



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

phemmersbaugh@sidley.com
(202) 736-8538

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

FOUNDED 1866

August 2, 2007

ELECTRONIC FILING

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

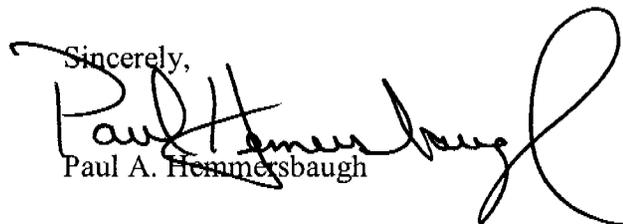
Re: STB Ex Parte No. 669, "Interpretation of the 'Term Contract' in 49 U.S.C. 10709

Dear Secretary Williams:

Enclosed, for filing in the above-referenced proceeding, is an electronic copy of the Reply Comments of CSX Transportation Inc. in the above-referenced proceeding. We will serve the parties on the service list with a copy of this filing.

Thank you for your assistance in this matter. If you have any questions regarding this filing, please contact the undersigned.

Sincerely,



Paul A. Hemmersbaugh

Counsel to CSX Transportation, Inc..

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE No. 669

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

REPLY COMMENTS OF CSX TRANSPORTATION, INC.

Peter J. Shutz
Paul R. Hitchcock
Mark S. Hoffman
Steven C. Armbrust
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

G. Paul Moates
Paul A. Hemmersbaugh
Sidley Austin, LLP
1501 K Street, N.W.
Washington, D.C. 20005

Counsel to CSX Transportation, Inc.

Dated August 2, 2007

I. INTRODUCTION AND SUMMARY

CSX Transportation, Inc. (“CSXT”) respectfully submits these Reply Comments concerning STB Ex Parte No. 669, *Interpretation of the Term “Contract” in 49 U.S.C. 10709*. As CSXT explained in its opening comments, it believes the Board should not adopt a new definition of the term “contract” for purposes of 49 U.S.C. § 10709. If the Board nonetheless does decide to adopt a new definition of the term “contract,” it should take care to avoid unintended consequences, and should specifically ensure that any such definition does not: drive rail carriers to increased use of public prices; discourage or interfere with existing private commercial relationships and agreements; or impede innovation in rail transportation markets.

CSXT believes the Board’s proposed definition would have significant unintended negative consequences – including the potential invalidation of a large number of rail transportation agreements the parties intended to be private commercial arrangements - with attendant disruption of commercial relationships. CSXT therefore urges the Board to ensure that any definition it might issue avoids interference with these kinds of existing mutually beneficial private rate arrangements, and suggests specific wording to accomplish that aim. Finally, any new rule the Board adopts should have prospective effect beginning on or after the date it issues a final rule.

To the extent that the Board’s concern is the potential for parties to include contract-like provisions (or other provisions the Board finds inappropriate) in public common carrier rates, CSXT suggests that a less sweeping approach is available. The Board could use its authority over common carrier rates and practices to determine, on a case-by-case basis, whether to allow

certain provisions in public tariffs.¹ To aid in that effort, and to allow parties an opportunity to conform their arrangements to the Board's view, the Board could issue guidance describing the types of provisions and requirements it generally views as impermissible in a public tariff. This would reduce the potential for unintended, negative consequences that are inherent in the proposed rule.

A. The Board Should Not Adopt its Proposed Definition of "Contract"

A substantial majority of commenters are in agreement that the Board should not adopt its proposed definition of the term "contract" for purposes 49 U.S.C. §10709. Several rail carriers and shippers strongly assert that it is unwise and inappropriate for the Board to adopt *any* specific definition of contract. *See, e.g.*, Comments of Ameren Energy Fuels and Services Company at 5-6 (Board lacks jurisdiction over questions related to contract existence, which must be determined by courts); Comments of Arkansas Electric Cooperative Corporation at 8 (urging termination of the proceeding without new rules and reaffirming that questions of contract existence are to be determined by courts); Comments of Norfolk Southern Railway Company at 4-8 (Board lacks statutory jurisdiction to define or interpret contracts, which are questions for the courts); Comments of Canadian Pacific Railway Company at 2-4 (to same effect); Opening Comments of Dairyland Power Cooperative at 1; Comments of Union Pacific Railroad Company at 2-6; *cf.* Opening Comments of Western Coal Traffic League at 13-18 (noting significant "jurisdictional issues" implicated by the Board's proposed rules regarding the existence, legality, and enforcement of contracts). Others, including CSXT, have further noted that the Board's proposed definition would interfere with private commercial arrangements and

