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21278 SERVICE DATE - DECEMBER 30, 1996

FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1313

[STB Ex Parte No. 541]

Railroad Contracts

AGENCY: Surface Transportation Board.

ACTION: Final Rules.

SUMMARY: The Surface Transportation Board (Board) adopts revised regulations governing contracts under 49 U.S.C. 10709 that are entered into between one or more rail carriers and one or more purchasers of rail services for the transportation of agricultural products. The revised regulations reflect the reduced regulatory oversight of rail transportation contracts introduced by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA).

EFFECTIVE DATE: These rules are effective on January 29, 1997.

FOR FURTHER INFORMATION CONTACT: Beryl Gordon, (202) 927-5660. [TDD for the hearing impaired: (202) 927-5721.]

SUPPLEMENTARY INFORMATION: In a notice of proposed rulemaking (NPR) served October 17, 1996 (61 FR 54144), the Board proposed revised regulations to reflect the reduced regulatory oversight of rail transportation contracts introduced by the ICCTA. The revised regulations were proposed by the Board after consideration of comments received from major shipper and carrier interests in response to an advance notice of proposed rulemaking served March 26, 1996 (61 FR 13147).

Comments in response to the NPR were received from the Association of American Railroads, the Kansas Grain and Feed Association, the Montana Wheat and Barley Committee (MWBC), and the National Grain and Feed Association. None of the commenters objects to the proposed regulations, and we will adopt them without substantive change.

While not objecting to the proposed regulations, per se, MWBC states that it is difficult and expensive for many small grain shippers to obtain timely information regarding contract summary filings, and that, in the past, many grain shippers have been unaware of contracts that might affect them until after the complaint period has passed. MWBC suggests that the Board institute a procedure to post the contract summaries filed each day on a "world wide web internet page readily accessible to the grain shippers."

The Board does not currently have the capability to disseminate information, either its own decisions or

materials filed with it, over the Internet. We do, however, support improvements in the dissemination of information, and are in the process of developing capability to disseminate information electronically in the future. Nevertheless, we cannot at this time determine the feasibility of disseminating electronically materials filed with us, such as railroad contract summaries, and thus cannot grant MWBC's request at this time. However, we are certainly prepared to consider alternative requirements as they become feasible.

In the meantime, it is important to note that the filing requirements contained in the proposed regulations have been in effect for many years, and other shippers and shipper groups have apparently been able to meet their information needs under the existing filing requirements, as no commenter other than MWBC has raised the issue. We are aware of the existence of independent service providers (generally referred to as watching services) that monitor contract summary filings for their clients and advise them when filings of interest are made. MWBC might wish to investigate the feasibility of using such a service.^{1/} Additionally, MWBC can investigate the feasibility of obtaining the needed information directly from the rail carriers pursuant to the information availability requirements of §1313.5(a)(2) of the proposed regulations.

Small Entities

The Board certifies that these rules will not have a significant economic effect on a substantial number of small entities. They merely eliminate obsolete provisions where regulatory oversight was eliminated, reflect certain other modest changes effected by the ICCTA, and largely continue existing contract disclosure requirements for agricultural products.

Environment

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 49 CFR Part 1313

Agricultural products, Contract summaries, Rail carriers, Transportation contracts.

Decided: December 17, 1996.

By the Board, Chairman Morgan, Vice Chairman Simmons and Commissioner Owen.

Vernon A. Williams
Secretary

^{1/}MWBC states that mail delivery from Washington takes as long as 5 to 6 days, but the watching services advise us that they can and do send contract summaries to their clients by facsimile transmission.

For the reasons set forth in the preamble, the Board revises part 1313 of title 49, chapter X, of the Code of Federal Regulations to read as follows:

PART 1313 - RAILROAD CONTRACTS FOR THE TRANSPORTATION OF AGRICULTURAL PRODUCTS

Sec.

