United States Department of Agriculture

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Agricultural Marketing Service

Transportation and Marketing Program

Transportation Services Division

1400 Independence Avenue SW
Room 4523
Stop 0266
Washington, DC 20250

June 25, 2020

Honorable Martin J. Oberman
Vice Chairman
Surface Transportation Board
395 E Street SW
Washington, DC 20423

Dear Vice Chairman Oberman:

Per the communication requirements in 49 C.F.R. § 1102.2(g)(4), the Department of Agriculture (USDA) is writing to detail and summarize its recent ex parte (EP) meeting in EP 755, Final Offer Rate Review (FORR). USDA staff (attendees are included below) appreciate meeting with you and Surface Transportation Board (Board) staff by phone on June 25, 2020.

At this meeting, the Board's personnel included:
Marty Oberman, Vice Chairman
Ellen Erichsen, Attorney-Advisor

USDA's personnel included:
Bruce Summers, Administrator, Agricultural Marketing Service (AMS), USDA
Bruce Blanton, Director, Transportation Services Division (TSD), AMS, USDA
Adam Sparger, Deputy Director, TSD, AMS, USDA
Jesse Gastelle, Economist, TSD, AMS, USDA
Peter Caffarelli, Economist, TSD, AMS, USDA

Our objective with the conversation was two-fold—to express our appreciation for the Board's efforts to make rate review more accessible and effective for agricultural shippers and to emphasize several points for the Board's consideration. Given the close connection to EP 756, our points also touched on aspects of the Board's proposal to streamline market dominance. USDA emphasized the following:

(1) The need for balance. Existing processes are lengthy and expensive. It is clear through the Nation's rail transportation policy that the Board has a mandate to regulate unreasonable rates, and it is evident more practical methods are needed. The absence of rate cases brought by shippers, coupled with the extreme distribution of rates, does not indicate balance. We believe the Board has an effective and workable solution in FORR that is at least as good as any current process.

(2) Further, effective rate review is needed because, under the current procedures, 100 percent of the unreasonable cases are missed.

(3) Price mark-ups represent an economically valid way to detect market dominance. They are a better measure of market dominance than the proposed screens, and if markups cannot be used directly as screens, they should be used to determine appropriate thresholds in the proposed screens.

(4) There is substantial merit in a competitive benchmarking approach, given its economic underpinnings. If the Board is unwilling to use the competitive benchmark approach, it could implement a revenue to variable cost (R/VC) screen at a higher threshold, where a complainant would have a presumption of market dominance. According to our reading of U.S. Code § 10707, an R/VC ratio greater than 180 is not itself enough to determine market dominance but an R/VC ratio greater than 200 (or some other higher level) could be enough. We see no evidence suggesting Congress did not intend to wholly eliminate R/VC as a market dominance determining factor, otherwise it could have plainly said R/VC is not enough to determine market dominance. Instead they mentioned a specific threshold as not being enough.

(5) USDA strongly believes the design of FORR incentivizes reasonable presentations of evidence and offers. Each side must weigh the risk of the other party suggesting something slightly more reasonable and thus being selected by the Board. In the rare event the Board is faced with two unreasonable proposals, a third option could be for the Board to elect the status quo. This could address a railroad concern over the binary choice.

(6) If substantial concerns remain over implementing a new procedure in full force, the Board could consider establishing FORR through an initial pilot phase to be evaluated after a set period or set number of cases. The idea is to craft something that can be used as a real-world experiment to try out new processes to see if they are used by shippers, work well, and are seen by the community as a positive step toward making rate review accessible. If the experiment works, the FORR process can be adopted permanently. If not, another approach can be tried.

The Board and USDA discussed the argument presented by several railroads that FORR is unfair because it does not prescribe an "economic measuring stick." USDA agreed FORR does not prescribe a single measuring stick and contended the Board's proposal creates a process that better captures the broader principles behind the Board's statutory requirement to provide effective rate review. USDA asserted that:

> No single methodology of rate review captures all these broader principles. For instance, the notion that a shipper should not bear costs from inefficiencies or facilities from which it derives no benefit is measured thoroughly by a Stand-Alone Cost analysis, which is an important aspect of rate considerations but far from the only consideration. Any one methodology that did capture the whole picture would be extremely complex and costly. The principles of effective rate review, while multifaceted, are very clear. The open question is how to determine whether one of those principles has been violated.
>
> The Board could be more explicit in their final rulemaking about the types of actions that represent a violation of those principles. For instance, another violation might be an "extreme markup of price above cost," which would be targeted toward 49 U.S.C. § 10101, avoiding "undue concentrations of market power" and could justify use of a competitive benchmarking approach. In addition, the Board could also be more explicit about how revenue adequacy might translate into a determination of unreasonableness. Being more explicit in these ways would mitigate the railroads' concern, while still

> leaving it up to the participants to determine the best methodology and evidence to make their case.

The Board and USDA also discussed the voluntary arbitration process suggested in CN's pleadings. USDA stated that it supports private-sector solutions, such as arbitration, as a means of resolving disputes, including those over rates. USDA noted railroads can voluntarily elect to arbitrate now over rates, yet do not. USDA posited this is because railroads lack the incentive to arbitrate so long as shippers lack an effective means to challenge a rate. Thus, effective rate review is a necessary and critical precursor to effective arbitration. USDA stated:

> Successful arbitration depends on the process itself. One system the Board could consider is offered by the National Grain and Feed Association, which has long been used in the grain community. NGFA's system could work because the process is transparent, binding, and involves arbitrators knowledgeable in both the shipping (agricultural, in this case) and carrier industries. Rates are not currently subject to NGFA's rail arbitration. Of note, another process—modeled after NGFA's arbitration rules—is used by BNSF Railway (BNSF) and Montana grain producers over the arbitration of grain rates. USDA offered to provide the Board with more information on arbitration, which is enclosed.

Enclosed, please find (1) a supplemental handout USDA offers for the record, containing further detail and supporting evidence to the issues discussed in the meeting as well as other points the Board might consider; (2) a 2007 paper describing NFGA's arbitration process, *The NGFA Arbitration System at Work*; and (3) a 2014 paper describing the mediation/arbitration system used by BNSF and Montana producers, *Rail Rate Mediation and Arbitration for Grain Shippers*. If more information would be helpful, please let me know.

Sincerely,

Adam Sparger, Deputy Director
Transportation Services Division

Enclosures (3)

United States Department of Agriculture

Ex Parte 755: Final Offer Rate Review
USDA Supplement for Informal Discussion with the Surface Transportation Board

June 25, 2020

Authority and Interest

The Agricultural Adjustment Act of 1938 and the Agricultural Marketing Act of 1946 entrust the Secretary of Agriculture with representing the interests of agricultural producers and shippers in improving transportation services and facilities. As one of many ways to accomplish this mission, the U.S. Department of Agriculture (USDA) initiates and participates in Surface Transportation Board (STB or Board) proceedings involving rates, charges, tariffs, practices, and services.

Introduction

USDA appreciates the Board waiving the general prohibition on ex parte communication in Ex Parte (EP) 755 (Final Offer Rate Review) and the opportunity to visit with the Board on these important issues. USDA offers this supplemental handout for the record, which reiterates and supports the points raised in its June 25 conversations with individual Board members and includes other points for the Board to consider. Given the close tie between this proceeding and EP 756 (Market Dominance Streamlined Approach), this handout also contains commentary on the Board's proposal to streamline the market dominance determination.[1]

Summary

The key takeaways discussed in detail in this supplemental handout include:

- USDA strongly supports the steps the Board has made with its Final Offer Rate Review (FORR) and Streamlined Market Dominance proposals.
- The Board should improve rate review. A number of agricultural shippers experience rates above the statutory 180 percent-threshold—some well-above—and yet no cases have been brought. This fact underlies the need for rate review reform.
- There are two types of errors—determining a rate is unreasonable when it is not (a false positive) and determining a rate is reasonable when it is not (false negative). Both are costly, yet current methods only guard against false positive errors. It is important to balance the costs of both errors.
- The Canadian experience with Final Offer Arbitration (FOA)—an approach that parallels the Board's FORR proposal in several respects—offers valuable insight for making FORR even more effective. Contrary to some claims, FOA's tight procedural schedule is a critical element in reducing costs to participants and encouraging the best evidence to be brought forward.

[1] For example, in its decision, STB wrote, "The Board proposes that the FORR procedure may only be used if the complainant also elects to use the streamlined market dominance approach proposed in Docket No. EP 756, Market Dominance Streamlined Approach, served concurrently with this decision." Surface Transportation Board. Decision. Docket No. EP 755: Final Offer Rate Review. Decided September 11, 2019.

- Price markups are a straightforward and economically valid way to measure market dominance and ought to be considered as a main element in the Board's rate review and market dominance proposals.
- The nature of rail and truck competition is complex. The fact that a shipper uses truck transportation does not mean trucking is an effective check against a railroad's market dominance. Moreover, data suggest railroads may have market power even over short distances, despite assumptions that trucks would be highly competitive with railroads along shorter routes.

Discussion

The Board Should Act

The Nation's rail transportation policy (49 U.S. Code § 10101) is designed to ensure a safe, healthy, and efficient rail transportation system, much of which is accomplished through competitive forces. Under this policy, railroads are permitted to differentially price to recover their high fixed costs and earn adequate revenues, but the policy is also designed to provide balance and have regulatory mechanisms in place where competition is lacking. While railroads may use differential pricing, these prices must be "reasonable" if the market is not competitive.[2]

Regulatory reform for reviewing and challenging unreasonable rates is needed. Shippers are facing rates where the revenue to variable cost (R/VC) ratio exceeds the statutory 180 percent-threshold,[3] and some are well-above this level. For example, according to the Board's confidential Carload Waybill Sample (CWS) data, 31 percent of grain shipments between 2015 and 2018 faced rates with the R/VC ratio higher than 180 percent. Fourteen percent of grain shipments had R/VC ratios higher than 240 percent, while 2 percent had R/VC ratios higher than 360 percent. In terms of tonnage, 47, 18, and 3 percent of grain tonnage are moved at R/VC ratios above 180, 240, and 360, respectively. Yet grain shippers are not bringing rate cases, lending credence to the long-time claim from shippers that existing procedures are too costly, complex, and uncertain.

Where markets lack effective competition, it is the regulatory mechanisms that check severe applications of market power. These mechanisms are the safeguards against unfair rates that disproportionately favor railroads at the expense of shippers (and by extension the larger economy), and these safeguards must be valid and accessible to work properly.

More Emphasis on Identifying True Positives and Less on Avoiding False Positives

In its reply comments, the Association of American Railroads (AAR) contended USDA "gets the Board's statutory paradigm exactly backwards" when USDA argues that false positives are better than false negatives, but AAR is ignoring the context of the argument.[4] AAR's error is in missing the marginal or incremental nature of USDA's argument and the broader need for balance. Elsewhere, Dr. Jerry Ellig expressed concern over USDA's suggestion to use a competitive benchmark as the market dominance screen because "all econometric models have prediction errors."[5] USDA agrees with this point and further emphasizes that all attempts to measure market dominance and rate reasonableness, econometric or otherwise, will have errors. The Board's goal should be to account for the costs of both kinds of errors

[2] 49 U.S. Code § 10101. Rail transportation policy.
[3] A shipper can contest the reasonableness of a rate only if the railroad is "market dominant" over the traffic at issue. In 49 U.S. Code § 10707(d)(1)(A), a railroad does not have market dominance if "the rate charged results in a revenue-variable cost percentage for such transportation that is less than 180 percent."
[4] Association of American Railroads. January 10, 2020. Reply Comments in EP 755, Final Offer Rate Review.
[5] Jerry Ellig. January 10, 2020. Reply Comments in EP 755, Final Offer Rate Review, and EP 756, Market Dominance Streamlined Approach.

(truly unreasonable rates deemed reasonable and truly reasonable rates deemed unreasonable) and attempt to minimize the total cost of those errors.

Without agricultural shippers bringing cases, existing rate review procedures are missing 100 percent of their unreasonable rates. That is, the errors have been unbalanced. Despite railroads' satistification with the status quo, the Nation's rail transportation policy requires the enforcement of rate reasonableness. USDA believes the Board's proposals are steps towards doing exactly that, and also believes that minor modifications to the proposals can both reduce the number of errors overall and move closer to balance.

The railroads often characterize the shipper position as a demand for "re-regulation." However, this is an exaggeration. USDA and others recognize that it is problematic for all users and society at large if many reasonable rates are incorrectly deemed unreasonable (false positives). Moreover, the R/VC data above suggest the majority of rail rates are reasonable. Therefore, it is important for the Board to have a test with a low rate of false positives. USDA's contention is only that unreasonable rates that remain unregulated (false negatives) are also costly. A balanced approach recognizing those costs means moving away from the 100 percent false negative rate.

Additionally, USDA believes there are many built-in safeguards to avoid false positives. Often, when medical professionals are concerned about how often a test's positive predictions are actually correct (precision), the simple solution is to test twice. The Board effectively does this by having a market dominance test followed up by a rate reasonableness test. Whatever level of precision the Board deems acceptable (and recognizing the tests are not independent), having the two tests means false positive rates can be higher and false negative rates can be lower on each test than if there were only one test.

AAR's reply comments contend "Congress did not instruct the Board to take a broad view of market dominance because a 'market dominance is always followed up by a rate reasonableness test.' Instead, Congress limited the agency's authority to instances where there was a lack of effective competition 'in hopes of removing most rates from rate regulation.'"[6] AAR's comments seem to apply to a world where these things could be measured perfectly and without cost. In reality, it is unclear how else the Board could effectively implement the various statutory goals in the Nation's rail transportation policy without "taking a broad view" and weighing the costs of the different kinds of errors as USDA has suggested.

In addition, it is helpful to consider comments from Dr. Ellig and the other authors of the Transportation Research Board's (TRB) 2015 landmark study from this perspective. Dr. Ellig states, "The USDA proposal would use benchmarking to create a presumption that a railroad is market dominant. The TRB committee's proposal would use benchmarking to identify rates that should be subject to more extensive scrutiny, but it did not propose to create a legal presumption that a rate above the STB-selected threshold indicates market dominance."[7]

While it is true the TRB committee did not propose benchmarking would solely lead to a presumption of market dominance, it is clear they see value in its implementation. In the report, they recommend "repeal[ing] the 180 percent revenue-to-variable-cost formula by directing [the U.S. Department of Transportation] to develop, test, and refine competitive rate benchmarking methods that can replace [the Uniform Rail Costing System (URCS)] in screening rates for eligibility to be challenged."[8] In their 2019 comments, they add, "the rate benchmarking procedure outlined in [the 2015 TRB report] provides a

[6] Association of American Railroads. January 10, 2020. Reply Comments in EP 756, Market Dominance Streamlined Approach.
[7] Jerry Ellig. January 10, 2020. Reply Comments in EP 755, Final Offer Rate Review, and EP 756, Market Dominance Streamlined Approach.
[8] Transportation Research Board, *Modernizing Freight Rail Regulation*, Special Report 318, 2015.

superior indicator of whether a railroad may have market dominance and a useful check on inaccuracies introduced by URCS."[9]

USDA agrees with the thrust of the TRB committee's comments. The difference between USDA's suggestion and the TRB authors' comments appears to be only in whether the competitive benchmark screen would replace the other proposed market dominance screens or add to them. USDA believes the competitive benchmark screen in addition to the proposed screens is too much focus on avoiding false positives.

