BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE 669

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

COMMENTS
OF
NORFOLK SOUTHERN RAILWAY COMPANY

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Norfolk Southern Railway Company ("NS") submits these comments in response to the Board's issuance of a Notice of Proposed Rulemaking in Ex Parte 669 – Interpretation of the Term "Contract" in 49 U.S.C. 10709 ("NPRM"). In the NPRM, the Board expresses concerns "about the lack of any clear demarcation between contract and common carrier rates because of the boundaries on [its] jurisdiction." NPRM at 4. The Board then proposes to define the term "contract" in section 10709 as "embracing any bilateral agreement between a carrier and a shipper for rail transportation in which the railroad agrees to a specific rate for a specified 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 facilities." NPRM at 6.

The Board correctly questions whether the hybrid pricing document used by Union Pacific Railroad Company ("Union Pacific Railroad"), known as Circular 111, is a proper response by a railroad to a formal request from a customer for a common carrier rate subject to the Board's jurisdiction. The Board notes that, "[t]he new pricing structures we are witnessing as reflected in the *Kansas City Power & Light Company v.*

Union Pacific Railroad Company (STB Docket No. 42095) ("*KCP&L*") proceeding, however . . . appear to have the hallmarks of a contractual relationship." NPRM at 4. NS shares the Board's concerns. Indeed, NS has rate authorities similar to Circular 111 that it considers to be contracts. Moreover, although the express intent of the parties can be relevant to the question of whether a contract exists, both the law and sound public policy provide that parties may not confer jurisdiction upon an agency. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).

Nevertheless, NS respectfully submits that the Board should not pursue its attempt to define the term "contract." Rather, the Board should focus on what a railroad is required to provide to a shipper in response to a formal request from the shipper for a common carrier rate subject to the Board's jurisdiction. 49 C.F.R. 1300.2 *et seq.* What constitutes a contract is a complex, fact-specific matter governed by the law of each of the 50 states (and the District of Columbia) that has evolved over the last 200 years. What is required of a railroad when a customer requests common carrier rates subject to the Board's jurisdiction, however, is a question that is exclusively within the Board's authority to answer and within its expertise. Moreover, declaring what a railroad must provide to a customer in response to a formal request for such rates resolves the issue presented in the *KCP&L* proceeding. Answering this narrow question will also ensure that the Board does not undermine the congressional intent to provide railroads and customers the flexibility to enter into a wide range of pricing arrangements.[1]

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[1] Congress authorized rail contracts in an effort to allow carriers "freedom . . . to market rail transportation more effectively," H.R. Rep. No. 96-1430, at 100 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.S.C.A.N. 4110, 4111, and Congress contemplated that this freedom would result in a variety of different kinds of contracts. *See, e.g.*, 126 Cong. Rec. S14005 (1980) (statement of Rep. Florio) ("we hope that [contracts] will vary because that will result in different terms in different contracts"). Congress has since

If the Board nonetheless pursues its efforts to define a contract – a term and legal concept that scholars have written books about – the definition the Board proposes is insufficient. An exchange of a rate for consideration does not necessarily a contract make because – depending on the situation – there can be other essential terms that parties must agree upon before a contract is created.

I. NS'S PRICING MECHANISMS

NS often enters into transportation contracts with its customers. Contracts have advantages for both the customer and NS. Not the least of these is commercial certainty for a period of time. Both parties know what rates and terms will apply for the duration of the contract. Contracts are a private sector resolution of the commercial issues facing the parties.

In addition to contracts entered into and signed by representatives of both the railroad and the customer, NS has contracts which are not formally executed and which it refers to internally as NSSCs, or signatureless contracts. There are various reasons to have such signatureless contracts, including ease of administration, but suffice it to say they fill a commercial need. In all instances (and NS has nearly 2000 of them today), NSSCs are private and are not disclosed to the public.

