Before the U.S. Surface Transportation Board

STB Ex Parte No. 665 (Sub-No. 1)

Rail Transportation of Grain, Rate Regulation Review

Oral Comments of the

U.S. Department of Agriculture

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The U.S. Department of Agriculture (USDA) appreciates the opportunity to present testimony at this hearing and sincerely thanks the Surface Transportation Board for investigating ways in which rail rate challenge procedures can be made more accessible for grain and oilseed shippers. USDA believes it is critical for these procedures to provide effective protection against unreasonable freight rail transportation rates where there is an absence of effective competition.

For too long, most agricultural producers and shippers have been left with no practically accessible means to challenge rail rates, much less seek redress. It is telling that no grain or oilseed shipper has filed a rail rate challenge using any of the Board's processes since the McCarty Farms case was decided in 1997. This is not because there have been no complaints about rates. Instead, USDA believes there have been no rate challenges mainly because the Board's procedures are too lengthy and expensive for virtually all agricultural shippers.

The cost of bringing a challenge is only part of the issue. Equally important, but not as easily quantified, is the constant changing of rules and procedures within the current rate-challenge system. This forces shippers to predict the outcome of any rate challenge and undermines their willingness to take part in any such system. Any newly proposed processes or amendments to existing rate challenge procedures are likely to be met with skepticism by agricultural shippers if they believe these new processes will not be consistently applied and therefore subject to unobtainable preconditions.

A consistent process establishes credibility. Not only will it encourage greater shipper participation, but it will also lessen the need for litigation and/or rate challenges by shippers as time goes on. In the opening comments of this proceeding that they submitted last year, some rail carriers argued that the possibility of litigation before the STB served to prevent rate increases in areas where competition is not as strong. Litigation only serves as an effective check, however, if STB's processes are consistently applied. This also underscores the importance of designing an effective and accessible rail rate challenge procedure for grain shippers and producers in order to ensure its credibility as a check against unreasonable rail rate increases. USDA believes that effective regulatory mechanisms are critical to rounding out the Rail Transportation Policy's complementary directive of allowing competition to establish reasonable rates.

Therefore, USDA encourages the Board to purposefully seek simplicity, practicality, and consistency in developing alternative rate relief methodologies for agricultural shippers and their unique needs.

USDA believes the most promising ways for the Board to encourage greater use by agricultural shippers of a specific rate challenge procedure are through: (1) significantly lowering the costs associated with the procedure, and (2) demonstrating a commitment to a predictable set of outcomes through the development of a process that is simple to use and easy to understand. USDA believes a formula-based procedure using data that is easy to obtain and deterministic in nature would have wide appeal to agricultural shippers.

Two such procedures have been submitted for the Board's examination in the course of this proceeding—the Ag Commodity Maximum Rate Methodology (ACMRM) proposed by the National Grain and Feed Association and the Two-Benchmark test proposed by the Alliance for

Rail Competition. Both of these alternative methods adhere to the criteria of simplicity, practicality, and consistency. Additionally, their inclusion and treatment of railroad revenue adequacy make them strong candidates for challenging rail rates moving forward as the regulatory environment increasingly incorporates this concept.

To complement formal processes, USDA has also encouraged mediation and arbitration in its opening and reply comments. A major benefit of mediation and arbitration is that they have the potential to offer rail-rate challenge procedures that are less time-consuming and lower-cost than the formal Board processes. In addition, these informal processes foster direct business discussions, facilitating informal resolution of many issues before they require more formal procedures.

If broadly utilized by the Nation's shippers and railroads, mediation and arbitration systems could offer agricultural shippers greater access to rate dispute settlement mechanisms that have a reputation for being fair, easily understood, accessible, and affordable. Examples of these types of arbitration systems that already exist include the National Grain and Feed Association's rail arbitration system and the Montana-BNSF mediation/arbitration system. These systems have not been broadly used for rate disputes because railroads have generally been unwilling to arbitrate rates. In addition, the scope of these systems cannot handle all agricultural rate disputes because of limitations on shipper membership, geographic application, and commodity. Nevertheless, they serve as good examples of how such systems can effectively resolve disputes and foster good business relationships.

As a practical way to advance fairness for agricultural rate disputes, USDA believes that the Board should actively assist in facilitating the expansion or creation of a mediation and arbitration system. Such a system could be the most promising and viable procedure for the average agricultural shipper who may not have the disposition, inclination, or time and money for a formal process. At the same time, the use, expansion, and success of mediation and arbitration systems is contingent upon the Board encouraging railroads to use them when handling rate disputes.

As a result of decades of efficiency improvements and recent but consistent rate increases, the railroads are now earning approximately their cost of capital, as documented through the study by Christensen Associates[*]. There is no doubt that the rail industry today is in far better financial health than it was in the immediate post-deregulation period.

It is in everyone's interest for the railroads to earn sufficient returns on their investments to be able to maintain, improve, expand, and safely operate their extensive and expensive infrastructure and rolling stock. USDA realizes the gains in efficiency, improvements in service, and investment in infrastructure would not be possible without the financial success of the rail industry. Yet railroads are natural monopolies, and the Rail Transportation Policy requires the Board to maintain reasonable rates where there is an absence of effective competition. Producers with few transportation options, such as wheat farmers in remote areas, have the highest rates and bear the brunt of any rail service disruptions.

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[*] Laurits R. Christensen Associates, Inc., *A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition,* Prepared for the Surface Transportation Board, November 2008.

Look no further than the rail service problems of 2014 to see numerous examples of grain and oilseed shippers who lacked competitive transportation options. As a result of inadequate competitive transportation options, those shippers faced skyrocketing costs, which in some areas widened the grain basis and depressed the net prices that farmers received. Ultimately this lowered incomes as producers absorbed much of the increased transportation cost.

USDA recognizes that policy changes should not reduce railroads' ability to invest in their networks or degrade service. Furthermore, USDA does not believe that every rate increase by a railroad is unreasonable or that railroads necessarily charge non-competitive rates to grain and oilseed shippers in general. The ability to charge such rates exists in noncompetitive markets, however, and this warrants careful consideration of prescriptions by the Board. This is why the Rail Transportation Policy requires the Board to maintain reasonable rates where there is an absence of effective competition, and why developing a workable rate challenge process for grain and oilseed shippers is so important.

At its core, this proceeding is being held to establish a means for challenging rail rates for grain and oilseed shippers who have neither competitive transportation options nor access to regulatory relief. Once such processes are established, this objective of the Rail Transportation Policy will have been met; going forward, the task will be for the Board to decide the merits of the rate challenges brought forth.