

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 665
RAIL TRANSPORTATION OF GRAIN

SUPPLEMENTAL COMMENTS OF
NATIONAL GRAIN AND FEED ASSOCIATION

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Dated: January 12, 2007

On November 7, 2006, the Board issued a Decision stating that the record for this proceeding will remain open until January 12, 2007 to allow for the filing of supplemental comments or information. National Grain and Feed Association ("NGFA"), which has previously participated in this proceeding, submits the following supplemental comments pursuant to the November 7 Decision.

At its November 2, 2006 hearing, the Board questioned grain industry witnesses regarding two issues that had been raised in their testimony. The first issue related to railroad requirements that shippers prepare bills of lading. The second issue related to financial assistance provided by railroads for the construction of agricultural facilities located on their lines. These supplemental comments respond to both issues.

CLASS I RAILROAD TARIFF PROVISIONS REGARDING BILL OF LADING
PREPARATION AND SUBMISSION BY CUSTOMERS

As summarized below (in alphabetical carrier order), virtually all carriers have provisions requiring shippers to prepare bills of lading, and most either impose penalties if those bills of lading are not submitted via email and instead are submitted by fax. Indeed, some carriers will not accept faxed documents at all.

To place the carriers' bill of lading preparation provisions in perspective, it is necessary to recognize that there is almost always a tariff or practical compulsion, or both, for a shipper to tender a car to the railroad for movement once the car is loaded. For instance, if the car involved is carrier equipment, it is subject to demurrage provisions, generally at rates of approximately \$75.00 per day. If it is private equipment, demurrage may not apply, but the cars need to be moved off industry tracks in order not to clog the facility. Either way, everyone involved is aware that it would be costly to retain loaded

cars on industry track, which sets the stage for railroads to demand that shippers prepare bills of lading, without which the cars cannot be forwarded.

The legal duty to issue a bill of lading clearly falls on the carrier and not the shipper: "A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall issue a receipt or bill of lading for property it receives for transportation under this part." 49 U.S.C. § 11706(a). The carrier tariff provisions described below not only purport to transfer that legal obligation to shippers, but in some cases to impose monetary penalties on shippers if they make an error in performing the carrier's legal duty to issue a bill of lading in the first instance.

The trend away from carrier preparation of bills of lading began as railroads shed themselves of local station agents who formerly prepared those shipping documents. Without those agents, carriers made it known to shippers that their shipments would move more expeditiously if the shippers would undertake to prepare shipping documents. Shippers gradually assumed that burden, initially utilizing mail or fax transmission to submit the documents. As time passed, carriers began to insist on computerized bill of lading transmissions by shippers.

Preparation of bills of lading is just one of many carrier functions that have been subtly or overtly transferred by carriers to shippers, especially in recent years. These function transfers have been accompanied by necessary additions to the shipper workforce to meet the new workloads imposed by carrier policies. In addition to bill of lading preparation, for example, some carriers consistently tender grossly inaccurate demurrage bills that are subject to penalties levied against shippers who do not pay the bills promptly, regardless of the bills' accuracy. To defend against payment of inflated and

inaccurate demurrage bills, shippers must employ personnel to review and restate the carriers' demurrage bills, frequently finding the demurrage bills to be at least 50 percent erroneous.

With one partial exception – BNSF – NGFA cannot identify carriers which compensate shippers for preparing and transmitting bills of lading.¹ Nevertheless, the statute appears to require payment of some form of adequate compensation when a shipper furnishes a service that it is the carrier's job to provide. The source of this requirement is 49 U.S.C. § 10745: "A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish a charge or allowance for transportation or service for property when the owner of the property, directly or indirectly, furnishes a service related to or an instrumentality used in the transportation or service." Pursuant to the provisions of § 10745 or its predecessors, railroads pay shippers who perform common carrier switching that the carrier is legally obliged to perform or who furnish materials necessary for a carrier's car to contain the load the carrier holds out to carry. *A. E. Staley Mfg. Co. Terminal Allowance*, 245 I.C.C. 383 (1941); *Furnishing of Grain Doors*, 355 I.C.C. 930 (1977).

While the language of § 10745 may appear facially to make the payment of allowances optional, that is not the case at all. The obligation of a carrier to pay an allowance to a shipper arises from a legal obligation of the carrier, such as the obligation to issue a bill of lading. *Allowances for Trucking Baled Cotton*, 326 I.C.C. 335 (1966).

¹ Insofar as grain shipments are concerned, BNSF, as noted below, pays a \$5.00 per car allowance for bill of lading preparation provided that the shipper also utilizes BNSF's electronic freight charge payment program. When BNSF first instituted this form of shipper compensation, payments were at the level of \$20.00 per car. Larger shippers hired additional employees to pursue the BNSF electronic option, but in the intervening years, BNSF has gradually reduced its payments to \$5.00 per car, which is often insufficient to meet the full shipper costs of the BNSF program.

