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October 23, 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 Opening 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

**OPENING 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 Opening Comments on the proposals contained in a Notice of Proposed Rulemaking (“NOPR”) to make several modifications to the Board’s rate reasonableness rules.

**I.
INTRODUCTION**

The NGFA is a U.S.-based nonprofit trade association, established in 1989, that consists of more than 1,050-member companies from all sectors of the grain elevator, animal feed and feed ingredient, integrated livestock and poultry, grain processing, biofuels and exporting business. NGFA-member companies 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 strategic alliances with the North American Export Grain Association, and has a strategic alliance with the Pet Food Institute.

The NGFA commends the Board for initiating this and other recent proceedings designed to improve upon its current rules and processes in an effort to protect shippers against

unreasonable rail practices. As evidenced by this proceeding, the NGFA also appreciates 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 has been an active participant in all previous Board proceedings addressing freight rate rules and competition in the railroad industry. In those proceedings, the NGFA repeatedly voiced concerns over decreased rail-to-rail competition for grains and oilseeds – nearly 75 percent of agricultural geographic areas lost rail competition between 1992 and 2007¹ – and the increased rate levels charged to grain shippers. The NGFA also has commented previously that the Board’s rules do not provide a meaningful way for rail shippers of agricultural commodities to challenge unreasonable rail rates.²

The consequences for U.S. agriculture are significant. In 2011, railroads hauled approximately 30 percent of all commercial movements of whole U.S. grains and oilseeds – most of which are shipped by NGFA-member companies. Agricultural commodity shipments are characterized by multiple origin-and-destination (“O/D”) pairs that are influenced heavily by

¹ U.S. Department of Agriculture and U.S. Department of Transportation, *Study of Rural Transportation Issues* (April 2010).

² Ex Parte No. 646, *Rail Rate Challenges in Small Cases*, Testimony of Dr. Kendell W. Keith on Behalf of the NGFA, filed April 16, 2003; Ex Parte No. 646 (Sub. No. 1) *Simplified Standards for Rail Rate Cases*, Joint Opening Comments of the NGFA and numerous other grain shipper organizations, filed October 24, 2006 (“*Joint 2006 Comments*”) and Joint Opening Comments of the NGFA and numerous other associations (“*Joint 2006 Comments II*”); Ex Parte No. 665, *Rail Transportation of Grain*, Comments of the NGFA, filed October 30, 2006; Ex Parte No. 680, *Study of Competition in the Freight Rail Industry*, Joint Comments of the NGFA and other agricultural interests, filed December 22, 2008; Ex Parte No. 705, *Competition in the Rail Industry*, Reply Comments of the NGFA, filed May 27, 2011, and Testimony to the Surface Transportation Board, filed June 10, 2011.

fluctuating market demand. Further, final delivery points to which agricultural commodities are shipped often have multiple sources of supply, which means that the volumes or carloads ascribed to a particular movement rarely are constant and predictable on a year-to-year basis. In short, the disparate O/D pairs that characterize agricultural commodity shipments differ markedly from other non-agricultural commodity shipments that often are characterized by relatively static O/D pairs.

While the NGFA supports the Board initiating this proceeding, it nevertheless believes that the NOPR falls short of achieving its stated goals. In the NGFA's view, the NOPR incorrectly presumes that existing rate rules provide a meaningful regulatory backstop to railroad abuse of market power, and therefore require only a few changes to improve their usefulness to rail shippers of grains, oilseeds, feed, feed ingredients and other grain products (hereafter collectively referred to as "grain shippers"). NOPR at 1 (STB has "a comprehensive set of rules that provides a variety of constraints on railroad pricing.").

To the contrary, 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 rate case being brought since the 1981 commencement of *McCarty Farms, Inc., et al., v. Burlington Northern Inc.* While substantial increases in railroad rates for agricultural commodities in the past decade have generated attention from Congress, the Government Accountability Office, this Board, and the U.S. Departments of Agriculture and

Transportation,³ exactly *zero* rate complaints have been filed by grain shippers seeking relief from the Board under any of its rate rules over this same timeframe.

Thus, while the NGFA in these opening comments proposes changes and improvements to the Three Benchmark Methodology (“3B”) and Simplified Stand Alone Cost (“SSAC”) rules, we also urge the Board to undertake a more comprehensive, in-depth review of its Simplified Standards for rail rate regulation⁴ and propose additional modifications that result in more substantive, meaningful changes to create a more meaningful, usable mechanism shippers can use to exercise their statutory rights to challenge unreasonable freight rail rates.

