

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE 669

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

**REPLY COMMENTS
OF
NORFOLK SOUTHERN RAILWAY COMPANY**

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I. INTRODUCTION

Norfolk Southern Railway Company (“NS”) submits these reply comments in Ex Parte 669 – Interpretation of the Term “Contract” in 49 U.S.C. 10709 (“NPRM”). In its opening comments, NS explained that the Board should not pursue its attempt to define the term “contract.” Ex Parte 669, *Interpretation of the Term “Contract” in 49 U.S.C. 10709*, Comments of Norfolk Southern Railway Company at 4-8 (“NS Comments”). Rather, the Board should focus on what a railroad is required to provide to a customer in response to a formal request for a common carrier rate subject to the Board’s jurisdiction – which is a question that is exclusively within the Board’s authority to answer and within its expertise. NS further submitted that answering that narrow question would resolve the issue presented by the *Kansas City Power & Light Company v. Union Pacific Railroad Company* (STB Docket No. 42095) (“KCP&L”) proceeding. NS’s opening position: (1) avoids a regulatory chasm; (2) avoids calling into question existing agreements and therefore interferes less with real-world commercial arrangements; and (3) is easier to apply prospectively.

Although other commenters have offered varying critiques of the Board’s proposal, several themes emerge from the opening comments. First, many parties agree that the Board should not try to define what is and is not a “contract.” Some parties contend that the best policy is for the Board to continue with its case-by-case approach to examining contract questions – a position NS agrees has merit. Some parties argue that the Board should only examine what is an appropriate common carrier tariff because that question is within the Board’s jurisdiction, whereas contract questions are not. Second, the parties’ comments demonstrate that there is no simple definition of “contract.” Third,

the various comments demonstrate that the Board's proposed definition is unclear and would require substantial refinement. Fourth, a number of parties, for their own disparate reasons, see this Board proceeding as an opportunity to argue that the Board should overrule longstanding court precedents and statutory provisions, regardless of the Board's lack of jurisdiction over the issues or of the power to do so.

II. NS'S OPENING COMMENTS

NS offered several perspectives in its opening comments, which are briefly highlighted here.

- The Board has no jurisdiction over contracts, whether a contract exists, or what the terms of a contract are. 49 U.S.C. § 10709. It is settled law that a court is the appropriate forum for determining whether a contract exists.¹ *Id.* at 4-5.
- There is no simple way to define "contract" in a sentence. Attempting to do so will result in a regulatory chasm because it is likely that some pricing documents will be deemed to be a contract by the Board but not a contract under state law – and vice-versa. *Id.* at 5-6.
- Broad statements about what is or is not a contract could undermine established commercial arrangements and inject uncertainty into the marketplace. *Id.* at 7-8.

¹ *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 Board should examine only matters within its jurisdiction, namely what is required of a railroad when a customer formally requests a common carrier rate subject to the Board's jurisdiction (a question presented by *KCP&L*). *Id.* at 8.
- The law clearly delineates the railroad's rights and obligations that arise when a customer formally requests a common carrier tariff. The railroad: (1) must respond to a formal request for a common carrier tariff subject to the Board's jurisdiction 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); (2) has the right to change the common carrier rates at any time, but new, higher rates cannot be effective 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)); and (3) must make the existing pricing document available to "any person, on request" (49 U.S.C. § 11101 (b)) "within hours, or at least by the next business day" (49 C.F.R. § 1300.2(b)). *Id.* at 9-13.

III. ALTHOUGH PARTIES FOCUS ON DIFFERENT ASPECTS OF THE QUESTION, MOST ARGUE THAT THE BOARD SHOULD NOT TRY TO DEFINE "CONTRACT."

In its opening comments, NS argued that the proper question for the Board to address is what is required of a railroad when a customer formally requests a common carrier rate subject to the Board's jurisdiction. That question is within both the Board's expertise and jurisdiction. NS further submitted that the Board should not define "contract" because the Board lacks jurisdiction over contracts.

Some parties suggest that the Board should not initiate any rulemaking.

