



**National Grain
and Feed Association**

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1400 Crystal Drive, Suite 260

Arlington, VA 22202

P: (202) 289-0873

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket EP 756

**MARKET DOMINANCE STREAMLINED
APPROACH**

**REPLY 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 respectfully files these Reply Comments on the Surface Transportation Board’s (“Board,” “STB” or “Agency”) proposal to adopt a streamlined approach for demonstrating market dominance in rate-reasonableness proceedings.

As overarching comments, the NGFA (1) reiterates its support for the NOPR subject to the recommended changes contained in its Opening Comments to improve and expand upon the process; (2) supports several recommendations made by other shipper organizations; and (3) urges the Board to reject proposed changes submitted by the Association of American Railroads (“AAR”) and several of its Class I rail carrier members that would add needless complexity and procedural and other hurdles that would undermine and ultimately render useless the utility and

positive change intended by the Agency in the proposed streamlined approach.

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 75 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. Reiterating Recommended Changes to Improve and Expand Upon the Proposed Rule

After reviewing the Opening Comments of other stakeholders in this proceeding, the NGFA reiterates and supplements its previous recommendations that the Board consider the following changes to the *prima facie* factors under its proposed market dominance streamlined approach:

A. RVC of 180 Percent or Greater

The NGFA reiterates its opening comment that the Board should address the current deficiencies in its Uniform Rail Costing System ("URCS") to ensure that the 180 percent quantitative jurisdictional threshold is as accurate as possible. *See also*, Comment of Jerry Ellig, Research Professor at George Washington University and member of the Transportation Research Board's Committee for a Study of Freight Rail Transportation and Regulation, November 6, 2019 at 10.

B. Movement Length Greater than 500 Highway Miles

The NGFA reiterates its recommendation that the proposed 500-mile *prima facie* threshold for determining if trucking is an effective competitive alternative to rail is inappropriately long for many agricultural product movements. As noted in NGFA's Opening Comments, 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- and service-competitive in domestic and export markets. NGFA also previously has cited, including in its Opening Comments in this proceeding, survey data gathered by the U.S. Department of Agriculture's Agricultural Marketing Service demonstrating that 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 – and the ability that rail carriers would have to contest such a presumption in reply under the Board's proposal – the NGFA strongly urges that the threshold for making a *prima facie* showing of

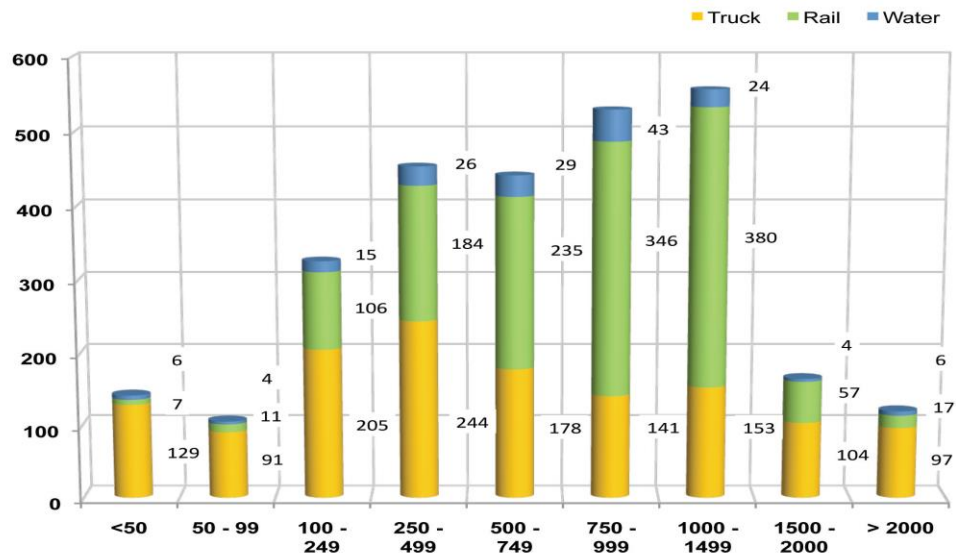
market dominance for agricultural commodity rate disputes should be no longer than 200 miles, and reiterates its Opening Comments' recommendation that complainants be given the right to present evidence that a railroad has market dominance over trucks at even shorter distances.

The NGFA disagrees with the AAR's view that the 500-highway-mile threshold is a "conservative" one. AAR itself concedes that any such a threshold "need not – and could not – identify the exact demarcation line whereby trucks do not provide effective competition to rail in every circumstance....Instead, this threshold is designed to identify a factual scenario where, along with when other factors are satisfied, complainants should be able to utilize streamlined procedures, after which the defendant carrier will have the 'opportunity in its reply evidence to argue that...the carrier is not market dominant for the movement.'" AAR Opening Comments at 9.

