



**National Grain
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REVISIONS TO ARBITRATION PROCEDURES

Comments

of

National Grain and Feed Association

June 13, 2016

The National Grain and Feed Association (“NGFA”) submits this statement in response to the notice of proposed rulemaking published by the Surface Transportation Board (“Board” or “STB”) in the May 16, 2016 *Federal Register* to amend its arbitration procedures to conform to the requirements of the Surface Transportation Board Reauthorization Act of 2015 (P.L. 114-110).

The NGFA, established in 1896, 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 grain, feed and processing industry. The NGFA also consists of 26 affiliated State and Regional Grain and Feed 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.

At the outset, the NGFA commends the Board for its efforts to implement in a timely manner this and other important provisions of P.L. 114-110, which represent the most significant changes to the U.S. rail regulatory framework since enactment of the Staggers Rail Act of 1980. As a strong advocate of the new statute, the NGFA believes it is imperative that the Board devise practical, reasonable and workable rules and procedures that enable rail customers to access and utilize the additional safeguards and protections intended by Congress.

The NGFA supports the STB's efforts in this proposed rule to expand the availability of the Board's rail arbitration system and to increase its potential use as a possible mechanism for resolving disputes between rail carriers and their customers. We continue to believe that providing more access to arbitration for rail customers generally would be a very positive development, and would facilitate the ability of both rail carriers and their customers to resolve disputes in a more direct, business-like manner. We believe expanding the Board's arbitration process to address rail rates and practices, as mandated under P.L. 114-110, holds promise for enabling carriers, shippers and receivers to address additional sources of disagreement in a professional and more transparent manner.

As the Board knows, the NGFA since 1998 has operated a Rail Arbitration System that has functioned extremely well. The Class I carriers and a number of short line and regional railroads participate in the NGFA's Rail Arbitration System, as do most NGFA-member grain handling, feed, grain processing and exporting companies. The NGFA's more than century-long

experience in offering commercial arbitration services to grain, feed and grain-related businesses – and the reputation those services have earned for their transparency, integrity, fairness and cost-effectiveness – provided a solid foundation upon which to create the NGFA’s Rail Arbitration System.

It is from the perspective of offering arbitration-related services – including rail – to the commercial grain, feed and processing industry that the NGFA offers these specific comments on the Board’s proposed rules:

- **Market-Dominance Test for Rate Disputes:** As the Board notes, P.L. 114-110 limits the access of relevant parties to the STB’s voluntary and binding rate arbitration process to cases in which the rail carrier is shown to have market dominance. In recognition of this requirement, the Board proposes a different and lengthier timetable for those rate cases for which the Agency needs to make a market-dominance determination. However, the STB also seeks comment on whether parties should be given the option to concede market dominance when agreeing to arbitrate a rate dispute, thereby foregoing the need and associated costs of the Board making such a determination.

The NGFA notes that in rate cases filed with the Board under the existing rate-reasonableness rules, the defendant railroad sometimes concedes market dominance. We urge that this practice be incorporated into rail arbitration cases involving rail rates. That is, the NGFA believes that rail carriers as a matter of practice should concede the existence of market dominance at the time the joint arbitration filing with the rail customer is made, as envisioned under the proposed rule. Given the voluntary nature of the Board’s arbitration procedures, we cannot envision of a rail carrier agreeing to rail rate arbitration unless it does not dispute that it is market dominant for the traffic for which the rate is being challenged.

Moreover, the NGFA believes that requiring market-dominance determinations in rail rate arbitration proceedings would hamper the arbitration process by increasing its duration and complexity, due in large part to the lack of clarity over what test(s) would

be used to determine if market dominance exists. In addition, market-dominance determinations for agricultural commodity shipments can be more complicated than other commodities that involve fewer moves over longer distances, and with fewer origin-destination pairs. The NGFA, therefore, believes that arbitration of rail rates should be limited to cases where market dominance is not contested.

