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**COMMENTS OF THE
NORTH DAKOTA GRAIN DEALERS ASSOCIATION**

**TO THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 586

**ARBITRATION - - VARIOUS MATTERS RELATING TO ITS USE
AS AN EFFECTIVE MEANS OF RESOLVING DISPUTES
THAT ARE SUBMECT TO THE BOARD'S JURISDICTION**

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Identity

The North Dakota Grain Dealers Association is a voluntary membership organization formed in 1911 to work collectively for the interests of the country grain elevators in North Dakota. Those elevators are the first point of sale for most grain production from North Dakota farms. We have about 440 such grain elevator locations.

Dependence on Rail

North Dakota is very dependent on rail transportation to get its grain to market. Nearly 85% of our production that moves out of state, goes by rail. Great distances to domestic and export markets make the truck alternative feasible in only a limited number of applications, and many of them only where the trucker can get a backhaul or use the grain as a backhaul.

As a result of this dependence and the market dominance of one particular carrier, Burlington Northern Santa Fe, and our lack of transportation alternatives, rail shippers of grain have little to say about the rail rates they are charged. The railroads charge what the traffic will bear. Many of the revenue to variable cost ratios on rail grain movements out of North Dakota are in the 220-300% range. This compares to a 180% market dominance threshold.

There are no navigable waterways in North Dakota to provide competition to the railroads.

This situation is extremely frustrating to the grain elevator industry and to farmers in our state. Not only do we pay extremely high rates, we also receive less than adequate service. Our grain is captive to the railroad. The railroad can focus its service and better rates on areas where there is competition, and get our grain later.

Remedy Needed

The Board is correct in recognizing that some simple method of relief is needed. Railroads are huge, monolithic entities with deep pockets. They also have huge staffs of attorneys, which can be confirmed by looking at the cover page of most filings from large railroads in STB proceedings. Railroad use these resources to frustrate shipper relief. The McCarty Farms rate case in Montana against BN went on for 17 years. The COT case against BN went on for seven years. Small grain shippers, or even what we might call the largest of grain shippers, simply do not have the stamina and resources to continually wage these kind of battles. And remember, during any shipper-railroad battle over a rate, the railroad is collecting the higher rate and using those funds to fight the shipper, while the shipper is having the excess rate extracted from him, thus depleting his resources to wage the battle.

As the saying goes: "something is wrong with this picture." The big railroad sets an outrageous rate which is presumed under present statute and regulatory procedures to be OK. Then the small shipper has to fight it.

NDGDA endorses NDPSC

This Association endorses the statement submitted by the North Dakota Public Service Commission. We have worked with that agency on many occasions regarding rail matters before the Board and before the Interstate Commerce Commission before it.

Set Limits

In this proceeding the Board is asking for views on legislatively-prescribed arbitration for small rate disputes. Our first choice would be some form of legislatively-prescribed limit on railroad rates so that such arbitrations would not be necessary. Otherwise there is an implied presumption that whatever rate big

railroad wants to impose is acceptable unless little shipper goes to arbitration or litigation to prove otherwise. The burden of proof is on the wrong side. A little more than 20 years ago the Staggers Act was passed to give the railroads more rate-setting freedom. Never was it envisioned that railroads would consolidate to the point that now four huge carriers dominate whole geographic regions of the country and whole industries. The mindset that the railroad is right in its rate-making until proven otherwise is no longer valid, if it ever was. Maybe this is getting off the track a bit from what the Board expected to hear in this proceeding. But it is the factual background. And so if that mindset is not going to change, then any arbitration remedy should be tilted in the shippers' favor.

Market dominance the first problem

In its September 20 announcement of this proceeding the Board suggests that arbitration should be limited to those shippers whose traffic meet the market dominance test, in other words paying more than 180% of variable costs. This might work as an eligibility determiner, but only if the determination of market dominance is simple and straightforward. We will repeat here a paragraph so eloquently stated by our North Dakota Public Service Commission in this proceeding: "Market dominance determination and related revenue-to-variable cost calculations are the largest single deterrent to effective rate relief. If these items are not addressed and made readily determinable and affordable, none of the other issues raised in the Board's initial decision need to be discussed since aggrieved shippers will never be able to afford to get to the point of needing arbitration. They will run out of money and patience long before that."