The NGFA also strongly objects to the contention of the BNSF Railway Company that "...there is no basis to establish a lower mileage threshold for agricultural products." BNSF asserts that it "regularly competes with trucks over distances well over 200 miles, for example for the movement of grain products from North Central Texas to the Gulf, which involves movement distances of over 400 miles." BNSF at 14. However, NGFA members that operate in this market territory advise that the corridor referenced by BNSF is characterized by many facilities that cannot receive unit train shipments, and that many of the rail movements, especially outside of peak harvest, are two-way moves – grain to the Texas Gulf and fertilizer in the return trips.

Further, the volumes of grain movements – roughly 413,000 bushels – in a typical train movement makes it impractical from both a logistical and economic standpoint to haul such volumes by truck. The lack of effective competition posed by trucks beyond 200 miles is borne out by other authorities, as well. The U.S. Department of Transportation's Federal Railroad Administration in its September 2010 report to Congress entitled *National Rail Plan – Moving*

Forward presented the following chart at page 16 of that document demonstrating the decline in the volume of shipments of all freight hauled by truck at distances exceeding much beyond 200 miles.



Moreover, a final report entitled ***Estimating the Competitive Effects of Larger Trucks on Rail Freight Traffic*** issued on October 26, 2010 by Carl D. Martland of the Massachusetts Institute of Technology – a study conducted “in coordination with the Association of American Railroads” – found that “rail clearly has the advantage for the bulk movements, even for the 50- and 200-mile moves,” and that the “detailed results indicate that the rail market share increased for lower value and longer distance movements....” Report at 12-13.

In addition, Class I railroads differentially price all types of agricultural products and traffic lanes. Apparently, the railroads are arguing that they should retain the right to differentially price any commodity at any location they want; but if a shipper was to challenge market dominance or an unreasonable rate, the railroads argue the STB’s standards need to apply the same mileage threshold for all commodities.

Finally, as pointed out in the Opening Comments of the American Chemistry Council, Fertilizer Institute, National Industrial Transportation League, Chlorine Institute and Corn Refiners Institute (“Coalition Associations”), trucking becomes less viable when movements cannot be completed in one day, given U.S. Federal Motor Carrier Safety Administration hours-of-service rules. Coalition Associations at 12. NGFA-member companies confirm that most agricultural truck transportation does not involve “overnight moves,” which constrains the distance traveled.

C. Absence of Intramodal Competition

The NGFA continues to support 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 the 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.

D. Absence of Barge Competition

Similarly, the NGFA continues to support 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. In this regard, NGFA does not object to the additional clarity proposed by the Coalition Associations for factors complainants could utilize to demonstrate the lack of effective barge competition. Coalition Associations’ Opening Comments at 15-16.

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

In its Opening Comments, the NGFA sought clarification from the Board that its NOPR's reference to truck "movements" (NOPR at 9) pertained to the percentage of total *volumes* of a commodity that are transported by truck versus volumes moved by rail. The NGFA notes that the Coalition Associations also have advocated that the unit of measurement should be the *volume* of the traffic at issue that is moved by truck, not the number of movements themselves. Coalition Associations at 9-10. As noted in NGFA's Opening Comments, doing so would be 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 reiterates its recommendation that the Board modify its NOPR threshold determination regarding whether truck transportation provides intermodal competition by (1) increasing the 10 percent threshold over a five-year period to 20 to 25 percent. See also Coalition Associations Opening Comments at 10 (which recommended a 20 percent threshold). The Board also should amend this proposed factor to clarify that the threshold applies to the origin-destination pair of the rate being challenged; (2) base any such threshold on 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 over a five-year period; and (3) 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 that transcend 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 ability to receive truck deliveries or the timeliness required for delivery of the shipment to the customer's destination.

For each of these *prima facie* factors, rail carriers that object to the complainant's filing would have ample opportunity under the proposed NOPR to contest the rebuttable presumption in their reply comments.

F. *No Practical Buildout Option*

The NGFA continues to support the Board'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 a combination of issues)." This provides sufficient flexibility for the complainant to outline its case, while still providing railroads with the option to rebut the complainant's rebuttable presumption in reply comments.

G. *Mechanical and Procedural Issues*

The NGFA also reiterates its recommendation that the Board clarify the point at which it will determine 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. The NGFA recommends that the Board clarify that the defendant railroad has a specific time period to contest the complainant's use of the streamlined approach.

III. **Arguments by Rail Carriers Urging the Board to Add Complexities and Additional Hurdles Would Undermine the Streamlined Market Dominance Approach and Should be Rejected**

The NGFA also offers the following comments on several proposed changes proffered by the AAR and several of its Class I carrier members. In general, the NGFA finds that most of the rail carriers' proposals amount to an obvious attempt to undermine the salutary goals of the Board in proposing a streamlined market dominance test and would not provide any substantive improvements to the proposal. They should be rejected by the Board in the final rules implementing the streamline market dominance test.

A. Limiting Use of the Streamlined Procedures

The NGFA opposes the Class I railroads' recommendation to limit use of the streamlined market dominance procedures to (1) small value cases heard under simplified procedures; and (2) cases with fewer than 10 origin-destination pairs. AAR Opening Comments at 6-7. There is utterly no basis for such a restriction. NGFA believes, as the Board has proposed, that the streamlined methodology should be available for use to any complainant filing a rate case, with the complainant having the option to utilize the non-streamlined procedure if that is most conducive to meeting the burden of demonstrating market dominance.

