



**National Grain
and Feed Association**

www.ngfa.org

1400 Crystal Drive, Suite 260

Arlington, VA 22202

P: (202) 289-0873

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

300385

**STB Docket EP 761
HEARING ON REVENUE ADEQUACY**

ENTERED
Office of Proceedings
February 13, 2020
Part of
Public Record

**STB Docket EP 722
RAILROAD REVENUE ADEQUACY**

**SUPPLEMENTAL SUBMISSION OF
THE NATIONAL GRAIN AND FEED ASSOCIATION**

On December 12-13, 2019, the Surface Transportation Board (“Board,” “STB” or “Agency”) conducted a public hearing in these proceedings. Representatives of the National Grain and Feed Association (“NGFA”) appeared and provided testimony on December 13, 2019. On December 16, 2019, the Board served a Decision that held the hearing record open until February 13, 2020 to allow hearing participants to supplement their oral testimony. Pursuant to that Decision, the NGFA hereby supplements its oral testimony to address certain issues and questions that arose during the hearing.

A. The Legal Viability of the Revenue-Adequacy Constraint

The Notice of Hearing issued on September 12, 2019 stated that the hearing's purpose was to receive public input on several recommendations made by the Rail Rate Reform Task Force ("RRTF") on how to incorporate a railroad's revenue-adequate status into maximum reasonable rate determinations. Devising ways to take a railroad's revenue-adequate status into account when determining maximum reasonable rates is not new. Such efforts have been part of the statutory directives to the Interstate Commerce Commission ("ICC") and the Board's charge for more than 40 years. See, e.g., *Standards and Procedures for the Establishment of Adequate Railroad Revenues*, 358 I.C.C. 844 (1978) ("Standards"). In *Standards*, the ICC adopted standards and procedures for implementing Section 15a(4) of the Interstate Commerce Act, the predecessor to 49 U.S.C. §10704. In contemplating the overall purpose of the annual revenue-adequacy determination it was directed to make for Class I railroads, the ICC concluded that while this statute focused attention on the criteria for determining revenue adequacy, "it is evident that more than a mere determination is contemplated." *Id.* at 847. Moreover,

it is clear that Congress did not intend for our mandate to be simply one of promoting railroad revenues. *Consideration of shipper and public interests requires that revenue adequacy be taken not only as a goal but also a limitation. In other words, to the extent possible, we are to assist railroads in attaining revenue adequacy, and to protect the public from having to provide revenues that exceed an adequate level.* *Id.* at 848 (emphasis added).

On the question of how to factor a railroad's revenue adequacy into an individual rate proceeding, railroad parties participating in *Standards* recognized that Section 15a(4) created some type of cap on railroad revenues. The ICC summarized its contention to be "that a specific increase proposed by an individual railroad should be approved so long as that railroad's overall revenue does not exceed an adequate level." *Id.* at 853. The ICC

concluded in *Standards* that “revenue adequacy should be a consideration in individual rate proceedings,” *id.* and “[a] proponent carrier’s revenue adequacy status can and should influence the determination as to how high its rate for a particular service may be reasonably set.” *Id.* at 854. Thus, the ICC clearly concluded that a railroad’s revenue-adequate status limited the extent to which it could increase its rates. This statutory interpretation in *Standards* was not judicially challenged by any Class I railroad.

The ICC carried over its interpretation of Section 15a(4) when its language was folded into the Staggers Rail Act of 1980 (Staggers Act) and became 49 U.S.C. §10704(a). First, the ICC modified its formula for determining revenue adequacy in *Standards* without modifying or retracting any of its statements regarding how a railroad’s revenue-adequate status would constrain its ability to raise its rates. *Standards for Railroad Revenue Adequacy*, 364 I.C.C. 803 (1981). Soon thereafter, the ICC promulgated *Coal Rate Guidelines Nationwide*, 1 I.C.C. 520 (1985), in which the ICC reaffirmed its interpretation of the statutory language, stating:

