



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

248933

STB Docket EP 756

MARKET DOMINANCE STREAMLINED APPROACH

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**OPENING COMMENTS OF
THE NATIONAL GRAIN AND FEED ASSOCIATION**

Pursuant to the Notice of Proposed Rulemaking (“NOPR”) served in this docket on September 12, 2019, the National Grain and Feed Association (“NGFA”) hereby files these Opening Comments on the Surface Transportation Board’s (“Board” or “STB” or “Agency”) proposal to adopt a streamlined approach for demonstrating market dominance in rate-reasonableness proceedings. As set forth in more detail herein, the NGFA continues to support strongly the Board’s efforts to improve its rules for reviewing the reasonableness of railroad rates and to make them more accessible and useful for agricultural shippers. Therefore, the NGFA supports the NOPR, subject to the following recommendations to improve and expand upon the process.

I. Identity and Interest of NGFA

Established in 1896, the NGFA consists of more than 1,100 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. The NGFA also consists of 33 affiliated State and Regional Agribusiness Associations. In addition, the NGFA has a strategic alliance and is co-located with the North American Export Grain Association and has a strategic alliance with the Pet Food Institute.

II. **Comments of The National Grain and Feed Association**

As it has stated consistently in numerous other Board proceedings, the NGFA believes that the current rules and regulations for challenging the reasonableness of railroad rates largely are unworkable and inaccessible to most agricultural shippers. Therefore, the NGFA welcomes the significant, constructive and impactful efforts of the Board and its Rate Reform Task Force to analyze the *status quo* critically and propose creative, legally authorized and supportable solutions to this huge and increasingly important matter. The NOPR's overall purpose of fashioning a mechanism to make market dominance determinations required by 49 U.S.C. §10707 more reasonable and manageable, while still fulfilling the statute's requirements, constitutes such a salutary effort.

The NGFA offers the following comments and recommendations on the specific "*Prima Facie* Factors" and procedural mechanics proposed in the NOPR.

A. RVC of 180 Percent or Greater

This *prima facie* factor obviously is pre-determined under 49 U.S.C. §10707(d)(1)(A), making the calculation of the 180 percent "jurisdictional threshold" an extremely important calculation. Therefore, it is important that the means by which the Board determines the calculation

of the ratio between a railroad's revenues to its variable costs is reasonably precise and accurate, and, in particular, reflective of the carrier's actual variable costs. The NGFA is aware of – and shares – criticisms of the Board's Uniform Rail Costing System ("URCS"). Several of those concerns most recently were expressed in this docket in a filing made on October 17, 2019 by members of a committee of experts in economics, regulatory policy and freight transportation convened in 2014 by the National Research Council of the National Academies of Science, which was established specifically to address and make recommendations on the Board's regulation of railroad rates, as well as a number of related issues. The NGFA implores the STB to continue its efforts to improve the URCS system and/or develop a new and improved means to calculate the R/VC ratio required by §10707(d)(1)(A).

B. Movement Length Greater than 500 Highway Miles

The NOPR has carried forward the 500-mile threshold for determining when trucking is an effectively competitive alternative to rail that first was proposed in Docket EP 665 (Sub-No. 2), *Expanding Access to Rate Relief*. As it did in that proceeding, the NGFA continues to believe this is an inappropriately long origin-destination mileage threshold for agricultural commodity shipments by truck. As it did in EP 665 (Sub-No. 2) the Board continues to rely upon a similar limit applied to primary iron and steel products in Docket No. EP 704, *Review of Commodity Boxcar, and TOFC/COFC Exemptions* (served March 23, 2016). See NOPR at 7.

The NGFA consistently continues to maintain that the 500-mile threshold applied to those specific commodities is far too long to be appropriate for agricultural shipments, and that trucking generally becomes cost-competitive with rail only for agricultural movements of 200 miles or less. Even at distances of greater than 200 miles, the rate advantage for rail applies only if: the rail carrier (1) genuinely desires to transport the movement and provides efficient, predictable service

that meets the rail customers' needs; and (2) prices the freight at a level that provides a competitive rate to trucks and allows the commodity to remain cost-competitive in domestic and export markets. For example, according to survey data gathered by the U.S. Department of Agriculture's Agricultural Marketing Service,¹ the tariff plus fuel surcharge on November 1, 2016 for a unit train shipment of corn traveling 175 miles from Des Moines, Iowa, to the Mississippi River destination of Davenport, Iowa, was \$0.57 per bushel. By comparison, the same movement hauled by truck cost \$0.51 per bushel. This example demonstrates that rail rates are almost competitive with truck rates for a 175-mile movement from central to eastern Iowa. But at distances of 200 miles or more, rail typically can out-compete trucks for freight rates – *provided* the rail carrier desires to move the cargo, provides reliable, predictable service that meets the customer's requirements and prices the movement in an effort to attract the business. Given the rate-making freedom and overwhelming market power railroads have to differentially price and set rates based upon the shipment distance at which rail and truck rates intersect – which currently is about 200 miles – the NGFA strongly urges that the threshold for making a *prima facie* showing of market dominance for agricultural commodity rate disputes should be no longer than 200 miles.

