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November 14, 2016
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Public Record

Before the U.S. Surface Transportation Board

STB Ex Parte No. 665 (Sub-No. 2)
Expanding Access to Rate Relief

Comments of the
U.S. Department of Agriculture

Elvis Cordova
Acting Under Secretary
Marketing and Regulatory Programs
U.S. Department of Agriculture
Washington, D.C. 20250

Date: November 14, 2016

OPENING COMMENTS OF THE UNITED STATES DEPARTMENT OF AGRICULTURE

The Agricultural Adjustment Act of 1938 and the Agricultural Marketing Act of 1946 charge the Secretary of Agriculture with the responsibility to represent the interests of agricultural producers and shippers in improving transportation services and facilities by, among other things, initiating and participating in Surface Transportation Board (Board) proceedings involving rates, charges, tariffs, practices, and services.

The U.S. Department of Agriculture (USDA) appreciates the opportunity to provide comments on the Board's Advanced Notice of Proposed Rulemaking (ANPR). It represents an important first step toward expanding access to rate relief for small shippers. USDA applauds the Board for its actions in seeking ways to find greater access to rate relief for shippers, especially agricultural shippers whose concerns with rates and service prompted the EP 665 proceeding in the first place in 2006. Agriculture experiences unique challenges. Weather affects its crops, which can be unpredictable and lead to different supply/demand outcomes than expected at the beginning of the growing season. Furthermore, agriculture faces highly competitive and ever-changing markets, which means that origins and destinations vary frequently, as well as tonnages. Thus, USDA supports the Board's efforts to make rate relief for grain shippers more accessible.

Many commenters have persuasively argued that the lack of use of the simplified rate cases is not the result of the reasonableness of rates, but is instead the result of complicated and expensive procedures that act as barriers to meaningful rate review for all but the very largest shippers. In its previous comments for EP 665, USDA emphasized the loss of rail competition since the Staggers Rail Act of 1980 (Staggers) and the exceptionally high market share of grain shipments held by only a few railroads today.¹ This explains the findings by the Government Accountability Office (GAO) that initially prompted this proceeding.² The GAO found that, while rates had declined on average since Staggers, they did not decline uniformly. Rather, some commodities, like grain, saw significantly smaller declines in rates. Similarly, since 2003, rates have been rising on average, but, according to the recent study by the Transportation Research Board, grain rates have been increasing well-above average.³ Contrary to the

¹ Remarks of the U.S. Department of Agriculture (EP_665_0_218018, November 1, 2006).

² Government Accountability Office, *Freight Railroads: Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed*, 2006, p. 14.

³ Transportation Research Board, Special Report 318, *Modernizing Freight Rail Regulation*, 2015, p. 60.

railroads assertion of rate reasonableness, these facts highlight the exact opposite. Some shippers pay rates well-above the threshold. Unsurprisingly, many shippers have expressed dissatisfaction with their rates, because they make the U.S. shipper and producer uncompetitive in the world market. All this points to the need for accessible rate review.

In its previous comments, USDA used an expected value calculation to emphasize the need to lower litigation costs and provide clarity on the rate dispute processes and expected outcomes.⁴ Increasing relief limits, while potentially increasing use from relatively larger shippers, would not make the rate review process more accessible to small shippers. Their relatively small revenues and low case value preclude them from incurring the high costs of existing proceedings.

Agricultural shippers too have persuasively argued that the rate relief processes have been inaccessible due to uncertainty and high litigation costs. Since EP 647, shippers have pointed out that even the ostensibly simplified procedures still require expensive expert guidance and high cost lawyers to litigate. For instance, the qualitative portion of the market dominance test, the procedures to choose comparable traffic, and the railroads' "other relevant factor" arguments impose costly burdens on shippers who cannot expect to recover their costs. Moreover, shippers have argued that the tests themselves are inappropriate. They pointed to the carrier practice of "across-the-board" pricing that invalidates the existing RVC_{comp} benchmark. They also pointed to the fact that the Board has deemed multiple carriers as revenue adequate, which raises questions about the appropriateness of any RVC_{comp} benchmark, since the Board should then consider differential rates unreasonable.

