

BEFORE THE SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 676

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

COMMENTS OF BNSF RAILWAY COMPANY

BNSF Railway Company (“BNSF”) submits these comments in response to the Surface Transportation Board’s (“STB” or “Board”) Notice of Proposed Rulemaking, Rail Transportation Contracts Under 49 U.S.C. 10709, STB Ex Parte No. 676 (served January 6, 2009), in which the Board proposes to establish rules for determining when an agreement to provide rail transportation service will be considered a contract governed by 49 U.S.C. § 10709 or a common carriage arrangement subject to Board jurisdiction.

As explained below, BNSF generally supports the Board’s proposal to treat as contracts subject to 49 U.S.C. §10709 all agreements for non-exempt rail transportation between railroads and shippers that contain a disclosure statement expressing the parties’ intent to enter into a contract under 49 U.S.C. §10709. However, BNSF does not believe that the Board should establish a presumption that all agreements that do not contain a specified disclosure statement are common carrier arrangements subject to the Board’s jurisdiction. When it is not clear from the face of the agreement that the parties intended to enter into a contract under 49 U.S.C. §10709, a determination of whether the agreement is a contract or a common carriage arrangement should be based on all relevant evidence. It would be particularly inappropriate to require that a railroad seeking to rebut the presumption of common carriage must demonstrate that the shipper was made aware by the railroad in the context of the specific negotiations of its

ability to request common carrier service. The only practical way for a railroad to make such a showing would be to create a deliberate written record in advance of entering into the agreement that the shipper had been informed of its right to seek a common carrier rate. However, the Board itself concluded in the January 6, 2009 Notice that it would be improper to impose such a requirement.

I. Background

The Board's proposed rules in this proceeding are the latest step in an effort begun by the Board in March 2007 to define what constitutes a "contract" for purposes of 49 U.S.C. §10709. *See* Notice of Proposed Rulemaking, Interpretation of the Term "Contract" in 49 U.S.C. 10709, STB Ex Parte No. 669 (Served March 29, 2007). The Board's proposal in March 2007 focused on the terms of the specific agreement between the railroad and the shipper, proposing to define as a "contract" agreements where the railroad agreed to a specific rate over a specified period of time in exchange for consideration by the shipper, such as a volume commitment. There was widespread consensus among the parties commenting on the proposal that the Board's proposed definition was too inflexible given the range of innovative pricing arrangements that railroads and shippers have developed. The parties also questioned whether the Board has the authority to define what constitutes a contract, which is a question of state law.

In March 2008, the Board abandoned its proposal to define the term "contract" based on terms of the agreement and instead proposed a procedural approach. *See* Advance Notice of Proposed Rulemaking, Rail Transportation Contracts Under 49 U.S.C. 10709, STB Ex Parte No. 676 (Served March 12, 2008). Under the Board's March 2008 proposal, a railroad seeking to enter into a contract under 49 U.S.C. §10709 for non-exempt transportation would have to take certain procedural steps in advance of entering into a contract to ensure that the shipper was

advised that the agreement was not subject to Board jurisdiction and that the shipper knew it had the right to obtain a common carrier rate. If these procedural steps were not taken, the Board would treat the agreement as a common carrier arrangement regardless of the characteristics of the agreement.

Railroad commenters responded that the Board does not have the authority to prescribe procedures governing how railroads and shippers may enter into contracts. The railroads also explained that the proposed procedural requirements would complicate commercial discussions and could inject friction into rail/shipper contract negotiations over an issue that has been largely free from dispute until now. Nevertheless, the railroads noted that the Board could bring some clarity to this area by establishing a presumption that a particular agreement is a contract under 49 U.S.C. §10709 if the agreement contains a specific reference to the statute or a statement by the shipper acknowledging that it is entering into an agreement not subject to Board jurisdiction.

In its January 6, 2009 Notice, the Board stated that it was abandoning the procedural approach proposed in March 2008, and basically accepted the railroad commenters' suggestion that an affirmative presumption could be established. The Board proposed a specific disclosure statement which, if contained in an agreement, would trigger a presumption that the agreement is a contract. However, the Board also proposed to establish a presumption that all agreements not containing the prescribed disclosure statement would be common carriage arrangements. This presumption would be rebuttable, but the party seeking to establish that such an agreement is a contract would bear a heightened burden of proof – “clear and convincing evidence” – and would also have to prove that the shipper was made aware in the context of the negotiations that it could request service under a common carriage arrangement.

II. BNSF Supports The Proposed Presumption That An Agreement Containing A Disclosure Statement Is A Contract.

In its January 2009 Notice, the Board stated that it sought “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 to agree to a rail transportation contract outside the Board’s jurisdiction under 49 U.S.C. 10709.” Notice at 3-4. BNSF agrees that it is appropriate for the Board to consider objective evidence relating to the parties’ intent in distinguishing contracts from common carriage arrangements rather than imposing procedural steps to be followed by parties seeking to enter into a contract. BNSF believes that if it is clear from the face of the agreement that the parties intended for the agreement to be outside of the Board’s jurisdiction, then the Board should treat the agreement as falling under 49 U.S.C. §10709.

The January 2009 Notice contains specific language which, if included in an agreement, would trigger a presumption that the agreement was expressly intended by the parties to be outside of the Board’s jurisdiction. The proposed disclosure statement contains a specific statement that the agreement is a contract under 49 U.S.C. §10709 and that it is not subject to Board jurisdiction.¹ Therefore, inclusion of a disclosure statement would clearly manifest the parties’ intent that the agreement would not be subject to Board jurisdiction.