Ex Parte 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, Comments of Dairyland Power Cooperative at 7 ("The proper course for the Board is not to issue a rule defining the term 'contract.'") ("Dairyland Comments"). Rather than issuing any rules at all, Dairyland Power Cooperative ("Dairyland") and Entergy Service Inc. ("Entergy") recommend that the Board instead "continue to apply a case-by-case determination of whether the involved arrangements constitute common carrier service." *Id*; see Ex Parte 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, Comments of Entergy Services, Inc. at 9 ("Entergy questions whether such an explicit test is necessary given the Board's limited jurisdiction over matters involving contracts, and the Board's current ability to decide such matters on a case-by-case basis without any need for any change in its rules.") ("Entergy Comments").

These parties have a valid point. The Board's case-by-case approach to situations brought to it by parties has served it well because its decisions have been measured and appropriate to the controversy. Adhering to that approach by terminating this rulemaking and confronting the question presented by the *KCP&L* case in the *KCP&L* proceeding has substantial merit.

NS's suggestion that the STB terminate this rulemaking and instead examine what a railroad must do when a customer requests a common carrier rate subject to the Board's jurisdiction -- which is the central question presented by *KCP&L* -- is another reasonable approach. Other parties agree that this is the proper question for the Board to examine. The National Industrial Transportation League ("NITL") suggests that the Board should change its focus: "[T]he NOPR's [NPRM] approach involves the Board's making a definitive finding as to the existence of a contract, as opposed to

addressing the narrower question of whether there is a tariff that is subject to the Board's jurisdiction." Ex Parte 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, Comments of National Industrial Transportation League at 30 ("NITL Comments"). Similarly, Canadian Pacific Railway Company ("Canadian Pacific") suggests that instead of defining a "contract," the Board should identify the terms that may properly be included in a common carrier rate quotation." Ex Parte 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, Comments of Canadian Pacific Railway Company at 7 ("CP Comments"). Finally, CSX notes that "the Board might better address the concerns expressed in the Notice by focusing on what may (and may not) constitute a public tariff."² Ex Parte 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, Comments of CSX Transportation, Inc. 4 ("CSX Comments"). The Board should focus on the narrow question presented by *KCP&L* – what is required of a railroad when a customer requests a common carrier tariff subject to the Board's jurisdiction – because the Board has the expertise to answer that question by virtue of its jurisdiction over that rail transportation. Dairyland Comments at 6; NS Comments at 8; Ex Parte 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, Comments of Ameren Energy Fuels and Services Company ("Ameren") at 6 ("[T]he Board should more appropriately define what constitutes common carrier service, or tariffs, which are more squarely within the Board's jurisdiction.") ("Ameren Comments").

² NS agrees in principle with these parties that the only proper question the Board should examine is one that is within the Board's jurisdiction. However, the Board should further restrict itself to answering the question presented by the *KCP&L* case – what is required of a railroad when a customer requests a common carrier rates subject to the Board's jurisdiction.

More fundamentally, many parties agree that the Board lacks jurisdiction over questions about contracts. NS Comments at 4-5. In Ameren words, “overwhelming precedent establishes that the Board lacks authority to determine whether a shipper and a carrier have entered into a private contract under 49 U.S.C. § 10709 and thus the Board’s interpretation of the term ‘contract’ may also be outside the Board’s jurisdiction.”

Ameren Comments at 5. Dairyland is again on point: “[h]owever, the STB does not have the corresponding authority to determine whether an arrangement constitutes a contract under 49 USC Section 10709. That is an issue for the courts to decide under the governing law.” Dairyland Comments at 6-7. Similarly, Western Coal Traffic League (“WCTL”) notes that “[a] significant threshold matter that appears not to have been discussed at all in the Notice is potential limitations on the Board’s authority to recognize the existence of a contract subject to 49 U.S.C. 10709.” *Ex Parte 669, Interpretation of the Term “Contract” in 49 U.S.C. 10709*, Comments of Western Coal Traffic League at 13 (“WCTL Comments”). Likewise, Entergy states that “the Board’s Notice largely appears to fail to recognize the fact that whether or not a contract actually exists is principally an issue for a court to decide.” Entergy Comments at 8. The parties’ concern about the reach of the Board’s jurisdiction is supported by the substantial amount of precedent the parties collectively cite for the proposition that, pursuant to the Staggers Rail Act of 1980, only courts have jurisdiction to decide contract questions, including whether a contract exists. *See* NS Comments at 4-5; Ameren Comments at 5; Dairyland Comments at 6-7, WCTL Comments at 13-18.

Finally, no party affirmatively asserts that the Board has such jurisdiction over contracts.

