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BY E-FILING

Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: **Expanding Access to Rate Relief,**
STB Ex Parte No. 665 (Sub-No. 2)

Dear Ms. Brown:

Enclosed for electronic filing in the above-captioned matter is the public version of the Reply Comments of BNSF Railway Company.

Separately, BNSF is electronically filing the highly confidential version of its reply comments.

If you have any questions, please do not hesitate to contact me.

Regards,



Linda S. Stein

Enclosures

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 665 (Sub. No-2)

EXPANDING ACCESS TO RATE RELIEF

**REPLY COMMENTS OF
BNSF RAILWAY COMPANY**

BNSF Railway Company (“BNSF”) respectfully submits these reply comments in the above-referenced proceeding. BNSF also joins in the reply comments filed by the Association of American Railroads in this proceeding.

As explained in BNSF’s opening comments, BNSF understands the Board’s desire to ensure that rail customers have access to balanced approaches to regulatory relief in appropriate circumstances. However, BNSF is concerned that, among other things, the new small rate case procedures proposed by the Board would interfere with properly functioning markets, and therefore do not strike the appropriate regulatory balance. Other railroad commenters also expressed general support for the Board’s efforts to streamline its rate reasonableness procedures, but concluded that the Board’s proposal here is not justified.

Notably, shipper organizations similarly voiced support for the Board’s efforts to improve existing rate methodologies while opposing the specific standards and procedures proposed by the Board here.¹ Given the overall lack of support for the Board’s proposal from

¹ See, e.g., Opening Comments of the American Chemistry Council (“ACC”), EP 665 (Sub-No. 2) dated Nov. 14, 2016 at 1; Opening Comments of Montana Wheat and Barley Committee, Alliance for Rail Competition, et. al, (“MWBC”), EP 665 (Sub-No. 2) dated Nov. 14, 2016 at 1; and Opening Comments of the National Feed and Grain Association (“NGFA”), EP 665 (Sub-No. 2) dated Nov. 14, 2016 at 1-2.

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both railroads and shippers, BNSF believes that the Board should consider discontinuing this proceeding.

I. The Evidence Submitted by Grain Shippers Confirms That There Is Not a Problem With Grain Rates That Requires a New Simplified Methodology.

Most of the opening shipper comments were submitted by grain shipper organizations, with the lengthiest comments being submitted by a group of 20 grain shipper organizations, including the Montana Wheat and Barley Committee (“MWBC”). The MWBC comments include verified statements from Gerald Fauth III (“Fauth VS”) and Terry Whiteside (“Whiteside VS”) that analyze grain rates, focused largely on BNSF’s grain rates. Notably, instead of supporting the idea that a new rate reasonableness methodology is warranted, these MWBC analyses actually confirm BNSF’s 2014 claims in Ex Parte 665 (Sub-No. 1) that there have not been rate cases involving grain commodities because grain rates are generally not high enough to prompt rate reasonableness litigation.

Mr. Fauth’s own evidence shows that a large percentage of BNSF’s 2014 grain movements originating in Montana, where Mr. Fauth repeatedly claims that BNSF has market power, had rates with R/VCs below 180%, and therefore would not even be subject to a rate reasonableness claim.² For example, in the 2014 Carload Waybill Sample, [] of BNSF’s 2014 barley movements originating in Montana had R/VCs below 180%. *See Fauth VS Corrected Figure 4, at 8.*³ As to wheat originating in Montana, Mr. Fauth finds that [] of 2014 BNSF’s wheat movements had R/VCs below 180%. *See Fauth VS Figure 3 at 7.* These

² Mr. Fauth analyzed every railroad movement of wheat, barley, peas and lentils originating from Montana in the 2014 Carload Waybill Sample. *See Fauth VS at 4.*

³ MWBC filed some corrected pages of the Fauth verified statement on November 30, 2016. MWBC also complains about the accuracy of URCS and therefore the accuracy of the R/VC ratios. MWBC Comments at 14-15. Some of MWBC’s complaints, *e.g.* that URCS does not allow movement-specific adjustments, have already been rejected by the STB. In any event, the Board has a separate proceeding to address URCS and this proceeding is not the proper forum to raise those concerns.

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wheat movements with R/VCs below 180% appear to be small shipments, suggesting that the rates paid by small shippers—those shippers who are intended to be the primary beneficiaries of the Board’s proposed new simplified rate methodology—are already below the Board’s jurisdictional threshold. The remaining [] of BNSF’s wheat movements, according to Mr. Fauth’s analysis, tend to be larger movements that average [] cars per shipment.