Of course, NS also has a number of tariffs. Most NS tariffs were not issued in response to a formal request by a customer under 49 C.F.R. 1300.3. These tariffs set forth many of the general provisions under which NS does business and cover such items as demurrage, credit, absorption of switch charges, and loading and unloading

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emphasized the importance of "customized" rail contracts. H.R. Rep. No. 104-422, at 174 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.S.C.A.N. 850, 860.

of cars. NS has also issued a few tariffs at the formal request of a customer under 49 C.F.R. 1300.3.

The hallmark of all of NS's tariffs is that they are publicly available upon request to any person in accordance with 49 U.S.C. 11101(b). *See Conrail v. Canada Malting Co.*, 2000 U.S. Dist. LEXIS 1273 (Feb. 7, 2000) ("A tariff rate refers to the rate that is established by the rail carrier and made available to the public on request."). NS also has the right to change the rates and terms of these tariffs upon 20 days notice pursuant to 49 U.S.C. 11101(c) and 49 C.F.R. 1300.4.

II. DEFINING WHAT IS A CONTRACT IS NOT A QUESTION FOR THE BOARD.

The Board should not attempt to define a contract. The Board has no jurisdiction over contracts, whether a contract exists, or what the terms of a contract are. The Board's jurisdiction is expressly limited by statute. 49 U.S.C. 10709. The Board's inquiry in this proceeding as to what is a contract focuses on something that is outside its jurisdiction. The Board instead should consider the question that arises from the facts in *KCP&L* – namely what is required of a railroad when a customer requests a common carrier tariff subject to the Board's jurisdiction. If the Board nonetheless elects to try to define a transportation contract, the Board's proposed definition of a contract must be revised to avoid creating a regulatory chasm.

A. What Constitutes a Contract Is a Question for the Courts.

The Board has no jurisdiction over contracts. 49 U.S.C. 10709. Moreover, it is settled law since the adoption of the Staggers Rail Act of 1980 ("Staggers

Act") that a court is the appropriate forum for determining whether a contract exists. "The court, not the ICC, in cases such as this, is the appropriate forum for determining the existence of an enforceable contract." *The Kansas City Power & Light Co. v. Burlington N. R.R. Co.*, 740 F.2d 780, 785 (10th Cir. 1984); *see also Cleveland Cliffs Iron Co. v. I.C.C.*, 664 F. 2d 568, 591 (6th Cir. 1981) (rejecting ICC assertion that it could decide questions concerning the existence and validity of a contract); *Burlington N. R.R. Co v. I.C.C.*, 679 F.2d 934, 942 (D.C. Cir. 1982); *Rates on Iron Ore, Randville to Escanaba via Iron Mountain*, 367 I.C.C. 506, 509 (1983) ("[T]o entertain and decide questions concerning the existence and validity of contracts . . . is a purely a judicial task which is not performed by the Commission").

The public policy decision to vest the power to decide contract questions only in the courts is logical. The laws of each of the 50 states (and the District of Columbia) determine whether a contract exists and govern the interpretation of the terms of the contract. Each state has decades of precedent that address detailed nuances of contract law. Even scholarly attempts to provide the most generalized answers to the most basic of questions about contracts fill large volumes. *See e.g. Corbin on Contracts.*

B. The Board's Definition of a Contract Would Create a Regulatory Chasm.

Moreover, the Board's proposed definition of a contract is simply insufficient. In at least some instances, constituting a valid contract will take more than a rate and some consideration such as a commitment to tender a specific amount of freight during a specific period or to make specific investments in facilities. Without resolving all the essential terms, the parties do not have a contract. *See* Restatement (Second) of Contracts § 32 ("An offer [to contract] must be so definite in its terms, or require such

definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain."); *Okun v. Morton*, 203 Cal. App. 3d 805, 817 (Cal. Ct. App. 1988) ("A contract which leaves an essential element for future agreement of the parties is usually held fatally uncertain and unenforceable."). What terms are essential depend on the situation; it is a fact-specific question. *See Lindsay v. Jewels by Park Lane, Inc.*, 205 F.3d 1087, 1091 (8th Cir. 2000) (definiteness of contract was matter of fact for the jury).[2]