B. Adding Conditions to Streamlined Process Criteria

The NGFA strongly opposes proposals from the AAR and Class I railroads to add factors or restrictive conditions to the streamlined market dominance process. One example is the AAR's proposal to limit use of the process to shippers that have "shipped more than a significant percentage of the commodity at issue to the destination in the case, such as 75 percent over the last five years, to demonstrate a lack of effective competition at destination." AAR Opening Comments at 10. This proposal is disingenuous, as rail carriers by exercising their market power,

can and do price freight rates to discourage movements to various origin-destination pairs, particularly those they no longer wish to serve. AAR's proposal would have the effect of disqualifying an entire segment of agricultural shippers from challenging rates they believed were unreasonable.

The NGFA also strongly opposes similar proposals by the rail industry to add geographic and product competition and other "indirect competition" factors to the streamlined market dominance process. *Id.* at 10. The Board rightfully eliminated geographic and product competition from its market dominance tests long ago, primarily because the Class I railroads abused the associated discovery and evidentiary processes to substantially drive up the costs and complexity of rail rate cases. Reintroduction of product and geographic competition into a streamlined market dominance process – which only creates presumptions that may be rebutted by the defendant railroad – makes no sense.

The AAR attempts to justify a contention that geographic competition is "difficult to measure" by citing an "example" that "the rate for transportation of wheat to a U.S. port for export will be constrained by competition from a Canadian movement of wheat to a Canadian port, because both are competing into the same global marketplace." *Id.* at 13. While perhaps theoretically possible, such competitive constraints do not exist in reality. In fact, the U.S. Department of Agriculture's Agricultural Marketing Service documented the rate-pricing power of Class I railroads in wheat transportation in the June 15, 2017 edition of its ***Grain Transportation Report***, which showed that their wheat and soybean rates are comparatively high relative to other grains, such as corn and sorghum, even over the same origin-destination corridors. USDA concluded by stating that, "Wheat 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.” Grain Transportation Report at 2-3.

USDA’s conclusion is substantiated by NGFA-member companies, which have reported wheat freight rates that are double the rates charged for sorghum from Kansas to the Texas Gulf for the same origin-destination pairs. Further, NGFA members in other freight corridors report that the market dominance of Class I carriers has manifested itself through rate-pricing practices in which carriers set rates for traffic they wish to haul to within a few cents of the point at which the commodity no longer will move by rail. Rapidly escalating freight rates attributable to the exercise of market power by, and the lack of competition between, Class I carriers were documented by the TRB in its 2015 Special Report 318, *Modernizing Freight Rail Regulation*, which found that, “None of the recent developments, all of which would seemingly favor lower rates (i.e., further shipment consolidation, dedicated trains) explains why rates for shipments of grain and oilseeds rose faster than rates for shipments of other commodities except coal. For example, rates for small shipments and for larger shipments of grain and oilseeds increased by more than 80 percent and by nearly 70 percent, respectively, from 2002-2013.” TRB report at 65. That real-world experience contradicts statements made by BNSF and other carriers that “the market determines where the wheat shipments go based on fluctuating market conditions,” that “pervasive competition” exists in rail markets that are “well functioning,” and that they offer “efficient, low-cost rail transportation services for grain shipments.” BNSF Opening Comments at 2, 5, 8 and 12.

The AAR and Class I carriers attempt in their Opening Comments to have the Board add a raft of requirements on complainants to provide evidentiary support, five-year lookback studies, removal of page limit restrictions and other onerous steps to document the absence of market

dominance. AAR Opening Comments at 11. Union Pacific Railroad Company (“UP”) at 7-10 and 13. These proposals should be viewed for what they are – an overt attempt by the Class I railroads to discourage complainants from utilizing the streamlined procedures. The UP is particularly brazen, stating that the “hurdles” within the *prima facie* factors are “too low to be useful, adding that the Agency should “seek empirical evidence and set higher hurdles, so the presumptions better assist shippers in identifying situations in which market dominance is not likely to be contested...(and) developing factors a shipper must overcome with evidence before railroads are even required to respond to complaints.” *Id.* at 12-13.

IV. Conclusion

The NGFA again commends and strongly supports the Board’s proposals to implement a streamlined market dominance approach for rail rate cases, and respectfully requests that the Board proceed to promptly issue final rules for such a process taking into consideration the comments submitted herewith.

Respectfully submitted,



Randall C. Gordon
President and Chief Executive Officer
National Grain and Feed Association
Suite 500 1400 Crystal Drive, Suite 260
Arlington, VA 22202
rgordon@ngfa.org
202-289-0873



Thomas W. Wilcox
GKG Law, P.C.
1055 Thomas Jefferson St.,
Washington, D.C. 20007
twilcox@gkglaw.com
202-342-5248

*Transportation Counsel for the National Grain and
Feed Association*

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