



Before the U.S. Surface Transportation Board

STB Docket No. EP 731

RULES RELATING TO BOARD-INITIATED INVESTIGATIONS

Opening Comments

of

National Grain and Feed Association

July 15, 2016

The National Grain and Feed Association (“NGFA”) submits these comments in response to the Surface Transportation Board’s (“Board” or “STB”) Notice of Proposed Rulemaking (“NPRM”) served on May 16, 2016 to implement rules for investigations commenced on the Board’s own initiative pursuant to the mandate contained in §12 of the Surface Transportation Board Reauthorization Act of 2015, P.L. 114-110, 129 Stat. 2228 (“Act”), codified at 49 U.S.C. §11701(d).

I. Identity and Interest of NGFA

The NGFA, established in 1896, consists of more than 1,050 grain, feed, 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 26 affiliated State and Regional Grain and Feed 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. NGFA Comments on Proposed Rules

A. The Board's New Investigative Authority is a Critical Feature of the Act that Must be Implemented as Broadly and Effectively as Possible

For the NGFA and other organizations that represent companies that ship and receive products by freight rail, the investigative authority mandated under §12 is perhaps the most important part of the Act. Since the STB's creation in 1996, its ability to address potential violations of its governing statute by railroads has been hampered by the restriction in 49 U.S.C. §11701(a) that the agency could begin an investigation "only on complaint." Consequently, the STB has had to rely upon rail shippers and others to bring to light potential statutory violations through the Board's formal complaint processes, thereby incurring the costs and other risks and burdens associated with such inquiries. However, rail shippers and receivers historically have been extremely reluctant to file formal complaints against railroads they are reliant upon or captive to for a variety of reasons explained to the Board in numerous other proceedings, and the absence of formal complaints has hampered the Board's ability to investigate potential violations.

This dynamic most recently was observed during the severe railroad service crisis that occurred in 2013/2014. Although many rail shippers nationwide suffered crippling economic losses from railroad service failures, they did not file formal complaints but still looked to the

Board for relief. However, because of the restriction in 49 U.S.C. §11701(a), the Board was precluded from proactively responding to the service crisis as promptly and forcefully as it perhaps otherwise would have, and instead was limited to conducting public hearings and collecting information in Docket EP 724, *United States Rail Service Issues*. The EP 724 proceeding and its sub-dockets have been extremely beneficial and helpful, but the NGFA agrees with Congress that the service crisis highlighted an inefficiency at the agency resulting from the STB not having “authority to proactively investigate rail issues on its own initiative.” S. Rep 114-52, *Surface Transportation Board Reauthorization Act of 2015, Report of the Senate Committee on Commerce, Science and Transportation on S. 808*, dated May 21, 2016 at 7. §12 of the Act was included to remedy this and other instances in which the Board’s efficiency and ability to respond effectively were impeded.

Given the context and the legislative intent of §12, this new authority needs to be implemented in a manner that enables the Board to freely and efficiently exercise the degree of prudent regulatory authority envisioned by Congress over potentially unlawful freight rail practices – an authority that long has been possessed and been the hallmark of other federal regulatory agencies that oversee commerce. In granting this additional authority to the Board, Congress clearly recognized the need to provide the STB with additional powers to proactively investigate potential statutory violations and to impose corrective actions regarding rail practices and other issues that adversely affect rail shippers and receivers. This new tool provided to the Board is important particularly in providing at least a limited degree of balance to regulatory oversight, and to mitigate the effects of complexity, associated legal and other costs, and potential for retribution that rail customers inherently face when evaluating whether to file a formal complaint with the Agency.

The NGFA recognizes the Act places some restrictions on the latitude the Board has to initiate investigations on its own authority – particularly the requirement that the issues to be investigated must be shown to have “national or regional significance.” Presumably, rail service deficiencies of the kind experienced in 2013/2014 fall within the intended definition of this term, since the previously cited Senate Report specifically mentions them in the context of the new authority. However, the NPRM itself is silent on what other potential rail practices or issues the Board would consider to be “of national or regional significance.” The NGFA suggests that in

either the preamble to the final rule, or the definitions section of the rule, the Board should provide a discussion of the type of rail practices or issues the Board would consider to be of national or regional significance that could trigger the provisions of the new regulations. This type of information would provide useful guidance to parties considering alerting the Board to potential violations qualifying for investigation by the Board.

B. The Final Rules Should Maximize the Board’s Ability to Implement this Important New Authority

The NGFA strongly urges the Board to implement final procedural rules that assist – not impose further hurdles on – freight rail users to demonstrate that a given rail practice or issue has regional or national repercussions, and thereby warrants investigation. Simply put, the Board should err on the side of implementing procedural rules that provide rail users and other parties with ample opportunity to demonstrate that the rail practice or issue involved meets this and other jurisdictional thresholds so the Board is not hampered in utilizing this important new statutory protection provided to freight rail users by Congress.