The R/VC screen alone is intended to avoid the false positive error of determining rate unreasonableness when a railroad is not in fact market dominant. USDA agrees with Dr. Ellig and the TRB authors that URCS is problematic, and agrees with the TRB comments when they cite Wilson and Wolak (2016) in stating, "'[T]he benchmark price could supplement the R/VC < 180 test to ensure that failure of this test is in fact due to a non-competitive price, rather than the methodological issues with the URCS 'variable cost' measure.'"[10] In other words, the competitive benchmark screen could be yet another safeguard to avoid false positives.

Adding the proposed market dominance prongs on top of the R/VC and competitive benchmark screens would further reduce false positives, but only marginally. However, doing so raises the expected number of false negatives. This is because some shippers with legitimate cases will be incorrectly barred from rate review through this abundance of screens. Given the need for balance, and the false positive safeguards already in place, USDA believes the Board should replace the proposed market dominance prongs with a competitive benchmark because the benchmark would likely have fewer errors overall—thereby reducing both false positives and false negatives. If the Board keeps its existing screens, it should not add the competitive benchmark screen on top. Doing so would not be consistent with the need for balance.

Final Offer Arbitration in Canada is a Useful Model

It is worth emphasizing that there are key takeaways from final offer arbitration (FOA) in Canada, a method that is related to the Board's FORR proposal. The Class I railroads with operations in Canada—Canadian National Railway (CN) and Canadian Pacific Railway (CP)—have considerable experience with FOA and their perspective could be an important part of improving the proposals. However, USDA encourages the Board to "not let perfect be the enemy of good." While the Canadian railroads present some valid concerns, the conclusion should not be to dismiss the proposal altogether, but to incorporate the concerns to improve it.

For example, the railroads express concern over the restricted schedule of FOA. CP argues the abbreviated schedule does not control costs and instead involves "much uncertainty" and "a substantial amount of preparation."[11] For CP, a typical "FOA team will include 4 to 6 lawyers, 2 to 5 experts/consultants, 7-10 in-house subject matter experts/witnesses, and numerous supporting personnel."[12] CP contends these costs make FOA inaccessible and, by extension, the Board's FORR proposal will be similarly flawed. However, the fact that a lot of resources are used is not a valid reason to do away with the restricted procedural schedule proposed in FORR—it is precisely the opposite. The reason why procedural limitations are needed is to act as a constraint and force parties to focus their limited time and resources on only the clearest and most important evidence. FORR coupled with the

[9] Boyer et al. October 17, 2019. Comments in EP 755, Final Offer Rate Review, and EP 756, Market Dominance Streamlined Approach.
[10] Ibid.
[11] Canadian Pacific. November 12, 2019. Comments in EP 755, Final Offer Rate Review.
[12] Ibid.

Streamlined Market Dominant test is still likely to be significantly lower cost than any other available rate review process.

CN raised another concern with differences in information between shippers and railroads coming into FOA. CN writes, "A railroad is given mere days to respond to an economic analysis that a shipper could spend months developing." While it is true, as the initiator of a case, the shipper can plan in advance, it is also true that a railroad has control over the issue at the center of an FOA case—the level of the rate. A shipper, weighing the costs and benefits of bringing a case—even if months in advance—would not do so if the rate is reasonable.

CN's argument also misses the advantages FOA affords the railroads, which is why the case results in FORR ought to be made public. Any particular railroad will likely be involved in more cases than any particular shipper, and as cases are brought railroads get more and more information on what works and what the results are in the FOA process. This is explained in a forthcoming paper by Dr. James Nolan. He writes, "As repeat players possessing more and asymmetric information, railways in Canada are much better positioned to build an effective FOA case than any individual shipper."[13] In sum, the Board is right to have a short procedural schedule and to make the results public.

USDA supports CN's suggestion to design an arbitration process for small shippers, as long as it is a complement to effective rate review processes, such as FORR and Streamlined Market Dominance.

Price Markup is a Straightforward and Accessible Measure of Market Dominance

In competitive markets, firms are unable to charge a price above cost because they will lose business to competitors charging less. This is not true in less competitive markets where firms exert market power and are able to charge a price markup above cost. In fact, the size of the price markup is directly related to the level of competition in a market and is used by economists to measure the degree of market power. Therefore, the Board has a straightforward means of estimating rail market dominance through R/VC ratios or through a competitive benchmark measure, like that suggested by the 2015 TRB report and follow-on work by two of that report's authors.[14]

USDA contends price mark-ups are a better measure of market dominance than the proposed prongs for the streamlined market dominance test, and if markups cannot be used directly as screens, they could be used to determine appropriate thresholds in the proposed screens.

The Presence of Alternative Shipping Options Does Not Imply Effective Competition

In their reply comments, AAR states, "[S]hipper organizations would have the Board rule that where the shippers elect to use truck, this is evidence of market dominance," but AAR has the claim backwards. [15] The correct statement is the presence of truck alternatives does not imply a competitive market. To claim the opposite—that truck presence does imply a competitive market—is called the "cellophane fallacy" in antitrust economics.

The cellophane fallacy refers to the mistake of concluding a market is competitive based solely on observed market shares at prevailing prices without accounting for the market power behind those prices. For instance, at some (high enough) price, a shipper will be deterred and find some alternative. The fact

[13] James Nolan, "Parallel or Converging? A Comparative Analysis of the Grain Handling and Rail Transportation Systems in Canada and the United States," forthcoming.
[14] See, for example, Wilson and Wolak, "Benchmark Regulation of Multiproduct Firms: An Application to the Rail Industry," NBER Working Paper No. 25268, November 2018.
[15] Association of American Railroads. January 10, 2020. Reply Comments in EP 755, Final Offer Rate Review.

that the shipper uses this alternative does not mean the alternative is necessarily competitive or a check against market power.

A hypothetical example helps illustrate this. Imagine a railroad that would—in the absence of all competition (e.g., from truck, barge, or other railroads)—charge, $7,500 for a 2,000-mile, single-car grain shipment, which costs the railroad $5,000. Now assume a truck alternative exists for $7,400. The railroad must now account for the truck option, so it might offer a price of $7,350, just under the competitor. In this world, trucking is a constraint on rail rates. Nonetheless, the railroad is clearly using its market power over this distant shipment to significantly markup prices above cost ($7,500 rate versus $5,000 cost). It is essentially pricing at the monopoly price. So, the mere existence of a truck alternative does not imply *effective* competition.

This example illustrates why markup is a better measure of market dominance than explicit modal market shares. Declaring markets—for example, where more than 10 percent of movements are by trucks—as "competitive" does not necessarily capture reality. While USDA recognizes a markup threshold will still be a somewhat arbitrary threshold, it is less arbitrary than other measures and benefits from its straight-forward approach that relies on readily available data. The STB cannot avoid the task of choosing where competition stops and market power begins,[16] and USDA believes a markup threshold is superior to using market shares for this task, as it is directly related to the level of competition and less arbitrary.

Railroads May have Market Power Even Over Relatively Short Distance Shipments

The cellophane fallacy has important implications for the shipment distance, intermodal, and intramodal thresholds, as proposed in EP 756. If "effective" competition is unclear (as it is without a defined allowable level of markup), it is even more unclear where to draw the line on what shipment distance (or distance to intra- or intermodal options) is associated with effective competition. The railroads argue effective competition occurs at the 500- or 750-mile shipment distance threshold. Shippers, on the other hand, contend that distance is around 250 miles. In both cases, it is unclear how one reaches these conclusions without a clearer definition of what "effective" competition is. In the shipment distance band favored by railroads, the 500- to 750-mile range may represent the longest distance shipment for which railroads have to consider the truck rate at all. USDA believes some railroads may have market power at distances even as short as 200 miles.

For example, based on USDA quarterly reports in 2018, surveyed truck rates averaged $2.97 per truck mile for a 200-mile shipment in the North-Central region.[17] This translates into a truck-carload equivalent at around $2,610.[18] Using the Board's 2018 CWS data, a 1-2 car, 200-mile grain shipment originating in similar states had an average variable cost per car around $1,000, while the average rate per car was $1,500. For shipments of 101 cars or greater, the average variable cost per car was $550, while the average rate per car was still $1,500.

While this is far from a complete analysis, it raises questions over how much market power railroads have even over 200-mile shipments. Of course, truck is quicker and more reliable than rail, which explains part of the difference. A more precise analysis would be needed to ensure an "apples-to-apples" comparison. However, the rail rates include a significant markup above rail costs, which is possibly unsurprising,

[16] Unless the Board defines effective competition as any price below the pure monopoly price or defines ineffective competition as any price above the perfectly competitive price, then the Board must define an arbitrary level of competition as "effective."
[17] USDA Agricultural Marketing Service, *Grain Truck and Ocean Rate Advisory*, 2018 reports. Values were averaged for the North Central region for the 200-mile distance band. The North-Central region includes Kansas, Kentucky, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Wisconsin.
[18] The truck-rail-equivalent is developed using standard measures of a railcar (110 tons) and a large semi (25 tons). Source: Iowa Department of Transportation's modal comparison chart.

given the higher, unconstraining, truck rate. The existence of the price markup implies railroads have market power even over shipments involving relatively short distances, such as 200 miles, and perhaps even fewer. Whether this distance and its associated level of competition and markup are "effective" is what the Board needs to define. Regardless of the distance chosen, STB should set the distance threshold (and other prongs) with an eye toward the average level of competition or markup associated with that distance.

The NGFA Arbitration System at Work

By
Lisa Bernstein
Wilson Dickenson Professor of Law
The University of Chicago

March 15, 2007

Introduction

This report explores the advantages and disadvantages of the National Grain and Feed Association's ("NGFA") arbitration system as compared to the two most prominent forums available for resolving commercial disputes—courts and general commercial arbitration tribunals. It also compares particular features of the NGFA system to the same features in other trade association-run private legal systems, concluding that the core elements of the NGFA system are common to most such systems and well suited to the grain and feed industry.

The report concludes that the NGFA system is the most highly developed and sophisticated of the association-run systems, and that it is superior to both general commercial arbitration and litigation in State and Federal court for resolving commercial disputes among industry members. It also notes that there is no indication that the system—in terms of its rules, procedures, and outcomes—is biased against non-members who submit claims (or have claims submitted against them) pursuant to either pre- or post-dispute arbitration provisions. The report also highlights the safeguards in the NGFA arbitration system that are designed to ensure that it is both fair and open to scrutiny by would-be users of its rules and procedures.

More generally, the report suggests that the NGFA system is valuable not only for its provision of an unbiased forum for the speedy, fair, and relatively low-cost resolution of disputes, but also, and perhaps most importantly, for its adoption of detailed and procedurally fair arbitration rules; its provision of several clear and detailed sets of contract default rules—the Grain Rules,[1] the Feed Rules,[2] the Barge Rules,[3] and the Barge Freight Trading Rules;[4] and its adoption of an adjudicatory philosophy that can support trade and the negotiated resolution of disputes in its shadow far better than contracts that are subject to the Uniform Commercial Code and that are interpreted and enforced in court.

In sum, the NGFA system offers all of those who use it significant advantages over dispute resolution through the courts or general commercial arbitration tribunals, and suffers from almost none of the disadvantages that make some other types of private and statutorily-based dispute resolution systems and tribunals controversial. As discussed further below, unlike many merchant-to-consumer types of arbitral provisions, agreements to arbitrate disputes through the NGFA system offer advantages to both large firms and small firms as well as to both stronger and weaker contracting parties. Moreover, the way the system is structured helps to ensure not only that it is well-run today, but also that it will be able (as it has been for over one hundred years) to adapt to changes in market conditions and other challenges in a flexible and rapid way that will benefit contracting parties.

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[1] The Grain Trade Rules were adopted in 1902.

[2] The Feed Trade Rules were adopted in 1921.

[3] The Barge Trade Rules were adopted in 1964.

[4] The Barge Freight Trading Rules were adopted in 1981. The NGFA also adapted special Rail Arbitration Rules in 1998 to supplement the regular arbitration rules in "disputes between railroads and their customers [when they are] using the NGFA Arbitration System." General Explanation of the NGFA Arbitration System, at www.NGFA.org.

Part I of this report gives a brief overview of the origins and operation of the NGFA arbitral system and the rules creation and amendment processes. It concludes that given the longevity of the system and the voting rules contained in the By-Laws that govern Trade Rules and Arbitration Rules adoption and amendment processes, the rules are quite likely to be value-creating for contracting parties, and that to the extent that they do not suit a particular transaction or transaction type, they do not impose costs on the contracting parties since they may, by their terms, be varied by contract.[5]

Part II of this report looks at how particular features of the NGFA system compare to (1) other trade association-run tribunals; (2) general commercial arbitration at the AAA;[6] (3) AAA-administered but trade association-specific commercial arbitration, and (4) litigation in State or Federal Courts. It also considers how the NGFA system as a whole compares to these other fora in terms of overall cost, ease of use, compliance with judgments (enforceability) and fundamental fairness.

Part III explores the ways that the existence of the system adds value to transactions even when disputes do not occur.

Part IV explores why most of the objections to arbitration commonly raised by consumer groups, farmers, academics, and politicians, are unpersuasive in the context of the NGFA system and the systems adopted by many other US and international trade associations.

In sum, the report concludes that the NGFA's private legal system is well tailored to the needs of the industry, adds a great deal of value to the transactions it governs, and is fair to those whose contracts it governs.

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[5] See NGFA Grain Trade Rules Preamble ("All Active members and other parties using these rules are free to agree upon any contractual provisions, which they deem appropriate, and these rules apply only to the extent that the parties to a contract have not altered the terms of the rules, or the contract is silent as to a matter dealt with by the pertinent rule.")

[6] In addition to their widespread use, a reason that the AAA rules were selected for the purposes of comparison is that some commentators have explicitly critiqued the NGFA arbitration system as being unfair because it operates differently from AAA-administered arbitration in terms of both its substantive rules and procedures. Matthew L. Benda and Edward E. Beckmann, for example, in To Arbitrate or not to Arbitrate: A Parishioners Guide to Alternative Dispute Resolution in the Agricultural Context, 2 Drake J. Agric. L 315 (1997) take the position that the AAA's rules are procedurally and substantively superior to NGFA's, especially in disputes between members and non-members. However, in reaching this conclusion the authors overlook many of the aspects of the AAA's rules that make them undesirable even according to the criteria for judging arbitration systems put forth by the author. For example, they suggest that the costs of a hearing in the NGFA system are higher than the cost of a hearing in the AAA system, id. at 326, something that as the tables in Part I of this report illustrate is unlikely to be the case. Second, they suggest that the legal reasoning in AAA opinions is superior to the Trade Rules based reasoning in NGFA opinions, something that ignores the fact that the outcomes under the general principles of law they suggest are employed by the AAA are far less predictable thereby making settlement less likely, and the fact that the AAA arbitrators only very rarely produce opinions at all.

