STB DOCKET NO. 42031

PARRISH & HEIMBECKER, INC. —
PETITION FOR DECLARATORY ORDER

Decided May 22, 2000

The Board finds (1) that the assessment and collection by CSX Transportation, Inc. (CSXT) of a surcharge with respect to shipments moved under transportation contracts between the railroad and third party consignees constituted an unreasonable practice under 49 U.S.C. 10702, and (2) in any event, that the surcharges could not be assessed and collected on shipments accepted by CSXT for movement when a non-recourse provision of the corresponding bills of lading had been endorsed.

BY THE BOARD:

This declaratory order proceeding arises out of a court action in *CSX Transportation, Inc. v. Parrish & Heimbecker, Inc.*, Case No. 96-75431, filed in the United States District Court, Eastern District of Michigan, Southern Division, on November 27, 1996. In the court proceeding, CSX Transportation, Inc. (CSXT), a Class I rail carrier, filed an action to collect from Parrish & Heimbecker, Inc. (P&H) $190,000 in unpaid surcharges[1] assessed in connection with P&H's outbound shipments of grain.[2] P&H filed a counterclaim to recover surcharges CSXT had previously collected.[3] In a decision issued February 2, 1998, the court denied the parties' cross motions for summary judgment, referred

[1] A surcharge is a charge above the amount specified for the linehaul movement. If a surcharge is assessed in connection with joint rates, it accrues solely to the surcharging carrier.

[2] The amount owed allegedly increased to $220,400 by the time this declaratory order petition was filed. CSXT explains that P&H paid $3,000 for surcharges incurred in May 1995, but failed to pay $33,400 for surcharges assessed after the court action was filed. According to CSXT, the $220,400 figure includes $107,200 in surcharges incurred between February 1995 and August 1996 and $113,200 in surcharges incurred after January 1, 1996, the effective date of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA). *See,* CSXT opening statement of fact and argument at 5, 9, 12.

[3] In its counterclaim, P&H also sought to recover $11,200 in surcharges allegedly paid in error on fertilizer shipments moving to its facility. The Court did not refer the fertilizer shipment surcharge issue to the Board. P&H petition for declaratory order, Appendix A.

the dispute to the Board, and retained jurisdiction over any resulting civil action for the purpose of assessing damages.[4]

P&H filed this declaratory order petition on May 20, 1998. P&H requests that we determine whether CSXT was entitled to apply, and whether P&H was obligated to pay, a light-density line surcharge of $200 per car on grain shipments that moved from P&H's elevator at Brown City, MI, exclusively under rail transportation contracts that CSXT negotiated with the consignees (the recipients of the shipped goods). If the surcharge applied lawfully, P&H alternatively requests that we determine whether CSXT was entitled to collect surcharges on shipments that moved under bills of lading in which the Section 7 "non-recourse" clause had been endorsed.[5]

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[4] A copy of the court decision was included in Exhibit A of P&H's petition for a declaratory order. In the decision, at 10, the court stated:

The ICCTA language regarding jurisdiction explicitly mandates that the STB has exclusive jurisdiction over remedies with respect to rates and practices of carriers. This alone could sustain the Court's decision to defer to the STB. Yet, this Court also believes that the decision as to the propriety of assessing surcharges on lines where the carrier also receives payment pursuant to contract could implicate larger issues of transportation policy that demand uniform administration by an expert body; and, invoking the doctrine of primary jurisdiction, the Court defers to the STB's expertise for this reason as well. Accordingly, this Court refers the parties to the STB pursuant to 28 U.S.C. 1336(b), retaining exclusive jurisdiction over any resulting civil action.

See also, P&H petition for declaratory order, Exhibit B (excerpt from transcript on motion for summary judgment).

[5] The Uniform Straight Bill of Lading is prescribed at 49 CFR 1035. The non-recourse clause of Section 7 of the Contract Terms and Conditions (Appendix B to Part 1035) specifies, in pertinent part:

The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges.

