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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. EP 528 (SUB-NO. 1)

PUBLICATION REQUIREMENTS FOR AGRICULTURAL PRODUCTS

OPENING COMMENTS OF

ALLIANCE FOR RAIL COMPETITION
NATIONAL FARMERS UNION
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
MONTANA FARMERS UNION
NORTH DAKOTA FARMERS UNION
SOUTH DAKOTA FARMERS UNION
MINNESOTA FARMERS UNION
WISCONSIN FARMERS UNION
NEBRASKA WHEAT BOARD
OKLAHOMA WHEAT COMMISSION
OREGON WHEAT COMMISSION
SOUTH DAKOTA FARMERS UNION
TEXAS WHEAT PRODUCERS BOARD
WASHINGTON GRAIN COMMISSION
WYOMING WHEAT MARKETING COMMISSION
NORTH DAKOTA GRAIN DEALERS ASSOCIATION
IDAHO GRAIN PRODUCERS ASSOCIATION
USA DRY PEA AND LENTIL COUNCIL
US DRY BEAN COUNCIL
US GLASS PRODUCERS TRANSPORTATION COUNCIL

Terry C. Whiteside
Registered Practitioner
Whiteside & Associates
P O Box 20574
Billings, MT 59104-0574
(406) 245-5132
twhitesd@wtp.net
Representing certain shipper interests
identified above

John M. Cutler, Jr.
Law Office
Suite 640
5335 Wisconsin Avenue, NW
Washington, DC 20015
(301) 767-7592
johnmcutlerjr@gmail.com
Attorney for Alliance for Rail Competition

I. INTRODUCTION

The Alliance for Rail Competition (“ARC”) and the other parties identified on the cover (collectively “ARC, et al.”), largely representing producers and shippers of agricultural commodities, welcome the opportunity to comment on the STB’s Notice of Proposed Rulemaking and Policy Statement served December 29, 2016. ARC, et al., generally support the Board’s decision in this proceeding.

ARC has, for many years, represented the interests of its captive shipper and producer members in STB proceedings. Since its inception in 1997, ARC has included agricultural producers and shippers, as well as shippers of other products. Other parties to these comments also represent captive producers and/or shippers of agricultural products. Though ARC, et al. are primarily based in Western States, the agricultural products of the members and constituents of ARC, et al. are transported throughout the United States.

More than a decade ago, in comments filed October 30, 2006 in Ex Parte No. 665, Rail Transportation of Grain, ARC listed features of STB regulation of rail rates, service, practices and competition that adversely affect many captive producers and shippers. At the end of that recitation, ARC called on the Board “to dismantle the barriers that provide railroads with a uniquely privileged position in the American economy, i.e., ineffective regulation and ineffective competition.” We concluded (Comments at 14-15):

These barriers were not erected overnight and ARC understands that they cannot be swept away at a stroke. However, the time has come to begin the task of restoring balance to railroad-grain shipper relationships.

This proceeding, and ongoing proceedings such as EP 711 (Sub-No. 1), Reciprocal Switching, and EP 722, Railroad Revenue Adequacy, in which ARC, et al. are participating, offer some hope of real progress toward that better balance.

There is much work left to be done on a workable test of rail rate reasonableness for agricultural commodities meeting the requirements of 49 USC§ 10101(d)(1)¹ and (d)(3)², as shown in the comments filed by ARC, et al., and others in EP 665 (Sub-No. 2), Expanding Access to Rate Relief. However, adoption of a rate reasonableness test that avoids the problems inherent in SAC, SSAC and Three-Benchmark would still fall short of meeting the needs of many producers of agricultural products, due to problems the current proceeding addresses.

It is not enough to have a regulatory standard that can constrain rates on captive traffic to reasonable levels, if most captive rail customers cannot afford to bring rate cases, or the relief offered is so limited or capped as to preserve powerful incentives for railroads to charge excessive rates, or if other obstacles prevent captive customers from invoking statutory remedies.

Today, the only rate reasonableness test that agricultural producers might find affordable – Three-Benchmark – works only to rein in “outlier” rates, which are not the norm for agricultural commodities. Moreover, the Three-Benchmark test has led to rates with R/VC percentages exceeding 300% being found reasonable. Better protections for captive rail customers are needed, especially where rail rates

¹ “If the Board determines ... that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such rail carrier for such transportation must be reasonable.”

² “The Board shall ... establish a simple and expedited method for determining the reasonableness of a challenged rail rate in those cases in which a full stand-alone cost presentation is too costly, given the value of the case.”

and/or R/VC percentages tend to be uniformly high, and subject to generally uniform increases. Such pricing is common for grain, as shown by the records in EP 665 (Sub-No. 1) and (Sub-No. 2). Under such circumstances, a comparable rates standard of reasonableness has clear shortcomings.

ARC, et al., recognize that this proceeding has a narrower focus. Nevertheless, ARC, et al., welcome both the proposed new regulation on rail tariff transparency and the Policy Statement on producer standing and aggregation of claims. The December 29 decision represents an important step toward the goal of better access to effective regulatory remedies for thousands of captive rail customers. Without these changes and clarifications, progress on other fronts, including rate levels, might fail to provide effective recourse to many in the agriculture community.

II. PRELIMINARY PROCEDURAL COMMENTS

Before making further substantive comments, ARC, et al. would address some procedural considerations. First, as we read the STB's December 29 decision, public comments are sought only as to the proposed modification to 49 CFR§ 1300.5(c), providing for online tariff access for agricultural products and fertilizer. The other points made in the Board's decision in this proceeding constitute a statement of general policy, effective as of December 29, 2016, which is not subject to the notice and comment rulemaking procedures of the Administrative Procedure Act, 5 USC§ 553.

