

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. EP 665 (Sub-No. 2)

EXPANDING ACCESS TO RATE RELIEF

**OPENING COMMENTS OF
THE NATIONAL GRAIN AND FEED ASSOCIATION
AND OTHER INTERESTED AGRICULTURAL PARTIES**

**I.
INTRODUCTION**

The National Grain and Feed Association (“NGFA”) hereby submits these opening comments on behalf of itself and other Interested Agricultural Parties¹ in response to the Surface Transportation Board’s (“Board”) Advance Notice of Proposed Rulemaking (“ANPR”) served on August 30, 2016 in this docket seeking comments and suggestions on a possible new rate review methodology that would apply to a subset of rail rate disputes, generally described in the ANPR as “very small disputes.”

We commend the Board for continuing to examine ways to make its rate rules more accessible to agricultural shippers. However, for the reasons discussed herein, we believe the Board has erred by (1) suggesting changes that potentially would address only a small subset of rate disputes despite the overwhelming body of evidence that none of the current methodologies

¹ See Exhibit 1.

for challenging unreasonable rail rates are workable for agricultural shippers;² and (2) expanding Docket No. EP 665 (Sub-No. 1) to apply to non-agricultural commodities, which we do not believe is warranted given both the unique characteristics of rail movements of grains, oilseeds and grain products, as well as the absence of involvement of non-agricultural shipper interests seeking an alternative rate methodology in that proceeding.

Therefore, we urge the Board to refocus on developing rate rules and procedures that are appropriate, workable and accessible for grain and other agricultural shippers for all railroad rate disputes. We offer several comments on the ANPR toward the development of rules to accomplish that original Board objective.

II. IDENTITY AND INTEREST OF THE NGFA AND OTHER INTERESTED AGRICULTURAL PARTIES

The NGFA is a U.S.-based not-for-profit trade association, established in 1896, that consists of more than 1,050 grain, feed, processing, exporting and other grain-related companies that operate more than 7,000 facilities and handle more than 70 percent of all U.S. grains and oilseeds. NGFA's membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed and processing industry.

² Some of the proceedings where such evidence and argument have been presented by the NGFA and many other agricultural commodity shippers include: Docket No. EP 646, *Simplified Standards for Rail Cases*, Docket No. EP 665, *Rail Transportation of Grain*; Docket No. EP 715, *Rate Regulation Reforms*; and Docket No. EP 665-1, *Rail Transportation of Grain, Rate Regulation Review*.

The NGFA also consists of 26 affiliated State and Regional Agribusiness Associations, has a joint operating and services agreement with the North American Export Grain Association, and has a strategic alliance with the Pet Food Institute.

In addition, the following national farm, commodity, agribusiness and other agricultural associations, whose memberships are described in Exhibit 1, join as other Interested Agricultural Parties in support of this statement: American Bakers Association; American Farm Bureau Federation; American Soybean Association; Corn Refiners Association; Growth Energy; National Association of State Departments of Agriculture; National Barley Growers Association; National Council of Farmer Cooperatives; National Farmers Union; National Institute of Oilseed Products; National Oilseed Processors Association; National Pasta Association; North American Millers' Association; Pet Food Institute; and USA Rice Federation.

Further, the following State and Regional Agribusiness Associations affiliated with the NGFA, whose memberships are described in Exhibit 1, also join as other Interested Agricultural Parties in support of this statement: Agribusiness Association of Iowa; Agribusiness Council of Indiana; California Grain and Feed Association; Grain and Feed Association of Illinois; Kansas Grain and Feed Association; Michigan Agribusiness Association; Michigan Bean Shippers; Missouri Agribusiness Association; Minnesota Grain and Feed Association; Nebraska Grain and Feed Association; North Dakota Grain Dealers Association; Northeast Agribusiness and Feed Alliance; Ohio AgriBusiness Association; South Dakota Grain and Feed Association; Texas Grain and Feed Association; and Wisconsin Agri-Business Association.

III.

THE NEED FOR RAIL RATE REASONABLENESS RULES AND PROCEDURES UNIQUE TO MOVEMENTS OF AGRICULTURAL COMMODITIES

In its Opening and Reply Comments in Docket No. EP 665 (Sub-No. 1), the NGFA provided extensive documentation and rationale for why rail movements of grains, oilseeds and other agricultural commodities differ in fundamental ways from non-agricultural commodities, such as coal, ores and chemicals.³ To reiterate, these include such factors as the following:

- The wide geographic dispersion and largely rural locations of grain, oilseed, manufacturing, processing and export facilities given the dispersion of agricultural production across multiple states and regions. Agricultural producers and facilities are far more likely to be captive or potentially captive to a single rail carrier than shippers of non-agricultural commodities or products. As noted previously by the NGFA, rail is the only viable transportation mode available to many agricultural producers and shippers.⁴ For instance, nearly all the grains and oilseeds produced in Montana, more than 70 percent of the grain and oilseeds produced in North Dakota and more than half the agricultural commodities produced in Arizona, Oklahoma and South Dakota are transported by rail.⁵
- Year-to-year variations in the quantity and quality of grain and oilseed production as a result of vagaries in weather and crop growing conditions (e.g. drought, flooding, excessive heat and other weather-induced anomalies that can affect crop yields and end-use quality characteristics dramatically). These shifts in agricultural production affect grain surplus and deficit areas, supply/demand fundamentals and commodity prices in ways that can and do significantly alter and realign grain movements between different shippers and receivers and change origin-destination pairs – not only from year-to-year, but often within a single year. A recent example of a large variation in grain exports occurred in calendar years 2012 and 2013 following a severe drought in a large portion of primary U.S. grain-producing regions. As a result of the drought, grain availability to serve domestic and export markets was reduced drastically, leading to a precipitous decline in U.S. grain exports. U.S. grain exports transported by rail to U.S. ports declined from 67.4 million metric tons in 2010 to 40 million metric tons by 2013 – a 41 percent decline. The reduction in rail shipments destined for ports was

³ NGFA Opening Comments and Evidence, pages 6-10.