Our revenue adequacy standard represents a reasonable level of profitability for a healthy carrier. It fairly rewards the rail company’s investors and assures shippers that the carrier will be able to meet their service needs for the long term. Carriers do not need greater revenues than this standard permits, and we believe that, in a regulated setting, they are not entitled to any higher revenues. Therefore, the logical first constraint on a carrier’s pricing is that its rates not be designed to earn greater revenues than needed to achieve and maintain this “revenue adequacy” level. In other words, captive shippers should not be required to continue to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to ensure a financially sound carrier capable of meeting its current and future service needs. *Id.* at 535-36.

The ICC further clarified that “A railroad seeking to earn revenues that would provide it, over the long term, a return on investment above the cost of capital would have to demonstrate with particularity: (1) a need for the higher revenues; (2) the harm it would suffer if it could not collect them; and (3) why the captive shippers should provide them.” *Id.* at footnote 36. Elsewhere in

Coal Rate Guidelines, the ICC stated, “the revenue adequacy constraint is a limit on the total revenues a carrier can collect.” *Id.* at 547.

The revenue-adequacy constraint in *Coal Rate Guidelines* was affirmed explicitly by the U.S. Court of Appeals for the Third Circuit in 1987. *Consolidated Rail Corp. v. U.S.*, 812 F.2d 1444 (3rd Cir. 1987). In that case, in which both railroads and shippers participated, the court held that the four constraints in the Final Guidelines were consistent with the 4R Act and the Staggers Act. As to the revenue-adequacy constraint specifically, the court stated that “[b]y imposing revenue adequacy as a ceiling, the ICC intends to ensure that a captive shipper will ‘not be required to continue to pay differentially higher rates than other shippers when some or all of that differential is no longer necessary to ensure a financially sound carrier capable of meeting the current and future service needs.’” *Id.* at 1450 (emphasis supplied), *Citing* 1 ICC 2d 520, 535-46. The court also said that the revenue-adequacy constraint and the other three constraints in *Coal Rate Guidelines* are “designed to protect captive shippers from paying rates that are unnecessary to achieve revenue adequacy and which reflect inefficiencies.” *Id.* at 1444. The revenue-adequacy constraint, although seldom used, subsequently has been part of the Board’s rate reasonableness rules and policies for more than 35 years.

Notwithstanding this long, clear line of agency and court precedent (and the lack of any railroad formally challenging the legality of the agency’s statutory interpretation) the Association of American Railroads (AAR) inexplicably alleged during the hearing proceeding that the revenue-adequacy constraint somehow “came out of the blue and was untethered from the statute, prior precedent, sound economic concepts or support of commentators....” Comments of the AAR at 33. This collateral attack on the legality of the revenue-adequacy constraint in this proceeding is utterly meritless.

B. Economic Profit Under §10704

One issue that arose during the hearing proceeding involved the question of how to define the term “economic profit” in 49 U.S.C. §10704(a)(2), which states in relevant part that railroads are entitled to earn a “reasonable and economic profit or return (or both) on capital employed in the business.” Economic profit typically is defined as the profitability measurement that calculates the amount that revenues exceed the opportunity costs a company experiences from using resources to make and sell these products. Opportunity cost is the cost of an opportunity foregone, *i.e.*, given up so as to pursue another one. Consequently, economic profit is excess money a company earned from one course of action over another had it chosen differently. When the opportunity costs exceed the revenues received, then the outcome is economic loss. Economic profit is different than “accounting profit,” which simply measures the difference between revenues and costs of production, without taking into account opportunity costs. Notwithstanding the foregoing, the AAR in this proceeding asserts “Economic profit equals ROI minus COC.” AAR Comments at 17, note 17.

