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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 677
COMMON CARRIER OBLIGATION OF RAILROADS

COMMENTS OF THE
NORTH DAKOTA GRAIN DEALERS ASSOCIATION

Identification

The North Dakota Grain Dealers Association (NDGDA) is a 97-year-old nonpolitical voluntary membership trade association of 150 companies that operate over 300 country grain elevators in North Dakota. These grain elevators are the first point of sale for nearly all grain produced in the state. These businesses receive, clean, condition, blend and ship grain on to domestic and worldwide markets. NDGDA's governing Board consists of managers of nine companies operating 15 of those elevators. Some members and some Board members are single car shippers; some load the biggest shuttle trains of 100 cars on the CP and 110 cars on the BNSF. All have use for non-shuttle service in blocks of 1-25-50 cars. Approximately 85% of North Dakota grain elevators are located on a rail line. Many of the others truck at least a portion of their grain volume to elevators on rail. The BNSF and CP Rail serve North Dakota. Several short lines or regional railroads have been created in the past 20 years off those two major carriers. These smaller railroads get almost all their cars from the major carriers and follow the major carriers' rates and service offerings.

The common carrier obligation

The common carrier obligation is the railroads' statutory duty to provide transportation or service on reasonable request (49 U.S.C. 11101). Section 11121 says railroads "shall furnish safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service." Thank you for initiating this proceeding to get these issues on the table for discussion.

The common carrier obligation should be a “glue” that holds the rail transportation system together. Supposedly it applies to all railroads and means all rail customers are entitled to service. This is especially important to agriculture and shippers/receivers of agricultural products. Ag product shippers are tied to the land. They cannot pick up and move as some businesses can. Thousands of them are scattered across the nation, near large cities and small towns, as well as in out-of-the-way places. Their relatively small size means few if any are critical to a railroad’s success. The destinations/receivers for these products are fewer in number, but dependent on sourcing their supply from those same rural areas. Even though relatively small and scattered, these origin and destination combinations are the lifelines for much of our food supply here in the United States and for export into world markets. Railroads link this together and so simply must serve.

We will not cite numerous statutes, regulations or case law. You have plenty of attorneys on the witness list to give you that. Instead we want to focus on practical application of the obligation or lack thereof, from a state that is highly dependent on railroad service. For the record, North Dakota is landlocked at the center of the North American continent, with no in-state water transportation alternatives. Year in and year out 75-80% of our grain production moves to market by rail. For our historically largest crop, wheat, it is 85-90%. The distance to barge transportation in the Minneapolis area is more than 400 miles from central North Dakota and about the same going to the Great Lakes at Duluth-Superior. Going to Pacific Northwest ports is 1200-1500 miles.

Defining the common carrier obligation for application to every situation is a challenge. So we will come at it from the other side. We believe the following situations/examples are not fulfilling the common carrier obligation:

1. Being more than 20 days late on car service. (This does not mean consistently late service is an acceptable norm.) Occasional later placements due to extreme weather events may be tolerable. However, like their customers, railroads have worked in this environment for decades and should be prepared to handle unexpected events. Grain elevators incur extra carrying costs and may suffer late delivery penalties when their railroad falls behind. Grain elevators on the CP receive lower bids for their grain from some buyers because of CP’s poor performance.
2. Selling service on an auction for a premium for supposedly guaranteed on-time delivery and then being more than 10 days behind. Grain is typically marketed in half-month

windows. Shippers bid on capacity to hit these windows. Selling capacity at a premium and then not meeting commitments for timely service is unacceptable. Penalties on the railroad for nonperformance must be sufficient to discipline them, and should continue to accumulate until performance is achieved.

3. Railroads offering a majority of capacity in packages that are economically practical for only a few big players to purchase.
4. Railroads expanding into new and other areas at the expense of existing customers. Growing the business is fine, but customers who have paid their dues should not be shortchanged.
5. Railroads focusing too much on their bottom lines and not enough on their customers and public obligations.
6. Railroads using their market power to push industries and customers into large capital investments for the efficiency of the railroads.
7. Not being prepared for known seasonal changes in demand.
8. Placing substandard equipment for loading.
9. Excessive exploitation of captive shippers through extreme rates, including inverse rates, and fuel surcharges that exceed actual increased cost of fuel.

In response to some of the topics STB had in its order for this hearing

We are familiar with service limitations resulting from a capacity constrained environment. Within the past few years North Dakota has provided information to the STB about being 30-40-50 days behind in rail service. Fortunately this has not been the case the past couple years. At those times some grain elevator managers occasionally unofficially heard from railroad personnel that locomotive power had been taken off grain trains and moved to other traffic such as intermodal. The pre-Christmas rush for retail and the fall harvest occur simultaneously. The first sometimes seems to have a more important deadline than the second.