⁴ *Id.* at 10.

⁵ *Study of Rural Transportation Issues*, U.S. Department of Agriculture and U.S. Department of Transportation (2010).

especially pronounced for corn and grain sorghum shippers, which experienced declines in rail movements of 68 percent and 86 percent, respectively.

- Embargoes, import restrictions and changes in government agricultural policies and farm price-support programs that influence producer planting decisions – both in the United States and in other countries that produce and export grains, oilseeds and other agricultural commodities in world markets. A case in point is China’s decision in 2012/13 to suspend imports of U.S. corn – and instead source corn from other foreign suppliers – in response to the presence of a biotechnology-enhanced trait (Syngenta’s MIR-162 Viptera) that had been deregulated for cultivation in the United States, but had not been approved yet for import by China and was detected in some U.S. shipments imported by that country.
- Changing demand from end-users of commodities based upon fluctuating customer demand for their products. In this regard, China’s emergence as the primary export market for soybeans has increased rail freight demand significantly in the U.S. northern plains states. In 1996, less than 2 million metric tons of soybeans were inspected for export at Pacific Northwest (PNW) ports. However, by 2015, more than 12 million metric tons of soybeans were inspected at PNW ports. Given the major role that transportation costs play in determining whether U.S. grains and oilseeds are competitively priced for export markets, access to reasonable rail freight rates is very important to soybean shippers in the northern plains states. Alternative soybean supplies are available from Brazil and Argentina, as well as from U.S. shippers positioned to supply the U.S. Gulf export ports.
- The lower value of agricultural commodities on a per-unit basis compared to their non-agricultural counterparts. This factor, too, makes grain and other agricultural commodities less amenable to the Board’s other three rate methodologies – each of which is too complex, too time-consuming, too costly and ultimately unworkable for grain and oilseed shippers.
- The uniqueness and fundamental difference of agricultural rail shipments – particularly the fluctuating demand for rail service – also is explicitly underscored by the existence of auctions for freight rail equipment and the secondary market for railcars.

In addition, according to the 2015 report by the National Academy of Sciences’ Transportation Research Board (TRB Study), grain is the largest commodity grouping within common-carrier service, accounting for about one-third of all ton-miles by tariff.⁶ Grain shippers

⁶ *Modernizing Freight Rail Regulation*. National Academies of Science Transportation Research Board (2015), page 44.

do not typically enter into rail transportation contracts because of the previously described nature of their businesses, in which varying shipment volumes and changing routings require more flexibility than typically allowed under contracts; indeed, the TRB Study found that only one in five ton-miles of grain shipments are moved under contract. The NGFA and other Interested Agricultural Parties strongly concur with the TRB Study statement that “[t]he continued reliance by grain shippers on common carriage, which is the only form of rail transportation that remains subject to direct regulation, has implications for STB rate and service oversight responsibilities....”⁷

Further, as documented in the TRB Study⁸, the level of rate increases for small and large shipments of grain and oilseeds increased more than 80 percent and 70 percent, respectively, between 2002 and 2013⁹, despite factors that seemingly would produce lower rates, such as: (1) reduced input costs and greater productivity of railroads; (2) increased use of railroad-supplied grain cars; and (3) larger, more consolidated shipments as unit trains became more prevalent for grains and oilseeds. The TRB Study also noted that the spikes in grain shipping rates were less likely to have been exaggerated by the expiration of low-rate legacy rail contracts, given the far greater prevalence of contracts in the coal industry.

The TRB Study noted further that real rail rates increased more than 25 percent between 2002 (when real rates reached their low point following enactment of the Staggers Rail Act of 1980) and 2013, growing nearly twice as fast as ton-miles and far exceeding growth in railroad input costs, which in real terms rose by only 2 percent over the same period. The TRB Study found that while real rates for most commodities increased between 15 and 25 percent from 2002

⁷ *Id.*

⁸ *Id.* at 47-48.

⁹ *Id.* at 41.

to 2013, grain rail rates increased a whopping 40 percent! Yet, despite these developments, no shipper of agriculture commodities has filed a rate case under any of the Board's existing rules in more than 30 years.

Consequently, it is critical that the STB modify its current rate review rules to make them more accessible to, and workable for, shippers of agricultural commodities with rate disputes of all sizes.