There appears to be a dearth of legislative history explaining the meaning of “economic profit” in §10704(a)(2). Nevertheless, the railroads’ view of the provision immediately after passage of the Staggers Act is instructive. For example, in 1987 an amendment was proposed by shipper interests to delete the term “economic profit” from §10704. In Congressional testimony opposing the amendment, the then-President of the AAR stated:

The statutory requirement that an adequate revenue for railroads include “a reasonable and economic profit or return (or both) on capital employed in the business” originated with the 4-R Act. The legislative history of that Act sheds no clear light on Congressional intent in employing the term. Economists use the term “economic profit” to refer to profits in excess of costs including returns to shareholders. The Congress would not intend that railroads generally be allowed excessive profits. It would be fair to infer, however, an intention to allow railroads like all other competitive industries to earn above normal profits (returns) in some

years to compensate for years in which inadequate profits (returns) were realized. Such averaging would be necessary if the railroads were to earn adequate returns over the long run. The deletion of the phrase “economic profit” could be construed as an intentional action to prohibit such averaging.

The word “economic” modified the word “return” as well as the word “profit.” An “economic return” means, to an economist, a return equal to the cost of capital – and that is the standard the ICC has adopted.

Upon deleting the words “and economic profit” the law would provide only for “a reasonable return.” This change gives effect to the other amendments in this section of the bill (discussed below) which, in the aggregate, would preclude the railroads from every (sic) earning the cost of capital and which would, therefore, be a prescription for disinvestment in the railroad industry.

Rail Industry/Staggers Act Oversight: Hearings before the Senate Committee on Commerce, Science and Transportation, Subcommittee on Surface Transportation, June 9, 1987, at 521, Statement of William H. Dempsey, President, Association of American Railroads.

The AAR’s statement that “[e]conomists use the term ‘economic profit’ to refer to profits in excess of costs including returns to shareholders,” is confirmation that in 1987, the AAR believed that economic profit included all profits in excess of costs, which included returns to shareholders and, it logically follows profits that are used to buy back shares of the company’s stock. Moreover, the “profit-averaging” concept advanced by AAR may have had some facial appeal in the years immediately following passage of the Staggers Act when some railroads still were struggling financially. However, it has absolutely no application to the modern railroad industry, when comparable years of “inadequate profits” do not occur. Finally, the AAR’s testimony confirmed that the AAR at that time interpreted “economic return” to mean a return equal to the railroad’s cost of capital.

C. The Board Should Encourage Actual Competition to Establish Market-Based Rates – Role of Reciprocal Switching and Bottleneck Rules

1. The best way to account for railroad revenue adequacy in rate-setting is to create actual rail-to-rail competition

It is beyond dispute that the Staggers Act was enacted in large part to allow and encourage competition between railroads to establish rates and terms for service. This plainly is evident within the National Rail Transportation Policy, which unequivocally states that “In regulating the railroad industry, it is the policy of the United States Government...(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail.” 49 U.S.C. §10101(1). *See also* §10101(4) (policy is to “ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense”); §10101(5)(“to ensure effective competition and coordination between rail carriers and other modes). Competition between railroads has been encouraged in areas such as rail construction under §10901, where the ICC and the STB have adopted longstanding policies that liberally approve rail buildouts and associated rail crossings to establish competition at captive shipper locations.¹

In their written submissions and testimony in this proceeding, the Class I railroads assert that they exist in a market where their rates purportedly are set through vigorous competition. However, the carriers’ claims of competition are not based on any evidence of actual head-to-head competition with other railroads. Instead “competition” is defined artificially by carriers in terms of whether the rates they charge are less than the 180 percent jurisdictional threshold under 49 U.S.C. §10707. For example, less than one-third of BNSF’s traffic exceeds 180 percent of

¹ See e.g. Docket No. FD 36186, *Texas Railway Exchange – Construction and Operation Exemption – Galveston County, Tex* (served January 17, 2020); STB Finance Docket No. 34210, *Sunflower Rail Company – Construction and Operation Exemption – Finney County, KS* (served March 28, 2003)

variable costs. So, BNSF asserts, *ipso facto*, that the remainder of its rates are established via market-based competition.

