

April XX, 2009

The Honorable John Rockefeller, IV, Chairman
Senate Committee on Commerce, Science & Transportation
254 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Rockefeller:

The undersigned organizations represent a cross-section of agricultural interests that are dependent on an efficient and competitive rail transportation network for the effective movement of agricultural goods to market. As such, we want to express our strong support for your efforts to bring about greater relief for rail shippers through reforms with a particular emphasis on reform of the Surface Transportation Board (STB).

Since the creation of the STB by the Interstate Commerce Commission Termination Act (ICCTA), the agency has failed to take a consistent and reasonably balanced approach in adjudicating issues between railroads and their customers. The STB regularly emphasizes railroad revenue needs and protections for railroads over shippers' interests and the need for competition in the marketplace. As a result of minimal effective oversight by the STB, railroad behavior in the marketplace and business relations between railroads and their customers have been adversely affected. These inadequacies extend to the producer of the agricultural goods as well in the form of lower prices due to higher freight rates or lack of available space to transport their product. These producers would be another beneficiary of any changes to address these adverse affects.

We believe that a more even-handed STB would address many of the concerns voiced by shippers, but we also recognize that it may take a more comprehensive approach to resolve the myriad of rail challenges experienced today. We believe that the following "suite of solutions" will stand together to resolve a number of the challenges faced by today's agricultural producers and shippers. Therefore we offer these suggestions as agreed to by the undersigned agricultural associations, listed in no particular order of priority, for your consideration to be incorporated in any potential rail legislation.

Refocus "National Rail Transportation Policy" to Provide a Better Balance Between Shipper and Railroad Interests: The ICCTA preamble includes a listing of objectives as part of "Rail Transportation Policy" and "regulating the railroad industry." Several key objectives should be prioritized by moving them to the front as "primary objectives" as follows: "Primary objectives of the rail transportation policy of the United States shall be---a) to ensure effective competition among rail carriers at origin and destinations; b) to avoid undue concentrations of market power; c) to maintain reasonable rates in the absence of effective competition; and d) to consider a shipper's right to reasonable practices, reasonable car service, and fulfillment by railroads of their common carrier

obligation to be equal in significance to any policy objective helpful to the railroad industry.”

Objectives (a), (b) and (c) are already included in the preamble, but are diluted within the broad list. By reordering them and creating a new “equality” standard under (d), the preamble would appropriately direct the STB to achieve greater balance and address the practical business needs of both railroads and their customers.

Addressing Unreasonable Practices by Railroads at the STB and Expedited Handling of Unreasonable Practice Challenges: The STB has unnecessarily delayed “unreasonable practice” proceedings, extending them for years. For example, in a recent case on car storage charges, the STB took over five years to issue a decision that ultimately rejected each of the rail customer’s arguments. In another case involving a petition to enjoin a new tariff from becoming effective, although the petition and the railroad’s response were filed prior to the tariff’s effective date, the STB completely ignored the injunction request.

The STB should be directed to conduct unreasonable practice proceedings within six months, and to set rules for timely consideration of requests to enjoin new tariffs before they become effective. An Administrative Law Judge (ALJ) process should be considered. Other possible methods to address unreasonable rail practices include providing for a shifting of the burden of proof to the carrier on reasonableness if the shipper presents a *prima facie* argument.

With respect to rail cars, rail fleets have in past years been inadequate to fill shipper requirements and railroads have encouraged shippers to provide their own equipment. Shippers in turn have made substantial investments in private car fleets; however the AAR maintains control of the terms confronted by shippers in using their cars through rules established by the AAR. Private car owners have only limited opportunity for participation in this process. Similar to the predicament for those that lease cars, there is no effective recourse through the STB for private car owners to address grievances over compensation, demurrage and rail service failures.

Additional unreasonable practices are ongoing, including ever-increasing efforts by railroads to shift and avoid lawful liability for their own negligence and to shift transportation risk to shippers. Railroads are increasingly requiring prohibitive terms in their arrangements with shippers that effectively excuse the railroad’s negligence and force shippers to agree to indemnify the railroad for personal injury and property damage liability that arises out of the railroad’s own negligent acts. Railroads have the power because of their market dominance to dictate such unconscionable terms on a “take-it-or-leave-it” basis. Shippers have few or no meaningful alternatives or means to negotiate.

Also required is economically reasonable access to reciprocal switching at railroad junction points. This is critical to allow for potential competitive alternatives. The shipping community is encountering excessively high switch charges by some carriers

that both inhibits competition and adversely affects a national freight system to cooperatively link and provide maximum market access.

Meaningful Access to Rate Relief Including the Opportunity for Access through Collective Producer Rate Challenges: A Final Offer Arbitration (FOA) mechanism should be created to provide an alternative format for rate dispute resolution. FOA would relieve the STB from ruling on the rate level aspect of the dispute, thereby making FOA a “tool for negotiation” without the need for a formal complaint to the STB. In doing so it levels the playing field for shippers while providing a fair and reasonable process with significantly lower litigation costs and reasonable time frame for a settlement. To further enhance the usefulness of FOA, groups of agricultural producers should be allowed to initiate a formal or informal proceeding thereby enabling FOA to be used to settle the dispute of the group.

In addition, the ICCTA directed the STB to establish workable procedures for small rate cases, but meaningful, practical and reliable access to rate relief remains unavailable for these cases. The STB recently issued a decision under its revised rules for small rate case rules (Ex Parte 646) that represents some improvement, but the current process still does not provide adequate access to relief, particularly given the costs and risks of litigation. Under the tiered approach based upon the value of the case the relief caps are still substantially too low. Maximum relief available over the five-year recoverable period is capped at \$1 million for small cases. Because the cost to bring even a small rate case remains a significant barrier (\$250,000), the maximum rate relief should be set no lower than \$3 million. We believe both of these options for challenging rates should be available to shippers.

Regulation and a Process to Challenge “Paper Barriers” that is Effective: The STB’s recent decision (Ex Parte 575) leaves intact the system allowing “paper barriers” that restrict the ability of a purchaser or tenant railroad to interchange traffic with carriers other than the seller or landlord railroad. The STB decided against general regulations for such arrangements; it will only examine them on a case-by-case basis following a shipper’s complaint. The decision also makes it clear that shippers would face an uphill battle in winning such a complaint. Paper barriers may have some justification and even may bring about some indirect benefits to rail customers, including encouraging railroads to sell branch line or other properties while they are sufficiently sound to handle traffic without major rehabilitation expenses. Also, admittedly, the STB does need some discretion in deciding the best outcome on in specific circumstances. However, there comes a time when the barriers become an impediment to economic efficiency. Paper barriers impede competition and a process for critical evaluation to assess market impacts is needed. If they are judged by the STB as necessary to facilitate an initial transaction between the Class I and Class II or III, then the restriction should not be permitted to continue in perpetuity, and the term for the paper barrier should be decided at the time the original transaction is consummated.

Again, we thank you for your dedication to this important issue and for the opportunity to provide comment in the process. We look forward to working with you and your staff as this process moves forward.

Sincerely,

Agricultural Retailers Association
American Soybean Association
National Association of Wheat Growers
National Barley Growers Association
National Corn Growers Association
National Council of Farmer Cooperatives
National Cotton Council
National Grain and Feed Association
National Oilseed Processors Association
National Sorghum Producers
North American Miller's Association
USA Rice Federation