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Before the U.S. Surface Transportation Board

STB Ex Parte No. 528 (Sub-No. 1)
Publication Requirements for Agricultural Products

Comments of the
U.S. Department of Agriculture

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Authority and Interest

The Agricultural Adjustment Act of 1938 and the Agricultural Marketing Act of 1946 charge the Secretary of Agriculture with the responsibility to represent the interests of agricultural producers and shippers in improving transportation services and facilities by, among other things, initiating and participating in Surface Transportation Board (Board) proceedings involving rates, charges, tariffs, practices, and services.

Introduction

The U.S. Department of Agriculture (USDA) appreciates the opportunity to provide comments on the Board's notice of proposed rulemaking (NPRM) concerning the publication of tariff rates and service terms for agricultural products and fertilizers, as well as the Board's clarifications on "standing" and "aggregation."

The NPRM addresses important issues to the agricultural community, shown in testimony given by stakeholders in comments and during the public hearing held June 10, 2015, for Ex Parte 665. As USDA's comments herein indicate, information on tariff rates, service terms, and changes to these terms are critical to business decision-making by agricultural producers and shippers. Such information needs to be easily available and accessible not only to the agricultural sector, but to the public as well. Furthermore, clarifying who may bring a case and whether shippers and/or producers can aggregate cases provides additional clarity on who has access to the rate review processes, which the agricultural community sees as being too complex, costly, lengthy, and thus unworkable for the needs of this important sector. USDA is pleased the Board is following-up on these additional issues.

Publication of Agricultural Rates

USDA appreciates and supports the Board's action to update its regulatory language regarding the publication of rate and service terms for agricultural products and fertilizer first adopted in 1996. Over the twenty-plus years since, online systems and websites have become increasingly prevalent for commercial and government entities to communicate data, information, and news to customers and the wider public.

As noted in the Board's decision, rail carriers must disclose common carriage rates and service terms and, according to the statute, railroads have additional disclosure requirements for agricultural products and fertilizer as codified in 49 C.F.R. § 1300.5. One portion of the text in § 1300.5 is notable and distinct for agriculture from that of general common carriage. It says, "...a rail carrier shall publish, make available, and retain *for public inspection* its currently effective rates, schedules of rates, charges, and other service terms, and any scheduled changes to such rates, charges, and service terms" (emphasis added). That phrase, "for public inspection," has two important aspects. First, the records must be available to all (the "public"), regardless of whether one ships with the railroad or not. Second, the records must be in a useable form for examination and inspection.

Availability of Tariff Rates and Terms to the Public

One result of the Staggers Rail Act of 1980 was a growing share of traffic moved under private confidential contracts. However, in a recent study, the Transportation Research Board wrote, "Despite the general shift toward contracting over the past decade, shippers of some commodities, particularly agricultural commodities, have remained users of common carriage. Contract carriage grew dramatically among coal and chemical shippers but barely changed

among shippers of corn and wheat.”¹ Grain is the largest commodity-user of tariff freight.² Thus, the availability of tariff rates and service terms is particularly important to agricultural shippers. It enables them to make better decisions by more accurately assigning relative values to various routes and their associated destination markets. Furthermore, agricultural shippers have the option to enter into private contracts with railroads that may involve below-tariff rates. Since the Board does not have jurisdiction over contracted rates, tariff rates and associated service terms can act as “a ceiling” on contract rates and terms. However, for that to work, the tariff rates and terms must be easily available to and known by shippers, as well as the public.

Railroads have generally made rates available online, but some require user accounts, which require approval and can create unreasonable delays for shippers and the public. Furthermore, one major railroad asks shippers “to email” the appropriate group for a rate, but does not appear to store the results of these inquiries online for others to access. Whether or not the railroad posts tariff rates and service information online and where to obtain this information on the website is not clear for all railroads. As per the statute, this information should be easily available to anyone that wants it.

USDA appreciates the Board availing its Office of Public Assistance, Government Affairs, and Compliance for parties having difficulty in accessing tariff rates and terms. Testimony during the hearing showed that shippers have reported issues of difficulty and delay in accessing these published rates. While railroads can require web users to register for an account, they should not delay registration approvals or reject requests from the public. Moreover, where and how shippers and the public access this information must be clear.

Accessibility of Tariff Rates and Terms for Inspection

Simply posting the tariff rates and terms may not make them usable to shippers and the public for inspection. They must also be accessible. Shippers have argued the Class I railroads should make their tariff rate and service documents more apparent, accessible, and user-friendly. Class I railroads provide tariff and service term information on their websites in varying degrees of ease-of-access and consistency. Most railroads have “pricing portals,” which offer a handy way to search and find rates given the shipment’s criteria, such as product, origin, and destination. These tools offer a more efficient way to gain desired information as opposed to combing through many PDFs, some of which may be expired or unsearchable. However, some railroads only provide the information, such as schedules of rates, in PDF-form, which is less accessible to shippers and the public, and is difficult to use. USDA recommends the Board require railroads to retain these records (e.g., rates, schedules of rates, etc.) where appropriate in a machine-readable format.

Standing and Aggregation Issues

Agricultural shippers have voiced considerable concern over unreasonable rates on the record in Ex Parte 665 and elsewhere, as well as concerns about unworkability of the rate grievance processes available to them. Thus, USDA appreciates the Board clarifying the issues of standing and aggregation in this NPRM and acknowledging, “...the statute permits parties to bring a rate complaint, even if they have not been directly harmed or did not directly pay for the

¹ Transportation Research Board, Special Report 318, *Modernizing Freight Rail Regulation*, 2015.

² Ibid.

transportation for which relief is sought.” Further, USDA welcomes the Board confirming, “...parties may seek to aggregate their rate claims.”³

Agriculture is a unique industry, where the entity that pays the freight (i.e., the shipper) is not always the same as the entity that bears the cost (i.e., the agricultural growers and producers). The agricultural community has sought clarification on whether agricultural producers, who do not directly pay the freight, have legal standing to pursue a rate case. The NPRM helps remove the uncertainty and makes it clear that producers have standing in the rate relief process.

Clarification on whether or not agricultural shippers can aggregate cases is also important. These shippers have found the legal process to challenge potentially unreasonable rates too costly and unusable. They have pointed out that the potential value of a successful rate relief case is not enough to justify the high costs of litigation. Single, small agricultural shippers may have an especially difficult time justifying pursuit of a rate case, given the small volume of their shipments. However, multiple small shippers combined into a single case might make rate relief a viable option. The NPRM helps remove the uncertainty on shippers’ ability to aggregate cases and the circumstances needed for such aggregation. Explicitly allowing aggregation is an important step toward making the rate review mechanisms more usable to agricultural producers and shippers.

Conclusions

USDA appreciates the Board’s efforts to address these important issues to shippers of agricultural products in the NPRM. Agriculture, in particular, has continued to ship large amounts of traffic via common carriage, even with railroads seeing growth in contracts from other commodities. Agricultural stakeholders therefore rely heavily on public tariff rates and service terms. They are a necessary component to making informed decisions and can act as a “ceiling” when agricultural shippers elect to pursue a contract. Finally, clarification on standing and aggregation helps reduce uncertainty for the Board’s rate review processes.

Respectfully submitted,



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³ Surface Transportation Board decision, Ex Parte 528 Sub-No. 1, *Publication Requirements for Agricultural Products*, December 29, 2016.

CERTIFICATE OF SERVICE

I, Bruce Blanton, certify that on February 27, 2017, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid, on all parties of record in STB Docket Number EP 528 (Sub-No. 1).

A handwritten signature in blue ink, appearing to read "Bruce Blanton", is written over a horizontal line.

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