

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 669

INTERPRETATION OF THE TERM "CONTRACT" IN 49 U.S.C. 10709

**COMMENTS OF
U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.**

I. Identification of U.S. Clay Producers Traffic Association

The U.S. Clay Producers Traffic Association, Inc. ("Clay Producers" or "Association") is a non-profit association of member companies engaged in producing and shipping clay in all modes of transportation from Georgia, South Carolina and Tennessee origins to numerous industries throughout the United States, Canada, Mexico, and the world. The Association was formed over 50 years ago to provide information to members concerning the transportation of clay, and also as a forum for discussion of developments and information concerning regulation by governing authorities affecting the transportation of clay. The Association has also historically represented the interests of its members in transportation matters before regulatory agencies, such as this Board. The members of the Clay Producers, parties to these Comments, represent approximately 95% of the industry in terms of total clay shipments and move clay from a relatively concise geographic area in Georgia, South Carolina and Tennessee, where the mineral deposits are found, to customers located throughout the United States, Canada, Mexico, and the rest of the world. Clay Producers' clay traffic is captive to the railroads due to the bulk

nature of their shipments originating from such a small, mostly rural, geographic area. The Clay Industry is a major factor in the economy of the small geographic area where it is produced.

Clay is a regulated commodity and has not been exempted from regulation under the general exemption orders issued under Ex Parte No. 346. Therefore, rail transportation rates and services, policies and practices are subject to STB regulation, unless the transportation is pursuant to a rail transportation contracts which is exempt from regulation under 49 U.S.C. § 10709.

II. Recent Prevalence of Non-Signatory Public Contract Rates.

In 2006, members of the Association were surveyed on the issue of whether they faced percent-of-revenue based rail fuel surcharges either in rail contracts or in common carrier traffic. To a large extent, members reported that they rarely, if even, engaged in negotiation of bi-lateral rail transportation contracts. Nevertheless, they responded that railroads typically announced unilateral rates and terms, universally offering transportation services at disclosed rates and terms in arrangement the railroads referred to as "non-signatory contracts". Members were confused as to whether publically offered transportation which could be accepted simply by tendering traffic without further commitment (other than the commitment to release the railroad from certain common carrier obligations) would be legally classified as exempt transportation or regulated transportation. The distinction is far from academic since disputes over exempt rail contract transportation must be pursued in civil court, whereas disputes over common carrier rates and service involve obligations under the Interstate Commerce Commission Termination Act ("ICC Act"), which preempts state contract law principles and which is also subject to this Board's primary jurisdiction.

Clay Producers welcome the Board's recognition of the need for clarification in this area. Railroads should not be able to arbitrarily engage in forum shopping by simply labeling a transportation service as being either a contract or common carrier service. As an association of shippers, Clay Producers has historically participated in or initiated proceedings before this Board, and/or the Interstate Commerce Commission, on matters of common interest to the group. In the public forums available before this Board and its predecessor Commission, it has commented on or complained of commonly experienced service concerns and problems. However, in instances where service problems or unreasonable practice concerns arise in connection with publically offered, unilateral, non-negotiable, non-signatory contracts, the Association's right to air the concerns of its members in a public forum is problematic. It is far too easy for a railroad to hide behind an asserted contract exemption, than to respond to the merits of charges of potential violations of the ICC Act.

Recently, this Board held in Ex Parte 661 that it is a unreasonable practice for railroads to impose percent-of-revenue based fuel surcharges on common carrier traffic, but declined to award damages. The Board also held it did not have jurisdiction over fuel surcharges imposed under exempt rail transportation contracts. Recently a civil class action on fuel surcharges imposed under contracts was filed in U.S. District Court of New Jersey. The Association believes the Board should be mindful of the possibility of great additional confusion which is likely to arise if it fails to clearly hold that its proposed interpretation of the term "contract" will only apply prospectively. While the Board's March 28, 2007 Notice of Proposed Rulemaking at page 6 states the Board's intent that its interpretation only be applied prospectively, the Association urges the Board to expressly state an effective date in the language of the regulations.

CONCLUSION

For all of the above reasons, Clay Producers support the Board's proposal to amend 49 C.F.R. ¶ 1300 and 1313 to define the term "contract" as "any bilateral agreement between a carrier and a shipper for rail transportation in which the carrier 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."

Respectfully submitted,

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Dated: June 4, 2007

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2007, I have served a copy of the foregoing Comments by first class mail, postage pre-paid, in accordance with the Rules of Practice on all parties of record, as they appear this date on the board's web published service list.

/s/ Vincent P. Szeligo
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