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BEFORE THE
SURFACE TRANSPORTATION BOARD

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COMPETITION IN THE RAIL INDUSTRY

Joint Comments of

Agricultural Retailers Association, National Association of Wheat Growers, National Barley Growers Association, National Chicken Council, National Corn Growers Association, National Cotton Council, National Council of Farmer Cooperatives, National Grain and Feed Association, National Oilseed Processors Association, Renewable Fuels Association, The Fertilizer Institute, USA Rice Federation

We appreciate the opportunity to present our views on competition in the rail industry from an agricultural market perspective. All sectors that rely on transportation need a financially healthy rail industry, but we also need railroads to actively compete for business in agriculture and other sectors. If the U.S. can build an improved competitive position, both domestically and globally, industries can grow and produce more jobs in the U.S. The railroads, as well as other commercial transport modes, can make a strong contribution to the U.S. competitive position.

The Nature and Structure of Agricultural Markets

We believe it may be helpful to provide a brief description of agricultural shipping markets, because they are unique in structure, and that structure helps to shape many of our views and the comments we offer in this statement. Agricultural shippers and receivers, including grain

elevators, feed mills, and processing plants, ship from many points to many destinations. There are approximately 15,000 agricultural-related shipping points in the U.S. Thus, agricultural shippers tend to ship relatively low volumes compared to other industries. Rail shipping comprises about 35% of the physical volume in agricultural shipping markets; trucks hold about a 50% market share; and the balance is served by the barge industry.

We believe a fair assessment of the rail transportation situation that now exists in the U.S. indicates that there are many agricultural locations that have a reasonable degree of competition, but there are some situations where competition could be described as less than adequate to discipline the market. The longer hauls of product to market tend to be more challenged in accessing competitive rail service, because trucks simply cannot be price competitive on long-haul movements.

The origination of grain from U.S. farms going to elevators or processors almost always starts with a truck movement. Assuming there are relatively nearby receiving locations to buy farm-trucked grain that offer competitive rail alternatives on outbound shipping, farmers at least have an initial opportunity to access competitive modes when grain first leaves the farm. However, once grain has been transferred from farm to a commercial facility, it is rarely transferred to another facility because grain handling costs, such as elevator "in and out" charges tend to be high enough to prevent movements between facilities. (Costs involved in multiple grain handlings are not just the result of labor costs, machinery depreciation, and the electrical power to run equipment, but also include the loss in grain quality---such as the increase in broken kernels---from multiple handlings.)

Another challenge to agricultural markets is that they change frequently in both the pricing of grain and the direction of movements. Prices change frequently in response to shifts in production (which can be related to planting decisions and weather patterns) and shifts in demand. Sometimes export markets are strong which will pull grain toward ports for movement overseas. Likewise the recent boom in ethanol production has redirected grain flows and relative pricing in very fundamental ways just over the last 5 years toward more domestic points where ethanol production has become concentrated. The point about this is that carriers and shippers alike need to be alert to rapid changes in agricultural markets and pricing of freight needs to be

flexible and responsive to market shifts to keep agricultural products competitive and moving toward the most desirable market.

The fact that individual agriculture shipper locations tend to be lower volume than many industries and markets often shift direction means that agricultural shippers cannot afford heavy litigation costs to solve situations where competition seems to be lacking (whether the absolute rate level is excessive to reach a market; or a switch is closed or priced so high as to impede economic access; service levels; or other problems). In the years it will take to pursue litigation, markets may change and render a litigation victory moot.

Competitive Issues for Agricultural Markets

Rail rates: While many rail rates are not an issue, some are and it appears to be a growing problem in some areas of the country. Rail rates for agricultural markets (as well as coal and chemicals) increased strongly even in relative soft rail markets from 2006 to 2010 (see chart on the next page). Ag rates increased 30% across these four years, compared to an average of 24% across all product lines. While complete data is not available for intermodal shipments because of the lack of comparable data for two of the major carriers, it appears that intermodal rate increases continue to lag considerably behind the rate increases in other product shipments.