On the face of the Uniform Straight Bill of Lading, the following language appears:

Subject to Section 7 of Conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

_____
(Signature of consignor)

In response to P&H's petition, we instituted this proceeding in a decision served January 27, 1999, and the parties subsequently filed simultaneous opening and reply statements. Upon reviewing the record, we find that the assessment and collection of the $200 per car light-density line surcharge constituted an unreasonable practice under 49 U.S.C. 10702 and, in any event, that the surcharges could not be assessed and collected on shipments accepted by CSXT for movement when the Section 7 non-recourse provision of the corresponding bills of lading was endorsed.[6]

BACKGROUND

P&H purchases, stores, and sells locally produced corn and other feed grains to the southeastern animal and poultry industry. The grain moves in multiple car shipments from a high-speed loading elevator that P&H constructed alongside CSXT's Brown City Line in 1985.[7] The grain moved under tariff rates until CSXT negotiated rail transportation contracts with the consignees in 1988. Thereafter, P&H tendered grain shipments to CSXT on a f.o.b. origin basis. For each movement, P&H prepared a bill of lading and, as required, inserted the number of the applicable rail transportation contract to ensure proper billing.

Surcharge Tariff ICC CSXT 9804-E went into effect without protest on August 1, 1993, and included a $200 light-density line surcharge that applied to each car movement that originated or terminated on the Brown City Line.[8] The surcharge was first assessed against P&H in October 1993 and was paid by P&H through January 1995. P&H then ceased paying these charges until it was notified by CSXT that the surcharge had to be prepaid beginning December 1,

[6] The involved shipments were accepted by CSXT "f.o.b. [free on board] origin" — meaning that the consignee was liable for the payment of transportation charges. Thus, the surcharges could not have applied to the consignor, P&H.

[7] The Brown City Line extends 51.32 miles from Brown City to Hoyt, MI, where it connects to CSXT's main Saginaw line and the lines of other railroads. At the time P&H constructed the elevator, the Brown City Line was operated by the Chesapeake and Ohio Railway Company, CSXT's predecessor. *See, The Chesapeake and Ohio Railway Company and CSX Transportation, Inc. — Merger Exemption*, Finance Docket No. 33306 (ICC served Sept. 18, 1987). Saginaw Valley Railway Company, Inc. (Saginaw), a Class III rail carrier, acquired the Brown City Line on or about May 4, 1998. *See, Saginaw Valley Railway Company, Inc., — Acquisition Exemption — CSX Transportation, Inc.*, STB Finance Docket No. 32829 (STB served July 24, 1996).

[8] There were eight stations on the Brown City Line, and the surcharge applied equally to each of them. P&H is the only Brown City Line shipper that objected.

1996, or its shipments would no longer be accepted.[9] P&H paid the surcharge from December 2, 1996, until the day it was canceled by Saginaw. P&H claims that, for most movements prior and subsequent to December 2, 1996, it endorsed the non-recourse clause of the bills of lading, but that CSXT ignored the endorsements.[10] P&H opening statement at 7-8.

CSXT states that the surcharge was applied to the Brown City Line after an economic analysis conducted in 1993 showed that the line qualified for such treatment under former 49 U.S.C. 10705a(b).[11] Essentially, the analysis concluded that the Brown City Line was losing approximately $575,000 a year, or $508.27 per carload. *See,* CSXT opening statement of fact and argument, Exhibit A (Verified statement of Mr. James Derwin, CSXT's Assistant Vice President of Asset Management) and Exhibit B (economic analysis). CSXT continued to apply the surcharge without change or challenge on and after January 1, 1996, the date on which the ICCTA eliminated the explicit statutory basis for surcharges.

