

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Docket No. EP 725**

**PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY AND CSX  
TRANSPORTATION, INC. TO INSTITUTE A RULEMAKING PROCEEDING TO  
EXEMPT RAILROADS FROM FILING AGRICULTURAL TRANSPORTATION  
CONTRACT SUMMARIES**

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

The National Grain and Feed Association ("NGFA") hereby replies in opposition to the petition to institute a rulemaking filed by Norfolk Southern Railway Company ("NS") and CSX Transportation, Inc. ("CSXT") in this proceeding ("Petition"), the goal of which is to eliminate the statutory requirement in 49 U.S.C. §10709(d)(1), as implemented in the Board's regulations at 49 C.F.R. Part 1313, that railroads file with the Board a summary of each contract for the transportation of "agricultural products . . . and products therefrom." As explained herein, the Petition should be denied and this statutory protection for agricultural shippers should remain in place and unchanged. In support of this reply, the NGFA states the following:

**A. Identity and Interest of the NGFA**

The NGFA is a U.S.-based nonprofit trade association, established in 1896, that consists of more than 1,050 member companies from all sectors of the grain elevator, animal feed and feed ingredient manufacturing, integrated livestock and poultry, grain processing, biofuels and

exporting businesses. NGFA members operate about 7,000 facilities nationwide that handle more than 70 percent of all U.S. grains and oilseeds. The NGFA also consists of 26 affiliated State and Regional Grain and Feed Associations, has a joint operating and services agreement with the North American Export Grain Association, and has a strategic alliance with the Pet Food Institute.

**B. §10709(d)(1) is One of Several Statutory Protections Specific to Agricultural Shippers Enacted to Help Protect Them from the Abuse of Railroad Market Power**

The Petition is silent on the legislative intent and purpose of §10709(d)(1), relying instead merely on the petitioners' allegation that the agricultural contract summaries they and other railroads are required to file under §10709(d)(1) are not currently being used sufficiently by the STB and rail shippers, specifically in formal proceedings. Petition at 4, 8. As the NGFA explains below, the contract summaries are in fact accessed and reviewed by several of the NGFA's member companies who responded to an inquiry by the NGFA after the Petition was filed. The fact that agricultural commodity summaries have not been used in formal Board proceedings is beside the point. The legislative history of §10709(d)(1) is not extensive, but it is reasonably clear that Congress enacted it specifically to continue to provide the Board and agricultural shippers with critical information about railroad contracting practices to help prevent the abuse of market power by railroads against agricultural shippers, and also out of concern that the railroads' fulfill their common carrier obligations for these commodities. Such concerns for all commodities shipped by railroad were a primary basis for the predecessor to §10709, 49 U.S.C. §10713,<sup>1</sup> which was much more extensive. H. Rep. No. 96-1431 (Conf. Rep.), 96th Cong. 2d Sess. (1980), reprinted in (1980) U.S. Code Cong. and Admin. News, pp. 3977, 4002-

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<sup>1</sup> See The Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895 (Sec. 208), reprinted in (1980) U.S. Code Cong. and Admin. News, pp. 1908-10.

03; H. Rep. No. 96-1430, 96th Cong., 2nd Sess. (1980), reprinted in (1980) U.S. Code Cong. & Admin. News, pp. 4130-33.

As explained in the Conference Committee Report on the ICC Termination Act legislation, Congress specifically determined that enough concerns remained about rail service to agricultural shippers in 1995 to continue to require the railroads to provide those shippers and the Board with information about railroad contracting practices:

Section 318 (Contracts) amends 49 U.S.C. 10713, which authorizes rail carriers to enter into contracts for transportation that are thereby removed from regulation, to retain the filing requirements for, and regulatory restrictions upon, rail transportation contracts only for agricultural products. *Except as to those commodities*, the contract limitations represent unneeded and unduly burdensome regulation, particularly given the elimination of tariffs for other traffic. Any egregious equipment and discrimination concerns could be brought to the Board under other remaining statutory provisions.

In the case of agricultural commodity contracts, only a contract summary, and not the contract itself, would be filed. In other respects, jurisdiction over agricultural commodity contracts remains as under the Staggers Act. *The purpose for retaining this jurisdiction is primarily due to concerns brought before the Committee about enforcement of the common carrier obligation.*

H. R. Conf. Rep. 104-422 at 175 (emphasis added). See also, ICC Termination Act of 1995, H. Res. 259, 104th Cong. (1995), statement of Rep. David Minge, Member ("Mr. Chairman, we have piles of grain sitting on the ground, some of it being exposed to moisture, some it now heating up, and this is going to cause loss for farmers and for elevators. What we need is greater shipping resources."); and statement of Rep. Jim Oberstar, Member ("[the Senate amendment adding section 318] includes a provision that requires summaries of agricultural contracts to be filed with the panel. It includes a requirement that contract carriers remain subject to the common carrier obligation."). This legislative intent for the purpose of §10709(d)(1) is reflected in the Board's regulations on complaint proceedings arising out of contract information covered by 49 C.F.R. Part 1313. See 49 C.F.R. §1313.9.

