
and North America Freight Car Association

Dated: March 9, 2012

National Grain and Feed Association (“NGFA”) and North America Freight Car Association (“NAFCA”) jointly submit this statement in support of the joint appeal of Western Coal Traffic League (“WCTL”), et al., appealing the decision of February 27, 2012 issued by the Director, Office of Proceedings (“Director’s Decision”). The Director’s Decision found that 16 individual, non-party WCTL member organizations “are subject to discovery in this proceeding under the Board’s subpoena power.”

NGFA is a trade organization comprised of approximately 1,000 companies engaged in grain merchandising, grain processing, and the preparation and sale of grain products and animal feeds. Its members are heavily reliant on rail service. From time to time, NGFA has filed complaints against railroads alleging violations of what is now the Interstate Commerce Commission Termination Act (“ICCTA”) and its predecessor statutes.

NAFCA is an unincorporated association comprised of some 32 companies that manufacture, are lessors of, are lessees of, or operate private freight cars. From time to time, NAFCA has brought complaints against railroads for violations of the ICCTA.

NGFA and NAFCA are concerned that the Director’s Decision may open the door to abusive discovery practices by railroads that are defendants in non-rate proceedings before the Board. As the Board acknowledges, complaints against railroads may be, and frequently are, brought by trade organizations that suffer no direct harm from the practices they assail. This procedure is protected by Section 11701(b) of the statute so long as the trade association does not seek to recover monetary damages. Section 11701(b) appears to have been designed by Congress to permit non-monetary challenges of railroad tariffs or rules by a trade organization, without requiring its members to participate directly in the case. This purpose has allowed numerous trade organizations, including NGFA and NAFCA, to challenge railroad tariffs and rules without

the compulsory involvement of their members. The Director's Decision appears at odds with Section 11701(b) by requiring members of an organization to become active participants in a proceeding even though the organization itself is not required to exhibit direct damage from the practices it challenges. In other words, it seems that, pursuant to Section 11701(b), a trade organization can challenge railroad practices on the grounds that they are unlawful or unreasonable, without the involvement of its members, while the Director's Decision plainly exposes all such members to active participation in the case, if not to discovery harassment as well.

NGFA provides a perfect example of a trade organization that is vulnerable to harassment through the issuance of subpoenas. Although NGFA has approximately 1,000 members, those 1,000 members include many small, country elevators, inexperienced in the ways of litigation and with discovery compliance. Such elevators (or some other subset of NGFA's membership) will likely have an interest in any proceeding at the STB in which NGFA appears. Under the Director's Decision, this interest, coupled with a finding of relevance of the information sought, is enough to grant a petition by a party to the proceeding for the issuance of third-party subpoenas on association members, subject to a technical conference or other procedure to hopefully narrow the scope of the subpoena. Each such elevator will require the assistance of counsel to participate in any conferences with the STB staff, negotiate with the requesting party, and prepare documents properly responsive to subpoenas. Whereas the Class I railroads generally are represented by the nation's largest law firms (with virtually unlimited paralegal, associate, and junior partner attorneys), shippers, including their trade associations, normally are represented by significantly smaller law firms, with a staff of from 6 to 12 people, and occasionally by sole practitioners. A Board-sanctioned demand by a Class I railroad for subpoenas to require hun-

dreds of small members of a trade association to produce documents can be an insurmountable burden in terms of costs, manpower, and time constraints.

On the other hand, many members of trade associations such as NGFA are larger companies, with business records distributed throughout dozens or more shipping locations, unlike Class I railroads, whose records normally are centralized. Subpoenas for the production of documents served on larger companies where records are stored at multiple locations likewise will impose costs, time burdens, and manpower constraints.

The Board should not apply a policy of granting petitions for subpoenas to be served on all members of a trade associations based on a mere showing of interest in the proceeding and potential relevance. Rather, it should require a party seeking third party discovery to make a strong showing of need for the information, and it should carefully scrutinize the nature of that association, the number of its members, and particularly, the burdens that would be imposed by subpoena compliance. The Director's Decision does not appear to have considered any of those issues, leaving them to be fought over by the individual trade association members upon which subpoenas are served.

A recent, pending, case involving NAFCA and Union Pacific Railroad Company, Docket No. 42119, *North America Freight Association v. Union Pacific Railroad Company*, offers a different solution to discovery than the one adopted by the Director's Decision. In that case, UP served detailed written interrogatories and document requests on approximately 16 members of NAFCA. Upon objection by NAFCA, the parties conferred. UP argued that, if NAFCA did not comply with UP's discovery requests, UP could seek subpoenas. NAFCA knew, as it suspected UP did as well, that any member of NAFCA served with a subpoena could comply by offering to make documents available where they are located. Since there are several large shipper mem-

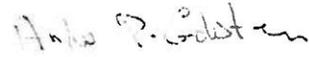
bers of NAFCA, whose records are located in multiple locations throughout the United States, NAFCA believed UP was aware that it might have faced an expensive task in sending lawyers to all of the locations where requested documents might have been located.

In any event, the parties agreed on an aggregated form of answer by NAFCA, in which it would describe the practices of its members collectively, rather than individually, in response to UP's discovery requests. UP reserved the right to seek more specific discovery if NAFCA's general answers were deemed insufficient. NAFCA emphasizes that this process was followed without a Board order authorizing the issuance of subpoenas and thereby tilting the scales in favor of UP. Where each of the parties realizes that it has something to lose by failing to negotiate a solution to discovery without a subpoena order hanging over the heads of one of the parties, there is an excellent chance that an agreement will be reached.

NGFA and NAFCA submit that the Board should not use its authority to issue subpoenas as a means, knowingly or unknowingly, of exerting pressure on member companies of associations who are not in the same position as the large railroads. The fact that associations have initiated litigation on matters that affect their members does not mean that the individual members must pay a heavy price for having authorized their association to act on their behalf.

NGFA and NAFCA urge the Board to grant the joint appeal of Western Coal Traffic  
League, et al.

Respectfully submitted,



Andrew P. Goldstein  
McCarthy, Sweeney & Harkaway, P.C.  
1825 K Street, N.W., Suite 700  
Washington, DC 20006



Thomas W. Wilcox  
GKG Law, P.C.  
1054 31<sup>st</sup> Street, N.W., Suite 200  
Washington, DC 20007

Attorneys for  
National Grain and Feed Association  
and North America Freight Car Association

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of March, 2012, I served a copy of the foregoing via email to the following addressees:

Samuel M. Sipe, Jr.  
Steptoe & Johnson LLP  
1330 Connecticut Avenue, NW  
Washington, D.C. 20036  
ssipe@steptoe.com

Christopher S. Perry  
U.S. Department of Transportation  
Office of the General Counsel  
1200 New Jersey Avenue, S.E., Room W94-316  
Washington, DC 20590  
christopher.perry@dot.gov

Michael L. Rosenthal  
Covington & Burling LLP  
1201 Pennsylvania Avenue, N.W.  
Washington, DC 20004-2401  
mrosenthal@cov.com

John H. LeSeur  
Slover & Loftus LLP  
1224 17th Street, N.W.  
Washington, DC 20036  
jhl@sloverandloftus.com

Eric Von Salzen  
McLeod, Watkinson & Miller  
One Massachusetts Avenue, N.W., Suite 800  
Washington, D.C. 20001  
evonsalzen@mwmlaw.com

Sandra L. Brown  
Thompson Hine LLP  
1919 M Street, N.W., Suite 700  
Washington, DC 20036  
Sandra.Brown@thompsonhine.com

*Andrew P. Goldstein*

---

Andrew P. Goldstein