I. History and Operation of the NGFA System

From the beginning of its private legal system, the NGFA took pains to ensure that its trade rules and arbitration rules were widely known and understood. The early trade press, most notably the journal, Who is Who in the Grain Trade, provided detailed coverage of the rules creation and amendment processes as well as information about the way the arbitration system worked. At least once each year the trade rules were reprinted in their entirety. In addition, decisions were reprinted, and readers were invited to submit questions about both trade rules and industry custom to the NGFA chairman, with some replies being published in an "Ask the Chairman" column.

In 1920, in an effort to facilitate understanding of the rules and the arbitration system, the association published a well-indexed, bound compilation of the arbitration decisions issued before that date. After that time opinions were circulated to members and reprinted from time to time.

Today, all arbitration decisions, as well as the NGFA Trade Rules and Arbitration Rules, are posted on a publicly accessible part of the NGFA website. Arbitration decisions are also circulated to members in the NGFA newsletter. In addition, NGFA continues to go to extraordinary lengths to acquaint its members and others in the industry with its rules. It continues to sponsor trade rules seminars that are designed to acquaint any interested persons with the trade rules, the arbitration system, and the relevant law.[7] These seminars serve to reduce the frequency of contractual misunderstandings and are viewed, and rightly so, as ways to avoid disputes requiring third party intervention. The printed materials from these seminars as well as additional written materials on the rules and association-drafted standard form contracts for different types of transactions are also available from the Association for a fee. Because these materials are so accessible, they enable transactors to learn a great deal about their legal rights and obligations without consulting a lawyer, thereby decreasing the legal costs of doing business.

Although the focus of this report is on the working of the arbitration system, it is important to note that the NGFA trade rules, which provide the substantive rules used to resolve disputes, are an integral part of the ability of the system to resolve disputes in a fair and expeditious manner.

The NGFA rules creation and amendment process is designed to be widely inclusive, with the interests of member firms of different sizes and regions being amply represented.[8] Today, the Trade Rules Committee, which is appointed by the NGFA Chairman to recommend

[7] For example, a seminar held in May 2004 covered topics such as "Applying the NGFA Trade Rules … Trading and Producer Contract Law … Case Study Presentations … Legality of Cash Contracts … Cross Border Trading in North America … The New Contracts: What Are They? When and Why to Use Them? … Managing Fiduciary Risks and Liabilities in Contracting … NGFA Arbitration - Alternative Dispute Resolution for the Industry."

[8] In all of the associations studied, trade rules were drafted solely by association members.

changes in the Trade Rules, to the membership, or to the Board of Directors,[9] is selected with an eye toward ensuring the representation of different-sized firms and maintaining a roughly even division between firms who are "net buyers" of commodities and those who are "net sellers" of commodities. Because firm representatives who serve on NGFA committees are not recompensed for their travel expenses and are not paid for their services, small firms sometimes choose to limit their participation in association committees, but as Table 1 below illustrates, firms of all sizes are active in the rules amendment process.

Table 1- Composition of Grain and Feed Trade Rules Subcommittees by Firm Size

Size of Company	**Number of Representatives on Feed and Grain Rules Subcommittees**
Small (Less than $25 million in sales)	5
Medium ($25 - $250 million in sales)	7
Large (More than $250 million in sales)	9

Moreover, because final approval of any rule changes must be ratified by the membership-at-large, with each firm, regardless of its size getting one vote, small firms could, simply by voting against the proposal, effectively block the adoption of any rules that would adversely affect their interests. As the table below demonstrates, they would out-vote large and medium firms 600 to 120.

Table 2- Firm Size and Representation in the NGFA Active Membership

Company Size in Terms of Annual Sales (or Grain Purchases for Processors)	**Number of Members**
Small (Less than $25 million in sales)	600
Medium ($25 - $250 million in sales)	100
Large (More than $250 million in sales)	20

Over the years the NGFA has struck a successful balance between amending the trade rules in response to new circumstances and the arbitrators' experience applying them,[10] and providing rules that are relatively stable. As of 1996 the Grain Rules were amended 58 times, the Feed Rules 32 times, the Barge Rules 22 times, and the Barge Freight Rules 8 times. Many of these amendments were wording changes to enhance clarity rather than

[9] The Board of Directors itself is composed of members from firms of all sizes. As of February 2004, eighteen directors worked at small firms (defined as those with less than $25 million in sales), twenty-one directors worked at medium sized firms (defined as those with sales between $25 million and $250 million), and twenty worked at large firms (those with more than $250 million in sales).

[10] Sometimes the arbitrators note the need for a rule amendment in their opinions. See, e.g., Pioneer Hi-Bred Int'l v. Overby Grain Farms, Inc., NGFA Case No. 1700 n. 1 (1993) ("[T]he arbitrators have communicated to the NGFA's Trade Rules Committee the dichotomy posed by NGFA Barge Trade Rule 2(g)(1) as it is now written.); Guthrie Corp. v. Continental Grain Co., NGFA Case No. 1673 n. 1 (1992) ("The arbitrators believed that the NGFA's Trade Rules Committee should examine whether a more specific definition of 'due diligence' in the Trade Rules would minimize future disputes of this nature, and have communicated this view to the committee.").

substantive changes. When rules changes do occur, they are widely discussed in the trade press as well as in NGFA publications and, more recently, on the NGFA web site, thereby ensuring that traders are aware of the changes. The fact that transactors can vary these rules by contract is a further guarantee that if the rules become obsolete, are unclear, or are unsuited to a particular transaction or transaction type, they will not pose any barrier to efficient commerce.

In sum, the democratic and inclusive nature of the rules-creation process is one of the primary reasons that the system has successfully adapted itself over time to changing market conditions and new technologies. It also helps to explain why the system has consistently been fair to transactors of all sizes.

II. Operational Features of the NGFA, the AAA, and the Courts as Fora for the Resolution of Commercial Disputes

This section explores the ways that various features of the NGFA arbitration system compare to those that are used in a sample of other trade association-run arbitration systems, the AAA general commercial arbitration system, AAA-administered industry-specific arbitration tribunals, and public courts. The AAA was selected for comparison because its rules and procedures are widely regarded as acceptable substitutes for those provided in civil courts.

Costs of Dispute Resolution: Forum and Legal Costs. Filing fees in most commercial arbitration tribunals—whether industry-specific or AAA-run or administered-- are higher than they are in court.[11] This is not because arbitration is a money-making venture,[12] but largely because courts receive a huge public subsidy.

Some trade associations charge a fixed filing fee while others vary the fee based on the amount in controversy (often subject to set minimums and maximums). In associations that are willing to arbitrate member-to-nonmember disputes, members and non-members are often charged different amounts. The differential fees for members and nonmembers are due to the fact that most association-run arbitration systems are subsidized from general membership dues. At the NGFA, however, while the arbitration system does receive a subsidy from dues, members and non-members are nonetheless subject to the same fee schedule.[13]

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[11] For example, it costs only $296.50 to file a civil claim in Los Angeles County. See http://www.lasuperiorcourt.org/fees. The cost of filing is $247 in Hennepin County, Minnesota which includes Minneapolis). See http://www.courts.state.mn.us/districts/fourth/General/Fees.htm; and $150 (without service) in Harrison County, Texas which includes Houston. See http://www.hcdistrictclerk.com/Civil_Info/Civil_info.asp. The New York City Civil Court Filing Fee for Commercial Claims is only $25. See http://www.courts.state.ny.us/courts/nyc/civil/fees.shtml.

[12] The AAA is a not-for-profit organization and most trade association executives maintain that arbitration programs either are operated at a loss or generate only insignificant income for the association.

[13] See NGFA Arbitration Rule 5.

The filing fees for a sample of trade association-run systems are set out in Table 3 below. As the table demonstrates, among industry-run arbitration tribunals, the NGFA's filing fees, which depend on the amount of the claim and are capped at $10,000, are quite reasonable.

Table 3- Filing Fees in Trade Association-Run Arbitration Systems

Association	Filing Fees for Members	Filing Fees for Nonmembers
ACSA-ATMI Board of Appeals (BoA)	$400	$800
American Film Marketing Association (AFMA) 1	1% of amount claimed; $200 minimum; $3,500 maximum	1% of amount claimed; $200 minimum; $4,500 maximum; plus a $500 surcharge.
American Spice Trade Association (ASTA-spice)	$250 for sole arbitrator; $500 for three arbitrators	$500 for sole arbitrator; $1,000 for three arbitrators
Association of Food Industries, Inc. (AFI) 2	$400; $800 if multiple contracts between the same parties	$900; $1,300 if there are multiple contracts between the same parties
Cocoa Merchants' Association of America, Inc. (CMAA) 3	The greater of 1% of the amount claimed or $500	1% of the claim plus $2,500
Green Coffee Association (GCA)	For contract arbitration –$605 for up to 250 bags; plus, for each additional bag up to 500, 35 cents per bag; and for each additional bag over 500 bags, 56 cents per bag.	For contract arbitration –$605 up to 250 bags; plus, 35 cents for each additional bag up to 500; and 56 cents for each additional bag over 500 bags. Furthermore, for non-members there is a surcharge that depends upon the status of the other party to the dispute. If the other party is a member, the charge is an additional $300; it is an additional $2,000 if the other party is a non-member.
National Cottonseed Products Association (NCPA) 4	$4,000	A non-member must either apply for membership, or pay the $4,000 plus 25% of the cash amount in dispute, up to a maximum of $250.
National Hay Association (NHA) 5	$200	Same as members.
Printing Industries of Wisconsin (PIW)	$175	Same as members.
Rice Millers' Association (RMA) 6	"$2,500" in the lowest claim bracket to "$10,000 plus ¼% of the excess (of the claim) over $1 million," in the highest claim bracket. No maximum fee.	Same as members.
Rubber Trade Association of North America, Inc. (RTA-NA) 7	$250	Same as members
National Grain and Feed Association (NGFA)[14]	"$400, plus 1% of the claim," in the lowest claim bracket to "$2,150, plus ¼% of the claim" in the highest bracket. There is a maximum filing fee of $10,000.	Same as members.

*This table represents the amount that member and non-member claimants (plaintiffs) must submit to initiate proceedings. Note that in NCPA arbitrations, a non-member may not bring the complaint (but he will be charged a filing fee if he consents to arbitrate). At the AFMA, AFOA, ASTA-seed, ASTA-spice, AFI, and CMAA, only the claimant pays this fee; whereas

[14] In April 2005, the NGFA membership approved the first fee increase in over five years.

at the BoA, GCA, NCPA, NHA, PIW, RMA, RTA, and NGFA, both parties pay the fee. Some of the associations with the lowest fees have not amended their rules recently.

**A "deposit" is defined as an amount charged as a rough estimate of actual cost (the excess is refunded and the deficiencies as compared to actual costs are payable), or an amount that will be refunded to one party or the other depending on the outcome.

1 - For a fee of $50 for members and $150 for non-members, AFMA will send a letter to the other party providing for a 10-day settlement period before arbitration is formally initiated.

2 - The AFI considers these amounts "deposits," but they are actually similar to filing fees. If the claimant loses, the fee will be used to "defray the cost of the arbitration," but there is no provision for refund or increase based upon actual costs. Furthermore, "[i]f the party bringing the arbitration is successful in the arbitration, an amount equal to the arbitration fee will be added to the award." AFI, Arbitration Rules, Section X(3).

3 - The CMAA considers these amounts filing fees, but they actually represent a deposit against costs. If there is any remainder at the end of the arbitration, it will be refunded to the claimant, and the Board may require either party to pay additional expenses incurred.

4 - These amounts are not actually filing fees but deposits; the deposit of the party against whom costs are assessed will be credited toward payment of the cost of the proceedings. In addition, if the deposit is insufficient to pay all costs of the arbitration, the party against whom costs are assessed must immediately pay the difference. The other party will have his deposit returned.

5 - NHA rules refer to these amounts as deposits; the winner has ½ of the fee returned.

6 - These amounts may be considered deposits against expenses, although they are called "administrative fees." These costs are fixed, but the fee schedule notes that "Any of the above fees may be increased at the sole discretion of the Arbitration Committee if deemed necessary by the Committee to cover RMA expenses."

7 - The fee is fixed in the sense that there is no refund if actual costs are lower than $250, although parties may be charged more if actual costs are greater. According to an association executive, the fee can range as high as $1,000, but $250 is adequate for 99% of the arbitrations conducted. The fee structure is not contained in the arbitration rules; it is established annually by the Board of Directors. In addition, unlike those of the other associations, this fee is not payable until after the award is rendered. One quarter of it is given to the arbitrators.

The NGFA's fees are also on the low side as compared to the more reputable of the general commercial arbitration providers. As the Table 4 below demonstrates, it would cost a plaintiff $1,600 to file a $160,000 claim at the NGFA but $4,000 to file the same claim at the AAA. In addition, as Tables 5 and 6 illustrate, the additional costs imposed on the parties by the AAA are much higher than the corresponding costs imposed by the NGFA.

Table 4- Filing Fees in AAA and AAA-Administered Systems

Association	**Filing Fees for Members**	**Filing Fees for Non-Members**
American Fats and Oils Association (AFOA)	"$500" in the lowest claim bracket to "$7,000," in the highest claim bracket*	Same as members.
American Seed Trade Association (ASTA-seed)**	"$500" in the lowest claim bracket to "12,500 plus .01% of the amount of the claim above ten million." There is a maximum filing fee of $65,000.	Same as members.
American Arbitration Association (AAA)***	"$500" in the lowest claim bracket to "12,500 plus .01% of the amount of the claim above ten million." There is a maximum filing fee of $65,000.	Not applicable

*For claims above the highest claim bracket, that is, claims in excess of $5,000,000, the filing fee will be negotiated at the time of the request for arbitration. There is a minimum filing fee of $2,000 for any case having three or more arbitrators. Note also that in addition to paying the filing fee, the claimant must submit a deposit of $5,000 to be applied against the fees and expenses payable to the arbitrators. The difference, if any, is refundable within thirty days after the award.

** The ASTA-seed rules apply to disputes with non-members only if the non-member is from the US or Canada. ASTA-seed members arbitrate disputes with parties from other countries under the auspices of the Federation International du Commerce des Semences.

*** AAA includes Expedited Procedures and Procedures for Large, Complex Commercial Disputes with its Commercial Arbitration Rules, but the same basic fee schedule is applicable to any of the Procedures.