The carriers' reliance on the jurisdictional threshold as a surrogate for the real competition envisioned by the framers of the Staggers Act is inaccurate, misleading and obscures the fact that there is very little actual, effective competition in the railroad industry any longer. The reality of the situation today is that carriers typically increase rates to the maximum extent they can. In other cases, carriers "demarket" rail movements they no longer wish to transport by either assessing exorbitant rates that make the movements economically uncompetitive, or imposing restrictive service terms and conditions that make rail unattractive to shippers or receivers (e.g., unilaterally shifting previous unit-train traffic to more costly and less-timely manifest service). These trends have become more prevalent under the so-called "precision scheduled railroad" operating model implemented by most Class I carriers.

Whenever the policy discussion turns to fulfilling the Staggers Act's policy and goal of allowing, "*to the maximum extent possible*, competition and the demand for services to establish reasonable rates for transportation," the railroads vehemently resist any attempts by the Board to increase the opportunities for Class I railroads to compete with one another and to gain market share. As noted by Vice Chairman Oberman in the hearing proceeding, "But it seems to be difficult for us – for the railroads to come in here and say 'let competition set the rates, but where there is a chance to have more competition, don't make us do it.' And I share (Board Chairman Ann Begeman's) sentiment, we've seen at least two concrete situations that I'm aware of where railroads, there's some evidence that they have a chance for competition and they are consciously avoiding it." Tr. At 343.

Typically heard Class I railroad laments of the horrors of actually competing for business with one another like other industries do on a daily basis are that if a railroad actually had to reduce its rates because of competition, this would (1) retard future investment in their system; and (2) create network “inefficiencies,” which usually boils down to the inconvenience of altering operating plans to keep or seek new business. These laments are obviously time-worn by now², but they were repeated in this hearing proceeding. See Tr. At 310 (where a witness for Norfolk Southern Railway asserted that creating competition through either bottleneck rule changes or reciprocal switching would “introduce a level of inefficiency and risk into the system that’s not present now. And both provide a disincentive to investment, a likelihood of causing congestion or other operational disruption.”). The NGFA finds the Board’s frustration with such positions both totally justified and encouraging, such as the comment of Chairman Begeman to a railroad representative at Tr. At 339 (“But I’m not hearing anything about the fact that you also could be receiving, you know, service, or you know, customers from the other bottleneck carriers that might want to be in the same situation where someone wants to go to you and leave them...it seems like it would be an opportunity should the carrier want to take it and, as Frank just said, and actually do some competition.”), to which the response was, “the concern we have [presumably with actually competing] is that what may be good for one particular shipper is bad for the network.”) *Id.* at 341. See also *id.* at 345, where the railroad representative stated that when faced with the choice of lowering a rate to keep traffic “I don’t want to – if we lowered the rate because I want to avoid it, that means there’s less chance of investment there, less new capacity, less solution for

² Such assertions have become a familiar refrain from the Class I railroads. Attached hereto are NGFA’s reply comments in Docket No. EP 711 (Sub – No. 1), *Reciprocal Switching*, filed January 13, 2017, which responds to nearly identical arguments made by railroad parties in that proceeding

operational issues.” The NGFA concurs with Vice Chairman Oberman’s response, which was, “[y]ou are arguing for monopolistic pricing, so you could have more money. I mean you’re either going to have competition set the rates or you’re not.” *Id.* at 346.

One of the salutary purposes of the public hearing was to explore whether the RRTF’s proposals to suspend or overrule the “Bottleneck Rules” for Long-Term Revenue Adequate Railroads potentially would create opportunities for Class I railroads to compete for new business and market share. Also revisited as part of that general discussion were the policy implications and issues surrounding an effort by the Board to revise the rules and policies implementing 49 U.S.C. §11102(c), which state in part “The Board may require rail carriers to enter into reciprocal switching agreements, where it finds such agreements to be practicable and in the public interest, *or where such agreements are necessary to provide competitive rail service.*” (emphasis supplied). Right on cue, the Class I railroads uniformly criticized the Board for even considering taking steps that would increase competition in the railroad industry and in part provide them with increased business opportunities and traffic volumes.