¹ Consistent with the terminology CSXT used in its opening comments, these Reply Comments will refer to all common carrier rates and public pricing terms, mechanisms and documents over which the Board has jurisdiction as "public tariffs." *See* CSXT Open. Comments at 1, n.1.

the important policy preference for such private arrangements over regulated common carrier rates. *See, e.g.*, CSXT Comments at 5-8.

CSXT agrees with the thrust of the comments summarized above: The Board lacks authority to narrow the statutory definition of “contract.” Further, the Board’s proposed definition could have the unintended effects of invalidating existing private contracts; discouraging private, negotiated rate agreements; and increasing the number and frequency of regulated public tariffs.

The diverse concerns and suggested modifications submitted by commenters also illustrate the extraordinary difficulty of establishing a single bright-line definition of “contract” that is lawful, unambiguous, practicable and easily administered, and does not cause significant negative collateral consequences. More specifically, CSXT believes that if the Board were to adopt its proposed definition of a Section 10709 contract, it would generate significant litigation over the meaning and application of the definition in a variety of contexts and circumstances. Such litigation would consume substantial resources of the railroads, their customers and the Board. Moreover, it would also create a period of uncertainty during which parties would not know what rules and standards will ultimately govern their commercial relationships. Thus, the comments submitted by both carriers and shippers further demonstrate that it would not be wise for the Board to adopt a new regulatory definition of contract.

B. This Rulemaking is Not the Appropriate Proceeding to Issue New Rules That Would Invalidate Existing Private Pricing Agreements, And Force Railroads to Apply Public Tariffs.

The Board’s Notice of Proposed Rulemaking (“NPRM”) gave no indication that it was concerned that parties were using *private* pricing arrangements inappropriately, or that it intended to affect such private pricing arrangements. To the contrary, the rulemaking was initiated to address the opposite concern, that parties might mislabel certain pricing arrangements

and agreements as public (common carrier) tariffs. *See* NPRM at 3-6. Thus, the Board gave no notice that it intended to issue a rule that would affect existing private pricing arrangements that the parties treat as private contracts outside the Board’s jurisdiction. If the Board determines that it wishes to address the separate and distinct question of whether some private pricing arrangements should be invalidated, thus forcing the carriers to use public tariffs, it should initiate a new rulemaking with a notice that describes its concerns and a proposal to address those concerns. What it should not do is issue a rule in this proceeding that, as an unintended and unannounced byproduct, negatively affects private transportation agreements and disrupts private commercial relationships and arrangements.

C. The Board Should Consider The Alternative Approach of Issuing Rules or Guidance More Clearly Defining What Practices It Considers Appropriate or Inappropriate Within a Public Tariff.

CSXT continues to favor the use of private transportation contracts in large segments of its business, but there are nonetheless markets and situations in which contracts are not the preferred form of pricing. CSXT takes no position on the specific pricing mechanisms that have raised the Board’s concerns. CSXT suggests that instead of attempting to re-define what is a “contract,” a more straightforward approach might be for the Board to issue guidance concerning the types of provisions or requirements the Board generally would consider impermissible in a public tariff. Such guidance could not take the place of individualized case-by-case review of the specific facts and circumstances pertaining to a given pricing mechanism. However, such prospective guidance could minimize disputes and situations requiring a ruling from the Board by allowing carriers an opportunity to fashion their future public tariffs to avoid the disfavored provisions.

If, for example, the Board determines that it is generally not appropriate for a carrier to include within a common carrier tariff a provision that imposes a binding obligation on the

customer to provide a certain minimum volume of freight, it could issue guidance advising that the Board will generally view such provisions as prohibited in public tariffs.²

Below, CSXT discusses the foregoing points in more detail, and responds to some of the comments filed by others in the opening round of comments.

