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BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO 676
RAIL TRANSPORTATION CONTRACTS UNDER
49 U S C 10709

OPENING COMMENTS OF
NATIONAL GRAIN AND FEED ASSOCIATION

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These comments are filed on behalf of National Grain & Feed Association ("NGFA") in response to the Board's Notice of Proposed Rulemaking ("NPR") of January 6, 2009¹

NGFA has more than 900 members, large and small alike, engaged in every facet of agribusiness, including grain producers, grain elevator operators, wheat and corn millers, producers of soybean and corn oil and oil processed from seeds, and biofuel producers. Virtually all facilities engaged in the agricultural business utilize rail service, often as their only means of transportation, and ship under both contracts and common carrier arrangements. NGFA has participated in the Board's proceedings that preceded and led to the institution of Ex Parte No. 676

I

The purpose of this pleading primarily is to call to the Board's attention the specific and unique provisions of Section 10709 and the Board's related regulations, establishing a singular process applicable to rail transportation contracts involving agricultural commodities, with a view toward eliminating inconsistencies between those provisions and the rules proposed by the Board in the Decision.

One of the pivotal findings in the Decision is the Board's assertion that it "lack[s] .. jurisdiction over contracts under 49 U.S.C. 10709." NPR, slip op. at 4. The Board then proceeds to discuss a number of reasons why the NPR should "focus only on common carriage, an area clearly within our jurisdiction." *Id.*

Contrary to the Board's views, however, the statute plainly confers jurisdiction on the Board over contracts for the transportation of agricultural products. 49 U.S.C. §

¹ NGFA is also participating in Comments being filed by a larger group of shipper organizations. The instant comments are confined to those provisions of 49 U.S.C. § 10709 that deal specifically with contracts involving the transportation of agricultural commodities.

10709(b). Both the statute and the Board's regulations thereunder, 49 C F R Part 1313, require carriers to file written summaries of grain transportation contracts with the Board, permit complaints against contracts by competitively impacted shippers to be filed with the Board on grounds that a contract will unreasonably discriminate or constitutes a destructive competitive practice, and permit the Board to modify or completely reject such contracts. Carriers are required to file their contract summaries no longer than 7 days after the date of the contract.

A complaint against an agricultural commodity contract must be filed within 18 days after the contract summary is filed. If discovery is desired by the complainant, a discovery request must accompany the complaint. Immediately upon the filing of a complaint, the rail carrier filing the contract summary is required to forward to the Board "the subject contract or amended contract." 49 C.F.R. 1313.10(a)(5). A short period is then established to conclude appeals of the Board's decision on discovery. The Board's rules thereafter provide a process for the submission of evidence and argument. Within 30 days after a complaint proceeding is commenced, the Board must determine if the subject contract "is in violation" of Section 10709, 49 U.S.C. § 10709(g)(3)(A). Final pleadings, in the form of replies to any petition for reconsideration of a Board decision on the merits, are due no later than 46 days after the filing of the contract summary.

49 U.S.C. § 10709 and 49 C F R Part 1300 make it impossible for the Board to assert that it has no jurisdiction whatsoever over rail transportation contracts. Moreover, those provisions make it equally clear that Congress intended agricultural commodity contracts to be written instruments as evidenced not only by Section 10709 and Part 1300 as a whole, but specifically by 49 C F R 1313.10(a)(5), requiring a rail carrier "immedi-

ately upon the filing of complaint” to “forward to the Board . the subject contract or amended contract ” A contract that is not a written instrument cannot meet that requirement Given that an agricultural transportation contract summary can be filed with the Board at any time after the contract itself is completed, and that contracting carriers must be prepared at that time to file the complete written contract, it follows that adherence to the Board’s rules virtually compels a written contract to be in existence in time to meet the Board’s filing requirements for contract summaries

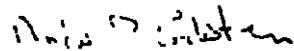
II

The language of 49 U S C § 10709 and 49 C F R Part 1313 render the Board’s proposed rules, set forth in Appendix A to the NPR, unnecessary and inappropriate where agricultural commodity contracts are involved The Disclosure Statement authorized in Appendix A requires the contracting railroad to include language in a contract document stating that [c]ontract arrangements are generally not subject to challenge before the Surface Transportation Board (“STB”), but can be enforced in a court of competent jurisdiction ” That statement is incorrect insofar as agricultural commodity contracts are concerned Similarly, there is no practical way to enforce an agricultural commodity contract in a “court of competent jurisdiction” while remaining within the boundaries of Section 10709. The Board is required to determine whether a contract for the transportation of agricultural commodities violates Section 10709 within 30 days after a complaint proceeding is commenced. 49 U S C 10709 (g)(3)(A) It is not even remotely foreseeable that a civil court can fully hear a case involving the validity of a contract in the few days that would be necessary were the Board to have to rely on the court’s conclusion in time to render a decision within 30 days.

III

No rational reading of Section 10709 suggests that there is a role to be played by the courts in determining the lawfulness of an agricultural commodity contract. Nor does the statute require any form of disclosure statement in order to confer Section 10709 jurisdiction on the Board over agricultural commodity contracts. NGFA accordingly urges the Board to make the provisions of proposed 49 C.F.R. 1301.1(a), (b), and (c) inapplicable to the transportation of agricultural products.

Respectfully submitted,



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