IV. COMMENTS ON THE ANPR

A. Overview

While some individual components of the ANPR are positive and warrant further discussion and development, the NGFA and other Interested Agricultural Parties find the ANPR as a whole disappointing for two primary reasons. First, despite more than a decade of concerns expressed by the NGFA, other agricultural industry groups, and individual agricultural shippers that the Board's rate-reasonableness rules do not provide meaningful access or relief to grain and other agricultural rail shippers, the ANPR suggests revisions to the existing rules, but applying them only to a very narrow subset of "very small rate disputes," a term the ANPR does not define. While the ANPR does not expressly state as much, this apparently very limited approach strongly suggests that the Board has determined its existing rate reasonableness rules *are* accessible, and actually *can* provide meaningful relief, to grain and other agricultural rail shippers for all but "very small disputes." ANPR at 10. If the Board has in fact made this determination, then this is extremely disappointing and we vigorously disagree with it.

Second, the Board began this process in 2013 focused on obtaining "input from interested parties on grain shippers' ability to effectively seek relief for unreasonable rates, as well as proposals for modifying existing procedures, or alternative new methodologies, should they be

necessary.” Docket No. EP 715, Decision served July 18, 2013, at 37. It accordingly opened Docket No. EP 665 (Sub-No. 1) expressly for this purpose. Contrary to the ANPR’s generic statement that “the shipper community” participated in Docket No. EP 665 (Sub No. 1), (ANPR at 6) the vast majority of rail shipper stakeholders that participated in that proceeding were agricultural shippers.¹⁰ No other industry groups representing other industrial commodities, or individual shippers of other non-agricultural commodities, participated in that proceeding. Moreover, the two proposals the Board received during that proceeding responded to the Board’s specific request for proposals on how to improve the ability of agricultural shippers to effectively seek relief for unreasonable rail rates. No one from the shipper community, agricultural or otherwise, advocated that the Board divert its focus from solving the lack of access to a workable rail rate-challenge methodology identified by agricultural shippers. Nor did any participant recommend that the Board expand the effort to include all rail shippers of all commodities.

Therefore, it is disappointing to the NGFA and other Interested Agricultural Parties that the Board has elected in the ANPR to take its eye off the ball and divert its focus from resolving the primary problem identified by grain and other agricultural shippers – the uselessness of the Board’s existing rate rules and procedures to agricultural shippers, regardless of the size of a dispute, and hence their lack of access to a workable rate-challenge methodology – and has chosen instead to expand the effort started in EP 665 (Sub- No. 1) to apply to all rail shippers of all commodities. As noted previously, the NGFA and other Interested Agricultural Parties do not disagree that broader rate regulatory reforms for all rail commodities are necessary. But for the

¹⁰ The only party that appeared to include any non-agricultural shipper interests was the Alliance for Rail Competition, which stated it had members who shipped coal, but whose membership is overwhelmingly comprised of agricultural shippers, and who also submitted its comments jointly with a large number of agricultural organizations.

reasons articulated in this and the preceding section of this statement, the NGFA and other Interested Agricultural Parties believe strongly that the STB should retain its focus in Docket No. EP 665 (Sub-No. 2) on reforms as applied to rail rates for grain and other agricultural commodities until a workable solution is found. If that solution is applicable to other commodities, then such application could be explored subsequently.

B. Comments on Specific Aspects of the ANPR

With the foregoing overview as a backdrop, the NGFA and other Interested Agricultural Parties provide the following comments on specific aspects of the ANPR.

1. The Scope of the ANPR is Far Too Narrow

The ANPR would modify the Board's existing rules for only a limited subset of agricultural and other shippers with certain "very small disputes" – a phrase, as noted previously, the Board declines to define but asserts would encompass only such disputes where the shipper could demonstrate it was "more likely captive," and whose rate was a "significant outlier" of rates charged for comparable traffic. Moreover, the ANPR states that "since the process would be significantly more streamlined" than required under the Three-Benchmark Method, relief obtainable for such a "very small dispute...would likewise need to be significantly less than the relief available under the Three-Benchmark approach." ANPR at 23.

For the reasons discussed by the NGFA in its filings in Docket No. EP 665 (Sub-No. 1), there is no reason for the Board to take such a conservative and limited approach to rate regulation reform given today's railroad industry, which is populated by revenue adequate and nearly revenue adequate Class I railroads. For the same reason, there is no basis to limit reform applicable to agricultural shippers to only "very small disputes," however that term is defined.

Correspondingly, there also is no reason to limit the relief available to "significantly less" than the relief available under a Three Benchmark analysis. In doing so, the Board apparently is

attempting to link the complexity, time, cost and aggravation associated with challenging a rail rate with the amount of relief available, thereby undermining and ultimately defeating the purpose and intent of creating an accessible and workable rate-challenge methodology for agricultural shippers. The NGFA and other Interested Agricultural Parties believe that narrowly defining the term “very small dispute” and significantly limiting the available relief will result in few, if any, rate cases being brought by captive agricultural shippers. Indeed, given the skewed and unbalanced risk-reward proposition, in which only minimal potential relief would be obtainable, we believe most agricultural shippers likely will continue to conclude it is wiser to endure unreasonably high rates than to risk the ire, potential retribution and other unsavory issues that arise when formally challenging their Class I railroad provider.

