

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
February 21, 2017
Part of
Public Record

Docket No. Ex Parte 528 (Sub-No. 1)

Publication Requirements for Agricultural Products

**COMMENTS OF
THE FERTILIZER INSTITUTE**

The Fertilizer Institute (“TFI”) respectfully submits these Comments in support of the new regulations and policy clarification proposed in a decision filed by the Surface Transportation Board (“STB” or “Board”) in the above-captioned proceedings on December 28, 2016 decision (“NPRM”).¹ TFI and its members commend the Board for updating its tariff publication rules for agricultural commodities, including fertilizer, to comport with modern practices by making railroad rates and other service terms publicly available on the railroad’s respective websites. Moreover, with its members representing companies involved in all aspects of the fertilizer supply chain and playing a vital role in producing and distributing vital nutrients that nourish crops to meet the global demand for food, fiber, and fuel, TFI generally supports Board policies that will effectively provide agricultural shippers meaningful access and relief under the Board’s rate reasonableness rules.

¹ Publication Requirements for Agriculture Products; Rail Transportation of Grain, Rate Regulation Review, STB Docket Nos. EP 528 and 665 (Sub-No. 1), decided Dec. 28, 2016 [hereinafter *NPRM*; *Policy Statement*].

I. AGRICULTURE RATE PUBLICATION

“Given the changes in the commonly used methods to disseminate information and the fact that some railroads already have agricultural rate and service information on their websites,” TFI supports updating the STB regulations to reflect these modern practices.² The STB’s decision regarding a rail carrier’s obligation to disclose or publish its common carriage rates and service terms is not controversial. Indeed, the Board made the valid observation that the “publication requirements, adopted in 1996, should be revised to reflect the fact that Class I railroads often use company websites and/or applications to disseminate information to customers and the general public.”³ Likewise, it is TFI’s understanding that railroad rates and other service terms are generally made available via the respective railroad’s website and that most shippers rely on these websites for access to such information. That being said, TFI believes the Board should provide further clarity on what constitutes “mak[ing] th[is] information available to any person online.”⁴

Most railroad websites are “user friendly,” making it relatively easy to find and access public tariff rate and service terms, or to request such information when it does not already exist. Some railroads, however, impose unnecessary obstacles to obtain the rate and service terms a railroad is required to disclose under STB rules. The BNSF website, in particular, states that “all *customers* now have to log in to access pricing tools and information.”⁵ As a threshold matter, current regulations require railroads to disclose rate information to “**any person**” that makes a

² NPRM; Policy Statement at 5.

³ NPRM; Policy Statement at 4.

⁴ NPRM; Policy Statement at 14.

⁵ bnsf.com Tools, BNSF Railway (last visited 2/13/17), <http://www.bnsf.com/customers/support-services/bnsf.com-tools/> (“[A]ll customers now have to log in to access pricing tools and information”) (emphasis added).

request for such information, not just “customers.”⁶ BNSF states that a customer can gain “instant access to pricing information” only after completing the online registration process which can take up to “1-2 business days” to process.⁷ TFI’s counsel ultimately was able to access BNSF tariffs through the following registration process:

- **February 13, 2017:**

- Completed the online registration process which required: (1) creating a user ID and password; and (2) providing a first and last name; job/title; email address; telephone number; company name and address; security questions and answers; answering questions regarding the type of activity for which the user desires access to the website.
- Received email confirmation stating: “Thank you for registering with bnsf.com. Please click on the link below to confirm your email address and to complete the registration process.” The first few attempts at clicking the link resulted with a webpage that provided: “An error occurred. Please try clicking the link again ...” On the third or fourth try, the link brought up a webpage that stated:

“Please allow 1-2 business days for a BNSF representative to establish your online profile including access to our online tools to manage your shipments. We will send you an email with further instruction when the process is completed.”

- **February 15, 2017:**

- Received email confirming registration process had been completed and was able to login and access customer “portal” after using appropriate credentials.
- Tariff information relating to service terms was available after login, however, pricing and rate information was not.
- Contacted a BNSF representative using the toll free telephone number to inquire additional steps for requesting rate and/or pricing information. The necessary steps provided by the representative were not intuitive and

⁶ 49 C.F.R. § 1300.2(a) (emphasis added) (“A rail carrier must disclose to any person, upon formal request, the specific rate(s) regulated (or the basis for calculating the specific rate(s)), as well as all charges and service terms that may be applicable to transportation covered by the rate(s).”).

⁷ bnsf.com Tools, BNSF Railway (last visited 2/13/17), <http://www.bnsf.com/customers/support-services/bnsf.com-tools/>.

would most likely require a first time user to make the same inquiry in order to gain access to rate and pricing information.

- After submitting a request for “pricing/tariff information” an email confirmation of the request was received which stated “Please allow 24-48 hours for us to process your request.”

Other railroads make their tariffs much more accessible. Although Union Pacific also requires registration to access public tariffs, the process and ensuing access are instantaneous.⁸ The other Class I railroads place their tariffs on the publically-accessible areas of their websites. It is not clear why BNSF does not do the same. Therefore, TFI asks that the Board take this opportunity to clarify that placing public tariffs in non-public areas of a railroad’s web site or the imposition of cumbersome and time-consuming registration requirements to access public tariffs are not appropriate means by which a railroad may “make the information available to **any person** online.”⁹

Finally, TFI concurs in the Board’s tentative determination not to require Class II and III railroads to post their tariffs on-line. TFI notes, however, that many such carriers already do publish tariffs on their web sites. For those that do so, TFI asks the Board to apply the same online publication standards of transparency and accessibility that it adopts for Class I railroads. The shortline carriers with which TFI members regularly interact already meet such standards.

II. CLARIFICATION OF POLICIES ON STANDING AND AGGREGATION OF CLAIMS RELATING TO RATE COMPLAINT PROCEDURES

Overall, TFI supports the Board’s policies on standing and aggregation of claims in regard to rate complaint procedures under 49 USC § 11701(b).

⁸ *Prices & Price Documents*, Union Pacific (last visited 2/15/17), https://www.up.com/customers/all/price_inquiry/index.htm.

⁹ *NPRM; Policy Statement* at 14 (emphasis added); *see also* 49 C.F.R. § 1300.5(c).

TFI supports the Board's clarification that direct harm is not required for standing to challenge a rail rate. The statute, at 49 U.S.C. § 11701(b), expressly states that "the Board may not dismiss a complaint made against a rail carrier providing transportation subject to the jurisdiction of the Board under this part because of the absence of **direct** damages to the complainant."¹⁰ Thus, the Board's clarification is consistent with the statute.

TFI also supports the Board's policies that will permit parties to aggregate their rate claims.¹¹ Currently, the potential cost of pursuing a rate case makes access to such relief inaccessible for many shippers, especially ones shipping in single car volumes. One way the Board can mitigate this problem is by allowing parties to aggregate their claims which will allow shippers to utilize economies of scale in facing the high cost of rate cases. As a result, TFI fully supports the Board's policy to permit the aggregation of claims.

III. CONCLUSION

For the foregoing reasons, TFI supports the proposals in the NPRM. TFI appreciates the opportunity to make its views known to the Board on this important subject.

Respectfully submitted,



Jeffrey O. Moreno
Madeline J. Sisk
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, DC 20036
(202) 331-8800

Dated: February 21, 2016

Counsel for The Fertilizer Institute

¹⁰ NPRM; Policy Statement at 7 (citing 49 U.S.C. § 11701(b)).

¹¹ NPRM; Policy Statement at 7-8.