

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. EP 733**EXPEDITING RATE CASES**

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

The National Grain and Feed Association (“NGFA”) submits these Opening Comments in response to the Surface Transportation Board’s (“Board”) Notice of Proposed Rulemaking (“NPRM”) served in this docket on March 31, 2017. The NPRM proposes certain changes to the Board’s rate case procedures designed to improve and expedite its existing freight railroad rate-review process.

The proposed rules are the outcome of the Board’s implementation of Section 11 of the Surface Transportation Board Reauthorization Act of 2015, P.L. 114-110, 129 Stat. 2228 (2015) (“STB Reauthorization Act”), which directed the Board, not later than 180 days after the date of the enactment, to “initiate a proceeding to assess procedures that are available to parties in litigation before courts to expedite such litigation and the potential application of any such procedures to rate cases.” 129 Stat. 2228.

This proceeding was commenced on June 15, 2016 with an Advance Notice of Proposed Rulemaking (“ANPR”), which was followed by informal stakeholder input during meetings with Board staff and in formal written comments in response to the ANPR.

I.

IDENTITY AND INTEREST OF NGFA

The NGFA, established in 1896, consists of more than 1,000 grain, feed, milling, processing, exporting and other grain-related companies that operate more than 7,000 facilities and handle more than 70 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. The NGFA also consists of 34 affiliated state and regional agribusiness associations, has a joint operating and services agreement with the North American Export Grain Association, and has a strategic alliance with the Pet Food Institute.

II.

COMMENTS ON COMPONENTS OF NPRM

A. Overview

The stated goal of the proposals included in the NPRM is to “help improve the rate review process and expedite rate cases.” NPRM at 2. The NGFA consistently has supported the Board's efforts to improve and streamline the procedures used to evaluate formal rail rate complaints, most particularly by proposing in June 2014 a new, innovative, objective and comparatively inexpensive rate-challenge methodology – the Ag Commodity Maximum Rate Methodology – to apply specifically to grain and agricultural commodities as part of the Board's proceeding in Docket No. EP 665 (Sub- No.1) *Rail Transportation of Grain, Rate Regulation Review*.

It is in this vein that the NGFA continues its involvement by providing Opening Comments on several of the Board's proposals set forth in the NPRM.

In doing so, however, the NGFA takes this opportunity to once again remind the Board of its firm belief that the Board's current *substantive* rail-reasonableness standards still do not provide meaningful access to challenge unreasonable rates for grain and other agricultural rail shippers.¹ Indeed, it now is approaching *40 years* since the last formal rate case challenging the reasonableness of a railroad rate was filed by a grain or other agricultural commodity shipper at the Interstate Commerce Commission or this Board. It now also is nearly four years since the Board's decision in Docket No. EP 715, *Rate Regulation Reform*, served on July 18, 2013 (*EP 715 Decision*), in which the Board announced that:

Since our simplified methodologies were instituted, no agricultural rate cases have been filed. Yet, as ARC and NGFA note, agricultural shippers continue to voice concerns regarding the level of their rates. We believe it is time to take a fresh look at rate relief procedures available to grain shippers. Within three months of the service of this decision, the Board will open a new proceeding to obtain input from interested parties on grain shippers' ability to effectively seek relief for unreasonable rates, as well as proposals for modifying existing procedures, or new alternative rate relief methodologies, should they be necessary.

EP 715 Decision at 37.

While the Board has, since issuing the *EP 715 Decision* in 2013, examined how it processes rate cases, as well as studied and taken comments on its rate-reasonableness methodologies, the Board still has not adopted substantive changes to any of its three existing rate-challenge methodologies, let alone adopted any changes that address the issues that make the Board's current rate rules inaccessible to and unusable by grain and other agricultural commodity

¹ See, Opening Comments of the NGFA in STB Docket No. EP 665 (Sub - No. 1), *Rail Transportation of Grain, Rate Regulation Review* (filed June 26, 2014) at pages 6-16; Opening Comments of the NGFA in STB Docket No. EP 665 (Sub – No. 2), *Expanding Access to Rate Relief*

shippers. The NGFA once again urges the Board to redouble its efforts to develop and implement meaningful changes to its current rate-reasonableness standards and methodologies that have rendered futile the pursuit of rate-reasonableness challenges by grain and other agricultural shippers.

B. Comments on Certain Aspects of the NPRM

Subject to the foregoing overarching concern, the NGFA offers the following brief comments on the NPRM from the grain and other agricultural commodity shipper perspective in anticipation that such underlying improvements also could be made applicable to what we continue to hope will be the ultimate development of a new and more workable rate-challenge methodology for grain and other agricultural commodities.

