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SERVICE DATE – JANUARY 22, 2010

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 676

RAIL TRANSPORTATION CONTRACTS UNDER 49 U.S.C. 10709

Decided: January 21, 2010

On January 6, 2009, we sought public comment on a proposed rule to provide clarity for distinguishing between contract rates for rail transportation and common carrier tariff rates.¹ In that notice, we proposed to treat any agreement that prominently displays a prescribed disclosure statement as a rail transportation contract under 49 U.S.C. 10709. The proposed statement would declare the agreement a rail transportation contract, advise the shipper it can instead ask for a common carrier agreement, and warn it that agreeing to the contract would generally take disputes arising from the document outside of the jurisdiction of the Board.

We will discontinue this proceeding for two reasons. First, we are persuaded by the public comments that the proposed disclosure statement would not adequately caution a potential shipper of its rights under the statute or of the full legal consequences of agreeing to a rail transportation contract. Many parties pointed to deficiencies in the proposed disclosure statement, and no party offered any workable language we can use. We agree with the shipper community that, without a suitable disclosure statement, we should not create an irrefutable presumption that a document a carrier has labeled as a “rail transportation contract” reflects the shipper’s intent to opt out of the protections provided by federal law.

Second, an objective of this proceeding was to protect shippers from unknowingly signing agreements that opt them out of the protections provided by federal law. However, a broad coalition of interests filed comments opposing the proposed (or any) disclosure statement.

No party has offered a suitable alternative disclosure statement. The Board will not continue to devote scarce resources to devising a suitable alternative, including conducting additional rounds of notice and comment, all to impose a rule on reluctant carriers when the intended shipper beneficiaries vigorously object. We have an institutional interest in establishing a transparent mechanism to determine our jurisdiction over a rate or service complaint instead of having to glean the parties’ intent based on the unique facts of each case before us. But in light

¹ See Rail Transportation Contracts Under 49 U.S.C. 10709, Ex Parte No. 676 (STB served Jan. 6, 2009) (2009 NPRM).

of the nearly universal opposition to this rule by a diverse group of stakeholders² and our own resource constraints, we have decided to discontinue this proceeding.

Rather, in the absence of any suitable alternative disclosure statement, we will refrain from creating a bright line rule and will instead continue our current practice of deciding whether a disputed rail rate is a section 10709 rail transportation contract or a common carriage rate on a case-by-case basis. However, we strongly encourage all railroads to clearly notify shippers when a document is intended to be a “rail transportation contract” governed by section 10709 and therefore outside the Board’s jurisdiction.

We therefore discontinue this proceeding.

BACKGROUND

In recent years, the Board has been concerned about uncertainty as to whether an agreement between a rail carrier and a shipper is a rail transportation contract governed by section 10709 (and thus generally outside the Board’s jurisdiction) or a common carriage arrangement. Although Congress expressly removed all matters and disputes arising from rail transportation contracts from the Board’s jurisdiction in section 10709(c), the statute provides no clear demarcation between a contract rate and common carriage rate. With the enactment of the ICC Termination Act of 1995 (ICCTA), it became more difficult to distinguish between the two types of rates, as railroads are no longer required to file with the agency either tariffs containing their common carriage rates or summaries of their non-agricultural contracts. In the past, the issue of whether a rate was a contract rate or common carriage rate was examined on a case-by-case basis in light of the parties’ intent. See Aggregate Volume Rate on Coal, Acco, UT to Moapa, NV, 364 I.C.C. 678, 689 (1981). In this proceeding, we sought to identify a brighter line that would eliminate or at least reduce the need for a case-specific review, and would provide clear guidance to both rail carriers and shippers as to when to invoke the Board’s jurisdiction to resolve a pricing or rate dispute. The fact that two sophisticated shippers, in recent cases before the Board, had regarded the same document, with the same language, in completely opposite ways underscored the need for greater clarity.³

The Board first proposed to address these concerns by interpreting the term “contract” in section 10709 as embracing “any bilateral agreement between a carrier and a shipper for rail

² Only one shipper expressed support for the proposed rule. See Open. Comments of Arkansas Electric Cooperative Corp. (AECC) at 2. AECC, however, focused its comments on the need to protect against collusive activities by the carriers. See id. at 3-4.

³ This ambiguity was exhibited in two Board proceedings regarding Option 2 of the Union Pacific Railway Company’s (UP’s) Circular 111. See Kansas City Power & Light Company v. Union Pacific Railroad Company, STB Docket No. 42095 (STB served Mar. 27, 2007) (the shipper agreed with the carrier that Circular 111 was a tariff); Union Pacific Railroad Company—Petition for Declaratory Order, STB Finance Docket No. 35021 (STB served May 15, 2007) (the shipper argued that Circular 111 was a contract).

transportation in which the railroad agrees to a specific rate for a specific period of time in exchange for consideration from the shipper, such as a commitment to tender a specific amount of freight during a specific period or to make specific investments in rail facilities.”⁴ Both shippers and carriers opposed that proposal. After reviewing their comments, we concluded that our original proposal might have unintended and undesirable consequences and decided to discontinue that proceeding.⁵

In the 2008 Decision, we instituted this proceeding and sought public comment on whether the Board should require that each carrier provide a specific written disclosure statement when it seeks to enter into a rail transportation contract under section 10709. That statement would have explicitly advised the shipper that the carrier intends the document to be a section 10709 rail transportation contract, and that any transportation under the document would not be subject to regulation by the Board. The statement would further have advised the shipper that it has a statutory right to request a common carriage rate that the carrier would then have to supply promptly, and that such a rate might be open to challenge before the Board. We also sought comment on whether to include a requirement for a written informed consent statement in which the shipper acknowledges, and states its willingness to forgo, its regulatory options. After reviewing the comments received on that proposal, we decided to modify our proposal.

