



ATTORNEYS AT LAW  
CANAL SQUARE 1054 THIRTY-FIRST STREET, NW WASHINGTON, DC 20007  
TELEPHONE: 202.342.5200 FACSIMILE: 202.342.5219

RICHARD BAR  
BRENDAN COLLINS  
STEVEN JOHN FELLMAN  
EDWARD D. GREENBERG  
KATHARINE FOSTER MEYER  
DAVID K. MONROE  
TROY A. ROLF  
DAVID P. STREET  
KEITH G. SWIRSKY  
THOMAS W. WILCOX  
CHRISTOPHER B. YOUNGER\*

SVELLANA V. LYUBCHENKO

ROBERT N. KHARASCH\*

\* OF COUNSEL  
\* NOT ADMITTED IN DC

MINNESOTA OFFICE:  
700 TWELVE OAKS CENTER DRIVE, SUITE 700  
WAYZATA, MN 55391  
TELEPHONE: 952.449.8817 FACSIMILE: 952.449.0614

WRITER'S DIRECT E-MAIL ADDRESS  
TWILCOX@GKGLAW.COM

WRITER'S DIRECT DIAL NUMBER  
202-342-5248

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**VIA E-FILING**

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

ENTERED  
Office of Proceedings  
January 7, 2013  
Part of  
Public Record

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

Dear Ms. Brown:

Enclosed for e-filing in the above-captioned case, please find the Rebuttal Comments of The National Grain and Feed Association.

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**

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**STB Docket No. EP 715  
RATE REGULATION REFORMS**

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**REBUTTAL 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 Rebuttal Comments addressing several aspects of the reply submissions of Class I railroad parties and the Association of American Railroads (“AAR”) on December 7, 2012.

The Opening Comments of the NGFA informed the Board that (1) the nature of the transportation characteristics of rail shipments of shippers of grains, oilseeds, feed, feed ingredients and other grain products (“grain shippers”) makes use of the current Full-SAC and Simplified Stand Alone Cost (“SSAC”) rules and processes infeasible to grain shippers to test the reasonableness of their railroad rates; and (2) the current Three Benchmark Methodology (“3B”) rules must be modified by the Board if they are to provide a meaningful means for grain shippers to exercise their statutorily provided right to challenge the reasonableness of grain shipper railroad rates.

The consistent message to the Board by the NGFA and other shipper parties in response to the Notice of Proposed Rulemaking (“NOPR”) in this proceeding has been that the current

rate regulatory rules tip the scales heavily in favor of the railroads because they pose no meaningful constraint on the rates carriers can charge a vast number of rail shippers. Moreover, the current rules and the proposals in the NOPR are set against the backdrop of a heavily concentrated railroad industry in which a few remaining Class 1 railroads possess and exercise a great deal of market power, as the Board was informed firsthand in EP 705, *Competition in the Railroad Industry*.

The statements by the NGFA and other grain rail shipper parties in this proceeding concerning the ineffectiveness of the current SSAC and 3B rules are supported by the undisputable fact that not a single grain shipper has filed a complaint at the Board seeking to test the reasonableness of its rail rates since 1981. This is despite the fact that in 2008, the Board assured the NGFA and other grain shipper interests that adoption of the SSAC and 3B rules 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.

Therefore, the NGFA believes it is highly likely that, if no changes are made to the SSAC and 3B rules, grain shippers will continue to refrain from challenging the reasonableness of their rail rates at the Board.

Not surprisingly, the reply comments of the Class I railroad parties and the AAR constitute a continuation of the vigorous defense of the *status quo* mounted in their opening comments – combined with, and exacerbated by, proposals to make the Board’s rules even more onerous for rail shippers. In these rebuttal comments, the NGFA addresses several aspects of the Class I railroad and AAR reply filings.

*First*, it simply is wrong for the Board to conclude, as the railroad parties urge, that any changes to better balance the Board's current rules to afford rail shippers with the statutory protections they are provided somehow will unleash a torrent of rate cases being filed at the Board. *See e.g.*, NS/CSX Reply at 12 (changes to the relief limit on SSAC cases "would be certain to lead to the filing of many more rate cases," or, in the case of doubling the 3B limit to \$2 million "would also be certain to generate more rate litigation than resolution of rate negotiations through private contracts.") In this regard, the NGFA agrees with NS and CSX that "[t]he more that parties' expectations about the rate regulatory regime are settled, the fewer challenges there should be. Settled expectations about the regulatory regime promote the goal of the [Rail Transportation Policy] because clarity in the regulatory limits promotes negotiated contracts and minimizes the need for federal regulatory control." *Id.* at 5.

