

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 699

ASSESSMENT OF MEDIATION AND ARBITRATION PROCEDURES

Comments of National Grain and Feed Association

I. INTRODUCTION AND BACKGROUND

In accordance with the notice and request published by the Surface Transportation Board (“Board”) on August 24, 2010, the National Grain and Feed Association (“NGFA”) hereby submits the following comments.

NGFA, established in 1896, is a U.S.-based nonprofit trade association that consists of more than 1,000 grain, feed, processing and grain-related companies comprising over 6,000 facilities that handle more than 70 percent of U.S. grains and oilseeds. NGFA-member companies also include about 350 firms with feed manufacturing operations at commercial feed mills and integrated livestock- and poultry-feeding operations. Affiliated with NGFA are 35 state and regional grain and feed trade associations. Activities conducted by NGFA members involve the significant use of rail transportation subject to the Board’s jurisdiction.

NGFA appreciates the opportunity to provide its perspective on the use of alternative dispute resolution, particularly arbitration, as a means of resolving disputes between rail carriers and their customers. NGFA and its members place tremendous value on access to effective and workable mechanisms to resolve such disputes. NGFA has no experience with the alternative dispute resolution processes currently maintained by the Board. However, NGFA does have

significant experience with its own Rail Arbitration System. NGFA Rail Arbitration is designed to offer a practical, inexpensive and timely way for shippers/receivers of grains, oilseeds, feed and feed ingredients, and other grain products to resolve disputes with railroads. NGFA Rail Arbitration has been operational for over 10 years, and it is widely perceived by both rail carriers and rail users as successful and workable. NGFA offers these comments pertaining to its system, focusing upon the features that are more frequently identified as contributing to the system's success, in the hope that NGFA's own experience might be of value to the Board.

II. NGFA'S RAIL ARBITRATION SYSTEM

A. NGFA Rail Arbitration is a collaborative effort between railroads and rail users.

In August 1998, NGFA and all the Class I railroads entered into an agreement that provides for compulsory arbitration of specific types of disputes between railroads and their NGFA-member shipper/receiver customers. Subsequently, a number of regional/shortline railroads also joined onto the agreement. Under this agreement, both railroads and rail users have agreed to be bound by the NGFA Rail Arbitration Rules and NGFA Rail Arbitration decisions while members of NGFA. To date, all of the Class I railroads and numerous shortline and regional railroads, as well as most NGFA-member grain, feed and processing companies, continue to participate.

The system is governed by the NGFA Rail Arbitration Rules, which are maintained and subject to review and amendment by a committee of fourteen persons, who are officers, partners or employees of NGFA-member railroads and rail users. At least seven members of the rules committee must be representatives of railroads. The rules committee must approve any changes to the rules before they may be considered by the NGFA Board of Directors or general membership.

The arbitration committees, which are appointed to decide individual cases, also consist of representatives from both railroads and rail users.

B. The general commitment to arbitrate is voluntary, but it is then binding upon applicable disputes that arise between the parties.

All NGFA Active and Associate/Trading members (which include railroads and most domestic rail users) are covered by and have access to NGFA Rail Arbitration unless they elect to withdraw from the Rail Arbitration System within 30 days of membership approval. Thereafter, Active and Associate/Trading members may withdraw from the Rail Arbitration System with 90-days notice. Originally, NGFA members agreed in advance on an annual basis to arbitrate those disputes subject to the agreement. In 2003, the process was amended to automatically establish rights, obligations and responsibilities under the Rail Arbitration System without the need to annually recommit. NGFA members now have the opportunity to voluntarily withdraw or opt out from the system with 90-days notice.

NGFA Rail Arbitration can be used to resolve any type of dispute where both the railroad and rail user agree to arbitrate after the dispute arises. However, NGFA Rail Arbitration is compulsory for certain types of disputes, including the following: property damage claims arising under or related to a rail sidetrack agreement; application of general car distribution rules that govern so-called “regular tariff” service; application of special car or equipment program rules; leases of railroad-owned land by rail users (with limitations); application of demurrage rules or terms; misrouting of loaded rail cars or locomotives; disputes arising under receipts and bills of lading (such as loss-and-damage claims); transportation contracts between rail users and rail carriers effective under 49 USC § 10709 (unless excluded from arbitration by contract); mishandling of private cars or locomotives; and most disputes involving the reasonableness of published service rules and practices (including demurrage) that otherwise would be subject to

the Board's jurisdiction. Compulsory arbitration does not include the reasonableness of freight rates or demurrage levels.

The list of commodities for which NGFA Rail Arbitration applies is also very broad and inclusive. The extensive list of included grains, oilseeds, feeds and ingredients, as well as other agricultural products, is specifically identified in the Rail Arbitration Rules.