IV. THE PARTIES' CONCERNS ABOUT THE BOARD'S PROPOSAL CONFIRM THAT THERE IS NO SIMPLE DEFINITION OF "CONTRACT."

In its opening comments, NS cautioned the Board that there is "no simple way to define in a sentence what a contract is." NS Comments at 6-7. The difficulties of trying to define a contract are illustrated by the comments of various parties.

Reminiscent of Goldilocks, some parties see the Board's definition as too broad, and some parties see the Board's definition as too narrow. But that is where the similarities to the fairytale end, because no party sees the Board's definition as "just right." All these parties have their own idea of what should constitute a contract – which generally would still require an analysis of individual facts in each instance – and thus confirm the impossibility of creating a single, simple definition.

Many parties dislike the Board's proposed definition of "contract" because they believe it is too broad. Consider the following examples.

- WCTL thinks the Board's proposed definition of "contract" is too broad because it might encompass rate authorities for unit trains that include annual volume rates and other terms traditionally included in common carrier rate authorities. WCTL Comments at 18-21.
- National Grain and Feed Association ("NGFA") wants the Board to restrict further its proposed definition by defining bilateral contracts as only "written instrument[s] signed by the parties" that reflect "a binding, mutual written declaration of the parties." Ex Parte 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, Comments of National Grain and Feed Association at 7 ("NGFA Comments"). Setting aside the potential conflict with the law of many states, NGFA's proposal would substantially narrow the Board's proposed definition. NGFA clearly thinks the Board definition of "contract" is too broad.
- Edison Electric Institute ("EEI") contends that the Board's definition may include as a "contract" an adhesion contract that has been foisted upon the shipper with no opportunity to negotiate. Ex Parte 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, Comments of Edison Electric

Institute (“EEI”) at 7 (“EEI Comments”). EEI seeks to have the Board narrow its definition to take the shipper’s ability to enter into a negotiated agreement at arm’s length.

- Entergy and Dairyland both fear that the proposed definition would subsume a wide variety of pricing instruments that are clearly intended to be or historically have been common carrier tariffs. Entergy Comments at 9; Dairyland at 5-6.

In stark contrast, other parties argue that the Board’s definition is too narrow. Consider the following examples.

- The Association of American Railroads (“AAR”) thinks the Board’s definition, which limits contracts to “bilateral” agreements, is too restrictive because it ignores the fact that “unilateral contracts are recognized commercial agreements.” Ex Parte 669, *Interpretation of the Term “Contract” in 49 U.S.C. 10709*, Comments of Association of American Railroads at 3 (“AAR Comments”).
- Canadian Pacific notes that contracts come in many forms, including contracts that incorporate common carrier tariff terms by reference, which the Board’s definition of “contract” would not cover. CP Comments at 4-5.
- CSX Transportation Inc. (“CSXT”) suggests that the Board expand its definition to cover non-public pricing arrangements. CSX Comments at 14.

Concern over the appropriateness of the proposed definition is further evident when some parties note that it may be both too broad and too narrow. Union Pacific Railroad Company (“Union Pacific”) and Entergy contend that the Board’s definition excludes any inquiry into the parties’ intent. Ex Parte 669, *Interpretation of the Term “Contract” in 49 U.S.C. 10709*, Comments of Union Pacific Railroad Company at 3-6 (“UP Comments”); Entergy Comments at 10. Depending on the circumstances, this criticism could be interpreted to mean that the Board’s definition might result in a finding that a contract existed where the parties’ intent was not to contract or in a finding

that a contract did not exist where the parties' intent was to contract. Thus, in their view, the Board's proposed definition of "contract" could be both too broad and too narrow.

Who is correct? Is the Board's definition too broad, too narrow, or both?

NS submits that the answer is, "it depends." Contract law is fact specific. Contract law has a long history with many court decisions from the courts of the 50 states and the District of Columbia. This body of law is complex enough to fill multivolume treatises and confound first-year law students across the country. It cannot be neatly summarized in a sentence or two. Under a particular set of facts that implicates particular contract law doctrines, it is possible that a court could find that a contract exists or does not exist for reasons similar to any one of the parties' points outlined in this Section.

But, the diversity of irreconcilable modifications to the Board's proposed definition that the parties suggest should lead the Board to conclude that now is the time for it to close the Pandora's box its proposed definition opened. The Board cannot and should not attempt to fashion a single sentence, one-size-fits-all definition of a contract.