- 1313.1 Scope; definition of terms.
- 1313.2 Contract summary filing requirement.
- 1313.3 Board review; contract disapproval.
- 1313.4 Filing procedures and formats for contract summaries.
- 1313.5 Contract and contract summary availability.
- 1313.6 Contract summary for agricultural commodities.
- 1313.7 Contract summary for grain products -- involving a port.
- 1313.8 Contract summary for grain products -- not involving a port.
- 1313.9 Grounds for complaints and contract review.
- 1313.10 Procedures for complaints and discovery.

Authority: 49 U.S.C. 721(a) and 10709.

§ 1313.1 Scope; definition of terms.

(a) This part addresses the provisions of 49 U.S.C. 10709 that require rail carriers to file with the Board a summary of each contract for the transportation of agricultural products (including grain, as defined in 7 U.S.C. 75 and products thereof) and that allow complaints to be filed with the Board regarding such contracts.

(b) The provisions of this part do not apply to any transportation that is exempted from the Board's contract regulation pursuant to an exemption issued under 49 U.S.C. 10502 or former 49 U.S.C. 10505 (repealed effective January 1, 1996).

(c) For purposes of this part, the term *contract* means an agreement, including any amendment thereto, entered into by one or more rail carriers and one or more purchasers of rail services to provide specified transportation of agricultural products (including grain, as defined in 7 U.S.C. 75 and products thereof) under specified rates and conditions. The term *amendment* includes contract modifications agreed to by the parties.

(d) An amended contract is treated as a new contract under this part. Remedies are revived and review is again available, upon complaint.

§ 1313.2 Contract summary filing requirement.

(a) Rail carriers subject to the jurisdiction of the Surface Transportation Board under 49 U.S.C. 10501 must promptly file with the Board a summary of each contract entered into for the transportation of agricultural products.

(b) Contract summaries not in compliance with this part may be rejected by the Board. If a contract summary is rejected, it will be considered as not filed, and the carrier must promptly file a corrected contract summary to replace the rejected summary.

§ 1313.3 Board review; contract disapproval.

(a) *Board review.* (1) No later than 30 days after a contract summary is filed, the Board may, on complaint, begin a proceeding to review such contract on the grounds described in § 1313.9.

(2) If the Board begins a proceeding, it shall determine, within 30 days after the proceeding is commenced, whether the contract is in violation of 49 U.S.C. 10709.

(b) *Contract disapproval.* If the Board finds that the contract is in violation of 49 U.S.C. 10709, it will:

(1) Disapprove the contract; or

(2) Where the Board finds unreasonable discrimination, in accordance with 49 U.S.C. 10709(g)(2)(B)(i), order the contracting carrier(s) to provide to the complainant(s) rates and service substantially similar to those contained in the contract at issue, with such differences in terms and conditions as are justified by the evidence.

(c) *Applicable rates/charges if a contract is disapproved.* If the Board disapproves a contract (or contract amendment), the appropriate non-contract rates/charges (or the contract provisions otherwise in effect) will be applicable.

§ 1313.4 Filing procedures and formats for contract summaries.

(a) *Filing of Summaries.* (1) Two copies of each contract summary, containing the applicable information specified in §§ 1313.6, 1313.7, or 1313.8, as appropriate, must be filed with the Board as soon as possible, but no longer than 7 days after the date of the contract (or contract amendment).

(2) The outside envelope or wrapper containing one or more contract summaries must be prominently marked "Rail Contract Summary" and addressed to: Tariffs Branch, Surface Transportation Board, Washington, DC 20423.

(3) A transmittal letter identifying the submitted publication(s), and the name and telephone number of a contact person, must accompany each filing of one or more contract summaries. Each transmittal letter shall clearly indicate in the upper left-hand corner thereof:

(i) The assigned alpha code of the filing carrier;

(ii) The number of summaries transmitted;

(iii) The filing fee enclosed, the account number to be billed, or the credit card to be charged;

(iv) The transmittal number if the filer utilizes transmittal numbers; and

(v) If the filing fee is charged to a credit card, the information must include the credit card number and expiration date, and an authorized signature.