The Board’s proposal is consistent with BNSF’s suggestion in its comments on the March 2008 proposal that the Board should establish a presumption that certain agreements containing an express reference to 49 U.S.C. §10709 and to the Board’s lack of jurisdiction over contracts would be considered contracts outside of the Board’s jurisdiction. BNSF therefore

¹ BNSF believes that it would suffice for the disclosure statement to state that the agreement is a rail transportation contract under 49 U.S.C. §10709 that is not subject to challenge before the STB.

supports the Board's proposal to the extent it establishes a presumption that agreements containing a disclosure statement are contracts under 49 U.S.C. §10709.

III. The Board Should Not Presume That Agreements Not Containing A Specified Disclosure Statement Are Common Carriage Arrangements.

However, BNSF does not agree with the Board's proposal that all agreements not containing a specified disclosure statement will be presumed to be common carriage arrangements. If the parties' intent is not clear from the face of the agreement, a determination of whether the agreement is a contract or common carriage arrangement should be based on all relevant evidence. If an agreement has all the indicia of a contract, it would make no sense to treat the agreement as a common carriage arrangement simply because the agreement does not expressly allude to the statute that allows parties to enter into contracts or to the Board's jurisdiction over common carriage movements. The Board's proposed presumption could therefore mistakenly result in the assertion of Board jurisdiction over agreements that do not provide for common carrier service.

In addition, the proposed presumption could lead railroads to include a prescribed disclosure statement in draft agreements as a matter of course, which appears to be one of the Board's objectives. But by effectively requiring the use of the disclosure statement, the Board may in many cases be injecting into sensitive commercial negotiations a legal issue of potential complexity – the scope of Board jurisdiction – that might not otherwise be addressed. Since Congress gave the parties the right to enter into contracts under 49 U.S.C. §10709, there have been thousands of negotiations, and virtually none has resulted in a dispute over the question whether the arrangement is a section 10709 contract or a common carriage arrangement. The Board should be promoting seamless commercial negotiations of rail transportation

arrangements, not forcing parties to grapple with issues that could unnecessarily raise commercial frictions.

IV. It Would Be Particularly Inappropriate To Require A Railroad To Show That The Shipper Was Made Aware Of Its Right To Request A Common Carrier Rate.

Even if the Board were to establish a presumption that agreements not containing a prescribed disclosure statement are common carriage arrangements, it would be particularly inappropriate for the Board to require that a railroad seeking to rebut that presumption must show that the railroad made the shipper aware during the negotiations that it could request a common carriage rate that would be subject to the Board's jurisdiction. The only practical way to make such a showing would be for a railroad deliberately to create a written record in advance of entering into the agreement that the shipper was informed of its right to seek a common carrier rate. But the Board in its January 2009 Notice already concluded that imposing such a pre-contract "informed consent" requirement would be inappropriate. As the Board noted, "[c]arriers made a strong case that the informed consent requirement would unnecessarily complicate the contract process and delay the timely implementation of contracts, especially when contracts are negotiated electronically or in the case of signatureless contracts." Notice at 4. Having rejected the idea of an informed consent requirement, it would make no sense for the Board to reintroduce such a requirement through the back door by making it impossible to show that an agreement is a contract without explicit proof of the shipper's informed consent.

In addition, the proposed "proof of informed consent" requirement would significantly increase the likelihood that the Board will mistakenly assert jurisdiction over agreements that are not common carrier arrangements. As noted above, if the Board establishes its proposed presumption, railroads are likely to include a prescribed disclosure statement in draft contracts as a matter of course. But given the large number of persons engaged in negotiating commercial

arrangements and the variety of circumstances in which rail transportation agreements are reached, it is inevitable that the specified disclosure statement will be inadvertently left out of some agreements intended to be contracts. But if the disclosure statement is left out inadvertently, it is virtually certain that no efforts would have been made to obtain an informed consent statement and therefore no way to prove that the shipper was affirmatively advised of its right to seek a common carrier rate. Thus, the Board's proposal could effectively result in an un rebuttable presumption that agreements not containing the prescribed disclosure statement are common carriage arrangements, regardless of the characteristics of the agreement or other circumstances surrounding the negotiation of the agreement.

The Board's proposal appears to be based on a concern that shippers need to be informed of their right to request common carrier rates. But nothing in the record suggests that there is a basis for such a concern. Most rail shippers are sophisticated buyers of transportation service and they understand that for non-exempt traffic, regulatory protections may be available if they elect common carriage service. Indeed, the shipper commenters in these proceedings have complained about the railroads' alleged use of "take-it-or-leave-it" contracts and a supposed imbalance in bargaining power, not about a widespread ignorance among shippers that they have the right to seek a common carrier rate. There is no justification for imposing either directly or indirectly a requirement that railroads take affirmative steps to inform shippers that they have a right to seek common carrier rates.

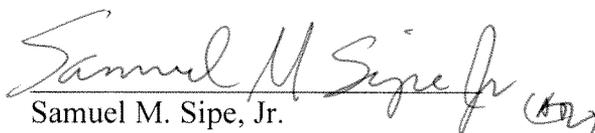
V. Conclusion

BNSF generally supports the Board's proposal to treat as section 10709 contracts all agreements between railroads and shippers for non-exempt rail transportation that contain a disclosure statement expressing the parties' intent to enter into a contract under 49 U.S.C.

§10709. However, for the reasons discussed above, the Board should not establish a presumption that all agreements not containing a specified disclosure statement are common carrier arrangements. BNSF particularly objects to the Board's proposal that a railroad seeking to rebut such a presumption must show that the railroad made the shipper aware in the context of the negotiations that the shipper could request common carrier service.

Respectfully submitted,

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