II. SCOPE OF THE NGFA’S OPENING COMMENTS

The NGFA previously has submitted comments to the Board explaining that the Full-SAC rules simply are not an option to test the reasonableness of rail rates for the vast majority of grain shippers, despite the breadth and scope of grain rail movements and the significant revenues they generate for railroads. *See, e.g., Joint 2006 Comments* at 4-16. For this reason, the NGFA in these comments does 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 focus on the NOPR’s proposed changes to the Board’s SSAC and 3B rules. We believe both of these methodologies require significant

³ *See, Joint 2006 Comments* at 16, *citing* Freight Railroads, United States Government Accountability Office, Report No. GAO-07-94 (October 2006); STB Ex Parte No. 665, *Rail Transportation of Grain* (Notice of October 11, 2006); *A Study of Competition in the US Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition*, Laurits R. Christensen Associates, Inc., Revised Final Report prepared for Surface Transportation Board (November 2009); *Study of Rural Transportation Issues, supra*, Note 1.

⁴ Ex Parte No. 646 (Sub-No. 1) *Simplified Standards for Rail Rate Cases* (served September 5, 2007); (“*Simplified Standards*”); *recon. denied* March 19, 2008; *aff’d*, *CSX Transportation, Inc. et al v. Surface Transportation Board*, 568 F.3d 236 (D.C. Cir. 2009).

changes, again as evidenced by the fact that 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 *Simplified Standards* 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 Board’s Simplified Standards Must Become Less Complicated, Less Expensive, and More Expedited

Congress, when enacting the ICC Termination Act of 1995, directed the Board to develop simplified and expedited methods for challenging certain freight rail rates. But Congress neither suggested nor required the Board to include in its simplified rate-rule regime the “constrained market pricing” (“CMP”) that provides the theoretical underpinning of the Full-SAC rail rate rules. *Simplified Standards* at 13. As it has previously, the NGFA continues to believe that the CMP and stand-alone cost theories, which were adopted in the context of high-volume shipments between repetitive O/D pairs (e.g., coal movements), are inappropriate for reviewing the reasonableness of rates associated with agricultural shipments that have disparate “starburst” O/D characteristics, as discussed previously.⁵

⁵ See, *Joint 2006 Comments* at 17-18.

1. The Board Should Remove the Damage Limit in SSAC Cases Without “Linking” it to a Full-SAC RPI Showing

The “centerpiece” of the NOPR’s SSAC proposal is to remove the limit on relief that could be provided for cases brought under the SSAC test and procedures. NOPR at 3. The current limit is \$5 million over a five-year prescription period. The NOPR states that the goal of removing the SSAC damage cap “is to encourage shippers to use a simplified alternative to a Full-SAC analysis that is economically sound, yet provides a less complicated and less expensive way to challenge rates . . .” by shifting more cases to the SSAC rules and away from the Full-SAC rules. *Id.*

However, the Board’s stated objective of encouraging shippers to use the SSAC methodology is undermined by its concurrent proposal to remove a current simplifying element of the SSAC rules and replace it with a much more complex and expensive Full-SAC component: the calculation of the full replacement costs of the facilities of the rail system used to serve the affected shipper, as determined by the SSAC rules. *Id.* at 13. In the NOPR, the Board acknowledges that this change would require the complainant to incur the additional costs of preparing and submitting detailed expert testimony, and to confront procedural delays attributable to additional evidence being submitted by the parties. The Board attempts to justify its proposal to link removal of the recovery limit to the creation of a more complex replacement cost analysis by estimating that a SSAC case still would cost less than \$2.75 million – half the Board’s estimate of the cost of a Full-SAC case. *Id.* at 15.

Rather than creating additional hurdles for utilizing the SSAC methodology, the NGFA believes the Board should be exploring ways to make the SSAC rules *less* expensive, *less* complicated and *more* expedited. The NGFA continues to believe that it is highly questionable

whether the existing SSAC rules promulgated in 2007 created a meaningful avenue that grain shippers and other similarly situated rail shippers without high-volume, repetitive, long-term rail movements could use to seek rate relief. In this regard, it is illustrative to note that the Board never has applied the SSAC rules and their principles to an actual rail rate dispute in the five years the SSAC rules have existed. In fact, only one shipper has ever filed a rate complaint seeking to use the SSAC rules, and that proceeding was settled before the parties submitted any evidence to the Board.⁶ Accordingly, while the current limit on recoverable damages has been cited by some parties as the reason they have not attempted to seek relief under the SSAC rules, the Board should not assume this is the *only* reason that no other rail shipper has ever filed a SSAC case.

