

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

242842

ENTERED
Office of Proceedings
March 20, 2017
Part of
Public Record

PUBLICATION REQUIREMENTS FOR AGRICULTURAL PRODUCTS

REPLY 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

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These reply comments of the Alliance for Rail Competition and the other producer and shipper interests identified on the cover (“ARC, et al.”) will be brief. Only one railroad – Union Pacific – filed opening comments in this proceeding.¹ There also appears to be little disagreement among the parties as to the tariff transparency issues addressed in the Board’s December 29, 2016 NPRM. All commenters support the Board’s proposed amendment, though some suggest improvements.

In addition, relatively little was said in the opening comments about the Board’s Policy Statement on standing for producers of agricultural products and fertilizer, and aggregation of claims. Producer and shipper interests, and USDA, were supportive. UP raised questions that can and should be left for future resolution, in the context of a concrete dispute.

The fact that UP was the only railroad filing opening comments does not preclude more railroads filing reply comments. However, any such filings raising new arguments would not be subject to responses by ARC, et al., or other producer or shipper interests, or by USDA.

ONLINE ACCESS TO RAIL TARIFFS

At a minimum, the Board should require online access for everyone to the rates and service terms applicable to agricultural products and fertilizer in the tariffs of Class I railroads. For the sake of clarity, ARC, et al., recommend that “at no charge” be inserted after “online” in the Board’s proposed addition to current 49 CFR § 1300.5(c). It should be understood that online access under Section 1300.5(c) will also mean online notice must be provided of “scheduled changes”

¹ ARC, et al. anticipated more railroad industry participation based on filings by AAR and other railroads in EP 665 (Sub-No. 1), Rail Transportation of Grain, Rate Regulation Review, in which the railroads discussed producer standing and remedy issues in some detail.

in rates, charges and service terms for these commodities as required by 49 CFR § 1300.5(a).

UP requests clarification of whether online access for “any person” means access for all persons, including persons who are neither current nor potential customers. ARC, et al., submit that the answer to this question must be yes. Nothing in 49 USC § 11101 or in current 49 CFR § 1300 (other than Section 1300.3) would support defining “persons” as “customers”, current or potential. However, we believe clarification on this point would be beneficial.²

We also urge the Board to expand the requirement of online tariff access to cover Class II and III railroads, to the extent that such railroads use websites with “common carrier rates, schedules of rates and other service terms” as their means of complying with 49 USC § 11101(d), if such railroads currently provide only restricted online access, or impose charges for such access.

As explained in the opening verified statement of ARC Witness Whiteside (at 19-20), many non-Class I railroads’ rates are components of important through rates or Rule 11 rates. See also NGFA’s opening comments. We know of no hardship to Class II and III railroads from a broader rule encompassing their websites, so long as smaller railroads with no online tariff information are excluded. As pointed out in the opening comments by The Fertilizer Institute (at 4), many Class II and III railroads already have websites providing the tariff access the Board proposes to require.

² It should be noted that, under 49 CFR § 1300.1(e), “service terms”, as to which online access would be required, include “all classifications, rules, and practices that affect the rates, charges or level of service for rail transportation.” Presumably, railroads could provide website links to such documents.

Finally, in light of TFI's recitation of obstacles encountered in attempting to access rates and service terms for fertilizer on BNSF's website, the Board should add a requirement that such access must be simple and expeditious. Compare 49 CFR § 1300.2(b), requiring that requested tariff information "must be provided immediately". There is no justification for railroad-imposed delays in online tariff access for producers and shippers of agricultural commodities and fertilizer, or for such access for other members of the public. If "registration features" are allowed (and it is not clear why they should be), they must not amount to obstacles to acquiring public tariff information, or using such information.

STANDING AND AGGREGATION OF CLAIMS

UP raises two questions as to the Board's Policy Statement on standing and aggregation of claims. First, UP appears to argue that the \$4 million limit on relief in a successful rate case using the Three-Benchmark approach should be given an expansive interpretation if the case is brought by "a grain producer, trade association, or attorney general who ... obtains a rate prescription." UP opening comments at 2-3.

This appears to be an issue that, for many reasons, is best left for analysis in the context of an actual case, and not in the context of a Policy Statement. First, the issue can only arise in the context of a rate case brought subject to a relief cap. ARC, et al. have argued against relief caps for several reasons, including the fact that market dominant railroads should not retain revenues from rates that are otherwise unreasonable, merely because a relief cap is the condition imposed on complainants for use of the methodology. Such an arrangement gives railroads an incentive not just to overcharge, but also to overcharge by amounts exceeding the relief cap, so the railroad wins even if it loses.

That issue aside, SAC and SSAC are not subject to relief caps, so the issue raised by UP would not have to be addressed in such cases. UP's intent may be to force more use of SAC-based remedies if aggregation of claims is allowed, leading to more rate litigation resembling the class action approach of McCarty Farms, in which producer standing was recognized. Of course, if this happens, UP's issue will not arise.

