

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 699

ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

Comments of National Grain and Feed Association

I. INTRODUCTION AND BACKGROUND

In response to the notice of proposed rulemaking (NPR) served in this docket on March 28, 2012 and published in the **Federal Register** on April 2, 2012, the National Grain and Feed Association (“NGFA”) hereby submits the following comments.

Established in 1896, the NGFA is a U.S.-based nonprofit trade association that consists of more than 1,000 grain, feed, processing, exporting and grain-related companies comprising over 7,000 facilities that handle more than 70 percent of U.S. grains and oilseeds. The NGFA’s 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, processing and export industry. Affiliated with the NGFA are 26 state and regional grain and feed trade associations. Activities conducted by NGFA members involve the significant use of rail transportation subject to the Surface Transportation Board’s (STB or Board) jurisdiction.

The NGFA and its members place tremendous value on having access to effective and workable mechanisms to resolve business-related disputes, as evidenced by the existence of an Arbitration System for resolving commercial disputes involving grain, feed and grain products that has been operated by NGFA since its initial founding. NGFA's system includes rail arbitration and mediation crafted and supported by NGFA-member rail shippers, receivers and carriers that was instituted in 1998. The Rail Arbitration System, which was described in NGFA's statement submitted to this docket on October 20, 2010, is perceived widely by both rail carriers and rail users to be successful and working well.

In this regard, the NGFA has particular interest in this proceeding and commends the Board's efforts to expand and enhance the availability of alternative dispute-resolution methods, particularly arbitration, as a means of resolving disputes between rail carriers and their customers.

II. STB's RAIL ARBITRATION PROPOSALS

The NGFA commends the Board for its efforts to review and consider changes to its existing rail arbitration procedures, and offers the following comments and recommendations on the Board's proposal. NGFA's comments should not be misconstrued as indicating agreement that the Board's proposed arbitration rules are preferable to the NGFA's Rail Arbitration Rules. In fact, as stated subsequently herein, the NGFA believes that in several respects, the STB's proposed rail arbitration procedures fall short of fostering the fairness and transparency so essential to the successful functioning of an unbiased arbitration system. In particular, NGFA

members expressed concerns regarding the Board's proposals related to the number of arbitrators to be assigned to each case, the dollar-amounts of relief that would be available, and the non-public nature of the arbitration decision(s) that would result, as well as the overall transparency of the program.

Matters Eligible for Arbitration

The Board proposes that the following types of disputes would be subject to arbitration under its arbitration program: demurrage charges; accessorial charges; compensation for misrouting or mishandling rail cars; redress for a carrier's misapplication of its published rules and practices as applied to particular prior shipments; and compensation for other alleged unreasonable practices and procedures related to past service. *[NPR Decision at 7.]* Under the proposal, other types of disputes could be arbitrated on a voluntary basis, with the consent of all parties.

Given its own well-established Rail Arbitration System, the NGFA strongly supports the Board's statement that its proposed arbitration procedures would not preempt the applicability of, or otherwise supersede, any new or existing arbitration clauses contained in agreements between shippers and carriers. *[Proposed Rule 1108.3(d)]*

For reasons provided in this statement, NGFA believes that its Rail Arbitration System contains features that are preferable to, and offer additional benefits for, at least the rail transportation of agricultural products, than the Board's proposed arbitration program.

Therefore, NGFA appreciates the Board's assurances that its rail arbitration procedures are not intended to supplant other established arbitration systems.

Yet, despite these assurances, some NGFA members have expressed concern as to the impact the Board's rail arbitration program ultimately may have on rail carriers' participation in NGFA's system. Under the Board's proposal, rail carriers would agree in advance to submit to binding arbitration for the certain specified types of cases – much as they do under the NGFA's Rail Arbitration System. Both the NGFA's and the Board's proposed arbitration programs provide a mechanism whereby the carriers subsequently may opt-out of the system. Currently, all of the Class I carriers and several of the main regional and short line carriers are parties to NGFA Rail Arbitration. While we believe these rail carriers remain supportive of the NGFA's system, it would be to the significant detriment of agricultural shippers and their farmer-customers were they to decide to participate solely in the Board's arbitration program, given the differences between the NGFA's system and the Board's currently proposed approach, as noted elsewhere in these comments.

