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**National Grain and Feed Association**

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Docket No. EP 714**

**INFORMATION REQUIRED IN NOTICES AND PETITIONS CONTAINING  
INTERCHANGE COMMITMENTS**

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

Pursuant to the decisions served in this proceeding on November 1 and November 15, 2012, the National Grain and Feed Association (“NGFA”) submits these Reply Comments addressing several of the arguments raised by railroad parties in their opening comments on the Notice of Proposed Rulemaking (“NOPR”) in this proceeding. The NOPR would require parties to provide additional information concerning interchange commitments – and to do so earlier in the process – when filing a notice of 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**

In its Opening Comments, the NGFA commended 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”). This issue also long has been of interest and concern to the STB, which began scrutinizing the anti-competitive nature of paper barriers as far back as 1998 in Ex Parte No. 575, *Review of Rail Access and Competition Issues*. During its deliberations, the Board adopted the term “interchange commitment” instead of “paper barrier,” since it determined the former was “a broader and more neutral term.”<sup>1</sup> In the NOPR, the Board proposes to require that additional information be submitted with notices of and petitions for exemption for rail transactions, including, among other things, specific details regarding the impact an interchange commitment will have on shippers and the purchaser or lessee railroad. The objective, as the Board states, is to ensure that shippers, other interested parties and the Board itself have sufficient information 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.

The NGFA believes the NOPR, which would add to the information the Board initially decided to require in Ex Parte 575 (Sub-No.1), is a logical and prudent outgrowth of the Board’s

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<sup>1</sup> STB Ex Parte No. 575 (Sub-No. 1), *Disclosure of Rail Interchange Commitments*, (served May 29, 2008) note 2.

decision in that proceeding to decline to adopt a single rule of general applicability governing interchange commitments and to instead consider the propriety of interchange commitments on a case-by-case basis.

## II ARGUMENT

While the NGFA and other shipper parties generally approve of the NOPR and the Board's objectives in issuing it, railroad parties who filed opening comments oppose the NOPR in its entirety. Opening Comments of The American Short Line and Regional Railroad Association ("ASLRRA Op.") at 3; Opening Comments of the Association of American Railroads ("AAR Op.") at 2; Opening Comments of the Norfolk Southern Railway ("NS Op.") at 3; Opening Comments of the Union Pacific Railroad Company ("UP Op.") at 2. The balance of the railroad parties' respective opening comments are, for the most part, devoted to advancing arguments as to why the *status quo* concerning disclosure of interchange commitments should not be disturbed. The NGFA submits that railroad parties arguing for the *status quo* has become a familiar refrain in response to the recent salutary efforts by the Board to take a serious look at its existing rules and policies, and to propose revisions that could provide marginal benefits and relief to rail shippers. Similar themes have been struck by railroad parties participating in EP 705, *Competition in the Railroad Industry*, EP 711, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules* and EP 715, *Rate Regulation Reforms*.

The NGFA submits that, as with these other proceedings undertaken by the Board, the *status quo* concerning the examination of the anti-competitive effects of interchange commitments is also unacceptable and therefore must be changed. The Board's NOPR in this proceeding is a positive step in that direction.

The primary arguments raised by the railroad parties for not making any changes to the existing interchange commitment disclosure rules appear to allege that the proposed new information disclosure requirements will have a chilling effect on future line transactions by imposing additional costs and burdens on the parties to the transaction. AAR Op. at 2; ASLRRRA Op. at 14; UP Op. at 3-4. To the extent that there are issues concerning the ability of short lines and Class I railroads to supply all of the information subsumed within the individual components of the NOPR, the Board can and should address those specifics in this proceeding, *provided* it concludes they are legitimate. *See* ALSRRA Op. at 14-20; UP Op. at 8-12. However, the NGFA believes the Board should be circumspect about claims that changing the current rules to require additional information to be provided in notice of and petition for exemption proceedings concerning rail line transactions will result in a large scale cessation of sales or leases of branch lines to short line railroads. Similarly, the notion that the adoption of regulations that merely require the submittal of more information on a transaction “will mean additional abandonments and discontinuances by Class I railroads that will hurt rail customers and rural communities that depend on continued rail service,” ASLRRRA Op. at 3, also seems to be overstated and unfounded.