****ASTA-seed has adopted the AAA's Commercial Arbitration Rules. AFOA is recognized as an affiliate because it uses AAA administrative services. Although the Association publishes arbitration rules under its own name, they are similar in many respects to those of the AAA.

In most association-run tribunals and in AAA general commercial arbitration, filing fees are only one component of the actual forum-related costs. As set out in Table 5 below, many associations impose additional fees in varying amounts as part of the arbitration process. In those associations that give the parties the option of requesting an oral hearing, additional hearing-related fees—some fixed and some based on actual costs (as at the NGFA) – are typically imposed.

Table 5- Additional Costs imposed by Association-Run Tribunals

Assn.	Other Fees and Costs
BoA	Non-members must pay actual costs if they exceed the filing fee.
AFMA	• A counterclaim or cross claim must be accompanied by a filing fee. • Arbitrator fees. The arbitrator usually collects a $1,000 advance on his fee from each party. Members pay an hourly rate of $250 for the first 16 hours and $275 per hour beyond that. Non-members pay $300 per hour for the first 16 hours and $325 per hour beyond that. • Travel and other expenses incurred by the arbitrator, when hearing is needed • $50 for members and $150 for non-members for the optional Pre-arbitration Settlement Procedure.
ASTA -spice	• A stenographic hearing, if desired.
AFI	• Additional hearings may be charged at the rates listed above under filing fees. • A party requesting postponement of a hearing may be required to pay the costs. If the postponement extends beyond 45 days at the request of the defendant, he shall pay $500. The association will not grant postponements beyond 90 days without the consent of the claimant.
CMAA	• Additional costs may be charged to either party if incurred. • A counterclaim or a third party claim requires an additional filing fee. • The parties may request and pay for a stenographic transcript if desired.
GCA	• The arbitrators may require an oral hearing. If there is an oral hearing, a stenographic record must be taken for the Association's record, and the expense will be charged to the parties. • An arbitrator's fee of $35.
NCPA	• If the issues and evidence relating to two or more contracts between the same parties are the same, they may be submitted under a single arbitration agreement. If the issues and evidence are different, or relate to quality, requiring different sets of samples, a separate arbitration agreement shall be signed for each contract; or, if the disputants request that different issues be covered by a single arbitration agreement, a separate fee shall be assessed for each contract involved. • Actual expenses for the arbitrator for attending meetings of the committee. (Loser pays.)
NHA	• The cost of an oral hearing if held. • $50 per diem for the arbitrators for their services in considering and deciding cases. • The amount of the arbitrators' traveling expenses and hotel bills.
PIW	• The hearing fee per session ranges from $450 for the initial 3-hour session, and $100 per hour for each additional session, to $1,750 for the initial 3-hour session, and $500 per hour for each additional session, depending upon the size of the claim. • Parties will be responsible for any stenographic services, transcript services, and expert witness fees (including travel) that they request.
RMA	• A counterclaim must be accompanied by an administrative fee. • Expenses, if any, of the arbitrators and the Arbitration Committee. • Fees and expenses of any experts. • Fees and expenses of consultants to the arbitrators and the Arbitration Committee.
RTA-NA	• One quarter of the administrative fee is given to the arbitrators, but they shall be awarded additional fees in the award if "unusual or extraordinary services" have been required of them. • Stenographic charges and other expenses. A member using any facility or service of the Trade shall be fully responsible for payment of proper fees for such facility or service upon presentation of invoice.
NGFA	• Cost of the stenographic record for an oral hearing; this will become part of the official transcript of the case. • When applicable, travel and hotel expenses for the arbitration committee, the National Secretary, and the Association's legal counsel.

In contrast, while the cost of simply filing a civil claim in public courts is far lower, the overall cost of resolving a dispute in industry-run tribunals is far less than it is in the public legal system, given lawyers' fees, the costs of initiating and responding to discovery requests, and the length of time it takes to obtain and collect a final judgment. Although data are not readily available, the use of lawyers in trade association-run arbitration systems appears to be increasing, at least in larger claims. However, the streamlined procedures employed by these tribunals should nonetheless result in a significant savings in legal costs relative to a court proceeding. In general, the cost of resolving disputes in association-run systems, and through the NGFA system in particular, is also likely to be less than the cost of resolving a similar claim through the AAA system. This is primarily because in the AAA a hearing is almost always held,[15] whereas at the NGFA, a hearing is held only if it is requested by one or both of the parties. In addition, unlike the NGFA where the arbitrators serve for free and parties pay only for the arbitrators' actual out-of-pocket travel expenses, parties in AAA arbitrations are obliged to pay the arbitrators their usual and customary fee which, given their legal training, can be high.

Moreover, whether it is cheaper to arbitrate in AAA tribunals than to litigate in court is less clear. The AAA procedures are more cumbersome and delay-prone than the industry-specific procedures, and lawyers are typically used. One study of AAA arbitration concluded that "[o]ne does not save money by going to the AAA," rather than state or federal court for claims above $5,000.[16]

Table 6 – Other Fees and Costs in Systems Run by the AAA & Affiliates

Assn.	Other Fees and Costs
AFOA	• If a monetary claim is made in the answer, another administrative fee is due. • Arbitrator's fee [not above $500 per arbitrator per hearing day or $300 per arbitrator for each executive session, or day of study time (when the Panel consists of a single arbitrator)] • A stenographic record, if desired or ordered by the arbitrators. • Required traveling and other expenses of the arbitrators. • For each day of hearing, there will be an administrative fee of $100 payable by each party for a single arbitrator panel, and $150 each for a multiarbitrator panel. • If a hearing is postponed after it is scheduled, the postponing party will pay the fee as if the hearing had taken place at the scheduled time. • A processing fee is payable 180 days after the case is initiated, and every 90 days thereafter, until the case is withdrawn or settled or hearings are closed by the arbitrator. The fee is $150 per party for a single arbitrator panel and $200 per party for a multiarbitrator panel.
ASTA -seed	• A Case Service fee is incurred for all cases that proceed to the first hearing. Fees range $200 to $6,000. • Another filing fee is due if there is a counterclaim or additional claim. • Arbitrator's compensation (consistent with the arbitrator's stated rates). • Stenographic record, if desired. • Required travel and other expenses of the arbitrator(s).
AAA	• A Case Service fee is incurred for all cases that proceed to the first hearing. Fees range $200 to $6,000. • Another filing fee is due if there is a counterclaim or additional claim. • Arbitrator's compensation (consistent with the arbitrator's stated rates). • Stenographic record, if desired. • Required travel and other expenses of the arbitrator(s).

[15] The AAA refuses to release data on how often hearings are held. However, according to a customer service representative (interviewed June, 2004) the AAA recommends a hearing in cases where more than $10,000 is at issue and maintains that although litigants typically follow their recommendations, the rules do not require them to do so.

[16] See Herbert M. Kritzer & Jill K. Anderson, The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and in the Courts, 8 Justice System Journal, 1, 18 (1983).

Timelines of Dispute Resolution The NGFA rules provide a clear time table for the filing of complaints and arguments (together with certain types of evidence specified in the rules), the approval of arbitrators, the filing of appeals, and payment of judgments, [17] a time table that should be sufficient for most types of disputes, except perhaps when a weather or pest related event –such as a freeze on the Mississippi river that halts barge traffic—puts a heavy strain on the system's administrators and its unpaid arbitrators, who not only decide cases, but also reduce their judgments to clear and detailed written opinions that take time to write and edit. Extensions of some of these deadlines are available under limited circumstances,[18] and are frequently granted, a practice that the Arbitration Rules Committee might consider constraining in their next round of Rules revisions.[19] However, the clear intent of the rules is to facilitate the timely resolution of disputes and reduce parties' ability to make strategic use of delay.[20] In contrast, while some states offer reasonably expeditious handling of civil claims, in many states it takes far longer for a commercial case that goes to trial to reach a final verdict. In addition, in the court system, during the period from filing to hearing, the civil discovery system gives the parties a way to inflict high and escalating costs on one another, a type of behavior that is severely constrained in the NGFA system. Nonetheless, NGFA should pursue methods by which it could further expedite its arbitration system, something that it began to do in its latest round of arbitration rules revisions.

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[17]Under the NGFA Arbitration Rules, the arbitration complaint must be filed within 12 months after a claim arises or after expiration of the contract performance date; except for cases between members and nonmembers arbitrated pursuant to a court order, in which the complaint may be filed within 30 days of issuance of the court order. After the complaint is filed, the rules establish specific sequential deadlines for the parties and the NGFA National Secretary: Plaintiff has 15 days to sign the arbitration contract; Defendant has 15 days to sign the arbitration contract; Plaintiff has 20 days to file a First Argument; National Secretary has 10 days to forward the First Argument to Defendant; Defendant has 20 days to file an Answer; National Secretary has 5 days to forward the Answer to Plaintiff; Plaintiff has 10 days to file a Rebuttal; National Secretary has 5 days to forward the Rebuttal to Defendant; Defendant has 10 days to file a Surrebuttal; National Secretary has 5 days to forward the Surrebuttal to Plaintiff. The National Secretary then appoints a three-person panel of arbitrators to the case. The parties have 5 days to challenge an appointment. Upon receipt of the arbitrators' final decision, the National Secretary has 5 days to forward it to the parties. The parties then must comply with the award or file an appeal within 15 days.

[18] See e.g., NGFA Arbitration Case No. 1900 (where a case was held in abeyance at the request of the parties). See also, NGFA Arbitration Rule 7(i), which provides that the National Secretary may extend the deadlines for parties' arguments for good cause shown for a period no longer than 20 days from the original deadline. Other factors that may lead to delay include: (1) oral hearing requests; (2) appeals; (3) administrative issues requiring resolution that interrupt the process; and (4) stays and abeyances requested by the parties to pursue settlement, court resolution or other reasons.

[19] For example, while the current rules provide that the "National Arbitration Committee shall act promptly on all cases submitted, " Arb. R. 8(k), it might be desirable to include a 30-day limitation subject to waiver for a fixed period in the discretion of the National Secretary. Moreover the NGFA membership very recently approved a number of Arbitration Rule Amendments in April 2005 that encourage the timely conclusion of cases.

[20] From 1995-2000, the average time for disposition in all cases was 424 days. However, due to a freeze on the Mississippi, whose severity was widely underestimated, this period includes a number of cases involving string trades (that is, deals between multiple parties) relating to this occurrence. The multiparty nature of these cases and the volume of them that occurred in a short time frame, added greatly to the average length of the dispute resolution process over this time period. Leaving these cases aside, the average time from filing to disposition during this period was 405 days. Further leaving aside cases that were subject to appeals or stays requested by the parties, the average time for disposition was 359 days.

Most industry-run tribunals attempt to constrain the use of delay as a strategic weapon. Many have adopted rules similar to the NGFA's. Others have no such rules; yet make it known that the expeditious resolution of disputes is one of their primary goals.

The AAA general arbitration rules also contain deadlines for the taking of particular actions, but these are so laxly followed that studies of the process found that it could take as long as or longer than resolving a dispute in court.

The ability to obtain a more timely resolution of a dispute is often most valuable to smaller transacting entities that enter into deals that are large in relation to the overall size of their businesses.[21] When such entities are the victims of breach, they may not have either sufficient internal operating capital or access to outside capital on reasonable terms, to enable them to continue in operation, or continue in operation at previous levels of trade during the pendancy of a dispute. In contrast, a large entity that enters into trades that are a fraction of its net wealth may suffer no ill effects from waiting for a judgment. As a consequence, the reduction in delay provided by the NGFA system is a feature that is highly advantageous to the less wealthy side of a dispute. Moreover, by giving smaller parties who might not otherwise have been able to sue a credible threat to arbitrate, the availability of arbitration should make it less likely that those who deal with smaller parties will take actions that they would have felt free to take if the smaller party only had recourse to the legal system to address contractual wrongs.

[21] Moreover, because the NGFA, like most trade associations with these systems, requires most claims to be submitted to arbitration within a year of the date the controversy arose, while a five-year statute of limitations applies in at least certain public courts, the system enables firms to have smaller disputing financial reserves than they would need if all of their contracts were subject to litigation in the courts. This is a benefit that should be particularly important to smaller or less well capitalized concerns.

Who are the decision makers? In most association run programs, an effort is made to choose arbitrators with knowledge about the type of transaction and good at issue. Table 7 below sets out the qualification of arbitrators in the sample of trade association-run systems.

Table 7 – Qualifications of Decision-Makers in Trade Association-Run Arbitration Systems

Assn.	Qualifications of Decision-Makers
BoA	• Knowledge of the Southern Mill Rules • Experience in their respective industry • Reputation for integrity and fairness • No interest in the matter involved
AFMA	• Arbitrators must be lawyers • At least seven years experience in the entertainment field representing sellers and buyers, particularly in the international licensing of film. • Experience in arbitration • Familiarity with litigation • In addition, to become a member of the AFMA panel, candidates must submit two letters of recommendation: one from an arbitrator who currently serves on the panel, and another from a party actively involved in the international motion picture business.
ASTA-spice*	None specified.
AFI	• No financial or other interest in the result of the arbitration. • Expertise in the product or commodity in dispute. • Arbitrators from overseas may be appointed if they are members of the Association. • Nonmembers may serve if there is an insufficient number of members available or if the Association is undertaking to arbitrate on products which are not dealt in by any extensive group of the Association's own members. Such non-members must be recognized in the trade as being competent to serve as arbitrators in the specific controversy. • Except where it is necessary or where the parties have otherwise agreed, panels shall not be selected exclusively of merchants or exclusively of brokers.
CMAA	• Members of arbitration panels must be members of the 25-person Arbitration Committee elected by the membership of the Association from among the membership. • No interest or conflict of interest in any arbitration.
GCA	• No personal or financial interest in the matter in dispute. • Prior to commencement of any arbitration each selected arbitrator is directed to state in writing or orally to the President that there is no circumstance known to him which does or might create any bias or appearance of bias or interest on his part and that there is no fact known to him which might disqualify him. • He must also state that he is knowledgeable about the subject matter at issue.
NCPA**	• Members of the arbitration committee must be members of the association. • Arbitrators are to be representative of the membership and the regions covered by the membership.
NHA	• Member of the 3 arbitration committees must be members of the association. • Members of the committees must hold no other office in the association. • Not more than two of the three arbitrators on any committee may be receivers of hay, nor can more than two be shippers. • The committees are geographically allocated.
PIW	• No interest financial or otherwise in the outcome of the case. • Completely impartial in fact and appearance. • High personal and professional integrity. • Particular knowledge and expertise in the printing industry.
RMA	• Arbitrators shall normally be drawn from the membership of the Arbitration Committee, but the Committee may in particular cases appoint one or more arbitrators who are not Committee members. • No financial or personal interest in the result of the arbitration.
RTA-NA	• Arbitrators must be members of the Association or employees of members, unless otherwise agreed by the parties.
NGFA	• Prominent people experienced in the type of trade or transaction involved • Employee or active partner, principal, officer or director of a member firm eligible to arbitrate disputes under these rules • Commercially disinterested with respect to the particular dispute

*No member may refuse an appointment to serve as arbitrator, unless for a good cause shown.
**Appointment as an arbitrator is subject to the member's consent to serve.