(b) *Contract summary title page.* The title page of each contract summary must contain only the following information:

(1) In the upper right corner, the contract summary number (see paragraph (c) of this section), followed by the amendment number if an amended contract summary.

(2) In the center of the page, the filing carrier's name, followed by the words "CONTRACT SUMMARY" or "AMENDED CONTRACT SUMMARY", as applicable, in large print.

(3) Date of contract and its effective date.

(4) In the center lower portion, the individual submitting the filing, and the name of the individual(s) for service of complaints (if not the same individual). If not otherwise noted, a complainant may rely on service to the individual submitting the filing.

(c) *Contract summary numbering system.* (1) The contract summary identification number must include the word "STB," the standard carrier alphabetic code for the filing railroad (limited to four letters), the letter "C," and a sequential number, with each separated by a hyphen. The following is an example: the 357th contract summary filed by the Conrail would have the following identification number: "STB-CR-C-357."

(2) At its option, the carrier may issue contract summaries with nonconsecutive numbers if it assigns blocks of numbers for specific uses. An index to the blocks of reserved numbers shall be filed with the Board.

(d) *Format requirements for contract summary information.* (1) The contract summary must enumerate and have each item required in §§ 1313.6, 1313.7 or 1313.8 of this part, as applicable, completed. When the item does not pertain to the contract, the term "Not Applicable" ("NA") shall be used.

(2) Changes in prior contract summaries must be underscored and must be followed by the words "addition," "deletion," "extension," "cancellation," or other appropriate descriptive phrase in parentheses. If the change to the contract is only in confidential matter, a statement to that effect must be made in the amended contract summary and must indicate the particular feature to which the change applies (i.e., rate, special feature, etc.). If "not applicable" is permitted in the original summary under §§ 1313.6 through 1313.8 of this part, the

amended summary may use "not applicable" with a notation that a change pertained only to confidential data.

(3) Amended contract summaries may not substitute phrases such as "not applicable" or "no change" where disclosure was required in the original contract summary (such as in the commodity description); amended contract summaries must set forth all required non-confidential terms in the contract, whether amended or not.

§ 1313.5 Contract and contract summary availability.

(a)(1) A contract summary filed under these rules shall be made available for public inspection in the Tariffs Branch of the Surface Transportation Board.

(2) A contract summary filed under these rules also shall be made available by the carrier(s) participating in the contract, upon reasonable request.

(b) Where not already required by §1313.10(a)(5) of this part, the contract for which a summary is filed under these rules shall be provided immediately to the Board, upon request, for its use in carrying out its functions under the statute.

§ 1313.6 Contract summary for agricultural commodities.

(a) *Summary information.* The summary of a contract for the transportation of agricultural commodities must contain the following information:

(1) *Carrier names.* A list, alphabetically arranged, of the corporate names of all carriers that are parties to the contract, and their addresses for service of complaints.

(2) *Specific commodity.* The specific commodity or commodities to be transported under the contract. Vague commodity descriptions such as "grain" are not permitted, even if that is the commodity description in the contract.

(3) *Shipper identity.* The specific identity of the shipper party to the contract, as well as any other party or parties on whose behalf that shipper is acting (to the extent known).

(4) *Specific origins, destinations, transit points, and other shipper facilities.* (i) Each specific origin and destination point to and from which the contract applies. Vague descriptions such as "various points in Kansas" are not acceptable. Broad geographic descriptions such as "all stations in Kansas" are permitted only to the extent such terms are actually used in the contract and such origins and destinations are subject to specific identification by reference to available publications.

(ii) Each port involved.

(iii) Each transit point identified in the contract.

(iv) Each shipper facility affecting performance under the contract (if not included in the origin/destination points or transit points), to the extent identified in the contract or known to the contracting parties.