DISCUSSION AND CONCLUSIONS

P&H generally argues that CSXT's assessment and collection of the surcharge violated former 49 U.S.C. 10705a(b) and constituted an unlawful practice under 49 U.S.C. 10702 (formerly 49 U.S.C. 10704). Specifically, P&H contends that CSXT unlawfully double billed for its services by collecting contract transportation charges from P&H's consignees and tariff surcharges from P&H. P&H contends that a carrier cannot act as a contract and a common carrier simultaneously with respect to the same shipments, citing *Burlington N. R.R. v. STB*, 75 F.3d 685, 687 (D.C. Cir. 1996) ("Contract transport is an alternative to traditional common carrier transport"). Even if the surcharge applied lawfully in connection with contract traffic, P&H argues that it could not

[9] CSXT asserted a "right to require payment of the surcharge prior to acceptance of any rail car from origin (Brown City) on outbound shipments of grain, as stipulated in CSX Transportation Surcharge Tariff 9804-K." *See,* CSXT opening statement of fact and argument at 5 and Exhibit G.

[10] P&H states that it reviewed the bills of lading for all movements made between August 1, 1993, and December 2, 1996, and identified 108 bills of lading, corresponding to 1,641 individual carloads, where the non-recourse clause had been endorsed. The 1,641 carloads allegedly reflect $145,000 in paid, and $179,800 in assessed but unpaid, surcharges. *See,* P&H opening statement of fact and argument, Exhibit No. 1 at 4 (Verified Statement of Mr. Phillip Hageman, P&H's Vice President).

[11] In the ICCTA, Congress substantially revised the Interstate Commerce Act (ICA), 49 U.S.C. 10101 *et seq.*, effective January 1, 1996.

be applied in connection with shipments that moved under bills of lading with endorsed non-recourse clauses, citing *Pittsburgh, C., C. & S.L. Ry. v. Fink*, 250 U.S. 577 (1919), and *Illinois Steel Co. v. Baltimore & O. R.R.*, 320 U.S. 508, 513 (1944) (*Illinois Steel*).

CSXT maintains that the surcharge was a reasonable, fair, and lawful way for it to recoup losses and avoid abandoning the Brown City Line. *See,* CSXT opening statement of fact and argument at 13. It argues that the Staggers Rail Act of 1980 (Staggers Act)[12] expressly authorized light-density line surcharges and did not preclude their application to movements governed by rail transportation contracts with third party purchasers. According to CSXT, its right to assess and collect the surcharge was one component, and must be understood within the overall context, of the Staggers Act.

1. Statutory Framework.

The Staggers Act was designed to revitalize the rail transportation industry. It sought to promote the development and continuation of a safe, sound, competitive, and efficient national rail system by: (1) allowing rail carriers to earn adequate revenues; (2) relying on competition and the demand for service, to the maximum extent possible, to establish reasonable rates; and (3) minimizing Federal regulatory control wherever possible. *See,* former 49 U.S.C. 10101a(1)-(5) (the rail transportation policy); *see also,* Report of the Committee on Conference on S. 1946, H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 80-87, 111-12 (1980) (Conference Report).

Rail carriers were authorized and, along with shippers, encouraged by the Staggers Act to enter into contracts for the delivery of specified transportation services under specified rates and conditions, as provided under former 49 U.S.C. 10713 (now 49 U.S.C. 10709). *See,* Conference Report at 80 and 98-101. The authority to contract was one of the more significant aspects of the new freedoms granted by the Staggers Act because it allowed rail carriers to tailor rail service more individually and thereby market transportation services more effectively. *Id.* at 100. Congress deemed contract service "a separate and distinct class of service," former 49 U.S.C. 10713(l), with the contracting carrier's obligations governed by the terms of its contract, former 49 U.S.C. 10713(h), rather than common carrier obligations, 49 U.S.C. 11101(a).[13] To

[12] Pub. L. No. 96-448, 94 Stat. 895.