Consider the following example. A railroad and a shipper of highly hazardous materials agree on a rate. They also agree on a minimum volume. But contract negotiations falter over allocation of liability. The railroad insists that the customer be liable in the event of a release. The customer says it is not willing to assume the liability and ends the negotiation. Then the customer tenders traffic for shipment. Do the parties have a contract even in the absence of an agreement on an issue as important as liability? A court could find under the circumstances and depending on the state's law that liability is an essential term for shipments of highly hazardous materials and many other chemicals, that the parties have not reached a meeting of the minds, and that there is therefore no contract.

Defining a contract as a rate and consideration such as a commitment to tender a specific amount of freight during a specific period or to make specific investments in facilities does not answer these questions. There is no simple way to

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[2] Indeed, in many reported cases courts found that parties failed to reach a definite contract despite the fact that the parties had agreed as to price. *See, e.g.*, *Conolly v. Clark*, 457 F.3d 872, 875 (8th Cir. 2006); *A.S. Reeves & Co. v. McMickle*, 605 S.E.2d 857, 859 (Ga. Ct. App. 2004); *Halowich v. Amminiti*, 18 Pa. D & C. 2d 306, 309-10 (Pa. Ct. of Common Pleas 1958); *Palombi v. Volpe*, 222 A.D. 119, 121, 226 N.Y.S. 135 (N.Y. App. Div. 1927).

define in a sentence what a contract is. If the Board defines contract simplistically, it is likely that some pricing documents will be deemed to be a contract by the Board but not a contract under state law. In that situation, there would be substantial commercial uncertainty, and a customer would have no forum in which to file any grievance. Simply put, there would be a regulatory chasm, and that does not advance the public interest.

C. Broad Statements About What Is Or Is Not a Contract Could Undermine Established Commercial Arrangements That the Parties Believe Are Contracts.

NS has in effect nearly 2000 NSSCs. These signatureless contracts are an important commercial tool to meet customers' needs and to provide both NS and those customers the protections afforded contractual arrangements. Broad, oversimplified statements about what is a contract and what is not a contract could result in substantial disruption in the marketplace if any Board action undermined the parties' understanding that these pricing authorities are contracts. NS thinks that its signatureless contracts are included in the Board's definition of a contract. However, there are ambiguities in the NPRM that could call that conclusion into question.

The Board defines a unilateral contract in the NPRM. That definition encompasses an express engagement by one party "without receiving in return any express engagement or promise of performance from the other." NPRM at 4; *compare* 1 *Corbin on Contracts*, Section 1.23 (2006) ("A unilateral contract consists of a promise or group of promises made by one of the contracting parties only, usually assented to by the other."). NS infers from that definition that the Board thinks a bilateral agreement is one in which both parties make an express promise and accept in some way other than performing the proposed act. *Compare* 1 *Corbin on Contracts*, Section 1.23 (2006)

(which defines bilateral contract as a contract in which both parties make promises). This definition ignores the fact that some contracts are unilateral (only one party making a promise) and accepted by the party when that party tenders traffic. What makes these pricing documents a contract is that the parties intended them to be contracts and that they are not available to the public upon request. The Board must be vigilant not to make a pronouncement that restricts parties' ability to enter into and derive the benefits of contracts and thereby undermines the congressional intent behind the contract provisions in the Staggers Rail Act of 1980. The Board should not issue any definition of a contract, but if it does, the Board should revise its definition to insure that signatureless contracts are included.

D. The Board Should Focus on Pricing Authorities That Are Within Its Jurisdiction Rather Than on Contracts.

The Staggers Act certainly segregated rail transportation provided under contract from rail transportation provided pursuant to a common carrier tariff rate. It removed from the Board's jurisdiction all matters subject to contracts. 49 U.S.C. 10709. It left the Board authority over tariffs only. 49 U.S.C. 11101. The Board should examine the rail transportation that is subject to its jurisdiction. Accordingly, the Board should not review what is a contract. The Board should review the question presented by the facts in *KCP&L* and determine what is required of a railroad when a customer formally requests a common carrier rate subject to the Board's jurisdiction.

