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Rachel D. Campbell
Director, Office of Proceedings
Surface Transportation Board
395 E St., S.W.
Washington, D.C. 20423

RE: **Docket No. Ex Parte 738 –**
Notice of Regulatory Reform Task Force Listening Session

Dear Director Campbell:

The National Grain and Feed Association ("NGFA") respectfully submits this statement in response to the Surface Transportation Board's ("Board") request for input to the Board's Regulatory Reform Task Force ("RRTF") on "rules and practices that are burdensome, unnecessary or outdated, and to recommend how they should be addressed" pursuant to Executive Order 13777 ("EO 13777"), issued on February 24, 2017.

Established in 1896, NGFA consists of more than 1,050 grain, feed, processing, exporting and other grain-related companies that operate more than 7,000 facilities and handle more than 70 percent of all U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation's grain, feed and processing industry. NGFA also consists of 34 affiliated state and regional agribusiness associations, has a joint operating and services agreement with the North American Export Grain Association, and has a strategic alliance with the Pet Food Institute.

As an overarching and fundamentally important comment, NGFA urges the RRTF to reject the unabashed attempt by the Association of American Railroads ("AAR") and its freight railroad members to misuse this proceeding to pursue their long-sought goal of rescinding or rendering useless the few remaining statutory protections mandated by the Staggers Rail Act of 1980 designed to protect rail users from the unfettered monopolistic power of Class I railroads. AAR would have the RRTF ignore or disregard the numerous provisions of the Staggers Act's Rail Transportation Policy[1] that call upon the Board to foster "effective competition" in the freight

[1] Among other things, the Staggers Rail Act's Rail Transportation Policy (§10101a) mandates that the U.S. government regulate the rail industry "***to allow, to the maximum extent possible, competition*** and demand for services to establish reasonable rates for transportation by rail"; ensure the development and continuation of a sound rail transportation system ***with effective competition*** among rail carriers and with other modes, to meet the needs of the public and the national defense"; "…***to ensure effective competition*** and coordination between rail carriers and other modes"; "***to maintain reasonable rates where there is an absence of effective competition*** and where rail

rail sector. Several of those statutory protections are the subject of ongoing active proceedings at the Board. The statutory obligation of the Board to foster competition and prevent the abuse of market power is needed more sorely now than ever before, given the precipitous decline in the number of Class I carriers from 41 in 1970 to only seven today. Today's U.S. rail network consists of two regional duopolies, with two Class I carriers dominant in the West and two in the East. U.S. agricultural shippers and receivers in 2016 depended on those four Class I railroads to transport 84 percent of grain and oilseed rail traffic compared to only 53 percent when the Staggers Act was enacted in 1980.

As EO 13777 and its foundational Executive Order 13771 make abundantly clear, "each Regulatory Reform Task Force shall evaluate existing regulations…and make recommendations to the agency head regarding their repeal, replacement or modification ***consistent with applicable law***" (emphasis added), another stipulation selectively omitted in the AAR's filing. On this basis alone – inconsistency with applicable federal law – the Board's RRTF is obligated to reject recommended "reforms" that contradict or are inconsistent with governing federal freight rail statutes – which encompass most of the recommendations contained in the AAR's submission dated May 18, 2017 that was entered into this proceeding on June 29, 2017.

NGFA is pleased that the May 25, 2017 90-Day Status Report prepared by the RRTF for the Board's Acting Chairman did not contain any of AAR's May 18, 2017 recommendations. Later in this statement, NGFA expounds on several AAR recommendations that are particularly egregious and the reasons the RRTF should dismiss them summarily.

NGFA's Recommendations

NGFA offers the following thoughts concerning several of the RRTF's initial "potential proposals" for regulatory reform:

- **Revise Environmental Rules:** NGFA commends the RRTF for examining a proposal to update the Board's environmental rules, and agrees that it "fits squarely within the RRTF mission of identifying burdensome and outdated regulations." NGFA would welcome the Board initiating a notice of proposed rulemaking to modernize its environmental rules.

- **Replacing Outdated Procedural/Filing Rules:** NGFA encourages the RRTF to recommend ways to improve and modernize the Board's procedural rules, including those: (1) permitting payment of filing fees and other payments to the Board through www.pay.gov; and (2) permitting all filings to be made through the Board's website. However, NGFA encourages the RRTF to at least explore the pros and cons, as well as feasibility and costs, of transitioning the posting of its rulemaking proceedings and portal stakeholders use to submit comments to regulations.gov, the federal government's

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rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital"; and "to ***prohibit predatory pricing and practices, to avoid undue concentrations of market power*** and to prohibit unlawful discrimination." [Emphases added.]

website utilized by most other federal departments and agencies for posting rulemaking notices and receiving stakeholder views. This suggestion may be precluded by the fact that the Board is an independent agency or other factors, but NGFA believes it at least warrants consideration.