However, the regulatory regime also would be settled if the Board was to modify its current SSAC and 3B rules to address the undisputable fact that grain shippers do not now attempt to use those rules to challenge rates they believe to be unreasonable, and if such modifications resulted in the possibility that grain shippers might obtain relief from unreasonable rates that is presently unavailable to them. Doing so simply would be a clarification and settling of the parties' expectations. In this regard, modifications to the Board's rate reasonableness rules to make them more accessible and meaningful to rail shippers would not eliminate private-sector commercial discussions. Indeed, it only would modify the environment in which the discussions occurred and foster more equitable commercial results.

NS and CSX further assert that adopting the proposals in the NOPR would "tip the scales in private negotiations by allowing the specter of regulatory intervention unfairly to influence such negotiations." NS/CSX Reply at 21. The NGFA submits that under the *status quo*, the

absence of meaningful regulatory intervention for grain shippers unfairly skews and influences current private negotiations by making them occur in an environment heavily favoring the railroad party.

While the railroads' predictions of increased rate litigation clearly are overblown, the possibility that modifications to the SSAC and 3B rules might lead to more cases being filed is not a reason to refrain from acting. Any inference that the Board might be unable to simultaneously process multiple SSAC or 3B cases should be rejected out of hand, as the Rail Transportation Policy clearly requires the Board "to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under [49 U.S.C. §10101-11901]." 49 U.S.C. §10101(15).

*Second*, the railroads' insistence that the Board must have detailed information on the litigation costs of multiple SSAC cases before any increase in the relief limits of the SSAC or 3B rules is considered is nothing more than a further attempt to perpetuate the *status quo*. See NS/CSX Reply at 26 ("any increase in the 3B relief limit must first be supported by solid probative evidence showing that the costs of SSAC cases are higher than the Board determined in *Simplified Standards*."); see also AAR Reply at 16 (Board must have "detailed evidence as to the cost of Simplified SAC before it considers raising the cap on the Three Benchmark approach"). The Board did not have specific evidence of litigation costs when it adopted the initial relief limits in *Simplified Standards*. Rather, it established the limits based on its estimates of the litigation costs – estimates shippers have consistently argued were too low. Further, only one rail shipper has sought to utilize the SSAC rules since their adoption in 2007, and there is nothing in the record of this proceeding that would indicate that more cases will be filed at the Board if the current rules are retained. Notwithstanding, the railroads argue that the Board

should not make *any* changes to the SSAC or 3B relief limits in the absence of extensive, detailed evidence on the costs of a SSAC case from multiple cases. For example, BNSF admits there currently is no basis for accurately estimating the cost of litigating a SSAC case, but nevertheless asserts the 3B relief limit cannot be raised until the Board knows the specific costs of a SSAC case. BNSF Reply at 5. The railroads' "Catch-22" insistence on specific cost data for multiple SSAC cases before raising the SACC or 3B relief limits may be considered is merely part of their overall argument to maintain the *status quo*.

The railroads' insistence on specific evidence of shipper litigation costs also stands in sharp contrast to their request that the Board take at face value their unsupported assertions about the alleged "extraordinary burden on the railroads imposed by the second disclosure requirements" of SSAC cases. AAR Reply at 14. For example, NS and CSX opine extensively on the alleged burdens of discovery on railroads in SSAC cases. However, neither NS nor CSX has ever been a defendant in a SSAC case. Thus, there can be no actual evidence supporting their allegations of burden. Moreover, UP, the one railroad which has been a defendant in a SSAC case, similarly complains of the burdens of the second disclosure requirement, but submits no actual evidence of such burden. UP Reply at 13. On the contrary, UP states that it improved the computer program it developed for the case it was involved in, thus inferring that the discovery burdens and associated costs to UP in a future SSAC case would be smaller. *Id.*

*Third*, the railroads continue to object to any increase in the relief limit in 3B cases, or any other modifications to those rules that would make them more accessible and relevant to grain shippers. The NGFA has suggested that, if the Board adopts its "linked" proposal to lift the SSAC relief cap, the 3B relief cap should be raised to at least \$4 million for the reasons articulated in the NGFA's opening evidence. If the Board removes the SSAC relief limit without

“linking” it to a requirement that a party undertake a full-SAC road property investment, then the NGFA suggests that the relief limit should be increased to \$3 million.