Moreover, the ANPR is too narrow because it would apply an alternative rate-challenge methodology solely to rate disputes involving Class I railroads. As it has stated in the Board’s proceeding on reciprocal switching (Docket No. EP 711, (Sub - No. 1)), the NGFA believes Class II and Class III railroads should not be carved out of the new rate-challenge methodology for grain. The NGFA and other Interested Agricultural Parties note that Class II carriers comprise increasingly larger, more profitable and more regionally important freight rail service providers, and, in at least one case, are larger than one of the Class I carriers. This is particularly important to agricultural shippers, given the significant, and growing, number of facilities located on shortlines – shippers that also need competitive options and recourse to challenge unreasonable rates. With the spin-off of many lines by the Class I carriers for reasons ranging from volume to maintenance costs to track capacity, Class II and III railroads may be the sole source of rail service for many agricultural facilities. Accordingly, exempting Class II and III carriers from being subject to a new rail rate-challenge methodology may shut facilities located in entire regions of

the country out of the opportunity to challenge rates they believe are unreasonable. Regardless of the category of railroad, a shipper is dependent upon that carrier to be competitive and serve its customers.

2. The ANPR “Preliminary Screen” Criteria are Not Workable or Correct

While the NGFA and other Interested Agricultural Parties are not necessarily opposed to the concept of a “preliminary screen,” we do not believe the screen components suggested in the ANPR are workable or correct. First, the ANPR includes a 500-mile “screen” as a measure of captivity, meaning that “very small disputes” involving rates for movements less than 500 miles between origin and destination would be precluded from using the new methodology. This 500-mile limit was derived from a similar limit applied to primary iron and steel products in Docket No. EP 704, *Review of Commodity Boxcar, and TOFC/COFC Exemptions* (served March 23, 2016). ANPR at 16, *citing* Docket No. EP 704 Decision at 7, n. 12. The NGFA and other Interested Agricultural Parties believe that the 500-mile limit applied to these specific commodities is far too long to be appropriate for agricultural shipments.

In contrast, the NGFA and other Interested Agricultural Parties maintain that trucking generally becomes cost-competitive to rail only for agricultural movements of 200 miles or less. But even at distances farther than 200 miles, the rate advantage for rail applies only if: (1) the rail carrier desires to transport the movement and (2) the railroad prices the freight at a level that provides a competitive rate to trucks and allows the commodity to remain cost-competitive in domestic and export markets. For example, according to survey data gathered by the U.S.

Department of Agriculture’s Agricultural Marketing Service,¹¹ the tariff plus fuel surcharge on November 1, 2016 for a unit train shipment of corn traveling 175 miles from Des Moines, Iowa, to the Mississippi River destination of Davenport, Iowa, was \$0.57 per bushel. By comparison, the same movement hauled by truck cost \$0.51 per bushel. This example demonstrates that rail rates are almost competitive with truck rates for a 175-mile movement from central to eastern Iowa. But at a distance of 200-miles or more, rail typically can outbid trucks for freight – *provided* the rail carrier desires to move the cargo and prices the movement in an effort to attract the business. Given the rate-making freedom and market power railroads have to differentially price and set rates based upon the shipment distance at which rail and truck rates intersect – which currently is about 200 miles – the NGFA and other Interested Agricultural Parties strongly urge that any distance screen the Board considers establishing for agricultural commodity rate disputes should be no longer than 200 miles.

The ANPR also suggests the employment of a second “screen” for the purpose of determining whether the rate at issue is a “significant outlier” compared to rates for similar traffic. This concept is not dissimilar to the basic theory underlying the Three Benchmark Methodology, which is to identify instances where a shipper is being singled out for abuse. In Docket Nos. EP 665-1, EP 715 and in other proceedings, the NGFA and other parties informed the Board that the Three Benchmark Methodology rules no longer were effective, in part because this main purpose of the methodology had been defeated by the rate-setting practices of the Class I railroads. Specifically, the NGFA and other parties provided evidence and testimony on “across-the-board”

¹¹ U.S. Department of Agriculture Grain Transportation Report, November 3, 2016, Table 7, page 9

pricing practices, by which all shippers' rates were increased to unreasonable levels. *See* Opening Comments of the NGFA in Docket No. EP 665 (Sub – No. 1) at 15.

In the ANPR, the STB seems to have substantially discounted these arguments in past proceedings about railroads' "across-the-board" rate-setting practices because it has suggested a "screen" that requires a demonstration that the challenged rate is a "significant outlier" of rates charged by the defendant railroad for comparable traffic. For shippers of agricultural commodities whose rates are set at virtually the same high levels across the board, the chances of passing the preliminary screen by showing a given rate is a "significant outlier" are small, and therefore the rules would be inapplicable to such shippers even if theirs and other shippers' rates were extremely high and, in fact, unreasonable.

Alternatively, the NGFA and other Interested Agricultural Parties believe the Board should consider utilizing within its preliminary screen criteria other fast-track factors for determining if a rail carrier is market dominant for movements exceeding 200 miles. Such factors could include a determination that the rate being charged exceeds 180 percent of the variable cost for providing the service and that the facility being served is effectively "closed" to competition from a second rail carrier.

Finally, the NGFA and other Interested Agricultural Parties disagree with the ANPR's suggested "screen" of prohibiting the plaintiff shipper from being eligible to bring a rate challenge if it has brought a case against the same defendant railroad using the new methodology within a certain, but unspecified, number of years. This, too, is inappropriate for grain and other agricultural shippers, whose rail shipments are characterized by multiple origin-destination pairs often served by the same carrier.