In the 2009 NPRM, we proposed to treat as a rail transportation contract any agreement that contains a prescribed disclosure statement (set forth below) but not to require such a statement. In the absence of the disclosure statement, we proposed to treat the document as a common carrier tariff subject to our jurisdiction absent clear and convincing evidence that: (1) the parties intended to enter into a rail transportation contract governed by section 10709; and (2) the shipper was made aware that it could request service under a common carrier tariff that would be subject to our jurisdiction. We proposed that this rule would apply prospectively only, and not to existing contracts, existing amendments, or existing supplements to contracts. All subsequent contracts, amendments and supplements, even those that attach to contracts signed before the effective date of the new rule, would need to contain the disclosure statement in order to be conclusively presumed to be a contract under 49 U.S.C. 10709 and thus outside of the Board’s jurisdiction, leaving the parties to resolve any contract dispute before a court of competent jurisdiction.

DISCUSSION AND CONCLUSIONS

The key to our proposed rule was the prominent inclusion of the following disclosure statement in all rail transportation contracts:

⁴ See Rail Transportation Contracts Under 49 U.S.C. 10709, STB Ex Parte No. 669 (STB served Mar. 29, 2007) (2007 NPRM).

⁵ See Rail Transportation Contracts Under 49 U.S.C. 10709, STB Ex Parte No. 676, *et al.* (STB served Mar. 12, 2008) (2008 Decision).

This agreement constitutes a rail transportation contract under 49 U.S.C. 10709. Contract arrangements are generally not subject to challenge before the Surface Transportation Board (“STB”), but can be enforced in a court of competent jurisdiction. Under federal rules found at 49 CFR 1300, railroads are required, upon request, to quote to shippers a rate for common carriage transportation (i.e., a non-contract rate). Pursuant to 49 U.S.C. 10701, the STB has jurisdiction (subject to some exceptions) over disputes arising out of common carriage (non-contract) rates.

The purpose was twofold. First, we sought to remove ambiguity with a clear statement that the agreement was intended to be a rail transportation contract. Second, we sought to ensure that shippers understood the consequences of entering into a rail transportation contract and that they could demand common carriage transportation instead.

It is the second part of this disclosure statement that the comments from both railroads and shippers suggest would not work as desired. We conclude that the rights of shippers to common carriage transportation and the consequences of entering into a rail transportation contract require more elaboration than any disclosure statement can provide. For instance, as proposed, the second sentence would have read: “Contract arrangements are generally not subject to challenge before the Surface Transportation Board (“STB”), but can be enforced in a court of competent jurisdiction.” Yet as indicated by the “generally not subject” clause, in certain limited circumstances, the Board has authority on contract issues.⁶ As another example, the proposed third sentence would have read: “Under federal rules found at 49 CFR 1300, railroads are required, upon request, to quote to shippers a rate for common carriage transportation (i.e., a non-contract rate).” But this is not true for exempt traffic, where the railroad has no obligation to quote a rate for common carriage transportation unless the shipper seeks a revocation of the exemption.⁷ And, finally, although the final sentence would have read: “Pursuant to 49 U.S.C. 10701, the STB has jurisdiction (subject to some exceptions) over disputes arising out of common carriage (non-contract) rates,” it would not have acknowledged the breadth of the exceptions to our jurisdiction over rate disputes arising from common carriage agreements.⁸

⁶ For example, complaints regarding agricultural commodity contracts may be brought to the Board. See 49 U.S.C. 10709(g); 49 CFR 1313.1(a).

⁷ Pursuant to authority in 49 U.S.C. 10502, the Board has exempted a broad class of commodities from its regulation. See 49 CFR 1039.

⁸ The Board may only regulate the tariff rates that railroads charge shippers when the rail carrier has market dominance and the shipper is thus a captive shipper. See e.g. 49 U.S.C. 10707(b), (c) (restricting the Board’s review of the reasonableness of a challenged rail tariff rate to cases where the rail carrier has market dominance) and 49 U.S.C. 10707(a), (d) (defining market dominance as where there is no effective competition for the movement or where the revenues received for a rail movement exceed 180% of the rail carrier’s variable costs to provide that service).

There is no obvious way to reform the disclosure statement to accurately describe shippers' rights to common carriage transportation and the consequences of entering into a rail transportation contract without either (1) making the statement too long and complex or, if we try to keep it short, (2) creating the potential to mislead a shipper that is not knowledgeable about the nuances of our regulatory system. It was never our intent, as some rail carriers suggest, to create an irrefutable presumption based on the bare statement that an agreement constitutes a rail transportation contract under section 10709. While that language is simple and straightforward, it is inadequate to assure us that the shipper has, in all or most circumstances, intentionally opted out of the federal law such that a bright-line, un rebuttable presumption would be appropriate.

As no party has proposed a suitable alternative, we will continue to address on a case-by-case basis the issue of whether a document constitutes a common carriage tariff that is subject to our jurisdiction, or whether the parties mutually intended to opt out of our jurisdiction by agreeing to enter into a rail transportation contract under section 10709.

In addition, we encourage railroads and their customers to avoid misunderstanding and resulting litigation by including the following language in pricing agreements:

This agreement constitutes a rail transportation contract. Under certain circumstances, freight railroad customers are entitled to demand and receive a common carrier (non-contract) rate, the terms of which are subject to the jurisdiction of the Surface Transportation Board (STB). For more information, contact the STB's Rail Customer and Public Assistance Program at (888) 254-1792 (toll-free) or rpa@stb.dot.gov.

The Board, however, is not prepared at this time to mandate a specific disclosure statement. Thus, we will discontinue this proceeding.

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

It is ordered:

1. This proceeding is discontinued.
2. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.