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BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 677
COMMON CARRIER OBLIGATION OF RAILROADS

STATEMENT OF TERRY J. VOSS ON BEHALF OF
AG PROCESSING INC

1. My name is Terry J. Voss. I am Senior Vice President – Transportation for Ag Processing Inc (“Ag Processing”). My business address is P. O. Box 2047, Omaha, NE 68103-2047. I appreciate the opportunity to address the Board regarding the common carrier obligation.

2. Ag Processing is a regional cooperative that, in turn, is owned by 195 co-operative agricultural companies, representing 200,000 farmer producers, mainly situated throughout the plains states. Ag Processing itself merchandises (that is, buys, sells, ships, and receives) field grains, including soybeans, but its principal business activity is corn and soybean processing. Ag Processing operates nine facilities that process soybeans, soybean oil, soybean meal, and bio diesel and one that processes corn into ethanol and its co-products. The company operates an export facility at Aberdeen, WA used primarily to export our members’ soybean meal and distillers dried grain shipments and an elevator at

Duluth, MN for grain export. AGP also owns grain elevators from Minnesota south to Texas that handle single-car to shuttle-size shipments. Our members own hundreds of grain elevators in the Midwest and Upper Midwest. At Eagle Grove, IA, we receive coal shipments to fuel a power generating plant that supplies electricity and steam to our soybean processing facility at that point. A similar facility is being constructed at Hastings, NE.

3. Our processing facilities, our members, and elevators are heavily reliant on rail transportation. Generally speaking, the markets for both corn products and soybean products are located long distances from the areas where corn and soybeans are grown and thus where the facilities to convert those commodities into products are located. The majority of our outbound products thus move by rail. Corn and soybeans used in our processing operations are delivered to our facilities both by truck and by rail, and often originate at elevators owned by our member companies. Seldom are any country elevators served by more than a single railroad, and seldom is there effective truck transportation competition for the single railroad that serves grain and processing facilities. Anybody familiar with the grain, soybean processing and ethanol industries would recognize without quarrel that rail service is essential to those industries.

4. For the past 25 years, Ag Processing and our members have witnessed a steady transformation of rail service from a business that was responsive to the needs of its agricultural customers to one that now very often attempts to dictate how those customers must conduct their business if they are to receive rail service. The institution of this proceeding is welcomed by Ag Processing and its members, and we offer our commendation to the Board for taking the important step of instituting a process to explore

what has become of, and what may be expected of, the common carrier obligation. We are not approaching this proceeding as one in the nature of a complaint where we make and sustain accusations against railroads for specific statutory violations; rather, our goal is to contribute to the Board's understanding of a shipper's view of issues that affect a business vital to this country, which is the transportation of freight by rail. Some of our members are reluctant to participate because they are served by a single carrier and concerned there would be repercussions from putting their name on a document.

5. The Board's Notice of February 22, 2008 instituting this proceeding defines the common carrier obligation as "the statutory duty of railroads to provide 'transportation or service on reasonable request,'" pursuant to 49 U.S.C. 11101(a). The Notice emphasizes that, while a railroad may not refuse to provide service merely because to do so would be inconvenient or unprofitable, the common carrier obligation is not absolute and service requests must be reasonable.

6. From these statements by the Board, we have concluded that an examination of the common carrier obligation must extend not merely to Section 11101(a), but to railroad service more generally, including obligations that arise under other specific provisions of the statute. It is my experience and conclusion that it is extremely difficult, if not sometimes impossible altogether, to separate the broad duty to provide "transportation or service on reasonable request" from specific provisions of the governing statute. Providing transportation or service on reasonable request requires more than maintaining a line of railroad between A and B, locomotives to haul cars over that line, and personnel to operate the trains.

7. One of the most fundamental aspects of a common carrier's obligation to provide transportation or service on reasonable request is car supply. Ag Processing presently maintains a fleet of approximately 3000 private cars, which includes about 1700 tank cars. If Ag Processing did not maintain its private car fleet, there is not the merest glimmer of doubt that we could not obtain transportation service on reasonable request for most of our shipments. It is now the "norm" that shippers furnish cars as a necessity of doing business and we have no way of knowing if we are being compensated for furnishing the cars. It is simply a shipper's cost of doing business today.

