



**National Grain
and Feed Association**

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. EP 765

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

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

The National Grain and Feed Association (“NGFA”) respectfully submits its Opening Comments to the Surface Transportation Board (“Board” or “STB”) in response to the Notice of Proposed Rulemaking (“NPRM”) served in this Docket on November 12, 2021. The NPRM sets out proposed regulations that would establish a voluntary “Small Rate Case Arbitration Program” to exist alongside the Board’s current voluntary arbitration program established under 49 C.F.R. Part 1108. The impetus for the NPRM was a Joint Petition for Rulemaking to Establish an Alternative Voluntary Arbitration Program for Small Rail Rate Disputes filed on July 31, 2020 by five Class I railroads.¹

¹ Canadian National Railway Company, CSX Transportation, Inc., the Kansas City Southern Railway Company, Norfolk Southern Corp., and Union Pacific Railroad Company (collectively, Joint Petitioners).

I. Identity and Interest of the NGFA

The NGFA, established in 1896, consists of more than 1,000 grain, feed, processing, exporting and other grain-related companies that operate more than 8,000 facilities handling 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 27 affiliated State and Regional Grain and Feed Associations and is co-located and has a strategic alliance with the North American Export Grain Association, and 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, as well as its extensive interaction with the Board in attempts to improve the agency's rail arbitration system.

II. Introduction

In its comments on the Joint Petition filed in this Docket on August 20, 2020 the NGFA supported the Board commencing a rulemaking proceeding on the Joint Petition and the proposals it contains, subject to several suggested modifications submitted on behalf of the NGFA's members. The proposed modifications were in part the outcome of a series of initial discussions between NGFA and representatives of the five Class I railroad petitioners prior to the Joint Petition being filed. As a general matter, therefore, NGFA is supportive of the Board issuing the NPRM, and the NGFA is pleased that the proposed regulations for the voluntary small case arbitration program reflect that the Board gave serious consideration to NGFA's suggestions and incorporated some of them into the NPRM. However, the NGFA believes that there are several aspects of the proposal that require additional modifications to

make it useful for the NGFA's members, which suggestions are set out in these Opening Comments.

Moreover, the NGFA reiterates that it 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 the Final Offer Rate Review (“FORR”) procedure for smaller rate cases. 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.

For these reasons, the NGFA strongly disagrees with the announcement in the NPRM that the Board is deferring further action on finalizing the FORR rules, and that the Board might even choose to not finalize those rules if it adopts final regulations in this proceeding.² NGFA implores the Board to proceed with publishing final FORR rules in EP No. 755, and even prioritizing issuing final FORR rules over final rules governing a Small Rate Case Arbitration Program. The decision to defer appears to be due in large part to the threats from the Joint Petitioners that there will be immediate legal challenges to FORR, which challenges the Board seems to believe it would stave off by granting the Petitioners' demand that they and other Class I railroads be exempted from FORR (or the threat of FORR) for five years.³ The NGFA respectfully disagrees with this approach, as it believes both FORR and a modified arbitration program should be in place. Additionally, the Joint Petitioners have already signaled their displeasure with the NPRM because it crosses one or more of the “red lines” they drew in the sand in

² NPRM at 12, 14.

³ *Id.* at 9. The NGFA notes that the railroads have not pledged to refrain from appealing a final decision adopting FORR even if they are exempted from the rules through the adoption of an small rate case arbitration program that meets their approval.

their Petition. This raises the possibility that, unless the Board retracts its proposed modifications to the Petitioners' proposal, the Class I railroads will refuse to voluntarily participate in the final version of the program. If so, and the Board has not also finalized the FORR rules when it issues its final rules in this proceeding, then this will further prolong the delay of adopting much needed modifications to the Board's rate reasonableness rules, particularly for smaller disputes. For these reasons the NGFA implores the Board to finalize the rules in FORR either before or contemporaneously with the issuance of any final rules in this proceeding.

III. NGFA's Comments on the NPRM's Proposals and Rationales

A. Waiver from FORR as a Condition for Agreeing to Arbitrate

In its comments on the Petition, NGFA expressed its members' "major concerns" over the Joint Petitioners' proposal that a railroad could withdraw from the small rate case arbitration program if the Board adopted a final rule implementing FORR that does not exempt such railroads' rates from being challenged under those procedures for five years.⁴ 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. However, the NGFA favors arbitration to resolve disputes. The NGFA, therefore, offered a potential alternative approach to the waiver issue, namely "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."⁵

⁴ Joint Petition at 16-17, 26 and Appendix A at 4.