NGFA also commends the Board for its current efforts to streamline its procedural rules applicable in rate reasonableness cases and other adjudications.

- **Comments Submitted in EP 712, *Improving Regulation and Regulatory Review*:** As noted by the RRTF in its recently issued Status Report, the Board in 2011 sought comments regarding "whether any of its regulations may be outmoded, ineffective, insufficient or excessively burdensome, and how to modify, streamline, expand or repeal them." These comments were sought in response to executive orders that were very similar to EO 13777. Although the Board received extensive comments and suggestions from industry stakeholders on potential substantive changes it could make to its regulations and regulatory policy, the EP 712 proceeding resulted only in a February 18, 2016 decision that made non-substantive changes (such as "obsolete statutory references, updating office and address references, and correcting spelling, grammatical, terminology, explanatory, and typographical errors"). NGFA concurs with then-Commissioner Begeman's assessment in her separate comment in the 2016 decision that more substantive changes to the Board's rules should have been considered during the four-year time span of that proceeding. Therefore, NGFA supports the RRTF's decision to review the comments received in that proceeding for responsiveness to EO 13777. Many of the suggestions of rail shipper stakeholders in that proceeding on the Board's rules and procedures governing rate reasonableness, revenue adequacy, reciprocal switching, market dominance, and other rules and procedures, continue to have strong relevance and application today.

NGFA respectfully submits the following additional recommendations for consideration by the Board's RRTF:

- **The Board Should Revamp its Rate Reasonableness Rules to Create a Cost-Effective, Workable Methodology for Agricultural Shippers to Challenge Unreasonable Freight Rail Rates:** NGFA and numerous other parties have provided an overwhelming body of evidence in statements submitted in response to the Board's separate proceedings in EP 665 (Sub-No. 2), *Expanding Access to Rate Relief*, its predecessor, EP 665 (Sub-No.1), *Rail Transportation of Grain, Rate Regulation Review*, and numerous prior proceedings that have stretched on for more than a decade documenting that the Board's three existing rate-challenge methodologies are too complex, cumbersome and costly, particularly for agricultural shippers. Many of the inefficiencies and causes of delay associated with the Board's existing rate rules could be alleviated by the Board following through on its proposals to make changes to the substantive rules it applies to test rate reasonableness. The nature of the Stand Alone Cost ("SAC") and Simplified Stand Alone Cost ("SSAC") standards themselves is the single greatest source of delay in processing rate cases. NGFA continues to believe that the Ag Commodity Maximum Rate Methodology it proposed in EP 665 (Sub-No.-1)

provides a useful model to the Board for developing an innovative, objective and comparatively inexpensive rate-challenge methodology. The National Academies of Science Transportation Research Board, in its ***"Special Report 318: Modernizing Freight Rail Regulation"*** published in June 2015 also urged the Board to adopt a similar benchmarking concept.

Simply put, contrary to the Staggers Act's mandate that the federal government regulate carriers "***to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital***," the Board's existing rate-challenge methodologies prevent rail users – particularly agricultural shippers – from having meaningful access at the Board to challenge unreasonable rail rates. That is borne out by the fact that the lone rail rate challenge involving agricultural commodities occurred when a class action lawsuit, *McCarty Farms v. Burlington Northern Inc*., was referred to the then-Interstate Commerce Commission in March 1981. That case was litigated before the ICC and the STB for 18 years before being dismissed when the complainants tried unsuccessfully to test their rates under the SAC methodology. Further, no case challenging an agricultural rail rate has been filed under the Board's Three-Benchmark Methodology, despite the Board asserting nearly 10 years ago that these rules would provide agricultural shippers with a meaningful way to challenge rail rates. EP 665, *Rail Transportation of Grain* (served January 14, 2008) at 5.

