

BEFORE THE SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 676

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

REPLY COMMENTS OF BNSF RAILWAY COMPANY

BNSF Railway Company (“BNSF”) submits these reply comments in response to the opening comments of several shippers, shipper associations and railroads on the Surface Transportation Board’s (“STB” or “Board”) Notice of Proposed Rulemaking, Rail Transportation Contracts Under 49 U.S.C. 10709, STB Ex Parte No. 676 (served January 6, 2009) (“Notice”). In Ex Parte No. 676, the Board has proposed to establish rules for determining when an agreement to provide rail transportation service will be considered a contract governed by 49 U.S.C. § 10709 or a common carriage arrangement subject to Board jurisdiction.

When the Board initiated this proceeding, it stated that its objective was to “offer regulatory protection to shippers that desire such protection, while encouraging private rail transportation contracts for those shippers that prefer such arrangements.” Notice at 4. While the Board clearly had shipper interests in mind, the shipper commenters are largely opposed to the Board’s proposed rules or express only tentative support.¹ The Board may decide not to issue rules in this area given the lack of widespread support from the parties that were intended to benefit from the rules. If the Board nevertheless decides to issue rules in this area, BNSF

¹ See, e.g. Comments of American Chemistry Council, et al. at 4 (“these Interested Associations are strongly opposed to the proposed rule”); Opening Comments of the Western Coal Traffic League at 2 (“WCTL is able to offer only qualified support for the STB’s proposal”).

urges the Board to modify the proposed rule in the three ways discussed in BNSF's opening comments.

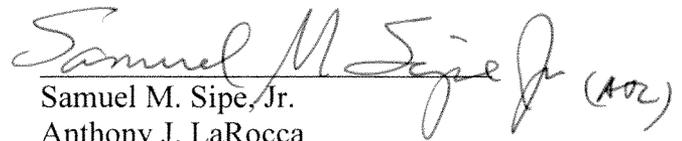
First, it would be appropriate for the Board to treat as contracts all agreements between railroads and shippers for non-exempt rail transportation that contain a disclosure statement expressing the parties' intent to enter a contract under 49 U.S.C. §10709. However, the disclosure statement proposed by the Board is unnecessarily complex. It should be sufficient for the disclosure statement to state that the agreement is a rail transportation contract under 49 U.S.C. §10709 that is not subject to challenge before the STB.

Second, the Board should not establish a presumption that all agreements not containing a specified disclosure statement are common carrier arrangements. Rather, if the parties' intent is not clear by their use of a disclosure statement in the agreement, a determination of whether the agreement is a contract or common carriage arrangement should be based on all relevant evidence.

Third, if the Board adopts a presumption that agreements not containing a disclosure statement are common carriage arrangements, the Board should not require that a railroad seeking to rebut such a presumption must show that the railroad made the shipper aware in the context of the negotiations that the shipper could request common carriage service.

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Respectfully submitted,



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