[13] *See also,* former 49 U.S.C. 10713(h) (now 49 U.S.C. 10709(b)) and current 49 U.S.C. (continued...)

reinforce this distinction, Congress removed contracts, once effective, and the underlying contract service from the regulatory authority of our predecessor, the Interstate Commerce Commission (ICC), and the ICA, former 49 U.S.C. 10713(h) and (i) (now 49 U.S.C. 10709(b) and (c)), and placed exclusive authority for the interpretation and enforcement of contracts in the courts, 49 U.S.C. 10713(i) (now 49 U.S.C. 10709(c)).[14]

The Staggers Act thus effectively created two separate classes of rail service — common and contract carriage. Carriers that entered into rail transportation contracts functioned as contract carriers with respect to their contract services and as common carriers with respect to their other services. *See,* Conference Report at 100; *Texas v. United States*, 730 F.2d 409, 417 (5th Cir. 1984) (*Texas)*, *rehr'g denied per curiam*, 749 F.2d 1144 (5th Cir. 1985), *cert. denied sub nom. ICC v. Texas*, 472 U.S. 1032 (1985) ("railroads are common carriers when they serve all comers at a general publicly disclosed rate, and contract carriers when they enter into private contracts authorized by the Act").

The Staggers Act also granted rail carriers significant new authority to impose surcharges and cancel joint rates.[15] This new authority was intended to grant relief from noncompensatory rates and divisions that chronically plagued

[13](...continued)
10709(f).

[14] In fact, tariff provisions that are incorporated into a contract became contract terms, and, as such, are no longer subject to Board authority to the extent they relate to contract matters. *H.B. Fuller Co. v. Southern Pacific,* 2 S.T.B. 550, 553 (1997).

[15] A joint rate is a single rate that applies to the through service of two or more carriers. Joint rates facilitate shipments that move beyond the originating carrier's lines.

the rail industry.[16] The Staggers Act contained provisions for two different types of surcharges — commodity surcharges[17] and light-density line surcharges.

Under the commodity surcharge provisions, former 49 U.S.C. 10705a(a), an individual rail carrier could unilaterally increase a joint rate, and its share of the joint-rate revenues, on movements of commodities specified by the carrier.[18] Under the light-density line surcharge provisions, former 49 U.S.C. 10705a(b), an individual rail carrier could also apply a surcharge to traffic originating or terminating on a "light density" line[19] if the revenues generated by the line failed to cover 110% of the variable cost of transporting traffic to or from the line and 100% of the reasonably expected costs of continuing to operate the line (the 110%/100% standard). This surcharge could be allocated in different amounts among different movements, but shippers could not be forced to bear more than

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[16] Joint rates necessitate the use of revenue dividing agreements. By the time the Staggers Act became law, those agreements, in many instances, had ceased to reflect actual carrier costs. Carriers with favorable divisions generally refused to renegotiate them, *Conrail Surcharge on Pulpboard,* 362 I.C.C. 740 (1980) (*Pulpboard*), while carriers with unfavorable or noncompensatory divisions found it difficult to justify joint rate cancellations under the public interest standards of former 49 U.S.C. 10705(e) or to obtain a regulatory prescription of joint rate divisions using the slow and cumbersome regulatory process of former 49 U.S.C. 10705(a). *See, Joint Rates Study: A Report to Congress Pursuant to Section 217 of the Staggers Rail Act of 1980,* Ex Parte No. 427 (ICC served November 18, 1982), slip op. at 2-4 (*Joint Rates Study*). In the Conference Report at 111, the problems resulting from the then-current joint rates and through routes were recognized as follows:

> The existing joint rates and divisions do not allow some rail carriers to recover even the variable cost of providing transportation services on certain through routes. Under existing law, unless all carriers participating in the joint rate concur, these rates and divisions can be changed only by protracted proceedings before the Commission * * *. [49 U.S.C. 10705a] will alleviate these problems in part by assuring that a carrier, with a minimum of regulatory interference will be able, by applying surcharges or directly cancelling routes, to either earn revenues over all lines equal to or exceeding 110 percent of * * * variable costs or to close routes not providing this level of earnings * * *.

[17] The commodity surcharge provision, former 49 U.S.C. 10705a(a), had a brief, 4-year life span. See, former 49 U.S.C. 10705a(p)(1); *Consolidated Rail Corp. — One Year Extension of Surcharge Authority Under 49 U.S.C. 10705a(a)*, Ex Parte No. 448 (ICC served September 26, 1983).