ARC, et al. will therefore focus in these opening comments on the Board's NPRM as to tariff access and transparency, and we are filing herewith the Opening Verified Statement of Terry Whiteside, who has extensive experience with relevant rail tariff issues.

We will also say a few words about the Board's Policy Statement, and we expect the railroads to address the Policy Statement at greater length in their opening comments, despite prior comments to the effect that such standing issues did not require a rulemaking.³ We plan to respond to any such railroad comments in our reply comments.

Second, ARC, et al., understand that the Trump Administration plans to reduce what it sees as excessive regulations. The extent of the new approaches to regulation, and their impact, if any, on STB railroad regulation, remain to be seen. However, nothing issued by the White House to date appears to affect this proceeding. See the February 2, 2017 White House Memorandum: Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, Titled "Reducing Regulation and Controlling Costs."

III. THE BOARD'S NEW RULE ON ACCESS TO CERTAIN RAIL TARIFFS SHOULD BE ADOPTED

There should be little or no opposition to the proposed modification of 49 CFR§ 1300.5, providing for online access to the tariff information railroads are already required to provide at their offices. In fact, website or online tariff access should be the easiest type of tariff access for railroads, and the most timely. However, as detailed in Mr. Whiteside's VS, the major railroads' websites do not currently provide all of the online access to "public" tariff information that shippers, producers and others need.

³ See the Reply Comments of NS filed August 25, 2014 in EP 665 (Sub-No. 1), at 7 (footnote omitted): "NS does not believe the shippers are asking for anything different than what the statute already acknowledges. Under 49 USC§ 11701(b), third parties have the ability to bring rate cases even when they do not pay directly for the challenged rail transportation. NS has no issue with the Board reaffirming the principle that on a case-by-case basis a party can bring a rate challenge as to transportation for which it can demonstrate a sufficient nexus to the rate at issues, even if not directly paying the rate."

Tariff transparency is already required by law for agricultural products and fertilizer; the Board's proposal merely adds modern online access methods, consistent with the way most business is done today. In fact, at some point the Board may want to propose online access to tariff information for other commodities as well. Tariff transparency as called for by the Board obviously serves the public interest, and the absence of tariff transparency has equally obvious deficiencies, particularly for producers and shippers of agricultural products and fertilizer. In the West, most agricultural products move at tariff rates, not under contracts.

In its final rule or decision, the Board should make it clearer that online access must be available at no charge. Currently, 49 CFR§ 1300.5(c) specifies that tariff information provided at carriers' offices "must be provided to any person, without charge." The new sentences the Board is proposing to add to Section 1300.5(c) require that Class Is "must also make the information available to any person online", but the new text does not specify that online access, like access at carrier offices, must be without charge.

Providing shippers with access to the tariff provisions applicable to their own shipments is not good enough. Shippers also need to know what rates, charges and service terms apply to alternative routings for themselves and their competitors. As the railroads frequently point out, many agricultural products are sold in multiple markets, depending in part on pricing. Railroad freight charges are part of pricing.

Not only do shippers need easy, fast, free and timely access to tariff data, but so do producers of agricultural products. Producers' businesses may also be affected for better or worse by the pros and cons (including rail costs and service terms) of choices available to them. This can be true even where (as in Montana) a

single railroad handles almost all shipments of agricultural products. When railroads deny or limit access to tariffs, producers' ability to optimize their businesses is impaired.

There are also other legitimate interests which should not be denied information about tariff rates and charges, or forced to assume costs and burdens to obtain such information. These other interests include federal and state government officials (the STB, USDA, DOT, GAO, etc., and state agriculture departments, attorney general offices, etc.). They also include brokers, freight forwarders, consultants, attorneys, academics, journalists, trade associations, wheat and barley committees and commissions and their staffers, employees and assistants. Rate histories are important for regulatory and analytical as well as commercial purposes.

Also important is tariff access for other railroads and other transportation service providers, including trucking companies and barge lines. Railroads like to claim that they are subject to extensive intramodal and intermodal competition, but such claims are especially hard to credit coming from railroads with highly restrictive access to their tariff provisions. Railroads have also argued that STB rate regulation should "mimic the outcomes of competitive markets".⁴ Captive shippers and producers cannot apply this standard to assess the reasonableness of their rates without access to tariff provisions containing the rates being charged to their non-captive counterparts.

ARC, et al., are aware of businesses which seek to restrict access to pricing information, and demand non-disclosure agreements when price information is provided. That such policies exist in other areas of the economy is no reason to

⁴ See, e.g., the August 25, 2104 Rely Comments filed by AAR in EP 665 (Sub-No. 1), at page 6.

tolerate them as to rail transportation of agricultural products and fertilizer. As a matter of law, Congress clearly intended to maximize transparency of “common carrier rates, schedules of rates, and other service terms” applicable to agricultural products. See 49 USC§ 11101(d). Sound public policy considerations also support implementation of the proposed rule.

During the period when railroad tariffs were posted in the ICC tariff room described by Mr. Whiteside (VS at 9), there were no restrictions on who could see the public tariffs. This was a period when confidential rail transportation contracts were nonexistent or rare, so almost all rail rates were tariff rates. There can be no justification for more limited tariff access today than there was then.

In its December 29, 2016 decision, the Board asks whether it should go further in promoting greater tariff transparency. Decision at 5. It also proposes to exclude Class II and III rail carriers from the online access requirement, “as this may be a significant burden to Class II and III carriers that do not have websites,” (*id.*, note 5). The Board also notes that Class I railroads’ websites may use a reasonable “registration feature.” *Id.*, note 6.