Further, "[c]arriers are obliged to perform or make allowances for all services necessary to give effect to their published rates." *Terminal Charges at Pacific Coast Ports*, 255 I.C.C. 673, 676 (1943). If a "shipper legitimately performs a service, it is 'entitled, under the plain terms of [the predecessor provision of Section 10745], to be paid by the carrier a just and reasonable allowance'". *Bud Antle Inc. v. U.S.*, 593 F.2d 865, 872 (9th Cir. 1979), citing *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 431 (1940). The only allowance election conferred on the Board is whether or not to prescribe uniform allowances under 49 U.S.C. § 11122 when shippers furnish freight cars, or to entertain such allowance requests on a case-by-case basis. See *LO-Shippers Action Committee v. Aberdeen and Rockfish Railway Company, et al.*, 4 I.C.C. 2nd 1 (1987), *aff'd*. *LO-Shippers Action Committee v. ICC*, 857 F.2d 802 (D.C. Cir. 1988).

NGFA is not here advocating any specific level of compensation due a shipper for preparing and issuing a bill of lading on behalf of a carrier. We have called the Board's attention to certain carrier practices that compel an uncompensated transfer of carrier responsibility to shippers because of the issues raised in this proceeding regarding the cost of grain transportation and the claims of certain carriers that grain rates are, so to speak, a bargain. Grain rates are not a bargain, especially if service inconsistencies are considered, and are not in any event the only measure of transportation costs. When carrier rates are portrayed in terms of ton-miles, all of the hidden but substantial costs of grain transportation, such as the private cars that shippers so often furnish, and the preparation of shipping documents, are overlooked, leading to distorted outcomes.

The following is a summary of the Class I railroad tariff provisions regarding issuance of bills of lading.

BNSF Railway

BNSF does not appear to have any omnibus tariff provisions requiring the customer to prepare an electronic bill of lading or penalizing a customer for failure to do so. For grain, BNSF does have tariff provisions under which it pays its customers \$5.00 per car, but the customer must complete the BNSF electronic bill of lading form and participate in electronic freight billing provisions requiring immediate payment of freight charges. Normally, payment is not required for 14 days. When the shipper's cost of money is factored in, however, it is possible that the \$5.00 does not cover the shipper's real costs. BNSF Tariff 4022, Item 13102.

Canadian National

The consignor is required to provide “full and accurate Bill of Lading information” using CN’s “eBusiness tool” available on the CN website. If a consignor provides incomplete or incorrect bill of lading information, CN charges \$400 per car to make the necessary corrections. CN Tariff 9100, Items 3000 and 3050.

Canadian Pacific

CP expressly requires that a “shipper must provide CPR with an electronic bill of lading before CPR is obliged to move the car for furtherance.” (Emphasis in text.) Its rules also state that bill of lading submissions via fax or email will no longer be accepted. CPRS Tariff 6y666, Item 4020.

CP has certain charges that apply to changes made once the shipper issues the original bill of lading to CP. If the requested change to a bill of lading is in the “pay

status (from prepaid to collect or vice-versa)”, CP charges \$95 per car or per bill of lading. CPRS Tariff 6666, Item 13060.

CSX Transportation

Shippers are required to provide CSX with complete bill of lading shipping instructions by fax or email “at least 2 hours prior to the ‘on duty’ time for the CSXT crew serving the shipper’s location” in order for CSX to pull the shipment from the shipper’s location on that given day. The shipper can use either fax or electronic data interchange. If a shipment is moved on shipper’s order from an industry track to CSX track without completion of forwarding instructions, the shipment is subject to a charge of \$500 per car. CSXT Tariff 8100, Item 12003.2.

Kansas City Southern

KCS assesses a \$300 per car charge for accepting cars “without proper billing instructions.” KCS Conditions of Carriage, Tariff 9011-G, Item 610. Its tariffs do not specify how the billing instructions are to be furnished.

Norfolk Southern

Cars ready for loading on NS are not deemed tendered for shipment unless “shipping instructions (Bill of Lading Information)” are provided by the customer. Bill of lading information can be provided electronically or by fax, but a charge of \$50.00 per bill of lading is assessed if fax is used. Item 6140, NS Tariff 8002.

