



TESTIMONY OF

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REPRESENTING

THE AGRICULTURAL RETAILERS ASSOCIATION

AT A HEARING OF THE

HOUSE COMMITTEE ON SMALL BUSINESS

ON

**“RAIL TRANSPORTATION ACCESS FOR SMALL BUSINESS
AND FAMILY FARMERS”**

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INTRODUCTION

I would like to thank Chairwoman Velázquez for holding this important hearing today. My name is Dan Weber, Vice President of Agronomy, with Ceres Solutions, LLP, a cooperative selling crop inputs and application services in the State of Indiana. I am also Chairman of the Board of Directors at the Agricultural Retailers Association (ARA), which represents a significant majority of the nation's retail dealers who provide essential agricultural pesticides, fertilizer, seed and other agronomic services to America's farmers. As the only national organization exclusively representing the interests of the agricultural retail and distribution industry, ARA is vitally interested in any federal laws or regulations related to the railroad transportation of agricultural inputs utilized in the nation's agricultural sector. As such, I am here today to testify on behalf of ARA. I appreciate the opportunity to discuss this important issue before the Committee.

Ceres Solutions is an agricultural cooperative operating 26 agronomy retail locations (some with rail service) serving 5,000 agricultural producers in 13 Western Indiana and surrounding counties with crop inputs and application services. Total agronomy sales exceed 150 million dollars annually. I began this role in the agronomy division of Ceres Solutions in February 2007, when the coop partnership between Growers, Westland and Agrokey cooperatives was formed. These three cooperatives have each been in business for at least 78 years, and they have worked with the railroads over many decades. Prior to partnership formation, I served as CEO of Growers Cooperative for 6 years. My background includes more than 34 years in agriculture retail sales and management, wholesale fertilizer, crop chemicals and seed distribution in the Midwest Region. In my position as Vice President of Agronomy, I oversee the procurement and receipt of over 125,000 tons of fertilizer with 40,000 tons of that being rail delivered to our facilities. I grew up on a farm in Snake Run Indiana. I graduated from Purdue University with a Bachelor's of Science in Agribusiness Management in 1970. In 1974, following my tour in the Navy, I began working in the agricultural retail industry as a retail agronomy plant manager.

IMPORTANCE OF FERTILIZER & OTHER CROP INPUT MATERIALS TO THE AGRICULTURAL INDUSTRY

Fertilizer use is essential to America's food security and economy. Fertilizer allows domestic farmers to feed and clothe the nation. For every additional dollar of income, consumers in Egypt, Indonesia, and Vietnam spend more than 25 cents on food, while consumers in the United States spend less than 10 cents.¹ We are the best at what we do when it comes to crop production due to newly adapted technology and better understanding and application of sound agronomic practices.

The use of fertilizer is also needed in order to produce enough agricultural products for renewable energy. Renewable energy allows the U.S. to be less reliant on foreign sources of energy. The call went out to the farmers in the United States asking them to produce more corn in an effort to replace part of the dependence on imported oil. They responded by planting a record 92.9 million acres, an increase of 11 percent over the previous year.² The world demand for fertilizer to produce more crops for food or fuel is pushing our fertilizer production and distribution systems to their limits.

The three major fertilizer materials we provide our customers are nitrogen (N), phosphates (P2O5), and potassium (K2O). Farmers are offered three choices of nitrogen in our market- urea, UAN, and anhydrous

¹ "U.S. Trade Growth: A New Beginning or a Repeat of the Past?" *Amber Waves*, September 2007, available at: <http://www.ers.usda.gov/AmberWaves/September07/Features/USTrade.htm>.

