

BEFORE THE
SURFACE TRANSPORTATION BOARD

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EX PARTE NO. 676

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

COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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Dated and Filed: May 12, 2008

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I. Introduction

Union Pacific Railroad Company ("UP") respectfully submits these comments in response to the Board's decision served March 12, 2008, in this proceeding ("Notice"). UP joins in and supports the Comments of the Association of American Railroads ("AAR"). These separate comments discuss UP's contract practices.

In its Notice, the Board expresses concern that "blurring between common carriage and contract rates" and a "lack of any clear demarcation" between them could cause confusion among shippers. (*Notice* at 4.) These concerns are unfounded. UP has measures in place to ensure that its common carriage rates and contract rates are plainly distinguishable, and UP is unaware of a single instance in which one of its customers has complained of mistaking a contract for a common carriage rate.

As explained below, UP's contracts, including its signatureless contracts, contain prominent language and headings indicating that they are contracts, subject to 49 U.S.C. §10709.¹ And, unlike common carriage agreements, UP's contracts require affirmative customer ratification before taking effect

Contracts offer a range of advantages over common carriage rates, such as pricing commitments and service guarantees. Not surprisingly, UP's customers seek to take advantage of these benefits and seldom show a preference for common carriage rates over contracts. But the Board's proposed disclosure requirement would discourage shippers from entering into contracts. This would serve neither UP nor shipper interests, as fewer shippers would use contracts and take advantage of the benefits that they offer.

II. Overview and History of UP's Signatureless Contracts

UP first made widespread use of rail transportation contracts following passage of the Staggers Rail Act of 1980. In early 1996, shortly after enactment of the Interstate Commerce Commission Termination Act, UP launched a new contract vehicle, known as a "signatureless contract." Derived from the widely-used exempt quotations that UP had previously used for movement of exempt commodities, signatureless contracts represent the product of bilateral negotiations between UP and its customers, and contain prominent language indicating that they are contracts.

¹ UP's comments pertain only to contracts for movements of regulated traffic. Exempt traffic is not governed by 49 U.S.C. §10709.

Unlike pre-1996 contracts, which required customers' signatures, signatureless contracts allow customers to assent to contract terms and conditions by tendering traffic under the terms of the contract, which they do by inserting the contract identification number in waybills or other appropriate shipping papers. Signatureless contracts are most commonly used where a customer desires special (i.e., discounted) rates or service terms, which deviate from UP's existing common carriage rates. In other words, UP does not use signatureless contracts to avoid establishing common carriage rates. Rather, UP normally uses signatureless contracts where common carriage rates already exist. UP has used signatureless contracts for over 12 years and has entered into more than 19,000 of them. They are widely accepted by UP customers and UP is not aware of a single complaint from its customers regarding their use.²

III. All UP Contracts Clearly Disclose that They are Contracts

All Union Pacific contracts, including signatureless contracts, are clearly identified as contracts and, as a result, no disclosure requirement is necessary. UP takes a number of measures to ensure that its customers can easily distinguish between contracts and common carriage rates. All of UP's contracts contain a prominent header reading, "Confidential Rail Transportation Contract Pursuant to 49 U.S.C. Section 10709." Furthermore, UP's contracts contain

² Of note, UP's signatureless contract program was originally unavailable to shippers of hazardous materials. UP later expanded their use to include hazardous materials shippers who were required to first sign a special form, covering liability issues related to their traffic. These shippers then signed up for the program in large numbers, which they were under no compulsion to do. Obviously, they understood that signatureless contracts provided significant benefits to them.

language stating, "This Agreement is made pursuant to 49 U.S.C. 10709 and shall become binding on the parties upon acceptance by the Customer named above " Attached as *Exhibit 1* to these comments is a copy of the basic contract form UP uses for signatureless contracts, and the Board can see for itself that the document is clearly identified as a Section 10709 contract. Both the courts and the Board have recognized that such language clearly identifies these transportation agreements as contracts, and that as a result they are not subject to the Board's jurisdiction.³

Moreover, the fact that UP has made more than 19,000 signatureless contracts over the past 12 years, and no customer has complained of mistaking a contract for a common carriage rate, further indicates that UP is properly notifying its shippers when a pricing document is intended to be a contract. Further, given the widespread use of contracts in the rail industry during the past quarter century, both small and large rail shippers are familiar with the distinction between contracts and common carriage rates ("tariffs") and do not require an elaborate disclosure statement to advise them of their differences. While UP does not object to the presumptions proposed by AAR, there is no need for a detailed disclosure statement informing shippers of their rights to seek common carriage rates, much less the sort of statement envisioned by the Board, which appears designed to dissuade shippers from entering into contracts.