In the first place, the additional information requirements obviously will not affect the approval of a line sale or other transaction that includes an interchange commitment, provided it is not anti-competitive. Second, to the extent a Class I railroad elected to attempt to abandon a branch line rather than sell or lease the line to a short line without an anti-competitive interchange commitment, rail shippers along the line and prospective purchasers of the line are protected by 49 U.S.C. §§10903 and 10904, as well as the Board’s regulations and policies governing proposed abandonments and offers of financial assistance. These rules and policies

enable active rail lines to remain in service and/or be purchased or subsidized by short lines and other entities to preserve service to shippers who depend on it.

The Board also should resist attempts by railroad party commenters to downplay the harm of interchange commitments to rail shippers. NS Op. at 3, 5; AAR Op. at 4; ASLRRRA Op. at 9. The NGFA agrees that “[g]enerally, interchange commitments have facilitated the creation and growth of short line railroads, which in turn has benefited the public by lowering transportation costs, improving service, and in some cases preserving rail transportation . . .”<sup>2</sup> However, it is also just as true that in the experience of shippers, including grain shippers, there have been instances in which interchange commitments/paper barriers have prevented competition, increased transportation costs, and resulted in the deterioration of rail service. Therefore, it is certainly untrue that “the Board’s concern over perceived competition issues, which seem to form the basis of the Board’s proposed requirements in this proceeding, is unfounded.” AAR Op. at 4.

Indeed, given the extensive amount of testimony and evidence the Board has heard on the topic of paper barriers over the past 14 years, the Board should be troubled that some railroad parties in this proceeding are asserting that, “rather than raising competitive concerns, as suggested by the NPR, transactions that contain interchange commitment [sic] do not diminish competition. The shippers on the line do not lose any competitive options after the transaction is consummated. They were served by one rail carrier before and by one rail carrier after the transaction.” *Id.*; ASLRRRA Op. at 9; NS Op. at 5. Under this rationale, all interchange commitments, even “proposed interchange commitments that would totally ban an interchange or

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<sup>2</sup> Ex Parte No. 575, *Review of Rail Access & Competition Issues – Renewed Petition of the Western Coal Traffic League*, (served October 30, 2007) at 7.

that would continue in perpetuity” – the commitments the Board stated it would apply “a higher level of scrutiny” to<sup>3</sup> - would be unassailable. *See* NS Op. at 5 (“[e]ven in the case of an interchange commitment that prohibits interchange with any other connecting carriers . . . the shipper’s transportation options are the same pre- or post-lease. In either case, the shipper is in the position of having single carrier service.”).

The NGFA strongly disagrees with this rail carrier position. Just because an interchange commitment might preserve single carrier service from the conveying Class I railroad does not mean there is no competitive harm or other violation of the applicable statutes. Interchange commitments should be unlawful if they unreasonably foreclose competitive options or other benefits to rail shippers that could have been obtained had the Class I railroad (1) sold the branch line to a short line without interchange restrictions or (2) instituted the Board’s formal proposed abandonment and offers of financial assistance processes. The NGFA believes that the railroad parties’ position set forth previously in this statement should only heighten the Board’s desire to more closely examine proposed line transactions early in the approval process, and it provides additional confirmation that the proposals in the NOPR should be pursued.

Accordingly, the NGFA continues to strongly support the Board’s proposal to require that parties filing notices of exemption and petition for exemption to affirmatively disclose whether the underlying agreement concerning rail line sale or lease transaction contains an interchange commitment, and to provide the additional information set forth in the NOPR when doing so, as modified in this proceeding in response to complaints of burden, unavailability of

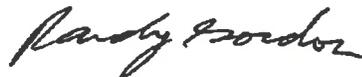
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<sup>3</sup> Ex Parte No. 575 (Sub-No.1), *Disclosure of Interchange Commitments*, (served May 29, 2008) at 2.

information, or similar complaints by railroad commenters that the Board determines raise legitimate grounds for modifying the NOPR.

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

Respectfully submitted,



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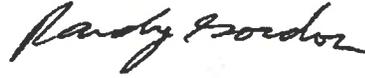
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Dated: January 17, 2013

Certificate of Service

I hereby certify that the foregoing Reply Comments of the National Grain and Feed Association were served on all parties of records by U.S. first-class mail.

A handwritten signature in cursive script that reads "Randy Gordon".

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Randall C. Gordon