III. THE LAW ALREADY SPEAKS TO THE QUESTION PRESENTED BY *KCP&L* – WHAT IS REQUIRED OF A RAILROAD WHEN A CUSTOMER ASKS FOR A COMMON CARRIER TARIFF– WHICH IS THE ONLY QUESTION THE BOARD SHOULD ADDRESS.

The question presented by Union Pacific Railroad's Circular 111 in *KCP&L* relates to only a subset of tariffs – those tariffs provided in response to a formal customer request for a common carrier rate subject to the Board's jurisdiction. The Board should resist the temptation to answer more than the narrow question presented by *KCP&L*. Broadening the inquiry increases the risk of unintended consequences from the regulatory action. The Board should not risk such unintended consequences and possibly disrupting existing commercial arrangements by making broad pronouncements that are not essential.

Moreover, the law clearly requires certain actions by a railroad when a customer formally requests a common carrier tariff. Most of those requirements are provided by statute and by Board regulations, although some have evolved over time through case-law. Nevertheless, the Board could provide guidance by issuing a policy statement that summarizes the current state of the law.

A. Statutory Requirements Apply When a Customer Formally Requests a Common Carrier Rate.

NS believes there are already some clear statutory and regulatory requirements on the railroad when a customer formally requests a common carrier rate subject to the Board's jurisdiction, but that the Board should provide additional clarity.

The first statutory requirement created by the Staggers Act is that the railroad must respond to a formal request for a common carrier tariff subject to the Board's jurisdiction. *See, e.g., Arizona Elec. Power Coop. v. The Burlington N. and*

Santa Fe Ry. Co., STB Finance Docket No. 34041, 5 S.T.B. 531, 532 (May 8, 2001) ("railroads have a general duty . . . to establish common carrier rates upon request"); *Western Resources, Inc. v. The Atchison, Topeka and Santa Fe Ry. Co.*, STB No. 41604 (served May 17, 1996), slip op. at 4-5 (a railroad's common carrier obligation requires it to comply with any reasonable request for service as well as shipper requests for rates). The Board's regulations supplement this statutory requirement by requiring a railroad to respond to a formal request for a common carrier rate within ten days, although the initial response may simply be that the railroad needs more information in order to provide a common carrier rate. 49 C.F.R. 1300.3.[3] Thus, the railroad must provide a common carrier rate in response to a formal request from a customer.

Upon receiving a formal request from a shipper for a common carrier rate, the railroad has two more statutory obligations. First, although the railroad has the right to change the common carrier rates at any time, it must wait until "20 days have expired after written or electronic notice is provided." 49 U.S.C. 11101 (c); 49 C.F.R. 1300.4(a). Second, the railroad must make the pricing document available to "any person, on request." 49 U.S.C. 11101 (b); *see also Conrail v. Canada Malting Co.*, 2000 U.S. Dist. LEXIS 1273 (Feb. 7, 2000) ("A [common carrier] tariff rate refers to the rate that is established by the rail carrier and made available to the public for inspection."). The Board's regulations elaborate on this statutory requirement that the common carrier rates must be made available to "any person, on request" by requiring the railroad to respond to such a request immediately and preferably "within hours, or at least by the next business day." 49 C.F.R. 1300.2(b).

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[3] These regulations apply to "any common carriage transportation or service provided by a rail carrier subject to" the Board's jurisdiction that is not under contract or for an exempted commodity. 49 C.F.R. 1300.1.

These basic requirements can be enforced at the STB. For example, any customer can petition the Board to order the carrier to comply with its obligation to respond to that customer's formal request for a common carrier tariff. *See Arizona Elec. Power Coop. v. The Burlington N. and Santa Fe Ry. Co.*, STB Finance Docket No. 34041, 5 S.T.B. 531 (May 8, 2001). Further, any person can seek a declaratory order under the Administrative Procedures Act directing the railroad to make its common carrier tariffs available upon request.

