



**National Grain
and Feed Association**
www.ngfa.org

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

301235

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. EP 763

**MONTANA RAIL LINK, INC. – PETITION FOR RULEMAKING –
CLASSIFICATION OF CARRIERS**

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

ENTERED
Office of Proceedings
November 2, 2020
Part of
Public Record

The National Grain and Feed Association (“NGFA”) respectfully submits these brief comments in response to the Notice of Proposed Rulemaking (“NPRM”) initiated by the Surface Transportation Board (“STB” or “Board”) on September 28, 2020 in response to the Petition for Rulemaking submitted by Montana Rail Link, Inc. (“MRL”) seeking changes to the classification of freight rail carriers. Specifically, MRL petitioned the Board to increase the current revenue threshold that determines whether a freight railroad is classified as a Class I carrier to \$900 million (in 2019 dollars) compared to the current \$504,803,294 (as adjusted for inflation).

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.

Many NGFA-member companies served by rail have facilities located on lines operated by Class II and III railroads. Class II railroads are becoming increasingly larger in their size and geographical scope. They are vitally important to the transportation of grains, oilseeds and their derived products to domestic and export markets through their interchanges with Class I carriers. Therefore, NGFA has a direct interest in the Board's classification of Class II and III carriers.

I. NGFA Does Not Oppose the Proposal to Increase the Revenue Threshold for Class I Freight Railroads

Subject to its subsequent observations in Section II, NGFA does not oppose increasing the Class I revenue threshold to \$900 million for freight railroads. In addition, NGFA notes that the MRL petition is supported by its Montana affiliate – the Montana Grain Elevator Association.

As MRL stated, being categorized as a Class I carrier would require that it submit accounting financial and regulatory reports to the STB, which it estimates would cost "at least \$150,000 annually," plus the costs associated with converting its accounting system, training employees, and maintaining and recording the reports. NPRM at 3. But to NGFA, even more important is MRL's contention that being classified as a Class I railroad would make it ineligible for shortline rehabilitation tax credits, of which it said it receives \$3 million annually to invest in its infrastructure. In addition, while not referenced specifically in the NPRM, NGFA understands that being classified a Class I carrier would cause MRL to lose its eligibility to participate in the Federal Railroad Administration's Railroad Rehabilitation and Infrastructure ("RRIF") Express Program that provides funds to Class II and III carriers to repair tracks, many located in rural areas.

MRL also noted that its reclassification as a Class I carrier would make it ineligible to participate in the Railroad Industry Agreement, which was established in 1998 and outlines ways Class I and shortline carriers are allowed to collaborate to ostensibly resolve issues concerning car supply, service quality, routing and interchange requirements.

As such, NGFA generally agrees with the Board's statement, that after reviewing MRL's petition, "it does appear that regional railroads, such as MRL, even with revenues approaching the current threshold, function more like significant Class II carriers and do not possess the comparative attributes (e.g., operational characteristics) of Class I carriers." NPRM at 4. NGFA also concurs with the STB's statement that, "[m]oreover, MRL provides a persuasive argument that the benefits of certain Class II carriers becoming Class I carriers under the Board's existing revenue thresholds would not outweigh the burdens that would be imposed on the newly classified carriers." *Id.* at 5.

Finally, NGFA also supports the Board's proposal to retain the current revenue threshold for Class III carriers as being \$40.4 million or less, calculated in 2019 dollars and indexed for inflation.

II. The Board Should Be Cognizant of the Increasing Size, Revenues and Regional Dominance of Class II Railroads When Applying Freight Rail Oversight and Regulation

Notwithstanding the foregoing, MRL is one of the largest U.S. Class II railroads, operating more than 930 route miles of track in Montana and Idaho between Billings, MT, and Spokane, WA. Approximately 23.5 percent of MRL's traffic volume is grain. MRL interchanges with, and is a *defacto* extension of, the BNSF Railway Company ("BNSF"), deriving approximately 84 percent of its total revenue from traffic interchanged with BNSF and through "ancillary services" it provides to its Class I partner. And while it is true that the average revenues of a Class I railroad

dwarf those of a Class II carrier, it also is true that MRL's total revenues in 2018 were nearly \$400 million, which greatly exceeds that of most other Class II railroads. Petition for Rulemaking at 7.

Moreover, as with many Class II railroads today, MRL is a significant regional carrier that has a virtual monopoly on all rail traffic in the state of Montana, and it often exercises that market power with its customers in a manner not dissimilar from Class I carriers. As Class II carriers continue to increase their size, geographic reach and revenues, the latter of which would be permitted under the NPRM, NGFA believes the STB should be vigilant to also adjust its regulatory oversight and standards that apply to the practices and rates established by such railroads.

In particular, NGFA believes that simplified standards being developed by the Board for rail customers to challenge unreasonable rail rates – such as the Final Offer Rate Review (“FORR”) process – should apply to Class II railroads. As NGFA observed in its comments in EP 755, the basic fairness of the proposed FORR standards and the simplicity and flexibility of the proposed processes are conducive to applying it to Class II and Class III railroads without the burdens to shortline railroads that the Board has identified in its other rate-challenge methodologies.

In addition, notwithstanding MRL's complaints about the cost of submitting data to the Board, NGFA believes the Board should examine whether to require larger Class II railroads like MRL to submit data sufficient to enable rail customers to analyze whether to bring a rate challenge under the STB's three-benchmark methodology. This methodology currently cannot be used to challenge the reasonableness of a Class II railroad's rates even though the size and scope of the railroad's system could lend itself to using a rate-comparison methodology to test the reasonableness of its rates if the Board had sufficient data. Moreover, the Board in EP 711, *Reciprocal Switching*, requested comments on whether the Board should extend the rules governing reciprocal switching under 49 U.S.C. §11102 to include Class II and III carriers. NGFA believes that as the Board potentially revisits adopting rules governing reciprocal switching in EP

711, it seriously should consider applying them to at least Class II railroads.

Put simply, NGFA believes that while there are good policy reasons for the NPRM, the Board needs to guard against exempting Class II railroads, in particular, from prudent regulatory oversight and standards as it increases the revenue threshold under which they are allowed to retain their Class II status.

Conclusion

As always, NGFA appreciates the Board's consideration of its comments, and would be pleased to respond to any questions it may have.

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



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*

November 2, 2020