Note that the "no business connection or financial interest" requirement can sometimes be waived under the rules of some associations. See, e.g., the rules of the RMA and the AFOA.

The AAA general commercial arbitration rules do not require industry-specific expertise, and lawyers commonly sit on panels. In contrast, the AAA-run association-specific tribunals do value and encourage industry expertise, but unlike the NGFA, they do not strictly require it.

Table 8 – Qualifications of Decision-Makers in Systems Run by the AAA & Affiliates

Association	Qualifications of Decision-Makers
AFOA	• Arbitrators must be members of the association or employees of companies that are members of the association. • No person who has a financial or personal interest in the result of the arbitration shall serve.
ASTA-seed	Rules are silent.
AAA	Rules are silent.

Associations vary in the number of arbitrators who hear each case. Most provide for three arbitrators, but some provide for as few as one, particularly when the parties consent to this. Most associations reimburse arbitrators for their out of pocket costs, while a few also pay them a nominal sum for their efforts. Table 9 below sets out the number of arbitrators, the selection process, and the extent to which they are compensated for their services or reimbursed for the cost of their participation in the system.

Table 9 - Decision-Makers in Trade Association-Run Arbitration Systems

Assn.	Number of Decision-Makers	Method of Selection	Compensation
BoA	2, one representing each association (but if those two are unable to reach a unanimous decision, they shall select a third to act with them). Fn 1	Association Executive	Unpaid (no expenses are mentioned)
AFMA	1*	Association provides list; parties strike and rate preferences; if agreement is not reached, an Association Executive appoints the arbitrator.	Paid by the parties, plus actual expenses
ASTA-spice	1 or 3 at discretion of Arbitration Board Chair.	Association Executive, with input from parties	Rules are silent
AFI	3	Arbitration Board selects panel; parties may challenge; an Association Executive makes the final choice.	Unpaid (rules are silent on whether they receive expenses)
CMAA	3	Chairman of Arbitration Board selects a panel and parties may challenge.	Unpaid (unless services require extraordinary amount of arbitrator's time; no expenses are mentioned).
GCA	3	Association provides list from which names connected with parties are removed; Association Executive chooses from remaining names by lot.	Paid by the parties through a fee based on the amount of coffee in controversy (no expenses are mentioned)
NCPA	5	Each party selects two members from the 15-member Arbitration Committee, and those four select a 5th, who serves as Chairman of the committee. Fn 2	Unpaid* (but they receive their actual expenses)
NHA	3	Association Executive appoints Fn 3	Paid, plus actual expenses Fn 4
PIW	1 or 3, depending on the size of the claim	Party Driven	Paid by parties (fixed administrative fee separate from filing fee covers the arbitrators' fees plus expenses)
RMA	3 or 5 or 7	Arbitration Committee appoints	Unpaid,* (but they receive their actual expenses)
RTA-NA	3	Arbitration Committee appoints, parties may challenge Fn 5	Paid by parties through a percentage of the filing fee (but Arbitration Committee may permit arbitrators to provide for additional fees if unusual or extraordinary services required).
NGFA	3	Association Executive appoints	Unpaid. * (they only receive expenses related to oral hearings).

Fn 1. This has not been necessary in ten years.
Fn 2. If the arbitration involves only dealer members, the parties may, upon unanimous written consent of all, petition the Board of Directors to appoint a special arbitration committee. In such event, the President shall select a committee from the Roster of Dealer Members, such committee to consist of not less than three (3) or more than five (5) Dealer Members.
Fn 3. When member to non-member disputes arise, selection process with greater party input is used.
Fn 4. Except when the Committee holds a session at the time and place of the annual Convention.
Fn 5. The Arbitration Committee may in its discretion appoint a person objected to by the parties, provided the person objected to is not disqualified to serve.
* This is not explicitly stated in the rule.

In contrast, in AAA General Commercial Arbitration, arbitrator fees can be very high, particularly for experienced or well-regarded arbitrators. This is also true, though to a somewhat lesser extent, in AAA-administered systems.

Table 10 - Decision-Makers in Systems Run by the AAA & Affiliates

Association	Number of Decision-Makers	Method of Selection	Compensation
AFOA	1 or 3	Association provides a list, and parties may strike and rate preferences; if agreement is not reached, an Association Executive makes the appointment from the list.	Paid by the parties, plus actual expenses
ASTA-seed	If the agreement does not specify a number, one, unless the AAA, in its discretion, directs that three arbitrators be appointed.	Direct Appointment by parties, or Association provides a list and parties may strike and rate preferences; if agreement isn't reached, the AAA may choose the arbitrator.	Paid by the parties, plus actual expenses
AAA	If the agreement does not specify a number, one, unless the AAA, in its discretion, directs that three arbitrators be appointed.	Direct Appointment by parties, or Association provides a list and parties may strike and rate preferences; if agreement isn't reached, the AAA may choose the arbitrator.	Paid by the parties, plus actual expenses

Appeals In the public court system, appeals are sometimes filed as a way to lengthen the disputing process or to avoid paying a judgment for a period of time or as a threat to induce the prevailing party to settle for an amount less than the judgment. As the tables below illustrate, the AAA stands in sharp contrast to the legal system in its non-provision of appeals within its system. The attitude of trade association-run systems to the provision of an appeals process is mixed.

Table 11: The Availability of Intra-Association Appeal

Association	Is Intra-Association Appeal Available?
BoA	No
AFMA	No
ASTA-spice	Yes
AFI	No
CMAA	Yes
GCA	Yes
NCPA	No 1
NHA	Yes
PIW	No
RMA	No
RTA-NA	Yes
NGFA	Yes

[1] However, there is provision for a "rehearing" if and only if new evidence is discovered after the hearing has been completed.

Table 12 – Availability of Appeal in Systems Run by the AAA & Affiliates

Association	Is Intra-Association Appeal Permitted?
AFOA	No
ASTA-seed	No
AAA	No

The NGFA arbitration system does provide for intra-association appeal. This feature of the system, as discussed further below, adds an extra layer of protection against biased or erroneous results. In addition, unlike the rules governing appeals in most public courts, its Arbitration Appeals rules contain several safeguards against the strategic use of appeals or threats to appeal.

First, the NGFA Arbitration Rules set out strict time limits for requesting an appeal, fifteen days from issuance of the primary arbitration committee's decision,[22] and appeals tend to be rendered in a timely manner. Second, the NGFA rules require the losing party to post a bond in the amount of the judgment,[23] thereby removing a defendant's incentive to request an appeal merely to delay paying a judgment. Finally, the NGFA imposes a separate filing fee on the appellant of twice the arbitration fee paid for the primary arbitration,[24] thereby greatly lessening the incentive to appeal in situations where the hope of reversal is slim. The number of appeals at the NGFA compared to the number of arbitrations is small.

[22] NGFA Arbitration Rule 9 (c)
[23] NGFA Arbitration Rule 9 (d)
[24] NGFA Arbitration Rule 9 (c)

The Discovery Process The NGFA system does provide for the exchange of information between the parties and specifies in its rules the type of evidence that should be submitted to establish particular types of facts.[25] The rules and jurisprudence of the tribunal also provide that when a party fails to provide information the arbitrators may take that into account. This provides parties with a significant incentive to provide the relevant information. It is not uncommon for arbitrators to note in their opinions that one or the other party failed to introduce a type of evidence that they considered probative such as a copy of a contract. The system does not provide for the type of widespread "fishing" expeditions through a person's business records that are permitted by the federal (and most state) rules of civil procedure. This is one of its greatest advantages. Sometimes a plaintiff who is considering filing a case in court may be deterred from doing so because the rules of civil procedure will then give the defendant access to business records that the plaintiff prefers to keep secret, such as customer lists or sources of supply, especially if the plaintiff and defendant are in any sense competitors (as in a dispute between two merchants who each buy and sell in a particular geographic area). Fear of being required to disclose this information may deter breached-against transactors from filing meritorious claims. As a consequence, the NGFA system may lead plaintiffs to vindicate their rights in cases where they would find it undesirable to do so in the public system—thereby increasing their access to justice.[26]

Although opponents of ADR in general, often claim that the differences between arbitral procedure and court procedure with respect to information exchange amount to a lack of due process in the private proceeding, this claim, at least in arbitration between business entities, reflects a fundamental misunderstanding of the needs of commercial contracting parties. There is not a single industry-run arbitration system that provides parties with the type of wide-ranging discovery rights that they are entitled to in court. Most, simply leave it to the parties to submit relevant information and many, such as the Board of Appeals, the National Cottonseed Products Association, the Printing Industries of Wisconsin, the Rice Millers Association, and the Association of Food Industries (with the parties' prior consent), also explicitly permit,[27] although do not require, the arbitrators to request additional information from the parties. The rules of these tribunals are developed and voted on by the very people whose transactions will be governed by them. As a result, if transactors really felt that these wide ranging discovery rights (due process protections) added value to contracting relationships, it would be logical for them to be included in their private systems.

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[25] See e.g., NGFA Arbitration Rules, Rule 6(a)(4) (explaining how to demonstrate proof of market difference); id. Rule 6(f) (providing that "if the grade or quality of commodities is in dispute, inspection certificates or other documentary evidence must be submitted.")

[26] For a general discussion of the ways transactors' desire to keep business information private might effect their litigation decisions, see Omri BenShahar and Lisa Bernstein, The Secrecy Interest in Contract Law, 109 Yale L.J. 1805 (2000)

[27] The rules of other associations examined are silent on this issue. Although the AAA gives wider ranging discovery rights under most of its rules, the general arbitration rules, the American Fats and Oils Association Rules, the American Seed Trade Association rules, all explicitly give the arbitrators the right to request information as well.

In thinking about how more limited discovery rights might impact the accuracy of adjudication,[28] it is important to note that arbitrators in trade association-run arbitration systems tend to have a great deal of background information about the industry, and a clearer understanding of the typical evidentiary trail in a given type of transaction. This knowledge likely makes it easier for them to make inferences from what they do not see than it would be for a judge or jury. Given their greater understanding of the market and transaction at issue, and the relatively clear nature of the trade rules, there is no reason to think that their decision would in fact be any less accurate than the decisions of judges and juries in similar cases governed by the Uniform Commercial Code.

Finally, it is important to note that state legislatures are beginning to recognize that even large corporations, generally considered to be among the most sophisticated litigants, who have contract disputes with other large corporations, might not find the wide ranging rights of discovery made available under the federal and most state rules of civil procedure desirable. Delaware, for example, has passed the Delaware Summary Proceedings Act[29] which is designed to give the parties in large contract disputes[30] a streamlined way to resolve them. The Act makes jury trials and punitive damages unavailable,[31] restricts the types and amount of discovery that may be undertaken, and limits the time for discovery to 180 days.[32] Since the Delaware legislature is considered uniquely sensitive to business concerns, the adoption of this statute is a strong indication that the availability of a less discovery intensive method of resolving disputes is considered desirable by very sophisticated (perhaps the most sophisticated) contracting parties.

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[28] Nevertheless, even if the lack of court-style discovery did reduce accuracy, it would not necessarily be an undesirable feature of the system. There is no reason to suppose that businesses want to bear the cost of the type of wide-ranging fact-finding and discovery permitted in civil litigation and AAA-sponsored general commercial arbitration. For an overview of the arguments against the desirability of maximum accuracy in adjudication, see Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis,* 23 Journal of Legal Studies, 307 (1994). While the public court rules of procedure need to be the same for contracts and torts (which may require a fishing expedition to uncover), business and non-business disputes, the NGFA system has the flexibility for an intelligent approach toward the type of information that it would be most cost effective to permit or to require disputing parties to introduce.

[29] Del. S. Res. 28, 137th Gen. Assembly (1994). In addition, many states explicitly require arbitration and/or mediation provisions to be included in certain types of agricultural and non-agricultural contracts, suggesting that states themselves perceive arbitration and/or mediation to be better than state courts for resolving such disputes See e.g., NY CLS Racing & Wagering § 1013 (2004). (Requiring binding arbitration to resolve disputes over the simulcast of horse races.); Cal Ins Code § 10089.70 (2004). ("Program for insurance mediation for earthquake disputes and automobile collision coverage and automobile physical damage coverage."); K.S.A. § 16-1505 (2003). ("Any swine purchasing contract, swine marketing contract or swine production contract between a contractor and a swine production facility owner or swine marketing pool or swine producer shall contain language providing for resolution of contract disputes by either mediation or arbitration. If there is a contract dispute the parties may submit the disputed issue to an arbitrator or mediator selected by the parties pursuant to the contract provisions.")

[30] Originally, the Act made its procedure available to disputes with over a million dollars at stake, but since 1998 it has been available in cases with more than one hundred thousand dollars in controversy.

[31] Del. Super. Ct. Rule 124(b) (2004).

[32] See Del. Super. Ct. Rule 124-33 (2004)

Openness and Public Access Trade association-run arbitration tribunals vary widely in terms of public and even member access to information about arbitral outcomes and decisions. Like the AAA, many association tribunals simply render awards and do not produce any kind of arbitral opinions. The AAA defends this practice in its arbitrators' manuals on the grounds that it minimizes the likelihood that its awards can be challenged in court.[33]

Other associations, such as the Memphis Cotton Exchange, require arbitrators to write opinions but only make these available to the disputing parties.

Table 13 below lists the way that each tribunal reports its decisions. A reporting method is classified under the heading "opinion" if it includes a statement of facts, allusion to the rule to be applied, and some conclusions applying the rule to the facts. A reporting method is classified as an award, if it is simply a written statement that Mr. A must pay $X to Mr. B.

Table 13 - Form of Decision in Trade Association-Run Arbitration Systems

Association	Award or Opinion?
BoA	Opinion
AFMA	Opinion
ASTA-spice	Opinion
AFI	Opinion
CMAA	Unclear
GCA	Opinion
NCPA	Opinion
NHA	Opinion
PIW	Practice varies
RMA	The award may, but need not, contain a statement of arbitrators' reasons and conclusions.
RTA-NA	Opinion
NGFA	Opinion

*In many cases, the rules were not explicit about the form of decision; so these determinations were made with the aid of inference from the language used in describing the award.

[33] See "No Written Opinion is Required," a Guide for Commercial Arbitrators, available at: http://www.adr.org/index2.1.jsp?JSPssid=15727&JSPsrc=upload\LIVESITE\Rules_Procedures\ADR_Guides\comguide.html. ("[W]ritten opinions might open avenues for attack on the award by the losing party. Courts will not review arbitrators' decisions on the merits of the case, even where the conclusions are different from those that a court might reach. But a carelessly expressed thought in a written opinion could afford an opportunity to delay enforcement of the award.")

