

**In the United States District Court  
District of Minnesota**

---

United Food and Commercial  
Workers Union, Local No. 663, *et al.*,

Plaintiffs,

*v.*

Case No. 0:19-cv-02660-JNE-TNL

United States Department of Agriculture,

Defendant.

---

**Proposed Amicus Brief of the  
North American Meat Institute & National Pork Producers Council**

The North American Meat Institute and the National Pork Producers Council speak on behalf of their member pork farmers and processors against vacatur of the New Swine Inspection System (NSIS) rule. Not only is there a profound reliance interest in the NSIS rule—to the tune of \$82 million at one facility and \$63 million at two others—but vacating the rule would not produce the nonspecific benefits imagined by the Plaintiffs. To the contrary, data from three exemplar facilities does not demonstrate any correlation between increased line speeds and increased musculoskeletal or laceration injuries to workers. On the other hand, the data shows that increased line speeds can offer workers anywhere from 23 to 27 additional Saturdays per year at home with family instead of on the line. The Meat Institute and the Pork Producers therefore ask the Court to deny vacatur and allow the nation’s pork suppliers to continue focusing on the unprecedented challenges already confronting them.

**A. Amici's interest in this case.**

The North American Meat Institute is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey, and processed meat products, and Meat Institute member companies account for more than 95 percent of United States' output of these products. The Meat Institute provides regulatory, scientific, legislative, public relations, and educational services to the meat and poultry packing and processing industry. The Meat Institute's advocacy includes amicus briefs in important cases such as this one.

The National Pork Producers Council is a 501(c)(5) nonprofit agricultural organization representing forty-two affiliated state associations serving as the global voice of the U.S. pork industry. The National Pork Producers Council works to ensure that the U.S. pork industry remains a consistent and responsible supplier of high-quality pork to domestic and international markets. Through public-policy outreach, the organization fights for reasonable legislation and regulations, develops revenue and market opportunities, and protects the livelihood of America's 60,000 pork producers.

**B. Two points for context: the limited purpose and limited application of line speeds.**

There are two important contextual points when considering line speeds and their role in the pork-production process. These points have received nodding attention elsewhere in the briefing, but they warrant renewed attention in the context of Amici's data below.

The first is that line-speed limits did not arise from worker-safety concerns. They were born of pragmatism, as the Court recognized early in this case: “FSIS did not establish line speed limits for safety purposes but to facilitate federal inspection.”<sup>1</sup> This does not mean, as the Court further recognized, that worker safety is irrelevant to plant operations.<sup>2</sup> Rather, it means that processors are not arbitrarily trying to separate line-speed limits from worker safety; those are already separate concepts. So when we see below, as we will, that increased line speeds do not correlate with increased laceration and musculoskeletal injuries, that merely confirms what one would expect. Plaintiffs presume a relationship that was not originally part of the line-speed equation.

The other contextual point—and it relates to the first—is that line-speed regulations cover only the evisceration line. As Hany Sidrak’s declaration for FSIS makes clear, most of the processing work that involves sharp instruments happens on processing lines, not evisceration lines.<sup>3</sup> And FSIS has never regulated the speed of processing lines.<sup>4</sup> Not only that, but capping evisceration-line speeds does not secondarily cap processing-line speeds, because there is an intervening chilling step.<sup>5</sup> So by seeking to influence worker safety through evisceration-line speeds, Plaintiffs are barking up the wrong tree.

---

<sup>1</sup> Dkt. 30 at 16; *see also* Dkt. 89 at 11 (USDA brief).

<sup>2</sup> Dkt. 30 at 16.

<sup>3</sup> Dkt. 90 at ¶ 12.

<sup>4</sup> Dkt. 90 at ¶ 12.

<sup>5</sup> Dkt. 90 at ¶ 13.

**C. The Meat Institute speaks with the unique benefit of the whole picture on NSIS line speeds.**

Although the legal background to this proceeding is well-developed, the facts about NSIS implementation on the line are largely missing. The little said so far has come largely as anecdote, hearsay, and conjecture.<sup>6</sup> Yet through its representation of multiple pork processors with years of experience in the HIMP program and, more recently, with NSIS, the Meat Institute speaks with the benefit of recent, holistic data on line speeds. Three members in particular—representing four of the seven facilities operating under the NSIS rule—serve as helpful examples through declarations describing current line-speed data, current injury data, and the non-relationship between the two. What emerges is contrary to the picture painted by Plaintiffs.