3. The ANPR's Comparison Group Approach

The NGFA and other Interested Agricultural Parties commend the Board for including within the ANPR the concept of adopting a comparison-based rate reasonableness methodology – a central feature embodied in the Ag Commodity Maximum Rate Methodology proposed by the NGFA in Docket No. EP 665 (Sub - No. 1). We also believe the Board is well intentioned in suggesting in the ANPR that the Board itself take the first cut at developing an initial comparison group of similar traffic drawn from the preceding four years of data in the Board's Waybill Sample in an effort to reduce the time and costs of doing so, which otherwise would be incurred by shippers.

However, the NGFA and other Interested Agricultural Parties take issue with the two "default parameters" contained in the ANPR, and recommend alternative approaches for the Board's consideration that are consistent with our previous recommendations. We also believe it will be important for the Board in any subsequent proposed rule to impose reasonable time limits, as well as more clearly spell out the type and volume of evidence, that could be presented by carriers and shippers, under the process envisioned for challenging the Board's initial comparison group determinations.

First, the NGFA and other Interested Agricultural Parties do not believe the Board should limit the initial comparison group only to rail traffic priced at or above the 180 percent of revenue-to-variable cost (R/VC), thereby excluding traffic priced below this threshold. As explained in its filings in Docket No. EP 665 (Sub - No. 1), the NGFA believes, and the other Interested Agricultural Parties concur, that it is more appropriate to include all comparable movements in the comparison group, including traffic with R/VC ratios of less than 180 percent. This is essential because captive agricultural commodity producers and elevators participate in a highly competitive

market in which transportation costs may well make the difference between being competitive or noncompetitive in serving farmers and other suppliers, as well as particular destination customers. Limiting the comparison group solely to movements that exceed 180 percent of R/VC would not provide sufficient representation of the “true” market for rail rates for the commodities involved.

Further, the NGFA and other Interested Agricultural Parties observe that the TRB Study, in faulting the Board’s reliance upon its Uniform Rail Costing System (URCS) for rate benchmarking, determined that the “URCS-derived R/VC formula does not indicate whether a rate is unusually high relative to rates of comparable shipments in competitive markets. In short, comparing the arbitrarily defined URCS variable cost with an actual rate is not a sound basis for screening shippers for eligibility for relief. It cannot be justified on economic grounds and has led to the development of a rate relief system that is characterized by large inequalities in shipper access to relief.”¹² The NGFA and other Interested Agricultural Parties concur and believe this consideration, too, argues for the Board evaluating all rates – including those less than 180 percent R/VC – as part of its comparison group analysis.

For these reasons, the NGFA and other Interested Agricultural Parties reiterate their strongly held belief that all comparable movements in the Confidential Waybill Sample should be included in the initial comparison group, regardless of their R/VC ratios.

Second, while the NGFA and other Interested Agricultural Parties generally concur with the ANPR’s three shipping-characteristic factors for traffic that would be included within the initial comparison group, we do urge the Board to reconsider the factor that would constrain the movement to being within a +/-15 percent mileage band around the actual miles traversed by the challenged traffic. In its proposed Ag Commodity Maximum Rate Methodology, the NGFA

¹² *Id.* at 91.

recommended that comparable traffic groups of other carriers be included if they were within +/- 20 percent of the distance that the challenged-rate shipment moved. We continue to believe that is the more appropriate standard.

The NGFA and other Interested Agricultural Parties do concur with the Board's other two proposed factors: (1) that the movement be of the same shipment type (e.g., unit train traffic or non-unit train traffic); and (2) that the commodity movement be classified within the same Standard Transportation Commodity Code ("STCC"). We believe the five-digit STCCs are sufficiently granular to result in an aggregation of the same type of agricultural commodities; indeed, those same codes are utilized under NGFA's Rail Arbitration Rules. We further believe that the "universe" of five-digit agricultural commodity STCCs that would be included within the initial comparison group using the criteria specified in the ANPR would yield the desired number of at least 20 observation data points cited in the ANPR.

Finally, as noted previously, the NGFA and other Interested Agricultural Parties urge the Board when developing a proposed rule to include reasonable time limits for the plaintiff-shipper and defendant-railroad to challenge the Board's initial comparison group determinations, as well as specify the type and volume of evidence that carriers and shippers would be allowed to present in such proceedings. To create a timely, cost-effective and ultimately workable rate-challenge methodology for agricultural shippers, it will be essential to create a streamlined process that avoids extensive discovery and back-and-forth arguments between the parties over what constitutes an appropriate comparison group.

4. There Should be No "Common Carrier Adjustment"

The STB's inclusion of this proposed factor in the ANPR is puzzling to the NGFA and other Interested Agricultural Parties. In the only case in which the Board adopted this adjustment

– a case brought under the Three Benchmark Methodology – the Board stated “ideally, the Board would not accept a “common carrier adjustment” in a Three Benchmark Methodology case. STB Docket No. 42114, *U.S. Magnesium v. Union Pacific RR Co.*, (served January 28, 2010) (“*USM*”) at 18. The Board also was clear in *USM* that it imposed this adjustment in that specific case reluctantly based upon the unique aspects of that case; primarily the fact that more than 97 percent of the TIH commodity traffic in each party’s comparison group was contract traffic. *USM* at 19. The Board also examined the waybill data utilized in that case and concluded that the difference in the markup between the 2.7 percent of tariff movements and the 97.3 percent of contract movements justified an adjustment of 14.8 percent of the rates produced by the Three Benchmark Methodology.

