

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte 669

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

REPLY COMMENTS

of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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The National Industrial Transportation League ("League") is pleased to submit these Reply Comments in response to the Notice of Proposed Rulemaking served March 28, 2007. In that Notice, the Board is seeking public comments on its proposal to interpret the word "contract" in 49 U.S.C. 10709 as embracing any "bilateral agreement" between a shipper and a carrier for rail transportation in which the railroad 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."

In its Comments filed June 4, 2007, the League noted that greater clarity was needed in identifying rate offers as "contracts" or "tariffs," and that therefore the Board should clarify the metes and bounds of the relationship between a shipper and a carrier. The League pointed out that such a clarification was particularly necessary because carriers have been issuing documents which on their face are labeled as "contracts," but which bear all the indicia of tariffs. However, the League also noted several significant problems with the Board's proposed approach, and

strongly urged the Board to adopt several changes in order to clarify the rule's scope and intent; to avoid unnecessary restrictive features; and to insure that the rule is not circumvented.

Specifically, the League noted that the Board's definition was ambiguous and substantially overbroad, since it would encompass arrangements such as minimum annual volume arrangements that have been treated as tariffs for decades. Moreover, the wording of the Board's proposed rule did not fit easily into other situations in which contracts might be negotiated, such as demurrage arrangements. The League urged the Board to consider more broadly and deeply the types of situations that might be covered by the proposed rule, and insure that the coverage is appropriate.

The League has carefully reviewed the comments filed by the other parties in this proceeding. Its review of those comments reveal several common threads. First, a number of parties agree with the League that a clarification of the legal relationship between rail common carriers and their shippers would be useful.¹ Second, virtually all parties, even those who believe that clarification in this area would be useful, are confused and troubled by the many uncertainties and ambiguities in the Board's proposed rule. While a wide variety of uncertainties and problems are discussed, a number of parties indicate that the Board's proposed rule could, on the one hand, apparently turn many common tariff mechanisms (such as annual volume tariffs) into "contracts," and on the other, exclude from "contract" status a wide variety of non-rate arrangements.² Third, many parties – both shippers and carriers -- question, to a greater or lesser degree, the Board's authority to issue a rule defining a "contract," on the grounds that the

¹ See, e.g., CSX Transportation, Inc. ("CSXT") Comments, p. 1; Comments of E.I. DuPont de Nemours (DuPont"), p. 1; Comments of U.S. Clay Producers Traffic Association ("Clay Producers"), p. 3; Comments of Ameren Energy Fuels and Services Company ("Ameren"), p. 2.

² See, e.g., BNSF Railway ("BNSF") Comments, p. 3; Canadian Pacific Railway ("CP") Comments, pp. 4-5; Dairyland Power Cooperative ("Dairyland") Comments, p. 5; Entergy Services Inc. ("Entergy") Comments, p. 9; Western Coal Traffic League ("WCTL") Comments, p. 18 et seq.

existence and terms of a contract is a matter for the courts and state law.³ Fourth, many parties – both shippers and carriers -- believe that the Board does have the authority to define a "tariff."⁴

I. THE BOARD SHOULD REVISE ITS PROPOSAL AS ADVOCATED IN THE JOINT REPLY COMMENTS, AND RE-NOTICE THIS PROCEEDING

In view of these commonalities, the League has combined with several other commenters to submit "Joint Reply Comments" to the Board. These Joint Reply Comments, which are in the nature of a brief "Statement of Principles," urge the Board to take a different tack in this case, and to reconsider and think through more clearly the meaning and implications of its proposal.

As emphasized in the Joint Reply Comments, the League strongly believes that shippers and carriers need more clarity as to what is, or is not, a common carrier relationship as distinct from a contractual relationship. The need for clarity has arisen particularly as carriers have developed more varied "hybrid" mechanisms. Indeed, the comments filed in this proceeding have confirmed the accuracy of the League's opening comments, that carriers, in addition to developing KCPL-type "tariffs that look like contracts", are also developing highly ambiguous arrangements that are labeled "contracts" but that have all the earmarks of a tariff. Arkansas Electric Cooperative Corporation ("AECC"), for example, reports on the existence of "non-signatory contracts" that appear designed to "self-exempt" a carrier and evade regulatory scrutiny. AECC Comments, p. 8. The Clay Producers comment on the same phenomenon. Clay Producers' Comments, p. 2. CSXT freely concedes that it has developed "Private Price Quotations" that it considers to be contracts, even though they do not require the shipper to transport a single carload of freight, make any investments, or in fact make any commitment of

³ See, e.g., Ameren Comments, p. 5; AECC Comment, p. 3; Association of American Railroad ("AAR") Comments, p. 3; CP Comments, pp. 3-4; CSXT Comments, p. 5; Dairyland Comments, p. 6; Entergy Comments, p. 8; Norfolk Southern Railroad Company ("NS") Comments, pp. 4-6; WCTL Comments, pp. 15-17.