*1. Clemens Food Group’s Hatfield, Pennsylvania and Coldwater, Michigan facilities.*

Amici’s first declaration comes from Clemens Food Group through its Senior Vice President of Operations.<sup>7</sup> It focuses on safety data from Clemens’s Hatfield, Pennsylvania facility, and economic data from the Hatfield facility and from Clemens’s Coldwater, Michigan facility. Both began operating under NSIS on March 30, 2020, but Hatfield operated under the HIMP program for

---

<sup>6</sup> See, e.g., Dkt. 74 at ¶¶ 7, 13, 15 (“Sometimes the plant speeds up the lines in order to make its production numbers. When the lines speed up we rail hogs faster.”; “Management told me that....”; “Coworkers have told me that....”).

<sup>7</sup> Ex. 1, Declaration of Eric Patton.

many years, so it is a good example of long-term data on unrestricted line speeds.<sup>8</sup>

The Clemens declaration covers the period from fiscal year 2014 through fiscal year 2021. (Clemens’s fiscal year runs from May to April, so fiscal year 2021, for example, runs from May 2020 through April 2021.<sup>9</sup>) It covers both head-per-hour line speeds and the recorded incident rate for laceration and repetitive-motion injuries. The incident rate is the number of OSHA recordable incidents per 100 equivalent full-time workers.<sup>10</sup> The incident rate in the Clemens declaration is for a group of departments including the Barn, Harvest, Offal, and Hog Coolers, together referred to as the “harvest floor.” Here are the line speeds and harvest-floor injury rates for fiscal years 2014 through 2021:<sup>11</sup>

<b>Fiscal Year</b>	<b>Average Line Speed</b>	<b>Incident Rate (Laceration)</b>	<b>Incident Rate (Rep. Mot.)</b>
2014	1,076	2.9	18.1
2015	1,147	2.8	10.9
2016	1,210	1.8	8.4
2017	1,178	1.7	8.8
2018	1,252	2.0	4.5
2019	1,292	1.3	5.6
2020	1,210	3.8	3.0
2021	1,250	0.0	3.1

---

<sup>8</sup> See, Ex. 1, Decl. of E. Patton at ¶¶ 3–5. Dkt. 90 at ¶¶ 5–6.

<sup>9</sup> See Ex. 1, Decl. of E. Patton at ¶ 5.

<sup>10</sup> Ex. 1, Decl. of E. Patton at ¶ 6.

<sup>11</sup> Ex. 1, Decl. of E. Patton at ¶¶ 5–13.

As one can see from this data, line-speed increases have not correlated with increased injury rates. From fiscal years 2015 to 2016, for example, the average line-speed increased from 1,147 head-per-hour to 1,210 head-per-hour, while the incident rate for laceration and repetitive-motion injuries declined. Likewise, from fiscal years 2018 to 2019, the average line speed increased from 1,252 to 1,292, and the incident rate for laceration injuries declined. Sometimes incident rates increased slightly even when line speeds declined, such as the laceration incident rate from fiscal years 2019 to 2020. These numbers undermine any suggestion that increasing line speeds correlates with increased laceration and repetitive-motion injuries.

Unlike the safety data, however, the economic data strongly correlates with unrestricted line speeds. If the Hatfield and Coldwater facilities are forced to run with a maximum line speed of 1,106 head-per-hour, Clemens will suffer more than \$42 million annually in lost profitability.<sup>12</sup> In addition, Clemens has invested approximately \$63 million over the years in building the Coldwater facility and installing new equipment at both plants to support the faster line speeds and in reliance upon the NSIS rule.<sup>13</sup> Accordingly, Clemens will suffer a cumulative loss of \$105 million during the first year if the NSIS rule is vacated and then incur losses of \$42 million annually thereafter.<sup>14</sup>

---

<sup>12</sup> Ex. 1, Decl. of E. Patton at ¶ 15.

<sup>13</sup> Ex. 1, Decl. of E. Patton at ¶ 15.

<sup>14</sup> Ex. 1, Decl. of E. Patton at ¶ 15.

And it is not just Clemens that will suffer. Its two facilities will also experience a reduced need for hogs due to decreased capacity, and Clemens estimates that its supply requirements could decline by as many as 1,235,000 hogs annually.<sup>15</sup>

In sum, Clemens's experience at Hatfield demonstrates that Plaintiffs' assertion of a generalized and speculative connection between increased line speeds and increased injuries has not materialized. And being forced to operate under a 1,106 head-per-hour cap would inflict massive economic consequences.

