



**National Grain
and Feed Association**

www.ngfa.org

1400 Crystal Drive, Suite 260
Arlington, VA 22202
Phone: (202) 289-0873

301003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket EP 765

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**JOINT PETITION FOR RULEMAKING TO ESTABLISH AN ALTERNATIVE
VOLUNTARY ARBITRATION PROGRAM FOR SMALL RAIL RATE DISPUTES**

**REPLY OF
THE NATIONAL GRAIN AND FEED ASSOCIATION**

The National Grain and Feed Association (“NGFA”) respectfully submits this Reply to the Joint Petition filed on July 31, 2020 with the Surface Transportation Board (“STB” or “Board”) by five Class I railroads to establish a voluntary “Small Case Arbitration Program” to exist alongside the Board’s current voluntary arbitration program established under 49 C.F.R. Part 1108.

NGFA supports the Board commencing a rulemaking proceeding on the Joint Petition and the proposals it contains, but as modified to include the suggested changes contained herein, ***provided, however***, that doing so does not delay the STB’s promulgation of a final rule implementing the Final Offer Rate Review (“FORR”) procedure for setting maximum reasonable rail rates.

NGFA acknowledges it was approached by, and had a series of initial discussions with, representatives of the five Class I railroads prior to their submission of the Joint

Petition on the concept of establishing separate rules within the STB's existing voluntary, binding arbitration regulations as a potential way to provide an additional mechanism for rail carriers and their customers to resolve rate disputes. Those discussions have been constructive and conducted in good faith, but ultimately have not been successful thus far in achieving consensus between the railroads and NGFA on the railroads' proposal. Indeed, on at least two major issues discussed later, the existing differences are significant and perhaps insurmountable.

However, the inability of NGFA and the railroads to achieve consensus on all aspects of their proposal should not be interpreted as NGFA objecting to the Board commencing a rulemaking in response to the Joint Petition. NGFA herein summarizes the elements of the Joint Petition it believes merit consideration, as well as those NGFA believes must be modified. However, in doing so, NGFA does not view an arbitration approach as a substitute – or in any way as a replacement – for the Board proceeding with all due dispatch to finalize its proposed rules to establish FORR. As proposed, FORR is a positive attempt by the Board to provide agricultural and other rail customers with a streamlined, more workable, timelier and more cost-effective approach to challenge rail rates they believe are unreasonable or unlawful. FORR also has potential merit in providing a necessary regulatory backstop available to rail users, in addition to any arbitration approach, to test rail rate reasonableness. NGFA believes the two processes – FORR and rail rate arbitration – can be structured in a way to coexist and complement one another.¹

¹ NGFA believes there is a statutory imperative under the Surface Transportation Board Reauthorization Act of 2015 (P.L. 114-110) for the STB to establish a simplified and expedited method for determining the reasonableness of rail rates, as mandated under the conditions specified in Section 11 of P.L. 114-110.

With respect to the Joint Petition itself, NGFA in this Reply: (1) reiterates its long-standing belief in, commitment to, and support of arbitration to resolve commercial disputes, including with railroads; (2) cites NGFA's continuing major concerns with the unconditional waiver from FORR that the Joint Petition insists must be granted to any Class I railroad enrolling in the Small Case Arbitration Program, as well as the Joint Petition's proposal that all decisions rendered under the arbitration approach generally be subject to strict confidentiality; (3) apprises the Board about the elements of the Joint Petition NGFA believes have merit for agricultural shippers that constitute its membership; and (4) provides several additional recommendations NGFA believes are reasonable and would improve, strengthen and be essential to any successful rail rate arbitration program developed by the Board. Finally, NGFA would have no objection to the Petitioners submitting a reply to this Reply and those of other stakeholders to inform the Board whether the railroad parties would be agreeable to certain suggested modifications to the Joint Petition, as well as whether consideration and adoption of those changes would result in their electing not to participate in the Small Rate Case Program if modified in certain respects.