The NGFA generally concurs with what we think is a workable and timely three-stage process proposed by the Board as the framework for pursuing investigations on its own authority, namely: (1) Preliminary Fact-Finding by the Board’s staff; (2) a Board-Initiated Investigation; and (3) initiation of a formal STB proceeding, if warranted. However, the NGFA does believe the Board needs to amend its proposal in significant ways to provide an important and appropriate degree of public transparency to both the Preliminary Fact-Finding and Board-Initiated Investigation stages, as well as provide for public transparency and accountability if and when deciding not to pursue or to discontinue an investigation.

For instance, the Board proposes in the NPRM preamble that the Preliminary Fact-Finding step (§1122.3) of its investigation framework would involve a “non-public inquiry regarding an issue to determine if there is a potential violation of 49 U.S.C. Subtitle IV, Part A of national or regional significance that warrants a Board-Initiated Investigation.” *NPRM* at 3. The results of the Preliminary Fact-Finding would be used by the Board’s staff in determining whether to close the fact-gathering or request authorization to open a Board-Initiated Investigation and determine if a violation “has in fact occurred.” *Id.* Under this proposed

construct, if the Preliminary Fact-Finding step remained non-public, such an effort by Board staff could begin and end without *any* public knowledge of the inquiry.

Similarly, the NPRM preamble states that the Board-Initiated Investigation envisioned under §1122.4 also “generally would be nonpublic and confidential...in order to protect the integrity of the process and to protect parties under investigation from possibly unwarranted reputational damage or harm.” *Id.* at 4. Again, if the Board-Initiated Investigation remained non-public, it could be terminated without freight rail users or the public being made aware it had been initiated in the first place. Moreover, under the NPRM, even if a Board-Initiated Investigation became public knowledge, “[p]arties who are not the subject of the investigation would not be able to intervene or participate as a matter of right in Board-Initiated Investigations.” *Id.*

Given the previously discussed significant hurdle of demonstrating that a particular issue subject to such Preliminary Fact-Finding or Board-Initiated Investigation is of regional or national significance, the NGFA finds that the Board’s proposal to make these preliminary investigations generally non-transparent to the public to be contrary to Congressional intent, stifling and overly restrictive. Rather than proceeding from a rule that makes all preliminary investigations non-public unless the Board directs or authorizes public disclosure of the activities (Proposed §1122.6(a)(1)), the Board should instead err on the side of transparency, subject to a showing that confidentiality is required and necessary under the circumstances. The NPRM also is insufficient because it provides no criteria or process for a party to ask for the public disclosure of information and activities conducted under §1112.3 and §1112.4, should the existence of a Preliminary Fact-Finding or Board-Initiated Investigation come to light.

In effect, the confidentiality provisions proposed in §1112.6 create a significant barrier that ultimately would necessitate that each alleged potential violation – presumably limited in scope to one or more rail movements involving just a single rail customer – meet the threshold of being of regional or national significance. The NGFA believes instead that the Board staff’s fact-finding and Board-Initiated Investigations should encompass the solicitation of input from other interested and potentially affected freight rail users to facilitate a determination as to whether there is a pattern of similar behavior involving the same or additional carriers that would

indeed constitute a given rail practice or issue meeting the threshold of being of regional or national significance.

For these reasons, the NGFA believes the Board should adopt a mechanism that could strike an appropriate balance between the need for an appropriate level of transparency on the general nature of an alleged issue that potentially warrants investigation during the Preliminary Fact-Finding and Board-Initiated Investigation stages, while still protecting the identity and reputation of the rail carrier and rail user party(ies) involved. Specifically, the NGFA recommends that the Board amend NPRM §1112.3 and §1112.4 to add the step of publishing a *Federal Register* notice, or the “Order of Inquiry/Investigation” described in the NPRM on its website, describing the general nature of the rail practice or issue subject to the Preliminary Fact-Finding and/or Board-Initiated Investigation, with the name(s) of the rail carrier and rail user(s) and specific confidential business information redacted. Within such *Federal Register* or Order of Inquiry/Investigation notices, we believe the Board should, among other things: (1) designate the point of contact within its staff for the Preliminary Fact-Finding action within §1112.3; (2) designate the point of contact for the Board-Initiated Investigation within §1112.4; and (3) solicit similarly confidential input from other freight rail users or parties on whether they have experienced or are experiencing a similar rail practice or issue involving one or more additional railroads, perhaps utilizing the confidentiality process utilized successfully by the Board’s Office of Rail Customer and Public Assistance.