³ *Glenn Hunter & Assocs., Inc. v. Union Pacific R.R. Co.*, 135 Fed Appx 849, 854 (6th Cir. June 17, 2005) (unpublished opinion) (Clause in Union Pacific contract stating "[t]his CONTRACT is made pursuant to 49 U.S.C. § 10709 . . ." removes contract from STB jurisdiction (Emphasis in original)), *Cross Oil Refining & Marketing, Inc. v. Union Pacific R.R. Co.*, STB Docket No. 33582, STB served Oct. 27, 1998, at 3 (Clause in Union Pacific contract stating "[t]his CONTRACT is made pursuant to 49 U.S.C. § 10709 . . ." removes contract from STB jurisdiction (Emphasis in original.))

IV. All UP Contracts Require Customers' Affirmative Ratification

UP customers cannot inadvertently enter into contracts, as they must take affirmative actions before a contract becomes binding upon them. UP customers can agree to ship traffic pursuant to the terms of a UP contract either in writing or, in the case of a signatureless contract, by tendering traffic under the terms of the contract. A shipper tenders traffic under the terms of a signatureless contract by inserting the contract number on appropriate shipping documents. (See *Exhibit 1*, "Reference" section). In other words, a customer must make a conscious decision to ship under a contract—a customer will not be bound by a contract's terms merely because it tendered traffic that might come within the scope of an outstanding contract proposal. A customer must either accept the contract by written notice or by indicating on its shipping documents that it is tendering traffic under the contract, establishing the customer's affirmative acknowledgment that it intended to enter into the contract.

V. Contracts and Signatureless Contracts Offer Many Advantages over Common Carriage Rates

UP can tailor contracts to meet the diverse needs of a wide range of customers. Many of UP's customers prefer contracts due to the various advantages they offer over common carriage rates. Unlike common carriage rates, contracts represent the outcome of bilateral negotiations between railroads and shippers, and contract rates are not subject to public disclosure. Additionally, whereas common carriage rates are subject to change at any time

on statutory notice, contracts provide more certainty and associated benefits to both railroads and shippers. Contracts allow shippers to obtain service and pricing commitments from rail carriers, while providing reciprocal benefits to railroads, often in the form of traffic volume commitments. Because of the greater certainty associated with transportation governed by contracts, UP contract prices often reflect discounts from common carriage rates.

For all of these reasons, customers frequently prefer contracts to common carriage rates, and many have shifted their business away from common carriage rates and toward contracts. Only in a limited number of instances have customers done the opposite.

VI. Implementation of a Disclosure Statement Would Delay the Contract Formation Process

Signatureless contracts allow for an accelerated contract formation process. In most instances, signatureless contracts reflect the outcome of oral negotiations between UP sales representatives and their shipper counterparts. In some instances, UP can establish a signatureless contract immediately following negotiations. Were the Board to institute its proposed disclosure requirements, the contract negotiation process would become substantially more cumbersome and the elapsed time between negotiations and the start of transportation service pursuant to a contract would increase, limiting UP's ability to promptly respond to shipper needs.

Despite the widespread use of signatureless contracts, UP continues to maintain common carriage rates for a large majority of regulated commodities,

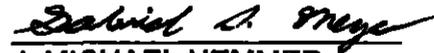
ensuring its ability to provide common carriage rates for shippers upon reasonable request. But large numbers of customers opt for signatureless contracts over common carriage rates for a variety of reasons, including the discounted pricing structures they normally provide. Again, this is a legitimate pricing device that UP has used for over 12 years and is widely accepted in the marketplace. There is no reason for the Board to discourage its use either by elaborate, unnecessary "disclosure" requirements, or otherwise.

