

224447

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX Parte No. 676

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

**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

**James A. Hixon
George A. Aspatore
Greg E. Summy
John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510**

***Counsel to Norfolk Southern
Railway Company***

Dated: January 29, 2009

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX Parte No. 676

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

**COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

Norfolk Southern Railway Company ("NS") hereby submits these comments in connection with the Notice of Proposed Rulemaking served by the Surface Transportation Board on January 6, 2009, in the above proceeding ("NPRM").

In its Notice, the Board proposed to create a bright-line rule to determine when a rail pricing document was a contract. Pursuant to that bright-line rule, the Board would deem a pricing document to be a contract – and therefore outside the Board's jurisdiction – if the document included a header that contained the following statement:

Disclosure Statement - 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 C.F.R. 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.

NPRM at Appendix A.

NS has no objection to including a clear statement somewhere in the document that it is a contract. That statement should be simple to avoid various pitfalls and NS

proposes that the Board amend its proposal to require the following statement somewhere in the pricing document:

"This agreement constitutes a rail transportation contract under 49 U.S.C. 10709 See 49 C.F.R. 1301.1 for further information."

That statement is clear. First, it places the railroad and the customer on notice that the document is a contract and that there are legal implications under the United States Code. Second, it also gives the railroad and the customer the opportunity to read 49 U.S.C. 10709. Third, it gives the Board the opportunity to provide additional legal guidance to a customer in the Code of Federal Regulations without putting the railroad in a position of providing legal advice to a customer. Moreover, it should be more than sufficient for the Board's purposes that this statement appear anywhere in the agreement. Indeed, if such a disclosure were a term of the agreement that would be even stronger evidence of the parties' intent than having it in a header.

The Board's proposal has several serious flaws that the Board should correct. Those flaws include the creation of a jurisdictional gap, the inaccuracy of the overly broad disclosure statement, and the potential unintended consequences of the railroads providing the overbroad disclosure statement. We discuss these issues in turn and think that NS's proposal provided in Appendix A solves all of them.

THE BOARD'S PROPOSAL CREATES A JURISDICTIONAL GAP

The Board's proposal creates a jurisdictional gap. The Board's proposal would create a bright line rule that "where an agreement for rail carriage contains the disclosure statement to be set forth in this new rule, the Board will not find jurisdiction over a

dispute involving the rate or service under the agreement and will treat that agreement as a rail transportation contract governed by 49 U.S.C. 10709.” *NPRM* at 1 and Appendix A. This is not a presumption that a contract exists (and thus that the Board lacks jurisdiction) so long as the document includes the disclosure statement, it is a hard and fast rule.

Of course, state common law rules regarding the existence of a contract do not turn on a disclosure statement.¹ Thus, it is possible that a court would look at a pricing document with a disclosure statement and determine under state rules of contract construction that no contract exists. If a court were to arrive at this conclusion, then under 49 U.S.C. 10709, a customer would have no relief in court. At the same time, the customer would have no relief at the Board because the Board would have disclaimed jurisdiction over the pricing document as a result of the inclusion of the disclosure statement.² Thus, the Board’s proposal would create a jurisdictional gap

The bright-line rule stands in stark contrast to the other situation addressed by the rule where a mere presumption is created. “[W]here an agreement for rail carriage fails to contain the disclosure statement, the Board will find jurisdiction over a dispute involving the rate or service under the agreement, absent clear and convincing evidence

¹ See Comments of Norfolk Southern Railway Company, Ex Parte No 669, Interpretation of the Term “Contract” in 49 U.S.C. 10709, which are hereby incorporated and made a part of this filing.

² Of course, the Board is not able to disclaim jurisdiction over matters expressly delegated to it by Congress. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984) (“First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

that. . .. *NPRM* at 1 and Appendix A (emphasis added). In this situation, the Board's proposal would create just a rebuttable presumption that no contract exists

The solution to the jurisdictional gap is that the Board should make its proposal a rebuttable presumption in both instances. Thus, the statement that "where an agreement for rail carriage contains the disclosure statement to be set forth in this new rule, the Board will not find jurisdiction over a dispute involving the rate or service under the agreement and will treat that agreement as a rail transportation contract governed by 49 U.S.C. 10709" should be followed by an "unless" clause. That "unless" clause would read something like the following. "unless a court of law determines pursuant to state contract law that the agreement is not a contract "

PART OF THE BOARD'S PROPOSAL IMPROPERLY LIMITS THE BOARD'S JURISDICTION

The Board's proposal improperly limits the Board's jurisdiction to the extent that it creates additional non-statutory prerequisites to its jurisdiction. Pursuant to 49 U.S.C. 10709, the Board lacks jurisdiction when a contract exists. The statute does not address any type of disclosure statement, and thus the statute does not allow the Board to exercise jurisdiction over a contract when the carrier has *not shown* by clear and convincing evidence *that "the shipper was made aware* that it could request service under a common carrier tariff rate that would be subject to STB jurisdiction." The Board's jurisdiction does not turn on whether a shipper was "made aware" of what the law is or what the effect of the law might be. Under the statute, whether the customer was told it could request a common carrier rate is not relevant to whether the Board has jurisdiction

Accordingly, references to this extra-statutory requirement must be eliminated from the rule

**THE DISCLOSURE REQUIREMENT IS OVERBROAD AND
PROBLEMATIC**

The proposed disclosure statement goes too far, is overbroad, and raises more issues than it solves. In particular, the language after the first sentence creates several substantial problems and is unnecessary³

