



National Grain and Feed Association

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Before the U.S. Surface Transportation Board

STB Docket No. 665 (Sub-No. 1), *Rail Transportation of Grain, Rate Regulation Review*

Public Hearing Testimony of Kevin Thompson

on behalf of

The National Grain and Feed Association

June 10, 2015

Acting Chairman Miller and Commissioner Begeman, I am Kevin Thompson, assistant vice president and transportation lead for Cargill Inc., in Minneapolis, Minnesota. I chair the National Grain and Feed Association's (NGFA's) Rail Shipper/Receiver Committee, which is comprised of 24 NGFA-member companies from all over North America, and is responsible for representing the broad policy interests of NGFA-member companies who ship and receive agricultural commodities by rail. NGFA commends the Board for initiating this important proceeding, and for conducting this public hearing to examine proposals for creating more accessible, streamlined, cost-effective and workable procedures for captive grain shippers to use to challenge rail rates they believe are unreasonable.

I am accompanied by Bruce Sutherland, vice president of Michigan Agricultural Commodities in Lansing, Mich. Bruce currently serves on the NGFA's Board of Directors and is immediate past chairman of NGFA's Country Elevator Committee. He also is immediate past chairman of the Michigan Agri-Business Association, one of NGFA's state affiliates.

Also with me on our panel are Thomas D. Crowley, president of L.E. Peabody and Associates Inc., in Alexandria, Virginia, and Thomas W. Wilcox, of GKG Law, P.C., in Washington, D.C.

I'm going to begin NGFA's presentation by providing an overview of the reasons the NGFA believes this proceeding is so important, and by highlighting key features of the proposal we submitted in June 2014 to create a totally new approach that captive agricultural commodity shippers could use to challenge freight rates they believe are unreasonable.

I'm also going to provide few thoughts on how the requirements that rail carriers file agricultural contract summaries under 49 CFR Part 1313 can be modified to allow for increased transparency.

Mr. Sutherland will follow me, and highlight several current "real-world" examples of how significant, unilateral increases in agricultural commodity rail rates produce adverse impacts on captive shippers and their farmer customers that the NGFA proposal is designed to mitigate or prevent.

Mr. Crowley is here to provide the Board with a summary of the NGFA's proposed new Ag Commodity Maximum Rate Methodology (ACMRM) and how it would operate in practice, and to discuss some of the questions in the Board's May 8, 2015 hearing notice.

Mr. Wilcox is going to will address certain legal issues associated with our proposal and other topics raised in the Board's public hearing notice.

All of us are here to answer your questions, as well.

NGFA-member companies are major users of the nation's rail system. Rail represents a significant modal share within major geographic regions, particularly the upper Plains states, as well as for major agricultural commodities, including more than 70 percent of wheat, 52 percent of barley and 20 to 25 percent of corn and soybeans. U.S. Class I railroad revenues for STCC 01

Farm Products and STCC 20 Food Products equaled \$10.77 billion and \$11.97 billion in 2013 and 2014, respectively. This represented 14.9 percent of Class I railroad revenues in 2013 and 15.6 percent of the revenues in 2014.

Reasons STB's Existing Rate-Challenge Procedures are Unworkable for Agricultural Commodities

NGFA's opening statement in this proceeding echoed arguments NGFA made in proceedings dating back to 2006, detailing why we believe the Board's three existing rate-complaint procedures simply are inappropriate and unworkable for agricultural commodities. To briefly summarize:

- First, the complexities and costs of pursuing a rate case under each of those existing procedures are prohibitive and excessive compared to the potential recovery of rate overcharges, and the nature and volume of traffic involved for most captive agricultural commodity shippers.
- Second, agricultural commodity movements typically are not static and predictable. They typically have multiple origin-and-destination pairs that vary year-to-year, as do annual volumes.
- Third, market demand for agricultural commodities frequently changes quickly, which is not conducive to the timelines needed to process a rate case under the Board's existing procedures.
- Fourth, the railroads' pricing practices – in which they utilize their market power to impose uniformly high rates across-the-board for certain commodities or groups of commodities – make rate relief under even the three-benchmark methodology unattainable, since those rules are designed to remedy cases where a shipper is singled out for market abuse. This flaw is compounded by the fact that under the current three-benchmark rules, only the movements of the defendant railroad may be included in a comparison group.

