

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

OPENING COMMENTS OF
NASSTRAC, INC.

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I. INTRODUCTION

NASSTRAC, Inc., also known as the National Shippers Strategic Transportation Council, welcomes the opportunity to comment on rail transportation contracts and the Board's most recent proposal. NASSTRAC supports the Comments being filed jointly by American Chemistry Council and other shipper organizations ("ACC, et al."), and urges the Board not to adopt its proposed rules.

II. INTEREST OF NASSTRAC

NASSTRAC is a leading national association of shippers of freight. As an incorporated membership association, it has for more than 50 years represented the interests of its members in transportation, logistics and supply chain issues before the ICC and STB, other governmental agencies, federal and state courts and Congress. NASSTRAC's regular members are shippers of freight and intermediaries who arrange freight shipments, and many carriers have joined NASSTRAC as associate members.

NASSTRAC has been most active on trucking issues, because rail service quality is generally not high enough for extensive use in just-in-time supply chains. However, NASSTRAC members ship via carriers of all modes, domestically and internationally, and often rely on rail carriers for inbound shipments of raw materials to manufacturing facilities, and for intermodal shipments.

In addition, while increased freight volumes in the next ten to fifteen years are projected to move predominantly by motor carrier, there are capacity, congestion and environmental issues that may lead to modal changes. These may lead to increased utiliza-

tion of rail and rail intermodal for shippers beyond the coal, grain, chemical and other bulk shippers that now constitute the railroad industry's main customer base.¹

NASSTRAC members therefore have a direct interest in rail contract issues today, and may have an increased interest in those issues in the future. NASSTRAC members also have extensive experience in the use of contract carriage agreements.

III. THE BOARD SHOULD RECOGNIZE DIFFERENT CONTEXTS FOR CONTRACT DISPUTES

In its January 6, 2009 Notice of Proposed Rule in this proceeding, the Board appears to be seeking a bright line test, applicable in all cases, to make clear when two parties have agreed to a contract under 49 U.S.C. § 10709 and when they have not. Despite its stated desire for a simple, clear test, the Board also appears to have decided against an informed consent requirement. There are several problems with the Board's latest proposals.

First, the Board is venturing into an area of the law that is normally seen as the province of courts and state law rather than regulatory agencies and federal law. In addition, the Board is looking for simple, mechanical answers to potentially complex questions, including but not limited to the following:

- Did the parties reach agreement?
- Is the agreement adequately supported by consideration?
- Was the agreement free of overreaching, duress and violations of public policy?
- Are all terms of the agreement unambiguous?

¹ In light of these considerations, NASSTRAC filed comments in 2006 in STB Ex Parte No. 575, Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League, supporting relief from paper barriers that constrain the ability of short line railroads to compete with major railroads and provide responsive (or any) service to shippers.

- If not, may extrinsic evidence or default rules be relied on to interpret the agreement?

A finding that two parties intended to enter a contract, even if that finding is correct, may leave unanswered many other questions, including whether their intent was successfully carried out, and if so, as to what issues. If parties reached agreement as to the rates and charges for a given service, but were silent as to terms and conditions, should the railroad's tariff provisions be deemed non-jurisdictional?²

If, conversely, a shipper and a railroad reach agreement as to a specific term or condition of service, e.g., frequency of deliveries or free time before demurrage charges accrue, does the shipper forfeit the right to challenge the rail rates it pays pursuant to the railroad's tariff?

Moreover, while a finding that a dispute is subject to a valid contract may warrant a Board finding of lack of jurisdiction, the Act does not make such a determination mandatory, but provides for agreement by the parties to alternative forms of resolution for some or all disputes, presumably including recourse to the STB. See Section 10709(c)(1) (emphasis added):

The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.

The Board proposes to resolve these questions by adopting an irrebuttable presumption of lack of jurisdiction “over a dispute involving the rate or service under a rail

² In H. B. Fuller Co. v. Southern Pacific Transportation Co., 2 S.T.B. 550 (1997), the Board held that it lacked jurisdiction to consider the reasonableness of charges in a tariff cross-referenced in a contract filed under Section 10709. Assuming the Board correctly decided to leave tariff reasonableness issues for determination by a court in a breach of contract action, it does not follow that the same result would be proper where there is no such cross-reference.

transportation agreement where that agreement contains a disclosure statement” conforming to the Board’s proposed verbiage.