[18] Other carriers, former 49 U.S.C. 10705a(a)(2), or shippers, former 49 U.S.C. 10705a(a)(3), could seek to have a commodity surcharge reduced or canceled, but the surcharge could not be reduced below the level necessary to generate 110% of the surcharging carrier's variable cost of providing service, former 49 U.S.C. 10705a(a)(2)(B) and (3)(B).

[19] Rail carriers earning less-than-"adequate" revenues, as determined under former 49 U.S.C. 10704(a)(2), could surcharge traffic originating or terminating on lines that carried less than 3 million gross ton miles of traffic per mile, and rail carriers earning "adequate" revenues could surcharge traffic originating or terminating on lines that carried less than 1 million gross ton miles of traffic per mile. *See,* former 49 U.S.C. 10705a(b)(1)(A).

their reasonable proportion of the reasonably expected costs. *See,* former 49 U.S.C. 10705a(b)(4). Shippers could challenge "the application or amount of a [light-density line] surcharge," former 49 U.S.C. 10705a(b)(6), and the ICC could order a carrier to reduce the surcharge (but not below the level necessary to satisfy the 110%/100% standard), former 49 U.S.C. 10705a(b)(3)(C), or reallocate the surcharge more equitably among the traffic on the line, former 49 U.S.C. 10705a(b)(4).[20]

The light-density surcharge provisions thus were one of the means provided in the Staggers Act for carriers to improve their earnings over otherwise unprofitable lines. They provided an "extraordinary" form of relief designed for the limited purpose of enabling rail carriers to earn revenues at least equal to the 110%/100% standard on light density lines,[21] and thereby avoid abandonment of the lines. *See, Joint Rates Study*, slip op. at 4, n.15.

2. Jurisdictional Matters.

We note at the outset that the provisions of former 49 U.S.C. 10705a were not reenacted by the ICCTA, and that the repeal of former section 10705a removed any special rights that may have existed under that section. *See,* section 204(b) of the ICCTA. However, the ICCTA reenacted the prohibition against unreasonable practices in 49 U.S.C. 10702 and transferred to the Board the power to make findings concerning unreasonable practices in 49 U.S.C. 10704. Thus, we have exclusive jurisdiction to determine the reasonableness of the practice of imposing a surcharge on this traffic both before and after enactment of the ICCTA.[22] Moreover, because the disputed surcharge applied

[20] *See, Light Density Surcharge, Brunswick, MO-Omaha, NE Line, N&W*, 357 I.C.C. 99 (1981).

[21] Conference Report at 111-12; *see also, e.g., City of Cherokee v. ICC*, 671 F.2d 1080, 1083 (8th Cir. 1982) ("the Staggers Act expressly prohibits the ICC from reducing the surcharge rates to a level below the 110%/100% formula * * *. Thus, the statute sets a minimum revenue standard which a railroad may seek to achieve through a surcharge.").

[22] CSXT argues that "P&H had notice of the surcharge and ample opportunity to challenge it through statutorily-prescribed procedures * * *. [but] failed to do so, and should not be permitted to circumvent the procedural framework set forth by Congress." CSXT reply statement at 11. However, former 49 U.S.C. 10705a(b)(6) expressly provided that "the application or amount" of a light-density line surcharge could be challenged under former section 10705a(b) "or some other provision of this chapter" and specified no time frame other than for suspension purposes. P&H's failure to file a regulatory complaint immediately does not necessarily foreclose it from participating in a court action, nor does it foreclose us from issuing a declaratory order in response to the court's request.

independently of, and bore no substantive relation to, the (preexisting) contracts for this transportation, this dispute may be resolved without regulating the contracts or any matters related to them.