Table 14 - Form of Decision in Systems Run by the AAA & Affiliates

Association	Award or Opinion?
AFOA	Unclear
ASTA-seed	Award
AAA	Award

Among trade association systems surveyed, the NGFA arbitrators write the most complete and cogent opinions. The NGFA also makes its opinions more easily and widely available to both members and the general public than any other association. NGFA opinions are made available in both the hard copy and electronic versions of its monthly newsletter and can be accessed by both members and the public on an unrestricted part of the NGFA website. The opinions are well-written and structured, with a clear statement of the facts, a discussion of the governing source of authority, and a clearly set out method for calculating damages when they are awarded. Indeed, it is far easier for a lay person to read NGFA opinions to learn what is expected of him[34] than it is for a person to figure out what it is he is actually supposed to do in a real world transaction from reading the Uniform Commercial Code and thinking about the unwritten customs of his trade, precisely what he would be required to do to figure out the proper course of action in a particular situation under the law. In addition, as discussed above, the NGFA sponsors seminars and training sessions to better acquaint interested persons with its arbitration system and other aspects of the trade. These educational programs are extraordinarily well-run, providing an understanding of the trade rules that is the equivalent of a law school's course in commercial law. It is far more likely that a grain merchant will know the NGFA's rules than it is that a typical merchant transactor will understand the contours of the Uniform Commercial Code. The effect of the NGFA system on influencing behavior is likely to be far stronger than the effect of a legal precedent on the activities of merchants more generally.

The NGFA's jurisprudential approach does not give the arbitrators the authority to change the Trade Rules through their decisions. Nonetheless, their opinions serve the function of identifying areas where the rules may need to be reviewed and possibly revised, and thereby promote the evolution of the governing principles perhaps better than the incremental common law approach of the courts.

More generally, the NGFA opinions serve to educate industry participants not only about how the rules work (which they do extraordinarily well), but also about what is and is not regarded as proper commercial practice in the industry. They are therefore more likely to

[34] Indeed, NGFA opinions sometimes contain very clear and distinct messages about what types of behavior are and are not considered acceptable. They also contain discussion about what constitutes good practice and how disputes can be avoided. See e.g., Cargill v. Zen Noh, NGFA Arb. Case. No. 1708 (noting that "the arbitrators take this opportunity, however, to suggest to all grain merchants that disputes of this type can be avoided by using clear, unequivocal and simple terms or language to make offers and to indicate acceptance to constitute a trade or enforceable contract."); Commodity Specialists v. Bartlett and Company, Case No. 1715 ("The arbitrators also concluded that the broker could have worked with both principals more explicitly at the time of the trade as the implicit meaning to both the buyer and seller.")

serve the key function of providing guidance for future behavior, than court decisions many of which are rendered without any meaningful opinion being written.

Qualifications of Neutrals and Safeguards Against Bias Trade association arbitrations are typically conducted by either active or retired members of the trade. There are no professional cadres of arbitrators and most arbitrators do not have legal training. Table 7, above, sets out the formal descriptions of arbitrators and their necessary qualifications in a number of trade association run systems and Table 8 above, sets out the same information for the AAA and the AAA-affiliated programs.

All trade association-run systems are careful to try to disqualify arbitrators who might have an interest in and/or be affected by the outcomes of the cases that they hear. Many have features that may operate as checks against biased decision-making. The NGFA has several such checks. First, NGFA arbitrators are required to sign their opinions, making the quality of their judgments at least partially observable to the membership-at-large. If an arbitrator were viewed to have rendered a biased opinion, he would likely suffer harm to his reputation and a decline in his own business' profitability, making it quite unlikely that he would engage in this type of practice. Second, the clarity of the NGFA trade rules, and the formalistic adjudicatory philosophy adopted by its arbitrators, are an additional layer of protection against bias. Unlike courts applying the Uniform Commercial Code, who have tremendous leeway to vary outcomes based on their conclusions about what is reasonable, seasonable, customary, and in good faith, NGFA arbitrators have significantly less discretion. Although custom (that is, unwritten custom) does play some role in NGFA arbitration when both the contract and the trade rules are silent on a point,[35] it is not the basis of many arbitral decisions, and unlike in the public legal system custom and conduct are rarely permitted to vary or trump the meaning of trade rules or contractual provisions as they so often do in litigated cases.[36] Although no dispute resolution system absolutely prevents biased decisions, the clarity of the NGFA rules makes it much harder for arbitrators to disguise bias, thereby reducing the likelihood that biased decisions will knowingly be rendered in the first place.

Unlike many private legal systems, the NGFA system gives the parties the right to appeal to a five-member arbitration appeals committee which undertakes a de novo review of the record, making it highly unlikely that attempts to improperly influence members of the primary arbitration committee would be successful. Since the make-up of any appeal committee is not determined until an appeal is filed, it would be quite risky to engage in such activity without being certain one could succeed in influencing the appeals panel as well.

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[35] For a discussion of the NGFA's adjudicative approach see Lisa Bernstein, Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms, 144 U. Pa. L. Rev. 1765 (1996) (noting that the NGFA Trade Rules are taken to codify those industry practices that are viewed to be customs, so that while arbitrators occasionally look to unwritten custom, it is only when there is no other basis for a decision that these unwritten customs are considered. Moreover, because unlike courts the arbitrators in the NGFA system have wide-ranging industry experience, it is unlikely that litigants will be able to fabricate unwritten practices, something that it is fairly easy for them to do in the public legal system.)

[36] See e.g., Nanakuli Paving v. Shell Oil, 664 F.2d. 772 (9th Cir. 1981) and Columbia Nitrogen v. Royster, 451 F.2d 3 (4th Cir. 1971), cases where courses of performance, courses of dealing and usages of trade are invoked to override quite clear contractual provisions.

The small likelihood of success of this type of corruption—which is further reduced by the NGFA rules giving either party the right to challenge both primary and appellate arbitrators for cause-- and the high risk of such an endeavor, make it very unlikely to occur. Moreover, since primary arbitration tribunals are composed of three arbitrators and appeals committees of five different arbitrators, obtaining a tainted judgment would require the influencing of a large number of people simultaneously, something that is unlikely to succeed.

Finally, the fact that NGFA opinions do not have binding precedential effect, greatly reduces, if not eliminates, arbitrators' incentives to render improper decisions in situations where the interests of an industry segment to which they personally belong are at issue. [37]

One-way requirements In most trade association run systems, members are, as a condition of membership, required to submit disputes with other members to the association's arbitration system. Many systems are also willing to hear disputes between member and non-members, provided that either of the parties includes an arbitration provision in their contract or enter into a post dispute agreement to arbitrate. The types of clauses often found in standard form consumer contracts which require the consumer to arbitrate any claims, but reserve to the company drafting the contract the right to resolve a dispute either through arbitration or litigation at its discretion do not appear to be used in the grain and feed industry.

Some of the trade association run tribunals, however, do have fee and/or cost-shifting provisions that some critics might characterize as one way requirements, though they generally apply to winning or losing parties regardless of status and thus are not properly characterized as such. The NGFA does not have any such provisions. In terms of fairness to smaller would-be plaintiffs this is quite important. In systems where plaintiffs might be forced to bear a portion of the defendant's costs (in an amount that might be either high or difficult to estimate) they might be deterred from bringing suit, if these extra fees and costs would leave them in financial distress were they to lose.

[37] This also reduces the pressure an industry segment might find it worthwhile to bring to bear in a particular case.

Table 15 - Fee and Cost-Shifting Provisions in Trade Association Systems

	Fee Shifting Provisions	Cost Shifting Provisions
BoA	For ATMI and ACSA members: Winner of arbitration has filing fees returned. Fees for requests for ex parte decisions returned if (identical) charge to losing party is collected. For non-members: No provisions	No provisions
AFMA	At the discretion of the arbitrator.	At the discretion of the arbitrator; however, certain costs are presumptively allocated equally.
ASTA-spice	Fee shifted to losing party unless losing party made prior written settlement offer deemed sufficient, in which case fee paid by party refusing settlement offer.	No provisions
AFI	Fee added to award of winning party who initiated arbitration.	At the discretion of the arbitrators, but parties bear expense of presenting their own witnesses, and there are limitations on the award of winning party's travel expenses.
CMAA	At the discretion of the panel.	At the discretion of the panel.
GCA	To be provided in award, apparently at discretion of arbitrators.	To be provided in award, apparently at discretion of arbitrators.
NCPA	Fee, in form of deposit for costs, shifted to losing party unless losing party made settlement offer greater than award renewed before arbitration committee, in which case fee paid by party in whose favor award is made.	Cost shifted to losing party unless losing party made settlement offer greater than award renewed before arbitration committee, in which case fee paid by party in whose favor award is made.
NHA	Winning party has ½ of fee returned; losing party forfeits entire fee.	No provisions
PIW	No provisions	No provisions
RMA	Arbitrators must allocate fees against one or both parties, allocation apparently discretionary.	Mandatory allocation includes expenses of arbitrators and Arbitration Committee and fees and expenses of experts and consultants of arbitrators and Arbitration Committee.
RTA-NA	To be stipulated in award and ultimately borne by losing party unless the arbitrators otherwise determine.	To be stipulated in award and ultimately borne by losing party unless the arbitrators otherwise determine.
NGFA	No provisions.	No provisions.

1 Note that the Southern Mill Rules provide that "[e]xpense of the arbitration shall be borne by buyer and seller in the same proportion as the respective parties may win or lose in the award made by the arbitration."

Table 16 – Fee and Cost Shifting in Systems Run by the AAA & Affiliates

	Fee Shifting Provisions	Cost Shifting Provisions
Association	**Shifting (or Return of filing fees)**	**Shifting of Arbitration Costs**
AFOA	In the discretion of the arbitrators, including fees due to AAA.	In the discretion of the arbitrators, including expenses due to AAA.
ASTA-seed	In discretion of arbitrators.	In discretion of arbitrators.
AAA	In discretion of arbitrators.	In discretion of arbitrators.

Consent of the parties The NGFA By-laws require members to submit disputes with other members to arbitration. As a consequence in transactions between NGFA members there are no colorable issues regarding the meaningfulness of members' consent to arbitrate. In transactions between members and nonmembers, however, where some contracts provide for NGFA arbitration and some do not, arguments based on lack of consent to the NGFA's jurisdiction have been raised from time to time. Typically the nonmember will claim either that he was unaware of the arbitration provision,[38] or that the system is systematically biased against nonmembers so he should not be held to the terms of the agreement.

In arguing against the NGFA's jurisdiction on the grounds that he did not know about the arbitration provision, a non-member is drawing on arguments from merchant-to-consumer arbitration regarding arbitration clauses that are buried in the fine print of contracts that unsophisticated consumers have no rational incentive to read. In contrast, the non-members challenging the NGFA arbitration provisions are, even if they engage in farming activities, more closely analogous to merchants than they are to consumers. Today, even small farmers are relatively sophisticated, selling their products for future delivery and managing their financial exposure with futures contracts settled on boards of trade. The contracts they challenge are not insignificant in size and they have as great an incentive as two merchants transacting with one another to include the provisions that they think will maximize contractual value. The ability to bring an arbitration action if they are not paid is, especially if they are a smaller entity than the member they are dealing with, of tremendous benefit to them, since the NGFA process is, as discussed in this report, cheaper and quicker than instituting an action in court. Moreover, since the NGFA widely publicizes the results of arbitration cases and makes its decisions easily accessible to both members and nonmembers alike, and also publicizes any failure of a member firm to pay an arbitral award, the chances that a judgment rendered by the NGFA will be promptly paid is far higher than the chances that prompt compliance with a court judgment will take place. More generally, the use of arbitration in connection to cash contracts for agricultural commodities is widespread and known to all in the industry. Indeed a contract for the sale of an agricultural commodity on

[38] There are some steps that NGFA members could take when entering into contracts with non-members that would make it less likely (though by no means certain) that a court would uphold the clause. For example, the arbitration clause should not be buried in small type and might be set forth early in the contract, in the specially negotiated remarks section, and in large type. In addition, the member could require the nonmember to separately initial the arbitration clause to show clearly that he was aware of it.

the cash market that did not include an arbitral provision of some kind would be far more unusual than one that did.

Extension beyond the contract context Many of the features of industry-run arbitration systems that make them well suited for the resolution of contract disputes, and many of the arguments in favor of their use, do not extend to their resolution of other types of disputes. For example, a panel of grain merchants adjudicating a dispute about timely delivery or damages for off-grade goods can bring to bear their years of experience in the trade and their knowledge of industry trade rules. In contrast, such a panel would have no particular expertise in resolving a dispute over termination of an employee, the existence of employment practices that violated the Age Discrimination in Employment Act,[39] or fault for a slip and fall tort that occurred in the employees' parking lot after an ice storm. The NGFA trade rules, by their terms, govern only "transactions of a financial, mercantile or commercial character connected with grain," "feed" and "barge transportation,"[40] and there does not appear to be a single NGFA arbitration case that involved any other type of transaction or claim. Many trade association-run programs have limits similar to those in NGFA compulsory jurisdiction.

The NGFA arbitration system offers disputants a way to resolve a dispute far more quickly than they could if they had recourse only to the public court system where the use of lawyers is, as a practical matter required. This cost saving is important not only in cases that actually result in an arbitration decision, but also in terms of its effect on limiting the ways that the mere threat of taking a dispute to a third party neutral impacts contractual relations. In transactions where one transactor can more easily bear the high cost of litigation (perhaps the first transactor works for a large firm with in-house counsel and no cash flow difficulties), the stronger transactor can threaten the weaker one with litigation if he does not agree to revised terms or some other demand. Because the mere initiation of a legal case, which is quite cheap in terms of filing fees, has the practical effect of requiring the defendant to hire a lawyer to file an answer (which can be quite costly) and may enable the plaintiff to make discovery requests before dismissal that are costly to respond to, the plaintiff can (especially if he has inside counsel), in effect, impose significant costs on the defendant before being forced to bear significant costs himself, thus gaining leverage he would be unable to obtain in the NGFA system.

Enforceability Under the FAA and the law of most states, an arbitration judgment is enforceable to the same extent as an award entered by a court.[41] Trade association-run systems, however, have additional means of persuading parties to comply with their

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[39] Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-34).

[40] NGFA Grain Trade Rules, Preamble; NGFA Feed Trade Rules, Preamble; NGFA Barge Freight Trading Rules, Preamble.

[41] Although arbitration awards can be challenged in court, on the grounds that fraud was involved; the arbitrators were provably biased; the arbitrators were guilty of misconduct, and especially of refusing to hear relevant evidence; that the arbitrators exceeded their powers or that they failed to execute a "mutual, final, and definite award," see 9 U.S.C. § 10(a) (1)-(4), reversal is uncommon.

judgments, such as publicizing noncompliance in association periodicals, a practice that in many industries can lead to reputation loss. [42]

III. Benefits of the System

As discussed above, many of the benefits of the NGFA's private legal system come from its ability to resolve disputes more quickly and cheaply than courts or general commercial arbitration providers. Yet many of its most important benefits do not come from its provision of first rate arbitration services, but rather from its provision of comprehensive sets of contract default rules and its adoption of a largely formalistic adjudicative approach that provides an alternative to inquiry into course of dealing, course of performance and unwritten usages, except in cases of true gaps in both the Trade Rules and the governing contract. Together the Trade Rules and the association's adjudicative approach, reduce the cost of transacting, reduce the number of genuine misunderstandings about rights and obligations that arise, and increase both the likelihood of settlement when disputes do arise as well as the likelihood that those settlements that are reached reflect the merits of the dispute rather than the parties' relative ability to bear litigation costs and delay.