⁵ NGFA Comments on the Joint Petition at 6 (emphasis in original). NGFA also suggested 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

In the NPRM the Board has proposed a “programmatic” structure where all the Class I railroads would commit to voluntarily participate in the small rate case arbitration program for a period of no less than five years, subject to earlier termination under certain defined circumstances. In return, each Class I railroad would be exempt from having any of its rates challenged under the FORR methodology in the event the STB decides to finalize the regulations. The participation and exemption would be subject to (1) certain withdrawal rights; and (2) an evaluation of the program after a period not to exceed three years after the program went into effect.

As for the evaluation period, proposed section 1108.32 would require the Board to conduct an assessment of the arbitration program “not later than three years after the start of the program.” This review is in part responsive to NGFA’s suggestion above, but the proposal differs from NGFA’s proposal in several critical respects. First, the NGFA’s suggestion was for an initial two or three term for the exemption coupled with an evaluation that would determine if the exemption should be extended. This was offered as a potential middle ground from exempting railroads from FORR for five full years. Additionally, NGFA’s suggestion contemplated that the evaluation would be conducted and completed within the initial term. Consequently, the waiver from FORR would expire at the end of the initial two- or three-year term unless it was extended after an evaluation process. This is a critical difference from the NPRM, which appears to be written such that the waiver from FORR is a minimum of five years, and is indeed *indefinite* unless it is terminated after a review that could begin up to three years after the program goes into effect.⁶ If this is the case, then practically speaking, and assuming that the review started at the end of year three, the waiver from FORR could stay in place for five years or more even if the result of the review was to terminate the arbitration program and the exemption. This is not acceptable to NGFA’s

succeeding rate cases. Yet another option would be to allow a railroad voluntarily to decline the waiver from FORR.

⁶ The NGFA recognizes that the exemption could also be terminated by the withdrawal criteria, but the issue of a five-year minimum exemption period remains.

members, and NGFA respectfully requests that sections 1180.32 and 1180.33 be amended to read as follows:

§ 1108.32 Assessment of the Small Rate Case Arbitration Program.

The Board will conduct an assessment of the Small Rate Case Arbitration Program to determine if the program is providing an effective means of resolving rate disputes for small cases. The Board's assessment ~~will occur upon the completion of a reasonable number of arbitration proceedings such that the Board can conduct a comprehensive assessment, though~~ shall be completed not later than three years after start of the program. In conducting this assessment, the Board will obtain feedback from parties that have used, or contemplated using, the arbitration process but elected not to use it. Depending on the outcome of such review, the Board may determine that the arbitration program will continue or that the arbitration program should be terminated or modified at that time.

§ 1108.33 Exemption from Final Offer Rate Review.

Railroads that opt into the arbitration program under § 1108.23(a) will be exempt from having their rates challenged under Final Offer Rate Review. ~~(if in effect)~~. The exemption will terminate (1) upon the effective date of the participating carrier no longer participating in the arbitration program under this part, including, due to withdrawal from the arbitration program, as set forth in § 1108.23(c), or termination by the Board of the arbitration program following an assessment under § 1108.32; or (2) three years after the start of the arbitration program unless it is extended by the Board following the assessment conducted under § 1108.32. Upon termination of the exemption, parties are permitted to challenge a carrier's rate using Final Offer Rate Review. ~~(if in effect)~~.

The NGFA believes that the modifications above would strike a workable balance between the carriers' demands for an exemption from FORR and the strong objections of the NGFA and other shippers and shipper organizations to exempting all of the Class I railroads from challenges to their rates under the FORR methodology for five years. As noted, NGFA believes that, given the lack of any arbitrations under STB procedures to date, an evaluation of whether to continue to the small rate case arbitration program and the FORR exemption should include soliciting input from shippers and shipper organizations who evaluated a potential arbitration but ultimately elected to not proceed.

B. Confidentiality of Arbitration Proceedings and Decisions

In its comments on the Joint Petition the NGFA also objected to the high degree of confidentiality of the arbitration process and outcomes proposed by the Joint Petitioners because it was the antithesis of

NGFA's transparent, public Arbitration System, which features published and publicly available decisions, and it is also contrary to the Board's current arbitration rules. In the NPRM the Board has proposed several provisions regarding confidentiality that modify the Petitioners' proposal regarding confidentiality, but in general the NPRM errs on the side of keeping arbitrations under the program confidential because the Board believes this will make railroads more likely to participate in the program.⁷ The NGFA questions the degree to which this premise is true, since the primary driver for the Petitioners' proposing to modify the arbitration regulations in the first place was to obtain an exemption from having the reasonableness of their rates reviewed under FORR rules and standards. As such, the NGFA believes Petitioners have overstated the degree to which greater transparency would deter Class I railroads from participating in an arbitration program that includes the exemption from FORR they seek. Similarly, the NGFA questions the Joint Petitioners' assertions, also reflected in the NPRM's presumptions, that another reason for acceding to the Joint Petitioners' demands for confidentiality is because arbitration will be more "informal" and not "like litigation."⁸ Given the zeal with which Class I railroads have historically objected to any reduction to their rates under any Board methodology or process, there exists no track record or actual proof that challenging rates in a modified arbitration program will be "informal" or any less rigorous than a case litigated under the FORR regulations as currently proposed. The NGFA believes this is another reason to place an initial term on the FORR exemption and to conduct an evaluation of the arbitration within that time frame.