The Board has not yet adopted a revenue adequacy constraint, but that could be another method of challenging rail rates, or rate increases, in which UP's relief cap issue is inapplicable.

As for Three-Benchmark cases, agricultural producer and shipper interests have been outspoken in arguing that the methodology is poorly suited for grain rate cases, because of its focus on "outlier" rates that rarely apply to grain shipments. Similar criticisms were also recently asserted as to the Board's proposed small-case approach in EP 665 (Sub-No. 2), Expanding Access to Rate Relief, by ARC, et al. and other agricultural interests, and by NGFA. Even the railroads opposed that approach.

As ARC, et al. argued in our opening comments in this proceeding (at 3), "There is much work left to be done on a workable test of rail rate reasonableness for agricultural commodities." While the Board's Policy Statement on standing and aggregation of claims is welcome, other obstacles to relief, like the high cost of SAC and the shortcomings of Three-Benchmark, continue to mean that most market dominant railroads are still essentially unregulated when it comes to rates on agricultural products.

Even if a new Three-Benchmark case were filed as to grain rates, UP raises questions that are difficult to answer in the abstract. If a producer successfully

challenges a grain rate that it effectively pays, application of the relief cap may be straightforward, affecting only that producer. If two producers challenge the same rate as applied to two origin-destination pairs, is UP saying that each producer should be limited to half of the amount of the Three-Benchmark relief cap? Why? If an attorney general were successful in challenging three grain rates in three cases, would the relief cap apply, and if so, how?

Addressing these and other issues on a case-by-case basis would permit full development of the issues by the parties most affected, in the context at hand, recognizing that differing cases can produce varying results. In contrast, attempting to anticipate all possible scenarios now, in a proceeding with only a handful of parties, would not serve the public interest.

For similar reasons, the second question UP raises, the question of third-party discovery in a rate case brought by a producer or producer group or a government body with *parens patriae* standing, is also best left for future analysis on a case-by-case basis. As explained above, the question may not arise anytime soon, in light of the absence of a rate reasonableness test suitable for challenging rates borne by captive producers of agricultural products. And if a rate case is filed, the parties involved, and the STB, can address discovery disputes if any arise.

Market dominance would appear to be the main point as to which a railroad might seek discovery. However, if the complainant is a single producer, there should be no need for third party discovery. At the other extreme, let us assume that the Montana Attorney General files a complaint as to many BNSF grain rates in Montana, where BNSF controls over 90% of grain shipments.³ In such a

³ See the opening comments of the Montana Department of Agriculture and the Montana Wheat and Barley Committee. As discussed in our opening comments, ARC, et al. support *parens patriae* standing for government officials in cases involving shipments of agricultural products.

proceeding, discovery would depend on the special circumstances of the case. BNSF might concede quantitative and qualitative market dominance as to enough origin-destination pairs to negate the issue.

Conversely, what if BNSF were to seek what the Montana AG considered abusive third-party discovery, e.g., long lists of document requests, interrogatories, depositions, etc., as to every captive grain producer in Montana (a group including most if not all Montana farmers)? The Board might need to consider restrictions on third-party discovery, or arrange for an Administrative Law Judge to recommend a fair solution. Picking up on another example cited by UP, in an unreasonable practice case, how much discovery of how many shippers or producers is necessary to establish that Railroad A has one set of requirements and Railroad B has another, less burdensome set of requirements?

What does not make sense is for the Board to try to anticipate all possible third-party discovery issues in the abstract, and in the context of a proceeding in which public comments were sought as to tariff transparency issues. Policy statements are chosen when agencies want to provide general guidance, and leave detailed implementation issues for resolution in future proceedings. UP's relief cap and third-party discovery issues do not need to be addressed now, and should not be addressed now.

CONCLUSION

For the reasons discussed above and in our opening comments in this proceeding, ARC, et al. support the Board's proposal for increased railroad tariff transparency as to agricultural commodities and fertilizer, and urge adoption of refinements in that proposal designed to increase public access. 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 captive shipments of these commodities.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Terry C. Whiteside". The signature is fluid and cursive, with the first name "Terry" and last name "Whiteside" clearly distinguishable.

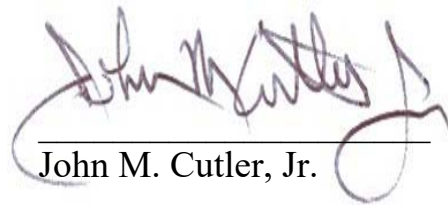
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A handwritten signature in dark ink, appearing to read "John M. Cutler, Jr.". The signature is highly stylized and cursive, with the first name "John" and last name "Cutler" being the most legible parts.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of March, 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.