*2. WholeStone Farms' Fremont, Nebraska facility.*

The second declaration comes from WholeStone Farms through its Chief Operating Officer.<sup>16</sup> It focuses on WholeStone's Fremont, Nebraska facility, which began operating under the NSIS rule on March 30, 2020.<sup>17</sup> Like Clemens's Hatfield facility, WholeStone's Fremont facility operated under the HIMP program before converting to NSIS, so it is a good example of long-term data on unrestricted line speeds.<sup>18</sup>

The data in the WholeStone declaration covers the period from December 2018 through 2020. It covers both head-per-hour line speeds and laceration and musculoskeletal injuries. Unlike Clemens's injury data, however, WholeStone's data is for the Fremont facility as a whole, not just the harvest

---

<sup>15</sup> Ex. 1, Decl. of E. Patton at ¶ 15.

<sup>16</sup> Ex. 2, Declaration of Steve Weers.

<sup>17</sup> Ex. 2, Decl. of S. Weers at ¶ 4. Dkt. 90 at ¶ 5.

<sup>18</sup> Ex. 2, Decl. of S. Weers at ¶¶ 3, 5; Dkt. 90 at ¶¶ 5–6.

floor.<sup>19</sup> Here are the line-speed and injury numbers for December 2018 through 2020:<sup>20</sup>

<b>Year</b>	<b>Average Line Speed</b>	<b>Laceration Injuries</b>	<b>Musculoskeletal Injuries</b>
Dec. 2018	1,288	1	3
2019	1,245*	3	1
2020	1,295	2	2

*\* The decrease in 2019 line speeds was due to ancillary slowdowns related to the installation of a CO<sub>2</sub> stunning system.<sup>21</sup>*

As with Clemens's Hatfield facility, line-speed changes at WholeStone's Fremont facility have not correlated with laceration and musculoskeletal injuries. When line speeds decreased from 1,288 in December 2018 to 1,245 for 2019, recorded laceration injuries went up slightly from 1 to 3. Recorded musculoskeletal injuries went down by the same number, from 3 to 1. When line speeds increased from 1,245 in 2019 to 1,295 for 2020, recorded laceration injuries went down from 3 to 2. Recorded musculoskeletal injuries went up from 1 to 2. These numbers do not suggest a correlation between changing line speeds and increasing laceration and musculoskeletal injuries.

And while line-speed changes have not correlated with increased injuries at Fremont, increased line speeds have produced a noticeable benefit in the form of fewer Saturday shifts. Reinstating the 1,106 head-per-hour limit would force the Fremont facility to operate an additional 27 Saturdays per year to

<sup>19</sup> Ex. 2, Decl. of S. Weers at ¶¶ 6–8.

<sup>20</sup> Ex. 2, Decl. of S. Weers at ¶¶ 5–8.

<sup>21</sup> Ex. 2, Decl. of S. Weers at ¶ 5.

make up the lost production during the normal production week.<sup>22</sup> This will deprive Fremont team members of a substantial quality-of-life benefit.

*3. Seaboard Foods' Guymon, Oklahoma facility.*

The last declaration comes from Seaboard Foods through its Senior Vice President of Operations.<sup>23</sup> It focuses on Seaboard's Guymon, Oklahoma facility, which began operating under the NSIS rule on March 2, 2020.<sup>24</sup> Because the Guymon facility never operated under the HIMP program or any other line-speed waiver, it is a unique before-and-after example of NSIS operations.<sup>25</sup>

The Seaboard declaration covers quarterly data for 2019 and 2020. It covers both head-per-hour line speeds and laceration and musculoskeletal claims and injuries on the harvest floor.<sup>26</sup> Here are the line-speed and injury numbers for 2019 through the second quarter of 2020:<sup>27</sup>

---

<sup>22</sup> Ex. 2, Decl. of S. Weers at ¶ 10.

<sup>23</sup> Ex. 3, Declaration of Stephen Summerlin.

<sup>24</sup> Ex. 3, Decl. of S. Summerlin at ¶ 3. Dkt. 90 at ¶ 5.

<sup>25</sup> See, Dkt. 90 at ¶¶ 5–6.

<sup>26</sup> In Seaboard's record keeping, a "claim" is any injury that requires medical cost outside the plant. This would include, for example, stiches, x-rays, and physical therapy. An "incident" is not severe enough to be a claim and thus requires no outside medical attention or cost. This would include, for example, sore muscles and minor cuts that can be fixed with a band-aid. Ex. 3, Decl. of S. Summerlin at ¶ 6.