Although it made a “common carrier adjustment” in *USM*, the Board emphasized that it was because of very unique circumstances, stating “[t]o be clear, we find this adjustment is appropriate in this case because of the scarcity of comparable movements in the Waybill Sample,” and that it did not expect to see such scarcity in future cases. *Id.* Moreover, “in future cases we will remain reluctant to adjust for contract traffic, or any other factor that could be accounted for in the comparison group selection, unless the data available severely constrains the selection of movements exhibiting that factor, as it does here.” *Id.*

In the first place, there is no need for a common carrier adjustment in rate cases involving grain and other agricultural commodities, since, as discussed previously, the significant majority of such commodities move by tariff rates. Thus, the percentage of contract traffic in a comparison group likely would never reach 97 percent, which triggered the Board’s one-time use of the adjustment in *USM*.

More significantly, however, if the Board was to adopt a “common carrier adjustment” as utilized in *USM* in proposed or final regulations, the Board instantly would increase the cost and complexity of cases brought under this, and any other, methodology. It is critical to note that, in *USM*, the “contract adjustment” proposal was advanced by Union Pacific as an “other relevant factor” in its opening evidence, and this was the first time such an “other relevant factor” had been proposed in a Three Benchmark Methodology case. Consequently, this issue was not the subject of any discovery. In its decision on the merits, the Board rejected *USM*’s protests of the consideration of this other relevant factor because to properly determine the appropriateness of this suggested markup would have required a special study that was beyond the scope of a Three Benchmark Methodology case, and this would have been unduly burdensome on all parties. *USM* at 18. As such, *USM* was left to attempt to rebut this proposed adjustment in its reply evidence using the data presented in *UP*’s evidence and the Waybill Sample.

Incorporating a potential “common carrier adjustment” into the Board’s rules would build additional costs and complexity into future cases because the production and analysis of contracts and related documents necessarily would become part of the discovery process in order for a complainant to anticipate and rebut a carrier’s claim for such an adjustment. Disputes over such proposed adjustments also invariably would require complainants and defendants to incur the costs of experts to provide analysis and testimony, as rate levels are only one consideration of whether a tariff movement is better or worse than a contract movement.

5. The Revenue Adequacy Adjustment Factor

The NGFA and other Interested Agricultural Parties are pleased that the Board is considering adopting the Revenue Adequacy Adjustment Factor (“RAAF”) included as part of the Ag Commodity Maximum Rate Methodology proposed by the NGFA in Docket No. EP 665 (Sub

– No.1). ANPR at 21-22. As explained by the NGFA in that docket, the RAAF is designed to improve on the extent to which the Three Benchmark Methodology currently takes into account railroad revenue adequacy in two ways. First, by replacing system-total revenues and costs in the RSAM and R/VC>180 ratio calculations with commodity-specific calculations, and second, by using the defendant’s most current financial reporting to the Board to more accurately determine the defendant’s revenue adequate status. *See* Opening Comments of the NGFA, Verified Statement of Thomas D. Crowley at 9-13.

The NGFA and other Interested Agricultural Parties maintain that the RAAF proposal establishes the most appropriate formula for making agricultural commodity-specific RSAM and RVC>180 calculations because it takes into account the quantity of commodity traffic that is captive to the rate-challenged railroad and allocates the burden of the revenue-need-adjustment factor to those commodities that provide the most revenue. We also continue to believe that using the most current financial data submitted to the Board by the railroads provides the most accurate picture of the railroads’ revenue-adequate status, because using a four-year average to develop the RSAM and R/VC>180 over-weighs historical performance and under-weighs the most recent. *Id.* at 11. The formula for determining the RAAF also would be relatively simple, straight-forward and transparent to administer and apply.

6. Procedural and Discovery Suggestions in the ANPR

The NGFA and other Interested Agricultural Parties support and commend the Board’s ongoing efforts to develop ways to make its procedures applicable to rail rate cases more streamlined and less costly and complicated. The ANPR contains several positive suggestions to this end. For example, we support the suggestions concerning initial disclosures to be provided with the complaint and the answer. These requirements follow the procedures used in the Board’s

formal complaint rules, and are not known to be onerous to comply with in practice. In addition, as stated previously, the NGFA and other Interested Agricultural Parties appreciate the Board's intent to streamline and reduce the costs of the process by making the initial determination of the comparison traffic group. However, rules implementing such a feature should contain reasonable controls on the extent to which parties would engage in the "battle of the experts" over proposed modifications to the Board's determination.

In terms of discovery, the NGFA's proposed rate methodology in EP 665 (Sub-No. 1) would not have permitted the submission of "other relevant factors" evidence by either party, for the reasons discussed therein. Opening Evidence in Docket No. EP 665 (Sub-No. 1) at 31. Consistent with this position, the NGFA and other Interested Agricultural Parties maintain that the possibility of considering "other relevant factors," should be eliminated from the ANPR, which, in turn, would eliminate the need to consider discovery issues associated with other relevant factor evidence. As stated previously, the incorporation of the "other relevant factor" of a potential "common carrier rate adjustment" as made in *USM* would introduce unneeded burdens, time, complexity and cost into these cases.