First, one of the most straightforward benefits of the trade rules and the NGFA's reluctance to look to unwritten customs, is that transactors do not need to learn the many and varied local customs that have grown up around the country, making it less expensive for transactors to deal with those living in other locations, thereby promoting the growth of a national market with its associated benefits. Similarly, because the Trade Rules are increasingly being used in the types of cross-border transactions encouraged by NAFTA, they make it unnecessary for transactors to become familiar with the commercial law related rules of Mexico and Canada, thereby reducing transaction costs.

Second, the comprehensiveness of the NGFA rules reduces the cost of entering into any contract, by decreasing the number of terms that must be specified and the number of terms that must be specifically defined. While this particular benefit was likely more significant before the advent of computers made the generation of standard-form and amended standard-form contracts so inexpensive, even today it facilitates telephone trade that are confirmed by email or postal mail. Moreover, by providing so many clear definitions of terms commonly used in trade, the rules make it unnecessary for contracting parties to set out definitions of key terms in their confirmations and contracts, leading to simpler agreements that the transactors are more likely to understand.[43]

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[42] For discussions of the ways that associations use reputation bonds as a way of inducing compliance with their judgments, see Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms," 144 *University of Pennsylvania Law Review* 1765 (1996); Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions, 99 *Mich. L. Rev.* 1724 (2001); The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study," 66 *U. Chi. L. Rev.* 76 (1999); Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry," 21 *Journal of Legal Studies* 115 (1992).

[43] Moreover, although it is currently inexpensive for each party to define terms in its computer-generated confirmations, it remains expensive for parties to trades done through the exchange of confirmations to check to see that the terms of their form confirmations agree. The reliance on the trade rules to supply such terms unless otherwise noted, therefore reduces the cost of checking

Third, the rules reduce the likelihood that disputes based on genuine misunderstandings of transactors' respective rights and duties will occur. Before the adoption of the rules and before knowledge of them became widespread, misunderstandings about the meaning of particular provisions were a surprisingly common source of disputes.

Fourth, the clear and predictable trade rules adopted by the NGFA create value for transactors by promoting flexibility and cooperation in the transactions they govern. Unlike courts who look to the parties' actions under a contract as the best indication of what they intended their writing to mean, and who often interpret actions like acceptance of late deliveries on a few occasions as modifications of the underlying contractual obligations, the NGFA arbitrators look to the obligations set out in the contract and Trade Rules to resolve disputes. As a consequence, if at the time a particular shipment arrives late, it has actually caused no harm to the buyer, there is no reason for him to bring an action against the seller or do anything other than accept the delivery and, if he feels like it, suggest that he hopes the goods will arrive on time in the future. If, however, the buyer knows that in accepting late delivery he will be eroding his right to demand timely delivery in the future, he might object to the late delivery and cause a ruckus that he would have no incentive to cause under the NGFA system. Put another way, there are many types of adjustments that contracting parties are willing to make at the time particular circumstances arise, that they might nonetheless be very reluctant to promise to make should the same circumstances arise. The reason is simple. Consider a buyer who keeps some inventory on hand and who is known to always give small extensions of delivery dates if he thinks the person he is dealing with has taken proper steps to ensure timely delivery. This may be good business practice for him, because knowing that he will be reasonable, sellers will not feel it necessary to take added precaution against late delivery and may therefore quote him a better price than the price he would be quoted were he to haul every seller into court or arbitration for each technical breach of a contract. Such a buyer, however, would want to preserve the right to demand strict compliance if he thought that the seller was not taking the proper steps to ensure timely delivery, or was putting him last as a priority since he was so accommodating.[44] As a consequence, relative to state imposed law, the NGFA system is quite likely to encourage contractual flexibility.

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confirmations as well as the likelihood that a so-called battle-of-the forms problem will arise in the case of a contractual dispute.

[44] While a contract could be drafted that permitted the seller to be late when he had taken optimal precautions to ensure timely delivery, this would be undesirable from the point of view of the buyer. What exactly would these optimal precautions be? First, the buyer and seller might not have a clear idea of it and it would be expensive to prove to a third party both what these precautions were and whether they had been taken in a particular case. As a consequence, even if it could be proven, looking at the matter from a time of contracting perspective and anticipating the cost if a dispute arose, it is unlikely that either party would bind itself to such an obligation. In economic terminology, such a contract would condition on information – whether or not the seller took optimal precautions – that would not be verifiable, that is, could not be proved to a court with sufficient accuracy at a cost that the parties would regard as desirable from an ex ante perspective.

IV. Common Objections to the Use of Commercial Arbitration and their Applicability to the NGFA system.

Many of the objections to arbitration put forth by those who seek to limit its use, were developed in connection with consumer-to-corporation ADR of the sort that is required by credit card user agreements, product warranties, bank-account agreements, and software vendors.[45] Although some of these arguments are powerful in the consumer context, most have little or no force in the context of contracts to buy and sell agricultural commodities, even in situations where one party is a merchant (and a member of a trade association providing arbitral services) and the other a producer (who is not a member of such an association.)[46]

First, and most generally, these arguments are based on the idea that agricultural producers are similar in knowledge, power, and resources, to ordinary consumers. While this comparison might have been valid at some point in the past where most producers were tiny unsophisticated family-run farms, it is much less apt today, when many producers (even family-owned firms) are larger and most producers must comply with a host of complex governmental regulations, have most likely encountered arbitration provisions similar to the NGFA's when they purchased seeds, and have long engaged in rather sophisticated financial means of managing their risk, including hedging on the Chicago Board of Trade .

Second, a core element of the critiques of consumer-to-corporate arbitration are that the consumer is somehow either unaware of the arbitration provision, unable to understand it, or forced to accept it. Given the longstanding use of arbitration in the seed industry, cash-markets for agricultural products, and commodities futures markets, it is unlikely that many farmers are surprised by the presence of these provisions. Moreover, the wording of the arbitration provision that NGFA recommends for use with non-members is clear, easy to understand,[47] and is widely used.

Finally, critics of arbitration point to several differences between judicial and arbitral procedures and conclude that "[a]rbitration includes many unfair advantages for powerful parties because it eliminated many complicated procedures inherent in the judicial system which were created to ensure a fair trial for less powerful parties."[48] There are a number of

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[45] A nice summary of these objections is provided in Shelly Smith, "Mandatory Arbitration Clauses in consumer Contracts Consumer Protection and the Circumvention of the Judicial System." 50 DePaul Law Rev 1191 (2001).

[46] Indeed encouraging the use of business-to-business arbitration was one of the main goals of the Federal Arbitration Act.

[47] The NGFA sample contract for use between grain companies and producers reads as follows: "**Arbitration:** The parties to this contract agree that the sole remedy for resolution of any and all disagreements arising under this contract shall be through arbitration proceedings before the National Grain and Feed Association (NGFA) under NGFA Arbitration Rules. The decision and award determined through such arbitration shall be final and binding upon the buyer and the seller. Judgment upon the arbitration award may be entered and enforced in any court having jurisdiction thereof."

[48] Shelly Smith, "Mandatory Arbitration Clauses in consumer Contracts Consumer Protection and the Circumvention of the Judicial System." 50 DePaul Law Rev 119, 1228 (2001).

reasons, however, that the less complicated and less expensive procedures involved in NGFA arbitration may benefit rather than harm, smaller, less powerful, parties.[49]

To begin with, many less powerful parties do not have the resources to avail themselves of these protective intricacies of the legal system. [50] Even if they might do better (and it is by no means clear that they would) in court than in arbitration, the likelihood that they could afford to pursue a case to trial is quite low, making the chance that as a practical matter, they would have no recourse at all if wronged, even higher than it would have been had their contract included a provision mandating arbitration.

Another procedurally based argument commonly put forth against arbitration is that "arbitration lacks safeguards inherent to the judicial system, such as discovery which is designed to maximize the fairness of trial,"[51] by forcing a corporation to turn over the relevant documents and statistics to consumers. While this objection is powerful in consumer-to-corporate litigation, where wrongdoing might not be uncovered absent the types of fishing expeditions encouraged by the discovery rules, it does not have much relevance in a contract dispute between a farmer and a merchant. In a typical transaction of this type, both the farmer and the merchant should each have a copy of the relevant documentation. Furthermore, especially where the claim is non-delivery of the goods or a dispute over their quality, the farmer may well have equal or better access than the merchant to relevant information. In addition, because the parties in NGFA Arbitration cases may request additional information from each other in their arguments, and the NGFA arbitrators have the authority to make inferences from any failure to provide information, it is unlikely that even large merchant concerns will be able to hide information to the detriment of farmers.

Opponents of arbitration also maintain that "mandatory arbitration denies consumers the traditional elements of the judicial system, including written opinions … the option of having a jury as a decision maker, and a fair appellate process to guarantee justice."[52] These objections do not carry much weight in the NGFA context. First, the NGFA arbitrators do write opinions, indeed they are produced in every decided case. In contrast, many state court proceedings do not result in a written opinion, but rather in an order directing a result. Second, if the purpose of a jury is to have a case decided by a group of peers, the three member NGFA arbitration panels come a lot closer to this ideal than do six or twelve citizens chosen at random who are likely to know nothing about agricultural commodity merchandizing. Third, the NGFA system does provide appellate review as a check on erroneous decisions made by primary arbitration panels.

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[49] The inclusion of arbitration provisions may however have a very negative effect on the ability of public interest groups or class action lawyers to use the consumer class action as a tool for policing corporate behavior. First, the inclusion of such a provision has been held to defeat class action status. Second, the absence of fee and cost shifting provisions, while quite beneficial to individual plaintiffs, makes it less likely that such organizations will choose to undertake these cases on what amounts to a contingent fee basis.

[50] Highly detailed procedural rules tend to favor the party with the better lawyer while simpler procedures are more accessible to ordinary business people and less skilled lawyers.

[51] Shelly Smith, Mandatory Arbitration Clauses in consumer Contracts Consumer Protection and the Circumvention of the Judicial System." 50 DePaul Law Rev 1191, 1228 (2001).

[52] Id. at 1228.

In sum, the leading arguments against arbitration that have been developed in the corporate-to-consumer context, do not, for the most part, apply to agricultural commodities arbitration, even in contexts where the contracts giving rise to the dispute are between merchant members of trade associations and producers who are not members of these associations. In addition, arguments based on the procedural superiority of trial to arbitration overlook the fact that many commercial cases resolved in the court system (excluding those that settle) are resolved not by trial but rather on motions to dismiss, motions for summary judgment, or through the entry of default judgments when the defendant fails to respond to a complaint. As a consequence, those attacking such systems on the grounds that they offer fewer procedural protections than are available at trial, need to show that the due process and fairness-based procedural protections afforded litigants whose cases are disposed of in civil litigation other than by trial are superior to those provided by the NGFA and other trade organizations.[53]

Finally, opponents of general commercial arbitration overlook the fact that industry-specific arbitration systems provide benefits to weaker parties that they cannot obtain in court or general commercial arbitration. These benefits are grounded in the style of NGFA opinions and in the association's arbitral enforcement mechanism. A NGFA member who refuses to arbitrate or who refuses to comply with an arbitral award entered against him can be suspended or expelled from the association. Such actions are published in the NGFA newsletter at the association's expense. In addition, NGFA opinions often label the actions of one or the other party as being improper even in cases where the party being so labeled prevails. These opinions are, as noted above widely circulated. As a consequence, by becoming a member and invoking NGFA arbitration in its contracts with nonmembers, a firm is, in effect, subjecting its contracting behavior to an additional level of scrutiny and transparency to its current and potential future trading partners. When a non-member producer enters into a contract with a NGFA member that includes an agreement to arbitrate, he gets a huge benefit (relative to litigation) if the member breaches the contract or violates trade rules. He has the option of bringing an action and getting damages without the expense of trial. He can also widely expose the bad behavior of the larger entity, thereby inflicting reputational harm. Knowing that any attempt to take advantage of the "little guy," even if technically okay will lead to negative reputation sanctions, and that nonpayment will be severely sanctioned, the member is likely to behave better toward the non-member during the course of their relationship than he would be if the arbitration provision were not included. As a consequence, wholly apart from what happens in decided cases, the fact that the member is subject to additional discipline means that from an ex ante perspective he is less likely to misbehave.

In contrast, in the public legal system, a producer's threat to sue a larger merchant might be unbelievable for many smaller-sized claims because litigation costs would easily swamp any

[53] In California, for example, the percentage of civil complaints (excluding family, small claims, and probate) disposed of by trial in 2003 was 8.8% (.8% by jury, and 8.0% by a court). See http://www.courtinfo.ca.gov/reference/documents/csr2003.pdf. In New York, only 4% of the civil cases were disposed of by trial. See http://www.courts.state.ny.us/reports/annual/pdfs/2002annualreport.pdf. In Texas, 5.56% of civil cases (excluding personal injury and tax) were disposed of by trial. This figure was calculated using statistics found at: http://www.courts.state. tx.us/publicinfo/AR2003/county/stsum_cv.pdf.

expected recovery. Moreover, any threat he might have to damage the large merchant's reputation would also be in vain for several reasons, among them, that he would have to bear the cost, he would not be believable until he had a judgment in hand which might be so many years later that no one will care, and it is unlikely that an opinion will be written in such a case and a mere award will likely not convey any reputation damaging information. Moreover, even if a judicially rendered opinion or award did contain reputation-damaging information, the fact that it was rendered by someone who knew nothing about agricultural commodity merchandizing would mean it would have limited impact. In sum, while many of the industry-wide benefits of the NGFA arbitration system are evident from looking at the way disputes are actually resolved, many of its most important benefits, particularly for non-members, are more subtle and may not be evident solely from looking at decided cases.

V. Concluding Remarks

This report has sought to provide an overview of the operation of the NGFA arbitration system as compared to the operation of other trade association run private legal systems, AAA-run or administered dispute resolution programs, and the legal system. It has demonstrated that while the NGFA system does not precisely mimic either the public system or the AAA's procedures, this should not be viewed as a weakness of its system, but rather as one of its important strengths. The substantive trade rules, procedural rules, and adjudicative approaches, developed in this system are well tailored to the types of transactions they govern. They add substantial value to contracting relationships without introducing any unfairness or power imbalances into contractual relations. Indeed, to the extent that the system affects the distribution of power between contracting parties at all, it tends to provide greater benefits to smaller parties (both NGFA members and nonmembers) by giving them a way to pursue valid claims without taking the type of financial risk entailed in state court litigation or bearing the costs of the significant delays involved in both litigation and AAA and AAA-administered arbitration.