Union Pacific

Union Pacific does not consider cars to be loaded for shipment until the consignor has furnished “forwarding directions” (Item 2605, UP Tariff 6004). The “term ‘forwarding directions’ means a bill of lading or other suitable order,” Item 2610, UP Tariff 6004,

and must list shipper; origin city and state; consignee; destination city and state; route, whether prepaid or collect or rule 11 shipment; payor of freight charges name and address; lading weight or weighing instructions; commodity (including applicable hazardous materials requirements); and other information in the case of export shipments (Items 35 and 2610, UP Tariff 6004). This is the same information as required for completion of a bill of lading. See 49 C.F.R. Part 1035. If a car is tendered without forwarding instructions, a charge of \$300 per car is assessed when it is placed on railroad-owned track. UP does not accept faxed "forwarding directions."

CARRIER ASSISTANCE FOR CONSTRUCTION OF AGRICULTURAL SHIPPING FACILITIES

At the November 2 hearing, the Board inquired of agricultural shipper representatives whether railroads provide financial assistance for the construction of agricultural facilities located on their lines.

The answer is that some, but not all, railroads do so on a selective basis, generally subject to minimum volume shipping requirements.

Financial assistance for the construction of agricultural facilities is not offered as a rule for "plain vanilla" grain elevators. Assistance may be offered for the construction of processing facilities or facilities that will ship or receive unit or grain shuttle trains. To receive assistance, a facility normally must be placed at a location approved by the railroad, with switch connections and interior industry trackage of the type and amount required by the carrier. In fact, with or without financial assistance, some railroads on some occasions have stated that they will not provide service to a new agricultural facility if it is not constructed at a point and with switch connections and appropriate track design and capacity acceptable to the carrier.

For the origination of unprocessed grains, construction assistance may be offered if the railroad is trying to encourage the establishment of a shuttle train station to attract grain away from smaller loading facilities. In these circumstances, assistance may be offered to the first facility to construct shuttle loading capacity at a point desirable for the railroad, but assistance generally is refused by the carrier for the construction of subsequent shuttle loading stations that might compete with the first, or subsidized, facility. Shippers in those circumstances may elect to construct competitive shuttle stations that comply with carrier access requirements, but without carrier financial assistance. Assistance is at times provided by a carrier as an incentive for the shipper to build additional receiving capacity to handle unit trains.

In all cases where financial assistance for the construction of agricultural facilities is provided, it is done so pursuant to a confidential contract and is tied either to a minimum percentage of the shipper's business from the facility or to per car volume requirements.²

The Board's rules confer an exemption on railroads to enter into agreements with their customers providing "payments or services for industrial development activities" or "commitments regarding future transportation" if the carrier "reasonably determines that such payments, services or commitments would not be eligible for inclusion in rail contracts under 49 U.S.C. [10709]". See 49 C.F.R. 1039.22. Part 1039.22 also provides,

² Additionally, in railroad grain shuttle train tariffs, per car financial incentives are offered if shuttle trains, generally consisting of 100 to 110 cars, are loaded or unloaded within a specified time, normally 15 hours. The use of these quick load and quick unload incentives is optional with the shipper or receiver on a per trip basis. Shippers and receivers of grain shuttle trains generally attempt to take advantage of these incentives not only to recover their costs of constructing high speed load and unload facilities and associated trackage, but also to obtain a competitive freight rate advantage over those shippers who have not constructed similar facilities and must pay higher freight rates.

however, that “for any actual movement of traffic, a carrier must ... conform to all other applicable provisions” of the Act.

In the case of agricultural products, including grain, 49 U.S.C. 10709 requires that railroads file with the Board a summary of any confidential rail transportation contract. The summary must contain certain information specified at 49 C.F.R. Part 1313 to enable persons affected by the contract to either seek similar treatment from the carrier or oppose the contract on the grounds provided in Section 10709. Summaries of grain contracts are watched closely by many large agricultural shippers, who often utilize the summaries to seek, through informal discussions with carriers, appropriate similar treatment.³

NGFA is not privy to any industrial development agreements or rail transportation contracts, which are confidential, and has no knowledge as to the number of instances in which railroads do or do not observe the contract summary filing requirements when industrial development agreements lead to subsequent shipment refund or other arrangements that are eligible for inclusion in rail transportation contracts.

³ NGFA will not here endeavor to present a thorough review of the requirements for the filing of grain and other agricultural product contract summaries, or the remedies available to shippers who believe they might be injured by a competitive contract to which they do not have similar access. Suffice it to say that Congress, recognizing that the grain industry is highly and uniquely sensitive to even small rate imbalances, elected to require disclosure of basic contract information, excluding rate, and to provide remedies in case a contract has the potential to cause injury. See *Water Transport Assn. v. ICC*, 722 F.2 1025 (2d Cir. 2983).

CONCLUSION

NGFA will be happy to answer any further questions that the Board may have.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Comments of National Grain and Feed Association have, this 12th day of January 2007, been served upon all parties of record, by first-class mail, postage prepaid.

Andrew P. Goldstein