



**National Grain
and Feed Association**

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Before the U.S. Surface Transportation Board

STB Docket No. EP 731

RULES RELATING TO BOARD-INITIATED INVESTIGATIONS

Reply Comments

of

National Grain and Feed Association

August 12, 2016

The National Grain and Feed Association (“NGFA”) respectfully submits these reply comments pursuant 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 Reiterates Key Recommendations in its Opening Comments
that Warrant Inclusion in the Board's Final Rule**

After reviewing the statements submitted by other parties in this proceeding, the NGFA wishes to reiterate several core recommendations it made in its opening comments regarding changes that we believe need to be incorporated into final rules developed by the Board to govern its important new authority to initiate investigations of potentially unlawful freight rail practices granted under §12 of the Act.

- First, it is important that the final rules implementing the investigative authority not be constrictive, restrictive or cumbersome so that the Board has the necessary latitude to freely and efficiently exercise the degree of prudent regulatory authority envisioned and granted by Congress under the Act. As noted in its opening comments, the NGFA believes the investigative authority mandated under §12 is perhaps the Act's most important feature for rail customers. See NGFA Opening Comments at 2. 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. If utilized properly, the investigative authority provides at least a modicum of regulatory oversight, a tool long available and utilized by other federal agencies responsible for oversight of commerce.

Likewise, the final rules should not impose complex requirements and associated legal and other costs on rail customers that are parties to an investigation launched by the Board under this important new authority. It is precisely because of the complexity and costs associated with filing a formal complaint with the Board, and the potential for rail carrier retribution, that have made rail shippers and receivers historically reluctant to final formal complaints against rail carriers. To the maximum degree possible, the process and procedures developed by the Board to govern its investigative authority must avoid the same types of complexities and costs.

- Second, the NGFA reiterates the importance of the Board incorporating an appropriate degree of public transparency and accountability into its final rules governing Preliminary Fact-Finding and Board-Initiated Investigations. The NGFA believes this can be accomplished through publication of a notice at both of these stages that provides a summary containing a general description of the nature of the issue(s) for which Preliminary Fact-Finding and Board-Initiated Investigations are being considered, while still redacting and protecting the identity and reputation of the rail carrier and rail user parties involved, and with appropriate exclusion of confidential business information. We note that the need for transparency also is cited by the National Industrial Transportation League (NITL) in its opening comments. NITL at 2 and 3. Similarly, the NGFA believes the Board should incorporate into its final rules appropriate accountability to inform the involved parties, and freight rail users and the public in general, about the outcome of investigations of a particular issue that either ultimately is not pursued or subsequently discontinued under §1122.3 and §1122.4, as well as the general reasoning for the Board or Board staff's decisions in that regard. See NGFA Opening Comments at 6-7.

- Third, the NGFA reiterates its view that language should be added to §1122.8 of the final rules 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. See NGFA Opening Comments at 7. The NGFA believes that interventions by similarly affected freight rail users could assist the Board staff and/or Investigative Officers in accumulating additional facts and information to document whether a potential violation is occurring, as well as whether the matter is of regional or national significance, as required under the Act. In this regard, such information potentially could be a determining factor as to whether such an investigation or Formal Board Proceeding ultimately is initiated.

III.

NGFA Opposes Certain Recommendations of Rail Parties that Would Undermine and Create Substantial, Unreasonable Burdens to the Board’s Investigative Authority

Contrary to the views expressed by the NGFA, the opening statement submitted by rail parties through the Association of American Railways (AAR), which largely is mirrored in the opening comments filed by the Norfolk Southern Railway Company (NS), generally appear to be an attempt to convince the Board to take as narrow a view of its new authority as possible, and ultimately to undermine, complicate, make more cumbersome and costly, and potentially render unworkable the ability of the STB and affected rail customer parties to make use of the investigative authority mandated by Congress.

The NGFA offers the following specific comments regarding the AAR’s opening comments:

A. Provisions Related to Preliminary Fact-Finding

- **Time Limit:** We strongly oppose the AAR’s proposal that the Preliminary Fact-Finding stage be included within the statutory one-year time period to complete a Board-Initiated Investigation. AAR at 4. As the Board’s proposal makes clear, the Preliminary Fact-Finding is designed for Board staff to determine whether sufficient information exists to recommend to the Board that a formal investigation be initiated. As such, the Preliminary Fact-Finding is a “due-diligence” stage to determine if a recommendation to initiate a full-fledged investigation is warranted. It is proper, therefore, for the one-year period to begin if and when *the Board* elects to start a formal investigation.

The NGFA does concur, however, with NITL and AAR that a reasonable time limit for the Preliminary Fact-Finding stage should be incorporated into the final rule. The NGFA would be comfortable with a 60-day time limit for the Preliminary Fact-Finding stage, slightly longer than the 45 days recommended by NITL, provided there is an opportunity for the parties to agree to a one-time extension if warranted by the quantity or complexity of information and evidence provided by the parties at this stage. The worst outcome would be a “rush to judgment” by the Board’s staff to either recommend a Board-Initiated Investigation or dismiss the inquiry altogether in response to an arbitrary time limit.

The NGFA disagrees with the AAR’s proposal that the “clock” on the Preliminary Fact-Finding stage begin when the Director of Proceedings or the Board approves such an initiative. AAR at 5. The NGFA instead recommends that the procedural time should begin on the date notification of the Preliminary Fact-Finding is published in the Federal Register (See NGFA Opening Comments at 6). We believe such a notification procedure should be incorporated into this section of the final rule.