Given the economics of the typical agricultural shipper for any particular shipping location, it is highly unlikely that such shipper would ever bring a stand alone cost case with a rail carrier. It simply cannot be justified given the litigation and costs involved. Agricultural shippers have been advocates of providing rate relief through the small rate case proceeding (utilizing the 3-B standard), but in general, the risk vs. potential reward of such a case is not well balanced and is against the interests of the shipper. We estimate a typical 3-B case in our industry would cost about \$250,000, and the total maximum benefit over 5 years would be \$1 million. Given the risk of losing, plus the likelihood that even if a case is won, the benefit might be less than the maximum allowed, we see few if any situations where agricultural shippers will find the 3-B small rate case approach appealing to use as it now stands.

Percentage Change in Revenue per Car 2006 to 2010
By Carrier, by Product
(Based upon Annual Data for 2006 & 2010)

	<u>All</u> <u>Rail Cars</u>	<u>Ag</u> <u>Shipments</u>	<u>Chemical</u> <u>Shipments</u>	<u>Coal</u>	<u>Intermodal</u>
UP	21%	27%	23%	32%	20%
BNSF	29%	30%	**	51%	**
CSX	28%	38%	41%	65%	**
NS	<u>18%</u>	<u>26%</u>	<u>27%</u>	<u>32%</u>	<u>1%</u>
Simple Avg. (not weighted by volume of movements per carrier)	24%	30%	30%	45%	11%

** Data for these product lines were not comparable for the two years, 2006 and 2010

Switching is a problem in many agricultural markets. Sometimes a switch is physically closed or closed by the high costs imposed by the carrier(s). (We have witnessed switch charges increasing from \$100 per car to over \$500 per car in approximately 3 years.) The Midtec decision created virtually insurmountable barriers to demonstrating a switch is uneconomic and creates barriers to competition that should be corrected. We would respectfully advise the STB to reconsider the Midtec decision in the interest of creating some additional competitive marketing alternatives to shippers. The STB should also consider establishing some revenue to variable cost thresholds for switches, and if the railroad charges for such switches exceed the

thresholds (e.g., 180%), the burden of proof that the switch cost is reasonable should shift to the carrier. While the cost of providing the switch should not be the only consideration, neither should it be ignored as a major factor in assessing what is reasonable in these situations, and what is reasonably necessary in consideration that the STB is charged in its preamble to seek competitive market solutions to issues. It would appear that making it simpler to litigate such matters would encourage greater cooperation in rail markets between carriers, and this is extremely important to maintaining a national rail network plus encouraging additional competition and creating opportunities for business and jobs growth.

Paper Barriers: While we acknowledge the STB has stated that this proceeding will not focus on interchange commitments between shortline spin-offs and Class I carriers (giving rise to “paper barrier” issues), we want the STB to be aware that this remains a significant problem for our industry. The STB’s decision in Ex Parte 575 leaves intact the system allowing “paper barriers” that restrict the ability of a purchaser or tenant railroad to interchange traffic with carriers other than the seller or landlord railroad. The STB decided against general regulations for such arrangements; as such, the STB will only examine such matters on a case-by-case basis following a shipper’s complaint. The decision also makes it clear that shippers would face an uphill battle in winning such a complaint. Paper barriers may have some justification and even may bring about some indirect benefits to rail customers, including encouraging railroads to sell branch line or other properties while they are sufficiently sound to handle traffic without major rehabilitation expenses. Also, admittedly, the STB does need some discretion in deciding the best outcome in specific circumstances. However, there comes a time when the barriers become an impediment to economic efficiency. Paper barriers impede competition and a process for critical evaluation to assess market impacts is needed. If they are judged by the STB as necessary to facilitate an initial transaction between the Class I and Class II or III, then the restriction should not be permitted to continue in perpetuity, and the term for the paper barrier should be decided at the time the original transaction is consummated.

