

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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EXPANDING ACCESS TO RATE RELIEF

REPLY COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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Union Pacific Railroad Company submits this reply in response to the opening comments submitted by the shipper parties in this proceeding—the American Chemistry Council (“ACC”), the Montana Wheat and Barley Committee et al. (“MWBC”), and the National Grain and Feed Association (“NGFA”). Union Pacific also joins in the reply comments of the Association of American Railroads.

The shipper parties’ comments reinforce our view that the Board should not proceed with efforts to develop a more simplified version of its Three-Benchmark (“3B”) test.

For the most part, ACC’s comments consist of observations about the Board’s proposal, rather than endorsements of, or opposition to, specific proposals. Where ACC does offer stronger opinions—for example, opposing eligibility restrictions but endorsing special market dominance standards and commodity-specific revenue need adjustments—we disagree with ACC’s positions for the reasons already discussed in our opening comments. However, Union Pacific does agree with ACC that the Board’s proposed new methodology does not “offer[] much, if any, savings over the Three-Benchmark methodology,” and that “some elements of the new methodology could increase costs.” ACC Comments at 11.

MWBC’s and NGFA’s comments also merit only a brief response. Both parties make clear that they would not be satisfied with a simplified, lower-cost version of the 3B test—they

want a test that is guaranteed to drive down as many grain rates as possible. To that end, both parties urge the Board to include traffic priced below the 180% R/VC level in comparison groups. However, they do not challenge the Board’s indisputably correct understanding that differential pricing principles and the statutory provisions governing rate reasonableness determinations require the exclusion of traffic with R/VC ratios below 180%. *See* ANPR at 13; *see also Rate Guidelines – Non-Coal Proceedings*, 1 S.T.B. 1004, 1026 (1996) (“That would be inconsistent with the statute . . .”).¹

MWBC also urges the Board to include non-defendant traffic in comparison groups—at least when the result would benefit shippers. MWBC does not challenge the Board’s conclusion that R/VC ratios cannot be compared across carriers. *See* ANPR at 14-15. Nor is MWBC concerned about increased litigation costs. *See id.* at 15. MWBC’s only concern is whether the inclusion of non-defendant traffic will drive down grain rates. *See* MWBC Comments at 22 (“If the Board’s methodology ‘works’ [i.e., produces lower rates] in such situations [i.e., when non-defendant traffic is included] but does not work if lower [non-defendants’] rates for similar shipments are ignored, the complainant should be allowed to pursue reasonable and cost effective discovery [of non-defendants’ lower rates].”).

MWBC’s and NGFA’s comments also repeat claims about grain transportation markets that Union Pacific and others thoroughly refuted in Ex Parte No. 665 (Sub-No. 1) (“EP 665-1”).

¹ NGFA also argues for including traffic with R/VC ratios below 180% by criticizing the Board’s “reliance upon [URCS] for rate benchmarking.” NGFA at 15. NGFA says URCS is so severely flawed that “‘comparing the arbitrarily defined URCS variable cost with an actual rate is not a sound basis for screening shippers for eligibility for relief.’” NGFA Comments at 15 (quoting Transportation Research Board, *Modernizing Freight Rail Regulation* 91 (2015)). However, if the Board believes URCS cannot be used for rate benchmarking, then including traffic with R/VC ratios below 180% in comparison groups would not be the answer; rather, the Board would have to abandon all R/VC comparison-based rate tests, including the current 3B test.

For example, they claim that grain shippers require special protections because most of them lack competitive options. But as we explained in EP 665-1, every grain producer initially ships by truck, and nearly all producers have a wide range of competitive options because they can truck grain not only to different elevators served by other railroads or by barge, but also to feed lots, ethanol plants, or other processing facilities. Any producers that may be beyond trucking distance to any destination except Union Pacific-served elevators also obtain competitive rail rates because there is such extensive geographic competition for grain.² Indeed, the shipper parties in EP 665-1 acknowledged that grain markets are highly competitive and that most grain moves at rates below the 180% R/VC jurisdictional threshold.³ MWBC and NGFA make similar concessions here. *See* MWBC Comments, Verified Statement of Gerald W. Fauth III at 9, 19, 20; NGFA Comments at 14 (“captive agricultural commodity producers and elevators participate in a highly competitive market”). Moreover, as we showed in EP 665-1, the use of system-average URCS to calculate variable costs of grain traffic likely *understates* the actual costs of handling grain, meaning that actual R/VC levels are even *lower* than system-average URCS calculations suggest.⁴

² *See* Reply Comments of Union Pacific Railroad Company at 6-9, *Rail Transportation of Grain Rate Regulation Review*, EP 665 (Sub-No. 1) (Aug. 25, 2014) (hereinafter “Union Pacific EP 665-1 Reply”); *see also* Comments of BNSF Railway Company, Verified Statement of William W. Wilson (“Wilson VS”) at 37-42, *Rail Transportation of Grain Rate Regulation Review*, EP 665 (Sub-No. 1) (June 26, 2014).

