

**NGFA Arbitration
Report to the Board of Directors
September 2024**

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| NGFA Arbitration case activity |
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In 2023:

- NGFA Arbitration resolved over \$17.6 million in claims.
- 46 new cases were filed.
- Total dollar amounts claimed in these cases exceeded \$17.8 million.
- Individual claims ranged from \$4,341,033 to \$11,355, and the average claim amount was \$387,941.

Thus far, in 2024:

- 11 new cases have been filed, representing continued tapering off of filings (compared to historic-peak recent years) and return to a pace not seen since 2017-2020.
- Total dollars claimed in these cases is \$8.9 million.
- Individual claims range from \$50,000 to \$4.5 million, and the average claim amount is \$810,119.
- Decisions were issued in 16 cases.
- Of the other cases filed during the peak and still pending – many are now at critical stages.
 - 23 pending cases involve oral hearings.
 - 5 cases involve appeals (including 3 with oral hearings).
 - 42 cases are with arbitration committees; 12 cases are to go to committees shortly.

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| Rules Amendments |
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This year, the NGFA membership ratified amendments to the NGFA Rail Arbitration Rules, which had been previously approved by the NGFA Board of Directors based upon the recommendation of the Rail Arbitration Rules Committee. These amendments increased the pre-occurrence damages cap for cases filed under the Rail Arbitration Rules from \$400,000 to \$600,000. (Note: There is no cap for cases filed under the non-rail specific Arbitration Rules).

The Arbitration Appeals Panel proposes three sets of amendments for a vote by the Board:

- **Parties and claims added to a case after it is filed:** The Panel’s recommendations address issues arising when new parties or claims are added to a case after it is filed. The situations include: 1) a plaintiff adding additional defendants; 2) a defendant adding *third-party claims* against new parties to hold them responsible for any damages awarded to the plaintiff; 3) a defendant asserting a *counterclaim* in opposition to or deduction from the claim of the plaintiff; and 4) a defendant asserting a *crossclaim* against another defendant. Because the current rules do not fully address these situations and recent issues and overall complexity experienced in the current caseload, the Panel determined to expand and make clarifications in the rules.

- **Awarding interest in arbitration decisions:** The Panel’s recommendations make clarifications in the rules to address some confusion by arbitrators about their discretion in awarding interest and at what point the interest is to begin to accrue.

- **Cancelling by NGFA of an oral hearing:** The Panel addressed recent experiences when a hearing is requested and NGFA attempts to schedule it, but a party becomes non-responsive and non-cooperative, even resisting efforts to proceed with the arbitration, which results in significant delays. The Panel’s recommendations clarify that NGFA has authority and discretion to cancel a hearing so it may proceed with a case in an appropriate fashion.

[The complete text of the proposed amendments is attached at the end of this report].

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| Educational Programming |
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A detailed account of arbitration and trade rules-related programming, including this year’s Trade Rules and Arbitration Seminar, is provided in the Trade Rules Report.

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| Other activities by NGFA’s committees related to arbitration |
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The Rail Arbitration Rules Committee is assembling a subgroup to review the list of commodities subject to Rail Arbitration under Rail Arbitration Rule 2(D). In particular, the committee is considering the inclusion of canola seed, canola oil, palm and other topicals.

The Arbitration Appeals Panel continues to consider issues arising in the administration of cases. As recent examples, the Panel confirmed NGFA’s approach:

- Rejecting an objection to arbitrators appointed to decide a case on the broad theory that the arbitrators are the party’s competitors. Merely being competitors does not disqualify an arbitrator under the NGFA rules or applicable law, and since so much of the membership can be perceived to be in competition, to apply the standard requested would significantly limit NGFA’s ability to constitute arbitration committees.

- Denying requests to exclude witnesses in advance of a hearing because of the lack of affidavits or witness statements. The rules do not provide for such requirements, and questions about the relevance and credibility of witnesses are best decided by the arbitrators at the hearing.

Proposed Amendments to NGFA Arbitration Rules
[additions underlined; deletions stricken-through]

Rule 2. Commencing an Arbitration Case

(A) To commence a case, a complaint must be submitted by the plaintiff to the NGFA Secretary. This complaint should state specifically the nature of the dispute; including the defendant's name and address, applicable contract numbers, date of incident giving rise to the dispute, and the amount of damages claimed.

The case shall incorporate the claims in the original complaint as well as any ~~cross-complaint~~, crossclaim, counterclaim, third-party claim, or offset ~~as set forth by the defendant~~, provided that any matters submitted by crossclaim, counterclaim, or third-party claim ~~the defendant~~ must be directly related to the claims in the original complaint. Any ~~such cross-complaint~~ crossclaim, or counterclaim, or third-party claim shall be heard as one case with the original complaint. Any crossclaim, or counterclaim, or third-party claim ~~cross-complaint, or counterclaim, or third-party claim~~ must be filed by the defendant at the same time the defendant's answer is due.

(B) Upon signing the arbitration services contract, each party must pay an arbitration service fee of 1.5% of the amount of the plaintiff's claims. The NGFA Secretary may assess additional fees later in the case based upon the increased claims (including crossclaims, counterclaims, and third-party claims ~~and crossclaims~~) by the parties. The minimum arbitration service fee is \$1,500. The maximum arbitration service fee is \$25,000. ...

Rule 4. Timelines Governing the Filing of Arbitration Argument ...

(C) The defendant shall have 20 days to file its answer (and any ~~cross-complaint~~ crossclaim, or counterclaim, or third-party claim) from the date it receives the plaintiff's first argument from the NGFA Secretary.

(D) Upon receipt of such answer (and any ~~cross-complaint~~ crossclaim, or counterclaim, or third-party claim) from the defendant, the NGFA Secretary shall have 5 days to forward a copy of same to the plaintiff, who has 10 days from receipt to file a rebuttal to the defendant's answer (and any ~~cross-complaint~~ crossclaim or counterclaim). The plaintiff is not obligated to file a rebuttal. ...

Rule 6. Arbitration Committee Procedures ...

(F) The Arbitration Committee and/or the Arbitration Appeals Committee may include an amount of interest in an award. If interest is awarded, the applicable rate of interest, unless otherwise provided by agreement between the parties, ~~the applicable rate of interest~~ shall be the Prime Rate as published by ~~in~~ the **Wall Street Journal** on the date the case was filed. ...

Rule 8. Oral Hearings ...

(E) The chair of the committee shall determine a time and a place for the hearing, and the NGFA Secretary shall notify the parties of the date and place selected. Neither party shall seek to postpone the hearing 10 days after such date has been set, unless good cause, satisfactory to the committee, can be shown. In special circumstances when the party or parties requesting an oral hearing fail to respond or cooperate in the planning of the hearing, the chair of the committee and the NGFA Secretary have discretion to cancel the hearing.