

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 676

COMMENTS OF BNSF RAILWAY COMPANY

BNSF Railway Company ("BNSF") submits these comments on the Surface Transportation Board's (hereinafter "STB" or "Board") proposal to impose procedural requirements on railroads before they can enter into rail transportation contracts. The Board's proposal is contained in a Notice served March 12, 2008. These comments supplement the comments being filed by the Association of American Railroads ("AAR") on the Board's March 12, 2008 proposal, in which BNSF has joined. As explained further below and in the AAR's comments, BNSF does not believe that the Board's proposal is warranted or that it would be lawful.

I. Background

In March 2007, the Board proposed to establish a rule that would define the term "contract" used in 49 U.S.C. §10709 as "any bilateral agreement between a carrier and a shipper 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." This proposed rule was not a response to any commercial dislocations in rail transportation markets or widespread complaints from the shipper community. Instead, the proposal arose out of a single rate reasonableness case that involved a pricing authority that the Board concluded had certain characteristics of a rail transportation contract. See *Kansas City Power & Light Company v*

Union Pacific Railroad Company, S1B Docket No 42095 (S1B served March 29, 2007). When the Board raised a question in that case as to the character of the pricing authority, both parties agreed that it was a common carrier pricing authority subject to the Board's jurisdiction

In response to the Board's March 29, 2007 notice of proposed rulemaking to define the term "contract," most commenting parties opposed the Board's proposed rule. There was a high level of agreement among shippers and railroads alike that the Board's proposal to inject itself into commercial dealings between railroads and shippers was unwise and would produce unintended consequences. There was also a general agreement among commenting parties that the Board did not have the authority to define what constitutes a contract. In its March 12, 2008 Notice, the Board acknowledged the widespread opposition to its proposal to define the term "contract," and it discontinued the proceeding in which that proposal was advanced.

However, the Board also noted in its March 12, 2008 Notice that it remains concerned about the lack of a clear distinction between transportation contracts that are not subject to the Board's jurisdiction and common carriage pricing authorities. As an alternative to its prior proposal to define the term "contract," the Board therefore proposed to establish procedural requirements that a railroad must follow when it seeks to enter into a rail transportation contract. Specifically, the Board proposes that a railroad be required (1) to advise the shipper that it intends to enter into a contract that is not subject to the Board's jurisdiction; (2) to advise the shipper that the shipper has a statutory right to obtain a common carrier rate quote; and (3) to give the shipper an opportunity to sign a written consent form stating its willingness to forego regulatory protections.

II. There is No Need or Justification for the Proposed Procedural Requirements

As BNSF pointed out in response to the Board's proposal to define the term "contract," the Board is attempting to deal with a problem that does not exist. Disputes about the nature of particular commercial arrangements are rare. In most cases, railroads and shippers have a common understanding as to whether or not their arrangements are contractual or subject to the Board's jurisdiction. Most rail shippers are sophisticated buyers of transportation service and they understand that for non-exempt traffic, Board regulatory protections will be available if they elect the option of common carriage. There is no evidence that the lack of a clear dividing line between contracts and common carrier arrangements has had any significant effect on the commercial relationships between railroads and shippers.

The Board's proposal to inject itself into the commercial process by which contracts are established will therefore only introduce potential friction into commercial arrangements that have largely been free of dispute. A requirement that the parties must introduce legal complexities into their commercial negotiations that are not otherwise in dispute (and are unlikely to ever come into play) would unnecessarily raise new issues in commercial negotiations that could interfere with the parties' primary purpose--crafting mutually advantageous commercial terms to cover future business opportunities. Congress intended to allow rail transportation markets to work with a minimum of regulatory interference. The Board should leave it to the parties in individual negotiations to decide whether they wish to address legal issues relating to the nature of the underlying commercial relationship. There is no reason for the Board to inject itself into those negotiations and potentially foster an adversarial relationship that could undermine the parties' commercial dealings.