With respect to BNSF’s 2014 grain movements with R/VCs above 180%, Mr. Fauth shows that the average R/VC is quite low, ranging from [] (BNSF corn movements above 180% in 100 or more cars) and [] (BNSF soybean movements above 180% in 100 or more cars) to [] (comprised of just [] BNSF barley movements above 180%). *See* Fauth VS Corrected Figure 4 at 8, Figure 12 at 31. As noted above, for Montana wheat, the BNSF movements with R/VC ratios above 180% tend to be the larger movements ([] average cars per shipment) likely involving shuttle movements. Mr. Fauth calculates the average R/VC on these movements to be []. *See* Fauth VS Figure 3 at 7. But as BNSF explained in its 2014 comments in EP 665 (Sub-No. 1), the dollar rates per unit of traffic shipped, *e.g.* a carload, are actually lower on shuttle movements than on smaller shipments.⁴ Further, the R/VC ratios in the Fauth analysis for those shuttle movements do not reflect substantial incentive payments by BNSF to the shippers that would, if properly reflected in the R/VC, bring down the R/VC ratios substantially.⁵

Lacking any data to show that grain rates are actually high relative to variable costs, MWBC complains that grain rates have increased sharply over the past decade. Specifically,

⁴ Verified Statement of John H. Miller (Miller VS) at 16 included with BNSF Opening Comments in EP 665 (Sub-No. 1) dated June 26, 2014.

⁵ *See id.*, Miller VS at 16; Verified Statement of Benton Fisher and Kaustuv Chakrabarti at 4-6 and Exhibit FTI-11 included with BNSF Opening Comments in EP 665 (Sub-No. 1) dated June 26, 2014. In the example presented by Messrs. Fisher and Chakrabarti, the R/VC was substantially reduced when the incentive payments are properly accounted for.

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MWBC's witness Mr. Whiteside presents charts purporting to show that BNSF wheat rates for a small number of selected origin/destination pairs have increased in nominal dollars over the last several years.⁶ *See* Whiteside VS at 18-20. His charts are simple updates of charts that he previously submitted in 2014 in EP 665 (Sub-No. 1).⁷ As BNSF explained in 2014, Mr. Whiteside's selection of a small number of movements is misleading and does not represent overall rate trends on BNSF.⁸ In fact, as BNSF explained, BNSF's average rate increases on wheat traffic have been significantly *below* the average rate increases on most of BNSF's top commodities by revenue from 2004-2013. *Id.* Specifically, BNSF's witnesses Messrs. Fisher and Chakrabarti showed that for BNSF's top 30 commodities by 2013 revenue, wheat's annual average revenue per ton increase ranked 26th out of the top 30 commodities from 2004 through 2013, making the rate increases on wheat among the *lowest* of the group.⁹

II. A Separate STB Rate Reasonableness Standard for Grain Shippers Is Not Justified.

A common criticism of the commenting grain shippers was that the Board made a mistake in coming up with proposed standards and procedures that would apply to a broad range of commodities rather than just focusing on grain. These shippers argued that grain shippers face unique concerns that require special rate reasonableness methodologies. But there is simply no evidence to suggest that grain shippers somehow require special and unique regulatory protection beyond that provided for shippers of other commodities.

⁶ MWBC also relies on a June 2015 Transportation Research Board ("TRB") report to claim that grain rates have been increasing rapidly in recent years, referring to the conclusion of the TRB that grain rates increased more over the period 2002-2013 than the rates for any commodity other than coal. *See* MWBC Comments at 7. It is not possible here to address the specific evidence in the TRB Report, except to note that the TRB analysis aggregates data for the entire rail industry and therefore covers a vast range of geographic regions and market dynamics. More important, as discussed below, the TRB results simply do not reflect BNSF's experience.

⁷ Verified Statement of Terry Whiteside at 14-16 included with Opening Comments of Alliance for Rail Competition, et al in EP 665 (Sub-No. 1) dated June 26, 2014.

⁸ BNSF Reply Comments in EP 665 (Sub-No. 1) dated August 25, 2014 at 8.

⁹ *Id.* and accompanying Reply Verified Statement of Benton Fisher and Kaustuv Chakrabarti at 10-11 and Figure FTI-4.

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The grain shippers identify various characteristics of grain markets that they claim are unique, but they fail to explain why those characteristics require different rate reasonableness standards than those applied to movements of other commodities, or indeed whether the characteristics they claim are unique (*e.g.*, fluctuating downstream demand) are not also shared by other commodities that move by rail.¹⁰ In the absence of compelling evidence, the Board has no basis to pick winners and losers amongst various shipper groups by creating a separate new rate reasonableness process that can only be used by grain shippers.