V. THE BOARD'S PROPOSED DEFINITION IS UNCLEAR.

In addition to the debate among the parties regarding whether the Board's proposed definition is appropriately scoped, at least three elements of the Board's proposed definition are unclear to many parties. The lack of clarity is not helpful and also cannot be easily resolved.

First, many parties are unclear concerning the use of bilateral and unilateral as a distinguishing feature.³ For example, NITL spends over 50% of its comments seeking clarification of the term “bilateral agreement.” NITL at 5-8. E.I DuPont de Nemours and Company (“DuPont”) also expresses its lack of understanding as to what would qualify as a “bilateral agreement.” Ex Parte 669, *Interpretation of the Term “Contract” in 49 U.S.C. 10709*, Comments of E.I Du Pont de Nemours and Company 2 (“DuPont Comments”). Similarly, NGFA submits that the Board does not sufficiently define what is meant by “bilateral” contracts. NGFA Comments at 6.

In part, this lack of clarity is not surprising given the complexities of the law regarding bilateral contracts and unilateral contracts, complexities which have perplexed courts. Indeed, *Corbin on Contracts* notes that courts often confuse concepts related to bilateral and unilateral contracts. *Corbin on Contracts*, Section 1.23 (2006); *see also* CSX Comments at 10 (noting that the Second Restatement of Contracts has abandoned the distinction because of the confusion it causes). Moreover, Dairyland and CSX correctly point out that 49 USC § 10709 makes no distinction between unilateral and bilateral contracts and that the use of these terms does little to demark an STB-regulated rate authority and an STB-unregulated rate authority. Dairyland Comments at 6; CSX Comments at 4.

Second, even the Board’s inclusion of the concept of “a commitment” from the shipper is less than clear. NITL and WCTL raise concerns about what commitments would make a pricing document a contract rather than a tariff. NITL

³ This confusion over what is meant by the term “bilateral” differs from and is in addition to the concerns raised by parties about whether defining “contract” to be bilateral agreements only is too restrictive.

Comments at 7; WCTL Comments at 18-19. DuPont asks whether even a *de minimis* commitment is enough. DuPont Comments at 2. Entergy and Dairyland ask the Board to clarify whether the longstanding policies that permitted carriers to issue common carrier rates subject to the Board's jurisdiction that included minimum volumes would be transformed into contracts because they contain this volume commitment. Entergy Comments at 9; Dairyland Comments at 5-6. Given the complex nature of commercial arrangements and commercial negotiations between railroads and customers, determining by rulemaking which commitments count and which do not is impractical.

A third area of confusion relates to whether contracts must be confidential, which is a concept included in the NPRM. NPRM at 4. For example, CSX, like NS, argues that the Board should abandon this rulemaking. But in an effort to be helpful to the Board, one of the possibilities proposed by CSX is that "all non-public price mechanisms and arrangements that quote a specific rate for a specific customer will be deemed contracts." *Id.* at 14. However, contracts are not by definition confidential. BNSF correctly states that a contract is confidential only to the extent the parties agree in the contract to make it so. BNSF Comments at 3-4. Confidentiality is not a hallmark of a contract and therefore cannot be used as a bright line test. Moreover, although common carrier rates subject to the Board's jurisdiction must be public (49 USC § 11101(b)), not all non-public price mechanisms must be contracts outside the Board's jurisdiction, particularly where exempt commodities are at issue.

These areas of confusion are not trivial; they are the heart of the Board's proposed definition. Nor are they easily clarified.

VI. A SIMPLE DEFINITION OF "CONTRACT" WILL CREATE SUBSTANTIAL COMMERCIAL UNCERTAINTY.

The Board should not underestimate the harm that will result from erroneously or too simplistically defining "contract." NS noted in its opening comments that if the Board defines "contract" incorrectly, or too simplistically, it is likely that some pricing documents will be deemed a contract by the Board but not a contract under state law -- thus creating substantial commercial uncertainty and disruption. NS Comments at 7. The Clay Producers and CSX are similarly concerned about the commercially disruptive effect of the Board potentially adopting its own definition of "contract." Ex Parte 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, Comments of the American Clay Producers Traffic Association at 3 ("Clay Producers Comments"); CSX Comments at 19.