3. Unreasonable Practice Claim.

CSXT claims that rail carriers were authorized under former 49 U.S.C. 10705a(b) to use surcharges to recover the reasonably expected costs of operating light-density lines and that all of the line's shippers were expected to share in that burden — regardless of whether they were responsible for the payment of freight charges — because such surcharges made it possible to sustain operations over money-losing lines for their benefit. In support, CSXT points to the language of former 49 U.S.C. 10705a(b)(1)(A) and (B), which allowed such surcharges to be applied to "traffic originating or terminating upon any" light-density line. CSXT argues that, by not expressly limiting the term "traffic," and by requiring that shippers not bear more than a "reasonable proportion" of a line's reasonably expected costs, former 49 U.S.C. 10705a(b)(4)(A), Congress must have intended that surcharges be applied on *all* of a light-density line's traffic, including originating or terminating traffic that moves under a transportation contract between the carrier and a consignee located off-line.

While CSXT would have us find that a light-density surcharge was available here to be applied in addition to, and not in lieu of, contract transportation charges, it apparently concedes that a light-density line surcharge could not be imposed on contract service if the contract were with the shippers located on the line.[23] We see no basis for reaching a different result based upon the physical location of the contracting party. Nor can we see a basis for superimposing (non-contract) regulatory provisions upon transportation moving in contract carriage. The Staggers Act fundamentally changed rail transportation by allowing railroads and their shippers to choose between regulated common carriage (traditionally designed to ensure equal, nondiscriminatory treatment of shippers) and contract carriage (to be governed exclusively by the terms agreed to by the contracting

[23] CSXT's position is reflected in its response to P&H's counterclaim for the recovery of surcharges paid on inbound fertilizer shipments. *See, supra* note 3. When P&H objected to the collection of these surcharges (in a letter dated February 16, 1996), CSXT responded (in a letter dated November 18, 1996), by stating: "You claim that the Surcharge Tariff bills are inappropriate as to inbound fertilizer shipments because such shipments were made pursuant to transportation contract CSXT-C-03512. CSXT agrees. Surcharges related to shipments made under that contract are withdrawn." *See,* CSXT opening statement of fact and argument, Exhibits E and F.

parties). Congress intended contracting to be "a separate class of rail service" and made clear that transportation provided under contract would be "exempt * * * from all regulation and all of the requirements of the [] Act." Conference Report at 100.

CSXT's application of a light-density line surcharge in the circumstances at issue here would blur impermissibly the clear distinction Congress intended between rail common and contract carriage service and would chill the use of contracting, contrary to Congress' intent.[24] A contract is designed to provide commercial certainty for both the shipper and carrier. *FMC Wyoming Corp. & FMC Corp. v. Union Pacific R.R Co.*, 2 STB 766, 772 (1997), *aff'd sub nom. Union Pac. R.R. v. STB*, 202 F.3d 337 (D.C. Cir. 2000). That certainty would be undermined if a carrier could unilaterally impose additional charges (beyond those provided for in the contract) for the same service to which the contract applies. Moreover, as we have consistently held, other statutory and regulatory provisions cannot be applied in a manner that would thwart the opportunities for the more innovative, advantageous, and individualized service that contracting offers. *Central Power & Light Co. v. Southern Pac. Transp. Co.*, 1 S.T.B. 1059, 1072 (1996), *aff'd sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir.), *cert. denied sub nom. Western Coal Traffic League v. STB*, 120 S. Ct. 372 (1999).[25] Permitting CSXT to unilaterally impose a light-density line surcharge on top of the contract rates it negotiated for such traffic would do just that.

There is nothing in the statute or the legislative history of former 49 U.S.C. 10705a to suggest that the surcharge remedy was meant to go beyond affording carriers limited relief from the failures of the then-existing common carriage tariff rate structure. The surcharge provisions of former 49 U.S.C. 10705a grew out of events relating to the unilateral publication by Consolidated Rail Corporation (Conrail) of surcharges for its own account. The ICC initially granted Conrail permission to publish a surcharge on pulpboard as "an innovative approach to meet a chronic problem of noncompensatory rates," *Pulpboard,* 362 I.C.C. at 741, but ultimately concluded that, unlike traditional surcharges (which had applied to special or additional separately identifiable services), Conrail's surcharge constituted "an additional increment in the rate for the joint service of all participating lines," and therefore could not be applied

[24] Congress intended that contracting be "widespread." Conference Report at 98.