² "U.S. Farmers Plant Largest Corn Crop in 63 Years", National Agriculture Statistics Service, June 29, 2007, available at: http://www.nass.usda.gov/Newsroom/2007/06_29_2007.asp.

ammonia. Urea is a 46 percent nitrogen dry product that we blend with other fertilizer and apply on crops like corn and wheat which use nitrogen. The liquid form, called UAN, is formulated in a solution of 32 percent or 28 percent nitrogen, and anhydrous ammonia (NH₃) is 82 percent nitrogen. Anhydrous ammonia is a pressurized gas in liquid form that requires special handling. Anhydrous ammonia provides the lowest cost to the farmer on a per unit of nitrogen basis making it the preferred choice of nitrogen for many of our farmers. The savings can be \$30 to \$40 per acre for 175 units of nitrogen on a typical corn crop. Anhydrous ammonia is the most widely used form of nitrogen fertilizer in the Corn Belt.³ While U.S. corn production has increased, domestic ammonia production has actually declined by 44 percent between 2000 and 2006. During the same period, the number of U.S. ammonia plants declined from 40 to 25 and domestic production capacity declined from 20 million tons to 13 million tons. This decline in production is partially due to rising natural gas prices in the U.S. As such, the market has responded with a 35 percent increase in imports- principally from the Trinidad and Tobago Republic, Ukraine, Russia and Canada.⁴ The imported anhydrous ammonia must travel across the country to the corn producing states.

The phosphate offered to our growers is mostly diammonium phosphate (DAP) which is a dry material mined in Florida. It is usually applied with urea and/or potash and is used on all crops. Potassium (potash) is a dry material mined in Canada or imported from Russia and is used on all crops. It is applied straight or blended with Urea and/or DAP.

As an agricultural retailer providing product and application service, our average tonnage moved through one of our retail operation is about 5000 tons of products. We turn our storage about four times in a typical year. In order to accomplish this efficiency, it requires continued timely receiving of products. Product is delivered through the fertilizer distribution network by truck (25 ton per truck) or train (100 tons per car), and both must be timely. Due to the nature of agriculture in Indiana, our crops are very seasonal and with a very narrow window of time for crop inputs to be applied. In the typical U.S. spring, the corn crop will be planted between April 15 and May 20. The grower typically begins to see a yield decrease if planting is delayed past this window. During the fall season, phosphates and potassium are applied to crops. The window of time for application is a little broader in the fall, but the coming of winter weather makes it impossible to cross the fields; thus, putting a certain urgency in the fall fertilizer season as well. This need for the farmer to have his nitrogen, phosphate, and potassium fertilizers on time is one reason that it is so critical that product is in place at our facilities on time. Likewise, it is just as imperative that we receive timely distribution from the truck terminals or railroad service.

There are no substitutes for nitrogen, phosphate, and potassium fertilizers to America's Farmers. These fertilizers must be applied annually to maximize yield production. The challenge that we have in the truck distribution of these nitrogen, phosphate, and potassium products from the terminals is the narrow spring window to plant the corn crop. The typical corn crop in Indiana is planted in a period of two weeks or less due to the size of equipment the farmer has today. The agriculture industry continues to experience consolidations of fertilizer wholesale facilities providing fewer choices to source product and more distance and time required to transport from the terminal to the retail plant operation. Due to the fewer fertilizer producing facilities, rising

³ "Soil Ph Effects on Nitrification of Fall-Applied Anhydrous Ammonia", *Soil Sci. Soc. Am. J.* 68:545-551 (2004), available at <http://soil.scijournals.org/cgi/content/full/68/2/545>.

⁴ "Will Anhydrous Ammonium Tip the Balance in the Battle for Acres?", *AgricultureOnline*, September 20, 2007, available at: <http://www.agriculture.com/ag/story.jhtml?storyid=/templatedata/ag/story/data/1195585018809.xml>.

natural gas prices, and rising transportation costs, the cost of fertilizer to the farmer for anhydrous ammonia has nearly doubled in many places over the past year.⁵

OVERVIEW OF RAILROAD ISSUES

Agricultural retailers use the railroad to transport crop input materials because there is no practical or “reasonable” alternative available. The railroad is the safest, most secure, and most efficient way to move these chemicals. The rail service to our agricultural retail operations plays a critical role in providing distribution due to the large volume of product, the distance it must travel to get to our agricultural retail location, and the restricted seasonal time frame this has to happen. Nearly all the regional fertilizer warehouses are filled by train or river barges. Railroads have claimed that they are at capacity; however, the railroad has failed to submit proof of its alleged capacity while outside studies suggest that the railroad is at capacity in only three percent of its rail area.