³ *See* Union Pacific EP 665-1 Reply at 9-10 (quoting comments of shipper parties).

⁴ *See id.* at 10-14. As part of that showing, we refuted claims that URCS does not reflect efficiencies associated with unit train shipments of grain. In addition, at the Board’s June 10, 2015 hearing in EP 665-1, we presented an exhibit illustrating that URCS calculations reflect grain unit train efficiencies: we showed that URCS variable costs per car for trainload shipments were 37% lower than URCS variable costs per car for carload shipments with otherwise identical movement characteristics.

With regard to MWBC’s claim that railroads undermine the reliability of Waybill Sample data by misreporting multiple car shipments as single car shipments, *see* MWBC Comments at 15, we (continued...)

We also explained in EP 665-1 that the options available to grain shippers—competition between Union Pacific and other railroads, competition between Union Pacific and trucks and barges, and geographic competition—benefit small farmers as well as large businesses. MWBC repeats claims made in EP 665-1 that farmers are forced to bear the costs of rates paid by captive elevators and that railroads are indifferent to the concerns of farmers. *See* MWBC Comments at 6 & Verified Statement of Terry Whiteside (“Whiteside VS”) at 28. However, as we noted in EP 655-1, the bulk of our freight bills for grain are paid not by elevators, but by relatively few grain receivers or brokers with extensive networks.⁵ Moreover, these receivers and brokers are not tied to particular origins—they can buy grain from a wide range of origins, and this geographic competition constrains the rates we can charge for movements from any one elevator. Furthermore, if we tried to charge unreasonable rates to an elevator that then tried to pass along the costs to farmers, the farmers could respond by trucking their grain to elevators served by other railroads or by barge, or to local feed lots or processors. And if farmers did so, they would deprive Union Pacific of revenues.⁶

Finally, MWBC’s comments repeats prior complaints about lack of public access to grain rates. *See* Whiteside VS at 20. Union Pacific’s public prices are available through a website that anyone can access by providing their name, company name, company email, and company phone

explained in EP 665-1 that the *shipper* determines how its cars are described on the waybill. *See* Union Pacific EP 665-1 Reply at 11 n.4.

⁵ *See* Union Pacific EP 665-1 Reply at 7; *see also* Wilson VS at 16-19 (describing concentration and vertical integration by agricultural firms with expansive networks for originating shipments).

⁶ *See* Union Pacific EP 665-1 Reply at 7-8. MWBC mischaracterized our evidence about which parties pay the bulk of our freight bills for grain by claiming that it shows larger volumes matter more to railroads than smaller volumes. *See* MWBC Comments at 6. They missed the point that the large agribusiness firms buying the grain and paying the freight can and do ship from a wide variety of points on and off Union Pacific in what NGFA describes as “a highly competitive market in which transportation costs may well make the difference between being competitive or non-competitive.” NGFA Comments at 14-15.

number.⁷ Our website allows public access to our public rates from any location at any time—far better access than is mandated by the Board’s regulations, which require each rail carrier to make its public rates for agricultural products and fertilizer “available at offices where it normally keeps rate information” and require only that rail carriers provide such access “during normal business hours.” 49 C.F.R. § 1300.5(c).

* * *

None of the shipper parties commenting on the Board’s proposed new procedures shows any enthusiasm for the proposal. Shippers do not want a lower-cost rate test; they want a test that produces lower rates at any cost. Their comments reinforce our strong belief that the relative lack of rate cases reflects the relative lack of rates that would be found to be unreasonable under any economically sound standard. The Board’s current rate reasonableness rules are working as they should, and there is no reason to develop yet another rate test.

Respectfully submitted,

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⁷ See http://www.up.com/customers/all/price_inquiry/index.htm.