In short, the NGFA believes strongly that the Board needs to provide under both §1112.3 and §1112.4 a transparency mechanism that would enable interested parties to become aware of, and seek to proactively intervene and participate anonymously on a “nonpublic basis,” in investigations the Board may be contemplating – and to do so at the earliest stage possible.

Such a *Federal Register* or Order of Inquiry/Investigation notice procedure – with appropriate confidentiality protections for both the subject railroad(s) and rail user(s) also would assist the Board’s staff in making a determination, given the proposed rule’s language that makes the launching of a Preliminary Fact-Finding under §1122.3 totally discretionary. NPRM at 9.

Further, the NGFA believes that within these rules there needs to be an appropriate degree of public transparency and accountability for the Board to inform freight rail users about

the outcome of investigations of a particular issue that either ultimately are not pursued or subsequently discontinued under §1112.3 and §1112.4, and the general reasoning for the Board or Board staff's decision in that regard. It is troubling, consequential and objectionable that no such transparency is envisioned under the NPRM. Without this modicum of transparency, a rail shipper or group of shippers could devote extraordinary time and resources into preparing and filing a formal complaint against a railroad, only to discover that the Board already had examined the subject matter at issue and found that it lacked merit (at least on a regional or national basis) under the non-transparent provisions of the NPRM.

Further, the NGFA urges the Board to clarify within §1112.4 – consistent with the preamble language in the NPRM – that the Board can initiate a Board-Initiated Investigation on its own authority, regardless of whether it is preceded by a staff-initiated Preliminary Fact-Finding.

Further, consistent with its previously cited recommendations related to increased transparency in providing general information on the nature of issues subject to Preliminary Fact-Finding or Board-Initiated Investigations (e.g., through publication of a *Federal Register* or Order of Inquiry/Investigation notice), the NGFA encourages the Board within §1122.8 to add language to clarify that while “[n]o party who is not the subject of a Board-Initiated Investigation may intervene or participate *as a matter of right* in any such Board-Initiated investigation...,” (emphasis added) this provision does not restrict a party from seeking permission to intervene and participate in a fact-finding or investigation if it can demonstrate it is affected by the potential violation being investigated. Again, the NGFA believes that interventions by similarly affected freight rail users could assist the Board staff and/or Investigative Officers in determining whether the rail practice or issue under potential investigation is indeed of regional or national significance, thereby being a potentially decisive factor in determining whether such an investigation or Formal Board Proceeding ultimately is initiated.

The NGFA believes another troublesome aspect of the NPRM involves its contemplated settlement provisions. The NPRM Preamble states that during Board-Initiated Investigations, the Investigating Officer(s) would be able to engage in settlement negotiations with the parties under investigation and would be empowered to submit any settlement agreement reached by the

parties as part of his or her proposed recommendations to the Board for approval or disapproval. NPRM at 6. While this language is not replicated within the proposed rule itself, the NGFA is concerned this concept – when applied within the overall “nonpublic” approach taken under the NPRM – could adversely affect freight rail users affected by potential statutory violations by railroads. Specifically, as written, the NPRM would empower the Investigating Officer(s) under a Board-Initiated Investigation to first, make a nonpublic determination that a particular rail practice or issue is of regional or national significance and contrary to law, then negotiate a settlement agreement directly with the carrier(s) and party (ies) under investigation, with the outcome presumably affecting the rights of *all* shippers and receivers affected by the alleged violation. However, under the NPRM, these other parties would not have any knowledge of the investigation or the settlement terms. The Board then conceivably could approve the settlement and dismiss the investigation, all out of the public eye and without one scintilla of notice or explanation. Moreover, under the Act, all relief must be prospective. The NGFA finds the settlement concept, when viewed in the context of the overall NRPM, to be disturbingly nontransparent and extremely troublesome, which reinforces the need for the level of transparency being advocated by the NGFA in these Opening Comments.

Finally, the NGFA does support the Board’s proposed rules regarding Investigative Officers involved in Board-Initiated Investigations (§1122.4), and finds the procedural rules and timelines (§1122.5) and provisions regarding the power of persons conducting Board-Initiated Investigations (§1122.9) to be appropriate and consistent with the Act.

C. Conclusion

In closing, the NGFA commends the Board for taking the important step of issuing proposed rules to govern investigations conducted on the Board’s own initiative pursuant to the Act, and urges the Board to consider our recommendations to introduce an appropriate and necessary level of transparency to the process used to determine if such investigations are to be pursued, and similarly provide appropriate transparency and accountability for the outcomes of any investigations that are undertaken or dismissed.

We encourage the Board to develop a final rule as soon as possible so this important protection provided under the Act may be made available to freight rail users. We would be pleased to respond to any questions the Board may have.

Sincerely yours,

A handwritten signature in black ink that reads "Randall C. Gordon". The signature is written in a cursive, flowing style.

Randall C. Gordon
President