The notion that facilitating actual competition between railroads would be harmful and bad policy is not only contrary to the express language of the statute and its legislative history, it is patently absurd, particularly in today’s duopolistic rail industry. The NGFA again strongly urges the Board to reject the Class I railroad’s overwrought claims that requiring them to actually compete with each other in accordance with the clear intent of Congress in the Staggers Act would harm them and their systems. Hereafter, the NGFA provides additional comments on the bottleneck proposals and the reciprocal switching discussion.

2. The Board has the authority to implement the RRTF proposal on bottleneck rules.

The NGFA reiterates its support for the RRTF's proposal that so-called "bottleneck rule" protections should be suspended or overruled for railroads determined to be long-term revenue adequate. In doing so, the NGFA presumes the RRTF means that a bottleneck railroad that serves the same origin or destination as an alternative railroad would be required to provide a rate for transportation over its bottleneck segment without (1) the shipper having to make a case for "competitive access" under 49 CFR Part 1144 and applicable precedent, and (2) without having to first enter into a contract for the non-bottleneck portions of the overall movement. The latter point is helpful to agricultural shippers because many do not ship by contract. NGFA does not interpret the RRTF's recommendation to mean that shippers could pick and choose interchanges and routings as the AAR and other parties asserted during the hearing. The NGFA believes that the Board should remain the ultimate authority for such determinations under 49 U.S.C. §10742 and other applicable statutes.

The NGFA agrees there is no policy basis for erecting the barrier of the competitive-access rules to protect a long-term-revenue-adequate railroad's desire for long-haul revenues, and the Board clearly has discretionary authority to implement that recommendation. Carriers do not have a statutory absolute right to either the long haul or a short haul. Specifically, 49 U.S.C. §10705(a) provides that the STB must "give reasonable preference, subject to this subsection" to the carrier originating the traffic when prescribing a joint through route. In addition, the Board's obligations to uphold a railroad's routing preferences are qualified further by 49 U.S.C. §10705(a)(2)(A) – (C). Subparagraph (C) provides that the Board does not have to defer to a railroad's preference for its long haul if the Board "decides that the proposed through route is needed to provide adequate, and more efficient or economic, transportation." This provision gives the Board broad

discretion to allow competition between Class I railroads when a bottleneck railroad has been determined to be long-term revenue adequate. Indeed, 49 U.S.C. 10101(1) commands the Board to allow such competition “to the maximum extent possible.” *See also* STB Docket NOR 42131, *Canexus Chemicals v. BNSF* (served February 8, 2012)(where the STB found in part that BNSF’s preference for a particular route and interchange point with the Union Pacific Railway was unreasonable under §10705(a) and contrary to the public interest).

The Board also clearly has the discretionary administrative authority to amend its competitive access rules under 49 CFR Part 1144 and decide to terminate their application to bottleneck rate situations involving long-term-revenue-adequate railroads. The authority to change the competitive access rules administratively was briefed extensively by the NGFA and other parties in their submissions in Docket No. EP 711 (Sub-No.1), *Reciprocal Switching*, where the Board in 2017 proposed to overturn 30-year-old agency precedent and regulations implementing 49 U.S.C. §11102(c), which have stifled shippers’ ability to obtain competitive rates through reciprocal switching from interchange points served by railroads other than their incumbent carrier.

Finally, the NGFA repeats below the three additional elements it believes would be appropriate for suspending the bottleneck rules as applied to shipments of agricultural products.

- First, in cases where the bottleneck railroad and alternative railroads regularly have utilized an interchange, there should be a rebuttable presumption that the interchange is physically and operationally feasible and safe. The railroad – not the shipper – should bear the burden to rebut this presumption.
- Second, suspending the bottleneck rules should not lead to a conclusion that “effective competition” is present for the non-bottleneck segments of through movements. Whether the bottleneck rate results in the competition the RRTF envisions actually occurs – or occurs at all – should be determined on a case-by-case basis pursuant to the Board’s rules governing determinations of market dominance.