The potential disruption is made worse by the uncertainty created by the NPRM. In its NPRM, the Board stated that "[p]arties are hereby placed on notice that if this proposal is adopted, the reasonableness of a rate reflected in a bilateral agreement entered into after this date [i.e. the date of publication of this decision in the Federal Register] will be treated as a confidential contract governed by section 10709 and outside the Board's jurisdiction." NPRM at 6. NS interprets this statement to mean that (1) the Board has not pre-determined that what is a contract is a proper inquiry for the Board; (2) to the extent it continues to pursue a definition of "contract," its proposed definition of "contract" is not necessarily correct and will be amended based on comments received; and (3) this statement would be applicable only if the proposed definition is not altered at all and only for purposes of rate reasonableness considerations. Even if the proposed definition were adopted as the final rule, it is not clear that retroactive uses of the new

rule would be lawful. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (agencies cannot promulgate retroactive rules in the absence of express congressional delegation of retroactive rulemaking power); *Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994) (interpretive rules subject to general ban on retroactive rulemaking).

The better policy would be for the Board to announce that its ruling is effective prospectively only from some specific date that is subsequent to the date of the Board's final decision. Clay Producers Comments at 3 (“[M]indful 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.”); CSX Comments at 18-20. To permit companies to prepare pricing authorities that comply with any Board order, the date on which a final rule becomes effective should be at least sixty (60) days after the issuance of a final rule. Clay Producers at 3 (“[T]he Association urges the Board to expressly state an effective date [from which the regulations apply prospectively] in the language of the regulations.”). Even then, there will likely be substantial disruption in the marketplace for a significant duration.

VII. SOME PARTIES SEEK THROUGH THIS PROCEEDING TO ESTABLISH NEW LEGAL RULES DESPITE COURT, AGENCY, AND CONGRESSIONAL DECISIONS TO THE CONTRARY.

Unfortunately, some parties seem to view this proceeding as an opportunity to establish a new set of contract rules or to persuade the Board to exercise power it does not have by overruling court precedents and congressional mandates. NS observed in its opening comments that:

- The laws of the 50 states and the District of Columbia determine whether a contract exists and govern the interpretation of the terms of a contract (NS Comments at 5);
- Courts have ruled that parties cannot confer jurisdiction on a regulatory agency (*Id.* at 2);
- The Board, and its predecessor agency, have long recognized that tariffs can include a number of different terms, including volume levels (*Id.* at 12-13); and
- Congress has mandated that common carrier rates must be available to any person on request (*Id.* at 10).

Despite these settled rules, various parties ask the Board to overrule each of these longstanding legal precedents notwithstanding the Board's statutory lack of jurisdiction or power and the statutory requirements that tariffs be publicly available.

First, some parties suggest new rules for contracts. These rules are not suggested modifications to the Board's proposed definition based on court precedent in the area of contracts. That is evident from the paucity of legal citations in support of the various suggestions. Rather, they are an attempt to exploit this rulemaking to remake more than a century of contract law.

Although courts and commentators on contracts have long dealt with the complex factors that collectively determine whether a contract exists— such as mutual assent, intent of the parties, offer, acceptance, consideration, etc. — several parties offer new standards as the definitive statement as to whether a contract exists. For example, NGFA proposes a new rule that a contract can exist only if the Board determines the pricing arrangement was “fairly negotiated.” NGFA Comments at 15. EEI, whose members are often larger than the railroads, seeks a similar new, universally-applicable rule of rail contracts that would require a finding of no contract unless the “shipper had the ability to negotiate.” EEI Comments at 7. Neither of these simplistic suggestions

reflects an actual universal and definitive rule for determining whether a contract exists. Nor can it be said that rail contracts of any kind are contracts of adhesion as NGFA would lead the Board to believe, because customers never have to sign a contract. Customers of regulated commodities always have the option of requesting a common carrier tariff.⁴

These suggestions for new contract rules raise three serious questions: (1) from where does the Board get jurisdiction when 49 USC § 10709 expressly removes contract questions from the Board's jurisdiction; (2) how could the Board enforce contract rules – especially bright-line rules – that would conflict with traditional contract analysis; and (3) should the Board adopt such contract rules. Of course, the Board could not force a court to apply its rules when a court examines whether a contract exists, which means these rules would only exacerbate the regulatory chasm NS cautioned against creating in its opening comments. NS Comments at 5-7. Accordingly, the answer to the third question is clear – the Board should not adopt such rules.

