224487

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 676

Railroad Transportation Contracts Under 49 U.S.C. 10709

COMMENTS OF

PPG INDUSTRIES, INC.

PPG Industries, Inc ("PPG") appreciates the opportunity to submit comments in this "Notice of Proposed Rulemaking" proceeding in which the Surface Transportation Board ("STB" or "Board") is proposing to adopt a rule that will be used to determine whether the Board has jurisdiction over a dispute involving a rail pricing document, based on whether the document includes a disclosure statement Specifically, the Board will determine that it does not have jurisdiction over a rate or service dispute if the rail pricing document expressly states that it "constitutes a rail transportation contract under 49 U S C. 10709 " and informs the shipper that contracts are not generally subject to the Board's jurisdiction STB Notice, served March 12, 2008, slip op. at 8, Appendix A. As explained herein, PPG strongly opposes the Board's proposed rule.

<u>Interest of PPG</u>

PPG is a diversified manufacturer of chemicals, protective coatings, glass and fiber glass with over 15,400 employees in the United States and more than 30 major facilities across the country Total sales in 2008 were $15 8 billion Almost half of these sales are in the U S PPG operates in more than 60 countries around the globe

PPG's commodity chemicals segment produces chlor-alkali and derivatives including chlorine, caustic soda, vinyl chloride monomer, chlorinated solvents, hydrochloric acid, calcium hypochlorite, and other chemicals. Most of these products are sold directly to manufacturing companies in the chemical processing, plastics and rubber, paper, minerals, metals, and water treatment industries. Price, availability, product quality and customer service are the key competitive factors in these businesses. PPG's North American chlor-alkali chemicals business operates three production facilities and employed over 1950 persons in 2008.

Cost pressures have made it exceedingly difficult for PPG's businesses, including commodity chemicals to compete in a global industry and to maintain jobs in the United States The commodity chemicals sector of PPG's business has faced tremendous cost pressures PPG's chemical rail bill alone has risen by 75% over the past 4 years

Many of PPG's businesses are dependent upon reliable rail service PPG believes an efficient and reliable rail industry is absolutely essential to a healthy and competitive U S economy and critical to PPG's success PPG requires efficient rail transportation, as some products cannot be moved by other modes and many of PPG's customers cannot receive products via alternative modes. In North America, PPG only uses rail to ship its chlorine over land, PPG does not ship via truck In that regard, PPG ships chlorine approximately 25% to 30% by rail and ships the remainder of the chlorine through pipelines or barges

<u>Background of the STB's Proposal</u>

This proceeding is intended to address the Board's concern over "the lack of any clear demarcation between common carriage rates and contract pricing arrangements and the resulting ambiguity regarding the Board's jurisdiction " STB Notice, served March 12, 2008, slip op at 4 Originally, the STB raised this issue in another rulemaking proceeding, Ex Parte No 669, *Interpretation of the Term Contract in 49 U S C 10709*, in which the Board proposed to interpret the term "contract" as·

> any bilateral agreement between a carrier and a shipper for rail 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

However, the Board decided not to adopt the proposed rule and to discontinue that proceeding after shippers and the railroads both expressed concerns with the contract definition

In March, 2008 the STB proposed a new alternative to distinguish contracts from common carriage agreements It sought comment on whether the carriers should provide a formal written disclosure statement when it seeks to enter a rail contract under 49 U S C. 10709 The statement would also advise the shipper it has a statutory right to request a common carriage rate *In addition the shipper would acknowledge by a written consent statement its willingness to* enter such an agreement and forgo its regulatory options

In the most recent proceeding the Board abandoned the "informed consent" requirement in the March 2008 proposal and has proposed yet another approach. The Board is now proposing to determine that a rail pricing document is a contract and, thus, the Board does not have jurisdiction over disputes arising under such document, if the document expressly states that: (1) the document offered by the carrier is a contract and that transportation performed under the contract is not subject to the Board's jurisdiction; and (2) the shipper has the right to request a common carrier rate that may be challenged before the Board

The Board has stated that the new proposed rule is intended to provide a more objective means of determining whether the parties' intent was to use a common carriage tariff subject to the Board's jurisdiction or a rail transportation contract This new rule would not require the inclusion of a disclosure statement in all rail contracts. However, if a rail pricing document includes the disclosure, the rule would require the Board to conclusively determine that it does not have jurisdiction.

PPG strongly opposes the Board's proposal As with the Board's March 2008 proposal, PPG believes that this most recent proposal will operate to reduce further shippers' regulatory options by encouraging the railroads to transform their rate offerings into contracts, simply by issuing the full disclosure statement The railroads could effectively create contracts even though there is no bilateral negotiation or "meeting of the minds" between the parties.

PPG's Experiences With the Railroads' Pricing Policies

In the past 5 years the railroads have changed their approach to the negotiation of rates with PPG The rates offered to PPG and implemented by the railroads substantially favor the carriers while largely ignoring the pricing needs of PPG PPG believes that railroads have been successful in extracting significant price increases from PPG based upon the limited competition in the rail industry With mergers and consolidations, 90% of the freight hauled in the U S is handled by only 4 railroads

In the past, PPG could negotiate long-term rail contracts covering multiple years, with reasonable price increases negotiated between the parties Today, virtually all of our contract rates for shipping chemicals expire after one year, and some rates remain in effect for only six months Moreover, some railroads have gradually shifted PPG's service and pricing terms for some commodities from contracts to private circulars and tariffs The circulars and tariffs allow the railroads to change (i e. increase) pricing at any time on 20 to 30 days notice PPG has been told that the railroads require this pricing flexibility to address the potential for "forced" routing changes necessitating the railroads to haul TIH (toxic by inhalation) materials around certain unspecified prohibited areas, and to address potential new regulations or rules that create cost increases or inefficiencies for the railroads