ACC, et al. refer to this as a “magic words” approach, and NASSTRAC shares their concern. Under this approach, “magic words” equal a contract and a contract represents the freely exercised choice by both parties to forego regulatory recourse as to any dispute over “the rate or service” provided by the railroad under the contract.

Making a disclosure statement trump all other considerations is bad enough where the shipper actually signs off on the disclosure statement. However, the Board proposes to go further and allow the railroad to foreclose the shipper’s regulatory recourse through unilateral or “signatureless” contracts.

Even in the absence of the disclosure statement, the Board will adopt only a rebuttable presumption that regulatory recourse remains available. This presumption can be rebutted by clear and convincing evidence that the parties intended to be bound by a contract governing the subject matter of their dispute (and, presumably, that they did not agree to preserve recourse to the STB for resolution of any disputes).

NASSTRAC members support freedom of contract, and strongly support the use of contracts with air, ocean and motor carriers as beneficial to shippers. Absent agreement as to rates and charges and terms and conditions of service, the transportation service will be subject to terms dictated by carriers.

The problem with rail transportation contracts is that so many are offered on a take-it-or-leave-it basis, especially where the railroad has market dominance. Even when there are competitive options, railroads draft the vast majority of contracts, and another reason many NASSTRAC members prefer not to use rail transportation (aside from poor

service) is the unwillingness of railroads to deviate from their standard (pro-railroad) contract terms when the parties negotiate.

For many NASSTRAC members, this aspect of contracting with railroads is more troubling than giving up regulatory recourse. Most members are not captive, and would not go to the STB for dispute resolution even if contract carriage, or elements of it, could remain jurisdictional. It generally makes more sense to shift freight from trains to trucks in the event of contract disputes than to try to invoke regulatory remedies.

However, there are also captive rail shippers among NASSTRAC members, and there may be more, whether they like it or not, if motor carrier capacity and congestion issues become more severe. This is not likely during today's economic recession, but the economy will rebound sooner or later, and the demand for freight transportation is expected to exceed the supply in the coming decades.

The recent Study of Competition in the U.S. Freight Railroad Industry by Christensen Associates indicated that there is far more rail freight moving at R/VC percentages above 180% than previously reported. According to the Study's Table ES-3, the percentage of rail freight that moves at high R/VC percentages, and is therefore at least quantitatively captive and jurisdictional, is roughly 30% calculated on a ton-mile basis, and between 40% and 50% when calculated on per-ton basis.

Moreover, the current recession appears not to have affected rail rates, and railroads report increased or steady revenues despite reduced freight volumes and lower fuel surcharges (which some railroads have offset by increasing the fuel component of rates). In contrast, many shippers are cutting costs, closing facilities and laying off workers due

to lower revenues. The railroad industry analysts' reports provide strong evidence of the major railroads' market power.

It is when railroads have, and exercise, the ability to impose monopoly pricing that regulatory recourse is most important. And it is in just such situations that the railroads have the greatest incentive to foreclose shipper recourse to the protections of the Act. If railroads can effectively deregulate themselves through contracts, they no longer need to worry about shipper challenges to otherwise unlawful railroad conduct, including unreasonable rates and charges and unreasonable practices.

Many shippers have no real choice but to go along with railroad demands that the shipper execute the contract the railroad has drafted. Few captive shippers can afford to pay 40% or 100% higher rail rates that apply if they refuse to accept one-sided railroad contracts, even if tariff rates exceed maximum lawful levels for regulated rail rates.

The arrangement the Board proposes calls to mind the early law on cargo loss and damage, when railroads were effectively able to disclaim liability for cargo loss or damage by offering reasonable rates with extremely low released values and extremely high rates with no released value. As the ICC commented, "The practical result was that the shippers had a choice of rate in name only, as the full value rates were too high to be used." Released Rate Rules – National Motor Freight Classification, 316 I.C.C. 499, 509 (1962). Eventually, Congress corrected the problem by giving the Commission supervisory authority over released rates.

It is one thing to allow carriers to use their market power to avoid cargo liability. It is another to allow them to use pricing power to evade regulation entirely, and by facilitating such evasions by railroads through the use of "magic words" presumptions and

by dropping informed consent requirements, the Board is undermining its own obligation to prevent railroad abuse of market power.