Another means of shipping agricultural ammonia is pipeline use. However, existing pipelines are at capacity with two million tons being transported through it. Furthermore, pipelines are not a reasonable alternative to many of our rural markets because there is limited access to the pipeline. In addition, in our market area, the distribution of anhydrous ammonia through the pipeline system is taxed to the maximum in part due to the seasonal demand and also the decrease in anhydrous ammonia storage along the pipe. For example, at the Crawfordsville Koch location, 64,000 tons of storage at the pipe terminal was scrapped due to concerns over the integrity of the storage tanks. The storage was not replaced; thus, putting more pressure on the anhydrous ammonia distribution system.

There are not enough trucks or qualified drivers to distribute the tons currently moved by rail cars in the time required for it to be used in agriculture. The trucking industry already has strained capacity. According to the American Trucking Industry, the trucking industry is currently short 20,000 drivers and that deficiency is expected to increase to 80,000 drivers by 2011. Furthermore, with new Department of Transportation regulations in place, it is much more difficult to find trucks to haul anhydrous ammonia than it was 5 years ago. There are fewer drivers that have the required commercial driver’s license with a HAZMAT endorsement than we had pulling anhydrous ammonia tanks prior to the new rules. Almost a third fewer qualified truck drivers to service our industry and more demand on their service as we lose rail delivered anhydrous ammonia service. Even if there were enough certified truck drivers to handle the additional freight, the idea of transporting the material by truck rather than rail flies in the face of the goal to lower carbon emissions that the U.S. is working hard to achieve.

The cost of rail service to our agricultural retail operations has increased at a rate that forces us to look at alternatives but finding few. We require a greater gross margin to cover these increased operational costs which pushes the farmers to need more for the crops they are providing for food. For example, dry rail fertilizer tariffs into Indianapolis increased from \$33.32 per ton for a single car shipment of DAP out of Florida in July 2005 to today’s rate of \$52.63 per ton. That is an increase of 58 percent in three years. Another example is the cost of anhydrous ammonia rail shipments out of Tampa, where the imports arrive. The cost of rail service was \$22.79 per ton from Tampa, Florida to our facility at Rensselaer, Indiana in 2000. Today’s rate is \$163.55 per ton, thereby eliminating the opportunity to source imported lower cost anhydrous ammonia out of Tampa. Every time we switch from using a rail car to trucking the same volume of material, we put four more semi tractors pulling 25 ton loads on our all ready crowded roads further distances. We use more fuel, create more lines at the truck terminals decreasing our efficiency and increasing costs as trucks sit in those lines and we expose the

⁵ “Dealer Report Regional Prices”, *Green Markets Dealer Report*, Vol. 22, Number 17, p. 4.

public to four times the exposure as the truck go though our cites and small towns. There is also a greater security threat when the chemicals travel by truck rather than train.

EXAMPLES OF HARMFUL PRACTICES & DETERIORATION OF SERVICE

For the preceding reasons, agricultural retailers and farmers must continue to use the railroad system for transportation of agricultural inputs despite the railroads' continued abuse of shippers.

ABANDONMENT OF SERVICE

The railroad has continued to decline in timely service by the rail in placement of cars being held in yards for distribution. I have been in the agricultural retail business for 34 years, and I've witnessed a decline in the service and increase in cost for much of my career. In the 60's the industry moved from an animal manure and bagged fertilizer placed in the crop plant row to using bulk fertilizer and broadcast application. These new bulk fertilizer agricultural retail facilities were built next to railroads to take advantage of the efficiency and volume rail cars provided. In the 70's we still had most of our agricultural retail outlets served by rail with acceptable service being provided. In the 80's we saw the beginning of the abandonment of many of our rail lines to our smaller communities and business operations. By the 90's we lost most of our rail service to smaller communities thereby increasing the costs of these operations which triggered a consolidation in retail facilities.