Unreasonable business practices by carriers are increasingly a concern of shippers, because such practices are risk-and-cost shifting methods that increase the cost of doing business of the shipper which affects the competitiveness of the agricultural and food industries served by rail, but are not related directly to rail rates. For example, in the recent past, we have observed

exorbitant charges by rail carriers for overloaded cars; we've also seen a proposal by a carrier to assess penalties on the shipper for build-up of snow and ice on railcars in transit---an issue that is not under the shipper's control; other carriers have required as a condition of carriage that the shipper fully indemnify the railroad against any loss and damage to the grain handling facility even when the damage is caused directly by railroad employees that are operating equipment on site. Another practice issue is a railroad's demand for a minimum volume commitment as a pre-condition to a shipper receiving an assured supply of cars. The agricultural industry provides more than 50 percent of the cars utilized to ship grain/grain products, but these shipper owners of cars have little say in new regulations and the associated costs imposed on such equipment, as the rail industry maintains tight control on the regulation of private cars through its own industry governing bodies.

Another business practice of carriers that affects tank cars (99% of all tank cars are owned by shippers) is "mileage equalization" practices which permit the railroads to route tank cars excessively long distances (for the railroads' logistical convenience) but mileage payments to the car owners only reflect the most efficient mileage route. forcing the shipper-owner of the tank cars to pay additional monies in car upkeep, repair and depreciation. Fuel surcharges have also in some cases been exorbitant and well beyond covering just the added increase in cost of fuel. In another case a shipper filed for an injunction against a carrier's new tariff declining to accept order bills of lading, and never even received a timely response to the filing from the STB. All of these unreasonable practice cases have proven difficult, costly and time consuming to litigate before the STB. We need a better approach at the STB to address these issues that do not relate directly to rates or service, but which do affect the ability of rail-served industries to compete for domestic and global markets.

Alternative mechanisms to resolve disputes: As the STB knows, National Grain and Feed Association (NGFA) in 1998 established a private arbitration system with the major railroads that applies to specific business non-rate related issues between carriers and shippers. It does not apply to prospective relief, such as a cease and desist order. Matters that can be arbitrated by NGFA members under this system include: 1) application of railroad demurrage rules or terms; 2) misrouting of loaded rail cars or locomotives; 3) receipts and bills of lading (e.g., Carmack disputes for loss and damage; 4) contracts; 5) application of special car or equipment program

rules (e.g., certificates of transportation, vouchers, pool contracts); 6) application of railroad general car distribution rules; 7) disputes involving mishandling of private cars; 8) disputes involving a lease by a rail user of real property owned by a railroad; and 9) property damage claims arising under a sidetrack agreement.

Please note that this private arbitration system operated by NGFA applies only to agricultural shippers or receivers (and only to whole grain, oilseed and associated processed products), but to the extent it does apply to issues in agricultural markets, it has proven to be a useful mechanism to either formally solve problems, or to encourage business dialogue that can lead to quicker business solutions that make sense for both parties. The STB has initiated a proceeding to assess whether it could establish a more user-friendly system of arbitration through the agency, and we would encourage that process to continue. NGFA also supports the concept of developing other private remedies between shipper/receivers and carriers. Any alternative dispute resolution method must be viewed as fair and objective, but also reasonably straight-forward on process and ease of use.

Financial health of railroads has been an issue, in particular in the 1980s when the industry was trying to recover from years of over-regulation by government and surplus capacity. By any reasonable measure of general business profitability, we believe the railroads have become very profitable and there are few risks to general rail profitability if the STB chose to make some reasonable adjustments in moving toward a more competitive environment. Long-term we think the carriers stand to benefit by reasonable increases in competition, such as those we are suggesting. We believe an improved regulatory structure that provides improved access to litigation and problem solving in rail markets between railroads and their customers can lead to improved prospects for growing the business which would support an improved overall U.S. economy and provide for more vibrant job growth in many sectors served by rail.

Respectfully submitted,

Agricultural Retailers Association

National Association of Wheat Growers

National Barley Growers Association

National Chicken Council

National Corn Growers Association

National Cotton Council

National Council of Farmer Cooperatives

National Grain and Feed Association

National Oilseed Processors Association

Renewable Fuels Association

The Fertilizer Institute

USA Rice Federation

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