Contrary to the whimsical and false assertions of AAR and its member railroads, the lack of rate challenges most assuredly is ***not*** attributable to the alleged presence of competition or moderation of rail rate increases. In fact, just the opposite is true, as documented in NGFA's filings in the aforementioned rate proceedings. Most recently, NGFA's assertions were buttressed by the U.S. Department of Agriculture ("USDA"), which reported in its June 15, 2017 ***Grain Transportation Report*** (attached to this statement) that "[g]rain rates have consistently risen over the past half-decade (even accounting for inflation), with a few, brief exceptions." For wheat, in particular, the USDA analysis found that changes in rates and rate spreads "are significant and puzzling relative to the price received for a bushel of wheat at its destination, which has declined" over the same time period. As an example, USDA cited average rail rates for wheat (including the BNSF and Union Pacific Railways) for shuttle service between the same origin and destination pairs of Wichita, Kan., and Houston, Texas, which were more than $1,000 per car greater than the rate charged for corn traversing the same route. USDA concluded that during a time when wheat and other grain shippers have been "struggling against falling grain prices and rising rail rates, ***[w]heat shippers in particular have found it difficult to compete in export markets, as they face higher rail rates than other grain shippers over similar corridors and rates that have not declined in response to changes in world wheat markets***." (Emphasis added.)

The impact that unreasonably high rail rates have in making U.S. agricultural exports uncompetitive is a job-killer. USDA states that every $1 billion in U.S. agricultural exports supports approximately 8,000 American jobs across the entire U.S. economy. U.S. agricultural exports also are an economic multiplier, with every $1 in agricultural

exports creating another $1.27 in U.S. business activity. Given that EO 13777 directs agencies to identify policies that "eliminate jobs or inhibit job creation," the RRTF should recommend that the Board promptly make substantial improvements to its rate-challenge methodology to provide meaningful access to a workable system for agricultural shippers.

- **The Board Should Revise its Outdated Rules Governing Orders for Railroads to Provide Reciprocal Switching:** The Board's existing rules and precedent implementing 49 U.S.C. 11102(c) are the epitome of "outdated" regulations, since no party has attempted to use them for nearly 30 years. NGFA and other agricultural interests have joined the National Industrial Transportation League (NITL) and other shipper interests in urging the Board to replace its current unworkable competitive switching rules – which the AAR again distorts and mischaracterizes by using the misnomer phrase "forced switching" – that apply to Class I railroads to provide a fairer, more reasonable way for shippers to access the lines of competing carriers to reach customer markets. Contrary to the exaggerated protestations of the Class I railroads, this action by the Board would, at the end of the day, merely replace an outdated and ineffective regulation and wrongly decided agency precedent that attempted to implement a statutory provision specifically addressing this subject. In reality, the Board's proposed rules in EP 711 seek to adhere to the statutory language. As NGFA and others have pointed out, the Board's Notice of Proposed Rulemaking in EP 711 (Sub-No.1) that would remove the references to reciprocal switching in the current regulations at 49 CFR Part 1144 and create a new Part 1145 to govern reciprocal switching under either of the two statutory prongs provided in §11102(c) is legally sound and adheres to the statutory language. NGFA reiterates the Opening and Reply Comments it submitted in this proceeding, which among other things noted the primary and most positive feature of the Board's proposal is to eliminate the requirement that a rail user seeking reciprocal switching demonstrate competitive abuse on the part of the incumbent railroad as a prerequisite for obtaining relief. That condition essentially imposed on shippers the impossible task of "produc(ing) a smoking gun" of intentional anticompetitive conduct by the incumbent railroad, as then-Vice Chairman Deb Miller correctly stated in her concurring statement. The competitive-abuse standard has been primarily responsible for no shipper obtaining or even seeking reciprocal switching relief since the late 1980s.

  Updating and reforming the Board's competitive switching rules are important in today's consolidated rail marketplace, in which only four increasingly profitable and revenue adequate Class I railroads haul more than 90 percent of all freight traffic, as well as the emergence of an increasing number of significant short line and regional railroads with strong ties to individual Class I carriers. The geographically widespread nature of U.S. agricultural production and the varying customer base of agricultural shippers and customers (which also are geographically diverse and can change frequently based upon fluctuating domestic and export market demand, weather and growing conditions, currency fluctuations, market prices and other factors) result in diverse and changing origin-destination pairs. In other cases, regional and local demand from grain processing, biofuels and the livestock/poultry sectors have necessitated movement of agricultural

commodities across longer distances that require interchanges with more than one Class I railroad.