(5) *Contract duration.* (i) The date on which the contract has or will become applicable to the transportation services covered by the contract.

(ii) The termination date of the contract, and any terms for automatic extension or renewal of the contract.

(iii) Any provisions for optional extension.

(6) *Rail car data.* (i) Either the information in paragraph (6)(A) of this section or the certified statement in paragraph (6)(B) of this section as follows:

(A) The number of dedicated cars (or, at the carrier's option, car days), by major car type, to be used to fulfill the contract or contract options, including those that are:

(1) Available and owned by the carrier(s) listed in paragraph (a) (1) of this section;

(2) Available and leased by those carrier(s), with average number of bad-order cars identified; and

(3) (Optional) On order (for ownership or lease), along with delivery dates.

(B) A certified statement that:

(1) The shipper will furnish the rail cars used for the transportation provided under the contract, and that those rail cars will not be leased from the carrier; or

(2) The contract is restricted to services which do not entail car supply.

(ii) For contract summaries filed on or before September 30, 1998, a certified statement that the cumulative equipment total for all contracts for the transportation of agricultural commodities (including forest products, but not including wood pulp, wood chips, pulpwood or paper) does not exceed 40 percent of the capacity of carrier-owned and -leased cars by applicable car type.

(7) *Rates and charges.* (i) The specific base rates and/or charges that would apply without the contract.

(ii) A summary of any escalation provisions in the contract.

(8) *Volume.* All volume, car and/or train size requirements, as set forth in the contract, including:

(i) Movement type (single-car, multiple-car, unit-train).

(ii) Minimum and actual volume requirements under the contract, by applicable period(s) (annual, quarterly, etc.).

(iii) Volume breakpoints affecting the contract.

(9) *Special features.* The existence (but not the terms or amount) of any special features, such as transit-time commitments, credit terms, discounts, switching, special demurrage, guaranteed or minimum percentages, etc.

(b) *Supplemental information.* In the event a complaint is filed that is directed at a carrier's ability to fulfill its common carrier obligation with carrier-furnished cars, the carrier(s) shall immediately supplement the information contained in the contract summary by submitting to the Board, and supplying to the complainant, additional data on the cars used to fulfill the challenged contract. This additional data shall include (by major car type used to fulfill the contract):

- (1) Total bad-car orders;
- (2) Assigned car obligations; and
- (3) Free-running cars.

§ 1313.7 Contract summary for grain products -- involving a port.

(a) *Summary information.* The summary of a contract for the transportation of grain products that involves service to or from a port must contain the following information:

(1) *Carrier names.* A list, alphabetically arranged, of the corporate names of all carriers that are parties to the contract, and their addresses for service of complaints.

(2) *Specific commodity.* The specific commodities to be transported under the contract. Broad commodity descriptions such as "grain products" are permitted only to the extent that is the commodity description in the contract.

(3) *Contract duration.* (i) The date on which the contract has or will become applicable to the transportation services covered by the contract.

(ii) The termination date of the contract, and any terms for automatic extension or renewal of the contract.

(4) *Rates and charges.* (i) The specific base rates and/or charges that would apply without the contract.

(ii) The existence (but not the terms or amount) of any escalation provisions.

(5) *Volumes.* The existence (but not the terms or amount) of any provisions regarding movement type (e.g. single-car, multiple-car, unit-train) or minimum volume requirements.

(6) *Special features.* The existence (but not the terms or amount) of special features such as transit time commitments, guaranteed car supply, minimum percentage of traffic requirements, credit terms, discounts, etc.

(7) *Rail car data.* Either the information in paragraph (7)(i) of this section or the certified statement in paragraph (7)(ii) of this section as follows:

(i) The number of dedicated cars (or, at the carrier's option, car days), by major car type, to be used to fulfill the contract or contract options, including those that are:

(A) Available and owned by the carrier(s) listed in paragraph (a)(1) of this section;

(B) Available and leased by those carrier(s), with average number of bad-order cars identified; and

(C) (Optional) On order (for ownership or lease), along with delivery dates.