I. Identity and Interest of NGFA

Established in 1896, NGFA consists of more than 1,000 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. NGFA also consists of 33 affiliated State and Regional Agribusiness Associations; 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.

NGFA has an overriding interest in this matter given its extensive involvement in the Board's various proceedings designed to devise a workable approach to enable agricultural shippers to challenge unreasonable rail rates, including NGFA's 2014 submission of an innovative new Agricultural Commodity Maximum Rate Methodology for resolving rail rate disputes involving agricultural products in EP 665-1, as well as its extensive interaction with the Board in attempts to improve the agency's rail arbitration system.

II. NGFA's Belief In, and Commitment To, Arbitration

The NGFA and its member companies place tremendous value on having access to effective and workable mechanisms to resolve business-related disputes, as evidenced by the existence of its Arbitration System for resolving commercial disputes involving grain, feed and grain products that has been operated by NGFA since shortly after its initial founding nearly 125 years ago. NGFA's system also includes Rail Arbitration and Mediation Rules crafted and supported by NGFA-member rail shippers and receivers and rail carriers, which took effect in 1998. The Rail Arbitration Rules, which were described at length in NGFA's statement submitted in EP 699 on October 20, 2010, are perceived widely by both rail carriers and rail users to be successful and working well. Indeed, all seven Class 1 railroads, as well as several of the principal regional and shortline railroads, are parties to NGFA's Rail Arbitration and Mediation Program. In that same proceeding, NGFA recommended ways it believed the Board could improve its existing rail arbitration procedures.

NGFA's experience has been that merely having access to efficient, workable, timely and cost-effective dispute-resolution processes, whether they be regulatory or

alternative dispute resolution, promotes business-to-business discussions that frequently leads to successful resolution of disputes between carriers and their customers. We believe that potential exists with FORR and a properly structured rail rate arbitration program that operate side-by-side.

III. NGFA's Major Unresolved Concerns with the Joint Petition

As indicated previously, NGFA has two major, overriding concerns with the Joint Petition, as submitted. Those concerns are as follows:

- **Total “Waiver” from FORR for Rail Carriers Enrolling in the Small Case Arbitration Program:** NGFA has major concerns over the Petitioners’ proposal that a railroad could withdraw from the Small Case Arbitration Program if the Board adopts a final rule implementing FORR that does not exempt such railroads’ rates from being challenged under those procedures. Joint Petition at 16-17, 26 and Appendix A at 4. It is NGFA’s understanding that this aspect of the Joint Petition, combined with the Petitioners’ statement that they would agree to participate in the Small Case Arbitration Program for five years, would remove FORR as an option for any rail user to test the reasonableness of the participating railroads’ rates for the duration of the five-year period. NGFA further understands the Class 1 railroads’ position that they will refuse to support or enroll in rail rate arbitration as presented in the Joint Petition if their requested FORR waiver is not granted.

As stated previously, NGFA’s members generally do not support an arbitration program that would eliminate the ability of a rail shipper to file a formal complaint to test the reasonableness of rail rates using any of the Board’s legally available rate-reasonableness methodologies. NGFA, therefore, has

tried to think creatively about ways to rectify what it believes is a significant deficiency in the Joint Petition while still addressing the railroads' concerns. In this regard, one option might be to stipulate an initial duration of two to three years for railroads' enrollment in the Small Case Arbitration Program ***provided, importantly,*** that this initial term is coupled with a binding commitment from the Board to conduct an assessment of the arbitration program, including by soliciting comments from stakeholders, to determine whether it is working as intended and should be continued, modified in some manner, or revoked and the carrier waiver from FORR removed. Another option might be to require a rail customer to pursue its initial rate case against a carrier through arbitration instead of FORR, but thereafter give the customer the option to utilize either FORR or arbitration for any succeeding rate cases. Yet another option would be to allow a railroad voluntarily to decline the waiver from FORR, which at least one Class I railroad indicated it would be willing to do according to its summary of an *ex parte* discussion with the STB Chairman and her staff on FORR.