Further, during the past six months, the Board has been informed by the NGFA and other parties of the widespread rail service problems and capacity constraints in the railroad industry today, and their impacts on agricultural shippers. These problems and issues culminated in the Board commencing a proceeding in *United States Rail Service Issues*, STB Docket No. EP 724, in which it received testimony from the NGFA and many other parties on service and capacity issues. These issues in part call into question the extent to which NS, CSXT, and other railroads are presently capable of meeting their contract and common carrier obligations to agricultural rail shippers. It is clear to the NGFA and its members that, despite the railroads' best efforts, the current service and capacity issues will take some time to resolve. The need for the information and transparency on railroad agricultural commodity contracting practices covered by §10709(d)(1) and Part 1313 is therefore presently at least as great, if not greater, than in the past.

**C. Member Companies of the NGFA Do Access and Use the Contract Summaries, and Expect Increased Access and Use in Light of Current Conditions**

In response to the Petition the NGFA surveyed some of its key rail-reliant member companies as to their use of agricultural contract summaries submitted to the Board. A few members reported that they regularly review the contract summaries as they pertain to their asset mix, and they perceive the contract summary requirement to be one of a limited number of protections against the abuse of railroad market power. Consistent with the discussion in the preceding section of this Reply, some other members acknowledged that they had not accessed and utilized filed contract summaries in the past, but several of these companies believe that rail contracts may become more prevalent given existing rail service deficiencies and the prospects that capacity challenges likely will persist for the foreseeable future as demand for energy, agricultural and other sectors for rail service continue to increase. As an example, one such

NGFA member company stated that it had moved from contract rates to almost exclusively common carrier rates for some commodities in past years, but anticipates a shift back to more contracts for agricultural commodity movements in response to the current capacity problems could result in increased review of the summaries. Despite the current prevalence of tariff rates, the NGFA estimates that a significant volume of grain and oilseed rail traffic - ranging from 20-25 percent - continues to be transported under contracts.

In short, the NGFA and its members see no reason or justification for the Board to decrease the level of transparency to railroad commercial activities *vis a vis* agricultural commodities through the elimination of this statutory protection inserted by Congress to protect agricultural rail shippers. If it takes any action in this area, the Board should consider taking steps to make the information provided pursuant to Part 1313 more accessible and useable to agricultural shippers by publishing it in a readily accessible and searchable database.

**D. The NS's and CSX's Claims of Burden are Insufficient to Justify the Board's Consideration of Relieving All Railroads of an Important Statutory Obligation**

The alleged burdens incurred by NS and CSX to comply with §10709(d)(1) and the Board's regulations are clearly insufficient to justify the Board entertaining the exemption they seek. NS claims that "NS spends" only around 6 hours per week preparing agricultural contract summaries. Petition at 7; Verified Statement of Lynn Harris at 3. This is the same amount of time NS reported its employees spent on this matter in 2010 and 2011. Petition at 7. There is no assertion that these tasks are carried out by a single person within NS, so the 6 hours could be spread out over numerous people who spend minutes a day on this matter. Even if one person performed all of the listed tasks, spending a little more than 1 hour per day in a five day work week to achieve compliance for the entire railroad seems far from excessive. Additionally, fully

two thirds of the allegedly burdensome work (4 out of 6 hours) is due to NS's business choice to use a form of contract known as "signatureless contracts," which NS claims increase the manual effort to prepare a summary as required by the Board's regulations. Ferris V.S. at 2. Leaving aside the question of whether such signatureless contracts are preferred or desired by NS's agricultural customers, or rather are instead used by NS for its convenience and economic benefit, compliance burdens a railroad creates for itself cannot be used to argue it must no longer comply with a federal statute. Moreover, NS does not claim that it incurs any financial burden by complying with the statute and the Board's regulations.<sup>2</sup>

For its part, CSXT makes no specific or quantified allegations that support its claim of undue burden, instead choosing to assert vaguely that it has "spent considerable time and expense" developing data systems, and incurred "substantial information technology maintenance costs and employees' time to administer and maintain the compliance system." Verified Statement of Eric C. Mack, Sr., at 2.<sup>3</sup>

The Petition seeks the exemption of all railroads from their obligations under §10709(d)(1), but no assertions or claims are made as to whether any other railroad believes it is unduly burdened by complying with the requirement to file agricultural contract summaries.

The petitioners' assertions of undue burden are weak and insufficient standing alone, but are particularly inadequate given the express purpose of this statute to provide the Board and agricultural shippers with information to help guard against the abuse of market power by the

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<sup>2</sup> The Ferris V.S. includes a summary of the nominal filing fees associated with NS's compliance, but NS does not, and cannot reasonably claim the approximately \$5,000 it spent in filing fees over the past four years financially burdened the Norfolk Southern Railway.

