



**Summary of Teleconference Meeting
Between the National Grain and Feed Association (NGFA)
and Surface Transportation Board (STB) Vice Chairman Martin Oberman
on Final Offer Rate Review (FORR) (EP 755)**

July 8, 2020

STB Attendees:

- Martin Oberman, STB Vice Chairman
- Ellen Erichsen, Attorney-Advisor

NGFA Attendees:

- Gary Devlin, Senior Director, Transportation, Ag Processing Inc., Omaha, NE
- Randy Gordon, NGFA President and CEO
- Tom Wilcox, NGFA Transportation Counsel and Partner, GKG Law, PC, Washington, DC

NGFA opened the discussion by commending the Board for issuing the final offer rate review (FORR) proposed rule and indicating its continued strong support for the Agency finalizing the proposed rule as soon as practicable. NGFA reiterated the importance to agricultural shippers of the Board implementing a rate-challenge procedure that is accessible, streamlined, timely and cost-effective – features that are inherent in FORR – given the changing origin-destination pairs and market supply/demand fluctuations that characterize agricultural markets. NGFA also briefly reviewed the aspects of FORR that it found most appealing to grain and agricultural shippers, and noted that it had made several suggestions for possible improvements to the proposed rule in its Opening and Reply Comments.

Vice Chairman Oberman then asked for NGFA's views about the possibility of utilizing STB's Voluntary Arbitration System to adjudicate freight rate complaints, and what modifications might be needed to have it be an acceptable method of alternative dispute resolution. He noted that the Canadian National Railway (CN) had proposed such an approach in lieu of FORR, and that representatives of several other Class I railroads had recommended consideration of a similar approach.

NGFA responded that it believed strongly that both an FORR and an arbitration-based approach had merit and could and should operate side-by-side to provide shippers with recourse to challenge rates they deem unreasonable and noncompetitive. NGFA said it believed it was not an "either/or" choice, and that there was a need for both FORR and a truly accessible and workable arbitration approach. In addition, NGFA noted the importance of arbitrators utilizing the FORR's flexibility in allowing shippers to present cases using market-based factors that best demonstrate their case, as well as adhering to the Board's streamlined market dominance test and revenue-adequacy constraint once those proposals are finalized.

NGFA noted that shippers and carriers can arbitrate rate disputes under its current Rail Arbitration System, but that doing so is not mandatory and both parties would need to agree to do so. NGFA said no rate arbitrations have been brought before NGFA. Further, it said it had approached several of the Class I railroads over the past five years or longer to explore creating compulsory rate arbitration within NGFA, and that only the BNSF Railway has been receptive to even discussing the possibility.

NGFA also described the procedures and transparency that are inherent features of its Rail Arbitration System, which has been in existence since 1998 and includes the publication of decisions that outline the case; the award made (if any); a description of the reasoning arbitrators used in reaching their decision, and the names of the arbitrators (which fosters accountability). NGFA noted that 34 rail arbitration cases had been submitted under its system since 1998, with 18 of those resolved by the parties prior to issuance of a decision. NGFA maintained this demonstrates that merely having access to an accessible efficient regulatory process like FORR and a legitimate alternative-dispute-resolution forum fosters business-to-business discussions for resolving differences.

Vice Chairman Oberman also asked NGFA about its recommendation that the Board provide additional guidance on FORR to assist shippers who are considering bringing a case. NGFA responded that additional articulation about the application of the National Transportation Policy tenets contained in the Staggers Rail Act of 1980, as well as further explanation on the meaning of the Long-Cannon factors would be useful.

Vice Chairman Oberman also inquired about the suggestion of the Union Pacific Railway, which was supported by NGFA, that the Board be allowed to reject both the plaintiff shipper and defendant carrier final offer rates if it found them both to not meet the statutory and other criteria of the proposed rule. There was discussion on whether the Board would, in practice, be faced with such choices under the FORR structure. In this regard, NGFA noted that under the FORR proposal, the failure of the complainant to meet its burden of proving market dominance and that the rate at issue is unreasonable would mean dismissal of its case in any event, regardless of what the railroad submitted.

NGFA also signaled its continued support for the concept of allowing plaintiff shippers to bring cases seeking higher than the proposed \$4 million relief over two years, provided some reasonable additional time for discovery was provided.

NGFA also discussed in some detail the statutory authority and solid legal grounds it believes the Board has to implement FORR.

The meeting concluded with NGFA offering to provide a summary of the rail arbitration cases that have been considered under its system, as well as samples of several of the decisions rendered.