FUEL SURCHARGE

The rail tariff increases and fuel surcharges experienced in past 3 years are also examples of unreasonable and excessive fees. The railroad's surcharge on fuel was 10.8 percent in 2005. It increased to 16.0 percent in December of 2006 till it moved to 26.8 percent in November of 2006. The surcharge decreased to 14.8 percent in 2007 and in 2008, the railroad began to use a "factor" that makes it difficult to compute what percentage increase it reflects. The somewhat hidden surcharges added to the tariff are the "Seasonal Price Factor". In 2005 it was \$350 per car. In March of 2006 it was \$200 per car plus there was "Equipment Surcharge" added \$550 per car through the fall season. In April of 2006 this was reduced to \$250 per car. The railroads use this illusive pricing scheme only because they can, and because there is little oversight and no competition. The STB has made an effort to address this issue, but the problem with transparency continues to exist.

CONNECTOR FEE

Another example of excessive fees is the railroads' practice of arbitrarily invoicing for services. For example, I am charged \$6,000 per year for the "Annual Sidetrack Connection Charge." I later received a letter from the railroad stating that if we did not receive a minimum of 25 carloads of freight per year, we would have to pay an "annual sidetrack connection charge" of \$6,000. Most of our smaller agricultural retail outlets receive four to six cars annually. Enforcement of this policy would prohibit most small agricultural retail outlets from being able to receive shipments as it would not let them be competitive with the additional costs passed on to their retail prices.

LOSS OF SERVICE

Next, the railroad's failure to respond to the needs of America's agriculture industry and rural communities by abandoning of rail service to agricultural retail locations that are not unit train receivers. The railroads defend their action by stating that it is much more economical to service the 65 or 85 car houses. The railroad's price increase on phosphate shipments out of Florida is a prime example of the railroad's preferential treatment to unit train shipping. On June 1, 2008, the single car rate will increase by 10 percent, while unit train shipments of 65 to 84 cars will increase 6 percent, and unit train shipments of 85 or more cars will increase only 3 percent. As a small agricultural retailer, I do not make as much money when I custom apply fertilizer on the 10 acre field

as I do when I apply fertilizer to the 100 acre field, but I do it. I do it because I have competition. If I were a monopoly, I would tell the 10 acre farmer he would have to merge with his neighbor and get bigger before I would waste my time providing a service, but I am not a monopoly, nor do I care to conduct business as one.

The railroads behave in this manner because they know that they can when there are only four major railroads serving different geographical regions of the country.

TARIFFS

The railroads neglect the needs of the agricultural industry by abandoning tariffs systems in which the dealers considered when they made long-term investment decisions. The railroads arbitrarily change their tariff structure without giving the industry warning. In 2001, we purchased a fertilizer warehouse and distribution facility. One of the things that made it attractive and economically doable was the advantage gained because the facility had a reduced rail tariff based off its ability to receive 15 car units of fertilizer at a time. This was an advantage until a couple of years ago the discounted tariff was raised to 65 cars, leaving the facility at the single car tariff rate. There were no indications this would happen when we visited with them regarding the 15 car tariff at the time of the acquisition. It was and is a severe economic hit to this operation. The railroads make it difficult for businesses to invest in operations because the businesses do not know when the railroads will change the tariff system, thereby decreasing the investment value and increasing the costs of operation.

FAILURE TO MEET CONDITIONS

The railroads harm the small business owner by failing to meet expressed conditions made by themselves to shippers. I recently visited with managers at another cooperative in the Midwest about the problems that they have experienced in doing business with the railroad. Three years ago, the cooperative was expanding by building a new 35,000 ton dry hub plant. To use the new plant, the cooperative needed to add almost a mile of track siding with two switches which are required by the railroad, one switch to the north and one to the south end. The railroad and the cooperative negotiated a deal to help offset the \$1.5 million cost of laying the rail by the plant. These negotiations continued for a year. The railroad promised the cooperative credits for cars received. The railroad negotiator gave the cooperative a verbal confirmation that there would be car credits, but failed to put the deal in writing. Before the agreement was approved by railroad management, the railroad's negotiator retired. The cooperative had already invested in the plant and built the track during this year long negotiation process, relying on the railroad's promise that there would be tax credits. In the end, railroad management turned down the proposal, leaving the cooperative with no credits to offset the costs of the rail siding built and no recourse. This is another example of how the railroad's failure to do business honestly abuses the agricultural industry, abuses the small business owner, and stifles investment in the U.S.