ARC, et al. do not object to the exclusion of Class II and III railroads which have no websites, though such railroads will still need to provide rate information to any person, without charge, and should use electronic means (e.g., email) if available. Cf. 49 CFR§1300.2(b). However, we see no reason why short lines that do have websites with tariff information should be allowed to deny or restrict online access to such data. Current 49 CFR§ 1300.5 does not exempt short lines, and, as Mr. Whiteside points out (VS at 19), many short line railroads’ rates are part of a through rate under Rule 11 or under an interchange agreement.

As for “registration”, it is not clear why the Board would allow railroads to require website users with an interest in tariff rates on agricultural products to “register” with the railroad. Under 49 USC 11101(d), railroads, whether they are Class I, II or III, must “publish, make available and retain for public inspection” their tariff rates on agricultural products. Rates and other service terms applicable to other commodities must be provided “on request” under 49 USC 11101(b), but agricultural product shipments are not subject to a similar requirement that a “request” for tariff information must be made.

In any event, any such feature should not include burdensome requirements for detailed information, along the lines of a showing of “need” or “relevance”, which railroads might use to discourage or deny online access. See also the attached Whiteside VS at 12, discussing a CP website restriction that prevents access by many farm producers and others who use gmail and other non-company email addresses. Such restrictions need to be eliminated.

The NPRM states: “the Board would expect that such registration be structured in manner that allows any person to view the tariffs for agricultural commodities and fertilizer.” Because registration requirements could be highly burdensome and still meet this standard, we urge the Board to clarify in its final decision in this proceeding that registration requirements, if any, must be minimally burdensome and continuing, without requiring an advance subscription and payment. The Board should also clarify that online tariff information, once obtained, may be freely shared.

IV. PRELIMINARY OBSERVATIONS ON THE BOARD'S POLICY STATEMENT

In deciding to issue a Policy Statement as to issues other than tariff transparency, the Board was electing to provide general guidance. Evidently, the Board expects details on non-shipper standing issues and aggregation of claims issues to be worked out in the future, as disputes are resolved in complaint (and other) proceedings.

ARC, et al. hope that the Board's guidance encourages captive producers and others with concerns about rail transportation of agricultural commodities to feel less excluded from regulatory relief. STB clarification as to standing and aggregation of claims should be welcome to many producers and other agricultural and fertilizer interests.

However, as noted above, greater clarity on standing is necessary but not sufficient. We also need one or more tests of reasonableness that constrain excessive rates on captive agricultural products and fertilizer shipments, even where the rates apply to groups of shippers, or to States or regions. SAC, SSAC and Three-Benchmark have never accomplished this result.

There are other aspects of the Board's Policy statement that deserve comment. One is the apparent inconsistency between the Board's statements that, on the one hand, it is not subject to restrictions on standing that courts impose, and on the other hand, it may apply exactly those standards.

At page 7 of its December 29, 2016 decision, the Board cites three tests of standing – whether the complainant suffered injury in fact, whether the injury results from the challenged conduct, and whether the injury is likely to be redressed by a favorable decision. These tests reflect established judicial

requirements for standing, rooted in the case or controversy standard of Article III of the Constitution, and the limited jurisdiction of the federal judiciary.

The STB is not an Article III court, and is not subject to the same limitations as courts. Rather, the STB, like the ICC before it, is charged with regulating the railroads in the public interest, subject to statutory and APA constraints. Moreover, one of the precedents the Board cites at page 7 – ICC Docket No. AB-3 (Sub-No. 103), Mo. Pac. R.R. – Aban. – In Douglas, Champaign and Vermilion Ctys., Ill., served November 3, 1994, makes the point more simply, noting “we do not exclude parties for lack of standing”.⁵

Despite this apparent inconsistency, ARC, et al. welcome the Board’s stated expectation that agricultural producers and other producers will be able to establish standing to challenge rail transportation rates. Decision at 8. We also welcome the Board’s policy of permitting “the aggregation of claims where appropriate.” (*Id.*)

One element of the standing issue that was not clarified in the December 29, 2016 decision is representational or *parens patriae* standing. The Board cited USDA’s request that “groups of agricultural producers, groups of elevators or State Attorneys General” be allowed to challenge rail rates. It also acknowledged the Montana Department of Agriculture’s comment that recognition of representative standing for State Attorneys General would increase efficiency for the Board, protect railroads from piecemeal litigation, serve the interests of producers worried about retaliation, and provide expertise. However, the Board did not respond to those requests, or to similar comments filed in past proceedings by ARC, et al.

⁵ We thank Gordon MacDougall, attorney for Larry J. Miller, for attaching a copy of this unpublished ICC decision to his January 24, 2017 filing in EP 665 (Sub-No. 1).

The principle of representative or *parens patriae* standing is well-established in the courts, and research in court precedents quickly leads to cases involving rail rate issues. The Supreme Court in Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982), recognized *parens patriae* standing in a State based on its “quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general.” 458 U.S. at 607. The Snapp decision cited, as an example of a State’s assertion of its citizens’ economic interests, Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945), “in which Georgia argued that some 20 railroads had conspired to fix freight rates in a manner that discriminated against Georgia shippers in violation of the federal antitrust laws.” 458 U.S. at 605.

In his concurrence in the Snapp decision, Justice Brennan wrote:

I can discern no basis either in the Constitution or in policy for denying a State the opportunity to vindicate the federal rights of its citizens. At the very least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations.... More significantly, a State is no ordinary litigant. As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention.

458 U.S. at 611-12, citations omitted.

Research into the background of the Georgia v. Pennsylvania Railroad case discloses that the court case was brought because the Governor of Georgia was impatient with the progress of parallel proceedings before the ICC, in which Southern Governors, among others, were challenging rail rates as unlawfully discriminatory, adversely affecting shippers in the Southern Territory. The ICC’s

order granting relief, in Class Rate Investigation, 262 I.C.C 447 (1945), also led to court actions, but was affirmed by the Supreme Court. See New York v. United States, 65 F. Supp. 856 (N.D. NY 1946), aff'd., 331 U.S. 284 (1947).