III. The Shippers' Proposed Changes to the Board's Recommended Methodology Are Inappropriate.

While criticizing the Board's suggested methodology, the shipper commenters ask that the Board change certain aspects of the methodology if the Board nonetheless proceeds with its plans to adopt another simplified approach. The changes proposed by shippers are focused on expanding the group of shippers that could obtain relief under the new approach and forcing down the maximum rates that would be permitted. The changes that the shippers recommend to the Board's methodology are inappropriate and inconsistent with economic principles that are supposed to guide the Board's rate regulation authority.

A. Preliminary screen.

The Board's proposed methodology involves a preliminary screen early in the rate review process to exclude rate claims that are unlikely to be successful. Both MWBC and NGFA comment that they believe the preliminary screen proposed by the Board should be less restrictive. MWBC's witness, Mr. Fauth, vaguely proposes that the preliminary screen should only include one threshold test rather than the three tests in the Board's proposed screen (based

¹⁰ They also ignore the competition from other transportation modes and the strong geographic competition that characterize grain transportation markets discussed at length in BNSF's opening comments in EP 665 (Sub-No.1). *See, e.g.*, BNSF Opening Comments in EP 665 (Sub-No. 1) at 17-20, dated June 26, 2014.

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on mileage, a revenue/ton mile outlier assessment, and prior litigation). Mr. Fauth presents no principled basis for his proposed change to the screen or for choosing among the three tests. His objective appears to be simply to expand the group of shippers that can seek relief and impose upon railroads the burden to explain why the case should not proceed. *See Fauth VS* at 25-26. Similarly, NGFA complains that the preliminary screen is too restrictive. NGFA argues, without any evidence, that trucks are not competitive with railroads beyond a distance of 200 miles, so any screen applied to agricultural movements should be based on a 200-mile screen, not a 500-mile screen. *See NGFA* at 11-13.

If the Board pursues its proposed new rules, it should not adopt a less restrictive screen than the one proposed. As BNSF explained in its opening comments, any further simplification of the rate review process must include a rigorous mechanism for eliminating rate claims unlikely to be successful. Such a screening mechanism is appropriate and necessary to reduce the burden on the Board and defendant railroads from litigating non-meritorious claims, and to reduce unnecessary interference by the Board in properly functioning markets.

B. Traffic in comparison group.

Some shippers urged the Board to include traffic with R/VCs below 180% in the relevant comparison groups. MWBC asserted that the Board should include shipments with R/VCs below 180% in the comparison group because grain shipments may be subject to a railroad's market power even if the R/VC is below 180%. *See MWBC Comments* at 20 and accompanying *Fauth VS* at 32-33. NGFA argued that the Board should include shipments with R/VCs below 180% because otherwise the Board would not be providing sufficient representation of the "true" market of commodities at issue. *See NGFA Comments* at 14-15.

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Some shippers also argued that the relevant comparison group should include the traffic of railroads other than the defendant. MWBC asserted that a broader group of traffic will help identify rate outliers. *See* MWBC Comments at 21-22 and accompanying Fauth VS at 27-31, 37. ACC argued that including other rail carrier movements was necessary to provide larger sample size for a comparison group. *See* ACC Comments at 10-11.

BNSF explained in its opening comments why it would be inappropriate to include any traffic with an R/VC below 180% in a comparison group. The Board has already concluded that the statutory scheme makes it improper to include those rates in a comparison group used to assess the reasonableness of rates that are subject to the Board's rate reasonableness authority. Similarly, as BNSF also explained in its opening comments, the Board has already recognized that it would be inappropriate to include non-defendant traffic in a comparison-based rate reasonableness methodology because such movements would not be comparable to movements on the defendant railroad. As BNSF further explained in its opening comments, the Board can ensure a sufficient number of movements would be in the comparison group without including non-defendant movements or movements with R/VCs below 180% in the comparison group. *See* BNSF Opening Comments at 9-12.

C. Market dominance.

Some shippers suggested that the statutory requirement of market dominance can be satisfied simply by applying a version of the Board's proposed preliminary screen. *See* NGFA Comments at 13; ACC Comments at 4-5. But the preliminary screen is intended only to eliminate claims that are unlikely to be successful, not to identify claims that are precluded by statute from being subjected to rate regulation. For the reasons explained in BNSF's opening comments, there is no legal basis or justification for applying a market dominance approach that

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is less rigorous than the approach already required in rate reasonableness cases. *See* BNSF Opening Comments at 12-14.

IV. Conclusion

There is no need for the Board to develop a new simplified methodology. There is no evidence of a flaw in the existing Three Benchmark methodology, which was designed to simplify rate reasonableness claims for small cases. There is also no evidence of a problem with rates that requires the development of a new approach. Since shippers and railroads alike oppose the Board's proposed new rate case methodology, the Board should consider discontinuing this proceeding.

Respectfully submitted,

/s/ Adam Weiskittel

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