The impact of the railroads' pricing practices on PPG's business is that PPG's transportation costs for TIH materials in both contract and non-contract pricing authorities can dramatically change (i e increase) on only 20-30 days notice, based on a unilateral determination by the railroad As for contract pricing, PPG has found that railroads are less inclined to offer contracts on TIH materials and when contracts are offered, it is on a "take it or leave it" basis, without agreeable pricing that has been negotiated

In addition, most class 1 railroads have adopted policies that require TIH cars to be delivered immediately on arrival Otherwise customers face daily charges of up to $2500/day as the cars wait in their own secure rail yard Often this storage is necessary due to inconsistent rail service, causing cars to bunch and forcing the customer to accept more cars than it needs Nevertheless, PPG and its customers face the burden of complying with this rule Also railroads have begun to fine shippers up to $2500 for any car that has improper billing Meanwhile, PPG continues to see examples of the same railroads misrouting cars, failing to pick-up exchange cars at junctions, or other mistakes that add time to shipments

PPG owns or leases all of its tank cars for shipments of chemicals The railroads use to *offer a full mileage rate, where they paid the car owner a per mileage income as an incentive for* purchasing its own cars to use on its tracks Virtually all full mileage pricing for the commodities PPG ships has been eliminated Often these conversions from full to zero mileage are also accompanied by a sizable increase in the base freight rate Due to no or limited competition, PPG has been forced to accept these unfavorable terms

The railroads have also extracted additional significant revenue from shippers such as PPG in the form of fuel surcharges. Initially, these surcharges were collected based on a percentage of the base rate. This meant that shippers had to pay a higher fuel surcharge for some chemical shipments such as chlorine, even though they were traveling the same distance as other chemicals The STB eventually ruled that fuel surcharges that are based on a percentage of a freight rate are unreasonable and required the railroads to change their policy with respect to tariff shipments.

In summary, over the past 5 years, freight costs for all chemicals have increased significantly PPG's cost per ton to ship chlorine by rail has skyrocketed, by approximately 78% from 2004 to 2008, and we are experiencing a continuation of this trend in 2009 PPG has limited ability to control these costs because the railroads refuse to negotiate contract terms, but rather offer us private circulars and tariffs that allow for pricing changes with minimal notice

<u>PPG's Concerns with the Proposed STB Rule</u>

PPG strongly opposes the proposed rule that would allow a rail carrier to create a 10709 contract with its customer merely by inserting a statement on a pricing document that declares the document to be a contract, regardless of whether the parties had any discussions or negotiations over the terms in the document PPG believes that the Board should abandon further consideration of the proposed rule for the following reasons

- The railroads are well aware that private contracts are not subject to challenges before the STB The proposal provides an additional incentive for railroads to convert rates into private contracts simply by issuing a disclosure statement, as opposed to entering into actual price and service negotiations with its customers, in order to prevent the shipper from exercising its regulatory remedies.

- The Board should not create a rule that will allow 10709 contracts to be unilaterally imposed on shippers by the railroads, with the consequence of cutting off shippers regulatory remedies The railroads already maintain the right to unilaterally establish pricing and service terms in tariffs, subject to review by the STB. Thus, the proposed rule is inconsistent with the tariff and contract pricing structures established under the Staggers Act

- While private contracts imply that the pricing and services have been subject to a bi-lateral negotiation between the shipper and carrier to the agreement, many railroads refuse to negotiate pricing, especially for chemical companies that ship TIH products, such as chlorine The proposed disclosure statement would permit a rail carrier to unilaterally create a 10709 contract without engaging in any negotiation with the shipper

- While a shipper can request common carriage rates, railroads will simply price these rates at even higher levels than their "contract" prices, especially for captive business (such as PPG at its Natrium WV plant), which forces the shipper to tender traffic under the unilaterally established "contract" and forgo its regulatory options

- PPG strongly believes that the Board's proposal will further encourage railroads to apply a "take it or leave it approach" in the so-called contract negotiation process We further firmly believe that a shipper must have the ability to challenge a rate with the STB if it believes that no other means of negotiation is possible. However, the instant proposal will allow railroads to transform tariffs into contracts simply by issuing the full disclosure statement, even though the railroads may refuse to "negotiate" any of the terms of the contract *At the very least, shippers should have the authority to enter into such contracts* under protest, whenever there is an effective lack of competition. In those cases, PPG believes that shippers should be permitted to seek a determination as to whether the rate charged is actually a tariff rate, and to challenge the "phantom contract rate" before the STB.

- With private contracts, railroads can establish fuel surcharges that are based on unreasonable percentages of base rates, knowing that they cannot be challenged by the STB.

PPG believes that a contract must be negotiated and the pricing, and terms and conditions, should be mutually agreeable to both parties. Additionally, a railroad should not be permitted to unilaterally impose a contract on its customer based on a lack of competitive options

Conclusion

PPG commends the Board for raising the contract vs tariff issues in this proceeding However, for the foregoing reasons, PPG requests that the Board not adopt its proposal that would permit a railroad to unilaterally create a 10709 contract with a shipper merely by including a statement on a pricing document that declares the document to be a contract that falls outside of the STB's jurisdiction

Respectfully submitted,

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Dated: February 5, 2009

CERTIFICATE OF SERVICE

This is to certify that on this 5th day of February, 2009, a true and correct copy of the foregoing Comments were served upon all parties of record via first class mail, postage pre-paid

Steven D. Minick /KAB

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