Finally, the NGFA and other Interested Agricultural Parties encourage the Board to incorporate into a proposed rule all or some of the aspects of the proposed procedural schedules included in the NGFA's Opening submittal in EP 665 (Sub-No. 1) (at Exhibit 1), which contemplated the submission of evidence and a final decision within 160 to 170 days, depending upon whether mediation was utilized by the parties.

IV. CONCLUSION

For all of the foregoing reasons – the fundamentally different nature of rail grain movements; the heavy use and disproportionate reliance of grain shippers on non-exempt

common-carrier shipments; and the dramatic escalation of grain rail rates over the last decade that cannot be attributed to market-based factors – the NGFA and other Interested Agricultural Parties respectfully urge the Board to refocus its efforts in this proceeding to go beyond the unnecessarily narrow scope of the ANPR and return to the original task of creating an appropriate, workable and reasonably accessible rate-challenge methodology that grain and other agricultural shippers can utilize to challenge railroad rates they believe are unreasonable, regardless of the size of their potential case. If, either during or at the conclusion of this process, the rules developed that are appropriate for agricultural rate challenges can be applied to other commodities, then the NGFA has no objection to the Board exploring whether the rules should be available for other non-agricultural commodities, either as adopted or further modified to account for the particular characteristics of such non-agricultural commodities.

We further urge the Board, after considering the comments submitted by the NGFA and other parties, to move expeditiously to develop and propose rate-challenge methodology rules appropriate for grain and agricultural shippers.

The NGFA and other Interested Agricultural Parties appreciate the Board’s consideration of our views on this important proceeding.

Respectfully submitted,



Thomas W. Wilcox
GKG Law, P.C.
1055 Thomas Jefferson St., NW, Suite 500
Washington, D.C. 20007

Counsel for National Grain and Feed Association

November 14, 2016

Exhibit 1

National Agricultural Producer, Commodity and Agribusiness Associations Supporting This Statement:

American Bakers Association (ABA), founded in 1897, is the Washington D.C.-based voice of the wholesale baking industry. ABA represents the interests of bakers before the U.S. Congress, federal agencies, and international regulatory authorities. ABA advocates on behalf of more than 700 baking facilities and baking company suppliers. ABA members produce bread, rolls, crackers, bagels, sweet goods, tortillas and many other wholesome, nutritious, baked products for America's families. The baking industry generates more than \$102 billion in economic activity annually and employs more than 706,000 highly skilled people.

American Farm Bureau Federation is the country's largest general farm organization, with nearly 6 million member families and representing nearly every type of crop and livestock production across all 50 states and Puerto Rico.

Corn Refiners Association (CRA) is the national trade association representing the corn refining industry of the United States. CRA and its predecessors have served this important segment of American agribusiness since 1913. Corn refiners manufacture sweeteners, ethanol, starch, bioproducts, corn oil and feed products from corn components such as starch, oil, protein and fiber.

Growth Energy is the leading association of ethanol producers in the country, with 85 plant members in 14 different states and 96 associate members who serve our Nation's need for renewable fuel. Our plants produce ethanol from grain and are leaders in innovating in second-generation fuels from sources like plant waste and other biomass.

National Association of State Departments of Agriculture represents the Commissioners, Secretaries, and Directors of the state departments of agriculture in all fifty states and four U.S. territories. State departments of agriculture are responsible for a wide range of programs including food safety, animal and plant health and fostering the economic vitality of our rural communities--where transportation and infrastructure are critical.

National Council of Farmer Cooperatives (NCFC), established in 1929, is the voice of America's farmer cooperatives. NCFC members are regional and national farmer cooperatives, which are in turn comprised of more than 2,500 local farmer cooperatives across the country. The majority of America's 2 million farmers and ranchers belong to one or more farmer cooperatives. NCFC members also include 22 state and regional councils of cooperatives.

National Farmers Union (NFU) has been advocating on behalf of American family farmers, ranchers, and rural communities since 1902. The organization is comprised of organized divisions in 33 states and has members in every state in the country. NFU seeks to advance smart farm policies and runs a series of educational programs that promote diversity and develop the next generation of family farmers. NFU supports sustainable production of food, feed, fiber and fuel, and will remain the respected, influential and independent voice on the future of American agriculture.

National Institute of Oilseed Products is an international trade association with the principal objective of promoting the general business welfare of persons, firms and corporations engaged in the buying, selling, processing, shipping, storage and use of vegetable oils and raw materials.

National Oilseed Processors Association (NOPA), established in 1930, the National Oilseed Processors Association's mission is to assist the U.S. soybean, canola, flaxseed, sunflower seed and safflower seed processing industries to be the most competitive and efficient in the world by utilizing the combined expertise, knowledge and resources of its members to foster market- and science-based policies. NOPA represents 13 member companies who process over 1.8 billion bushels of oilseeds annually at 64 plants in 19 states, including 58 plants that process soybeans.

National Pasta Association (NPA) is the trade association for the United States pasta industry. NPA's members are pasta manufacturers, durum wheat millers and suppliers to the US pasta industry. Founded in 1904, the NPA's mission is to increase the consumption of pasta, to promote the development of sound public policy, and to act as a center of knowledge for the industry and the consumer.

North American Millers' Association (NAMA) is the trade association of the wheat, corn, oat, and rye milling industries. NAMA member companies operate mills in 38 states, Canada and Puerto Rico, representing more than 90 percent of total industry production capacity.