- **Voluntary Nature of STB Arbitration Procedures:** Given what ultimately is the voluntary nature of the Board's arbitration procedures, the NGFA recommends strongly – and believes it would have value – for the Board to provide a database portal that rail customers and carriers could use to report on instances in which they attempted to utilize STB arbitration to resolve a covered dispute, but were unsuccessful in doing so because of the opposition or rejection by the other relevant party. The NGFA suggests that parties should be allowed, and encouraged, to report to the STB the identity of the declining party that would have been involved in the arbitration if the dispute had been submitted, the general nature of the dispute, and the stated reason the declining party gave for rejecting the overture for arbitration. We concur with views expressed by other rail customer organizations that, given the STB's desire to increase the use of its arbitration procedures, and the lack of their use over many years, having a record to determine the reasons why the rules are being used, or not, would be important to enable the Board and other policymakers to evaluate future potential changes through the regulatory or legislative process.
- **Definitions – § 1108.1(m):** The NGFA recommends that the Board consider revising this subsection (m) to clarify that "*rate disputes*" involves more than "a rail carrier's rates," which could be misinterpreted to be confined solely to a railroad's line-haul rates. In today's rail markets, the NGFA's members find they are increasingly paying fees and charges in addition to the basic line-haul rates. We recommend that a more precise definition of "rail carrier's rates" be provided in this section to reflect the fact that the phrase may encompass other charges and surcharges assessed by railroads including, but not limited to, tariff rates for empty tank car movements, fuel surcharges, and other charges.

- **Definitions – § 1108.1(k):** Similarly, the NGFA recommends that the Board consider defining several terms in this subsection, including “accessorial charges.”
- **Participation in the Board’s Arbitration Program – § 1108.3(a)(2):** The NGFA strongly supports the Board’s proposal to allow an arbitration proceeding to be initiated by relevant parties through the filing of a joint notice in situations in which the participants have not opted into the STB’s arbitration program previously. Doing so, we believe, will allow maximum flexibility for case-by-case determinations by relevant parties on whether to submit a particular dispute to STB arbitration, and thereby enhance the potential use of the Board’s arbitration process.
- **Use of Arbitration – § 1108.4(g):** The NGFA would prefer that the Board maximize the flexibility of parties and arbitrators to consider realistic and practical approaches consistent with the statute’s mandate to follow sound economic principles when arbitrating disputes, particularly those involving rates. Accordingly, the NGFA recommends that the Board clarify that, while an arbitrator or panel of arbitrators “shall consider” the Board’s current Stand-Alone Cost (SAC), Simplified SAC (SSAC) or Three-Benchmark (3-B) methodologies for setting maximum lawful rates and the provisions of 49 U.S.C. 11704(a)(2), the arbitrator or panel is not bound to resolve rate disputes using the Board’s existing rules, and may consider alternatives that are consistent with the statutory language.

In this regard, we believe the involved parties utilizing the STB’s arbitration procedures, as well as the arbitrators themselves, should have the flexibility to agree to utilize simpler methodologies in their particular circumstances. For example, the parties could agree to resolve a dispute quickly using a straight revenue-to-variable-cost ratio comparison of an agreed-upon traffic group, or the rate methodology proposed by the NGFA for grain rail rates under EP 665 (Sub-No. 1), among others.

On these grounds, we encourage the Board to add the phrase, “*but not be confined to*” where shown in the following sentence of § 1108.4(g): “*In rate disputes, the arbitrator*

or panel of arbitrators as applicable, shall consider, ***but not be confined to***, the Board’s methodologies for setting maximum lawful rates, giving due consideration to the need for differential pricing to permit a rail carrier to collect adequate revenues (as determined under 49 U.S.C. 11704(a)(2)). [Emphasis added.] We believe this is consistent with the statute and the intent of Congress.