8. The lack of adequate railroad car supply is by no means a phenomenon confined to tank cars. Covered hopper cars are not supplied by some railroads for certain types of traffic or in quantities that are inadequate to meet normal demand, thereby forcing shippers to supply those cars. For example railroads do not supply covered hopper cars used for distillers dried grain. One western carrier offers its soybean meal shippers two options: the first is to enroll in a Car Allocation System under which the shipper-processor commits a designated number of cars to load for the transportation of processed commodities requiring that type of car. The shipper must guarantee the carrier a minimum number of annual loads per month in railroad furnished cars and is subject to a penalty for default. The carrier in turn guarantees to provide a specified number of cars for loading. If the shipper does not elect to enter into this program, it must either supply its car needs through private cars or rely on carrier general car distribution. We are not aware of any other commodity group or user of covered hoppers that are required to furnish private cars and be part of an allocation system to receive railroad furnished cars.

9. Car management is at the root of many of the service problems experienced with railroads and conditions for car use are frequently sore points when it comes to obtaining transportation or service from railroads on reasonable request. Car supply has been a contentious situation between the grain industry and railroads for over a century.

10. Some carriers provide car availability through an auction system, where the highest bidder will win a set of equipment for a trip to load grain,. Many of our members have concerns with these auctions systems. They are confused and concerned as to where the common carrier obligation to furnish cars stops and where the auction system starts. This should be defined.

11. In the past few years, some carriers are requiring shippers (in this instance, a term meaning an originator or receiver of traffic) to construct additional industry track so that all cars are accepted by the industry upon arrival. If a shipper does not have adequate industry track to accept each car, loaded or empty, as it becomes available for placement, the car is automatically placed on constructive placement and becomes subject to demurrage or storage which has been as high as \$100 per car per day during the past year, with less than 24 hours free time before those charges apply. Shippers who have no ability to construct or otherwise find trackage to hold each arriving car become subject to penalties. In some cases, track construction is impossible; we have two facilities completely surrounded by city streets and residences, with no conceivable way to build more trackage. This is a marked departure from the rules that prevailed when many facilities were constructed as recently as ten years ago. This leaves us vulnerable to infrastructure expenses as a condition of service. Erratic service compounds these prob-

lems. A few cars may set in a terminal for a day or two. The next day a few more are added. Soon, we have six or eight; or ten or twelve cars in a bunch before they depart. They all arrive at the same time, even though shipped days apart. We are then subject to charges because of erratic service. Erratic service causes havoc with a private rail car fleet. As service changes, so does the need for cars. The shipper has too many or too few depending on service. Leases for private rail cars are not adjustable on short notice based on service. Nor is track at a facility. Shippers who rely on railroad car supply are not in the same perilous position, but they run the risk of not receiving cars adequate to meet their needs. The conclusion we draw is that railroads impose conditions on shippers that compel shippers to make car and track investments for which we receive little or no compensation.

12. More and more, railroads demand that our company, as a shipper, provide services that a short line connecting carrier normally would provide for its trunk line connection. One railroad has demanded that one of our facilities pre-block cars before they are released to the carrier. At that facility, where we are served by carrier X only but are open to reciprocal switching to carrier Y, our transportation costs have been increased because we are required to pre-block all cars that carrier X will switch to carrier Y. We are already paying the carriers to perform this service. The rate we pay carrier Y for line haul transportation includes the reciprocal switch charge of carrier X, which was reached by agreement between carriers X and Y (who, I believe, have a system-wide reciprocal switching charge agreement in place). Having reached that agreement, and apparently preferring to leave it undisturbed for commercial reasons, carrier X now seeks to in effect

increase its compensation by reducing its costs at the expense of our company, which will receive no compensation for pre-blocking cars.

13. A third railroad, serving an altogether different facility of our company, now maintains that we should pre-block all outbound cars, sorted by the carrier that will receive those cars in interchange at a given gateway. This, again, is work that normally and historically has been done by railroads and for which we compensate them in their freight rates. I do not know if demands such as the ones described are being made on other shippers, but they clearly are being proposed to our company as a condition of receiving service.

14. Another example of a carrier function that has been passed on to us, our members and all shippers in order to receive service arises in connection with the issuance of bills of lading and the payment of freight bills. Because railroads no longer have local station employees who issue paper bills of lading, shipping documentation is exchanged electronically, which is not necessarily a problem. The problem arises when some carriers insist that you either utilize their website for all transactions or hire a third party to communicate electronically with the railroad. These requirements cause extra work and expense for the industry because, when we utilize the carrier's website, we must then make a separate record for our company. A related problem arises if the shipper inadvertently makes a clerical error in the transmission of electronic data. Where such clerical errors are made, charges are assessed for correcting them. One railroad charges over \$300 to correct an error in an electronic bill of lading, even though the bill of lading should have been issued by the carrier in the first place as part of its carrier obligation.