- Third, as noted previously by NGFA, to the extent a long-term-revenue-adequate railroad responds to a request for a rate over a bottleneck segment by establishing a charge to switch the trains of the alternative railroad, there should be clear standards that prevent such charges from becoming an economic barrier to using an alternative railroad. NGFA previously has suggested a rebuttable-presumption, cost-based approach that the railroad must justify if the switch charge is challenged.

Distilled to its essence, the railroads' collective objection to the RRTF's bottleneck recommendation is that they do not want to be put in a position of competing with another railroad to keep business they currently have from a captive rail shipper to which they can charge monopoly rates. This is flatly contrary to the statutory charge to the Board to allow rail-to-rail competition "*to the maximum extent possible.*" The RRTF's proposals, on the other hand, are entirely consistent with the statutory directive.

3. The Board also has the authority to liberalize the reciprocal switching rules, which also may prove to be a very effective way to foster rail-to-rail competition

The railroads' reaction to the RRTF's bottleneck rule proposals is consistent with the theme the Class I railroads advanced in Docket No. EP 711 (Sub-No. 1), *Reciprocal Switching*, in which they objected strongly to the Board's proposal to reverse the onerous standards for permitting reciprocal switching pursuant to 49 U.S.C. §11102(c), an action that would have benefitted all Class I railroads by increasing their opportunities to compete for market share.

Amending the reciprocal switching rules remains a potentially effective way to increase competition in the railroad industry. As discussed in this hearing proceeding, there is an interplay between requiring a bottleneck railroad to short-haul itself under §10705 and §11102(c) because under §10705, the Board may require a bottleneck railroad to short-haul itself and permit competition with a non-bottleneck railroad by requiring the bottleneck railroad to provide

reciprocal switching pursuant to §11102(c). Thus, a reciprocal switching order under §11102 is an express exception to the statutory provisions that favor the railroads' preference for their long haul. The NGFA believes that amending the reciprocal switching rules to place more appropriate emphasis on implementing the congressional intent of directing railroads to enter into reciprocal switching agreements "where such agreements are necessary to provide competitive rail service" is warranted.

D. The NGFA Supports Rate Rules that Compare Rates if Properly Formulated and Procedurally Efficient

The NGFA continues to believe the Board's Three-Benchmark methodology could be improved to make it a more accessible, workable and cost-effective process for challenging unreasonable rail rates. For this reason, in its Opening and Reply Comments in the Final Offer Rate Review (FORR) proposed rule (EP 755), NGFA respectfully recommended that the Board not close the docket in *Expanding Access to Rate Relief*, EP 665 (Sub-No. 2), and instead continue work toward issuing final rules that modify its initial proposal in response to the comments received from NGFA and other stakeholders, as well as the recommendations of its RRTF. In particular, the NGFA supported the following recommendations made by the RRTF to improve the "smallest rate cases" methodology proposal in EP 665 (Sub-No. 2):

1. Allow the traffic comparison group to include similar traffic with R/VC ratios below 180 percent, so long as they exceed the carrier's RSAM figure;
2. Set the revenue need adjustment factor at 1 when the carrier is "long-term revenue adequate," as defined by the Board;
3. Eliminate the so-called "common-carrier adjustment," which was used in a single case with virtually no evidentiary support;
4. Eliminate the "revenue-per-ton-mile screen;"

5. Eliminate the “other-relevant-factors” component, which has been shown to be subject to abuse and litigation gamesmanship by defendant railroads;
6. Eliminate the confidence interval; and
7. Adopt more streamlined procedural rules and timelines.