C. Absence of Intramodal Competition

The NGFA supports the NOPR's proposal that a *prima facie* demonstration of a lack of effective intramodal competition may be made through a verified statement from an appropriate official of complainant's company or organization attesting to the fact that the complainant does not have physical access to another railroad, whether through direct access or another means, such as a switching arrangement.

¹ U.S. Department of Agriculture Grain Transportation Report, November 3, 2016, Table 7, page 9.

D. Absence of Barge Competition

Similarly, the NGFA supports the NOPR's proposal that in most cases a complainant can make a *prima facie* demonstration of the absence of effective barge competition by submitting a verified statement from an appropriate official attesting that the complainant does not have practical physical access to barge competition.

E. No More than 10 Percent of Recent Movements by Truck

The NGFA first asks the Board to clarify that when it is referring to truck "movements" (NOPR at 9) it is referring to the percentage of total volumes of a commodity that are transported by truck versus rail. This is important in the grain industry where large volumes of a commodity are grown or produced, and then may be shipped by truck or by rail. Viewing a percentage threshold in terms of total commodity volumes is consistent with the *McCarty Farms* decision cited by the Board in support of this *prima facie* component. See *McCarty Farms v. Burlington N. Inc.*, 3 I.C.C. 2d 822, 830 (1987).

The NGFA also believes the Board should modify its NOPR threshold determination regarding whether truck transportation provides intermodal competition in three ways. First, NGFA believes that the proposed threshold that a complainant has used trucks to transport 10 percent or fewer of its total movements subject to the rate at issue over a five-year period is far too low, and that a more realistic and representative threshold would be 20 to 25 percent. The Board also should amend this proposed factor to clarify that the threshold applies to the origin-destination pair of the rate being challenged.

Second, to account for year-to-year fluctuations in the use of truck transportation at agricultural facilities, the NGFA believes any such threshold should not be based *solely* on a single five-year period, but also consider whether the threshold has been met by calculating an Olympic

average over a five-year period, dropping the high and low years.² Agricultural commodity modal movements can and do change significantly based upon production, regional variations, weather-related transportation disruptions (*e.g.*, 2019’s spring flooding in the Midwest), and competing markets and international trade flows, to name a few. A one-year anomaly may skew the determination if the threshold is based on every year or the simple average of a five-year period.

Third, the Board also should amend the NOPR to allow the complainant to demonstrate that truck transportation does not represent a viable or cost-effective intermodally competitive alternative for the specific rail movement whose rate is being challenged, regardless of the threshold level. The intermodal competition of trucking can vary greatly based upon several factors beyond the rail customer’s ***overall*** use of truck transportation in its business. For instance, intermodal competition from trucks may not be realistic or cost-competitive given the distance of the origin-destination movement, the destination facility’s receiving characteristics or the timeliness required for delivery of the shipment to the customer’s destination.

F. No practical Buildout Option

The NGFA concurs with the NOPR’s proposal that a complainant may demonstrate the absence of a practical “buildout” option through “a short plain statement in a verified statement from an appropriate official or other means, that it has no practical build-out option due to physical, regulatory, financial, or other issues (or combination of issues).”

² Olympic averages eliminate the high and low observations and then average all remaining observations.

G. Mechanical and Procedural Issues

The NGFA recommends that the Board clarify one aspect of this section of its NOPR streamlined approach, namely at what point will the Board make the determination that a complainant has met the requirements for a *prima facie* showing of market dominance and may proceed under the streamlined approach, as opposed to the final determination that the complainant has met its burden of demonstrating market dominance? Specifically, the NOPR appears to leave it to the complainant to unilaterally determine if the criteria of proposed section 1111.12(a)(1) – (6) are met. NOPR at 11. However, the proposal does not appear to address the inevitable instances in which a defendant railroad contests the complainant’s attempt to use the streamlined market dominance approach. Rather, the NOPR contemplates that the Board would make only the final decision of whether the complainant has met its ultimate burden of showing market dominance, and this determination would be made after all evidence is submitted.

To address this uncertainty, the NGFA recommends that the final rules would benefit from the Board clarifying that the defendant railroad has a specific time period to contest the complainant’s use of the streamlined approach.

III. Conclusion

The NGFA commends and strongly supports the Board’s proposals to implement a streamlined market dominance approach for rail rate cases, and it asks the Board to give due consideration to the comments submitted herewith.

Respectfully submitted,



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