If the arbitration process works as well as intended, NGFA's anticipation is that rail customers would be inclined to continue utilizing it. Further, any of the aforementioned options – a “shorter initial enrollment and mandatory look-back review,” “first rate complaint pursued through arbitration” and/or “railroad foregoing the FORR waiver” – would provide a strong incentive for railroads to be constructive participants in the rate arbitration process, knowing that FORR remains an alternate option accessible to rail customers.

NGFA anticipates having additional discussions with the Petitioners on this aspect of the Joint Petition and would encourage the Board to solicit other

stakeholder input on potential ways to resolve this particularly vexing issue so that any potential final regulations implementing a Small Case Arbitration Program do not have the unfortunate result of Class I railroads declining to opt-in, thereby wasting the overall effort. NGFA also wants the Board to adopt final FORR rules with respect to a waiver that avoid, above all, another “Back-to-the-Future” scenario in which rail users, particularly agricultural and smaller shippers, again find themselves without access to a workable approach to effectively resolve rate disputes with their carriers if a rail rate arbitration approach ultimately does not prove successful.

- **Confidentiality of Arbitration Decisions:** The Joint Petition also generally proposes that all Small Case Arbitrations “would be confidential to the maximum extent possible.” Joint Petition at 16. This would mean that only a limited summary of certain enumerated aspects of the arbitration case would be published and publicly available in the form of a quarterly report posted by the Board. *Id.* Further, if a decision was appealed to the Board, the only public document would be a redacted version of the final decision on appeal.

This degree of confidentiality is the antithesis of NGFA’s transparent, public Arbitration System, which features published and publicly available decisions that include: (1) the names of the parties involved in the arbitration case; (2) a general description of the case; (3) the rationale and reasoning used by the arbitrators in reaching their decision; (4) the award, if any; and (5) the names of the arbitrators. Each of these public features enhance accountability and integrity of the process. The Joint Petition’s demand for confidentiality of rate arbitration decisions also is a marked departure from the Board’s own existing voluntary arbitration program (EP 699), which requires the publication

of arbitration decisions, after redacting all proprietary and confidential business information – which is appropriate. The Board rightfully recognizes public arbitration decisions are in the public interest.

NGFA's experience has been that the prospect of a public decision often provides a significant incentive for the involved parties to settle the dispute themselves, often prior to the substantive start of the arbitration process. NGFA believes the issue of confidentiality of rate arbitration decisions also would benefit from stakeholder comments and further replies from the railroad filers of the Joint Petition on whether a summary of certain aspects of such decisions should be made public.

Finally, arbitration decisions rendered under NGFA's Arbitration and Rail Arbitration Systems have no precedential value, and NGFA does not object to the Petitioners' proposal that the decisions rendered under a Board-established rate arbitration process be accorded the same non-precedential treatment.

IV. Elements of the Joint Petition that NGFA Believes Have Merit for its Members and Agricultural Shippers

From the perspective of its agricultural shipper member companies, NGFA generally concurs with the following aspects of the Joint Petition, which closely mirror the provisions proposed by the Board in FORR:

- **Application, Eligibility and Rate Relief:** NGFA does not object to the proposed cap on rate relief of \$4 million over a two-year period, indexed for inflation using the Consumer Price Index using 2020 as the base year. However, NGFA believes reconsideration of this cap should occur for consistency's sake if a different one is adopted by the Board in its FORR final rule. NGFA also does not object to the Joint Petition's proposed maximum

one-year rate prescription, with reparations for past overcharges, or a combination of the two based upon the preference of the rail customer that successfully challenges a rate.