For grain shippers, the SSAC rules pose essentially the same regulatory barriers as the Full-SAC rules. For example, the SSAC rules require the complainant's evidence to reconstruct all of the tracks making up the "predominant route of movement" covered by the challenged rate, with essentially no ability to remove the costs of inefficiencies. This is an extremely difficult proposition, particularly if the rate in question represents more than a simple point-to-point movement from one origin to one destination. In addition, the proposed requirement of "constructing" all of the tracks embeds in the SSAC methodology the fundamental obstacle to pursuing a Full-SAC case for grain shipments (high litigation costs and complexity attributable to multiple movements to multiple destinations over many rail lines). Second, the SSAC rules apply the same "cross-subsidy" rules applied in a Full-SAC presentation, another primary obstacle to potential grain shipper complainants, particularly those shipping on low-density branch lines. The NGFA also continues to believe the Board has significantly underestimated

⁶ Docket NOR 42115, *U.S. Magnesium, LLC v. Union Pacific Railroad Company*.

the cost of pursuing a SSAC case under its current rules. *See, Joint 2006 Comments II* at 23-28 (estimating that legal and consulting costs for a SSAC case under current rules would exceed \$2 million).

To make the SSAC rules more accessible and feasible for all rail shippers – and to comply with the Congressional directive in 49 U.S.C. §10701(d) – the NGFA believes the Board must adopt additional changes that truly make those rules simpler and less expensive to use and administer. Accordingly, the NGFA believes the Board at a minimum should amend its proposal to delete the requirement that a shipper submit a Full-SAC replacement cost-evidentiary presentation as part of a SSAC proceeding. In addition, the Board should clarify that removal of the damage 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.

2. The Damage Limit for 3B Cases Should Be Not Less than \$4 Million If the NOPR’s SSAC Proposal is Adopted

In the NOPR, the Board proposes to raise the relief limit in 3B cases from \$1 million to \$2 million over five years. NOPR at 15. Apparently as justification for increasing the 3B limit to this level, the Board estimates that the costs of pursuing a SSAC case under its proposed “linked” removal of the damage limit will be “significantly less” than \$2.75 million. Thus, the Board proposes to set the 3B relief limit at approximately the revised estimated cost of a SSAC case, presumably deemed by the Board to be \$2 million.

As stated previously, the NGFA continues to believe that the actual cost of bringing a SSAC case under the *current* SSAC rules would exceed \$2 million. The Board concedes that the NOPR’s “linked” removal of the SSAC relief limit would further increase litigation costs. Thus, even if the basic rationale for setting the 3B limit at the estimated cost of a SSAC case was

sound, setting the 3B relief cap at \$2 million is too low. Apart from tying the 3B relief limit to the estimated costs of a SSAC case, the NGFA maintains that a primary reason why none of its members have found the current 3B rules to be useful for seeking relief from high railroad rates is that the current damage limit of \$1 million over five years is far too low given the anticipated actual costs of pursuing a 3B case and other factors, and that raising the limit to at least \$3 million is warranted. *See, Joint 2006 Comments II*, Verified Statement of Thomas D. Crowley at 14 (legal and consulting costs could reach \$400,000); Verified Statement of Gerald W. Fauth at 46 (just consulting fees could reach \$225,000); Ex Parte No. 705, *Competition in the Rail Industry*, Reply Comments of the NGFA, dated May 27, 2011 at 2 (benefits of litigation must be a minimum of \$3 million over five years to justify a 3B case).

The NGFA's assertion that the Board's 2007 estimates of the costs of undertaking a 3B case were too low is supported by the few 3B cases that have been filed. In those cases, it appears railroad defendants have raised numerous, expert-intensive arguments on "other relevant factors" and the use of current waybill data to which the complainant was required to respond.⁷ There is, therefore, a lack of clarity on what "other relevant factors" may be allowed to increase the rates arrived at using the 3B calculation. This uncertainty will translate into increased litigation costs for future complainants should another 3B case ever be filed. Moreover, the litigation cost estimates of the Board supporting the \$1 million relief limit did not include the costs of oral argument, which the Board now routinely schedules for all rail rate cases.

⁷ In Docket NOR 42132, *Canexus Chemicals Canada LP v. BNSF Railway*, the Opening Evidence of the defendant railroad included an alternative three benchmark methodology rate calculation based on current BNSF revenues and costs, and proposed four "other relevant factors" adjustments to the maximum reasonable rates produced by applying the methodology to the Confidential Waybill Sample data provided to the parties by the Board. The defendant railroad added still another proposed "other relevant factor" adjustment in its Reply Evidence.

In summary, the NGFA believes the Board's proposal to increase the 3B relief limit to its estimated costs of a SSAC case is conceptually flawed, and that a relief limit set at \$2 million over five years is too low, in any event. The NGFA believes that if the Board accepts our recommendation that the proposed "linked" SSAC proposal be removed, the 3B relief limit should be increased to at least \$3 million. If the "linked" SSAC proposal is retained, the relief limit should be set significantly higher, to at least \$4 million.

