

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 669

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

REPLY COMMENTS OF
NATIONAL GRAIN AND FEED ASSOCIATION

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I.

INTRODUCTION

National Grain and Feed Association (“NGFA”) in this pleading replies to the comments filed by other parties on June 4, 2007. Although there is by no means uniformity of outlook by the parties toward every issue raised by the Board’s proposed rule, most of the commenting parties question the Board’s authority to adopt the proposed “contract” definition or the wisdom of doing so even if the authority is present. Almost all of the railroad parties’ comments concur with the view of NGFA that the Board should rethink its proposal rather than adopt a rule that is likely to create more problems than it will solve. Further, as explained in NGFA’s initial Comments, the proposed definition may be at odds with the long-standing regulations of the Board that provide a mechanism whereby shippers of agricultural commodities can pursue specific statutory remedies against certain contracts.

After reviewing the comments of other parties, NGFA remains convinced that the Board’s proposed definition of the term “contract” is highly problematic, particularly for agricultural commodities and the special statutory provisions available for review and possible reformation of agricultural commodity contracts made available by Congress in Section 10709. NGFA also recognizes that the absence of clearer guidelines to distinguish “contracts” from “tariffs” would be helpful. However, for reasons explained in more detail below, NGFA has come to the view that by far the more prudent method of providing that clarification, and one that should meet the concerns of the Board, would be through a definition of “common carrier tariff” rather than through a definition of “contract” (and especially the “contract” definition proposed by the Board).

Accordingly, NGFA has joined with other shippers and shipper organizations to file Joint Reply Comments (“Joint Reply”) contemporaneously with these Reply Comments. The Joint Reply represents the suggestions of several large shipper groups whose members utilize both common carrier and contract rail transportation and contains a proposal for the definition of “common carrier tariff” for consideration by the Board. The parties filing the Joint Reply expressly reserved their right to file individual supplemental reply comments, as NGFA is doing in this pleading.

NGFA recognizes that some shippers, apparently confined to those who receive coal, believe that the Board should consider applying its rules in a manner that would end public pricing of common carrier rates through routinely available “publications” because those shippers believe that public pricing of their rates leads to collusive results and undermines competition between railroads.

NGFA is constrained to vigorously oppose calls for the end of all publicly priced common carrier rates. Public pricing of agricultural rail rates provides transparency and market information that is relied upon extensively by the grain industry and the agricultural marketplace. The disappearance of publicly priced common carrier rail rates for agricultural commodities would seriously undercut the ability of the marketplace to make those adjustments in price that are necessary to help the market react to alterations in rail rates and other changes that impact trading decisions.

Even if the Board is convinced that public pricing of certain rail rates invites anti-competitive practices in certain circumstances, it is unnecessary for the Board to mask all common carrier rates merely because some shippers believe that public pricing is having a detrimental effect on competition in their industry. Shippers seeking relief from public

pricing can approach the Board under 49 U.S.C. § 10502(a), or the Board can act on its own motion pursuant to 49 U.S.C. § 10502(b), to exempt from certain provisions of 49 U.S.C. § 11101 the narrow class of common carrier rate disclosure complained of by certain parties as producing anticompetitive results.

NGFA must also take issue with those commenters who advocate a definition of the term “contract” that would include rates and transportation terms published in railroad tariffs under rules that purport to make the tariff contents into binding Section 10709 contracts. Any such approach would fail to recognize the purpose for which Congress codified the use of contracts and would undercut the performance of “common carrier” service by railroads who choose to convert their common carrier services into totally deregulated contract services in the absence of any negotiated agreement with a shipper. The definition of “common carrier tariff” contained in the Joint Reply would have the effect of prohibiting such practices.

II.

PUBLIC PRICING

Some commenters have suggested that the Board treat the public pricing of railroad rates as an unreasonable practice because it leads to collusive results among railroads. This alternative has been proposed to the Board because certain shippers believe that “the railroad coal transportation marketplace has the characteristics that make it very subject to collusive pricing.”¹ NGFA addresses this issue first, prior to discussing the reasons in support of the common carrier tariff definition contained in the Joint Reply and other relevant issues.