Principles Undergirding NGFA's Proposed New Ag Commodity Maximum Rate Methodology (ACMRM)

The NGFA commends the Board for recognizing that its current rate-complaint procedures need to change so they are more effective and accessible, while still rendering well-reasoned and sound outcomes. We appreciate the recent statements to Congress in that regard by Acting Chairman Miller, as well as former Chairman Elliott during his recent Senate confirmation hearing.

The NGFA shares these goals. We believe strongly that having a rate-complaint process in place that is viewed by both captive shippers and railroads as being reasonably “accessible” will have a broad salutary effect in disciplining unreasonable rate behavior by rail carriers, which now operate in what at best is a duopolistic market. Further, we do not believe that adoption of NGFA's proposed approach will result in a torrent of rate cases filed at the STB. Instead, by disciplining market behavior, it will change the dynamic under which commercial decisions are made outside of the Board's purview. This is not unlike the beneficial impacts NGFA has experienced from its Rail Arbitration Rules, whereby the mere existence of mandatory arbitration that works has resulted in not more arbitrations, but reasonable business behavior and ongoing communications to between railroads and shippers to resolve differences in a balanced manner.

In any event, the NGFA took seriously the Board's willingness to consider modified or entirely new approaches to replace the current rate rules that apply to captive grain shippers. We began by surveying captive-shipper member companies and devised a new approach that contains the following features that we believe are essential elements of any new rate-complaint approach for captive shippers of agricultural commodities ultimately adopted by the Board.

- First, the approach must be accessible and inexpensive to administer, and preferably should be based upon an objective formula to provide a forum for complainants with smaller claims. In this regard, the NGFA's methodology relies upon information obtainable from the STB or available publicly, and does not allow the use of “other relevant factors” or other methods utilized in the current three-benchmark rules that at times have been injected by railroads to complicate and delay such cases.

- Second, the rules must provide a meaningful constraint on the current unfettered ability of railroads to virtually dictate – if they wish to do so – the markets to which captive agricultural commodity shippers can serve, simply through their rate pricing or other measures. The rules also should reasonably preserve rail revenues and carriers' ability to continue to invest in their networks. We believe the NGFA's proposed methodology accomplishes this by utilizing a rate-comparison approach somewhat similar to the Board's current three-benchmark approach that also takes into account both revenue adequacy determinations and the current market for the type of captive traffic whose rate is being challenged.
- Third, any new system must provide for expedited presentation of evidence, prompt agency deliberations, and timely decisions, given the fluidity and inherent changes in U.S. and global agricultural markets. NGFA's proposal achieves this by establishing a procedural schedule under which the Board could issue a final decision within 170 days after a complaint is filed, which we believe is the minimum time for a decision that parties could reasonably expect.

NGFA also has proposed that new rate-complaint rules apply to a broad range of agricultural commodities, as opposed to a narrow subset of "grain". We recognize that our recommendation includes grain-based products, such as ethanol and biodiesel. But our rationale at this formative stage of the process for developing new rules is that the Board should err on the side of being more, rather than less, inclusive for purposes of a proposal published for public comment to fully vet the relevant issues. We note that the 68 agricultural commodities and products that we propose be eligible for the new rate-challenge process are identical to those that were agreed to by the railroads to be covered under the NGFA's Rail Arbitration Rules.

Further, NGFA's proposal urges the Board to reconfirm and, if necessary clarify, existing rules that allow parties directly or indirectly affected by potentially unreasonable rail rates to seek relief. This would permit parties, such as farmers who do not directly pay rail rates but often bear the brunt of rail rate increases, to challenge the reasonableness of the rail rates charged to captive shippers, such as elevators, to whom they sell their crops, and to obtain refunds or other damages for their share of the increased costs attributable to unreasonable rate levels.