1. Pre-Filing Notice and Mediation

While the Stand Alone Cost (“SAC”) methodology is neither appropriate nor usable by grain and other agricultural shippers, the NGFA is not opposed to the Board’s proposal to provide for a pre-complaint period and pre-filing notice for the purposes of parties engaging in mediation prior to the filing of a SAC methodology complaint. *NPRM* at 4.

However, the NGFA believes that the 70 days proposed by the Board for such a mediation process is too long. In the NGFA’s view, by the time any non-agricultural shipper is poised to take the significant step of filing a SAC rate complaint, it already will have engaged in thorough discussions with the defendant railroad and the respective positions of the parties will have become entrenched enough that formal action likely would be required to resolve their differences.

For this reason, the NGFA recommends that the Board’s rules should provide for a mediation period of no more than 45 days, while also providing the option for an extension by mutual agreement of the parties if circumstances warrant. This should be sufficient time to give

the parties one last opportunity to resolve their differences prior to the complaint being filed, with the option to extend the 45-day limit if it appears such mediation could result in a positive outcome.

2. Discovery

The NGFA has no opinion on the Board's decision to not adopt "standardized" discovery requests in SAC cases, and to require a complainant to serve its initial discovery requests with its complaint, given NGFA members' well-documented unfamiliarity with SAC cases and procedures, given their irrelevance to grain and agricultural commodity shipments. *Id.* at 6.

3. Meet-and-Confer Requirement

The NGFA supports the adoption of a requirement in all rate cases that when a party seeks to compel a discovery response, it must certify to the Board that it conferred in good faith with the person or party failing to answer the discovery to obtain it without Board intervention. As the NPRM notes, this is a common requirement in federal court litigation under Federal Rule of Civil Procedure 37. *Id.* at 7.

4. Evidentiary Submissions/Final Briefs

The NGFA supports the NPRM's proposals regarding the staggering of submission of public and highly confidential versions of evidentiary filings three business days apart, as well as the adoption of standardized identifying markers to designate confidential, highly confidential and sensitive security information that would be applied in all rate case proceedings.

The NGFA also supports the NPRM's proposal to limit the length of final briefs in SAC and Simplified Stand Alone Cost ("SSAC") methodology cases to a maximum of 30 pages, inclusive of exhibits. However, the NGFA further recommends that the Board be proactive in tailoring final briefs to "specific issues of concern to the Board" by determining (1) whether final briefs are even needed or desired, on a case-by-case basis, and (2) imposing even shorter page

limits where the issues do not justify a 30-page limit. We make this recommendation because, while potentially helpful to the Board in complex rate cases, final briefs also can undermine the well-established right of a complainant to have the last word in a formal complaint proceeding. Consequently, the NGFA suggests that the final version of proposed §1111.9 (2) should state: “The page limits of final briefs authorized by the Board shall be established on a case-by-case basis and shall in no case exceed 30 pages in length, inclusive of exhibits.”

5. Appointment of Staff Liaison/Technical Conferences

The NGFA supports the NPRM’s proposal to designate a Board-appointed liaison to the parties in all rate cases to provide a broad array of technical and other advice to parties during the pendency of a rate-reasonableness case brought under any of the Board’s three existing rate-review methodologies or any future simplified methodologies that subsequently may be adopted by the Board. *Id.* at 9-10. The NGFA agrees with the Board that increased staff involvement at all stages of a rate-case process could reduce the number of disputes between the parties that are presented to the Board for adjudication. More importantly, given the lack of any grain or agricultural rail rate case filings over the past 36 years, the NGFA believes the proposed staff involvement contemplated by the NPRM, including the establishment of ground rules, issue-specific Board expectations, and a point of contact for questions about the process, could prove to be extremely useful to grain and other agricultural shippers in the event such a case eventually is ever filed.

III.

CONCLUSION

In conclusion, the NGFA continues to implore the Board to revise its substantive rate-challenge standards as they are applied to grain and other agricultural commodity rail shippers.

In the meantime, the NGFA generally supports the various proposals in the NPRM developed by the Board in response to the Congressional directive set forth in Section 11 of the STB Reauthorization Act. The NGFA appreciates the Board's consideration of these Opening Comments.

Respectfully submitted,



Randall C. Gordon
President
National Grain and Feed Association
1400 Crystal Drive, Suite 260
Arlington, VA 22202



Thomas W. Wilcox
Principal
GKG Law, P.C.
1055 Thomas Jefferson Street, Suite 500
Washington, D.C. 20007
(202)-342-5248
Counsel for the NGFA

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