¹ Opening Comments of the Western Coal Traffic League (“WCTL”) at 2.

NGFA deems it unnecessary and inappropriate for it to comment on the characteristics of the coal marketplace and the possibility of curtailing public pricing in that marketplace. It would not, however, be wise or necessary to extend similar conclusions to the grain and agricultural marketplace.

Grain and other agricultural products move from an extremely broad array of origins to a large number of destinations within a single, constantly changing marketplace. Corn that moves, for example, from an origin in Missouri to a port in Texas is in the same overall market as corn that can move from an origin in Nebraska to a port in Texas or a port at the Pacific Northwest. Dozens of origins are capable of supplying the same grain commodity to a given destination. Contracts to buy and sell grain often permit one of the parties to the contract to select, at time of shipment, either the specific origin point or the specific destination point from within a specified range of options, in effect allowing grain contracts to be fulfilled in the most efficient logistical manner available. In all of these cases, the marketplace makes its choices based at least in part on public knowledge of the rail rate structure. Indeed, because prices received by grain producers are so closely tied to the cost of transporting grain to market, public pricing of grain enables farmers and elevators and others at the production end of the grain pipeline to determine the value of their commodities at points of consumption by subtracting known transportation costs from the bids they are offered.

Grain trades are made, or not made, based on price differentials of as little as a fraction of a cent per bushel. This market, so highly sensitive to costs, functions efficiently but could not continue to do so without transparency for transportation costs.

Congress, moreover, has expressly directed the public dissemination of common carrier rates for the transportation of agricultural products. Railroads are instructed to “publish, make available, and retain for public inspection ... common carrier rates, schedules of rates, and other service terms.” 49 U.S.C. § 11101(b). The Board has rate and service publication rules applicable specifically to agricultural products, including grain, that require a rail carrier to “publish, make available, and retain for public inspection its currently effective rates, schedules of rates, changes, and other service terms” applicable to the transportation of such commodities. 49 C.F.R. § 1300.5.

These disclosure provisions reflect the intent of Congress that agricultural marketplaces be able to rely on continued public pricing of common carrier rates and service terms. There may come a day when such public pricing has deleterious effects of the type now alleged to characterize the coal marketplace. But that time has not yet arrived for the grain marketplace. If the Board is convinced that competition in a particular marketplace is being undermined by the type of public pricing now pursued by rail carriers in some circumstances, NGFA respectfully suggests that the Board consider taking steps pursuant to 49 U.S.C. § 10502 to relieve railroads of the right to maintain access to public pricing in that specific marketplace, rather than dismantle public pricing for all transportation subject to the Board’s jurisdiction.

III.

WHY THE BOARD SHOULD FOCUS ON COMMON CARRIER TARIFFS

The Board’s proposal to define the term “contract” in 49 U.S.C. § 10709 may well be aimed at a legitimate concern, but it is the wrong solution, especially for the transportation of agricultural commodities.

The Board's Decision of March 29, 2007 (the "Decision") instituting this proceeding indicates Board concern with "hybrid" tariffs such as the Union Pacific rate provisions considered in *Kansas City Power & Light Company v. Union Pacific Railroad Company*, Docket No. 42095. There, in what UP characterized as a tariff, it offered two sets of non-negotiable rates and terms for the same point-to-point transportation: (a) an Option 1 unrestricted rate that could be withdrawn or altered by UP prior to use by the shipper, at a level considered unacceptably high by the shipper, and (b) an Option 2 rate lower than the Option 1 rate, with the level guaranteed for three years provided the shipper made a certain guaranteed minimum volume of shipments. To avail itself of the Option 2 rate, the shipper was required to execute a written Certificate accepting the terms and conditions of Option 2.