The statement that “[u]nder federal rules found at 49 C F R. 1300, railroads are required, upon request, to quote to shippers a rate for common carriage transportation (i e., a non-contract rate)” is simply wrong with regard to exempt commodities *NPRM* at Appendix A. The statement that “the STB has jurisdiction (subject to some exceptions) over disputes arising out of common carriage (non-contract) rates” would be misleading, without significantly more dissertation, to a shipper of exempt commodities. *Id* These two statements would mistakenly lead such a customer to believe that the railroad was obligated to provide it a common carrier rate challengeable at the Board – the railroad is not. Thus, including the additional language on contracts for exempt commodities is

³ The language referenced here is “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 ”

incorrect and would actually create more questions than it answers about that customer's rights before the Board ⁴

The Board's proposed rule and the extensive disclosure statement effectively result in a requirement that a railroad provide legal advice to its customers about the customers' rights and remedies under federal law. The Board's proposal demonstrates an expectation that customers not represented by legal counsel can rely upon the legal advice offered by that disclosure statement, regardless of whether the railroad agrees or disagrees with it. The proposed disclosure statement would place the railroad in the untenable position of either (1) endorsing the blanket disclosure statement by its silence or (2) offering legal advice to the customer (to address the inaccuracies in the statement) should it choose not to endorse it. The language that creates this problem should be stricken from the rule to avoid putting the railroad in the position of providing legal advice to its customers or from signing a contract with an incomplete or incorrect statement of the law.

A disclosure statement such as the one proposed by NS in Appendix A is sufficient to alert a customer that it may wish to seek legal counsel. That customer has the choice to obtain counsel if it wishes. It should not be the railroads' burden to provide legal advice to customers to correct inaccuracies in a blanket disclosure statement that is not universally applicable.

Finally, the proposed language could create estoppel problems for parties. As noted above, because the disclosure statement is overbroad, it includes a purported

⁴ Moreover, a requirement that the Board's proposed disclosure statement be placed only in contracts for regulated traffic would be unwieldy and difficult for a railroad to administer.

summary of the law that is not necessarily complete or accurate, such as in the instance of exempt commodity shipments. When a party enters into a contract with the disclosure statement, that party runs the risk that it may be estopped from arguing that the purported summary of the law, which they did not write or otherwise agree to, is incomplete, inaccurate, or inapplicable. This potential estoppel problem is another reason the Board should keep the required disclosure statement simple.

NS'S PROPOSED SOLUTION TO THE IDENTIFIED PROBLEMS

The problems that arise from the Board's proposed statement being overbroad can be easily remedied. The solution is to keep any required disclosure statement simple, such as NS's proposed language.

"This agreement constitutes a rail transportation contract under 49 U.S.C. 10709. See 49 C.F.R. 1301.1 for further information."

Any disclosure statement should be simple to understand and alert the reader to the issue that the person mandating the disclosure wants to address.

The information contained in the Board's proposal could be moved to the regulation (as suggested in the manner described in the attached Appendix A). The regulation could (1) address in general terms the nuances of rates and contracts concerning regulated and deregulated traffic, which the proposed disclosure statement does not and should not, and (2) provide information regarding the implications of an agreement being a transportation contract under 49 U.S.C. 10709. Finally, keeping the disclosure statement simple and including a reference to a regulation that provides more

information also eliminates the improper requirement that railroads "Mirandize" the railroad shipping community.

CONCLUSION

NS agrees a simple disclosure statement could be useful. But, the Board's proposal has flaws. The Board should revise its proposed rule as outlined in this submission by NS by (1) requiring a more limited disclosure statement and permitting it to be anywhere in the document, (2) creating a safe harbor that any pricing document that contains the disclosure statement is not subject to regulatory review by the STB, unless a court declares the document is not a contract; and (3) providing an overview of the potential legal significance of the agreement being a contract in 49 C.F.R. 1301.1 rather than requiring the railroad to provide legal advice that may or may not be complete or accurate to the customer. In Appendix A, NS provides a revised version of 49 C.F.R. 1301.1 that incorporates the suggestions it has made in this submission

Respectfully submitted,



John M. Scheib
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

January 29, 2009

APPENDIX A

NS PROPOSED LANGUAGE FOR 49 C.F.R. 1301.1

PART 1301—RAIL TRANSPORTATION CONTRACTS

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

§1301.1 Contract Disclosure Statement.

(a) The Board will not find jurisdiction over a dispute involving the rate or service under a rail transportation agreement where that agreement contains a disclosure statement that conforms with paragraphs (b) and (c) of this section, unless a court of law determines pursuant to state contract law that the agreement is not a contract. Conversely, where a rail transportation agreement fails to contain such a disclosure statement, the Board will find jurisdiction over a dispute involving the rate or service provided under that agreement, absent clear and convincing evidence ~~both that the parties intended to enter into a rail transportation contract governed by 49 U.S.C. 10709, and that the shipper was made aware that it could request service under a common carrier tariff rate that would be subject to STB jurisdiction.~~ 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 C F.R. 1300, railroads are required, upon request, to quote to shippers of commodities that are not exempt from regulation 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 carrier rates.

(b) The disclosure statement should appear ~~at the top of the first page of~~ in the rail transportation agreement in type size at least as large as the type size used for the body of the agreement.

(c) The disclosure statement should read as follows:

Disclosure Statement - This agreement constitutes a rail transportation contract under 49 U S C 10709 See 49 C F.R. 1301 I for further information