<sup>3</sup> Like NS, CSXT's witness Mack provides an approximate compliance filing fee amount, but CSXT also makes no claim that payment of these fees financially burdened the railroad. Also, the vagueness of CSXT's assertions is compounded by the fact Mr. Mack provides no time frame over which CSXT incurred the time and expense his statement complains of. The Board's regulations at 49 C.F.R. Part 1313 have been in effect for 18 years.

railroads, and to help ensure they are meeting their common carrier obligations. The value to shippers of this information and its potential use greatly exceeds the meager burdens described by NS and CSX.

**D. Granting the Exemption Would Result in Harm to Agricultural Shippers**

The petitioners assert that granting the exemption would not result in any harm to any party. Petition at 8. The NGFA respectfully disagrees. First, granting the exemption they seek would adversely affect the agricultural shippers who access and use this information. Second, the NGFA and its members take no solace in the Petitioners' primary argument that no party would be harmed because an individual party "could always seek to revoke the exemption once approved." *Id.*, citing 49 U.S.C. §10502(d). In support of this proposition the Petition merely summarizes the general rules that would apply to such a request. This discussion nevertheless highlights the significant evidentiary hurdles a party would have to overcome to try and reinstate the contract summary filing requirement. Moreover, there is no discussion or analysis of how those rules might apply to this particular statutory provision, since eliminating the summary filing requirement would mean key information a party would need to support a petition to revoke the exemption would no longer be publicly available (presumably, a party seeking to revoke the exemption would need current contracting information that demonstrated an abuse of market power and/or failure to fulfill the common carrier obligation). Assuming for the sake of argument that the evidentiary hurdles were surmountable, revoking the exemption would also require the proponent to incur the cost and expend other resources needed to litigate the request, and then to wait the time it would take the Board to consider the evidence and render a decision. In the case cited in footnote 7 of the Petition, for example, it took four years to reach a decision,

and the Interstate Commerce Commission ultimately declined to revoke the requested exemption, in any event.

Third, the Board has received volumes of comments and testimony from the NGFA and numerous other parties over the past decade explaining how the consolidation of the railroad industry has resulted in a significant concentration of market power into a handful of Class I railroads. More recently, the significant service deficiencies and capacity issues discussed above have resulted in considerable harm to many agricultural shippers. Relieving the railroads of their obligation to file agricultural contract summaries, and thereby eliminating the availability of this information to agricultural shippers, would harm them by eliminating one of the few means they have to ascertain whether they are being harmed by railroad commercial practices. The fact that agricultural contract summaries have not been used in formal Board proceedings in the past does not mean they are not fulfilling, or could not fulfill their purpose as envisioned by Congress to protect agricultural shippers from the abuse of market power.

#### **F. Conclusion**

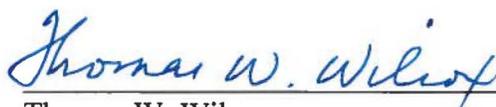
In summary, the Petition should be denied. 49 U.S.C. §10709(d)(1) contains a statutory protection specifically enacted for agricultural shippers which should not be administratively repealed through the Board's exemption authority. For the reasons forth in this reply, continuing to require the railroads to comply with this statutory provision is necessary to carry out the transportation policy of 49 U.S.C. §10101, and its continued application is needed to protect agricultural shippers from the abuse of market power, since that was its legislative intent. As such, the requirements of 49 U.S.C. §10502(a) are not met.<sup>4</sup> NGFA further submits that given the current state of the rail industry, the Board should err on the side of increasing transparency

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<sup>4</sup> The petitioners acknowledge that the provision "(a) the transaction or service is of limited scope" is inapplicable to their Petition. Petition at 3.

and retaining statutory protections for rail shippers. This is particularly true, where, as in this instance, the burden on the railroads to comply with their statutory and regulatory obligations is minimal.

Respectfully Submitted,

A handwritten signature in blue ink that reads "Thomas W. Wilcox". The signature is written in a cursive style and is positioned above a horizontal line.

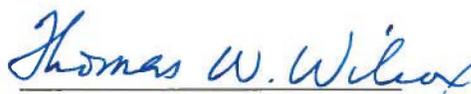
Thomas W. Wilcox  
Svetlana Lyubchenko  
GKG Law, P.C.  
1054 31st Street, N.W., Suite 200  
Washington, DC 20007  
(202) 342-5248

***Counsel for the National Grain and Feed  
Association***

June 2, 2014

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Reply to Petition of Norfolk Southern Railway Company and CSX Transportation, Inc. to Institute a Rulemaking Proceeding to Exempt Railroads from Filing Agricultural Transportation Contract Summaries has been served this ~~2<sup>nd</sup>~~<sup>2<sup>nd</sup></sup> day of June, 2014 on counsel for each of the petitioners by first-class mail, postage prepaid.

  
Thomas W. Wilcox  
Thomas W. Wilcox