IV. INFORMED CONSENT IS NOT IMPRACTICAL

The Board attempts to justify its decision to drop an informed consent requirement, i.e., any assurance that the shipper knowingly agreed to forego all recourse to the protections of the Act, based on railroad arguments that such a requirement would “unnecessarily complicate the contracting process.” Notice at 4.

The Board should be skeptical of these claims, and of the use of “signatureless” contracts generally. It is not difficult for shippers to agree expressly to a contract, either through the use of electronic signatures or through the use of email messages confirming agreement.

In addition, shippers accustomed to shipping under contract carriage agreements with motor carriers, like many NASSTRAC members, are generally familiar with 49 U.S.C. § 11401(b), which reads, in relevant part, as follows:

If the shipper and carrier, in writing, expressly waive any or all rights and remedies under this part for the transportation covered by the contract, the transportation provided under the contract shall not be subject to the waived rights and remedies and may not be subsequently challenged on the ground that it violates the waived rights and remedies. The parties may not waive the provisions governing registration, insurance, or safety fitness.

It is common for shippers and motor carriers to include, in their standard contracts, a provision satisfying the statutory requirement for an express waiver agreed to in writing by both parties, and there are, almost certainly, far more motor carrier contracts being executed in this country than rail transportation contracts.

Informed consent, in the form of some indication of shipper agreement beyond the tendering of freight and receipt by the shipper of a communication containing the Board's disclosure statement, is thus not only practical, but it is the norm in much of the transportation contracting engaged in by freight shippers. It does not "unnecessarily complicate the contracting process."

Indeed, adoption of a "negative option" approach to rail contracts, where silence is deemed (irrebutably) to constitute assent, when a "positive option" approach is the rule for trucking, with the Act deemed applicable unless there is a clear bilateral written waiver, is likely to increase confusion, instead of reducing it.

Shippers accustomed to the Section 14101(b) approach may believe that, absent their explicit agreement to waiver of the Act's protections, those protections remain available, either as to rates and services as a whole, or as to terms and conditions that have not been addressed or emphasized in the contract negotiations with the railroad.

NASSTRAC understands that lower rates and other features of contract service may be extremely important to shippers. However, it is not too much to ask that shippers' assent to any waiver of their rights be knowing and confirmed.

V. THE NEED FOR THE BOARD'S PROPOSED "SHORTCUT"
IS NOT CLEAR

The rationale for the Board's proposal in this proceeding appears to be convenience. The railroads want to minimize the burdens of contracting (and getting shippers to waive regulatory recourse), and the Board wants to minimize the burdens of determining whether a shipper being served at negotiated rates knowingly waived the protections of the Act.

These issues can be contentious, and have arisen in two major coal rate cases. However, the likelihood that they will arise often appears to be low.

At one end of the spectrum are shippers who are highly unlikely to seek regulatory recourse, either because they do not qualify for any relief under the Act or have less expensive and time consuming alternatives available, or because they are satisfied with the deals they have struck. Most transportation contracts, like most contracts of other kinds, do not generate disputes, or generate only disputes that parties are able to resolve informally.

At the other end of the spectrum are shippers who know full well that they forego the protections of the Act when they sign a rail transportation contract. These shippers therefore attempt to negotiate all aspects of the parties' relationship. If they are captive, they may not get very far, due to their lack of bargaining leverage. However, they knowingly decide not to invoke their right to common carrier service, and understand that they thereby lose the right to file a complaint challenging unreasonable rail rates and/or practices.

The number of shippers who fall between these extremes is likely to be small, but it may include shippers who are unsophisticated, or deal with railroads infrequently, and are therefore more vulnerable than other shippers to sharp practices or the abuse of railroad market power.

Preserving the ability of such shippers to argue that they did not intend, or did not knowingly intend, to waive all their rights should not impose unmanageable burdens on railroads or the Board. And such burdens as may occasionally arise are preferable to the alternative – shippers being taken advantage of by monopoly railroads.

The use of presumptions by administrative agencies is not necessarily arbitrary or capricious, but when presumptions are adopted, they must be rational, consistent with the statute, and useful. See generally Holland Livestock Ranch v. United States, 714 F.2d 90 (9th Cir. 1983). They should also do more good than harm. The Board's latest proposal with respect to rail transportation contracts fails all of these tests. Accordingly, it should not be adopted.

VI. CONCLUSION

For the foregoing reasons, NASSTRAC urges the Board to terminate this proceeding without adopting its proposed rules.

Respectfully submitted,



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