B. The Board May Provide Useful Guidance Regarding a Railroad's Response to a Customer's Formal Request for a Common Carrier Rate.

Although a railroad is required to provide a common carrier rate upon formal request (49 C.F.R. 1300.3), the Board could provide guidance by issuing a policy statement that enumerates the current state of the law. The Board has observed that "[w]ithout rates, and any attendant terms setting forth the particulars of service, a shipper cannot make a specific service request." *Pejepscot Indus. Park, Inc., d/b/a Grimmel Indus.—Petition for Declaratory Order*, STB Finance Docket No. 33989, at *16 (Served May 15, 2003) Therefore the basic shipping terms on which the common carrier tariff rate is premised must be reasonably responsive to the customer's basic shipping specifications. For example, if a customer ships individual carloads of traffic, a common carrier tariff that is premised on unit train shipments would not meet the customers shipping needs, and the railroad providing such a response would not meet its obligation. *See Western Resources, Inc. v. Atchison Topeka & Santa Fe Ry. Co.*, STB Docket. No. 41604, 1996 WL 257677, at *3 (May 7, 1996) (rail carrier had obligation to establish

common carrier unit-train rate where single-car rate was not appropriate); *cf. Arizona Pub. Serv. Co. v. Atchison Topeka & Santa Fe Ry. Co.*, ICC Docket No. 41185, 1995 WL 111487, at *5 (Mar. 10, 1995).

Obviously, the shipping specifications a customer can insist upon are limited by the railroad's right to set the rates and terms of service in the first instance. 49 U.S.C. 10701(c). For example, the customer has no right to insist that the railroad provide a common carrier rate long before an existing contract expires. *Burlington N. R.R. v. Surface Transp. Bd.*, 75 F.3d 685 (D.C. Cir. 1996). Also, the customer may not insist that the railroad provide a common carrier rate for rail transportation in private cars (although the railroad may agree to provide a common carrier rate for shipments in shipper-supplied cars). *Texas Municipal Power Agency v. Burlington N. Santa Fe Ry. Co.*, STB Docket No. 42056, at *8 (served Sept. 27, 2004) (holding that railroad does not have to quote a rate for transportation in shipper-owned cars so long as the railroad can meet its common carrier obligations with its own cars) (citing *Atchison, Topeka & S.F. Ry. v. United States*, 232 U.S. 199, 214-15 (1914); *Shippers Comm., OT-5 v. Ann Arbor R.R.*, 5 I.C.C.2d 856, 865 (1989), *aff'd, Shippers Comm. OT-5 v. ICC,* 968 F.2d 75 (D.C. Cir. 1992)).

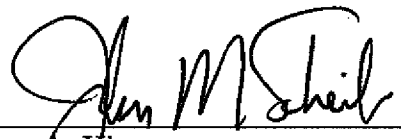
Furthermore, a common carrier rate provided in response to a customer's formal request may include various restrictions so long as the customer is agreeable. Two examples would be a railroad providing rates premised on the customer supplying the cars or providing rates that are conditioned on the customer shipping a minimum volume. *See Western Fuels v. BNSF Ry. Co.*, STB Docket No. 42088 (challenging a tariff containing rates conditioned on the customer shipping a minimum of 7,000,000

tons). Although the railroad could not provide such a conditioned rate where the customer is not agreeable to such a rate, the two parties certainly could agree that such a conditioned response is acceptable.

IV. CONCLUSION.

In this proceeding, the Board should define what qualifies as an adequate response to a formal request for common carrier rates and terms of service because that is all that is necessary to resolve the issue raised by *KCP&L*. The Board should not define what constitutes a transportation contract. If it nonetheless does, the Board should revise its proposed definition.

Respectfully Submitted,



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