II. THE PROPOSED DEFINITION OF CONTRACT HAS SERIOUS DEFECTS THAT MUST BE REMEDIED PRIOR TO THE ISSUANCE OF A FINAL RULE.

A. The Proposed Rule Would Impermissibly Broaden the Board's Rate Regulatory Jurisdiction.

The Board's proposed bright-line definition would narrow the statutory definition of "contract," and thereby broaden the scope of the Board's jurisdiction, in contravention of Section 10709. The statute states that rail carriers may "enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions." 49 U.S.C. § 10709. The Board's proposed definition would place additional limitations, conditions, and requirements on contracts, thereby narrowing the scope of the statutory term "contract," and concomitantly expanding the scope of the Board's jurisdiction over "non-contract" (i.e. public tariff) rates and arrangements. *See id.* § 10709(c). While an agency is allowed, in some circumstances, to interpret the scope of jurisdiction conferred on it by Congress, it may not broaden that jurisdiction to exceed express statutory limits.

Moreover, the proposed definition would necessarily involve the Board in making determinations regarding the existence and validity of contracts under the laws of at least 50 different jurisdictions, a task that the ICC and courts have long held is properly reserved for the

² It should be remembered that for decades carriers have offered minimum annual volume tariffs that allow a customer to nominate a volume and ship at a reduced rate based on that volume. Only if the nominated volume is not reached is there an obligation to pay more, and then only at the higher rate. Under such arrangements, no minimum volume is actually required. *See CSXT Open. Comments at 18, n. 15.* Generally, if no freight is shipped at all, no additional amounts are due. This is different from a legally binding commitment to tender a certain volume with stated consequences (damages) for any shortfall.

courts. *See, e.g., Burlington Northern RR v. I.C.C.*, 679 F.2d 934, 937-40 (D.C. Cir. 1982); *Rates on Iron Ore, Randville to Escanaba via Iron Mountain*, 367 I.C.C. 506, 510 (1983) (“to entertain and decide questions concerning the existence and validity of contracts . . . is a purely judicial task which is not to be performed by the Commission.”). Contract law generally provides that the primary determinant of whether a contract exists in a particular instance is *the parties’ intent*, not whether the arrangement is unilateral or bilateral or whether it involves a specific period of time or advance commitments from both parties. *See, e.g. Kansas City Power & Light Company v. Burlington Northern Railroad*, 749 F.2d 780, 785 (10th Cir. 1984)³. Where there is a question about whether the parties have entered a contract, the Board and its predecessor have typically “examined the record on a case-by-case basis to determine objectively manifested intent.” *See, e.g., Aggregate Volume Rate on Coal, Acco, UT to Moapa, NV*, 364 I.C.C. 678, 689 (1981). Even if the Board had authority to determine the existence or validity of a contract – which it does not – a single rigid bright-line rule could not adequately address the myriad different pricing arrangements entered in a variety of different circumstances under the laws of 50 different States.

In sum, the Board lacks the authority, expertise and resources to declare what pricing documents or arrangements are and are not contracts. To attempt to do so would be contrary to

³ While this is an accurate description of the majority rule, it cannot hope to encapsulate the diverse laws of contract and related equitable doctrines among the 50 States. As discussed in CSXT’s opening comments, if the Board were to attempt to rule on the existence or validity of contracts under applicable law, it would be required to analyze and apply at least 51 different systems of contract law, a very burdensome undertaking. As CSXT and other commenters demonstrated, the terms the Board uses in its proposed definition (such as unilateral versus bilateral) are ambiguous and treated differently in different jurisdictions. *See* CSXT Open Comments at 10-13; NGFA Open. Comments at 7-9; UP Open. Comments at 12-13. Thus, unless it were to create its own rules and “law” of contract (which it lacks authority to do), the Board would risk issuing anomalous rulings in which a pricing arrangement was deemed a “contract” in one case and an essentially identical agreement was deemed a public tariff in another case.

both the letter and the spirit of the Staggers Act. Accordingly, CSXT suggests that the Board withdraw its proposed rule and terminate this proceeding.

B. If the Board Decides to Adopt a New Definition, it Should Revise That Definition to Avoid Unnecessary Limitations on Private Pricing Arrangements.