North Dakota grain elevators are also familiar with carrier-imposed requirements for infrastructure investments. In the past seven years about 40 locations have upgraded or built entirely new facilities to accommodate the railroads' push for 100 or 110 car shuttle trains. Millions of dollars are spent for each location. Technically these are not "requirements," but through pricing and service priorities the railroads have made it known that the biggest trains -will-be their-priority. This has led to what some in the industry believe is an overbuilding rush in some areas, with not enough grain to keep all of them in business. Now we have ethanol plants

coming in and taking some of the corn away. There are significant efficiencies for the railroads in having fewer locations loading larger trains. There are efficiencies in use of the car fleet that benefit some grain elevators and some farmers to varying degrees. But there are also costs, including construction, grain gathering and for public infrastructure.

Volume requirements beyond train size are usually not disclosed. Neither are the incentives, but they are commonly understood to include a minimum annual volume, a credit of \$XXX per carload and a duration of 3-5 years.

Areas of Concern

Our questions and concerns about the common carrier obligation are in at least the following general areas: Who decides what to haul; service to different sizes of shipments; car supply; surges in demand; service to and maintenance of branch lines.

If hauling containers of electronics and toys from the Pacific Coast into the interior of the United States is more profitable than hauling grain or coal, is it okay for the railroad to let grain and coal fall behind while they haul the containers? Our answer is no.

While railroads are private businesses, in some ways they resemble regulated utilities that are also private businesses. Both provide an essential service. Both are granted franchises by governments. Railroads have received theirs by being allowed to merge and merge and merge again, to expand territory and become increasingly dominant. These franchises are protected. A railroad can object to a competitor coming into "its" territory. A railroad can expand its territory through the use of eminent domain, a power not held by any agricultural shipper. We believe that along with the granting and expansion of these franchises comes a public obligation that goes beyond the railroads' bottom lines. Certainly the public interest is served by having profitable railroads. But that cannot be the only measuring stick.

In the winter of 2003-04 the BNSF was current on shuttle trains but up to 50 days behind on non-shuttle service. Of course that affected both non-shuttle shippers and shuttle shippers loading non-shuttle. We believe such a disparity in timeliness of service does not fulfill the common carrier obligation of railroads to non-shuttle service. North Dakota has a diversity of crops. It is number one of all states in the production of spring wheat, durum wheat, oats, barley, flax, dry edible beans, dry edible peas, lentils, oil and non-oil sunflowers, and canola. We rank ninth in the production of soybeans and 13th in the production of corn, but nevertheless produce scores of millions of bushels of each. Some of these crops are typically marketed in lots of one carload or several carloads, not in large train sizes. Spring wheat is traditionally our largest crop.

It and durum wheat are often marketed in small lots with tight quality specifications. Diversification in crops and more quality specs in crops is becoming the rule instead of the exception. This means that access to single cars and smaller shipment sizes is very important. On a per-bushel basis these bring more revenue than the larger shipments.

Railroads are in a position to force shippers and receivers into gearing up for the largest trains. With effective competition this might not be so. It would probably be more efficient for a grocery store to sell potatoes in 100 pound bags only. But if a store tried that it would soon lose its potato business to competitors who sold in 20, 10 and 5 pound bags. This is what competition does in providing what the consumer wants. The smaller shipments must have adequate service under the common carrier obligation.

Marketing of Capacity

Another aspect of size is how capacity is marketed. The BNSF bundles its shuttle train service into 12 month and 24 month commitments. At three turns per month that is 36 or 72 train loads of more than 400,000 bushels each. A recent new twist is the three-year commitment. Few if any individual shippers can afford to make these kinds of commitment. What has evolved is a few major players controlling this capacity and distributing it out to individual shippers. We question if this is fulfillment of the railroads' common carrier obligation to its customers. There are middlemen.

The railroads serving North Dakota sell most of their capacity, both shuttle and non-shuttle, in an auction. There is only one seller and rail customers compete against each other for what is often a scarce resource. Bids are allowed to go up above tariff without limit, but are not allowed to go below tariff.

A secondary market in capacity has also developed. A benefit is adding fluidity to the market, allowing the sale of transportation services from a buyer who may have too much to one who for one reason or another has too little. A downside is giving more control to those with the deepest pockets and who can afford to assume the most risk. Typical shippers must go into this secondary market and purchase their car needs from those third parties, often at a premium. A side effect to this is insulation of the railroad from true market signals that more cars are needed. The secondary marketer gets those signals and also the premium that could have gone into the railroads' coffers to purchase more equipment. So while trading capacity may make sense economically, it does not necessarily contribute to infrastructure and equipment improvements.

When the BN started its COT (Certificate of Transportation) program in the late 1980s a formal complaint against it was filed at the ICC by the National Grain and Feed Association, the North Dakota Grain Dealers Association and other parties. After much legal commotion the ICC ruled against the shipper interests in a four to one decision. NGFA and NDGDA appealed to the 8th Circuit Court. The Court remanded the case back to the ICC and said if a particular railroad car distribution process "so reduces the number of cars available for" other shippers that it unduly impairs the railroad's ability to meet its common carrier obligation, then the preferential program is "unlawful." That 8th Circuit Court of Appeals decision still stands. It seems applicable to the disparity in timeliness between shuttle and non-shuttle service.