Several railroad parties argue that increasing the current relief limit in 3B cases will result in a downward “ratcheting” of rail rates to the jurisdictional floor of 180% of URCS variable costs. AAR Reply at 15; BNSF Reply at 7-8. These assertions are significantly overstated and exaggerated. While these parties are correct that the D.C. Circuit recognized that setting rates using a comparison of other rates for similar transportation could result, over time, in a gradual reduction of all rates to the jurisdictional floor, the court readily acknowledged that this phenomenon could occur only if a comparison of the rates formula “is employed regularly and repeatedly.” *Burlington Northern Railroad Co. v. I.C.C.*, 985 F.2d 589, 597 (D.C. Cir. 1993). Similarly, in *Simplified Standards*, the Board stated that “even if every single potential captive shipper were to seek, and obtain, the maximum relief available under the Three-Benchmark approach this would result in a reduction in total revenues by less than 2.4%,” and “for *that* ratcheting potential to be realized, there would have to be an *avalanche* of rate cases brought to the agency.” *Simplified Standards* at 74 (emphasis supplied). Contrary to the assertion of AAR, neither the D.C. Circuit nor the Board has ever stated that “ratcheting” rates down to the jurisdictional threshold level was “likely.” AAR Reply at 15. Further, as noted earlier in these Rebuttal Comments, there is no evidence that raising the relief cap in 3B cases will result in an “avalanche” of 3B cases.

The railroad parties also criticize the potential changes to the 3B rules suggested by the NGFA to make them more relevant to grain shippers in today’s railroad pricing environment, where the significant market power of the Class 1 railroads enables them to institute simultaneous, across-the-board rate increases by commodity or region. In such an environment,

all of the rates for “comparable” movements could be set at levels that would be unreasonable according to the Board’s Full-SAC or SSAC principles. However, a rate methodology that determines reasonableness by comparing rates for similar movements would provide no relief. The NGFA believes each of its recommendations warrant full consideration by the Board, and the NGFA reiterates that its suggestions to modify the 3B rules are offered as part of a more general request that the Board undertake a significantly more in-depth review of the SSAC and 3B rules, either as part of this or a separate proceeding. This more in-depth review is necessary, particularly given the fact that grain shippers have never sought to utilize the Board’s 3B and SSAC rules to challenge the reasonableness of their rates, despite the fact that rail rates for grain shipments have increased significantly since the rules’ adoption.

In conclusion, the railroads’ arguments in the Reply phase of this proceeding are all variations on the same general theme that the Board should either maintain the *status quo* of its SSAC and 3B rules, or make them even less accessible and relevant to rail shippers. Maintaining the *status quo* would be an unacceptable, undesirable and objectionable outcome of the NOPR.

The NGFA strongly urges the Board to continue its efforts to improve its Simplified Standards by making them *less* expensive, *less* complicated, more equitable and more expedited. Specifically, as explained in more detail in the NGFA’s other filings in this proceeding, the NGFA (1) supports removal of the SSAC relief cap without requiring complainants to conduct a Full-SAC road property investment evidentiary presentation; (2) supports increasing the 3B relief cap to \$3 million if the Board’s “linked” SSAC proposal is not adopted and to at least \$4 million if it is; and (3) strongly urges the Board to undertake a more in-depth review of the

SSAC and 3B rules with the goal of making them more accessible and meaningful to grain shippers.

Respectfully submitted,



Thomas W. Wilcox  
GKG Law, P.C.  
1054 Thirty-First Street, NW  
Suite 200  
Washington, DC 20007  
(202) 342-5248

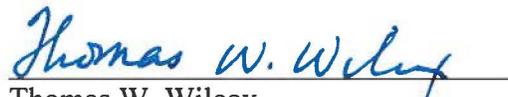
Andrew P. Goldstein  
McCarthy, Sweeney & Harkaway, P.C.  
1825 K Street, N.W., Suite 700  
Washington, DC 20006  
(202) 775-5560

*Attorneys for The National Grain and Feed  
Association*

January 7, 2013

**Certificate of Service**

I hereby certify that on January 7, 2013, I served a copy of the foregoing Rebuttal 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