If the Board nonetheless decides to promulgate a new definition of contract, CSXT urges it to take care that the new definition does not create new problems and disruptions for rail carriers and their customers. As CSXT has explained, the Board's proposed definition could invalidate a large number of commercially useful private transportation arrangements, potentially including some of CSXT's Private Price Quotations ("PPQs"). *See* CSXT Open. Comments at 5-10. In attempting to address one perceived problem, the proposed rule would unintentionally create other problems that would discourage private contracts and agreements, stifle innovation, and disrupt existing commercial relationships and practices to the disadvantage of shippers and carriers. *See* CSXT Open. Comments at 5-9, 13-16; CP Open. Comments at 4-7; NS Open. Comments at 7-8.

CSXT proposed two alternative modifications to the Board's proposed definition of "contract" that could achieve the Board's stated objectives in this rulemaking while avoiding the unintended consequence of discouraging private contracts like PPQs. *See* CSXT Open Comments at 15-17. CSXT suggested that the Board could modify its proposed definition to address its concerns while avoiding unintended consequences by adding the following language to its proposed new section 49 CFR § 1301.(c):

Notwithstanding paragraph (c)(1) of this section, the term contract in 49 U.S.C. § 10709 shall also include a confidential non-public agreement or pricing arrangement in which a carrier offers or agrees to provide specific rail transportation service to a specific customer for a specific rate.

CSXT Open Comments at 15-16. Alternatively, CSXT proposed that that Board could address its concerns more simply by substituting for the proposed definition of “contract” the following definition:

The term *contract* in 49 U.S.C. § 10709 shall mean any confidential non-public agreement or pricing arrangement in which a carrier offers or agrees to provide specific rail transportation service to one specific customer for a specific rate.

Id. at 16-17. While CSXT continues to believe that the more sound and preferable course would be for the Board not to issue any new definition of contract, the two modifications CSXT has proposed would help to minimize the unintended and disruptive collateral consequence of deeming private rail transportation arrangements (which the parties believe and intend to be contracts) to be something other than contracts for purposes of Section 10709.

III. ANY DECISION THE BOARD MAY TAKE IN THIS PROCEEDING SHOULD BE INFORMED BY, AND CONSISTENT WITH, THE LONGSTANDING LAW OF WHAT CONSTITUTES A PUBLIC TARIFF.

Whatever approach the Board ultimately favors in this proceeding, CSXT urges the Board to give strong consideration to fundamental principles that have long defined what constitutes a common carrier holding out to the public to provide service (i.e. a “public tariff”). Those principles should assist the Board in examining the reach of its jurisdiction, and thus aid in determining how it might best apply the statutory term “contract.”⁴

⁴ At least one commenter suggested that, if the Board adopts a definition of “contract” it would create a regulatory gap in instances in which the Board found the arrangement at issue was a “contract” and a court subsequently held it was not a contract. See NS Open. Comments at 5-7. A similar argument might be applied to a bright-line definition of a public tariff – if the Board found a pricing mechanism was not a public tariff and a court subsequently found the same mechanism was not a contract, the parties might have no enforceable pricing arrangement, and might be forced to fall back upon a common carrier rate that neither party had intended would apply to the movement(s) in question. However, the potential for such a gap already exists, and would continue to exist if the Board maintained the status quo. If a party brings a rate

There are three primary characteristics that have defined and identified public tariffs for decades, long ante-dating the Staggers Act's authorization of private contracts. First, the rates and terms offered in public tariffs are available to any and all shippers who wish to use them. Second, common carrier rates are publicly available and not private or confidential. Third, the rates and terms of public tariffs are not fixed for any period of time – the carrier may change the terms of public tariffs at any time (provided it gives the minimum advance notice required by the statute). As discussed below, contracts, including non-public-tariff pricing arrangements, generally do not share these three characteristics.