<sup>27</sup> Ex. 3, Decl. of S. Summerlin at ¶¶ 4, 6–II.

<b>Quarter</b>	<b>Average Line Speed</b>	<b>Laceration Claims/Incidents</b>	<b>Musculoskeletal Claims/Incidents</b>
Q1.2019	1,085	0 / 7	0 / 0
Q2.2019	1,083	0 / 3	0 / 1
Q3.2019	1,094	0 / 0	0 / 1
Q4.2019	1,103	1 / 0	0 / 1
Q1.2020	1,103	2 / 4	0 / 0
Q2.2020	1,118*	1 / 3	0 / 0

*\* As noted in Mr. Quinonez's Declaration, Dkt. 72 at ¶ 8, "[b]efore the COVID-19 epidemic, [line speeds] were running at approximately 1200 hogs per hour."*

Although Seaboard's implementation of NSIS is in its early stages, the data nevertheless shows no correlation between line-speed changes and injuries, and also shows a consistently low injury level overall. From Q1.2020 to Q2.2020, for example, the average line speed increased from 1,103 to 1,118 head-per-hour, and laceration claims and incidents both declined. Moreover, the data reflects minor fluctuations in laceration claims and incidents even when average line speeds were fairly constant from Q1.2019 through Q1.2020. This too shows the weakness of basing causation claims on anecdotal observations on the line. Any one incident is likely to draw attention, but the overall pattern does not suggest a problem, much less one caused by line speeds.

While it has not produced a meaningful rise in injuries, Guymon's conversion to NSIS has come with several benefits. To accommodate the increased line speeds under NSIS, Guymon increased its staffing in the harvest

area by 22 people (11 each shift), not including inspectors.<sup>28</sup> (This tracks the testimony in Andrew Pugliese's declaration.<sup>29</sup>) Moreover, Guymon's expected NSIS production output will allow the facility to operate 23 fewer Saturdays each year.<sup>30</sup> This will provide a substantial quality-of-life benefit to the team members at Guymon.

Then there are the capital expenditures Seaboard put into Guymon related to the NSIS conversion, which would be lost if the NSIS rule is vacated. To prepare for operations under NSIS, and in reliance on the continuing effect of that rule, Seaboard invested \$82,000,000 in that facility.<sup>31</sup> These included expanding the facility's cooler capacity and installing a new chilling system for hog carcasses.<sup>32</sup> Seaboard is relying on continued operations under the NSIS rule to offset these costs.<sup>33</sup>

In short, Seaboard's experience at Guymon demonstrates that Plaintiffs' generalized and speculative safety concerns have not played out, and that increased speeds will allow substantially fewer working Saturdays at the facility.

---

<sup>28</sup> Ex. 3, Decl. of S. Summerlin at ¶ 5.

<sup>29</sup> Dkt. 91 at ¶ 8.

<sup>30</sup> Ex. 3, Decl. of S. Summerlin at ¶ 13.

<sup>31</sup> Ex. 3, Decl. of S. Summerlin at ¶ 14.

<sup>32</sup> Ex. 3, Decl. of S. Summerlin at ¶ 14.

<sup>33</sup> Ex. 3, Decl. of S. Summerlin at ¶ 14.

**D. Rolling back the NSIS rule will affect the entire supply chain, not just processors.**

The other piece of the supply chain is pork farmers, represented here by the National Pork Producers Council. If pork processors cannot make up for lower line speeds with additional shifts, then that capacity reduction will further squeeze hog farmers already facing what one economist has called “the worst financial disaster ever for American hog farmers.”<sup>34</sup> COVID-related capacity constraints at pork-processing plants this Spring have already severely impaired the marketability of hogs being raised by thousands of farmers across the United States. As of this summer, 2020 losses were pegged at \$5 billion, while “[r]oughly two million hogs are still backed up on farms and this is likely to cause more pigs to be euthanized to prevent suffering due to overcrowding.”<sup>35</sup> Add to this Clemens’s estimate that an 1,106 head-per-hour line-speed cap will reduce its pork-supply requirements by as many as 1,235,000 hogs annually, and the situation is even more bleak.<sup>36</sup> This environment is not one in which additional production slowdowns can be weathered in stride. The livelihoods of American hog farms are already in a precarious state.