What is "small"?

The definition of a "small" shipper changes over time. Since Staggers, the number of North Dakota country grain elevators has declined approximately 25%. The number of Class I rail carriers has declined by about 85%. So even though many grain shippers have become larger, their relative economic might in relation to the railroads has declined precipitously. The point we're making is that the definition of a "small" shipper has to be raised significantly from what we

might have thought of in the past, in order to give meaningful relief to a meaningful number of shippers.

The Board's starting point for discussion of the definition of a "small" shipper to be in the 200-500-car load per year range is unrealistic. We suggest something in the 2500 range. In addition, this upper limit cannot be tied to each unique origin-destination pair. Grain from one North Dakota country grain elevator will be shipped to scores of different millers, processors, and export locations over the course of a year. Rail rates to ALL of those destinations from this ONE origin may be too high and should qualify for this arbitration mechanism. It is the captivity of the origin that leads to excessive rates charged to that shipper.

Form of Arbitration

We do not believe that the take it or leave it final offer type of arbitration is necessarily the best. As outrageously high as some North Dakota grain rail rates are, a shipper may feel compelled to make a final offer at something just a little less outrageously high in order to appear reasonable to the arbitrator. For example, the Board has that 180% revenue to variable cost ratio threshold for market dominance. A shipper with a current rate in the 260% range might really want and deserve a 180% RVC ratio rate. But he will likely not make that his final offer because such a drop might appear unreasonable to the arbitrator. A shipper may feel compelled to make a final rate offer in the 220% RVC range, which is still unreasonable according to the Board's own standards. In other words the railroad gets a benefit in the arbitration process by having been more outrageous with its rates in the past. To avoid this pressure on the shipper to give away something before the arbitration starts, an arbitration system should be modified final offer, meaning that the arbitrator or arbitrators can find something in between. The arbitrators should also be given instruction that the 180% RVC market dominance threshold must be given much weight in their final decision.

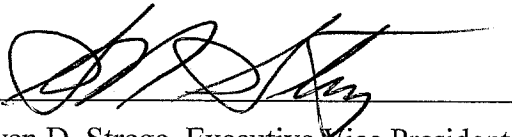
We expect that the rail arbitration system of the National Grain and Feed Association will be brought up in this proceeding. The North Dakota Grain

Dealers Association is an Affiliate Association member of the National Grain and Feed Association. The NGFA rail arbitration system is not universally applicable to all country grain elevators or all disputes. Railroad rates are specifically excluded from that system.

The September 20 announcement of this proceeding, at the source of footnote 10, states ". . . those shippers who clearly lack sufficient traffic to exercise leverage against the carrier." Captive country grain elevator shippers in North Dakota have little if any leverage on the carrier. It is simply a situation of paying the rate the railroad charges. This is a fundamental principle the Board must acknowledge and apply in this proceeding and others.

Conclusion

Rail grain shippers in this part of the country, especially those on the Burlington Northern Sante Fe, are frustrated to the point of simply throwing their hands in the air and allowing the railroad to do whatever it wants to them. They feel there is no effective referee anymore. The BNSF wants to cut back drastically on the number of grain elevators it serves, concentrating on only a few major terminals from which it can haul the largest of trains. It manipulates rates and service to accomplish its ends. Through this process the BNSF will put out of business many other modern facilities that have paid excessive rates for years and spent millions of dollars over the past 20 years to keep up with railroad demands. The Board needs to step to the plate and be counted for shippers in this and other cases. Promoting a useable arbitration system on rates is a step in that process.



Steven D. Strega, Executive Vice President

North Dakota Grain Dealers Association

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