

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 676

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

REPLY COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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I. Introduction

UP respectfully submits its reply to the opening comments submitted to the Board by various commentators in this proceeding. Many parties have focused on whether the proposed rule is needed or whether the proposed rule exceeds the Board's authority.

UP understands their concerns. We also value clarity as to whether a price document is a contract or common carriage offering. We believe that with appropriate revisions the proposed rule can assist in the clear demarcation between contracts and common carriage rates without exceeding the Board's authority or complicating contract negotiation and administration.

II. General Reservations with Proposed Rule

A. The proposed rule is unnecessary.

Several commentators indicate that the proposed rule does not address any real issue that the shippers or railroads have and express doubt that the proposed rule is needed. WCTL said its impression is that “the number of actual disputes that have been made public is quite low.” *WCTL Comments, Ex Parte 676, Feb. 5, 2009, p. 3.* BNSF observed that “[s]ince Congress gave the parties the right to enter into contracts under 49 U.S.C. §10709, there have been thousands of negotiations and virtually none has resulted in a dispute over the question of whether the arrangement is a section 10709 contract or a common carriage arrangement.” *BNSF Railway Company Comments, Ex Parte 676, Feb. 5, 2009, p. 5.* The “Interested Shippers” of the shipper trade association collective filing referred to this rulemaking as an attempt to grapple with a “perceived problem.” *American Chemistry Council et al. Comments, Ex Parte 676, Feb. 5, 2009, p. 10.* NASSTRAC stated that “the likelihood that these issues will arise often appears to be low.” *NASSTRAC Comments, Ex Parte 676, Feb. 5, 2009, p. 10.*¹

Based on UP’s experience with negotiating and entering into thousands of contracts for transportation services with customers over the years, UP agrees that disputes about whether a price document is a contract or common carriage rate are

¹ The Board’s impetus for this rulemaking proceeding appears to be its concern with UP’s Circular 111 common carriage offering and the possibility that shippers could inadvertently enter into a contract and thereby forfeit rights to common carrier rates and services and associated remedies. *Rail Transportation Contracts under 49 U.S.C. 10709, STB Ex Parte 676, served Jan. 26, 2009, p.2-3.* Circular 111 does not warrant such concern. The cover sheet of Circular 111 states that it is a “UNIT TRAIN COAL COMMON CARRIER CIRCULAR...” UP has acknowledged that shippers retained their rights to challenge the reasonableness of the rates and the terms of Circular 111 before the STB. *Union Pacific Railroad Company Comments, Ex Parte 676, Feb. 5, 2009, p. 10.*

rare.² One reason is that UP typically includes a provision in contracts that they are 49 U.S.C. §10709 contracts and conversely in common carrier documents that they are common carrier tariffs or circulars. That experience leads UP to believe that there may be value in a rule that adopts a rebuttable presumption that if a price document contains a statement that it is a 49 U.S.C. § 10709 contract, then the Board will find that it does not have jurisdiction over transportation covered by the document.

Before adopting any rule, however, UP urges the Board to carefully consider whether the level of clarity provided in the rare situations where this arises outweighs the potential for ambiguity and questions that the proposed rule would inject into daily business dealings. Accordingly, it is critical that if the Board proceeds with this proposal that it (i) define what agreements the rule would apply to, (ii) limit its application to the master or main contract, and (iii) clarify how the rule would apply to pre-existing documents in order to avoid unexpected and unintended consequences. *See Union Pacific Railroad Company Comments, Id.*

B. The proposed rule lies beyond the Board's jurisdiction.

Several parties have questioned whether the Board has the jurisdiction to implement this proposed rule as written.³ Their concerns are well-founded. Under the Board's proposed rule, the Board will assert jurisdiction over the transportation in

² Currently UP does have a dispute pending before a court with a customer about whether contract rates exist absolving UP from an obligation to also provide common carrier rates. But even in that situation, there is no uncertainty about whether a document is a common carrier tariff or a contract and the proposed rule would not resolve the dispute. *Plaintiff's Complaint for Declaratory Relief at p. 2-5, Union Pacific Railroad Company v. Arizona Electric Power Cooperative, Inc., No. CV-09-45-TUC-FRZ, (Ariz. filed Jan. 2009).*