As noted above, standing requirements in the courts are more restrictive than standing requirements in proceedings before the ICC or STB. It therefore should not be difficult for the Board to recognize that, in appropriate circumstances, State Attorneys General have standing to bring and/or participate in challenges to rail rates imposed by market dominant railroads on their States' producers or shippers of agricultural products and fertilizer. The benefits cited by USDA and the Montana Department of Agriculture are compelling. The concurrent court and ICC proceedings at the time of Georgia v. Pennsylvania Railroad provide further support for State parens patriae standing, and for the availability of rate relief at the request of parties other than shippers (though any rate challenge by a State Attorney General today would involve contemporary STB standards of lawfulness.)

The Board also elected not to address the issue of reparations in its Policy Statement. Decision at 6, n.7. ARC, et al. understand the Board to intend that issues of relief and other details be addressed in future proceedings, including rate cases. We nevertheless anticipate that the railroads will pursue this issue in their opening comments, to which ARC, et al. will respond in the reply round.

In its August 25, 2014 Reply Comments in EP 665 (Sub-No. 1), the AAR addressed relief, after indicating that standing issues were clear based on past precedent. At pp. 25-27 of those comments, the AAR cited court decisions from 1914-1924 for the proposition that reparations are available only to the person

responsible for the freight charges, suggesting that only a shipper or consignee would have standing to seek reparations. (The AAR does note, at page 26, n.13, the possibility of recovery by an agent for a principal.)

Remarkably, the AAR then goes on to argue that the Board lacks authority to prescribe a rate on the basis of a complaint by a party other than a shipper. Under this reading of the Act, a complaint brought by a producer, group of producers or State Attorney General cannot be dismissed “because of the absence of direct damage to the complainant” under 49 USC 11701(b), but the STB could not award reparations or order the challenged rates reduced, upon finding them unreasonably high. Put another way, as the AAR reads Section 11701(b), it permits non-shippers to file rate complaints, but no relief can be awarded, a clear Catch-22. This was not the intent of Congress.

V. CONCLUSION

For the foregoing reasons, ARC, et al. support the new online tariff access rule proposed in the Board’s December 29, 2016 decision, subject to clarification as to the concerns discussed above. We also welcome the Board’s Policy Statement on standing and aggregation of claims, even if some questions remain to be answered in the future, and even though better rate reasonableness tests are still needed for rates on captive shipments of agricultural products and fertilizer.

Respectfully submitted,



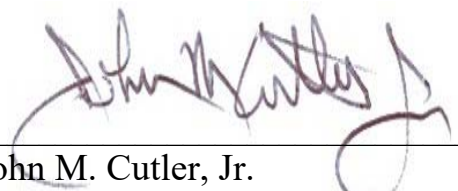
Terry C. Whiteside
Registered Practitioner
Whiteside & Associates
PO Box 20574
Billings, MT 59104-0574
406-245-5132
twhitesd@wtp.net
Representing certain interests
Identified on cover



John M. Cutler, Jr.
Law Office
Suite 640
5335 Wisconsin Ave., NW
Washington, DC 20015
301-767-7592
johnmcutlerjr@gmail.com
Representing Alliance for Rail
Competition

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of February, 2017, caused copies of the foregoing document to be served on parties of record by electronic means or first class mail.



John M. Cutler, Jr.

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. EP 528 (SUB-NO. 1)
PUBLICATION REQUIREMENTS FOR AGRICULTURAL
PRODUCTS

VERIFIED STATEMENT
OF
TERRY WHITESIDE

Terry C. Whiteside, Registered Practitioner
Principal - Whiteside & Associates
Chairman – Alliance for Rail Competition
P. O. Box 20574
Billings, MT 59104-0574
Phone: 406-245-5132

Email: twhitesd@wtp.net
Dated: February 21, 2017

VERIFIED STATEMENT

My name is Terry Whiteside and for the past thirty-two years I have been involved in the rail, pipeline and freight transportation industry. I have worked both in private and government based public entities in capacities for both carriers and shippers. Past duties and responsibilities include managing car fleets, operating tariff rooms within Fortune 500 companies, publishing tariffs for Class I carriers as well as representing shippers of freight. I am a registered practitioner and have been Principal in Whiteside & Associates, a transportation and marketing consulting firm located in Billings, MT, for the past 28 years. I also serve as Chairman of the Alliance for Rail Competition. Our clients at Whiteside and Associates cover a broad range of industries including agriculture, processing, mining, lumber, ports, manufacturing, bulk transport and finished goods.

In a decision in these proceedings served December 29, 2016, the Surface Transportation Board (STB or Board) is seeking comments and suggestions through a Notice of Proposed Rulemaking (NPRM) process wherein the Board proposes amendments to its regulations on the publication of rate and

service terms for agricultural products and fertilizer. The Board also seeks to clarify certain standing and aggregation issues related to rates. In this verified statement for ARC, et al. I will focus on the Board's NPRM as to tariff access and transparency.

We have been asked by the Alliance for Rail Competition (ARC), Idaho Barley Commission, Idaho Grain Producers Association, Idaho Wheat Commission, Minnesota Farmers Union, Montana Farmers Union, National Farmers Union, Nebraska Wheat Board, North Dakota Farmers Union, North Dakota Grain Dealers Association, Oklahoma Wheat Commission, Oregon Wheat Commission, South Dakota Farmers Union, Texas Wheat Producer Board, Washington Grain Commission, Wisconsin Farmers Union, Wyoming Wheat Marketing Commission, U.S. Glass Producers Transportation Council, U. S. Dry Bean Council and U.S.A. Dry Pea & Lentil Council to submit these opening comments and verified statement.