⁴ See, e.g., Ameren Comments, p. 6; CSXT Comments, p. 17; Dairyland Comments, p. 6; NS Comments, p. 8; WCTL Comments, p. 27.

any kind whatsoever. CSXT Comments, pp. 6-7. These "PPQs" appear to be indistinguishable from tariff rates. NS concedes that it has a similar program, called "NSSCs", or "signatureless contracts." NS Comments, p. 3. DuPont reports that the arrangements that it has seen allow the carrier to change the rate on 30 days' notice, are otherwise governed by published tariffs, and are accepted by tendering traffic, with no commitment to tender any volume of traffic. DuPont Comments, p. 2. Union Pacific Railroad Company ("UP") similarly indicates that it has "unilateral" contract arrangements which are "accepted" simply by tendering traffic, which contain no other commitments, but which can be unilaterally cancelled by UP on just 30 days' notice. UP Comments, pp. 12-13. Entergy correctly notes that the "hybrid pricing" vehicles being developed by carriers appear to be crafted to allow carriers the "maximum flexibility to fend off any review by either the STB or the courts." Entergy Comments, p. 10. The Board should not permit such unilateral attempts to evade its regulatory jurisdiction.

Given this uncertain landscape, the League disagrees with those parties who suggest that there is no need for the Board to better define the relationship between shippers and carriers.⁵ More clarity is needed. Moreover, the League strongly believes that rail transportation contracts should be the product of negotiation and agreement between shippers and carriers, and that contracts under Section 10709 should result in an exchange of mutual promises. The League agrees with the Association of American Railroads that the Board should not stifle innovative developments between shippers and carriers, see AAR Comments, p. 3, but the League also believes that the Board should insure that contracts are the product of an agreement between shippers and carriers, and are not simply a unilateral offering by the carrier. Carriers should not be able to "self-exempt"⁶ by imposing documents on shippers that are in reality in the nature of

⁵ See, e.g., CP Comments, p. 2.

⁶ See, AECC Comments, p. 5.

"a holding out to the public to provide specified transportation services for a given price that a shipper accepts by tendering traffic,"⁷ and calling such documents "contracts" exempt from regulatory scrutiny.

The Joint Reply Comments note that, instead of trying to define a "contract," the sounder, more legally defensible approach would be for the Board to define what is a common carrier tariff, a matter that is clearly within the jurisdiction and legal authority of the Board. The Joint Reply Comments recommend for the Board's consideration a definition of a "tariff," which would be defined as a "unilateral offering" by a rail carrier or carriers of rates, charges, conditions or service terms. A "unilateral offering" would be one that could be used or accepted by tendering, or stating an intent to tender, traffic to the carrier.

Several points should be noted. The definition of a "tariff" suggested in the Joint Reply comments is, and should be, broad. In this respect, the League agrees with BNSF that the Board should not seek to discourage or artificially preclude public common carrier pricing. BNSF Comment, p. 2; see also, UP Comments, p. 10. Indeed, BNSF correctly notes that "publicly available common carrier rates subject to regulatory oversight have always been a central feature of railroad pricing," and that common carrier rates "can benefit shippers and the public" by facilitating efficient competitive markets. *Id.*

The proposed Joint Reply Comment definition of common carriers rates would encompass such common tariff offerings as traditional annual volume rates, COTS, etc., which are unilateral offerings by the rail carrier. See, e.g., *Coal to New York Harbor Area*, 311 I.C.C. 355 (1960). Tariffs could, under the proposed definition and as supported by long precedent, contain conditions on their use, such as a minimum volume requirement to qualify for the rate stated in the tariff, which if not satisfied, a different rate would apply. *Id.* Other conditions, such

⁷ See Notice, p. 4.

as notification requirements or force majeure provisions that are common in tariffs, would similarly not transform a unilateral offering by a carrier into a contract. See, UP Comments, pp. 6-7. Of course if, instead of a unilateral offering, an exchange contained mutual promises by the shipper and the carrier, such a document might be a contract, but that question would be one for the courts and state law.

The proposed definition of a tariff would encompass all arrangements that could be used or accepted by tendering, or stating an intent to tender, traffic to the carrier. The "used or accepted" and "intent to tender" language would clarify that an inquiry by a shipper of the carrier for a rate and service terms, or a notice from the shipper that traffic is available to the carrier, or similar actions, would not transform a unilateral offering by the carrier into a contract between the parties.

Finally, a shipper's use of such a tariff, as conditioned, would not, without more, transform an minimum annual volume tariff into a contract. Mere use of a unilateral offering does not and should not make a tariff "bilateral" and therefore a "contract" under the proposed Joint Reply Comment definition. The League strongly agrees that the Board should clarify that matter in any rule. See, NGFA Comments, p. 7.⁸ Thus, the proposed definition notes that "[t]ariffs cannot be used to form a contract under Section 10709." Of course, tariff provisions may be incorporated into contracts by agreement of the parties, but the suggested rule indicates that tariffs by themselves should not form contracts under Section 10709.