- **Arbitration Commencement Procedures – § 1108.5:** As noted previously, the NGFA commends and strongly supports the Board’s proposal to provide for jointly filed notices in lieu of a formal complaint proceeding under its arbitration procedures. We also commend the Board for allowing the involved parties to choose up to three arbitrators to resolve the dispute, and to provide for a written arbitration agreement among the parties at the outset stating the specific issues to be arbitrated and the corresponding monetary award cap to which the parties have agreed, if different from the levels specified in the statute and proposed in these rules.
- **Arbitrators – § 1108.6:** The NGFA supports the single-strike process proposed by the Board within this section for parties involved in an arbitration case at the STB to select arbitrators from a roster maintained on the Board’s website. We also support the Board’s proposal to update the roster of arbitrators annually, and to seek public comment on any modifications.

The NGFA, however, does suggest a revision to **§ 1108.6(b)** to provide members of the Board – in addition to the Chairman – to have input into the establishment of the roster of arbitrators. Specifically, the NGFA recommends the addition of the phrase “*after soliciting recommendations and input from fellow members of the Board*” in the following sentence: “*The initial roster of arbitrators shall be established and maintained by the Chairman of the STB, ***after soliciting recommendations and input from fellow members of the Board***, who may augment the roster at any time to include other eligible arbitrators and may remove from the roster any arbitrators who are no longer available.*” [Emphasis added.]

- **Arbitration Procedures – § 1108.7:** The NGFA commends and supports the Board’s ambitious proposed timetable designed to expedite arbitration proceedings and render timely decisions, noting that the schedule also contains appropriate opportunities to extend such deadlines if agreed upon by the parties to a dispute. However, we again note that this timetable is not realistic for rate disputes if the Board constrains arbitrators to utilizing the STB’s rate methodologies to resolve such disputes, and if the Board includes market-dominance determinations under the Board’s existing uncertain rules as part of the arbitration process.
- **Decisions – § 1108.9:** The NGFA supports the Board’s proposal to require that arbitration decisions be in writing, containing findings of fact and conclusions of law. Further, we believe it is important to add to the items covered in the written decision the names of the parties involved in the dispute, a summary of the facts and arguments presented in the case, the reasoning of the arbitrator(s) in reaching the decision, and the name(s) of the arbitrator(s).

Most importantly, we continue to urge strongly that the Board take an additional step in its final rules by requiring such written decisions to be made public by posting them on the STB’s website, with confidential business material redacted. As stated repeatedly and consistently in its written and oral statements submitted in EP 699, the NGFA believes adamantly that the issuance of public, written decisions under its own Arbitration System provides transparency that contributes greatly to the fairness, integrity, and informational and educational value of the system – and ultimately encourages its use. We believe the same benefits would accrue to the STB’s system if the Board did likewise.

- **Petitions to Review Arbitration Decisions – § 1115.8:** The NGFA commends the STB for its proposal to require that appeals of an arbitration decision be submitted within 20 days, so as to maintain the expediency of the arbitration process. However, we do recommend that the 20-day requirement be based upon the date the final arbitration decision is received by the parties, rather than the proposed 20 days after a final

arbitration decision is reached, to allow for any delay or lag time in the parties actually receiving the decision.

Finally, the NGFA strongly recommends that the Board add a new section to its arbitration procedures to expressly state that the Board's arbitration rules do not preempt the applicability, or otherwise supersede, existing industry-operated arbitration systems, such as the one operated successfully by the NGFA. This is consistent with the provision in § 11708(b)(3) of P.L. 114-110, which states that the voluntary arbitration of rail rates and practices disputes operated by the Board: *"shall not prevent parties from independently seeking or utilizing private arbitration services to resolve any disputes the parties may have."*

Conclusion

The NGFA again wishes to commend the Board for examining ways to improve its rail arbitration procedures, and expand them to include consideration of rail rates and practices in conformance with P.L. 114-110. We appreciate the opportunity to convey our views, and would be pleased to respond to any questions the Board may have.

Sincerely yours,

A handwritten signature in black ink that reads "Randall C. Gordon". The signature is written in a cursive, flowing style.

Randall C. Gordon
President