- **Arbitration Initiation and Mediation:** NGFA generally concurs with the Petitioners’ proposed procedural process for submitting an arbitration case. However, to further expedite the process and in anticipation that the rail customer plaintiff and the defendant carrier already will have engaged in significant negotiations *long before* considering the filing a case, NGFA recommends that the mediation process be limited to 30 days (not “for at least” 30 days), and that the parties be allowed to agree by mutual consent to waive mediation altogether. Joint Petition at 11. NGFA also proposes that the Board apply its existing practice of liberally granting requests to extend the initial mediation period if both parties believe such an extension would be beneficial in reaching an agreement.
- **Arbitration Panel Selection:** The Joint Petition’s proposal on the selection and payment of arbitrators, and the selection of replacement arbitrator(s), is not objectionable to NGFA. However, we do note that the STB would need to concur with having the Board Chairman adjudicate “for-cause” objections over the arbitrators selected by the parties, a feature of the Joint Petition that NGFA supports as being extremely important and necessary.
- **Procedural Schedule and Discovery:** NGFA believes the Joint Petition’s proposed procedural schedule, limits on discovery requests and interrogatories, and the proposed ban on depositions are reasonable and could help expedite a rate arbitration process.

- **Market Dominance Determination:** NGFA supports the Joint Petition’s utilization of the streamlined market dominance test as finalized by the Board in EP 756. But NGFA believes a shipper also should have the option under Small Rate Arbitration to instead utilize the non-streamlined market dominance approach if it does not believe it can meet the criteria for a streamlined determination. Regardless of which market-dominance test is used, NGFA strongly supports the Joint Petition’s prohibition on the arbitrators considering product and geographic competition and from applying the “limit price test” used in *M&G Polymers*, both of which unduly would delay, complicate and add to the cost of a rate arbitration case. As correctly stated in its final rule in EP 756, the Board, too, has found that “the time and resources required for parties to develop, and for [the Board] to analyze, whether it would be feasible for a shipper to change its business operations (by changing its suppliers, customers or industrial processes) so as to avoid paying the challenged rate can be inordinate.” Board at 31-32 (in EP 756).
- **Evidence in Rate Arbitration Cases:** NGFA takes no position at this time on the Joint Petition’s proposal that evidence regarding system-wide revenue adequacy (or inadequacy) could not be considered by an arbitration panel to determine rate reasonableness. Importantly, however, NGFA believes that the Revenue-Adequacy Constraint (“RAC”) methodology that originated from *Coal Rate Guidelines Nationwide* is a rate-reasonableness standard that is separate and distinct from the Board’s more recent consideration of a newer Rate-Increase Constraint (“RIC”) methodology that eventually could be adopted in some form by the STB to place limits on a “long-term revenue adequate” railroad’s ability to differentially price its captive shippers’ traffic.

Under the Joint Petition, the adoption of the RIC methodology by the Board likely would be considered by the Petitioners as the creation of “a new rate reasonableness methodology after a shipper or railroad has opted into the program” that would permit a carrier to opt-out of the Small Case Arbitration Program. Joint Petition at 17. NGFA disagrees with the Petitioners on this point, and it believes that if the Board implements new standards utilizing the RIC concept, these standards should be included within the standards available for consideration by complainants and arbitrators in a rail rate arbitration.

V. Additional Provisions NGFA Believes Would Improve, Strengthen and Are Essential to Any Rail Rate Arbitration Process Developed by the Board

Next, if the Board commences a rulemaking proceeding on the Joint Petition (as we recommend), NGFA hereafter offers several preliminary refinements to the railroads’ proposal that it believes should be acceptable to the Petitioners and on which it believes the Board also should request public comment. NGFA summarizes those recommendations here:

- **Rate-Reasonableness Determination:** NGFA appreciates the Joint Petition’s statement that while an arbitration panel would be required to consider the Board’s methodologies for rate reasonableness as required by 49 U.S.C. 11708(c)(3), the Petitioners’ do not believe this means constraining the panel to utilize *only* an existing methodology. Instead, commendably in NGFA’s view, the Petitioners state that arbitrators instead could base their decisions on other approaches consistent with statutory standards (although the Petitioners are adamant that arbitrators be prohibited from basing decisions on a

systemwide revenue-adequacy constraint). Joint Petition at 14.