The League strongly urges the Board, in view of the points stated in the Joint Reply Comments, to revise its approach in line with the suggestions in the Joint Reply Comments.

⁸ The Joint Reply Comments note that common carrier transportation as evidenced in bills of lading is a type of "contract, but that it is also clear that the mere use of a bill of lading does not create a Section 10709 contract. See also, AECC Comments, p. 4; CSXT Comments, p. 10, fn. 8.

II. OTHER REPLY COMMENTS

In addition to the comments above, the League would like to address a few other specific points raised in the opening Comments of several parties.

As noted above, CSXT notes the Board's desire to clarify the distinction between public tariffs and Section 10709 contracts in order to reduce the potential for confusion and uncertainty. CSXT Comments, p. 1. Like other parties, CSXT has problems with the definition proposed by the Board, and CSXT suggests three possible approaches that the Board might use to address its concerns.

The League agrees with CSXT that the Board's proposed definition poses uncertainties and problems, but does not agree with a number of the solutions advanced by the carrier. CSXT suggests that the Board could establish a rule that all non-public price mechanisms that quote a specific rate for a specific customer will be deemed contracts for Section 10709 purposes, regardless of structure. CSXT Comments, p. 14, 15-16. But such a rule would be both too narrow and far too broad. The CSXT proposal is too narrow because, as BNSF correctly points out, contracts may be formed even if they are not confidential, and there is no statutory requirement for contract confidentiality. BNSF Comments, pp. 3-4. But the CSXT proposal would also be far too broad. Tariffs can effectively apply to a single shipper (for example, a utility shipping coal between two named points). Indeed, tariffs can apply even to named shippers. *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984). Moreover, as a policy matter, "signatureless" contracts, or other unilateral offers, should not be "deemed" contracts. Additionally, the CSXT proposal, to define a contract by "deeming" that certain kinds of documents are contracts, is flatly inconsistent with numerous commenters who note that the courts, and not the Board, have the jurisdiction to determine the existence and terms of a "contract." See, e.g., NS Comments, p.p. 4-6; CP Comments, p. 3.

CSXT also suggests that the Board could forbid public tariffs that are stated to be effective for a specific duration or a specific period of time. CSXT Comments, p. 17. While the League believes that the Board could and should more clearly define common carrier tariffs as set forth in the Joint Reply Comments, CSXT's proposed tariff solution, which would define a tariff by its content rather than its structure, would be inconsistent with 40 U.S.C. 10701(c) and sound public policy.

Indeed, the League does not believe that the distinction advanced by CSXT, between "public prices . . . made available to any and all customers" and "private pricing agreements . . . made available to specific individual customers," see CSXT Comments, p. 13, is either a lawful or sound basis upon which to distinguish between common carrier tariffs and contracts. As noted above, BNSF correctly notes that contracts may be public. BNSF Comments, pp. 3-4. As noted above, common carrier tariffs may apply to a single shipper or even to a named shipper.⁹ Indeed, UP argues that its Circular 111 is "valid common carrier pricing document that does not reveal prices publicly," a position at odds with the "public" versus "private" distinction advanced by CSXT. UP Comments, p. 11.

Norfolk Southern, like a number of other parties and like the Joint Reply Commenters, indicates that the Board should focus on pricing authorities that are within its jurisdiction – tariffs – rather than on contracts. See, NS Comments, pp. 8-13. However, NS would have the Board limit its inquiry solely to "what is required of a railroad when a customer formally requests a common carrier rate" NS Comments, p. 8. The League respectfully believes that

⁹ It should be noted that there is a distinction in the statute between Section 11101(b), the statutory provision applicable to common carrier rates which states that a rail carrier must "provided to any person, on request, the carrier's rates and other service terms"; and Section 11101(d), the statutory provision applicable to agricultural common carrier rates, in which the carrier must, in *addition* to the requirements in Section 11101(b), "*publish, make available and retain for public inspection . . .*" 49 U.S.C. 11101(d). The difference in statutory wording can be argued to mean that ordinary (i.e., non-agricultural) common carrier rates need not be published, made available, and retained for public inspection.

such a limited inquiry would not meet the needs of either the Board or the transportation community. The problem faced by the Board and the shipping public is not uncertainty in the case when a shipper makes a formal request for a tariff. Rather, it is the pervasive, ongoing uncertainty and confusion over the status and legal effect of rate and service offerings in the absence of a formal request – the legal nature and effect of day-to-day, business-to-business exchanges for transportation rates and service, which the Board needs to clarify for both legal/jurisdictional and business reasons.

III. CONCLUSION

The League appreciates this opportunity to present its views to the Board on this important matter.

Respectfully submitted,

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