

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

243759

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**STB Docket No. EP 733  
EXPEDITING RATE CASES**

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ENTERED  
Office of Proceedings  
June 14, 2017  
Part of  
Public Record

**REPLY COMMENTS  
OF  
THE NATIONAL GRAIN AND FEED ASSOCIATION**

The National Grain and Feed Association (“NGFA”) hereby submits these brief Reply Comments in response to the opening comments filed in this Docket by The Association of American Railroads (“AAR”); the American Chemistry Council, The Fertilizer Institute, and The National Industrial Transportation League (“ACC/TFI/NITL”); and the numerous parties comprising the “Coal Shippers/NARUC.”

While this proceeding properly focuses on procedural improvements to the Board’s existing processes for adjudicating rate cases, the NGFA disagrees strongly with the AAR’s Opening Comments in which it states that the “substantive basis of the Board’s (rate-challenge) tests does not need overhaul.” AAR Opening Comments at 4. The NGFA and numerous other parties have provided ample evidence in statements submitted in response to the Board’s separate proceedings in EP 665 (Sub-No. 2) *Expanding Access to Rate Relief*, its predecessor, EP 665 (Sub-No.1), *Rail Transportation of Grain, Rate Regulation Review*, and numerous prior proceedings that the Board’s three existing rate-challenge methodologies are too complex, cumbersome and costly, particularly for agricultural shippers. See, NGFA Opening Comments at 2-4, 6; ACC/TFI/NITL Opening Comments at 2. AAR also erroneously attempts to use the results of the

InterVISTAS study to justify its position, while selectively and conveniently omitting the fact that the results of that study were challenged during the Board-sponsored roundtable conducted on October 12, 2016 by numerous credible parties, including academic experts who authored the National Academies of Sciences Transportation Research Board (“NAS/TRB”) benchmark *Special Report 318: Modernizing Freight Rail Regulation* published in June, 2015.

**A. Improvements to Substantive Standards Will Translate into More Streamlined Processes**

ACC/TFI/NITL joined the NGFA in reminding the Board that many of the inefficiencies and causes of delay associated with the Board’s current rate rules could be alleviated by the Board following through on its proposals to make changes to the substantive rules it applies to test rate reasonableness. The NGFA agrees with ACC/TFI/NITL that the nature of the Stand Alone Cost (“SAC”) standard itself is the single greatest source of delay in processing SAC cases, and the NGFA adds that the same can be said for the Simplified Stand Alone Cost (“SSAC”) standard. In its opening comments, the NGFA urged the Board to redouble its efforts to change its existing standards and methodologies that have rendered futile the pursuit of rate-reasonableness challenges by grain and other agricultural shippers. The NGFA continues to believe that the Ag Commodity Maximum Rate Methodology it proposed in EP 665 (Sub-No. 1) provides a strong basis for developing an innovative, objective and comparatively inexpensive rate-challenge methodology. For their part, ACC/TFI/NITL urge the Board to “give serious consideration to” certain proposals in EP 722 (Sub-No. 2), *Railroad Revenue Adequacy* to develop a benchmarking methodology similar to a concept developed by the NAS/TRB and discussed in that proceeding. ACC/TFI/NITL Opening Comments at 2. The NGFA agrees with ACC/TFI/NITL that the Board should prioritize its efforts to focus on these and other proposals to change the substantive

standards by which it reviews reasonable rates, since adoption of measures that will simplify the standards to be applied will translate into better and more efficient procedures.

#### **B. Pre-Filing Notice and Mediation**

The NGFA continues to maintain that the 70-day pre-complaint period is too long for the reasons set forth in its Opening Comments. Moreover, the NGFA believes the Coal Shippers/NARUC raise good arguments for having no pre-filing period. To the extent the Board desires to proceed with adoption of a pre-filing notice requirement, the NGFA supports the proposal of the Coal Shippers/NARUC, as it is consistent with the NGFA's proposal that the pre-filing period should be 45 days, and it adds several potentially useful procedural components. Specifically, the NGFA supports: (1) the proposed requirement that a railroad must provide a requested common carrier rate no later than 90 days prior to the anticipated start of service; (2) the proposal that a shipper would have 50 days to evaluate the rate; and (3) the mediation period prior to filing the complaint would be 40 days. The NGFA is neutral on the Coal Shipper/NARUC proposal regarding the respective timing for requests for and responses to "Core SAC Data," other than to state that establishing a date for production of such data after the commencement of a formal complaint proceeding seems logical and efficient, since, if mediation is successful, no case would be filed and such production obviously would not be necessary. Moreover, the NGFA generally supports the establishment of a deadline for the production of such "Core SAC Data." *See, ACC/TFI/NITL Opening Comments at 4.*

#### **C. Motions to Compel**

In its Opening Comments, the NGFA supported the adoption of a requirement in all rate cases that when a party seeks to compel a discovery response, it must certify to the Board that it conferred in good faith in advance with the person or party failing to answer the discovery to obtain

it without Board intervention. In these Reply Comments, the NGFA supports the request of Coal Shippers/NARUC that the Board clarify the scope and application of rules set forth at 49 C.F.R. §1114.31(a) – namely whether the 10-day period for filing motions to compel (or 14 days as proposed in the NPRM) and the new “meet-and-confer” requirement – apply in cases where a party has received incomplete responses to requests for document production. Coal Shippers/NARUC Opening Comments at 35-38. For the regulations applicable to rate reasonableness cases to be efficient and most useful to litigants, they must be unambiguous and straightforward. The Board should err on the side of clearing up any ambiguities in its rules to minimize the extent to which litigants can complicate and/or delay cases through disputes over the application of ambiguous applicable rules. *Id.* at 36-37.

**D. Evidentiary Submissions/Final Briefs**

The NGFA supports the proposal advanced by ACC/TFI/ NITL that the submission of final briefs should be staggered so that complainants file their briefs two weeks after the defendants. Such a schedule would help address the concern expressed by the NGFA in its Opening Comments that the final brief phase of a case should not undermine the well-established right of a complainant to have the last word in a formal complaint proceeding.

**E. Appointment of Staff Liaison/Technical Conferences**

The NGFA reiterates its support for the NPRM’s proposal to designate a Board-appointed liaison to the parties in all rate cases to provide a broad array of technical and other advice to parties during the pendency of a rate-reasonableness case brought under any of the Board’s three existing rate-review methodologies or any future simplified methodologies that subsequently may be adopted by the Board. *Id.* at 9-10. However, contrary to the recommendation of Coal Shippers/NARUC, the NGFA believes that appointment of such a liaison should be made during

the pre-filing phase to assist those parties that may be new to, or unfamiliar with, the rate-complaint process. Coal Shippers/NARUC Opening Comments at 39.

### III.

#### CONCLUSION

With minor exceptions, the NGFA is either neutral or supportive of the comments submitted by ACC/TFI/NITL and Coal Shippers/NARUC. The NGFA supports the Board's expeditious finalizing of the NPRM after its consideration of the comments received into the record of this proceeding, and again recommends that these procedural improvements be applied, where appropriate, to existing and future rate-challenge methodologies developed by the Board. NGFA at 6.

Further, we again call on the Board to revise its substantive rate-challenge standards as they are applied to grain and other agricultural commodity rail shippers to create a workable mechanism for these parties to challenge rail rates they believe to be unreasonable.

Respectfully submitted,



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June 14, 2017