NGFA would suggest the further addition that the arbitrators also could consider “flexible market-based standards” that include, *but are not limited to*, those contained in the “Agreement to Administer Alternative Dispute Resolution of Rail Grain Rate Disputes” entered into between the BNSF Railway and the Montana Grain Growers Association and Montana Farm Bureau Federation in January 2009. These additional flexible market-based factors include, but are not limited to, such things as: (1) rate levels on comparative traffic; (2) market factors for similar movements of the same commodity; and (3) overall costs of providing the rail service. NGFA believes a more comprehensive list of “flexible market-based factors” that arbitrators could consider during their deliberations, which NGFA, too, will work to identify, could be fleshed out during an ensuing rulemaking on the Joint Petition.

- **Withdrawal from Small Case Arbitration Program:** NGFA also believes the Board should seek public comment on the following recommended changes and clarifications to this section of the Joint Petition:
 - (1) The stipulation in the Joint Petition that the customer of a single railroad could not file more than one case at a time against that carrier should be clarified further to state that another case could be filed against the same railroad once the original arbitration decision has been issued, regardless of whether that original decision is appealed. Joint Petition Appendix A at 5.
 - (2) The Joint Petition should be amended to provide an opportunity for either party to challenge the other’s contention that there has been a “material change” to the arbitration program or to the STB’s existing rate-

reasonableness methodologies, rather than allowing a single party to self-determine such an occurrence. Joint Petition at 17. NGFA suggests the appeal could be made to either a Board-retained administrative law judge or to the STB Chairman.

- (3) The Joint Petition provision that references the Board “creat(ing) a new rate reasonableness methodology” should be clarified to exempt FORR and RIC as being new methodologies. Joint Petition Item (3) at 17.
- (4) Rather than requiring the “immediate dismissal of any arbitration proceeding” for which a final decision has not been rendered at the time either party withdraws from the rail rate arbitration program, NGFA believes that any arbitration case should be completed and a decision rendered once the appointment of the arbitration panel has been completed and the arbitration process has commenced. Joint Petition at 17-18 and Appendix A at 5. NGFA does not believe either party should be penalized by having the other party withdraw from an arbitration case once the parties have completed mediation and begun expending additional personnel and financial resources to resolve the dispute through arbitration.
- (5) The proposal should be clarified to note that, even under the FORR blanket waiver provision proposed in the Joint Petition, rail users still would have the option to pursue, in lieu of arbitration, a rate challenge against defendant carriers enrolled in the Small Case Arbitration Program utilizing one of the Board’s other three existing rate-challenge methodologies – Stand Alone Cost (SAC), Simplified SAC or Three-Benchmark.
- (6) Finally, any rulemaking on the Joint Petition should clarify that any railroad withdrawing from the rate arbitration program immediately would be

subject to having its rates challenged using any of the Board's then-available rate-challenge methodologies, including FORR.

VI. Conclusion

In closing, NGFA appreciates the efforts of the five Class I railroads to collaborate in developing and submitting the Joint Petition to the Board for consideration, as well as this opportunity for NGFA to provide its initial reply. As noted, while it continues to have several significant – and perhaps, insurmountable – concerns over two major elements of the Joint Petition, NGFA nevertheless encourages the Board to initiate a rulemaking in response to the Joint Petition after giving due consideration to the comments contained in NGFA's and other stakeholder's replies. However, NGFA reiterates that it makes this recommendation with the important caveat that initiating a rulemaking in response to the Joint Petition neither detract from nor delay the Board's development and issuance of a final rule implementing FORR.

NGFA appreciates the Board's consideration of its views on this important matter and would be pleased to respond to any questions. NGFA also again reiterates its appreciation to the Class I carriers for proffering the Joint Petition, and for engaging in constructive, good-faith discussions on their proposal.

Respectfully submitted,



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

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Thomas W. Wilcox
GKG Law, P.C.
1055 Thomas Jefferson St., Suite 500
Washington, D.C. 20007
twilcox@gkglaw.com
202-342-5248
*Transportation Counsel for the
National Grain and Feed Association*