VII. Conclusion

The Board's proposed contract disclosure requirement is unjustified and unnecessary. UP contracts and signatureless contracts are easily distinguishable from common carriage rates and have not resulted in any customer complaints. At the same time, signatureless contracts have benefited both UP and its customers by combining the flexibility of contracts with the ready availability of common carriage rates. Institution of the proposed disclosure requirements would only make establishment of contracts more difficult and drive some customers back to common carriage rates that are less suited to their needs.

Union Pacific Railroad Company therefore respectfully requests that the Board discontinue this proceeding or, alternatively, adopt the presumptions proposed by the AAR.

Respectfully submitted,


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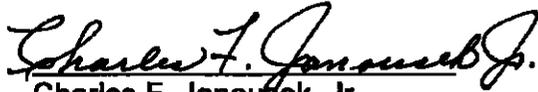
*Attorneys for
Union Pacific Railroad Company*

May 12, 2008

VERIFICATION

I, Charles F. Janousek, Jr., declare under penalty of perjury that the facts stated in the foregoing document are true and correct, to the best of my knowledge, information, and belief.

Executed this 12th day of May, 2008.

A handwritten signature in cursive script that reads "Charles F. Janousek, Jr." is written over a horizontal line.

Charles F. Janousek, Jr.
Manager—Contracts
Union Pacific Railroad Company

**CONFIDENTIAL RAIL TRANSPORTATION CONTRACT
PURSUANT TO 49 U.S.C. SECTION 10709**

ACCOUNT OF: *[Insert Customer Name and Address information]*

TERM:

The Effective Date of this *[Insert Contract ID Number]* shall be *[Insert Date]* and it shall expire on *[Insert Date]* (Expiration Date)

REFERENCE:

All shipping documents must make reference to *[Insert Contract ID number]* as well as the seven digit STCC *[Insert STCC number]*, Origin, Destination and Equipment Identification Number on their face when tendered to the Origin Carrier

SUBJECT TO:

Except as otherwise specifically provided herein, shipments are subject to the provisions of Rules Circular UP 6600-Series.

This Agreement is made pursuant to 49 U S C 10709 and shall become binding on the parties upon acceptance by the Customer named above. Customer may accept the terms and conditions of this Agreement either by written notice, or by tender of traffic under its terms. Additionally, it is understood that the terms and conditions of the Rules Circulars specified hereinabove, that are in effect on the Effective Date of this Agreement, are hereby unconditionally incorporated herein and accepted by the parties to govern shipments made hereunder.

TERMINATION

[Insert applicable termination clause]

Termination of this Agreement, or any portion thereof, for any reason shall not release any party from any obligations they may have accrued prior to such termination.

NOTICES:

All notices required under this Agreement shall be in writing and shall be effective upon receipt. They shall be sent via personal delivery, via Certified U S Mail (Return Receipt Requested) or via overnight service which provides evidence of delivery ("Notice") addressed to the party to be notified at the address shown below or at any other address which such party has given notice, in

accordance with this Notices section to the other parties hereunder

[Insert Railroad and Customer contact information]

PAYMENT PROCEDURES (FREIGHT CHARGES):

Customer shall pay to the billing Railroad the rate(s) set forth herein, and the charges accrued hereunder, in accordance with the credit and collection terms set forth in Uniform Freight Classification 6000-series, Rule 62, as amended from time to time. Rate(s) in this price document are expressed in U.S. currency

All claims for overcharges or undercharges (including duplicate payments) for freight charges arising under this Agreement must be filed in writing within twelve (12) months from the date of the original freight bill. Any court proceeding to collect an overcharge or an undercharge shall be commenced within six (6) months of the date of written declaration of a timely filed claim. Overcharge or undercharge claims or lawsuits for less than \$NNN.NN per freight bill shall not be filed.

No claim shall be paid if the overcharge or undercharge is found to be under \$NNN.NN per freight bill.

EXHIBIT/RIDER

This Agreement hereby incorporates the terms and conditions of the Exhibit and any Rider attached hereto. In the event of a conflict between this Agreement's printed words and the Exhibit and any Rider, the Exhibit and Rider shall govern.

[Note: price and other commercial terms are contained in Exhibit and Rider]