Single Arbitrator

In its NPR decision, the Board cited the NGFA's previous comments on the advantages of using three arbitrators versus a single arbitrator to resolve disputes. Nevertheless, the Board has proposed in the NPR that arbitrations cases conducted under its program be decided by a single arbitrator, unless all parties agree to share the cost of a second and third arbitrator.

NGFA's view remains that STB arbitration proceedings should be presided over by a three-person arbitration panel. Doing so would reduce the likelihood of bias and errors in the rendering of the decision. It also would enhance the chances that arguments presented by the parties will be comprehended and receive due consideration from the arbitrators. The practice that historically has worked well under NGFA's Arbitration System – including the Rail Arbitration System – is to select three impartial arbitrators for each given case, allowing the parties involved to challenge any of the appointments for prejudice or other causes. Moreover, under NGFA's Rail Arbitration System, both carrier and shipper representatives serve as arbitrators. Further, NGFA's Rail Arbitration Rules Committee is comprised of an equal number of rail carrier and rail user representatives. Both shippers and carriers participate in the decision-making and share "ownership" of the process. NGFA believes that this balanced approach has been essential to securing the commitment of both rail carriers and rail customers to NGFA's Rail Arbitration System.

NGFA is cognizant of the financial constraints that the Board confronts in controlling the costs of its proposed arbitration program both to the parties and to the Board itself. However, NGFA is unaware of any arbitration system where there are no arbitration costs borne by the parties to a case. Given the many benefits of a three-arbitrator approach, NGFA recommends that the Board require the use of three arbitrators, and cap the cost of the second and third arbitrators at a specified level, such as \$500 per arbitrator per day.

Further, unrelated to the number of arbitrators assigned to each case, NGFA members have expressed concerns over the background and type of expertise that would be possessed by

arbitrators used in the Board's proposed process. It is unclear in the Board's NPR what the level and nature of the arbitrators might be, or the pool from which they would be derived. The NGFA believes that key to the success of its Arbitration System is that selected arbitrators have industry-specific knowledge. A program that instead relies upon arbitrators selected solely based upon their legal background and expertise, for example, may not be as widely accepted.

Arbitration Period

The Board proposes that the evidentiary phase of its arbitration process be completed within 90 days, and that the arbitration decision be issued within 30 days thereafter.

If the NGFA's recommendation concerning the use of three arbitrators is adopted by the Board, it may be necessary to lengthen somewhat the time deadline for issuing a decision. But NGFA commends the Board for proposing a timely arbitration process, which the NGFA's experience has shown to be important to the success of such a system.

Relief Available

The Board proposes that the relief that could be awarded under its arbitration program would be limited to a maximum of \$200,000 "per arbitral dispute." The Board states it believes this amount would be sufficient to accommodate a wide range of claims, and that disputes involving higher amounts of relief generally are complex enough to warrant resolution using the

Board's formal adjudicatory procedures. The Board also invited comments on whether a different dollar-cap would be preferable.

The NGFA notes that its Rail Arbitration Rules currently also contain a \$200,000 cap per-occurrence on claims that a party may be obligated to arbitrate. However, NGFA's Rail Arbitration Rules Committee, which oversees NGFA's Rail Arbitration System and formulates recommendations for changes – decided in March 2012 to review whether this cap should be increased because: 1) The initial cap was formulated more than 14 years ago; 2) the prices of agricultural commodities, in particular, have escalated and remain volatile; and 3) the average non-rail NGFA arbitration claim well exceeds \$200,000.

Therefore, based upon its own experience, NGFA submits that the Board should consider increasing its proposed cap.

Further, NGFA notes that its own rules provide for the cap of \$200,000 on a “per-occurrence” basis. This enables a plaintiff to pursue a claim that exceeds \$200,000 if the dispute involves more than one “occurrence.” An example of such a claim could involve an alleged transgression involving multiple shipments. Viewed from this perspective, the Board's current proposed cap limiting damages to no more than \$200,000 per “dispute” is even more restrictive, and would exclude a potentially wider range of cases.

