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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 676

RAIL TRANSPORTATION CONTRACTS UNDER 49 U.S.C. 10709

**COMMENTS OF
U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.**

I. Introduction

The U.S. Clay Producers Traffic Association, Inc. ("Clay Producers") previously submitted its comments in Ex Parte No. 669, Interpretation of the Term "Contract" in 49 U.S.C. 10709, describing problems and confusion facing its members due to the lack of a bright-line standard for establishing whether rail transportation services utilized by its members are subject to STB regulatory protection. Those comments appear to be recognized by the Board's decision, served March 12, 2008, but the Board's revised proposal in Ex Parte 676 (i.e., creation of a boilerplate term for creation of exempt rail transportation contracts) could create more problems than it solves. For reasons set forth in the National Industrial Transportation League's opening comments filed in Ex Parte 676, Clay Producers continue to support the proposal it joined in with NITL, as set forth in their Joint Reply filed August 2, 2007.

2. Identification of U.S. Clay Producers Traffic Association

Clay Producers is a non-profit association of member companies engaged in producing and shipping clay in all modes of transportation from Georgia, South Carolina and Tennessee

origins to numerous industries throughout the United States, Canada, Mexico, and the world. Clay Producers formed as an association over 50 years ago to provide information to members concerning the transportation of clay, and also as a forum for discussion of developments and information concerning regulation by governing authorities affecting the transportation of clay. The association has also historically represented the interests of its members in transportation matters before regulatory agencies, such as this Board. The members of the Clay Producers, parties to these Comments, represent approximately 95% of the industry in terms of total clay shipments and move clay from a relatively concise geographic area in Georgia, South Carolina and Tennessee, where the mineral deposits are found, to customers located throughout the United States, Canada, Mexico, and the rest of the world. Clay Producers' clay traffic is captive to the railroads due to the bulk nature of their shipments originating from such a small, mostly rural, geographic area. The Clay Industry is a major factor in the economy of the small geographic area where it is produced.

Clay is a regulated commodity and has not been exempted from regulation under the general exemption orders issued under Ex Parte No. 346. Therefore, rail transportation rates and services, policies and practices are subject to STB regulation, unless the transportation is pursuant to a rail transportation contracts which is exempt from regulation under 49 U.S.C. § 10709.

3. The Board Should Retain Jurisdiction to Determine Whether Transportation Provided Pursuant to Communications and Documents Exchanged Between a Shipper And A Carrier Is Subject to Regulation Regardless of A Boilerplate Term Buried In One Of The Writings Allegedly Forming An Exempt Contract.

A clear Board definition of a common carrier tariff is a better method than the creation of a boilerplate "full disclosure" term which could pop into one of the many communications typically generated in the arrangement of transportation services.

Clay Producers previously noted that its members often requested rate quotes which are answered by a railroad via e-mail, fax or other method of causal communication and which might be interpreted as being either exempt contract traffic or a regulated common carrier transportation service. *See generally, Clay Producers Opening Comments*, Ex Parte 669. The typical confusion over classification of the regulated nature can give rise to a factually intensive dispute where there are many documents exchanged. *See E.I DuPont v. CSX Transportation*, STB Docket 42099, et seq., served December 20, 2007 (facts and circumstances did not meet carrier's burden of proving existence of a contract.).

Clay Producers are concerned about the fact pattern in which a shipper requests a rate which it assumes will be a common carrier rate but it does not specifically use magic words in the request (such as, "we request a rate which is classified as a common carrier rate and subject to STB regulation"). Should a rail carrier be able to return a quote for a rate and argue that if traffic is tendered, that act forms a contract simply because one sentence in a series of communications incorporates by reference newly established boilerplate language (e.g., "this quote is subject to RR Publication X-123")? A railroad could simply publish the boilerplate in a circular and whenever it gave a quote, refer to the circular number and then argue that this constitutes full disclosure.

Clay Producers agree with the approach set forth in *E.I. DuPont v. CSX*, decision serviced December 20, 2007 at page 5 (where "the record fails to indicate that the parties possessed the requisite intent to enter into a rail transportation contract", the arrangement is common carriage.) However, in a case where a shipper clearly states that it is requesting a common carrier rate, that clear and unequivocal request should be definitive and should not be

overturned simply because some subsequent communication from the carrier contains, or makes reference to, a boilerplate disclosure.

A shipper may request a rate and ask for "your best rate" because it is bidding on the sale of its product to a price sensitive customer. A rate quoted by the railroad as "a competitive rate" should not be construed as shorthand for "this is an exempt contract offering". If the Board declines to set forth a definition of what constitutes a common carrier tariff and instead requires set language which identifies the offer as a contract exempt from regulation, it should be careful to avoid creation of a presumption that the parties have the requisite intent to enter into an exempt contract where the facts and circumstances indicate that the boilerplate is not truly an indication of the parties' intent.

CONCLUSION

For all of the above reasons, Clay Producers urge the Board to consider setting forth a definition of what constitutes a "tariff", rather than creating a boilerplate provision which allows a carrier to avoid regulation simply by inserting language in any one of the communications exchanged in arranging for the transportation.

Respectfully submitted,

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Dated: May 12, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2008, I have served a copy of the foregoing Comments by first class mail, postage pre-paid, in accordance with the Rules of Practice on all parties of record, as they appear this date on the board's web published service list.

/s/ Vincent P. Szeligo
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