



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736 8000
(202) 736 8711 FAX

thynes@sidley.com
(202) 736-8198

BEIJING GENEVA SAN FRANCISCO
BRUSSELS HONG KONG SHANGHAI
CHICAGO LONDON SINGAPORE
DALLAS LOS ANGELES TOKYO
FRANKFURT NEW YORK WASHINGTON, DC

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August 2, 2007

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The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

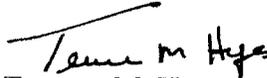
Re: Ex Parte No. 669 Interpretation of the Term "Contract" in 49 U.S.C. 10709

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and ten copies of the Reply Comments of Canadian Pacific Railway Company. A diskette containing an electronic version of the Comments is also enclosed.

Please acknowledge receipt of the enclosed Comments for filing by date-stamping the enclosed extra copies and returning them via our messenger. If you have any questions, please contact the undersigned counsel.

Sincerely,


Terence M. Hynes

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Enclosures

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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STB Ex Parte No. 669

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

**REPLY COMMENTS OF
CANADIAN PACIFIC RAILWAY COMPANY**

Paul A. Guthrie
Vice President - Legal Services
Canadian Pacific Railway Company
401 9th Avenue, S.W.
Gulf Canada Square, Suite 500
Calgary, Alberta T2P 4Z4 Canada

Terence M. Hynes
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (Fax)

Attorneys for Canadian Pacific Railway Company

Dated: August 2, 2007

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 669

**INTERPRETATION OF THE TERM “CONTRACT”
IN 49 U.S.C. 10709**

**REPLY COMMENTS OF
CANADIAN PACIFIC RAILWAY COMPANY**

Pursuant to the Decision served in the above-captioned proceeding on March 28, 2007 (the “*NPRM Decision*”), Canadian Pacific Railway Company and its U.S. subsidiaries, Soo Line Railroad Company and Delaware and Hudson Railway Company, Inc. (collectively “CPR”) submit the following Reply Comments regarding the Board’s proposal to promulgate a rule interpreting the term “contract” in 49 U.S.C. § 10709. For the reasons discussed below, the Board should decline to adopt the proposed rule, dismiss this proceeding, and continue its longstanding practice of determining the status of particular rate arrangements on a case-by-case basis.

The opening comments of carrier and shipper parties alike reflect the confusion and uncertainty engendered by the Board’s attempt to craft an all-encompassing definition of what types of rate arrangements constitute “contracts” for Section 10709 purposes. Some commenters express concern that the proposed definition unduly **broadens** the scope of what constitutes a “contract,” and would result in the reclassification of many commonly used “tariff” documents as transportation contracts. For example, Western Coal Traffic League asserts that the proposed rule “may go too far substantively” by proposing a definition that “could cause all unit train coal transportation arrangements [which involve mutual commitments by both the carrier and shipper] to be deemed contracts.” WCTL Comments at 18. *See also* Entergy Comments at 9

(proposed contract definition “appears to be so broad as to possibly subsume a wide variety of pricing instruments that are clearly intended as common carrier tariffs”); Dairyland Power Cooperative Comments at 5-6 (proposed definition of contract could affect “coal transportation arrangements that historically have been considered common carrier arrangements”). BNSF and National Grain and Feed Association (“NGFA”) likewise express concern that tariff mechanisms used by railroads to allocate grain car supply could be adversely impacted by the proposed rule. *See* BNSF Comments at 2-3 (concern that proposed rule might disrupt its “Certificates of Transportation” (COTS) program); NGFA Comments at 17 (indicating that NGFA “would be disappointed were the [proposed rule] to upend or undermine the various approaches taken by railroads to allocate grain car capacity”). CPR shares the concerns of BNSF and NGFA that the proposed rule could disrupt commercial arrangements (both tariff and contract) developed by carriers and grain shippers to manage grain car capacity efficiently.

Conversely, other commenters fear that the proposed definition of a Section 10709 “contract” impermissibly **narrows** the scope of contractual arrangements contemplated by the statute. In its opening comments, CPR demonstrated that the proposed requirement that all Section 10709 contracts include “a specific rate for a specific period of time” could call into question the status of a variety of written agreements that the parties clearly intended to be Section 10709 contracts, including agreements that incorporate tariff rates by reference or that relate to non-price matters such as car supply and service guarantees. CPR Comments at 4-7. UP likewise stated that the Board’s proposal “could create confusion and uncertainty about existing arrangements and discourage carriers and shippers from entering into more flexible and innovative arrangements.” Union Pacific Comments at 13. *See also* CSXT Comments at 5 (“the proposed definition could upset existing private commercial arrangements and practices, and

unnecessarily limit development of innovative new private arrangements”). Norfolk Southern expressed concern that the proposed rule “could result in substantial disruption in the marketplace” by undermining a variety of private rate agreements. Norfolk Southern Comments at 7. NGFA (correctly) questions whether the Board may lawfully “define ‘contract’ more narrowly than permitted by the language of the statute.” NGFA Comments at 7.

As the opening comments show, the Board’s effort to elaborate on the statutory definition of a Section 10709 “contract” is fraught with difficulty. It is not practicable to articulate a simple bright-line distinction between “contract” and “common carrier” rates that takes into account the wide variety of pricing mechanisms utilized by railroads and shippers in today’s dynamic transportation marketplace. Indeed, the opening comments demonstrate convincingly that any attempt to craft such a definition is likely to create far more problems than it might solve. As NGFA points out, “the [NPRM] Decision recites no benefit to be gained by departing from the statutory language. . . . especially if to do so would raise doubts about the validity of existing contracts for the transportation of agricultural commodities.” NGFA Comments at 6.