A wide range of commercial arrangements between railroads and shippers exists today due to the range of individual circumstances that the parties address in their commercial

negotiations. It is important that railroads and shippers continue to have maximum flexibility in negotiating arrangements that meet their needs in particular circumstances. It would be inappropriate for the Board to inhibit the flexibility that parties now have to negotiate acceptable commercial arrangements by imposing any artificial requirements on the negotiation process. The Board's proposed rule could discourage creative commercial arrangements and therefore could have the same kind of unintended consequences that led the Board to abandon its proposed rule defining the term "contract."

III. The Board Does Not Have the Authority To Impose the Proposed Requirements

The case law is clear that the Board has no authority "to entertain and decide questions concerning the existence and validity of contracts [under] the common law of contracts."

Cleveland Cliffs Iron Co v I.C.C., 664 F.2d 568, 591 (6th Cir. 1981) See also *Burlington N R R Co v I.C.C.*, 679 F.2d 934, 937 (D.C. Cir. 1982). Therefore, BNSF assumes that the Board does not intend its proposed rule to establish preconditions to the formation of a valid or enforceable contract. The Board clearly does not have such authority. Whether a valid contract exists is a question exclusively for the courts to decide under state law.

Rather, BNSF assumes that the intent of the Board is to impose procedural requirements on railroads to take certain steps before entering into contracts. However, the Board also lacks the authority to impose such requirements. As the AAR explains in its comments, Congress in the Staggers Act and ICCTA sought to encourage the use of rail transportation contracts to the maximum extent possible. The Board's proposal would erect procedural obstacles for parties seeking to enter into contracts and would therefore conflict with Congress' clearly stated intent to promote, not discourage, contracts. Indeed, the thrust of the proposal is to discourage contracts by pointedly reminding shippers that they would be giving up all possible recourse to

Board jurisdiction if they enter into a contract. There is no authority in the statute that would allow the Board to impose such procedural requirements that could discourage parties from entering into contracts.

IV. The Board Could Establish a Presumption That Certain Arrangements Are Contracts Outside the Board's Jurisdiction

The Board has acknowledged that the question of whether a particular commercial arrangement constitutes a contract or common carriage arrangement turns on the intent of the parties. *See, e.g., E I Dupont de Nemours v CSX Transportation, Inc.*, Docket No. 42099 (served December 20, 2007). There are some circumstances where the parties' intent is clear. For example, if a railroad and a shipper followed the procedures outlined by the Board in its March 12, 2008 Notice in a particular negotiation, it would be clear that the parties intended to enter into a contract that was outside the Board's jurisdiction.

The Board considers evidence in individual cases to determine whether there is a "reasonable possibility" that a particular arrangement is a contract.¹ The Board could therefore establish a presumption that there is a "reasonable possibility" that a particular arrangement is a contract if (1) the contract refers specifically to section 10709 of the statute, (2) the railroad expressly advises the shipper that it intends to enter into a contract that is not subject to the Board's jurisdiction and the shipper does not object; or (3) the shipper explicitly acknowledges that it is entering into a contract that is not subject to Board jurisdiction. Such a presumption would not preclude other evidence that a particular arrangement is or is not a contract, but it would help minimize disputes concerning the Board's jurisdiction over contracts.

¹ *See, e.g., Toledo Edison Co v Norfolk & Western Ry. Co.*, 367 I.C.C. 869, 871-73 (1983)

V. Conclusion

For the reasons set forth above, BNSF urges the Board to abandon its proposal to impose procedural requirements on railroads seeking to enter into rail transportation contracts. While BNSF does not believe that any action is necessary in this area, BNSF would not oppose the Board's creation of a presumption that certain conduct by railroads and shippers would be evidence of an intent to establish a contract that is outside the Board's jurisdiction. However, the Board should make it clear that such a presumption would not preclude other evidence of the parties' intent.

Respectfully submitted,

 (RM)

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