³ *CSX Transportation, Inc. Comments, Ex Parte 676, February 5, 2009, p. 3. National Grain and Feed Association Comments, Ex Parte 676, February 5, 2009, p. 2. American Chemistry Council et al. Comments, Ex Parte 676, February 5, 2009, pp. 16-20. Norfolk Southern Railway Company Comments, Ex Parte 676, January 29, 2009, p. 5.*

question unless that contract (and each of its amendments, modifications or supplements) bears the mandated paragraph in the prescribed manner or the railroad provides clear and convincing evidence that the customer was informed of its rights to request common carrier service and rates, even if a court would find the existence of an enforceable contract.⁴ Essentially the proposed rule would create a new condition that the contracting parties must comply with, which is not in the scope of its jurisdiction.⁵

On occasion, the Board does have to determine how to distinguish a contract from a common carriage arrangement,⁶ but that does not give the Board the authority to impose contracting requirements. UP's recommendation of allowing a limited disclosure statement that a document is a §10709 contract to create a rebuttable presumption that the document and the services it covers are beyond the STB's jurisdiction would further the STB's goal of certainty within the bounds of the Board's jurisdiction.

III. Proposed Rule Recommendations

A. Limit the effect to a rebuttable presumption.

UP agrees with BNSF and NS that the effect of the proposed rule should be limited to a rebuttable presumption that a contract exists if UP's suggested limited disclosure language is in the document.⁷ No presumption should apply as to the existence or non-existence of a contract if UP's suggested limited disclosure language

⁴ Notice at p. 8.

⁵ "A contract authorized under this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates any provision of this part." 49 U.S.C. §10709(c) (1). Certain exceptions exist for contracts for agricultural products. *See 49 U.S.C. §10709 (d), (g), and (h).*

⁶ Notice at p. 5.

⁷ Norfolk Southern, *supra* note 3, at p. 5., *BNSF Railway Company Comments, Ex Parte 676, February 5, 2009, p. 4.*

does not appear in the document. This is a logical and fair limitation because both parties to a contract have presumably read the entire document and understand what it says. Therefore, by entering into a contract that includes the disclosure language, the parties accept the document's designation as a §10709 contract just as they accept the other terms and conditions. The reverse is not necessarily true. The status of a contract between a shipper and railroad as a 10709 transportation services agreement is a matter of state law as to whether a contract exists and a matter of federal law as to the relative authority of courts and STB regardless of whether the parties address these issues in the contract. Accordingly, the absence of a provision or statement should not lead to an irrebuttable presumption.

B. Limit the scope of the rule to base or main contract documents.

We agree with CSX that the proposed rule creates much uncertainty with regard to amendments and supplements.⁸ Given the countless number of ways that contracts are amended, supplemented, clarified, and modified, it would be a daunting task for the Board to develop a rule that does not create more questions and uncertainty and yet provides enough clarity for railroads and shippers to conduct daily business without unintended results.

To avoid this morass, the proposed rule should not apply to amendments, supplements or any other documents that modify, implement or further a transportation contract that includes the disclosure language.⁹ A requirement that all of these agreements and understandings be in writing and include the disclosure creates a

⁸ CSX, *supra* note 3, at p. 4.

⁹ *Union Pacific Railroad Company Comments, Ex Parte 676, February 5, 2009, p. 7.* CSX, *supra* note 3, at p. 5.

significant burden on doing business as described in UP's Comments in this proceeding.¹⁰ The Board's attempt to establish clarity through the proposed rule would result in the exact opposite, unless its application was narrowed as suggested.

C. The rule should exclude agricultural contracts that are subject to 49 U.S.C. §10709(d).

The Board's rule should be limited in scope to exclude contracts for the transportation of agricultural products that are subject to 49 U.S.C. §10709(d). UP agrees with the National Grain and Feed Association that this rule should not interfere with the statutory process in place for these agricultural commodity contracts.¹¹ Any attempt to marry the proposed rule with the current process, rather than simply excluding these contracts, would create confusion.

IV. Conclusion

The proposed rule attempts to create a bright line rule governing the Board's jurisdiction. The proposed rule, however, would raise questions and lead to uncertainty in the daily business relationships of shippers and railroads. If the Board adopts a rule in this matter, the Board should not adopt the proposed rule without fully addressing all questions and ambiguities created by such a rule. UP respectfully recommends that, at most, the Board adopt a very limited disclosure rule that only creates a rebuttable presumption that a document, including all of its amendments, modifications, and supplements, is a §10709 contract beyond the Board's jurisdiction, if a limited disclosure is included in the main contract document.

¹⁰ Union Pacific, *supra* note 9, at p. 5.

¹¹ NGFA, *supra* note 3, at p. 5.

Respectfully submitted,



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