Perhaps the most important defining characteristic of a common carrier rate is that it is available to all qualified shippers. *See* 49 U.S.C. § 11101(b). As the ICC explained, public tariff rates must be “available to all shippers.” *See National Grain and Feed Ass’n v. Burlington Northern RR*, 8 I.C.C. 2d 645, 651 (1992), *overruled on other grounds*, 5 F.3d 306 (8th Cir. 1993). Contracts, in contrast, are arrangements that are exclusively between the parties (generally a carrier (or carriers) and one or more purchasers of rail transportation services), and their terms are not available to non-parties. This characteristic of common carrier public tariffs is consistent with the general definition of common carriage as transportation “service available to the general public.” *See Contracts for the Transportation of Property*, Ex Parte No. MC-198,

reasonableness challenges to a pricing mechanism today and the Board rules it lacks jurisdiction because the mechanism is a contract, there is always the possibility that a court will subsequently find it is not a contract under applicable law. Presumably, in that event, a party could return to the Board, advise it that a court had held the arrangement was not a contract (the Court's finding would be determinative, and extinguish the Board's prior finding), and request relief from the Board. Regardless, the potential regulatory gap identified by NS is inherent in any approach in which two different bodies have authority to rule independently on the same question (e.g. whether a pricing document or arrangement is a contract). The adoption of a standard or decision rule to guide that determination does not *create* the possibility for conflicting conclusions, it simply does not eliminate it.

1991 WL 62174 (Feb. 20, 1991). A private pricing agreement or arrangement generally is not available to all shippers and therefore is not a public tariff.

A closely related characteristic of a public tariff is that its terms are published, i.e. they are publicly available to any shipper or other purchaser of rail services. *See* 49 U.S.C. § 11101(b), (e). *Conrail v. Canada Malting Co.*, 2000 U.S. Dist LEXIS 1273 at *19 (Feb. 7, 2000). CSXT's public tariffs are available for review on its internet web site at any time. By law, all CSXT public tariffs, including the few that are not available on its web site, are available upon request. 49 U.S.C. Section 11101(b). Contracts, in contrast, are nearly always private. Indeed, rail carriers have a statutory obligation not to disclose the terms and conditions of rail transportation contracts to non-parties other than the Board.⁵

Finally, common carrier rates are always subject to change or termination in the sole discretion of the rail carrier. They remain in force only until the carrier decides to change them. *See, e.g., Zoneskip, Inc. v. United Parcel Serv., Inc.*, 8 I.C.C.2d 645, 651 (1992) (“[C]ommon carrier shippers are not entitled to any particular level of service beyond that held out in the tariff, and . . . their rates, regardless of the level at which they are set, may be changed at any time on statutory notice.”); 49 U.S.C. § 11101(c). Contracts, in distinction, generally are in force for a specific period of time, terminable on specific notice by one or either party, or terminable on commercially reasonable notice.

It is important to note that, while common carrier rates generally should exhibit each of the three key characteristics described above, it is not essential that a contract lack all of those

⁵ *See* 49 U.S.C. § 11904 (“Unlawful disclosure of information”). The statute allows a rail carrier to disclose such information only in three circumstances: (i) the shipper consents to disclosure; (ii) a court or government agency orders or request that the information be disclosed; or (iii) another rail carrier or its agent needs the information to adjust mutual traffic accounts. *Id.* at 11904(a)-(c).

characteristics. Courts must determine, under applicable state law, whether a particular non-tariff pricing document or arrangement is a “contract.” Thus, for example, CSXT’s Private Price Quotations (“PPQs”) would clearly not be common carrier rates because they are not public and they are not available to all shippers. To the contrary, they are private and confidential and generally available only to a single shipper. Therefore, the PPQs would be outside the Board’s rate reasonableness jurisdiction. The extent to which those PPQs would be enforceable contracts under governing state law would be determined only by a state or federal court.⁶

IV. CSXT’S PRIVATE PRICE QUOTATIONS AND SIMILAR PRIVATE PRICING ARRANGEMENTS ARE OUTSIDE THE BOARD’S JURISDICTION.

A. PPQs Are Not Public Tariffs and the Board Should Take Care to Ensure It Does Not Unintentionally Cause Confusion Regarding Their Legal Status.