---

<sup>34</sup> *Hog Farmers Urgently Need Congressional Action to Weather Crisis*, National Pork Producers Council, July 20, 2020, *available at* <https://nppc.org/hog-farmers-urgently-need-congressional-action-to-weather-crisis/> (last visited August 21, 2020).

<sup>35</sup> *Id.*

<sup>36</sup> Ex. 2, Decl. of E. Patton at ¶ 15.

**E. Although the data supplied by the Meat Institute supports denying Plaintiffs’ administrative challenge entirely, it especially supports denial of vacatur.**

As shown above, the data on NSIS line speeds does not support a challenge to that rule based on worker safety. But the data even more pointedly counsels against vacating the NSIS rule regardless of what the Court decides on the merits. This is because the second *Allied-Signal* factor—the disruptive consequences of vacatur—strongly supports leaving the NSIS rule in place. *See Allied-Signal, Inc. v. United States Nuclear Regulatory Comm’n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993).

Plaintiffs spend one paragraph on the disruptive-consequences factor, stating that any disruption to the NSIS facilities “is easily outweighed by the increased risk of injuries to workers that would result from keeping the rule in place.”<sup>37</sup> As Amici have shown, this alleged increased risk is not borne out by data from the regulated facilities, and it does not “easily outweigh” the real-world consequences of vacatur. *National Parks Conservation Assoc. v. Semonite*, 422 F. Supp. 3d 92, 101, 103 (D.D.C. 2019).

The data instead indicates that forcing processing facilities to work under lower line-speed limits would likely deprive workers of additional Saturdays with their families, and would upset Seaboard’s \$82 million in capital expenditures, with no proven safety benefit. It would cost Clemens more than \$42 million annually in lost profitability, and would deprive Clemens of the

---

<sup>37</sup> Dkt. 69 at 34.

substantial investments it made in reliance on increased line speeds. Moreover, all but one of the current NSIS facilities have operated without line speeds for many years under HIMP or a similar waiver.<sup>38</sup> Vacatur would subject these facilities to a new regulatory regime overnight after years of settled expectations.

Amici respectfully ask that the Court consider all this if called upon to exercise its “remedial discretion” concerning vacatur. *Am. Great Lakes Ports Assoc. v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020). Disruptive consequences may alone support denying vacatur even in the presence of serious rulemaking deficiencies. *Id.* (To be clear; Amici agree with USDA that there were no rulemaking deficiencies, and that the data presented here bears this out.) Indeed, because vacatur analysis looks at the “overall equities and practicality of the alternatives,” neither *Allied-Signal* factor is dispositive, and the opponent of vacatur need not prevail on both. *Semonite*, 422 F. Supp. 3d at 99 (citing cases in which courts denied vacatur when first factor favored vacatur but second did not). And Plaintiffs acknowledge that denying vacatur “is appropriate when leaving the rule in place ‘will do no affirmative harm.’”<sup>39</sup> That is the case here.

### **Conclusion**

The NSIS rule allows the nation’s top pork processors to operate safely and efficiently. Recent data demonstrates this. Vacating the NSIS rule would impose significant costs on these processors and their employees, without any

---

<sup>38</sup> Dkt. 90 at ¶ 6.

<sup>39</sup> Dkt. 69 at 34 (quoting *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005)).

reason to expect a corresponding increase in safety. Not only that, but vacatur would inflict further pain on the nation's already suffering pork farmers at a time of unprecedented difficulty. Amici therefore respectfully ask the Court to uphold the NSIS rule.

Dated: August 21, 2020

*Respectfully submitted,*

Robert W. George\*  
Ark. Bar No. 98134  
Joshua C. Ashley\*  
Ark. Bar No. 2012051  
**Friday, Eldredge & Clark, LLP**  
3500 Pinnacle Hills Pkwy., Ste. 301  
Rogers, Arkansas 72758  
479.695.2117 – *phone*  
501.537.2922 – *fax*  
*rgeorge@fridayfirm.com*  
*jashley@fridayfirm.com*

*/s/ Joshua N. Turner*  
Joshua N. Turner  
Minn Bar. No. 0400279  
**Faegre Drinker Biddle  
& Reath LLP**  
2200 Wells Fargo Center  
90 South Seventh St.  
Minneapolis, Minn. 55402-3901  
612.766.7000 – *phone*  
612.766.1600 – *fax*  
*josh.turner@faegredrinker.com*

*\*PHV Pending*

*Attorneys for North American Meat  
Institute & National Pork Producers  
Council*