The Board regarded the UP tariff as a "hybrid" having the outward trappings of a tariff but the inner workings of a contract because the carrier agreed to maintain a specific rate level for a specific period of time in return for a volume commitment by the shipper. Nevertheless, the shipper and carrier chose to regard the Option 2 provisions of the tariff as a common carrier rate, and when KCPL challenged the maximum reasonable level of that rate in a complaint proceeding before the Board, UP failed to defend on the ground that the rate was contained in a contract over which the Board had no jurisdiction. The Board noted that such a concurrence of both shipper and carrier in the conclusion that a given "tariff" is in fact a common carrier undertaking creates a jurisdictional anomaly. See Decision at 6, where the Board indicates that jurisdiction cannot be determined "merely by agreement of the parties before it."

A comprehensive discussion of the extent of the Board’s jurisdiction to interpret or even acknowledge the validity of contracts is contained at pages 13-18 of the WCTL Comments. As there observed, some court and Board decisions hold that the Board is powerless to interpret or enforce rail transportation contracts. Consequently, in one proceeding the Board ruled that, where a railroad’s common carrier rates are challenged as exceeding a maximum reasonable level, it is up to the railroad not only to raise any jurisdictional defense of “contract,” but to pursue that defense by promptly seeking a court determination that the challenged rate arises from a contract and is not a common carrier rate over which the Board has jurisdiction, *Toledo Edison Co. v. Norfolk & Western Ry. Co.*, 367 I.C.C. 869 (1983). Thus, the Decision’s criticism of “jurisdiction merely by agreement” may reflect its concern with the fact that, unless the defendant in a rate complaint proceeding actively pursues a contract defense in court, the Board sees itself as powerless on its own motion to conclude that the assailed transportation provision amounts to a non-jurisdictional contract.²

If the Board believes that the rule it has proposed in this proceeding will resolve any jurisdictional uncertainty arising from carrier rate publications, NGFA respectfully suggests that the Decision fails to indicate how that jurisdictional infirmity would be overcome by the proposed rule. If the Board lacks jurisdiction to rule on “the existence of a contract rate,”³ then the Board seemingly would lack jurisdiction to determine the existence of a valid contract rate even if the Board undertakes to define the term “con-

² As WCTL points out, however, a recent Board Decision has found that a contract is present without dependency of a court action. WCTL Comments at 17. The Decision makes no effort to resolve what may be viewed as a conflict of authority regarding the Board’s jurisdiction to find the existence of a valid contract.

³ See WCTL Comments at 16, citing *Petition for Review of a Decision of the Public Service Commission of Utah Pursuant to 49 U.S.C. 11501*, ICC Docket No. 39060 (March 2, 1983).

tract.” At the very least, any effort along those lines by the Board will be highly controversial.⁴

If the proposed rule is adopted by the Board, yet the Board remains without jurisdiction to rule “on the existence of a contract rate,” then the Board will continue to face a jurisdictional anomaly; namely, if a rate complaint is filed against what the Board regards as a contract pursuant to the proposed rule, a court would remain the only forum to determine whether the arrangement between carrier and shipper amounted to a “contract” over which the Board lacks jurisdiction. If the Board is of the opinion that the proposed definition of “contract” would provide it a foundation to determine, exclusive of a court’s jurisdiction, whether the terms and conditions of a rate equal those of a “contract,” the Decision unfortunately fails to disclose the underpinnings for such a belief.

On the other hand, if the Board defines the essentials of a common carrier tariff, it avoids all questions regarding its jurisdiction to do so and accomplishes the laudable purpose of drawing a clearer line of distinction between common carrier tariffs and contracts without walking on jurisdictional thin ice. The Board accordingly should abandon its contentious effort, with which virtually all parties disagree, to define the term “contract” and instead consider adoption of the definition of “common carrier tariff” contained in the Joint Reply.