Some parties seemingly would like the Board to overrule the legal principle that parties cannot confer jurisdiction on an agency. Mutual assent and the intent of the parties are significant factors in contract law to determine whether a contract exists. Union Pacific Comments at 3-6. But the United States Supreme Court has held that parties may not confer jurisdiction on an agency. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986). And the Board lacks the power to change that fact.

⁴ Where a customer cannot challenge that tariff because the railroad is not market dominant, by definition the contract could not be a contract of adhesion because some alternative exists for the customer.

Other parties' suggestions would result in a dramatic shift in the legal landscape for common carrier rates. For example, CSX suggests that the Board adopt a rule that common carrier rates cannot include a volume commitment. CSX Comments at 16. Today, the law permits common carrier rates to include volume commitments if the shipper concurs and the common carrier rate is responsive to the customers shipping situation. As NS cited in its opening comments, a currently pending rate case involves a pricing document that includes a volume commitment. NS Comments at 12-13. Moreover many shipper parties specifically seek clarification that such common carrier rates would be permissible under the new rules. *See e.g.*, WCTL Comments at 18-21; Entergy Comments at 9; Dairyland Comments at 5-6; NGFA Comments at 16-17. This suggested change in the law, while easier to implement because it is a bright-line, would result in substantial turmoil in the marketplace according to these shipper parties and deny railroads the right to meet certain needs via tariffs.

As a second example of proposed changes to the law of common carrier rates, Union Pacific contends that its Circular 111 is a response to a request from a customer for a common carrier rate subject to the Board's jurisdiction that complies with all the legal rules that govern such rates. As NS explained in its opening comments, the lodestar of a common carrier rate subject to the Board's jurisdiction is compliance with the statutory requirement that the railroad must make the pricing document available to "any person, on request," as it has been interpreted in the Board's rules. NS Comments at 10 (citing 49 U.S.C. § 11101(b) and *Conrail v. Canada Malting Co.*, 2000 U.S. Dist. LEXIS 1273 (E.D. Pa. Feb. 7, 2000)). Union Pacific asserts without citing legal precedent that it can comply with the statutory requirement to disclose the pricing document to "any person, on request" by disclosing only to a small subset of persons "who are covered by

the rate document.” Union Pacific Comments at 11. The Board simply does not have the power to change this statutory requirement.

VIII. PUBLIC PRICING IS NOT NECESSARILY ANTICOMPETITIVE.

NS concurs with the parties who assert that public pricing is not necessarily anticompetitive. Regrettably, the Board in part based this proceeding on a faulty assumption about the relationship between public pricing and anticompetitive behavior. NPRM at 4-5. Many shipper parties now attempt to shroud this entire proceeding in a fog of unsubstantiated and misleading anticompetitive concerns. *See, e.g.*, NITL Comments at 3; WCTL Comments 9-12.

NS fully agrees with Union Pacific, AAR, BNSF Railway Company (“BNSF”), and other parties that explain that public pricing (1) is a legitimate commercial practice; (2) is an option provided for rail carriers to use at their discretion when exercising their pricing authority under 10701(c); and is not *per se* anticompetitive. BNSF Comments at 2; UP Comments at 9-10; AAR Comments at 4. If public pricing were always anticompetitive, the daily newspaper ads would be the basis for indicting thousands of companies across America.

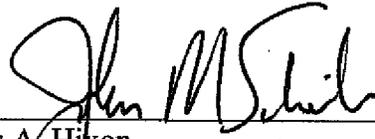
IV. CONCLUSION.

The Board should not define “contract” because: (1) it lacks jurisdiction over contracts; (2) the term “contract” cannot be defined simply and with sufficient bright-lines to provide certainty and clarity to railroads and customers; (3) any new definition of “contract” could undermine longstanding pricing arrangements that benefit customers and railroads; and (4) any definition it adopts will conflict with the common

laws of some, if not all, of the 50 states and the District of Columbia and would therefore leave a regulatory chasm. If it nonetheless does, the Board must revise its proposed definition of "contract" and make that definition applicable prospectively only.

The most appropriate question, which is within the Board's jurisdiction and expertise, for it to consider is what qualifies as an adequate response to a formal request for common carrier rates and terms of service.

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