DISCUSSION

In its decision served December 12, 2013 in the last phase of this proceeding, EP 665 (Sub-No.1), Rail Transportation of Grain, Rate Regulation Review, the Board focused entirely on

grain and invited public comment on the Board's existing rate complaint procedures following many years of comments by agricultural shippers that the STB processes are not accessible to grain shippers and do not provide effective redress or protection against unreasonable freight rail transportation rates . The Board also sought specific proposals for modifying existing procedures or new alternative rate relief methodologies that would serve the interests of agricultural shippers and their recourse to the STB for relief from excessive freight rates and charges.

In Opening Comments submitted by ARC, et al on June 26, 2014 followed by reply comments on August 25, 2014 on behalf of ARC and several other Ag-related groups, we focused on testimony that served to described the many problems faced by grain and grain products shippers associated with the Board's current jurisdictional costing and rate reasonableness methodologies. The Board may want to revisit those comments and verified statements as we also outlined and proposed

modifications and alternative methodologies in response to the Board's call in the proceeding.

As stated in EP 665 (Sub-No. 1), agricultural producers and shippers have two major markets for their products: domestic consumption and markets accessible from tidewater transfer points (export). What is common to both of these two markets is that in order for agricultural production to have or create value to the farm producing industry, the farm products must be moved from fields and elevators to the ultimate markets or ports. The distance of move and the amount of harvest can vary from a few miles and a few truckloads to thousands of miles and hundreds of thousands of carloads. Generally agricultural commodities and fertilizer shipments require movement in bulk quantities under tariffs.

The bottom line is that all rail movements ultimately depend on rate and service levels. Rail rates that are too high to economically compete in the market place effectively shut out farm production. Service levels on rates that don't move traffic

do not matter. Rail service levels become important only when rail rates are reasonable enough to foster movements of products.

Agricultural transportation is unique from a producer perspective. The farm producer when delivering grain to an elevator or merchandiser, is the bearer of the transportation charge. It is deducted from the price producers receive for their grain deliveries. However, the grain merchandiser/elevator operation physically pays the railroad for transportation of the grain. Thus the farm producers bear the rail freight charges but do not pay the freight charges. Put another way the producer is the party that suffers under unrestrained pricing by a monopoly railroad.

OUTLINE OF TERRY WHITESIDE VERIFIED TESTIMONY:

The following testimony is based upon my professional experience with tariff access from the nation's rail system. In my experience I have worked with Class I (ICC) carriers

compiling and filing tariffs and maintaining extensive tariff libraries while managing tank car fleets. Additionally I have worked for private and public agencies that maintained tariff libraries and in the last 25 years have maintained extensive tariff files for rail agricultural movements from and to points all over the U.S.

Given that contextual background, in this Verified Statement the following subjects will be addressed:

- 1. The history of freight rate tariff public disclosure**
- 2. Present day ‘hiding’ of tariffs from full public disclosure**
- 3. Need for increased access to railroad public documents such as tariffs** which serve to provide education (to agricultural producers, small and large elevators, and merchandisers), and access to more complete summaries of transportation contracts and operational data
- 4. Be mindful that rail carriers now believe it is their right to set the market price of the commodity they are transporting.** This has led to rail carriers demarketing certain shippers while promoting others and limiting their access to their markets. In recent years --

especially the last decade -- we continually hear from shippers of numerous reductions in rail service by major railroads and their inability to utilize the current STB rate standards to access regulatory review. Rail rates and charges that exceed maximum lawful levels cannot be justified by service quality, no matter how good.

High rates are even more objectionable when accompanied by poor service. Given their increased market power throughout the grain agricultural region, the railroads have been able to restructure the way wheat and other grains move to market. A railroad with market power is in a position to use its control of pricing and service to encourage some routings and shipments, and to discourage others, thus influencing where and when products or product mixes move. Thus it is crucially important that all published tariff rates, charges and service terms be readily and openly accessible to the public, including both users and potential users of the rail transportation services.

5. Summary

1 THE HISTORY OF FREIGHT RATE TARIFF PUBLIC DISCLOSURE

1950-1970

In the 1950s, railroads were required to file all tariffs with the Interstate Commerce Commission. The ICC then filed all of these tariffs in a large library known as the “tariff room” in Washington D.C. The tariffs were open for inspection to anyone who wanted to look at them and were available for copying by the patron. There was no service by the ICC to access the tariffs for patrons outside the confines of the Tariff Room. A number of companies employed Washington DC based tariff readers to look for and study tariffs of interest. The principle the ICC adopted was that all railroad published tariffs must be available to the public for inspection.

Generally the individual railroad would also provide access to the public at their headquarters or main offices. Many railroads would also send requested tariffs to individual shippers. It should be noted that there were at this time, many railroads – hundreds compared to the 7 majors that exist today. Most companies running rail fleets had and kept their own tariff libraries with railroad tariff specialists to read and interpret the rates and routing capabilities of their individual movements.

At the same time, many of tariffs were being published by Tariff or Rate Bureaus. Tariff or Rate Bureaus were given anti-trust protection, allowing multiple railroads to get together and set rates. Generally those rates were available in the DC tariff room, but the bureaus also would send them to shippers, with and sometimes without, regular subscriptions.

1970-1980

In the mid-1970's with the advent of desktop computers (but no internet) a number of carriers started making their rates (usually by individual tariff numbers) available through dissemination of early version of CD's, updating these tariff CD's periodically. The railroads did not restrict the flow of information on rates to the general public.