C. The rules and procedures are well defined and established, but the process is relatively simple and streamlined.

NGFA Rail Arbitration is managed within the standard NGFA Arbitration System, which has been in operation since 1896. The entire NGFA Arbitration Rules are contained within 9 pages of a 6" x 9" printed booklet. There are 10 standard rules with a varying number of subparts, mostly providing the procedures for fees, filing of arguments, oral hearings, appeals, appointment of arbitrators, and publication of decisions. The rules are not intended to require attorneys or legal training of any kind, although of course the parties are free to employ attorneys at their choosing. The filings and procedures established in the rules are also relatively informal. Oral hearings and appeals are very infrequent although they are available in every case and the rules provide for them. The NGFA Rail Arbitration Rules, adopted in 1998, supplement the standard NGFA trade arbitration rules.

NGFA Arbitration is designed to resolve claims expeditiously while giving each party a full and fair opportunity to be heard. The complaint generally must be filed within 12 months after a claim arises. The rules then establish specific sequential deadlines for the filing of arguments, challenges to appointments of arbitrators and appeals. Extensions are strictly limited.

NGFA Rail Arbitration cases are consequently designed to be cost-effective. Access to rail arbitration, like non-rail NGFA Arbitration, comes with membership. There is no additional cost for companies electing access to the Rail Arbitration System. If a company becomes

involved in an arbitration case, there is an arbitration service fee that is assessed on the identical basis as in NGFA's non-rail Arbitration System. The fee structure is specifically stated in the Arbitration Rules based on the amount in dispute, ranging from \$400 plus 1% of the claim for claims up to \$100,000 to the maximum fee of \$10,000. There are no additional administrative fees or charges for the arbitrators' services of any kind. The fee covers the entire process unless a party requests an oral hearing or files a post-decision appeal, which are both options in every case. Oral hearings require reimbursement for the out-of-pocket expenses for conducting the hearing by the requesting party. Fees for filing an appeal are based upon the initial fee that was assessed, but are chargeable only to the party pursuing the appeal. Particularly because there are no arbitrators' fees or other costs required beyond the initial filing fee and because the streamlined process enables an efficient use of attorney time, NGFA Arbitration is typically regarded as more cost-effective than other dispute resolution mechanisms.

D. The process facilitates settlement between the parties.

The Preamble to the NGFA Rail Arbitration Rules provides: "In all cases, rail users and railroads are encouraged to make reasonable efforts to resolve matters before pursuing formal dispute resolution procedures."

Of the cases filed under NGFA Rail Arbitration, relatively few go through the entire process and result in an issued decision. Most are settled between the parties within 1-2 months from the time the claim is filed. At this point, only about 1 in 15 cases filed even reaches the phase in which the parties begin to file arguments. NGFA has no details about or means to track potential claims that are settled among the parties before they are filed under NGFA Rail Arbitration. However, NGFA is repeatedly advised by its members that countless potential

claims are settled with arbitration as the backdrop and because it is established among the parties that the alternative is to employ NGFA Rail Arbitration as the governing mechanism.

E. Cases are decided by committees of three arbitrators from the industry; their decisions are written, detailed and made publicly available.

Each NGFA Arbitration case is assigned to a panel of three arbitrators without regard to the amount of the claim or the fee in dispute. Appeals are assigned to a panel of 5 arbitrators in all cases. Critics of arbitration often complain that relying on a single arbitrator increases the potential for incorrect results or even bias and unfairness.

NGFA arbitrators never receive any type of monetary compensation. In the event of an oral hearing, the arbitrators are reimbursed for travel-related expenses, but they receive no other form of compensation or reimbursement under any circumstances. A common criticism of arbitration systems is that paid arbitrators benefit from repeat business so they tend to favor one particular side over the other.

NGFA arbitrators are industry people experienced in the type of trade or transaction involved in the case. They are commercially disinterested with respect to the particular dispute at hand. They are carefully screened by NGFA before they are appointed. The parties have an opportunity to challenge the appointment of an arbitrator for prejudicial or other reasons.

The rules specifically require that arbitration decisions be in writing and include the pertinent facts, conclusions and reasons for the decision. NGFA itself has no authority to require the arbitrators to reverse or modify their decision. Decisions are subject to judicial review under the Federal Arbitration Act and they may be appealed to a separate NGFA arbitration appeals committee. Decisions are also published and distributed to all NGFA members and they are accessible by the public on the NGFA website. As a result, scrutiny of the process from the outside is enhanced and parties who use the system more frequently do not have any advantage

of tracking how cases are decided. NGFA believes that written and publicly accessible decisions promote discipline and integrity by the arbitrators, and serve as an informational guide on assessing or even avoiding future disputes. The transparency also increases confidence in the system and its process both with NGFA-members and non-members that may use the system.

III. CONCLUSION

NGFA submits these comments to the Board to share its perspective and experience regarding the use of arbitration in rail-related disputes in the hope that these may be of benefit as the Board considers its own alternative dispute resolution mechanisms. In particular, NGFA respectfully suggests that the Board consider, as key features for its process, the relative simplicity and built-in balance and transparency that NGFA has found to be of enormous value.

Respectfully submitted,

National Grain and Feed Association

Dated: October 20, 2010