



National Grain and Feed Association

1250 Eye St., N.W., Suite 1003, Washington, D.C. 20005-3922, Phone: (202) 289-0873, FAX: (202) 289-5388, Web Site: www.ngfa.org

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Docket No. EP 714

INFORMATION REQUIRED IN NOTICES AND PETITIONS CONTAINING INTERCHANGE COMMITMENTS

OPENING COMMENTS OF THE NATIONAL GRAIN AND FEED ASSOCIATION

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Pursuant to the decisions served in this proceeding on November 1 and November 15, 2012, the National Grain and Feed Association (“NGFA”) submits these Opening Comments on the proposals contained in a Notice of Proposed Rulemaking (“NOPR”) that would require parties to provide additional information concerning interchange commitments – and to do so earlier in the process – when filing a notice or petition for exemption with the Surface Transportation Board pertaining to the sale or lease of a rail line that contains terms that limit the incentive or ability of the purchaser or tenant carrier to interchange traffic with rail carriers other than the seller or lessor railroad.

I. INTRODUCTION

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, 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 enhance shipper protections against unreasonable rail practices. The issue of so-called “paper barriers” to rail access and competition long has been a concern of rail shippers of grains, oilseeds, feed, feed ingredients and other grain products (hereafter collectively referred to as “grain shippers”). As testament to this fact, the NGFA was an active participant in STB Ex Parte No. 575, *Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League* commenced by the Board in 2005. In comments submitted in that proceeding, and in oral testimony provided at the public hearing conducted in conjunction with the proceeding, the NGFA urged the Board to initiate a rulemaking to reconsider the extent to which it should have oversight over interchange commitments, as well as to determine if rail carriers should have the ability to retain such barriers in perpetuity.

As noted in the NOPR, the Board in 2007 declined to adopt a single rule of general applicability governing interchange commitments under the *Ex Parte No. 575* proceeding, and decided instead to consider the propriety of such commitments on a case-by-case basis.

At that time, the Board indicated it would give especially close scrutiny to those interchange commitments that totally ban the lessee/purchasing railroad from interchanging traffic with a third-party carrier, as well as those commitments that were not time-limited. The NGFA has supported both of these tenets as requiring particularly close review by the Board, and believe the burden of justifying such commitments should be on the carrier.

The Board also proposed new disclosure requirements in 2007 to ensure appropriate advance regulatory scrutiny of the sale and lease arrangements containing interchange commitments, and in May 2008 formally adopted the proposed rules. In the present proceeding, the Board proposes to require that additional information be provided in notices and petitions for exemption to include, among other things, specific details regarding the impact the interchange commitment will have on shippers and the purchaser or lessee railroad. The objective, as the Board states, is to provide sufficient information to enable shippers, other interested parties and the Board itself to determine whether the exemption process is appropriate for a given transaction. As the Board also notes, it is proposing that such information be disclosed earlier in the process, given the “very short deadlines” associated with the notice of exemption process.

II

ARGUMENT

The NGFA strongly supports the Board’s proposal to require that parties filing notices of exemption to affirmatively disclose whether the underlying agreement concerning rail line sale

or lease transaction contains an interchange commitment, and to provide additional information when doing so.

Specifically, the NGFA supports that such filings should include the following highly relevant additional information:

- A list of shippers that currently use or have used the affected rail line within the last two years.
- The number of carloads those shippers originated or terminated (submitted under seal and confidential).
- A certification that the railroad has notified affected shippers of the proposed transaction and interchange commitment.
- A list of third-party railroads that physically interchange with the rail line sought to be acquired or leased.
- The percentage of the purchasing/leasing railroad's revenue projected to be derived from operations on the line subject to the interchange commitment (submitted under seal and confidential).
- The estimated difference between the sale or lease price with and without the interchange commitment (submitted under seal and confidential).
- An estimate of the discontinued annual value of the interchange commitment to the Class I (or other incumbent carrier) leasing or selling the line (submitted under seal and confidential).
- A change in the caption of the notice case so that the existence of an interchange commitment is clear and apparent by reading the title.

In addition, the NGFA strongly supports the Board's proposal that the previously cited information be submitted simultaneously with the filing of a notice or petition for exemption. The NGFA concurs with the Board's NOPR statement that providing such information up-front will allow affected shippers, other interested parties and the Board itself to evaluate contracts

containing interchange commitments in a more timely manner without the delay associated with seeking additional information.

Finally, the NGFA wishes to utilize this opportunity to reiterate its overarching concerns – expressed during the *STB Ex Parte No. 575* proceeding – regarding interchange commitments that last in perpetuity or that restrict or eliminate the ability of the lessee/purchaser railroad to interchange traffic with a third-party carrier. As noted in the NGFA’s statements submitted in that proceeding, interchange commitments containing such features may be detrimental to grain shippers by:

- restricting or prohibiting short-line carriers from hauling traffic over competitive routes;
- subjecting the short-line carrier’s traffic to potentially higher rates by foreclosing the possibility of using potentially lower-rate competitive routes;
- limiting the ability of short-line railroads to receive an adequate and timely supply of cars, since they depend for car supply on the connections of the Class I railroad selling or leasing the line. This issue is especially relevant to the grain, feed and grain processing industry, where smaller facilities often rely on Class I carriers for car supply; and
- compelling short-line rail traffic to move over routes that are more congested than alternative routes of another carrier that might be available were it not for the existence of paper barriers.

For these reasons, the NGFA strongly associates itself with the Board’s NOPR statement that long-term interchange commitments have the potential to “control the competitive environment – affecting rates and service for years to come.” Requiring parties in rail line transactions to provide as much relevant information as possible – and to do so as early as possible – will assist grain shippers, other interested parties and the Board in identifying

interchange commitments that are anti-competitive and otherwise harmful to grain shippers, and in fashioning appropriate remedies based on the relevant facts and circumstances .

**III.
CONCLUSION**

The NGFA supports the Board-proposed changes to require additional relevant information be provided about interchange commitments contained in notices or petitions for exemption when entering into transactions involving rail-line acquisitions.

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

Respectfully submitted,

Handwritten signature of Randall C. Gordon in blue ink, with the initials "TWW" written at the end of the signature.

Randall C. Gordon
President
National Grain and Feed Association
1250 Eye St., N.W.
Suite 1003
Washington, D.C., 20005
(202) 289-0873

Thomas W. Wilcox
GKG Law, P.C.
1054 Thirty-First Street, N.W.
Suite 200
Washington, D.C., 20007
(202) 342-5248
*Attorney for The National Grain and Feed
Association*

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