15. We are seeing a clear and growing trend toward shifting risk from railroads to industry as a condition of receiving common carrier service. This trend emerges very clearly where an industry requires a new switch connection or renewal of an Industry Track Agreement. Industry Track Agreements are required by virtually all railroads as a condition precedent to the delivery and pickup of cars. They are prepared by the carriers and mainly address liability issues when the carrier enters on industry track to implement placement or pulling of cars. These agreements contain provisions that place far more responsibility on the shipper for personal injury, property damage, or death than fall on the carrier, even where the carrier may be negligent. Virtually all have indemnification clauses that require the shipper to make the carrier whole even where the carrier may be negligent. No similar clauses protect the shipper. These types of agreements are commercially unreasonable but are extracted as a condition to receiving rail service. In one agreement we are aware of, the shipper is confronted with a clause requiring the company to waive any protection it might be entitled to under State Workers Compensation or Industrial Insurance acts, followed by a clause requiring the shipper to acknowledge that the waiver was mutually negotiated when it was told absolutely no changes would be made to that section of the agreement.

16. Where a facility is expanded or newly constructed, and a switch connection is required between the railroad's line and the industry track, we see similar risk assumption provisions, also with indemnification clauses that apply either regardless of railroad negligence or only in the event of sole railroad negligence. When railroads serve facilities, the concept that each party should be responsible for its own negligence is fast disappearing and common carrier service is conditioned on risk assumption by shippers.

17. Some segments of a railroad's system, consisting mainly of older track and roadbed, are not capable of handling large cars loaded to 286,000 pounds gross weight, and operate on track restricted to 268,000 pounds. One carrier takes advantage of this situation when it furnishes a larger car for use over that type of segment. The larger car can only be loaded to 268,000 pounds, but the carrier charges a rate based on the car's 286,000 pound capacity, thereby compelling the shipper to pay for transportation service on cars that cannot be efficiently utilized by the shipper.

18. I mentioned earlier that we receive coal to fuel an internal power generation plant. We are not a big coal receiver, but we have traditionally met our needs with rail delivered coal. When our most recent coal transportation agreement came to an end, the carrier, which serves both origin and destination, initially told us it was no longer interested in the traffic. Subsequently, the carrier quoted a rate so far above the prior rate as to make it clear that the carrier did not intend to handle traffic at the rate. The carrier was correct. Its rate was so high that our company was able to make alternate arrangements for coal originating at the same general origin, moving via two different railroads and then via truck transfer to our power facility, at a very large increase to the previous rates. Here is an instance in which a carrier with a single-line movement quoted a rate so high that the single-line movement could be replaced by a three-carrier, two-load haul. I question whether quoting rates in this manner is a legitimate common carrier response.

19. One of the complaints we hear most often from our members is the requirements of loading unit and shuttle grain trains. The concept is fine and a very efficient way to move large volumes of grain. The notification process of when the cars will arrive and be available for loading is not accurate. This notification of estimated time of

arrival can be off as much as eight hours. Once the empty cars are spotted, the elevator has fifteen hours to load and bill the train (for shuttles). Often, the elevator loading crew has been on duty for several ours prior to the actual spotting of the train. The biggest concern expressed is safety and the need to have the crew available when the cars arrive.

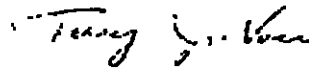
20. Our members question if a better system couldn't be worked out. They understand the need for efficiency, but also know the necessity of safety. Even more frustrating for them is that sometimes the trains are not pulled even twenty four hours after loaded. What's good for the goose is good for the gander could apply here.

21. We were recently made aware of a 100 car train that was loaded and billed on a Saturday. This elevator is served by more than one railroad. The following Friday (six days later), the other railroad was bringing empty cars to the facility to spot. The train from the previous Saturday had not been pulled. The empty train had to be diverted to another elevator, and the seller was out of contract terms with the buyer. Certainly, the carriers who did not move the loaded train had some type of a common carrier obligation to do so.

22. One topic mentioned by the Board in its Notice was proper use of rail embargoes. Our experience has shown that as a rule an embargo is put in place too late. Normally a facility is totally congested before the embargo is put on. We feel that if the carrier notices that a problem is occurring it may be prudent to issue an embargo early and use permits to control the traffic that wants to move to that destination. We have found that to be a much better solution than an embargo being issued and cars held for additional days or weeks while the backlog is being worked off.

22. I recognize that some of the issues I have discussed might be addressed under sections of the statute other than Section 11101(a). I have included them in this statement for two reasons. First, they exemplify the many ways in which railroads can narrow, condition, or decline to provide transportation or service, whether that obligation is viewed under Section 11101(a) or elsewhere under the statute. Second, I believe that the issues I have discussed are responsive to one or more of the topics addressed in the Board's Notice of February 22, 2008.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Terry J. Voss".

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