NGFA and other agricultural groups do not believe rail carriers should have an unfettered ability to cut off access to markets unilaterally through absolute closures of intersection points or by establishing switch charges that make such access economically prohibitive – which is an all-too-common railroad practice today. NGFA continues to urge the Board to retain the authority to determine, on a case-by-case basis, whether a shipper's facility is within a "reasonable distance" of a working interchange (and thus is eligible for reciprocal switching) rather than limiting such a determination based solely upon whether the facility is within a specific mile radius of an interchange. Further, NGFA and other agricultural shipper groups support instituting a revenue-to-variable-cost-based threshold for switching charges (such as the Staggers Act's 180 percent threshold for challenging rail rates) which, if exceeded, would shift the burden to railroads to demonstrate that such charges are reasonable. Some switch charges have ranged from $500 to $700 per car or more – far exceeding the variable cost to carriers of providing the switching service. Cost-effective switching is fundamental to maintaining a national freight rail network. We encourage the RRTF to recommend that the Board proceed expeditiously at the appropriate time to finalize its proposed rule in this proceeding by adopting these recommendations and removing the "competitive-abuse" standard from its existing rules.

- **Preserve Transparency of Railroad Reporting of Service Performance Metrics:** NGFA strongly opposes the AAR's recommendation that the RRTF recommend elimination of the requirement that Class I rail carriers submit weekly reports of service performance to the Board. While not as granular as NGFA recommended, the additional reporting detail required by the Board is essential for both the Board and rail users to better track service performance, and is far superior to the very general, cursory information provided by railroads through AAR.

  In its comprehensive proceeding on this matter [EP 724 (Sub-No. 4)], NGFA and other shipper groups commended the Board for its commitment to enhancing the transparency and accountability of Class I rail carriers regarding rail service performance reporting. As the Board and rail customers vividly recall, the absence of such reporting on a consistent basis across Class I carriers was a significant contributor to the void of information regarding the severity and extent of the costly service disruptions that gripped agricultural shippers and receivers, as well as multiple other industry sectors, during the fall and winter of 2013/14, and hampered rail customers' ability to meet – or modify – contract commitments or to explore potential alternatives in their logistics planning. The importance and need for access to these data remain highly relevant, as they have provided rail customers with an early alert in recent weeks about increasing service problems being experienced at one of the four major Class I railroads – delays that likely will become increasingly severe and disruptive as the fall grain harvest begins.

  As it has stated consistently throughout the Board's consideration of this matter, NGFA believes that making permanent the weekly collection and reporting of rail service performance metrics will improve the ability of rail customers and the Board to notice

future aberrations in rail service more quickly and effectively. We commend the Board for issuing final rules in this proceeding making such reporting mandatory and permanent. In addition, as the Board correctly has stated, building a baseline of factual information on rail service performance will provide a useful barometer for comparative analysis to evaluate future trends. That will be valuable in identifying and addressing future regional or national service disruptions more effectively and expeditiously.

As noted previously, sufficiently specific rail service metrics also have great utility for – and are being used actively by – rail customers, including shippers and receivers of grains, oilseeds and grain products, as an early alert to potential service disruptions. For rail customers captive to a single railroad, access to such information can assist in exploring ways to try to mitigate the business harm caused by having sporadic, unpredictable or even non-existent, rail service for an extended period of time. In addition, for other rail customers that do have access to alternative transportation modes or other business options, having the ability to monitor rail service performance data and to take preemptive action earlier in the process may have the benefit of reducing the overall adverse impact of such rail service disruptions in the future.

As such, the transparency provided by having accurate and sufficiently specific rail service performance data provided in a timely, consistent and uniform format are critical for the agricultural industry to be able to make necessary adjustments to business and logistical plans, storage and marketing strategies, and customer-service responses (including to farmer-customers) if there are disruptions in reliable, predictable rail service. The ability to do so is essential to minimizing, to the degree possible, the economic harm throughout the agricultural value chain, including the operations of facilities of NGFA-member companies, as well as the upstream and downstream domestic and export customers those companies serve.

- **Preserve Requirement for Carriers to File Summaries of Agricultural Transportation Contracts:** NGFA adamantly opposes the AAR's call that the RRTF recommend repeal of the requirement that rail carriers report agricultural contract summaries under 49 C.F.R. §1313. As NGFA pointed out in its comments in EP 725, summaries of agricultural transportation contracts are, in fact, accessed and reviewed by NGFA-member companies, and represent one of several specific statutory protections designed to protect agricultural shippers from abuse of railroad market power. It is reasonably clear that Congress enacted this provision specifically to continue to provide the Board and agricultural shippers with critical information about railroad contracting practices to help prevent the abuse of market power by carriers and because of concern that railroads fulfill their common-carrier obligations for agricultural commodities.

