

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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STB Docket No. EP 528 (Sub-No. 1)

PUBLICATION REQUIREMENTS FOR AGRICULTURAL PRODUCTS

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

The National Grain and Feed Association (“NGFA”) appreciates the opportunity to submit these Opening Comments in response to the Surface Transportation Board’s (“Board”) Notice of Proposed Rulemaking (“NPRM”) served on December 28, 2016 in this docket proposing amendments to its regulations governing the publication, availability and retention for public inspection of rail carrier rates and service terms for agricultural products and fertilizer.

The NGFA commends and strongly supports the Board’s proposal to update its 20-year-old rules to require that all Class I railroads make publicly available online their common carrier tariff rates, charges and other service terms, as well as subsequent changes to such rates, charges and terms, for agricultural products and fertilizer. This information would be provided regardless of whether the requestor is a current or potential customer of a given railroad. The NGFA does, however, recommend several refinements to the Board’s proposal that it believes are necessary to fulfill the Board’s stated objective to make such information transparent, readily accessible and usable to the requestor. Further, we urge the Board to amend its proposal to require that Class II and III carriers that decide to post such tariff, charges and service terms on their websites do so

under the same standards of transparency, accessibility and usability as required of Class I railroads.

The NGFA herein also provides comments on the Policy Statement issued by the Board in the NPRM, in which the Board provides a welcome and fully justifiable clarification of its policies related to standing and aggregation of claims as they relate to rate complaint procedures.

I.

IDENTITY AND INTEREST OF NGFA

The NGFA, established in 1896, consists of more than 1,050 grain, feed, processing, exporting and other grain-related companies that operate more than 7,000 facilities and handle more than 70 percent of all U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed and processing industry. The NGFA also consists of 34 affiliated state and regional agribusiness associations, has a joint operating and services agreement with the North American Export Grain Association, and has a strategic alliance with the Pet Food Institute.

II.

PUBLICATION OF AGRICULTURAL RATES

The NGFA commends the Board for proposing to update its regulatory language regarding the publication of rate and service terms for grain and other agricultural products, first adopted following enactment of the ICC Termination Act of 1995 (P.L. 104-88). As the Board correctly notes, "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." NPRM at 4.

As pointed out by the NGFA and other Interested Agricultural Parties in their Opening Comments in the Board’s proceeding proposing to expand access to rate relief,¹ grain and other agricultural shippers remain major users of railroad common carriage. That fact was substantiated by the 2015 report of the National Academy of Sciences’ Transportation Research Board (“TRB Study”), which documented that grain is the largest commodity grouping within common-carrier service, accounting for about one-third of all ton-miles by tariff.² As noted in the TRB Study, grain shippers do not typically enter into rail transportation contracts because of the nature of their businesses, in which varying shipment volumes and changing routings require more flexibility than typically allowed under contracts. Indeed, the TRB Study found that only one in five ton miles of grain shipments were moved under contract. The NGFA and other Interested Agricultural Parties strongly concurred with the TRB Study statement that “[t]he continued reliance by grain shippers on common carriage, which is the only form of rail transportation that remains subject to direct regulation, has implications for STB rate and service oversight responsibilities....”³

Broad access to rail tariff and service terms assists agricultural shippers in making marketing and logistics decisions and helps them evaluate the comparative advantages and costs of alternative modes of transport for given routes, as well as whether to explore the feasibility of contract rates and terms. Hence, the Board’s proposal to update its rules regarding common carrier rates and other service terms, as well as any changes to those rates or terms, is extremely important to agricultural shippers and receivers, including agricultural producers, and should be finalized in an expeditious manner.

¹ STB Docket No. EP 665 (Sub-No. 2), *Expanding Access to Rate Relief*.

² *Modernizing Freight Rail Regulation*. National Academies of Science Transportation Research Board (2015), page 44.

³ *Id.*

The NGFA also strongly supports the Board’s existing regulations codified at 49 C.F.R. § 1300.5 that state, in relevant part, “...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.) As noted by the Board in the NPRM, these regulations also obligate rail carriers to ensure that such information includes “an accurate description of the services offered **to the public**..., the specific applicable rates (or the basis for calculating the specific applicable rates), charges, and service terms; and...be **arranged in a way that allows for the determination of the exact rate, charges and service terms applicable to any given shipment** (or to any given group of shipments).” 49 C.F.R. § 1300.5(b)(emphasis added). Railroads also are required to make such information available without charge. 49 C.F.R. § 1300.5(c). Simply put, the Board’s regulations rightfully require that currently effective tariff rates, schedules of rates, charges and other service terms for agricultural products and fertilizer be made transparent, readily accessible and publicly available to **all parties**, regardless of whether they are current or potential customers or receivers of the given railroad, and is to be provided in a format that is usable and easily comprehensible by the party seeking it. The Board is correct to require and ensure that each of these features be applicable to online systems used to convey such tariff and service information.

However, the NGFA believes that to achieve this objective, it is extremely important for the Board to address existing barriers and shortcomings that exist on some Class I railroad’s websites that substantively impede access to tariff rate information and service terms. The Board itself notes that some railroads use a registration feature as a precondition to providing access to viewing some tariff information and service terms online. But some railroads create cumbersome and time-consuming hurdles through their website registration process and password-protection

requirements before such information can be accessed. The BNSF Railway, for instance, states that a “customer” can gain “instant access to pricing information” only after completing an online registration process that can take up to “one to two business days” and includes a requirement that the company validate its name and location by providing a Secretary of State’s registration and a W-9 tax form, or a credit reference sheet listing the company name and address. The NGFA also refers the Board to the example raised in The Fertilizer Institute’s (TFI) Opening Comments, in which it summarizes the multi-day steps required by the BNSF website before only tariff, but not pricing, information was made available to TFI’s counsel. TFI at 3-4.