As the merger phase of the industry in the 1970's and 1980's created ever larger carriers, the tariffs began to reflect tariffs covering larger territories. Each carrier seem to have its own way of transmitting tariff information to customers, but generally railroads did not restrict access by shippers and the public to tariff information. It was evident that more and more access was being granted by the railroads as the internet became more accessible.

1990 to 2000

In the early 1990's with the advent of extensive internet access the railroads generally opened up access to the public of their tariff files, thereby allowing complete access.

2. PRESENT DAY “HIDING” OF TARIFFS FROM PUBLIC DISCLOSURE

2000 to present

In the early 2000's, the BNSF put up a firewall to access to BNSF tariffs by the public and required registration before access would be granted. After first, the registration was fairly simple, but within several years, the BNSF added requirements to obtain access, including the qualification that the registrant must be a shipper on the BNSF – See Exhibit I.

Within about 6 months, the UP followed a similar path of blocking access to the public to view their agricultural tariffs. The UP's registration requirements seem to be a little less stringent than the BNSF's but the effect was the public was not allow to view public tariffs.

Additionally, from inside the firewall an entity approved by UP to view tariffs can request a UP Price Change Document

Notification wherein the UP will convey to the user selected menu information about price and/or tariff changes to the user. The UP system of registration is called MyUPRRLogin on their website. Additionally, the UP changes the password on each account every 30 days – See Exhibit II.

Within the year, the other major railroads, CSX and NS put all of their tariffs behind firewalls requiring carrier approval to access any tariff information – See Exhibit III and Exhibit IV.

CN and CP today have also erected barriers to public access. CP requires that its approval is only made to those possessing a company/corporate email. It will not accept email extensions such as gmail, Hotmail, yahoo, etc. This effectively rules out most farm producer entities, many smaller companies who do not possess company/corporate email address and inquiries by entities when not in their company/corporate office from being able to view any CP tariffs. This restriction by CP illustrates the problems that may arise if railroads are allowed to use “registration features” when implementing the required online tariff access. – See Exhibit V and Exhibit VI.

Most of the carriers provide an individual origin/destination pair lookup model but typically only from inside the firewall after acceptance of registration by the carrier.

UP calls this lookup tool “Price Document Search”, while BNSF calls theirs “Carload Shipping Advisor”.

Are the restrictions from or openness to access by the railroads consistent among users?

The railroads’ policies on tariff access appear not to be applied evenly. For example, I am advised that the BNSF, does allow the USDA, which is designated by law to represent farm producers, access to tariffs but apparently will not allow the Montana Department of Agriculture the same access. Both are governmental agencies and not shippers but represent farm producers. This discrimination by the carriers needs to be addressed by the Board by ordering full public access to all tariff bases.

Several carriers will not allow 3rd party access to freight forwarders and other intermediaries even if they are actual shippers. The same is true for DOT-registered Transportation Brokers who arrange transportation for actual shippers or future potential shippers. Shippers generally are allowed to access their own tariff items but we have heard from several that they are not allowed to view all tariff items from the carrier, such as their competitors’ rates and charges. Many carriers limit access to actual shippers, which does not allow potential future shippers

access to perform comparative analyses for possible future business opportunities involving rail transportation.

It is important that everyone, and not just shippers, be allowed online access to conduct research on transportation options, including rates, charges and service terms applicable to agricultural products. This includes producers, producer groups, consultants, attorneys, researchers, federal and State governmental officials and bodies, academics, journalists, etc..

The railroads are using these firewalls to restrict public access and indeed shipper access even though by law they must provide transportation to the public under their common carrier obligation. By law, railroads must provide to any person, in writing or electronically, the carrier's rates and service terms. See 49 USC 11101(b), and 49 CFR 1300.2(b), which makes electronic tariff information the preferred means. And for agricultural products, Section 11101(d) and 49 CFR 1300.5 require even greater tariff access.

The railroads' access restrictions affect not only agricultural/fertilizer movements but also many other commodities. While this proceeding does not focus on non-agricultural commodities moving under tariffs, the same public interest concerns addressed in this proceeding should be looked at by the Board as grounds for requiring rail rates on other

commodities to be made available online. The requirements made applicable to shipments of agricultural products and fertilizer are set forth in 49 USC Section 11101(d) and 49 CFR 1300.5. However, Sections 11101(b) and (c), and 49 CFR 1300.2 apply to all other commodities.

3. NEED FOR INCREASED ACCESS TO RAILROAD PUBLIC DOCUMENTS SUCH AS TARIFFS

There is a compelling need for increased access to railroad public documents such as tariffs which serve to provide commercial, pricing, service and other tariff information as to railroads' transportation of agricultural products and fertilizer. Access to more complete summaries of transportation contracts is also desirable for assessing the development potential of future business. This is simply reestablishment of a 100+ year old practice of open tariff access established by the ICC. With modern internet access capabilities, the carriers can and do provide restricted access to some but not all shippers as to some but not all information. The Board needs to open up online tariff access without charge or subscription, permitting public scrutiny of all tariff rules, regulations and rates and all tariff changes.

The railroads continue to deny access to their public tariff systems to many organizations, including small shippers and individual farm producers. That practice needs to be stopped by the Board. Tariffs are not meant to be secret documents but should be readily available to public inspection.

**4. BE MINDFUL THAT RAIL CARRIERS NOW
BELIEVE IT IS THEIR RIGHT TO SET THE
MARKET PRICE OF THE COMMODITY THEY
ARE TRANSPORTING THUS INCREASING THE
NEED FOR FULL PUBLIC DISCLOSURE OF ALL
TARIFF RATE INFORMATION**

These actions by the railroads, mandates that any rail shipper paying the freight and/or farm producer bearing the freight have access to all tariff publications from all carriers that service and/or compete in their potential markets. There are literally hundreds of destinations and thousands of origins. Additionally, shipments from mines and plants have hundreds of origin/destination pairs and it is imperative that these shippers be able to view all rates for their current and potential commodity movements and their competitors' commodity movements to

make the best economic decisions for themselves, their organizations and their supply chains.