3. The Board Should Consider Additional Improvements to the Simplified Standards to Make Them More Accessible and Useful to Grain Shippers

In addition to the foregoing, the NGFA believes the Board should undertake a significantly more in-depth look at its Simplified Standards, either in this rulemaking proceeding or in a new proceeding, with the expectation of making additional modifications to achieve the goal of complying with Congressional directives regarding non-Full-SAC rate reasonableness rules and procedures. Several examples of additional areas of inquiry are set forth below.

First, in the *Joint 2006 Comments* in Ex Parte No. 646 (Sub-No.1), the NGFA joined many other shipper organizations in urging the Board to withdraw the SSAC proposed rules for the numerous reasons stated in the joint comments. Given that five years have elapsed and the Board has yet to see any evidence from any party seeking to apply the rules – let alone issued a decision applying these rules – the NGFA urges the Board to undertake a comprehensive review of the SSAC rules to examine whether in practice they have met the Congressional directive in §10701(d) of "establishing a simplified and expedited method for determining the reasonableness of challenged rates" for all rail shippers where a Full-SAC case is too costly. Based upon its members' experience, the NGFA believes this is not the case. Further, the NGFA does not believe that the changes contained in the NOPR will make it any more feasible for grain

shippers to file SSAC cases. A more comprehensive review and determination would be appropriate, particularly given the Board's stated goal in this proceeding to "encourage [SSAC's] use over the more complex, costly, and time-consuming Full-SAC test." NOPR at 13.

Second, recent pricing practices of the Class I railroads – particularly the practice of assessing simultaneous rate increases across-the-board for certain commodities or groups of commodities – have made the existing 3B rules less useful and effective for determining rate reasonableness. Such practices undercut current 3B rules, which are designed to correct instances where a shipper is singled out for market abuse and require the shipper to justify such a finding by comparing its rates to other, similar movements of the same commodity. For example, if the given rate a complainant is challenging is increased by 500 percent, but the rates of all other similarly situated shippers also are increased 500 percent, then all rates might be at "unreasonable" levels given the Board's current principles. Yet in this example, the 3B rules would not provide an avenue for any relief.

Such rail pricing policies should prompt the Board to consider changing its 3B rules to eliminate consideration of such practices by carriers in determining whether a given rate is unreasonable. In this regard, the NGFA suggests potential changes that could warrant consideration include some combination of the following:

(a) Mitigate a railroad's ability to manipulate comparability for a single commodity or class of commodities by expanding comparability criteria to include different commodities with similar rail operating statistics, comparable movements on other railroads, or other criteria; (b) cap the amount of change allowed in a comparison group of commodities as measured year-over-

year on a five-year historic basis; or (c) place an upper limit on the R/VC ratio of any traffic that can be included in a comparison group.

Third, given that Class I railroads are achieving “revenue adequacy” with more frequency, the Board should reconsider the appropriateness of the current goals set forth in the ICC Termination Act as they are applied to the financial health of the railroad industry. If the Board recognizes, as the NGFA believes it should, that present methodologies for challenging unreasonably high rail rates are not workable, yet believes that it is constrained by statute or case law against proposing and implementing more workable measures to correct the problem, the NGFA believes the Board should ask Congress for additional statutory authority designed to provide genuinely simplified and expedited standards for resolving rail rate disputes.

IV. CONCLUSION

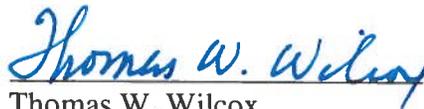
The NGFA supports efforts by the Board designed to improve its rules and policies to provide a workable mechanism to challenge unreasonable rates. In summary, the NGFA respectfully requests in these opening comments that the Board:

- Retain its proposal to remove the limit on rate relief provided under SSAC rules, but eliminate the “linked” requirement that those challenging unreasonable freight rates use the more complex and expensive Full-SAC requirement to calculate full replacement costs of the facilities of the rail system used to serve the affected shipper.
- Clarify that the recovery limit under SSAC rules is for a 10-year, rather than five-year, period, to be consistent with a Full-SAC prescription period.

- Increase to at least \$3 million the recovery limit under the 3B rules over five years and to at least \$4 million if the “linked” Full-SAC replacement cost-evidentiary presentation is not removed from the SSAC proposal in accordance with the NGFA’s recommendation.
- Undertake a more comprehensive review of its Simplified Standards and develop further modifications that will enable them to meet the Congressional directives concerning rail rate disputes where the Full-SAC methodology is not justified.

The NGFA appreciates the opportunity to submit these Opening Comments, and looks forward to continuing to be an active participant in this proceeding.

Respectfully submitted,



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*Attorneys for The National Grain and Feed
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October 23, 2012

Certificate of Service

I hereby certify that on October 23, 2012, I served a copy of the foregoing Opening Comments of the National Grain and Feed Association via email and U.S. mail on each of the Parties of Record in this proceeding.


Thomas W. Wilcox