



**National Grain
and Feed Association**

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket EP 756

MARKET DOMINANCE STREAMLINED APPROACH

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

ENTERED
Office of Proceedings
September 21, 2020
Part of
Public Record

The National Grain and Feed Association (“NGFA”) hereby respectfully submits this brief Reply to the Petition for Reconsideration filed on August 24, 2020 jointly by the American Chemistry Council, Corn Refiners Association, The Fertilizer Institute, the National Industrial Transportation League and the Chlorine Institute (collectively the “Coalition Associations”), as well as the Supplemental Petition for Reconsideration submitted by the Chlorine Institute, which urge the Surface Transportation Board (“Board” or “Agency”) to reconsider its decision served on August 3, 2020 to implement a Market Dominance Streamlined Approach.¹

NGFA supports, in particular, the Coalition Associations’ and the Chlorine Institute’s petitions with respect to the need for the Board to reconsider the interrelationship between its decision generally to impose a 500-mile *prima facie* threshold for determining whether truck

¹ NGFA understands that this Reply is being submitted after the time allotted for replies to pleadings by the Board’s regulations, but NGFA respectfully asks the Board to accept it into the record of this rulemaking proceeding because it will aid the Board in considering the referenced petitions for reconsideration, and its inclusion in the record will not prejudice any party of record.

transportation is an effective alternative to rail in two respects: 1) circumstances in which there is an absence of other transportation alternatives for movements of shorter distances; and 2) the failure to adequately account for the mileage associated with the common practice of truck drivers to make return trips on the same day as the shipment is delivered from origin to destination.

Identity and Interest of NGFA

Established in 1896, NGFA is the nation's largest and most broad-based agribusiness association. Its more than 1,000 grain, feed, processing, exporting and other grain-related companies 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 proceeding given its strong support for the Board developing a streamlined market-dominance approach so that agricultural rail users can better access their legal right to challenge freight rates they believe are unreasonable. As the Board well knows, if a rail customer is unable to prove a railroad has market dominance over the traffic at issue, it is precluded from bringing a rate case under any circumstance.

Thus, implementing a meaningful and workable streamlined market-dominance approach is a necessary precursor to any of the Board's other commendable efforts to develop a more accessible, streamlined, workable and cost-effective methodology for use by rail customers to challenge unreasonable rates, such as its proposed Final Offer Rate Review process.

I. NGFA Supports and Commends the Board for Its Decision to Institute a New Proceeding on the Relevance of the 500-Mile Threshold to Agricultural Commodity Shipments

NGFA appreciates and commends the Board for its decision to initiate a separate proceeding under EP 756 on its 500-mile *prima facie* threshold for determining if trucking is an effective competitive alternative to rail so as “to further explore...whether various commodity-specific thresholds should be created, including for agricultural commodities,” given the Agency’s “long-standing concern” that its rate-reasonableness review process “is not readily accessible to many agricultural shippers.” Board decision at 15. NGFA looks forward to the Board’s initiating this follow-on proceeding and will participate actively in it.

However, when initiating the pending proceeding, NGFA concurs with the Chlorine Institute that the Board needs to reconsider whether the 500-mile, or hopefully a significantly shorter, threshold should continue to apply if some of the other *prima facie* factors are shown to exist. In particular, NGFA believes the Chlorine Institute makes a compelling argument that a mileage-based *prima facie* factor should **not** apply if a pipeline does not exist as a competitive alternative and truck transportation is not used. Chlorine Institute at 2.

As the Board’s Code of Federal Regulations language implementing the streamlined market dominance approach [§1111.12] currently is structured, *each and every one* of the seven factors is required to be met before the rail customer can make a *prima facie* showing that a carrier has market dominance over the traffic at issue. Thus, whatever mileage threshold ultimately is determined by the Board to be applicable as a *prima facie* factor, it should **not** apply if there is no other effective transportation alternative for the movement at issue.

Similarly, for agricultural shippers, NGFA believes that the Board as part of its upcoming proceeding should be receptive to receiving comment and reconsidering the truck *prima facie* factor of 10 percent by volume of movements subject to the rate at issue for the origin-destination pair over a five-year period, depending upon the ultimately determined mileage threshold. As one example, NGFA believes the petitioners have made a valid argument that consideration should be given to the “substantial investment by the shipper in rail-related equipment or facilities with respect to the movements at issue” that should be considered when weighing whether trucking represents a competitive alternative to rail. *Id.* at 4. That is particularly relevant given that in many, if not most, instances, agricultural shipper investments in rail-related equipment, sidetrack and facilities are demanded by the railroad as a pre-condition for obtaining or retaining rail service.

II. The Board Should Consider Motor Carrier Return Trips within the Highway Mileage-Based *Prima Facie* Factor

Finally, NGFA encourages the Board when instituting its new proceeding on the mileage-based *prima facie* factor to take into consideration the valid argument made by the Coalition Associations concerning the common practice of many shippers, including those transporting agricultural products, that utilize dedicated trucks (frequently shipper- owned or leased) to have drivers make empty return trips to the origin facility or the trucker’s home location on the same day the cargo is hauled to destination. Coalition Associations at 7-8. As pointed out by the Coalition Associations, the Board selected the 500-mile threshold after concluding that trucks are unlikely to provide effective competition in instances where a motor carrier cannot complete a movement in one day, and that a truck typically can transport a shipment up to 500 miles in a single day. Board decision at 11.

Therefore, NGFA supports the Coalition Association’s request that the Board expressly solicit comments on these factors. Coalition Associations at 9. NGFA believes that the Board can and should do so as part of its upcoming rulemaking on commodity-specific distance thresholds.

Conclusion

As always, NGFA appreciates the Board's consideration of its comments, and commends the Agency for its efforts to implement a reasonable streamlined market dominance approach for rail rate cases. NGFA looks forward to participating in the Board's upcoming proceeding to further clarify the issues raised in this Reply.

Respectfully submitted,



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September 21, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2020, a copy of the foregoing Reply of the National Grain and Feed Association was served by email or regular mail on all parties on the official Service List for this Proceeding.



Thomas W. Wilcox