⁴ In its Initial Comments, NGFA took the position that the Board’s proposed definition of “contract” was at odds with the statute and the Board’s existing regulations which have been in place without complaint or contention for over 20 years. NGFA also argued that, if the Board does assert jurisdiction to define the term “contract” in Section 10709, it must also have, and should also assert, jurisdiction to define what is necessary to fulfill that term, including fair negotiations rather than adhesive or unconscionable terms dictated unilaterally by a carrier. NGFA adheres to those views in the event the Board adheres to its proposed rule.

IV.

THE BENEFITS OF ADOPTING THE COMMON CARRIER TARIFF DEFINITION PROPOSED IN THE JOINT REPLY

From the viewpoint of NGFA, there are several benefits to be obtained from adopting the common carrier tariff definition proposed in the Joint Reply, which is as follows:

A ‘common carrier tariff’ within the jurisdiction of the Board is defined as any unilateral offering by a rail carrier, or carriers, of rates, charges, conditions of carriage, or service terms, whether applicable to shippers generally, any class or group of shippers, or to specified individual shippers. A ‘unilateral offering’ is any offering of rates, charges, conditions of carriage or service that can be used or accepted by tendering, or stating an intent to tender, traffic to the carrier or carriers. Tariffs cannot be used to form a contract under Section 10709.

First, by dropping the idea of defining “contracts” as proposed in the Decision, the Board will avoid a conflict with the Section 10709 definition of “contract” (an agreement “to provide specified services under specified rates and conditions”) and will avoid interference with the long-standing Board rules at 49 C.F.R. Part 1313 that implement those provisions of 49 U.S.C. 10709 conferring the ability on certain agricultural shippers to challenge agricultural contracts on various specified grounds. See NGFA initial Comments at 2-5.

As pointed out in those initial Comments, there certainly is room for improvement in the way carriers adhere to the contract summary filing requirements for agricultural commodities contracts contained in Part 1313 and in the Board’s efforts to police adherence to those requirements, but at least the existing system would not be worsened or placed under a shadow of doubt by the adoption of a new definition of “contract” that

may fail to reflect all of the types of agreements that have been regarded as contracts for more than 20 years. Also, there are contracts pertaining to agricultural commodities that do not meet the Board's proposed definition of a contract ("a specific rate for a specific period of time") because they involve such matters as additional demurrage days, track rental, or a specific type of switching, rather than a "specific rate." Each such type of service legitimately can be the subject of a contract between an agricultural shipper and a railroad and become subject to the protections in Section 10709 that extend not just to "a specific rate," but also to "services." See 49 U.S.C. 10709(g)(2)(B)(i).

Second, by adopting the proposed definition of common carrier tariffs, and in particular by endorsing the concept in that definition that a carrier cannot use a tariff with its unilaterally dictated provisions to compel a non-negotiated commitment by the shipper that, upon acceptance, is regarded as a "contract" immune from scrutiny by the Board, the Board in effect will be confining contracts to their intended purpose, which "is to establish negotiated, mutually agreeable rates to which parties intend to be bound." See Decision at 3.

Although tariff provisions may at times be incorporated into Section 10709 contracts, tariffs standing by themselves were never intended by Congress to become Section 10709 contracts.⁵ When the use of rail transportation contracts initially was codified by Congress in former Section 10713 (former 49 U.S.C. § 10713), railroads were required to file written contracts with the Interstate Commerce Commission whenever they exercised their contracting authority. See, e.g., *Railroad Transportation Contracts*, 3 I.C.C. 2d 219 (1986), which references the history of rail transportation contract proceedings before the

⁵ Insofar as NGFA is concerned, the last sentence of the proposed Joint Reply definition of common carrier tariff is not intended to preclude incorporation of specific tariff provisions into a contract, but only to bar the use of tariffs as "stand alone" contracts.

ICC. Under those statutory provisions, it is indisputable that a contract was required to be a discrete written document between the parties to it. A tariff that contained, for example, provisions for repetitive use of unit grain trains at rates which varied according to the number of trips made by the train, would not have qualified as a Section 10713 contract.