Rail carriers with dominance in the market place continue to demarket certain shippers while promoting others, limiting their shippers' access to their markets not just through rate differentials and excessive rates, but also through restricted access to tariff data. In recent years -- especially the last decade -- we continually hear from shippers that a traditional market they have market into for years is shut off by a railroad (mainly through tariff actions) and other non-traditional markets are suddenly accessible. Examples of demarketing like these are countered by railroads suggesting that they are simply providing increased market access for growers, using "market based" pricing.

It is clear that carriers have demarketed certain markets while increasing access into other markets based upon their perceived right to control markets that their rail franchise deems advantageous to that railroad's operations.

All shippers/producers need access to all rates moving their commodities over a railroad that services their facilities.

Rail rates and charges that exceed maximum lawful levels cannot be justified by service quality, no matter how good. High rates are even more objectionable when accompanied by poor

service. Given their market power throughout the grain agricultural region, the railroads have been able to restructure the way wheat and other agricultural products move to market. A railroad with market power is in a position to use its control of pricing and service to encourage some routings and shipments and to discourage others, thus influencing where and when products or product mixes move. Thus it is crucially important that all published tariffs be readily and openly accessible to the public.

5. SUMMARY:

We commend and thank the Board for taking on this most important issue. It is long overdue. As the railroads have consolidated their economic franchises in the late 1990's we now see the limiting of public access to their tariffs rates and charges spring up in the early 2000's.

The nation's railroads are obligated to publish and make available all of their tariffs to public inquiry without restrictions or impediments. Up until the early 2000's they did provide general access. By about 2003-2005, all of the major railroads had developed secure firewalls and had placed access to the tariff information behind the firewalls. These restrictions on access to

tariff information by the railroads are neither acceptable nor necessary.

As our opening comment states: Providing just shippers with access to the tariff provisions applicable to their own shipments, through restricted firewall access, is not good enough.

Two issues are important here.

First, the tariff provision access must be open and unconstrained to the public.

Second, the access must be open to all tariff provisions published by the carrier. Shippers also need to know what rates, charges and service terms apply to all possible alternative routings for themselves and their competitors. As the railroads frequently point out, many agricultural products are sold in multiple markets, depending in part on pricing. And railroad freight charges are part of pricing.

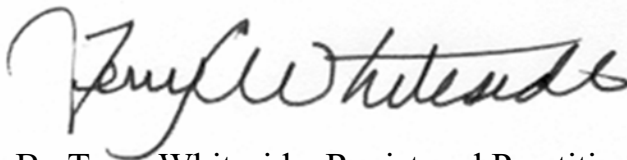
Public tariff access should also be applied to Class II and Class III carriers which have websites where they post tariff provisions. Many of the Class II and Class III railroads with tariff information on their websites have not erected the limited firewall access of Class Is, but excluding such carriers from the Board's new rule would permit them to adopt such access restrictions. In many cases, the shortline rail rates are add-ons to the Class I rates (for example, Rule 11 and interline situations)

and thus are very important for ascertaining the through rate for a movement. These rates need open access similar to that to be provided under the proposed regulations affecting the Class I railroads. In any event, if a Class II or III railroad maintains a website with rates, charges and service terms on shipments of agricultural products and fertilizer, how is the statute or the public interest served by excluding such carriers from the new rule?

We continue to believe, as we look at this proceeding, this Board has a real chance of taking a forward look at access to regulatory oversight for agricultural production. Opening up unlimited access to anyone who wants to research rail tariff information for shipments of agricultural products and fertilizer without cost or subscription requirements is necessary. Such unfettered access can be an open registration process to all who seek access, but it must be open to all who request such access. As we have stated before, the Board must be pro-active in this process and this holds great hope that the future may lead to forward-looking, well-thought-out changes that will promote a more economical, efficient, fair and productive rail transportation system for the national economy.

VERIFICATION:

I hereby certify that the foregoing is true and correct on penalty of perjury.

A handwritten signature in black ink, appearing to read "Terry Whiteside". The signature is fluid and cursive, with the first name "Terry" written in a larger, more prominent script than the last name "Whiteside".

Date: 02/21/2017

By Terry Whiteside, Registered Practitioner
Whiteside & Associates
P. O. Box 20574
Billings, MT 59104-0574
Phone: (406) 245-5132
Email: twhitesd@wtp.net



bnsf.com Registration

bnsf.com Registration

Does your company already do business with BNSF?

- ☐ Yes
- ☒ No
- ☐ I am ready to become a BNSF customer and want to speak with a salesperson
- ☒ I would like to continue registering for access to bnsf.com

> NEXT

You

First Name Middle Name / Initial Last Name

Title/Job

Email Re-enter Email

me@mycompanydomain.com

Telephone Ext (optional)

Mobile Fax

☐ I authorize BNSF to send text alerts about my shipments to this mobile number.

Company

Company Name

RESET

[If you do not see your company or your location, then click here to enter your information manually.](#)

Security

User ID

User ID's are NOT case sensitive and must be 6-8 characters.
You may use letters and/or numbers.

Password

Confirm Password

Passwords ARE case sensitive and must be 8 - 16 characters long

Retype your password again

Security Question 1 -- Select -- Security Answer*

Security Question 2 -- Select -- Security Answer*

Security Question 3 -- Select -- Security Answer*

* Must be at least 4 characters and cannot be the same as your user id

Examples

Do you want to model your bnsf.com access like a Co-Worker? ☐ Yes ☐ No

bnsf.com Training: We are available Monday - Friday, 8:30am - 5:30pm CST.