The registration requirements of some Class I railroads that limit access to such information solely to customers or potential customers – not to any interested person – do not comply with the Board’s existing regulations. Carriers do this by typically requiring that an inquirer identify a commodity or have a marketing representative (in the case of the Norfolk Southern Railway) attest to the legitimacy of the party seeking information. The net impact is that some parties, including transportation counsel, consultants and other interested agricultural parties, often are not privy to proposed tariff changes or modifications to tariff rates, terms and conditions, and in other cases don’t gain access until after the 20-day period for objecting to such rates and terms has expired.

Thus, while the NGFA does not necessarily object to a railroad using a registration feature as a precursor to viewing tariff information online, it does believe strongly that the Board should go beyond “...**expect(ing)** that such registration be structured in a manner that allows any person to view the tariffs for agricultural commodities and fertilizer.” NPRM at 5. (Emphasis added.) Instead, the Board should make it abundantly clear in the text of the final regulations in this proceeding that such registration features must provide for immediate and unrestricted access to “any person” – not just current or potential customers – of all tariff rates, pricing information and

all applicable service terms and conditions for agricultural commodities and fertilizer. The final rules also should require Class I railroads to clearly indicate on their website home pages whether and where interested persons can access public tariff, rate and service information online so that parties are not forced to engage in frustrating and seemingly endless navigation through railroad website portals to locate and access such information to which they are entitled.

The NGFA also supports the Board's proposed amendments to 49 C.F.R. § 1300.5 that would direct parties having difficulty accessing tariff rates and service terms for agricultural commodities and fertilizer to contact the Board's Office of Public Assistance, Government Affairs, and Compliance. However, if the Board's regulations are structured so as to require rail carriers to remove existing barriers and hurdles to accessing such information from railroad websites and to make the information transparent, easily searchable and available in a usable format online, the NGFA believes such requests could be kept to a minimum.

Finally, the NGFA concurs with the Board that Class II and III carriers should not be required to make currently effective tariff rates, charges and service terms for agricultural products and fertilizer available online. However, the NGFA does urge the Board in its regulations to require that *if* Class II and III carriers choose to post such tariff, charges and service terms online, that they be held to the same standards of transparency, accessibility and format usability required of Class I railroads.

III.

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

The NGFA commends the Board for issuing its clarifying Policy Statement in the NPRM with respect to standing and aggregation of rate claims involving agricultural commodities and fertilizer.

As the Board correctly notes in the NPRM, the NGFA has stated repeatedly that the price producers are paid for grain generally is affected directly by the transportation costs incurred by the elevators or other facilities to which they sell their crops. Given the highly competitive global marketplace in which the U.S. grain, feed and processing industry participates, there is limited ability by the industry to pass high transportation costs forward through the marketing chain to the receiver or end-user customer/consumer. Thus, while farmers and agricultural producers are not direct payers of rail freight, they nevertheless are adversely affected directly if a particular railroad rate charged to the elevator or other purchaser of their crops is unreasonably high.

As the Board states, the statute [49 U.S.C. § 11701(b)] “permits parties to bring a rate complaint even if they have not been directly harmed or did not directly pay for the transportation for which relief is sought. Accordingly, grain producers (and other indirectly harmed complainants) cannot be disqualified due to the absence of direct damage.... Indirect damage, therefore, is not a bar to grain producers or other indirect purchasers of rail transportation bringing a complaint, but such complainants must still establish that they have standing to proceed with a complaint.” NPRM at 7.

The NGFA strongly supports this Policy Statement clarification by the Board that direct harm is not required for standing to challenge a rail rate, which is consistent with the statute and provides the opportunity for agricultural producers and state attorneys general to bring a rate case.

Further, the NGFA supports the Board’s statement to allow aggregation of rate claims, on a case-by-case basis, depending upon whether the claims or defenses involve common questions of law or fact, whether administrative efficiencies could be achieved through aggregation, and the number of claims being aggregated.” NPRM at 8. Allowing parties to aggregate their claims will enable shippers and receivers to utilize economies of scale that could make access to the Board’s

complex, cumbersome, time-consuming and costly rate-complaint procedures more accessible – particularly if, as advocated by the NGFA, those procedures are improved, simplified and streamlined for grain and other agricultural shippers in final rules issued in Docket No. EP 665 (Sub-No. 2).

IV.

CONCLUSION

In conclusion, the NGFA strongly supports the Board's proposal to update its regulations that govern the public availability of tariff rates, rate changes and service terms for agricultural commodities and fertilizer. We urge the Board to adopt the recommendations offered by the NGFA to further improve the NPRM by reducing the barriers to timely and unfettered access to such information by all persons.

The NGFA also strongly supports the Board's Policy Statement, as contained in the NPRM, regarding standing and aggregation of claims in rail rate challenges.

The NGFA appreciates the Board's consideration of its Opening Comments, and encourages the Board to proceed expeditiously to issue a final rule on these important matters.

Respectfully submitted,



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