As noted in its previous filings on the FORR rulemaking, the NGFA does not agree with the RRTF’s recommendation to establish a \$500,000 cap for relief for cases utilizing the three-benchmark methodology. This is far too low for reasons the NGFA has explained in its prior comments to that docket.

However, the NGFA continues to believe that rate review methodologies that utilize a rate-comparison approach, such as the Board’s “smallest rate cases” proposal and the current Three-Benchmark Methodology (as modified by recommendations from the RRTF, NGFA and other stakeholders), can be useful and improve the process, and we encourage the Board to continue its efforts in this regard. NGFA’s support for the comparison-traffic-based approach also is one reason it conditionally supported the Board’s proposal to amend its Waybill Sample regulations to simplify and increase the sampling rates required to be reported by Class I railroads of non-intermodal carload shipments. The RRTF correctly has pointed out that this additional data would provide a greater number of potentially comparable movements and relevant comparability factors from which shippers could create comparison group proposals, thereby rectifying the paucity of data that currently too often exists.

E. The NGFA Continues to Believe Rate Disputes Could be Resolved Through its Arbitration Process

The NGFA continues to believe rate-related disputes between its member companies and rail carriers could be resolved successfully through the NGFA’s Rail Arbitration System, which

has been in place since 1998 and has operated extremely well. In fact, there is nothing now preventing a shipper and railroad from arbitrating a rate dispute through NGFA, even though such arbitration currently is **not** compulsory under NGFA's Rail Arbitration Rules.

However, doing so requires a willing partner. Thus far, Class I carriers have rejected repeated approaches from NGFA to create a framework for compulsory arbitration of rate-related disputes. To its credit, the BNSF Railway approached NGFA on two occasions for exploratory discussions – first with NGFA's Executive Committee on January 12, 2015, and followed by an initial working discussion on October 27, 2016 between two BNSF executives with a delegation representing NGFA's Rail Shipper/Receiver Committee to explore potential approaches. However, no follow-up discussions have been conducted with BNSF after it indicated that agreement by one or more additional Class I carriers would be a prerequisite for its participation. Despite several approaches by NGFA to other Class I railroads since 2016, none has expressed a willingness to even explore such discussions, which NGFA attributes in large part to the current lack of an accessible, timely, workable and cost-effective rate-challenge process at the Board. Further, no Class I railroad yet has agreed to arbitrate a rate complaint involving an individual shipper through NGFA's system.

NGFA believes fervently in alternative-dispute resolution, including its own, which provide impartial, transparent, cost-effective and timely resolution of disputes, with decisions rendered by disinterested experts knowledgeable about the type of dispute involved in the case. Cases filed under NGFA's Rail Arbitration System are adjudicated by a panel of three arbitrators comprised of both rail carriers and rail users, with written decisions published and made available publicly, in which the arbitrators' names are listed to further enhance transparency and accountability.

NGFA believes strongly that having a streamlined, workable, timely and cost-effective rate-challenge process available through the Board – such as the proposed FORR and an updated and improved Three-Benchmark methodology along the lines NGFA has suggested – would be an important development to “incentivize” thus far recalcitrant Class I carriers to consider alternative dispute resolution as a means of resolving shipper-railroad disputes involving freight rail rates and other matters, including demurrage and accessorial practices that rail customers may believe are commercially unfair, commercially unachievable and non-reciprocal.

Conclusion

The NGFA appreciates the Board’s willingness to provide an opportunity for stakeholders to provide supplemental comments following the public hearing, and thanks the Board in advance for its consideration of its comments.

Respectfully submitted,



Randall C. Gordon
President and Chief Executive Officer
National Grain and Feed Association
1400 Crystal Drive, Suite 260
Arlington, VA 22202
rgordon@ngfa.org
202-289-0873



Thomas W. Wilcox
GKG Law, P.C.
1055 Thomas Jefferson St. Suite 500
Washington, D.C. 20007
twilcox@gkglaw.com
202-342-5248

*Transportation Counsel for the National Grain
and Feed Association*

February 13, 2020