  The Board was correct when it ruled unanimously on August 11, 2014 to deny the petition of the Norfolk Southern Railway and CSX Transportation Co. to institute a rulemaking proceeding to exempt railroads from filing agricultural transportation contract summaries (EP 725). As the Board correctly noted, the joint railroad petition did not demonstrate that:

> "the statutory requirement is particularly burdensome to them, much less the railroad industry. CSXT makes no specific or quantified allegations to support its claim of undue burden. NS attributes the bulk of the alleged burden to signatureless contracts, but as NGFA points out, the use of these contracts may be for NS's own convenience" (August 11 decision at 5.)

The Board further stated, "the evidence of record does not support Petitioners' claim that summaries are rarely, if ever, reviewed or used." To the contrary, the Board stated that the railroad petitioners' assertion that the summaries of only two railroads have been accessed more than 1,200 times in a period of less than six years "cannot fairly be characterized as 'rarely if ever' (accessed)." *Id*. Finally, the Board noted, "In enacting the (Interstate Commerce Termination Act), Congress determined that continuance of the requirement to file agricultural transportation contract summaries was warranted due to concerns about rail service to agricultural shippers. The evidence of record in this proceeding indicates that these concerns persist, thereby demonstrating a continued need for the filing of these contract summaries." (*Id*. at 5-6.)

Again, this matter has been settled, and EO 13777 correctly precludes giving carriers a "mulligan" because the Board's unanimous decision in EP 725 is consistent with applicable law.

- **Revenue Adequacy:** NGFA notes that potential changes to the Board's rules for determining railroad revenue adequacy and the application of the "revenue adequacy constraint" under *Coal Rate Guidelines, Nationwide* in rate reasonableness cases were the topic of the submittals of several stakeholders in EP 712 in 2011. These comments continue to have relevance today, since the Board still has not addressed its rules and policies related to revenue adequacy in a substantive manner. As noted in its Reply Comments submitted in EP 722, *Railroad Revenue Adequacy*, NGFA believes rail shippers and shipper organizations have provided considerable evidence and argument in this and other proceedings demonstrating that a principal policy goal of the Staggers Rail Act has been achieved: Class I railroads clearly have reached – and in some cases exceeded – the revenue-adequate goal Congress structured within the Staggers Act for them to seek to achieve. Despite reaching this critically important juncture in the history of the Staggers Act and the railroad industry generally, the Board's regulations on how to determine a railroad's revenue-adequate status, and how a railroad's achievement of revenue adequacy will affect the Board's regulations and policies, remain controversial and undefined, respectively. Therefore, NGFA encourages the RRTF and the Board to continue the efforts begun in EP 712 and EP 722 to develop and finalize policies and regulations to apply to railroads determined to be revenue adequate. In this regard NGFA reiterates the statement made in its Reply Comments in EP 722 that the legislative history of 49 U.S.C. §10704(a) and the Board's rules and precedent are clear that once a railroad achieves revenue adequacy, its ability to engage in differential pricing *vis-à-vis* its captive customers is heavily constrained, if not prohibited.

- **Modifying or Relaxing the Board's Interpretation of its *Ex Parte* Rules:** There is one area in EP 738 on which NGFA and AAR are aligned, and that is regarding the recommendation that the Board reform its rules regarding *ex parte* communications to allow increased dialogue between stakeholders and Board members and staff in the policy, reporting and rulemaking context. NGFA concurs with AAR that there is no legal requirement prohibiting the Board from engaging in transparent contacts with stakeholders, a process that other agencies engage in routinely, and that doing so likely will result in the Board and its staff having more pertinent information on which to base decisions. We believe that sufficient safeguards can be put in place regarding disclosure of such *ex parte* meetings to ensure that due process and fundamental fairness is assured. Recent efforts by the Board to begin to reform and modernize its *ex parte* rules have been beneficial and appreciated by stakeholders, and the RRTF should recommend that they be continued and expanded.

Conclusion

NGFA appreciates the RRTF's consideration of its recommendations. We again urge the RRTF not to allow the AAR or its freight rail members to hijack this important regulatory reform initiative in an overt attempt to secure significant policy changes that are inconsistent with existing law and legislative intent (which would contradict the expressed conditions of EO 13777), are the subject of ongoing Board proceedings, or for which they have been unsuccessful in securing through the open and transparent rulemaking process that exists at the Board.

NGFA would be pleased to respond to any questions the RRTF has on these recommendations.

Respectfully submitted,

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