- ☐ I would like to be contacted by an eBusiness representative for training on the web tools
- ☐ I will call in for assistance

If you have recently shipped on BNSF, you can provide 1 or 2 equipment identification numbers below to help us determine how to best establish your profile.

Tasks

Which of these tasks will you need to do online?

Will you be submitting shipping instructions or bills of lading? ☐ Yes ☒ No

Will you be receiving or paying invoices?

☐ Yes

☒ No

Will you be tracking shipments?

☐ Yes

☒ No

Can't find what you need?

Please tell us what you would like to do on bnsf.com (optional):

or

[P>NEXT](#)

Exhibit II – UPRR

Customer Registration

Apply For an Online User ID

To request a MyUPRR user ID and password, you must already be a customer of Union Pacific Railroad (your company is already shipping and receiving commercial freight via rail). A user ID and password will allow you to access our secure online tools to do business with us.

***Is your company currently doing business with Union Pacific or has done so in the past?**

☐ Yes

☐ No

Next

Storage and Flip Payments

If you need to make a storage or flip payment for a container or a trailer still at the ramp, please use the following registration process:

Storage / Flip Registration

Supplier to Union Pacific?

If you are looking to become a supplier to Union Pacific, please use the following registration process:

Become a Supplier
(<https://suppliers.www.uprr.com/srmt/registration>)

Seeking a job with Union Pacific?

If you are interested in employment at Union Pacific, please visit:

up.jobs
(<http://up.jobs/>)

Exhibit III – CSX

ShipCSX / REPORT AN EMERGENCY: 1-800-232-0144

ABOUT USRESPONSIBILITYCUSTOMERSUPPLIERSINVESTORSWORKING AT CSX

Customers / Commodities / Agricultural Products / Pricing

Agricultural Products

Services

Resources

Pricing

Maps/Locations

Contact Us

Pricing

Get pricing information on Agricultural Products.

Look Up a Price

If you are not a current CSX customer but would like pricing information, contact our Inside Sales team at NBD@csx.com, or call 1-877-ShipCSX (1-877-744-7279), options 5 - 1.

If you're already a CSX customer, [log in to ShipCSX](#) to use the secure Price Look-Up tool.

Supplemental Pricing

Get information about accessorial and supplemental pricing in the [CSXT 8100 Publication](#).

Find Recommended Junctions

Use our [Junction Lookup tool](#) to find preferred junctions for shipments involving other railroads.

Related Links

New to CSX or Rail?

Customer Service

Learn More About ShipCSX

REDI Center Customer Training





ShipCSX Log In

EmployeesRetirees

Company StoreContact Us

PrivacyTerms of Use

EMAIL SIGN-UP
Subscribe to receive CSX Press Releases

Exhibit IV – NS

close window

External Customer Registration Form

[Hyperlink to Employee Registration](#)

Please complete the following registration form. Fields in red are *required*. Click the Submit Registration button when you have completed the form. Your registration will be processed as quickly as possible and you will be contacted via phone or email when your profile has been set up.

First Name:	Initial:	Last Name:
Company:	Address:	LOB: Choose Business Type ▼
City:	State: Choose State ▼	Zip Code:
Email:	Phone: - -	Ext:
Fax:		

Norfolk Southern Sponsor E-mail Address: This should be a Norfolk Southern employee who knows you, knows where you work, and has contact with you on a regular basis. This could be a Sales and Marketing Rep, Trainmaster, or anyone whom you work closely with at NS.

NS Sponsor Email: [Help me find my NS sponsor](#)

Please check the Norfolk Southern application(s) which you are requesting:

- ☐ **Bill of Lading**- Submit shipment instructions to NS via the Internet.
- ☐ **Freight Bills**- This application is for users who APPROVE, REVIEW and/or PAY NS Freight Bills. Your request will be vetted. If you have any questions please email: efreightbillrequest@nscorp.com
- ☐ **Equipment Orders**- Shippers, order empty equipment for loading.

Coal:

- ☐ **Coal Transportation Management System** - Manage and monitor your coal unit trains.

Grain

- ☐ **Commodity Transportation Management System**- Manage and monitor your grain unit trains .

Scrubber Stone (Available 2006)

- ☐ **Commodity Transportation Management System**- Manage and monitor your scrubber stone unit trains .

Intermodal:

- ☐ **Intermodal Applications**- A suite of Shipper/Bill-To specific inquiries (Pickup Numbers, Units Enroute, Terminal Inventories, Units Ingated or Outgated etc.)
- ☐ **Intermodal Dray Applications**- A suite of Trucker/Draymen specific inquiries (QuickTrak, QuickDray, Gate Receipts, Intermodal Dray Applications). This application is for Drayage Customers only.
- ☐ **ExpressNS Dispatcher Application**- Web application for motor carriers designed to enhance the operational productivity of dispatchers and drivers

Exhibit V – CN



[PRICE DOCUMENTS](#) [STATION GROUP SEARCH](#)

[CLOSE WINDOW](#)

Visitor Registration

Please tell us a little about yourself then Press 'Continue'.

First Name: *

Last Name: *

Company: *

E-Mail: *

* : Required information
* : By submitting your email address, you agree to receive electronic communications from CN.

This response was prepared on 2017-02-14 13:11 Eastern Time.

By accessing and using this Web site, you agree to its [Legal Terms and Conditions](#).
[Privacy Policy](#)
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Exhibit VI – CP

CUSTOMER
STATION

User Login

Enter your User ID and Password to login

* Mandatory Fields

* User ID

* Password

Login

[Forgot Password?](#)

[Forgot User ID?](#)

[New User?](#)

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