Finally, the NGFA firmly believes that new rules to judge the reasonableness of the rates for agricultural commodity shipments must include a component that takes into account the revenue-adequate status of the defendant railroad. The Board and the industry have entered a new phase where the rail revenue-related objectives of the Staggers Rail Act of 1980 for carriers have been achieved, and the Class I railroads are or nearly are revenue-adequate under Board procedures. This should change the way the Board exercises its regulatory responsibility. For this reason, NGFA's proposed methodology includes a way that revenue adequacy can be accounted for in rate-reasonableness determinations.

Some parties have argued in their submissions in this proceeding that the Board should make no changes to its current rate-challenge procedures. Instead, they assert that no rate complaints for agricultural commodity transportation have been filed because all such rates are inherently reasonable, fair and based on market forces, even in situations where no competitive alternatives to one railroad exist. However, in the absence of accessible and effective rate rules, their standard for what is a fair and reasonable rate for a captive shipper is what they unilaterally decide it is. As stated in NGFA's Reply Comments, we believe these arguments should be rejected out-of-hand, as they ignore the ground truths that have emerged as a result of the reduced competitive options available to agricultural commodity shippers from the consolidation of the rail industry into regional duopolies. Simply put, ineffective and unworkable rate-reasonableness rules have enabled and emboldened the railroads to extract excessive monopoly profits from captive agricultural shippers, at times determining who wins and loses in serving domestic and global agricultural markets.

Others will propose that arbitration should be the sole remedy available to captive shippers to challenge unreasonable rail rates. As the Board knows, the NGFA is a huge proponent of arbitration as a forum for resolving disputes in a knowledgeable, cost-effective and business-like manner. We believe the mere existence of arbitration encourages more direct and earnest communication between parties in trying to resolve business-related disputes.

NGFA's Rail Arbitration System has been around since 1998, and was developed with the involvement and cooperation of several of the Class I railroads participating in this proceeding. But while the NGFA's Rail Arbitration System provides for compulsory arbitration of several specific types of disputes between railroads and rail users, we have been unsuccessful thus far in

achieving agreement among rail carriers to consider making arbitration of rail rate complaints mandatory, despite a couple serious recent attempts to do so. The NGFA of course remains receptive to future dialogue with rail carriers on this possibility. And I should hasten to add that there is nothing to preclude a rail carrier from voluntarily agreeing to arbitrate a rate dispute with a shipper now under the NGFA's existing system.

The STB's experience has also been that arbitration has never been shown to be useable for rate disputes. That may yet occur someday, but until then, there is a real and immediate need for the Board to establish new rules that are accessible to captive agricultural commodity shippers and producers.

Agricultural Contract Summaries Under 49 CFR Part 1313

I also wanted to briefly address the Board's request that parties address the requirement that carriers file agricultural contract summaries pursuant to 49 CFR Part 1313. NGFA has previously suggested in EP 725 that the Board make contract summaries more readily accessible to rail shippers electronically, and that the database be searchable. Also, one of my colleagues at Cargill filed a letter in that proceeding suggesting that the Board be more vigilant about ensuring the railroads submit the data called for in the regulations, such as specific O/D pairs instead of vague ranges of origins and destinations that are not particularly useful or informative. We will submit additional thoughts on this in a separate filing in this proceeding.

Transition to Bruce Sutherland

Now, let me turn to my colleague, Mr. Sutherland, to briefly discuss the chilling impacts that all-too-current unfettered rate-setting practices employed by rail carriers can have on the ability of agricultural shippers to serve markets and their farmer-customers.

Conclusion

(Following Tom Wilcox's Presentation)

Thank you, Tom. Members of the Board, we again appreciate your time and attention, and wish to conclude by respectfully urging the Board to proceed by issuing a proposed rulemaking on new rate reasonableness rules and procedures to resolve the issues that have prevented current rate rules from being usable by captive agricultural commodity shippers.

We would be pleased to respond to questions.