The Pet Food Institute (PFI) has been the voice of U.S. dog and cat food makers for almost 60 years. PFI's mission is to promote long and healthy lives for dogs and cats by advocating for transparent, science-based regulations and by providing fact-based information about pet food safety, pet nutrition and pet health to pet lovers. Its member companies, which are committed to product safety and quality, account for roughly 98 percent of all U.S. dog and cat food production.

USA Rice Federation is the global advocate for all segments of the U.S. rice industry with a mission to promote and protect the interests of producers, millers, merchants and allied businesses.

State and Regional Agribusiness Associations Affiliated with NGFA Supporting This Statement:

Agribusiness Association of Iowa exists for the purpose of advocating, communicating and educating on behalf of a proactive, profitable, and environmentally responsible professional agribusiness industry. AAI's membership consists of over 1,100 business locations across the state of Iowa that supply feed, seed, crop protection chemicals, grain, fertilizer, equipment and additional products and services that benefit agriculture, as a whole.

Agribusiness Council of Indiana (ACI) has deep roots in Indiana's agribusiness community. Formed in 2001, ACI brings together two longstanding agribusiness associations: the Indiana Grain and Feed Association (formed in 1902) and the Indiana Plant Food and Agricultural Chemicals Association (formed in 1966). Today, ACI has approximately 400 member companies spanning the Midwestern grain, feed, fertilizer and ag chemical industries.

California Grain and Feed Association, established in 1924, is the nonprofit agricultural trade association that provides government representation, information, education, environmental and safety consultation and other services to the state's grain and feed industry.

Grain and Feed Association of Illinois is the state-wide trade association for the grain and feed industry in Illinois. More than 90% of the commercial grain storage space in the State of Illinois is represented by members of the Grain and Feed Association of Illinois. Members range in size from multi-national organizations to small, single facility operations. Membership of approximately 170 companies consists of country and terminal grain elevators, grain brokers, feed dealers, feed manufacturers, truckers, ethanol plants, and both corn and soybean processors. The industry directly employs just over 5,000 people. In addition, the Association has over 165 members allied to the grain and feed industry. They include banks, construction companies, futures brokers, accounting firms, insurance companies, equipment suppliers and others. This results in approximately 4,900 additional people indirectly employed by the grain and feed industry.

Kansas Grain and Feed Association is a 118-year-old trade association representing 98 percent of all commercially licensed grain storage capacity in Kansas. Its members own and operate nearly 1,000 grain storage and handling locations across the state.

Michigan Agribusiness Association (MABA), with roots dating to 1903, represents businesses that form the backbone of Michigan's agriculture sector – the second largest industry in Michigan, which employs more than 1 million people across the state and generates more than \$71 billion for its economy. MABA's diverse membership includes companies in the grain, fertilizer, crop protection, feed, transportation, milling and dry bean sectors. MABA members also include companies that process and sell food and food products, supply goods and provide services to every corner of the agriculture industry.

Michigan Bean Shippers is focused on providing services and advocating policies that further the interests of Michigan's bean shipping industry.

Missouri Agribusiness Association advocates for the business of agriculture while offering services and networking opportunities for the agribusiness community.

Minnesota Grain and Feed Association serves as a leader for the agribusiness industry with integrity, respect and innovation in its programs and services.

Nebraska Grain and Feed Association, established in 1896, was formed to promote the common business interests of the grain and feed industry; to seek and obtain improvement of business conditions of the grain and feed trade; to acquire and disseminate information to facilitate the proper conduct of business in the grain and feed trade; and to promote the general welfare of the association and its members.

North Dakota Grain Dealers Association is a statewide trade association representing the North Dakota grain, feed, and grain-processing industries. Association activities are focused on providing services and advocating policies that further the interests of the commercial grain industry in North Dakota.

Northeast Agribusiness and Feed Alliance is a member organization of agribusiness companies serving the agriculture industry throughout the Northeast. Our primary goals focus on advocacy, education and collaboration for the betterment of our industry.

Ohio AgriBusiness Association is a state trade association whose member companies and their employees are committed to supplying modern agriculture with the basic needs and essential support necessary to grow Ohio's number-one industry. Our membership includes businesses in manufacturing, wholesale and retail, which represent business sectors including agronomic inputs (seed, plant food, crop protection), livestock feed and nutrition, grain marketing and operations, insurance, equipment and financial services.

South Dakota Grain and Feed Association is a statewide, non-profit trade association composed of grain elevator firms and other agribusinesses involved in the grain, feed and farm supply business.

Texas Grain and Feed Association (TGFA) is made of almost 400 member firms that represent virtually every facet of the grain and feed industry. From country elevators and retail feed stores to the export elevator and large integrated and commercial feed manufacturers, TGFA members are an integral part of the agriculture industry in Texas. The diverse membership strengthens our voice, which is represented in nearly every legislative district in Texas.

Wisconsin Agri-Business Association consists of over 300 agribusiness companies, operating well over 1,000 branches and facilities, that do business in Wisconsin consisting of grain elevators, feed mills, seed developers and dealers, fertilizer and farm pesticide manufacturers, retailers and service providers, crop consultants, equipment dealerships, farm stores, ethanol plants, and many other agribusiness marketers and service providers.