Moreover, implementing the proposed rule would embroil the Board in adjudicating complex questions of contract interpretation – including whether a valid contract exists in a particular instance – that are the sole province of the courts. *See, e.g., Burlington Northern Railroad Co. v. ICC*, 679 F.2d 934, 939-940 (D.C. Cir. 1982) (contract enforcement questions subject to plenary authority of the courts); *Cleveland Cliffs Iron Co. v. ICC*, 664 F.2d 568, 591 (6th Cir. 1981) (determining the existence and validity of a contract is a “purely judicial task”). Commenting parties overwhelmingly believe that the Board cannot, and should not, engage in deciding such questions. *See, e.g.,* CPR Comments at 3-4; CSXT Comments at 10-13; Ameren Comments at 5-6; Arkansas Electric Cooperative Corporation Comments at 3; Entergy

Comments at 8; Norfolk Southern Comments at 4-5. Indeed, doing so could result in a “regulatory gap” where the STB, applying its proposed contract definition, found a particular rate arrangement to be a “contract” for Section 10709 purposes (and therefore declined to assert jurisdiction over the rate in question) but a court, applying state law, later held that no contract existed. *See, e.g.*, Norfolk Southern Comments at 5-6; WCTL Comments at 23.

Nevertheless, certain shipper parties encourage the Board to assume responsibility for deciding whether a valid “contract” between a railroad and a shipper exists, and to base that determination on the relative bargaining positions of the parties, rather than the language of the agreement and the parties’ intent. For example, Edison Electric Institute suggests that:

“it is not the parties’ intent to enter into a ‘contract’ that should be the basis of the STB’s determination that an agreement is in fact a contract, but rather the shipper’s ability to enter into a negotiated agreement at arm’s length, i.e., that the shipper has the ability (if it so chooses) to negotiate meaningfully the rate and other fundamental components of the contract.”

Edison Electric Comments at 7 (emphasis added). Similarly, NGFA argues that “[t]he Board should add a requirement for fair negotiations to its proposed rule” defining what is, and is not, a Section 10709 contract. NGFA Comments at 10 (emphasis added). These proposals fly in the face of longstanding contract law principles establishing that the existence of a contract depends, first and foremost, on the intent of the parties. *See, e.g.*, Union Pacific Comments at 4-5 (and cases cited therein); WCTL Comments at 21-23 (and cases cited therein). Applying such a rule would require the Board to undertake a detailed analysis of the elasticity of the shipper’s demand for rail service, the parties’ relative bargaining leverage, and the “fairness” of the carrier’s contract proposals. It would also create an unfair opportunity for shippers to disavow written agreements that they had entered into voluntarily based upon the vague assertion that

their negotiations with the railroad were not “meaningful.” Edison Electric’s proposal is utterly inconsistent with the law and unworkable, and should be rejected.

CPR urges the Board not to adopt any rule that attempts to define what is (or is not) a rate “contract.” As the opening comments filed in this proceeding demonstrate, such a rule is more likely to complicate than to simplify the resolution of future disputes relating to the status of particular rate documents. It may also discourage railroads and shippers from implementing customized rate and service arrangements that best meet their commercial objectives, contrary to Congress express intent in providing for transportation contracts in Section 10709. The Board should continue its longstanding practice of determining the status of particular rate arrangements on a case-by-case basis. Questions involving the existence (or non-existence) of a valid contract between a carrier and shipper should be decided, in the first instance, by a court of competent jurisdiction.

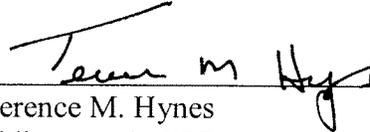
The perceived concerns that motivated the Board to initiate this rulemaking proceeding have more to do with the content of rate documents represented to be “tariffs” than the question whether particular rate agreements are valid Section 10709 contracts. As CPR’s opening comments noted, the Board might consider addressing those concerns by instituting a rulemaking to consider issues relating to the elements of a valid rate “tariff,” such as whether tariffs may properly require minimum time/volume commitments or other non-price consideration from the shipper, and whether “tariff” rates must, in all instances, be publicly disclosed. Such an inquiry may provide useful guidance to carriers and shippers without threatening to disrupt their ability to fashion innovative commercial arrangements in response to market requirements.

CONCLUSION

For all of the foregoing reasons, CPR urges the Board not to promulgate a rule adopting the interpretation of the term “contract” in 49 U.S.C. § 10709, as proposed in the *NPRM*

Decision.

Respectfully submitted,



Paul A. Guthrie
Canadian Pacific Railway Company
401 9th Avenue SW
Gulf Canada Square, Suite 500
Calgary, Alberta T2P 4Z4
Canada

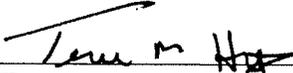
Terence M. Hynes
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (Fax)

Attorneys for Canadian Pacific Railway Company

Dated: August 2, 2007

CERTIFICATE OF SERVICE

I hereby certify this 2nd day of August 2007 that I have served all parties of record in this proceeding by first class mail, postage prepaid.



Terence M. Hynes