(ii) A certified statement that:

(A) The shipper will furnish the rail cars used for the transportation provided under the contract, and that those rail cars will not be leased from the carrier; or

(B) The contract is restricted to services which do not entail car supply.

(8) *Ports.* (i) The port(s) involved.

(ii) Either the mileages (rounded to the nearest 50 miles) between the port and each inland origin or destination, or the specific inland origin and destination points.

(b) *Supplemental information.* In the event a complaint is filed that is directed at a carrier's ability to fulfill its common carrier obligation with carrier-furnished cars, the carrier(s) shall immediately supplement the information contained in the contract summary by submitting to the Board, and supplying to the complainant, additional data on the cars used to fulfill the challenged contract. This additional data shall include (by major car type used to fulfill the contract):

(1) Total bad-car orders;

(2) Assigned car obligations; and

(3) Free-running cars.

§ 1313.8 Contract summary for grain products -- not involving a port.

(a) *Summary information.* The summary of a contract for the transportation of grain products that does not involve service to or from a port must contain the information specified in § 1313.7, paragraphs (a)(1), (2), (3) and (7). It must also contain the information specified in § 1313.7(a)(6) if the contract contains such terms.

(b) *Supplemental information.* In the event a complaint is filed that is directed at a carrier's ability to fulfill its common carrier obligation with carrier-furnished cars, the carrier(s) shall immediately supplement the information contained in the contract summary by submitting to the Board, and supplying to the complainant, additional data specified in §1313.7(b).

§ 1313.9 Grounds for complaints and contract review.

(a) A complaint may be filed against a contract covered by this part:

(1) By any shipper on the ground that such shipper individually will be harmed because the contract unduly impairs the ability of the contracting rail carrier or carriers to meet their common carrier obligations to the complainant under 49 U.S.C. 11101;

(2) By a port on the ground that such port individually will be harmed because the contract will result in unreasonable discrimination against such port; and

(3) By a shipper of agricultural commodities on the ground that such shipper individually will be harmed because:

(i) The rail carrier has unreasonably discriminated by refusing to enter into a contract with such shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue, and that such shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; or

(ii) The contract constitutes a destructive competitive practice.

(b) *Unreasonable discrimination*, for purposes of paragraph (a)(3)(i) of this section, has the same meaning as the term has under 49 U.S.C. 10741.

§ 1313.10 Procedures for complaints and discovery.

(a) *Complaints, discovery petitions, replies, and appeals.* (1) *Initial filing.* Complaints must be filed by the 18th day after the contract summary is filed. Any discovery petition must accompany the complaint.

(2) *Complaint.* A complaint must contain the correct, unabbreviated names and addresses of the complainant(s) and defendant(s). The complainant must set out the statutory provisions under which it has standing to file a complaint, and its reasons for requesting that the Board find the challenged contract unlawful.

(3) *Discovery petition.* A discovery petition must note on the front page "Petition for Discovery of Rail Contract" and note the contract (and any applicable amendment) number. It should provide the following information:

(i) *Standing--grounds.* The ground upon which the petitioner's complaint is based under §1313.9.

(ii) *Standing--affected party.* Pertinent information regarding the petitioner's actual or potential participation in the relevant market, including:

(A) The nature and volume of petitioner's relevant business.

(B) The relevant commodities that petitioner ships or receives.

(C) Comparisons of the petitioner's commodities, locations of shipping facilities and serving carriers,

actual or potential traffic patterns and serving carrier(s), with the traffic patterns and serving carrier(s) identified in the contract summary. State whether petitioner is a consignor or consignee.

(D) The petitioner's ability to ship the commodity in question at a time generally simultaneous with the challenged contract.

(E) The potential effect of the contract on the petitioner's relevant business.

(F) Any additional supporting information, including prior negotiations, if any.