As the use of rail transportation contracts grew, the ICC was burdened with thousands of contract filings and determined to exempt railroads from the need to file written contracts except for those involving agricultural commodities. Written contracts, even when not required to be filed with the ICC, nevertheless had to be prepared because the ICC conditioned its exemption from the filing requirement by adding a rule that “[r]ail carriers must immediately provide to the Commission all contracts and/or contract amendments it requests.” *Railroad Transportation Contracts*, 8 I.C.C. 2d 730, 739 (1992). It remained clear that rail transportation contracts were intended by Congress to take the form of a written instrument reflecting the specific bargains between the parties to the contract.

When Congress undertook in 1995 to abolish the Interstate Commerce Commission and replace it with a streamlined Surface Transportation Board, the filing of written contracts was not an issue because it had been dispensed with administratively by the ICC, except as to agricultural contracts. Because of that, and the fact that the ICCTA eliminated the filing of all tariffs with the Board (and, presumably, the personnel who kept track of filings such as tariffs and contracts), Section 10709 dropped the express requirement that all contracts be in written form.⁶

⁶ As indicated in the initial NGFA Comments, the Board nevertheless recognized the need for written contracts insofar as agricultural commodities are concerned, by adopting rules requiring railroads to submit

There is nothing in the legislative history of the ICCTA to indicate that deletion of the written contract requirement from the statute, after it already had been deleted administratively in most cases, was intended suddenly to permit the contracting requirements of Section 10709 to be satisfied by using a tariff as a substitute for a contract. Whether a contract under the present statute is oral (to the extent oral contracts may be valid) or written, there remains no reason to believe that Congress now intends to permit carriers to create contracts by the mere use of tariffs. Had that been the intention of Congress, a strong argument could be made that it is totally unnecessary to expressly authorize rail transportation contracts at all inasmuch as a bill of lading, which is issued for all shipments pursuant to 49 U.S.C. 11706, is a contract that requires the shipper to pay the carrier's "lawful charges." See 49 C.F.R. Part 1035, Appendix B, Section 7.

Congress obviously did not regard bill of lading contracts, requiring payment of all "lawful" carrier charges, including tariff charges, as sufficient to meet the purpose of Section 10709. If the tariff provisions which must be honored pursuant to a bill of lading contract are deemed to satisfy the contracting purposes of Section 10709, then literally any tariff movement subject to a bill of lading will be beyond the Board's jurisdiction. The Board should not now start to take the position that its jurisdiction over rail transportation can be shed merely through a tariff arrangement when the clear background of Section 10709 contemplated a negotiated contract bargain between the parties.

Third, adoption of the proposal contained in the Joint Reply in lieu of the Board's proposed rules will remove the uncertainty that many parties found objectionable in the proposed rule. The proposed rule centers around a requirement that all Section 10709

copies of those contract immediately to the Board when a challenge is mounted against an agricultural commodity contract.

contracts be “bilateral,” but does not define “bilateral.” Moreover, by avoiding any ambiguous definition of “contract,” the Board will avoid being confronted with interpretations of its definition and the problems arising from those interpretations. For example, under the *Utah* case, *supra*, the Board deems itself without authority to determine whether any given instrument or other arrangement is in fact a valid contract. Thus, if the Board adopts a definition of the term “contract” that is unclear, it may find itself in the same position it occupies today when a rate complaint is filed; that is, the Board may have to defer to the courts to determine whether the arrangement over which a dispute exists amounts to a contract. By instead electing to define a common carrier tariff, the Board plainly can exercise all of the authority required to determine if the arrangement is subject to its jurisdiction.

WHEREFORE, NGFA urges the Board to reject its proposed definition of “contract” and instead renote and adopt the definition of “common carrier tariff” contained in the Joint Reply.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Reply Comments of National Grain and Feed Association has, this 2nd day of August 2007, been served upon all parties of record, by first class mail, postage prepaid.



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