The NGFA reiterates that its experience with its Arbitration System 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. It therefore repeats its suggestion that the final rules contain a requirement that arbitration decisions under the Small Rate Case Arbitration

⁷ *Id.* at 46.

⁸ *Id.* at 47.

Program should include a decision published on the Board’s website that includes: (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.

While the NGFA believes that arbitration decisions should be public as described above, NGFA supports the Board’s proposals in the NPRM that a decision should have no precedential value, and that it would be inadmissible in other arbitrations.⁹ The NGFA adds that, if these latter two features are part of the final Small Rate Case Arbitration Program, then the Board should be less concerned, in the event of an appeal of an arbitration decision, about (1) “maintain[ing] the confidentiality of the arbitration decision—including the award and origin-destination pair—to the ‘maximum extent possible,’”¹⁰ and (2) adopting “a requirement that the Board pay particular attention to avoiding disclosure that would have an effect on the marketplace.”¹¹ The NGFA submits that the point and objective of an effective regulatory backstop, including arbitration administered by the Board, is to incentivize market participants to enter into mutually acceptable commercial arrangements. Excessive confidentiality can defeat that purpose. The NGFA supports the NPRM’s proposed provisions that would result in some transparency in the event of an appeal but suggests that the Board not base its final rules strictly on a determination of complying with the minimum level of disclosure required by law.

C. Comments on Other NPRM Provisions

As stated above, the NGFA appreciates that the NPRM includes several modifications to the Petitioners’ proposal suggested by NGFA and/or supported by it. These include proposed revisions (1) establishing a relief cap of \$4 million unless otherwise agreed by the parties; (2) refining to the

⁹ NPRM at 51.

¹⁰ *Id.*

¹¹ *Id.* at 50.

requirement that parties engage in mediation; (3) providing that complainants may attempt to demonstrate market dominance utilizing “either the streamlined approach or non-streamlined approach,” and prohibiting arbitrators from considering product and geographic competition and from applying the “limit price test;” (4) proposing to include in an Appendix to the rules the market-based standards for rate reasonableness contained in the Agreement to Administer Alternative Dispute Resolution of Rail Grain Rate Disputes” entered into between BNSF Railway and the Montana Grain Growers Association and Montana Farm Bureau Federation in 2009; and (5) clarifying that participating Class I railroads are exempt only from FORR and not any other Board rate methodology. Each of these improve upon the proposal and make it more likely the NGFA’s members will utilize the program.

In its Petition Comments NGFA took no position on the Joint Petition’s proposal that evidence regarding system-wide revenue adequacy could not be considered by an arbitration panel to determine rate reasonableness. The NGFA concurs with the analysis of this issue set forth in the NPRM and its conclusion that 49 U.S.C. § 11708 requires shippers to be allowed to submit, and arbitrators to consider, certain revenue adequacy evidence.”¹² The NGFA encourages the Board to adopt final rules governing the Small Rate Case Arbitration Procedures that do not contain any general prohibition revenue adequacy evidence or methodologies.

D. Service During and After Arbitration Cases

Finally, the reason that some NGFA members do not pursue formal rate relief or otherwise challenge rail rates before this Board is because they fear retaliation by their serving railroad, on which they are entirely dependent for rail service. To encourage participation in a small rate case arbitration program or stave off apprehension to participate, the NGFA encourages the Board to incorporate the rail service data it collects from the Class I railroads into its evaluation of the Small Rate Case Arbitration

¹² NPRM at 32.

Program. If the analysis of such data before, during, and after an arbitration demonstrate that service to the shipper deteriorates for controllable reasons, the Board should be prepared to take applicable action against the carrier if it is warranted.

IV. Conclusion

In closing, the NGFA appreciates the Board initiating 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 its suggestions on how to improve proposed rules modifying the Board's arbitration procedures are accompanied by the important caveat that the Board's efforts in this proceeding neither detract from nor delay the Board's development and issuance of a final rule implementing FORR.

Respectfully submitted,

Sincerely,



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