It is important to keep in mind that this proceeding began as a means of providing rate relief to grain shippers, who the GAO singled out as paying higher rates than other commodity shippers, and who face unique circumstances that can undoubtedly complicate rate review. USDA is concerned that in moving toward a new rate review process for smaller disputes for all shippers—and away from a process specifically for grain rate reviews—the unique needs of agricultural shippers could be lost in the shuffle. Since the record is replete with concerns from agricultural shippers over the decades and since the record for Ex Parte 665 Sub. 1 shows that other shippers did not express concerns about a process that is established specifically for agriculture, USDA encourages the Board to revert the proceeding back to a grain rate review as originally intended, perhaps as a pilot project. If over time the process proves to be workable for agricultural shippers, the Board could always expand the process later for other shippers with small disputes and have the added benefit of any lessons learned from the change for grain shippers.

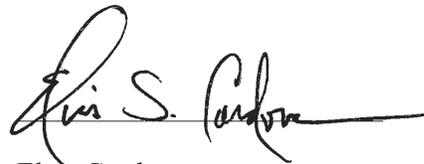
USDA believes the Board has a unique opportunity with this proceeding to experiment and begin embracing some of the suggestions given to the Board in the recent Transportation Research Board (TRB) study and expressed during the recent InterVistas roundtable discussion. USDA recognizes the Board wants to move forward cautiously, and that fully embracing those suggestions would involve a large degree of complexity and uncertainty. Thus, the Board should realize that a grain-specific rate review

⁴ Comments of the U.S. Department of Agriculture (EP_665_1_236229, November 1, 2006).

would entail a significantly lesser degree of changes—because it would be limited to a smaller universe of shippers—and therefore would inherently be less risky and more cautious. It seems with changes that have been decades in the making that experimenting with smaller steps first before moving on to the larger universe of potential changes down the road would be a prudent method to effect change. USDA encourages the Board to take the opportunity of using the original approach of a new rate review process specifically for grain as a means to experiment with implementing new and better processes and methodologies suggested by TRB and the InterVistas roundtable panel. For instance, the Board could use this opportunity to implement not only streamlined prescreens, but also a competitive benchmark along with tight and strict procedural deadlines.

While USDA is still contemplating suggestions on the details for this proceeding, it supports the Board's overall goal of shortening the case timeline and reducing litigation costs. Achieving this goal will be a key determinant of whether the new procedures will work for shippers. USDA supports the general concept of using preliminary screens as a way to cut cost and time. In doing so, the Board should choose preliminary screens that are clear and easily knowable to shippers prior to initiating a case. USDA generally supports the Board's proposal to make market dominance determinations based on abbreviated evidentiary submissions. Without speaking to any specific details, USDA also generally supports the Board's suggestion of determining the comparison group based on default parameters in order to reduce litigation costs. Finally, USDA supports the Board's goal to streamline the case by placing limits on discovery and consolidating the procedural schedule. USDA appreciates the fact that the Board has heard shippers' perspectives and has shown a willingness to seek ways in which to provide them with a new rate review process that is potentially more accessible. USDA is still considering the details of the Board's proposal and is awaiting submissions of other parties. USDA may offer further perspective and/or analysis as the proceeding progresses.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Elvis S. Cordova", with a long horizontal flourish extending to the right.

Elvis Cordova
Acting Under Secretary
Marketing and Regulatory Programs
U.S. Department of Agriculture
Washington, D.C. 20250

CERTIFICATE OF SERVICE

I, Bruce Blanton, certify that on this 14th day of November, 2016, caused a copy of the foregoing document to be served by first-class mail, postage prepaid, on all parties of record in STB Docket Number EP 665 (Sub-No. 2).



Bruce Blanton
Director
Transportation Services Division
U.S. Department of Agriculture
Washington, D.C. 20250