RATE CHANGES

An additional example of a failed railroad system is that there is no recourse for the small business operation to challenge the rail decisions. There appears to be little recourse if a shipper suffers due to the railroad's failure to deliver product on time, while the shipper suffers because his customer goes elsewhere for the product. We have experienced many delays in placement of cars this spring causing economic hardship, additional freight costs, and potentially carryover of this inventory showing up late into the next crop season. I have been told that the legal cost to arbitrate with the railroad is in the hundreds of thousands of dollars and can take several years.

NEW COSTS FROM FEDERAL SECURITY RULES

I was recently told that due to the new Department of Homeland Security rules prohibiting storing anhydrous ammonia in the rail yard over 48 hours, we would have to either receive the car (this was not an option due to the rain causing a delay in our farmers use of the product); return it to the shipper (not a good option as the product is somewhat allocated), or I would have to have it placed on one of our other side tracks. We had room at another facility five miles from the rail yard, so the railroad took the cars to the other facility. Following the rail company moving the two cars of anhydrous ammonia, we received an invoice for \$52.85 per ton. There are 80 tons in a railcar, making the total bill \$8,456. After several calls pleading my case for thinking this was somewhat excessive, I received help in a reduction of the bill to \$8.75 per ton or a total of \$1,404. When our customers were ready to use the anhydrous ammonia because the weather improved, we asked the railroad to move the two anhydrous ammonia cars to the original destination. After moving the two cars five miles, I again received an invoice for the originally charged rate of \$52.85 per ton. I have not started the process of trying to get this rate reduced at this time; however, if there were competition, this type of pricing would not be a competitive bid for this rail service.

INHERENTLY SAFER TECHNOLOGIES ARGUMENT

In the aftermath of September 11th, for safety and security reasons, Federal regulators began issuing new rules that apply to agricultural retailers and the chemicals that they store and apply. Congress and Federal regulators are currently considering a law that would mandate America's agricultural industry to use inherently safer technologies (IST). ISTs include input substitution, catalyst or carrier substitution, process redesign, product reformation, procedure simplification, and technology modification. The agricultural retail industry is already heavily regulated for environmental and security reasons; thus, ARA believes that mandating IST regulations would be excessive.

Ammonia and chlorine are the two most common toxic-by-inhalation (TIH) chemicals, of which ammonia is used extensively in the agricultural industry. The railroads have made it clear that they do not want to transport TIH chemicals. Much of the aggressive behavior mentioned previously is attributed to the railroad's reluctance to carry ammonia and other TIH chemicals. The railroad argues that the agricultural industry should use ISTs in place of the TIH chemicals currently used.

There are several problems with the railroad's argument for IST. First, there is no excess fertilizer production in the current global market. Fertilizer is being produced and used at a ratio of one to one, which means that it is not possible to switch from one type of fertilizer to another type. Even if substitution of fertilizer were possible, if the reports that the railroad is at capacity are true, the railroad does not have the capacity to carry the larger quantities of alternative fertilizer required to match the potency of anhydrous ammonia. Second, there is no alternative input chemical for ammonia. The railroads claim that there is an alternative, but they have not shared their research with the rest of the agricultural industry. If there were a viable economical alternative, the agricultural industry would likely welcome its use given the shortage of fertilizer that we currently have.

Under the Staggar Act, the railroad is to function as a "common carrier" in exchange for the government's original substitutes, financial bailouts and protection. As a "common carrier", the railroad is responsible for carrying all of the nation's goods- not just the ones that the railroad would prefer to carry. The Surface Transportation Board (STB) defines the common carrier obligation as the, "duty of railroads to provide transportation or service on reasonable request."⁶ The STB attempts to create a loophole for the railroads by

⁶ "Railroad Shipping: STB to Hold April Meeting on 'Common Carrier Obligation' of Railroads, *Logistics Management*, February 2, 2008, available at: <http://www.logisticsmgmt.com/article/CA6535371.html>.

debating the word “reasonable”. However, transporting fertilizer must be deemed a “reasonable request” when the very same law that the STB Chairman references to defend the railroad’s unwillingness to fulfill its obligation explicitly lists the railroad’s responsibility when transporting “agricultural products, including grain and fertilizer.”⁷ The STB’s authority does not trump the laws made by Congress nor does the STB have the authority to interpret and change laws. The STB is an economic regulatory agency that Congress created to resolve railroad rate and service disputes and reviewing proposed railroad mergers.