Regarding surges in demand and the railroads' obligation to serve them, we've heard railroad representatives say they can't be expected to build a church for Easter Sunday. We agree. But when cars ordered on Labor Day and due on Thanksgiving Day or Christmas Day are not filled until Easter Sunday then we have a problem.

Equipment Condition

Railroads are to place equipment that is suitable for loading. Many Canadian Pacific grain shippers report big problems with CP grain cars. Many bottom gates don't work properly. Crowbars must be used to pry them closed. Something must be done to seal the cracks so grain does not leak out. We elaborated on this situation in our filing regarding the CP-DME merger.

The BNSF has added new cars that usually go into shuttle service. But the condition of some cars in non-shuttle service is a problem. The STB should be monitoring both the number of cars and the condition of cars. Regarding fleet size, we need to know the net number of cars. Sometime railroads tell us how many cars they are adding. We also need to know how many are being retired and leases being allowed to expire.

Maintaining Track

The common carrier obligation cannot be served if there is no track to reach the rail customer. In 1980 North Dakota had 5,083 miles of railroad track. Since then about 30% of those miles have been abandoned. Railroads usually say there just isn't enough business to keep the line open anymore. That may be true, but in some cases the rail customers wonder who abandoned whom. When service is sporadic because the line is not maintained and must frequently and/or for long periods of time be embargoed, of course the business declines. The rail dependent customer is made less competitive and the cycle feeds on itself. We know the STB has separate statutes for abandonments and a process for them. But the matter bears

mentioning here because abandonment of the common carrier obligation leads to future abandonment of the actual rail line.

Another trend we are seeing in carrier-imposed requirements for infrastructure investment is industry payment for the replacement of turnouts (switches) from industry track to mainline track. Within the past few years the Canadian Pacific Railway has been pushing this matter. It is a very costly one, \$50,000 - \$100,000 or more per switch. The first attempt was to simply start billing the shipper for the cost. After objections were raised the CP offered an annual payment plan of several thousand dollars in anticipation of the switch having to be replaced at some point. Upon further rail customer objection, that was postponed or laid aside. Now it may be coming back again.

Much or most of the wear and tear on the switch is due to the railroad's mainline traffic. It is not reasonable to charge the customer for its replacement. It is the equivalent of the grain elevators charging customers to replace the front door when it wears out. We've heard the railroad's "but for" contention – "but for" the customer being there it wouldn't need a switch. Let's put the shoe on the other foot. "But for" its customers there would be no need for the railroad. When railroads first came across these prairies there was competition among them to get customers located on their line. Grain elevators and other customers were considered assets. Now it's as if some are liabilities. Just think; if they could get rid of all their customers they wouldn't have switches to repair. Another objection is that the rail customer has no say whatsoever in the matter. The railroad decides the switch needs to be replaced and it will spend whatever is necessary and bill the customer. I'm not sure we have had an instance of service being cut off because the customer didn't pay that bill, but the threat is there and if the customer doesn't pay this will no doubt happen. We question if demanding such payment for continued service is in keeping with the common carrier obligation.

Conclusion

The STB order announcing this hearing asked for comments regarding the role of the Office of Compliance and Consumer Assistance. Up until late 2006 that was the Office of Compliance and Enforcement. Now it has been combined with other functions, with no Enforcement in the name. Maybe it is a small thing, but it probably didn't enhance the agency's image as one standing up for rail customers. After all, enforcement would be on railroads, not rail customers.

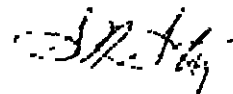
This highlights a gap between what many rail customers expect and perhaps should have, and what the agency actually does. Since the latter half of the 19th century railroads have held significant economic power over their customers. Abuse of that power brought about creation of the STB's predecessor agency, the Interstate Commerce Commission, in 1887. A former North Dakota Public Service Commissioner has said the first complaint brought to that new ICC was about a shortage of grain boxcars in the Dakota Territory.

It is conventional wisdom that regulation became too stifling and so it was relaxed with the Staggers Act in 1980. Since then the balance of power has shifted even more in favor of the railroads. They've consolidated into much fewer, much larger, and more dominant players. Rail customers need someone to proactively stick up for their interests in the face of this. But generally speaking they have to initiate the process and are then faced with intimidating, lengthy, expensive and uncertain complaint processes to get any relief. They are up against well-funded railroad industry lawyers. It is truly a David vs. Goliath scenario, or the 800 pound gorilla in the ring with the 100 pound weakling shipper.

We believe the STB could take a stronger hand in calling fouls and correcting the situations. Make sure there are consequences. An example of getting started down that road was the fuel surcharges proceeding begun about two years ago. We wish the agency would have gone farther, and that may still be possible. But that is not the subject of this particular proceeding.

We think this agency should define with as much clarity as possible what the common carrier obligation of the railroads is. At the beginning of this statement we listed some things we feel violate that obligation. Other witnesses will no doubt give other examples. The four major Class I railroads control over 90% of the U.S. rail business. Most shipping points for agricultural products have access to only one of those. It is easy to see how abuses can and do occur. The STB should be more proactive in stepping in and correcting the abuses of the common carrier obligation that have become all too common.

Respectfully submitted,



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