As CSXT explained in its opening comments, the PPQs it issues to its customers are not public tariffs and therefore are outside the Board’s jurisdiction. *See* CSXT Open. Comments at 2-3, 5-9, 16-18. Both CSXT and, to its knowledge, its customers understand and intend that PPQs and similar private pricing arrangements are not public tariffs and therefore are outside the Board’s jurisdiction. A new rule – like that proposed by the Board – that may have the effect of rendering such arrangements void, would be contrary to the intent and expectations of CSXT and its customers, who intended these arrangements to be private agreements outside the Board’s jurisdiction and have relied upon that understanding. Such an involuntary deviation from the parties’ expectations would unnecessarily limit the ability of CSXT and its customers to enter or renew mutually beneficial private rail transportation arrangements; could disadvantage shippers

⁶ It is possible that in some instances applicable state law would hold that CSXT’s PPQs are simply offers to form a contract unless and until a shipper “accepts” the offer by tendering freight for transportation in accordance with the terms of the PPQ. This would not mean that a PPQ that a shipper has not yet used is subject to the Board’s jurisdiction, on the theory that it is not a contract until it is accepted. Rather, it would be simply a private offer to enter a transportation contract, which is outside the Board’s jurisdiction.

who are parties to existing private pricing arrangements⁷ and could stifle innovation in rail transportation service arrangements . *See id.* at 5-9.

PPQs have none of the three defining characteristics of a public tariff. First, they are not available to all shippers, but rather are offered only to a single specific shipper. Second, PPQs are emphatically neither published nor publicly available – they are private, marked “Confidential,” and the terms of each are intended to be known to only CSXT and the specific customer to whom it applies. Third, CSXT generally makes its PPQs available for a fixed period of time (with a notice period for termination) and they are generally not changed during that time. Public tariffs, on the other hand, may be changed at any time with 20 days notice. In sum, PPQs and similar private pricing agreements are precisely the sort of market-based, innovative arrangements that the Staggers Act was designed to encourage and promote, and these types of arrangements between CSXT and its customers are common and woven into the fabric of CSXT’s diverse, customer-based service offerings. Therefore, if the Board issues any rule or guidance in this rulemaking, it should make clear that such private pricing arrangements remain outside the Board’s jurisdiction over public tariffs.

B. Arguments that Private Pricing Arrangements Like PPQs Should be Regulated as Public Tariffs are Misguided and Inconsistent with the Act and its Policies.

Some shipper comments suggest that the Board should only deem a rail transportation pricing document or arrangement a Section 10709 contract if it somehow determines that the shipper had sufficient opportunity to engage in “meaningful” and “fair” negotiations. *See, e.g.*, Comments of Edison Electric Institute at 5-7; Comments of NGFA at 10-15. As numerous

⁷ For example, a customer that has entered into a sales contract on the assumption that its transportation rate would be as set out in its PPQ could be seriously disadvantaged if the PPQ were invalidated, leaving the (higher) public tariff as the applicable price.

commenters in this proceeding have established, the law is clear that the Board lacks jurisdiction to determine the existence or validity of a contract in the first instance. What EEI and NGFA ask the Board to do, however, is to venture much further outside its jurisdiction to conduct *post-hoc* inquiries to determine – under some unspecified and unknown standard – whether contracts entered into by parties were the product of a sufficient amount of negotiation, and whether they are “fair.”⁸ Even putting aside the considerable difficulty and burden of conducting such fact-specific inquiries with respect to myriad agreements and pricing arrangements arising under the laws of 50 states and the District of Columbia, such activity is far outside the Board’s jurisdiction and would add yet another layer of complexity and uncertainty to the question of whether a private arrangement is subject to the Board’s jurisdiction.

Moreover, any suggestion that private pricing arrangements such as PPQs are entered into only because shippers are unable to negotiate or lack other options is simply incorrect. Rail carriers and their customers operate in a fluid and dynamic competitive environment. Shippers’ commercial opportunities in a dynamic marketplace are always changing and evolving, and PPQs provide an option for a shipper to take advantage of a new (or renewed) opportunity expeditiously and without long negotiations. CSXT offers PPQs as a convenient, easily administered, lower-cost approach for certain shippers, but it does not insist that they use PPQs instead of more comprehensive, formal contracts. To the contrary, if it better suits the needs and interests of the customer, CSXT is always willing to negotiate to enter a different type of contractual arrangement or to move its freight under an applicable public tariff. ,

⁸ Moreover, the rules EEI would have the Board apply in determining whether a contract exists are contrary to general common law contract principles. Without citing any authority, EEI seeks to turn contract law on its head by asserting that it is “not the party’s 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 arms length.” EEI Open. Comments at 7.

