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April 4, 2019

By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

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STB Docket EP 752, Petition for Rulemaking - Association of American Railroads

Dear Ms. Brown:

The National Grain and Feed Association (“NGFA”) respectfully submits this statement opposing the Petition for Rulemaking filed in this docket by the Association of American Railroads (“AAR”) on March 14, 2019. NGFA generally concurs with the position advanced in the Reply filed by the “Joint Shippers”¹ participating in this docket that it is inappropriate, unnecessary, contrary to the practices of nearly every other independent federal agency and contrary to the public interest for the Surface Transportation Board (“STB” and “Board”) to promulgate a formal regulation encumbering the Board with conducting a cost-benefit analysis in virtually all rulemaking proceedings. The Petition should be summarily denied.

Established in 1896, the NGFA consists of more than 1,100 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. Its 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. The NGFA also consists of 33 affiliated State and Regional Agribusiness Associations. In addition, the NGFA has a strategic alliance and is co-located with the North American Export Grain Association (NAEGA), and has a strategic alliance with the Pet Food Institute.

More specifically, the NGFA is not opposed to the Board incorporating a structured cost benefit analyses (“CBA”) process into its rulemaking proceedings should it desire to do so. However, there is no need to engage in a formal rulemaking to codify regulations governing CBAs for all Board-proposed regulations, something very few other executive branch or independent agencies have done. It is far more common and typical for federal agencies, if they adopt CBA standards, to do so using an internal memorandum or policy statement, which gives the agency flexibility in preparing CBAs depending upon the rulemakings undertaken.

¹ Agricultural Retailers Association, American Chemistry Council, American Malting Barley Association, Corn Refiners Association, Freight Rail Customer Alliance, Industrial Minerals Association-North America, Institute of Scrap Recycling Industries, Louisiana Chemical Association, National Association of Chemical Distributors, National Industrial Transportation League, Private Railcar Food and Beverage Association, The Chlorine Institute, The Fertilizer Institute, and Vinyl Institute

NGFA concurs with the Joint Shippers that it would be very difficult to fashion a “one-size-fits-all” regulation governing CBAs for all STB rulemaking proceedings given the Board’s multifaceted statutory directives. Contrary to the strong implication in the Petition that the Board’s only statutory mandate of import is to “promote the long-term financial health of the railroad industry,” Petition at 3,² the Board’s statutory mandates are much broader and more balanced and complicated. To name just a few, the Board also must act in the overall public interest, encourage competition between railroads, ensure rail rate, demurrage and accessorial practices and charges are reasonable, and encourage the efficient use of railcars and other rail assets – many of which now are owned by non-railroads.

NGFA, therefore, would not oppose the Board undertaking the development of CBA standards to be applied in rulemakings if it wished to utilize its limited resources for this purpose. However, this should be pursued *only* in the non-formal manner utilized by other federal agencies. Because AAR’s Petition seeks only the establishment of CBA standards through adoption of a formal regulation, NGFA urges that it be denied or withdrawn.

Finally, NGFA questions the motives of AAR in submitting the Petition at this time. Namely, the Board has weathered an extended period of uncertainty given the delay in nominating and confirming new members. Thankfully, the Board now has three of its five allotted members in place and has indicated it is ready to resume consideration of important pending policy matters, several of which are of keen interest to NGFA. To NGFA, the Petition is a thinly disguised attempt by the AAR to delay even further the Board’s completion of important pending rulemaking proceedings, most notably EP 711 (Sub-No. 2), *Reciprocal Switching*, which has been pending before the agency since 2016 (but which really began in 2011 with the filing of a Petition for Rulemaking in Docket EP 711 by the National Industrial Transportation League). The Petition also specifically mentions EP 704 (Sub-No. 1) *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*. Other potential rulemakings that also could be adversely affected by further delay include EP 665 (Sub-No. 2), *Expanding Access to Rate Relief*, an Advanced Notice of Proposed Rulemaking issued in August 2016d that is part of the Board’s salutary efforts to develop and adopt new regulations and standards to govern challenges to unreasonable rail freight rates.

NGFA implores the Board not to delay any pending rulemaking proceedings (or in the case of rail rate regulation reform, any other agency actions that emanate from the current deliberations of its Rail Rate Reform Task Force) should it either: 1) grant the Petition (which it should not do); or 2) deny the petition but elect to begin developing a memorandum or policy statement on CBAs.

Further, NGFA believes the Board needs to be circumspect when evaluating whether and when to conduct CBAs given its finite staff resources to ensure it does not further hamstring its efficiency and effectiveness in conducting business. Doing so not only would be a disservice to rail users and be contrary to the public interest, but also would contravene Congressional intent under the Surface Transportation Reauthorization Act of 2015 designed to further enhance the Board’s timely consideration of proceedings and cases.

² See also, *id* at 10 (the Board has statutory obligations to “minimize regulation and promote the railroad industry’s financial health”).

For the reasons set forth in this letter, NGFA respectfully requests that the Board deny the AAR's Petition.

Sincerely,

A handwritten signature in black ink that reads "Randall C. Gordon". The signature is fluid and cursive, with the first name being the most prominent.

Randall C. Gordon
President and Chief Executive Officer
National Grain and Feed Association

A handwritten signature in blue ink that reads "Thomas W. Wilcox". The signature is cursive and written in a slightly slanted position.

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