Arbitration Awards Availability

The Board proposes that its arbitration decisions not be made public and that they not have precedential value. Based upon its experience, the NGFA agrees that there is little or no benefit to according these decisions formal precedential effect for future cases. However, NGFA believes very strongly in the benefits of an open, transparent and accountable process, including a publicly available and easily accessible written decision.

In fact, the prospect of a public decision often is a significant incentive for the parties in these cases to settle the dispute between themselves, often prior to the substantive start of the arbitration process. As NGFA stated in its initial comments in this proceeding, of the cases filed under NGFA Rail Arbitration, relatively few go through the entire process and result in a published decision. Most are settled between the parties within one to two months from the time the claim is filed. The NGFA repeatedly is advised by its members that countless potential claims are settled among the parties before they are filed under NGFA Rail Arbitration. The NGFA believes that the transparency of the process, including the public, published decision, is one of the reasons that settlements are so prevalent.

Moreover, issuance of public, written decisions, including a listing of the names of the arbitrators, enhances fairness by allowing for scrutiny of the process from the outside. A common criticism of arbitration forums that do not make their decisions public is the perception that the parties who use those forums more frequently (i.e., the so-called “repeat players”) have an “advantage” in their ability to assess and track how cases are decided.

Further, the NGFA believes that written and publicly accessible decisions generally promote discipline and integrity by the arbitrators. It stands to reason that an arbitrator will have more incentive to issue a quality, well-reasoned and unbiased decision when it is publicly viewable. The NGFA recognizes the Board's view that an approach of non-disclosure might encourage parties to avail themselves of the process. However, NGFA believes that transparency will increase confidence in the system, encourage early negotiation between the parties to resolve the dispute amicably before the arbitration process reaches a public conclusion, and thereby also promote participation in the program – all while simultaneously avoiding the pitfalls of a closed system.

Further, the NGFA notes that while it agrees arbitration decisions should not be deemed to have precedential value – published, publicly available decisions nonetheless offer considerable value as an informational guide for assessing or even avoiding future disputes of a similar type.

Review of Arbitration Awards

Under the Board's proposal the parties would have the right to appeal any arbitration decision to the Board, but the agency's review would be limited to instances involving “a clear abuse of an arbitrator's authority or discretion.” [*NPR Decision at 5*] However, proposed rule 1115.8(c) requires the arbitrator to “be guided by the Interstate Commerce Act and by STB and ICC precedent.” Thus, under this proposal, a party apparently would be able to argue on appeal

that it is an abuse of discretion for an arbitrator to depart from an earlier STB or ICC decision. That is a much broader standard than just “a clear abuse of an arbitrator’s authority or discretion,” the latter being closer to the appellate standard under the Federal Arbitration Act [*1 U.S.C. § 1, et. seq.*]. NGFA believes the Board should not instruct arbitrators to be guided by prior STB and ICC decisions, except for jurisdictional issues.

III. MEDIATION

NGFA notes that the Board proposes to revise its rules to expand the use of confidential mediation of certain types of adjudicatory matters that are subject to dispute before the Agency.

NGFA strongly concurs with the Board’s predilection to continue to make available to shippers and carriers its highly regarded Rail Customer and Public Assistance (RCPA) Program. NGFA members strongly support RCPA, and those that have utilized this service since it was instituted in November 2000 have found it to be useful in obtaining the attention of carriers to shipper complaints – in effect, elevating the “standing” of rail customers with carriers. This service has helped identify, clarify and bridge differences between carriers and their customers, in essence serving much the same role as mediation. We do believe the Board could better, and more frequently, publicize the availability of this valuable service to rail customers. While expanded use of mediation could have value of its own, NGFA submits that it might be preferable for the Board to allocate its resources to further enhancing its RCPA Program.

IV. CONCLUSION

The NGFA submits these comments to the Board to share its perspective and experience regarding the use of arbitration in rail-related disputes in the hope that these may be of benefit as the Board considers its own alternative dispute resolution mechanisms.

Respectfully submitted,

National Grain and Feed Association

Dated: May 17, 2012