USDA United States Department of Agriculture

Agricultural Marketing Service

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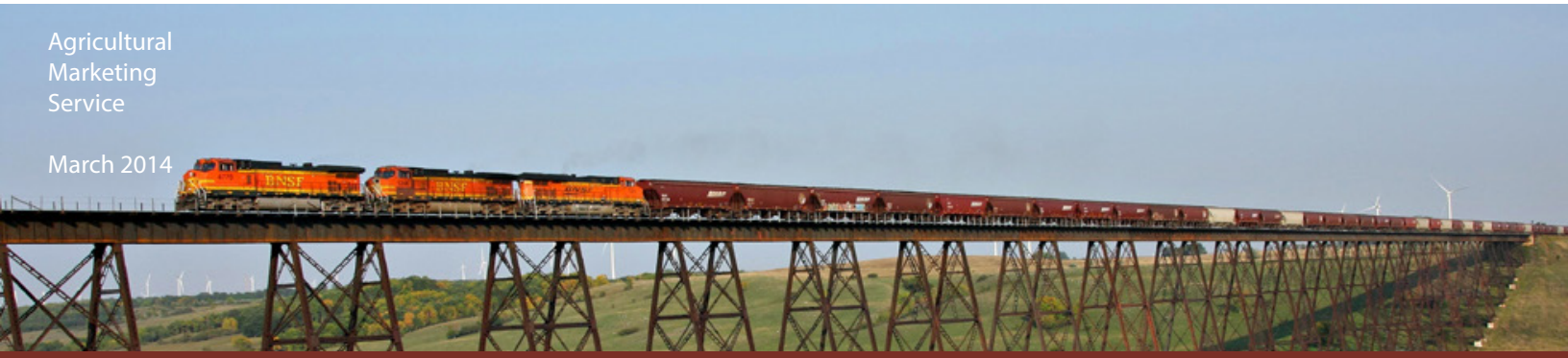

Rail Rate Mediation and Arbitration for Grain Shippers

Marvin Prater • Adam Sparger

Summary

Transportation costs have a direct impact on agricultural producers' profits. Agricultural producers in remote areas have few transportation alternatives, and the price they receive for their products is net of transportation and other marketing and handling costs. When producers and marketers of agricultural products believe the rates they are paying for transportation are too high or uncompetitive, they need access to a dispute-settlement mechanism that is fair, easily understood, accessible, and affordable.

Agricultural shippers believe the formal procedures for challenging unreasonable rail freight rates available through the Surface Transportation Board (STB) are too lengthy and expensive, with the risk not being worth the reward, effectively preventing them from accessing meaningful rate relief. Also, although affected by rail rates, agricultural producers do not have access to STB rate-challenge procedures because they typically do not ship their products to the ultimate consumer, but rather sell them to agribusinesses that arrange for transportation to the final customer.

Mediation and arbitration of agricultural rail rates offer alternatives to formal STB procedures. A less formal rail rate mediation/arbitration system could potentially provide a fairer and lower cost approach to challenging rail rates. The Montana Grain Growers Association, Montana Farm Bureau Federation, and BNSF Railway Company (BNSF) have developed rail rate mediation/arbitration procedures that can be accessed by producers. Although this system is a step forward, it is limited to only one State and one railroad; no other major railroad thus far has been willing to arbitrate rail rates.

A national-level rail rate mediation/arbitration system that is simple and cost-effective is needed to provide a fair and impartial forum for all grain producers and shippers.

Introduction

The United States has invested in a transportation infrastructure—truck, barge, and rail—that gives its agricultural producers a competitive advantage in transportation costs. Even so, higher transportation costs in any given situation can damage the competitive position of U.S. agricultural products in the highly competitive export markets, as can the cost of production at the farm level. The ability to export surplus grain production is extremely important because U.S. farmers produce much more than can be consumed domestically. The ability to export excess supply supports

domestic grain and agricultural product prices, provides jobs, and enhances the vitality of rural economies. The rates agricultural shippers pay for transportation can facilitate or inhibit American competitiveness in world agricultural markets, which can directly degrade the strength of local rural economies.

Railroad volumes and business also hinge on competitiveness in world and domestic markets. Depending on the particular market and geographic location, agricultural shippers may have a choice among transportation carriers or modes. On the other hand, other commodities compete with agricultural traffic for rail capacity, which can influence railroads' offered rates.

Because markets do not respond competitively from every origin at all times, however, producers and shippers may sometimes view the rates they are paying for transportation as excessive or uncompetitive. With transportation costs integral to profit, producers and shippers need access to fair, cost-effective processes to challenge rail rates they believe to be unreasonable.

Under the Staggers Rail Act of 1980,[1] agricultural and other shippers may challenge rail rates that are 180 percent or greater of the revenue-to-variable cost ratios of carriers providing the service. Currently, agricultural shippers may challenge rail rates through a formal rail-rate appeals process governed by the Surface Transportation Board. They also may submit a rail-rate dispute to the National Grain and Feed Association (NGFA) rail arbitration system. But under the NGFA Rail Arbitration Rules,[2] either the shipper or the carrier must be an NGFA member company, and both of the involved parties must agree to arbitrate the rail rate case. A third option for producers shipping through facilities in Montana that are served by BNSF Railway is the rail-rate mediation/arbitration mechanism established by the BNSF and some farm organizations.

Rate Appeals Procedures

There are currently three rate appeals procedures available to shippers through the STB. The first procedure is known as the Stand-Alone Cost (SAC) test. Under the SAC test, a shipper has to design an optimally efficient, hypothetical railroad to serve the traffic that includes the route used by the shipper. The shipper then develops a hypothetical rate used to judge the reasonableness of the actual rate being charged. This hypothetical rate simulates the rate which would prevail in a competitive market. However, the costs and complexity of a SAC test make it inaccessible to all but the biggest shippers who must pay, on average, $5 million or more to litigate such a case.

The second procedure was designed for medium-size rate disputes. It is known as the Simplified-SAC test and is a scaled-down version of the original SAC test, using simplifying assumptions to judge the reasonableness of the challenged rate. Though it is less expensive than the Stand-Alone Cost procedure, the Simplified-SAC procedure still requires more than $2 million in legal and consulting costs to pursue.

The third procedure, known as the Three-Benchmark test, was designed as a less costly alternative to the SAC test to be used in small rate cases. With this test, the reasonableness of the challenged rate is determined by comparing the markup (difference between revenue and variable cost) for the challenged rate to three different comparable markups. This shows whether the challenged rate markup is reasonable compared to other markups. The cost of appealing rail rates using the Three-Benchmark procedure ranges from $250,000 to $500,000, and the limitation on rate relief is $4 million over a 5-year period.[3]

1 *Staggers Rail Act of 1980*, Public Law 96-448, *Title II–Railroad Rates and Inter-Carrier Practices*, §10701a.

2 National Grain and Feed Association. "Trade Rules and Arbitration, Arbitration System." http://www.ngfa.org/trade-rules-arbitration/arbitration/, (February 5, 2014)

3 STB Decision 42980, July 18, 2013, Docket No. Ex Parte 715, *Rate Regulation Reforms*.

Agricultural shippers are in need of a rate-challenge procedure that is timelier and less expensive than these rate appeals procedures. Many agricultural shippers have found these rate-challenge procedures too lengthy and expensive, effectively preventing them from accessing rate relief. Although chemical companies have successfully used the Three-Benchmark Procedures, no agricultural shipper has appealed rates using them. U.S. Magnesium, a producer of chlorine, is the only firm to file a rate complaint using the Simplified-SAC procedures, but settled the case before an STB decision was rendered.[4]

Mediation and Arbitration

Mediation and arbitration offer alternatives to the rate-challenge procedures at the STB. Mediation is an informal process in which the parties discuss issues in dispute with a mediator who assists them in resolving the dispute. The outcomes of mediation are not binding. Arbitration is more formal than mediation, but is still a relatively informal process compared to formal STB procedures. Arbitration is generally binding on the parties, in which the parties in a dispute present written and/or oral arguments before an arbitration panel of neutral qualified third-party arbitrators with expertise in the subject matter of the dispute. The quality of the decisions in arbitration is strongly dependent on the objectivity and qualifications of the selected arbitrators.

Arbitration involving grain-shipper rail-rate appeals would operate most effectively with a panel of three arbitrators who collectively have strong backgrounds in arbitration procedures, grain merchandising, and rail transportation. A panel of three arbitrators is generally preferred because it improves the likelihood of well-reasoned opinions, enhances the balance and fairness with which the system is viewed, and reduces the potential for inadvertent errors. All of these reasons are especially important given that there are limited rights for court appeals under arbitration.

Unlike a court case, an arbitration decision does not set precedent. However, by agreeing to participate in arbitration, the parties agree to be bound by the arbitral decision with limited appeals rights. Thus, a desirable arbitration agreement would provide for an appeals process that broadly allows either party to appeal an arbitrated decision in addition to necessary instances involving a clear abuse of an arbitrator's authority or discretion. Without an effective avenue for appeal within the arbitration agreement, parties may not be as willing to enter arbitration proceedings because the court system generally will not vacate arbitration decisions. When an arbitration appeal to the court system occurs, the appellate court will typically look at the process of arbitration and the way in which the rules of law were applied to determine whether the proceeding was fair, but will generally not alter the arbitrator's finding of facts or decision unless impropriety, such as clear arbitral bias, is present.

If parties are to make use of an arbitration system, there must be assurances of fairness, neutrality, and openness to foster an atmosphere of trust. Publishing the decisions—excluding proprietary and confidential business information—is essential for providing transparency, building trust in individual arbitrators, and demonstrating a commitment to neutrality. In addition, publicly published decisions can discourage extreme positions, encourage voluntary settlement, and create incentives for arbitrators to render thoughtful, well-reasoned decisions. Arbitration processes that are perceived as accessible and fair by both parties are also likely to encourage the parties to try to resolve the dispute through direct discussions, thereby preserving business relationships.

A major benefit of arbitration is that it has the potential to offer less time-consuming and lower cost rail-rate challenge procedures than the formal STB process. One of the most important aspects of arbitration is the direct business discussions it encourages, facilitating informal mediation of many issues before they require more formal arbitration. The Montana-BNSF Railway arbitration system only charges each party an initial $400 case management fee to initiate a case. Additional fees are determined by the fee schedule of the administering body, the Judicial Arbitration and Mediation Services (JAMS).

4 *U.S. Magnesium v. Union Pacific Railroad*, Surface Transportation Board, NOR 42115 and NOR 42116. The cases were initiated on June 25, 2009, and terminated on March 24, 2010.

Similarly, the STB and NGFA have arbitration systems for resolving commercial disputes between shippers and participating railroads. The NGFA arbitration system, established in the late 1890s, has a long history of successful resolution of disputes. The fee structure for NGFA rail disputes arbitration is:

Up to $100,000 claim	$400, plus 1% of the claim
$100,001 to $500,000 claim	$900, plus ½% of the claim
More than $500,001 claim	$2,150, plus ¼% of the claim
Any claim	Maximum fee of $10,000

However, the fees cited in these examples do not include the possible costs of a consultant and/or lawyer that the parties may decide to use to help prepare the case.

Montana-BNSF Mediation/Arbitration System

The mediation/arbitration system between producers in Montana and the BNSF Railway is the only one that can be used to mediate or arbitrate rail rates. BNSF does not have any current plans to enter into other bilateral arbitration agreements, but it is open to reviewing and discussing other voluntary arbitration proposals.

The Montana-BNSF mediation/arbitration system was started January 30, 2009, and is conducted through the Montana Grain Growers Association (MGGA) and the Montana Farm Bureau Federation (MFBF). It is administered by JAMS and modeled after the NGFA's arbitration rules. No other major railroad thus far has been willing to arbitrate rail rates.

The Montana-BNSF arbitration system uses three mutually agreed-upon arbitrators drawn from a pool of eligible arbitrators. If the parties cannot agree on three arbitrators, the claimant chooses one, BNSF chooses one, and the remaining arbitrator is chosen by both parties.

The system is unique in that it allows grain producers, rather than the grain elevator shipping the grain, to make claims. The advantage of this provision is that the grain producer is generally the party that can incur the most harm from rail rates believed to be excessive, since transportation costs are reflected in the price paid to the farmer. By contrast, the elevator's main concern may be that its rail rates are comparable to other elevators in the region so that it does not become uncompetitive.

Eligibility is limited to those producers shipping wheat or barley more than 250 miles on BNSF and is restricted to shipments having a revenue-to-variable cost ratio (R/VC) higher than 180 for non-shuttle shippers and a R/VC higher than 195 for shuttle shippers. The R/VC is determined using the STB Uniform Rail Costing System. Arbitrators are also limited to ruling on the tariff rate, not on the fuel surcharges or other accessorial charges that can add significantly to the cost of rail service. The fuel surcharge, however, is included in mediation discussions. Finally, relief would not be granted in the event a truck rate is lower than the BNSF rate, even though the truck rate would be uneconomic over longer distances or the lower price may be given only when the trucking firm needs a backhaul. Any relief obtained by the producer is effective for no more than 1 year from the award and 14 months prior to the commencement of the arbitration process.

In December 2009, a case filed by a Shelby, MT, producer was successfully mediated. The rate at issue was for wheat shipments from Shelby to export facilities near Portland, Oregon. A majority of Montana's wheat crop each year is loaded on vessels at the mouth of the Columbia River, and nearly all of the wheat is transported from origin to destination by BNSF. As a result of this mediation, BNSF lowered the rail rate by $165 per railcar (about 4.5 cents per bushel). In addition, BNSF reduced rates, to a smaller extent, for shuttle loaders east of Shelby and on its Northern line in order to preserve current market relationships among elevators.

Even though the Montana-BNSF system has received some praise from agricultural and shipper interests, it is not without its opponents. Montana Attorney General Steve Bullock criticized the Montana-BNSF arbitration system as being unlikely to provide meaningful relief to shippers.[5]

Conclusions

There is a need for agricultural producers and shippers to have access to a fair, timely and affordable method for challenging rates believed to be unreasonable. The current STB rules governing SAC, Simplified-SAC, and Three-Benchmark rate appeals have not been feasible for agricultural shippers. Additionally, the STB rate-challenge procedures do not give agricultural producers an opportunity to bring a rail rate case; only the grain elevator shipping the grain may make a claim.

Arbitration of agricultural rail rates potentially promises a more expeditious, fairer, and lower cost way of challenging high rail rates. All the country's grain producers and shippers deserve a forum and process that is fair, impartial, cost-effective, and works for the betterment of both shippers and major railroads. Major railroads in addition to BNSF should be encouraged to participate in a similar program that is national in scope.

5 Letter to BNSF from Montana Attorney General Steve Bullock, August 17, 2009.

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