RECOMMENDATIONS

ARA has several recommendations for improving railroad service to the agricultural sector.

REFORMING THE STB

First, ARA supports reforming the STB to make it more accountable and responsive to shippers. The railroads’ arbitrary taxing on cost and raising the tariffs, indicates that there is no oversight of the railroads’ actions. The STB appears to have no interest in our issues as small business operators. Why would the STB continue to allow the railroads to eliminate service to our rail houses and push towards unit train receivers only if they truly had the public best interest in mind?

USDA RAIL STUDY

Second, ARA supports the proposed United States Department of Agriculture (USDA) rail study of the impact of the railroad on the agriculture industry. The proposed provision is up for consideration in the Farm Bill debate. This study would provide more information to legislators and small business owners in the agricultural industry. The study would also result in more transparency between the railroads’, its customers, and lawmakers.

TRANSPARENCY IN CHARGES AND RATES

Third, ARA believes that there should be more transparency in fuel charges and rates. It is impossible for the occasional or seasonal shipper to compute the fuel surcharge, and too expensive for a small business to go to STB to challenge rate. The railroads take advantage of this power imbalance and confusing rate structure by behaving like a monopoly. For example, Ceres Solutions sells the rail company about 250,000 gallons of fuel for their locomotives. We fill them at night or on the weekend- whenever they call. We asked about having the railroad pay us a fuel surcharge for the truck that has to service their train, they refused and said they would get someone else to do it before they would pay us a surcharge. Transparency in the fuel charges would encourage competition and discourage this monopolistic-type of behavior.

RAIL CAR REDESIGN

Forth, ARA encourages further research to be conducted in order to determine whether the railroad’s proposed new rail car design is an effective design. The railroad and the Department of Transportation are considering designing a new rail car which is heavier than the currently used cars. There is evidence that the new car would be too heavy for some of the current railroad tracks to support when filled with some agricultural inputs. The railroads should not invest in new cars that further limit their service, and they should design a car that can continued to be used on the current track since it is rarely upgraded.

COMMON CARRIER OBLIGATION

Fifth, ARA thinks that the railroads’ common carrier obligation should be maintained. Since 1980, the railroad industry has shrunk from 40 lines to four major lines because of the government’s protection of the industry. If

⁷ 49 U.S.C.A. § 11101 (a) (d) (1988).

the government is going to protect the industry, the rail industry should serve all of the U.S. in return. The railroad has the duty by law to be the common carrier; their performance of that duty should not be left to the railroad's discretion.

REVIEW OF THE ANTI-TRUST EXEMPTION

ARA recommends Congress review H.R.1650, which would remove the railroads' antitrust exemption and give the STB six months to review proceedings to bring the railroads into compliance with antitrust laws. It is our understanding that this legislation could help bring competition and fairness to the railroad industry.

CONCLUSION

ARA and our members strongly support a railroad system which is healthy financially, but we believe it is important to have a railroad infrastructure that is not needlessly sheltered from competition and left to operate without proper oversight. America's agricultural industry is currently faced with high fuel, fertilizer and transportation costs. If the railroad is left to operate in its current environment, the agricultural industry may be stalled in its productive capacity, and the U.S. will continue to see food and energy prices soar. The current railroad regulatory environment may help further drive many within agriculture out of business and increase our dependence on foreign sources of food and fiber.

Thank you for considering ARA's views. We appreciate Congresswoman Velázquez interest and support on this important issue. We welcome the opportunity to provide further input to the committee on the issue of the rail transport of agricultural inputs. ARA stands ready to work with Congress on the development of railroad legislation that adequately reflects the needs of America's agricultural industry and our rural economy. As we face these challenges, we can only accomplish what needs to be done if we work together.