The fact that any specific PPQ may not have been the product of lengthy, individualized negotiations does not mean it is the product of unequal bargaining power or a “take-it-or-leave-it” approach. CSXT has extensive commercial relationships, covering many different movements, and a number of years, with most of its customers. Even a contract involving lengthy, comprehensive negotiations, viewed in isolation, might appear to be more advantageous to one party or the other. To the extent any meaningful evaluation would ever be possible, the overall bargaining power and negotiating opportunities in a specific carrier-shipper relationship could only be evaluated in the context of all transportation agreements and arrangements between the parties over the course of a significant period of time, with consideration given to changing economic and market conditions. Therefore, attempting to analyze a party’s “opportunity to negotiate” in the context of a single private pricing arrangement would be both outside the Board’s jurisdiction, and a meaningless exercise.

In any event, under the contract law of most jurisdictions, lack of negotiation alone is not a sufficient basis to find the parties did not form a contract. Indeed, in a variety of commercial contexts, one party accepts another’s offer without any discussion or changes. *See, e.g.,* Farnsworth on Contracts § 4.26 at 533-35 (2d Ed. 1998). Thus, even assuming, *arguendo*, that some PPQs involve limited negotiation, that limited negotiation would not be a reason to treat them as “not contracts” for purposes of determining the Board’s jurisdiction.

Nor are PPQs properly considered “contracts of adhesion,” in which one party has no choice but to accept the terms exactly as offered.⁹ Many shippers have competitive transportation options (including via truck, barge, and/or air). And, even a solely-served shipper

⁹ Even contracts of adhesion are generally enforceable unless their terms are unconscionable. *See* Farnsworth § 4.27 at 546-47.

always has the option of requesting a public tariff rate. If that shipper believes such a rate is not reasonable, it has remedies at the Board. Thus, it is simply not the case that shippers are effectively forced to enter PPQ agreements because they lack other options.

At bottom, requests that the Board analyze and police private agreements, or limit the existing statutory definition of “contract”, all founder as prohibited by law and impracticable. Section 10709 is clear -- the Board does not have jurisdiction to regulate contracts, and it certainly provides no exception for the Board to regulate where it determines that a contract is not “fair” or was not the product of adequate negotiations. The Board has neither the authority, nor the expertise, nor the resources to conduct such inquiries, which Congress has intentionally reserved for the courts.

V. ANY NEW DEFINITION THE BOARD ADOPTS SHOULD HAVE ONLY PROSPECTIVE EFFECT.

As CSXT urged in its opening comments, in no event should the Board attempt to give retroactive effect to any new rule or definition it might promulgate in this proceeding. *See* CSXT Open. Comments at 18-20. Both carriers and shippers have relied on the Board’s existing standards and practices, developed over the course of the last 30 years, in structuring their commercial arrangements and relationships. *Id.* With respect to PPQs and similar private pricing arrangements, CSXT and its shippers (and presumably other rail carriers and shippers) have entered such arrangements in reliance on the understanding that that they were private, lawful arrangements that do not constitute a common carrier holding out to provide service. Given this substantial reliance by the parties on their reasonable understanding of the law based upon three decades of practice and experience, it would be unfair and commercially disruptive for the Board to issue a rule that purports to retroactively invalidate these private confidential agreements as not a “contract” under Section 10709. Therefore, any new rule or definition

adopted in this proceeding must be prospective only, with an effective date on or after the issuance of the final rule.¹⁰

Applying any such new rule retroactively would not only be unfair and inappropriate, it would be unlawful. A federal agency lacks power to issue retroactive rules, unless Congress expressly grants it that power. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988); *cf. id.* at 476 (Scalia, J.) (text of APA compels conclusion that “rules have legal consequences only for the future.”). This prohibition on retroactive rules applies equally to “interpretive” rules. *See Health Insurance Ass’n of America v. Shalala*, 23 F.3d 412, 422-24 (D.C. Cir. 1994); *Beazer East, Inc. v. U.S. EPA*, 963 F.2d 603,609 (3d Cir. 1992) (“The [APA] does expressly prohibit an agency from retroactively imposing an interpretive rule upon a regulated party.”) The Board’s proposal to make its new rule effective as of the date of its proposal, rather than some even earlier date, does not change the analysis – the final rule would apply retroactively to conduct that occurred prior to the issuance of that rule. Thus, at a minimum, any new rule (including any new definition of “contract” for purposes of Section 10709) must be prospective from the date the final rule is issued.¹¹