- **Submission of Evidence:** The NGFA also concurs with NITL that the Board should incorporate within §1122.3 of the final rule an obligation of the parties to comply with the Board staff’s requests for information, documents and evidence sufficient to

determine whether to recommend that a Board-Initiated Investigation is warranted, with a proviso that the Board staff will base its recommendation on the weight of the evidence provided. We also recommend that appropriate timelines (e.g., 10 days) be incorporated into §1122.3 of the final rule for the parties involved to submit their evidence for the Board staff's consideration, so that one or more of the parties involved does not attempt to "run out the clock" and submit an avalanche of information at the 11th hour.

- **Authorization to Pursue Preliminary Fact-Finding:** The NGFA is comfortable with the Board's proposal that its staff, at its discretion, may conduct Preliminary Fact-Finding, contrary to the AAR's proposal that such an initiative require preapproval by the Director of the Office of Proceedings or the Board "given the potentially significant consequences on regulated parties..., as well as the future consequences if the Preliminary Fact-Finding turns into a Board-Initiated Investigation and possibly a Formal Board Proceeding." AAR at 6.

B. Provisions Related to Board-Initiated Investigations

- **Determination of National or Regional Significance:** The NGFA believes the Board is correct in not attempting to define arbitrarily what constitutes an issue having "national or regional" significance, and hence eligible for investigation under §12 of the Act. Had Congress wanted to impose such a definition, it presumably would have done so in the Act. To the contrary, the AAR would have the Board attempt to define "national or regional significance" as meaning "widespread and significant effects on transportation service or markets in a region or across the nation." AAR at 10. We believe such a narrow and prescriptive definition is inappropriate, and fails to acknowledge other factors that could warrant consideration (e.g., the impacts on the competitiveness or ability of a shipper or receiver to be responsive to customer demand, etc.). Alternatively, the NGFA has suggested that the Board in the Preamble to the final rule or the definitions section provide illustrative examples of the type of rail practices or issues it would consider as potentially meeting the threshold of national or regional significance, without binding

itself to a rigid, self-generated definition that may or may not reflect the intent of Congress or may not be appropriate over time. NGFA at 3-4.

- **Separating Investigative and Decision-Making Functions of Staff:** The NGFA also believes, contrary to the views of AAR, that the Board is correct to replicate the statutory language by inserting language that, “to the extent practicable,” an Investigating Officer shall not participate in any decision-making functions in any Formal Board Proceeding(s) opened as a result of any Board-Initiated Investigation(s) that he or she conducted. AAR at 11. In any event, the NGFA believes the Board would be ill-advised and ill-served to tie its hands unilaterally in this regard given unknown future circumstances.
- **Notification of Board-Initiated Investigation:** The NGFA does concur with the AAR that the provision in §1122.5(a) of the proposed rule that states the Investigating Officer is to provide a copy of the Order of Investigation to the affected parties [and, NGFA proposes, also publish the Order on the STB’s website] “not later than 30 days after commencing a Board-Initiated Investigation” appears excessive, and that a 10- or 15-day notification requirement would be appropriate. AAR at 12. This also would have the advantage of providing additional time for the investigation itself, given the one-year time limit.
- **Discovery:** The AAR would have the Board give broad latitude for discovery to the parties involved in a Board-Initiated Investigation, “at least at the Formal Board Proceeding phase.” AAR at 14. AAR argues that persons who provide information or otherwise participate in a Formal Board Proceeding should be considered parties to the proceeding for purposes of the Board’s discovery rules. This undoubtedly is because under the Board’s discovery rules and 49 U.S.C. 721, discovery from a non-party may be permitted only if the Board issues a subpoena. However, the NGFA is very concerned that, intentionally or not, AAR’s proposal will have the effect of discouraging rail customers from becoming involved even tangentially in Board-Initiated Investigations by merely providing information to staff for fear of it resulting

subsequently in burdensome discovery, complexity and excessive legal costs. The NGFA is not opposed to discovery in formal investigative proceedings, but discovery of right via the Board's rules should be limited to entities that elect to become parties by formally intervening in the proceeding, which NGFA proposes should be liberally allowed by the final rules. See NGFA Opening Comments at 7.

- **Restrictions on Investigative Officer:** AAR also proposes to impose finite discovery provisions upon the Investigating Officer involved in Board-Initiated Investigations. AAR at 15. While the NGFA appreciates the need for prudent and reasonable discovery, we recommend that the Board not adopt the specific numerical constraints recommended by AAR in this regard, given the unknown but likely differing nature and circumstances of rail practices or issues that may warrant investigation in the future. Discovery should be focused on witnesses and documents that are likely relevant to the rail practice(s) or issue(s) being investigated.
- **Certifications and False Statements:** Contrary to the recommendation of the AAR, the NGFA believes it is appropriate for the Board to retain in its entirety §1122.11 of the proposed rule regarding the production of documents and the truthfulness of statements made in response to Preliminary Fact-Finding or Board-Initiated Investigations. We find curious and amusing the AAR's argument that these requirements would somehow impose a "burden." AAR at 16.

IV.

Conclusion

In closing, the NGFA again 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 appreciates the Board's consideration of our recommendations as it develops its final regulations.

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 style with a large initial 'R' and a distinct 'C' before the last name.

Randall C. Gordon
President