(iii) *Relevance*. The relevance of the information sought to the petitioner's challenge to the contract.

(iv) *Nexus*. Where the complaint challenges a carrier's ability to perform its common carrier obligation, the nexus between the information sought and the common carrier obligation of the contracting carrier(s).

(4) *Service of pleadings*. The complainant must certify that 2 copies of the complaint, and discovery petition if filed, have been sent to the contracting carrier(s) either by hand, express mail, or other overnight delivery service the same day as filed at the Board. The contracting carrier shall in turn serve the contracting shipper with a copy of the complaint and petition. Replies shall be served in the same manner on complainant/petitioner.

(5) *Submission of contract*. Immediately upon the filing of a complaint, the rail carrier filing the contract summary shall forward to the Board, by hand, express mail, or other overnight delivery service, the subject contract or amended contract.

(6) *Replies*. Replies to the complaint/petition are due within 5 days from the date of filing of the complaint/petition, and in no event later than noon on the 23rd day following filing of the contract summary.

(7) *Copies*. An original and 10 copies of complaints, petitions and replies must be filed with the Board in a package marked "Confidential Rail Contract Material"

(8) *Discovery appeals*. If action on a petition for discovery is taken under delegated authority, that action may be appealed to the Board, subject to the following:

(i) An appeal must be received within 2 days of the initial decision, but in no event later than the 28th day after the contract summary is filed.

(ii) The appeal must be marked "Appeal of Delegated Authority Action Regarding Rail Contract Discovery".

(iii) Telegraphic notice or its equivalent must be given to the opposing parties.

(iv) Replies to the appeal must be filed within one day after the appeal is filed.

(v) An original and 10 copies of appeals and replies must be filed with the Board.

(9) *Furnishing of information.* If discovery is granted, the carrier must furnish the required information to the petitioner by the 1st working day after the Board issues its decision.

(b) *Informal discovery.* (1) Prior to filing a petition for formal discovery under paragraph (a) of this section, a petitioner may request discovery from the carrier.

(2) The carrier must promptly grant or deny the request.

(3) Agreements between carriers and shippers for informal discovery are permitted under these rules.

(c) *Confidentiality.* If confidential contract data are filed with the Board in a pleading, the party filing these data should submit them as a separate package, clearly marked on the outside "Confidential Material Subject to Protective Order." The order in paragraph (d) of this section applies to the parties specified in the order who receive confidential information through proceedings before the Board or through informal discovery.

(d) *Protective order.* Petitioner and carriers, and their duly authorized agents, shall limit to the contract complaint proceeding the use of contract information or other confidential commercial information which may be revealed in the contract, the complaint, reply, or in any other pleading relating to the contract. This restriction shall be a condition to release of any contract term to a petitioner/complainant and shall operate similarly on a carrier in possession of confidential information which may be contained in a complaint, petition for discovery, or request for informal disclosure. Any information pertaining to parties to the contract or subject to the contract (including consignors, consignees and carriers), or pertaining to the terms of the contract, or relating to the petitioner's/complainant's confidential commercial information, must be kept confidential. Neither the information nor the existence of the information shall be disclosed to third parties, except for: consultants or agents who agree, in writing, to be bound by this regulation; information which is publicly available; information which, after receipt, becomes publicly available through no fault of the party seeking to disclose the information after it has become publicly available, or is acquired from a third party free of any restriction as to its disclosure. The petitioner/complainant or carrier must take all necessary steps to assure that the information will be kept confidential by its employees and agents. No copies of the contract terms or other confidential information are to be retained by the parties not originally privy to the data subsequent to the termination of the proceeding.

(e) *Contract review proceeding.* If the Board institutes a proceeding to review the contract, the complainant's case-in-chief is due 9 days after the institution of the proceeding, but no later than 39 days after the filing of the contract summary. Replies are due

16 days after the institution of the proceeding, but no later than 46 days after the filing of the contract summary.