¹⁰ CSXT renews its request that the Board postpone the effective date of any new contract or tariff definition to 120 days after the issuance of a final rule, to allow carriers and shippers an opportunity to make adjustments and changes necessary for an orderly transition to new rules and standards. *See CSXT Open. Comments* at 19. At a minimum, however, CSXT urges the Board to make any such new rule effective as of the date of issuance of the final rule. Any earlier effective date (e.g. the date the NPRM was published in the Federal Register) would be inappropriate, disruptive, and unlawful.

¹¹ CSXT understands that PPQs with an original issue date prior to the Federal Register publication date would not fall into the retroactivity period contemplated by the NPRM, because they were “entered into prior to” the Federal Register publication date. *See Ex Parte 659, Interpretation of the Term “Contract” in 49 U.S.C. 10709*, Decision at 6 (served March 29, 2007). However, CSXT believes that the Board’s definition, if adopted without modification, could render PPQs issued after April 4, 2007 (the Federal Register publication date) invalid. Nonetheless, because PPQs are highly useful pricing tools, with broad acceptance from our customers – and because the Board’s goals in this proceeding would not be advanced by

CSXT believes that its position regarding prospective application of any rule affecting private pricing arrangements is entirely consistent with the Board's policy objectives. The Board stated that it intended to make its proposed rule retroactive to the date of its proposal in order to avoid providing an incentive for parties to rush to establish hybrid "common carrier" agreements during the pendency of the rulemaking. The Board was not concerned – and need not be concerned – that parties might take the opposite course, i.e., rushing to convert public tariffs into private transportation contracts during the rulemaking period. Thus, the "danger" that the Board sought to address (parties rushing to issue public tariffs) does not exist with respect to the proposed rule's potential to invalidate certain private contracts.

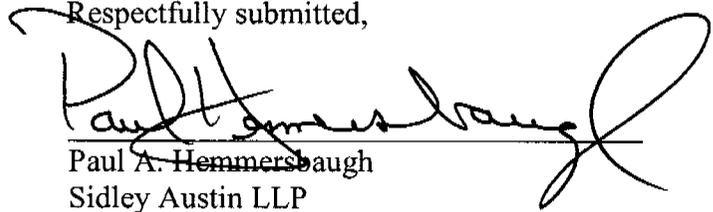
CONCLUSION

The Board should not attempt to define contracts for purposes of Section 10709. It could address its concerns by issuing guidance more clearly defining the types of provisions and requirements it finds objectionable in a public tariff. If the Board nonetheless decides to issue a new rule defining "contracts," it should modify the proposed definition to make clear that private pricing arrangements such as CSXT's PPQs are Section 10709 contracts. If the Board is inclined to consider a new rule that would deem such private pricing arrangements to be public tariffs, or simply invalid, it should initiate a separate rulemaking proceeding to address that issue, which

invalidating PPQs – CSXT has continued to offer individualized rate arrangements under PPQs over the past several months, and intends to continue to do so in the expectation that the Board's final rule action will not invalidate those arrangements. As CSXT has explained in its comments, we do not believe the Board's proposal was intended to invalidate such arrangements, and we are optimistic that any final rule the Board issues in this proceeding will not have that unintended consequence. If, however, the Board does reach a conclusion that invalidates PPQs issued after April 4, 2007, CSXT intends to immediately advise customers of this outcome, and will promptly begin billing based on the otherwise applicable common carrier rates.

was not discussed in the NPRM for this proceeding. Finally, any new rule the Board adopts must be prospective, and not retroactive.

Respectfully submitted,



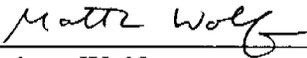
Peter J. Shultz
Paul R. Hitchcock
Mark S. Hoffman
Steven C. Armbrust
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

Paul A. Hemmersbaugh
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
202/736-8000 (tele.)
202/736-8711 (fax)

Counsel to CSX Transportation, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2007, I caused a copy of the foregoing Reply Comments of CSX Transportation, Inc. to be served on all parties of record in this proceeding by first class mail, postage prepaid or more expeditious method of delivery.



Matthew Wolfe