[25] *See also, Buffalo Crushed Stone, Inc. v. STB*, 194 F.3d 125, 129-30 (D.C. Cir. 1999) (Board need not interpret a particular statute or regulation in a way that would subvert the regulatory scheme by undermining an independent statutory mandate).

without the concurrence of all joint-line participants under former 49 U.S.C. 10762(b)(2). *Id.* at 744.

Less than six months later, the Staggers Act authorized rail carriers to apply surcharges unilaterally and for their own account. The commodity surcharge was specifically designed to address the problem of noncompensatory common carriage rates and divisions that had evolved from the refusal of connecting carriers to make adjustments to joint rates. The light-density-line surcharge was designed to deal with the problem of inadequate rates that had resulted from shipper efforts to delay or thwart rate adjustments to common carriage rates.[26] Contract rates, on the other hand, represented an entirely new approach that allowed carriers to avoid altogether the noncompensatory common carriage rate structure that had developed prior to the Staggers Act.

Thus, we can find no basis for the notion that rail carriers can use common carrier surcharges to augment contract revenues.[27] Accordingly, we find that CSXT's application of the disputed $200 per car light-density line surcharge in connection with grain shipments moving from P&H's Brown City elevator under transportation contracts negotiated by CSXT with third party consignees was an unreasonable practice under 49 U.S.C. 10702.

4. Effect of A Non-Recourse Clause.

P&H alternatively contends that it was not obligated to pay, and CSXT should be barred from collecting, surcharges in those instances where P&H

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[26] *See,* Conference Report at 82-83 (The Act "authorizes a carrier to surcharge or cancel a joint rate when the existing joint rate does not provide the carrier with 110 percent of its variable cost. * * *. A similar below cost of service problem occurs with respect to light density lines. That problem, however, relates more to shippers on a particular line than to inter-carrier relationships."); *Reasonably Expected Costs*, 1 I.C.C.2d 252, 254-55 (1984) ("the purpose of the light density line surcharge is to permit railroads to recover the full costs of operating their light density lines from any and all traffic 'originating or terminating' on those lines regardless of whether the traffic [moves under] *single-line or joint line*" rates (footnote omitted) (emphasis added)).

[27] CSXT's argument that denying it the ability to apply a light-density line surcharge would be "economically irrational" — because it would force rail carriers to recoup their light-density line costs by rolling surcharges into contract rates and thereby lessen the incentive for third parties to contract — does not hold up under scrutiny. It is the delivered price of a product or commodity that is paramount; transportation costs matter only as they relate to the ultimate delivered price. Accordingly, a shipper like P&H would ultimately bear the burden of any higher transportation charges to the extent that it would have to adjust its own prices to account for transportation and other cost increases in order to remain competitive and retain market share. Thus, we fail to see why the carriers should not include the full price of transportation in their contracts with consignees.

endorsed the Section 7 non-recourse clause on the bill of lading and CSXT accepted shipments as endorsed. We agree.

The bill of lading is a receipt for the property a carrier is tendered for transportation. Ordinarily, it is a pre-printed form that accompanies all movements; it is provided by the carrier and signed by the consignor. The non-recourse clause is part of the bill of lading, *See, supra* note 5, and when it is endorsed by a consignor, the carrier is placed on notice that all lawful transportation charges must be collected from the consignee and cannot subsequently be collected from the consignor. *See, Bills of Lading*, 9 I.C.C.2d 1137, 1151-52 (1993) (*Bills*). Thus, CSXT effectively released P&H from any surcharge liability whenever it accepted shipments with the non-recourse clauses of the bills of lading endorsed. *See, Illinois Steel*, 320 U.S. at 513. The language in the surcharge tariff that purportedly makes the actual line patron responsible for payment makes no difference.[28] A non-recourse clause endorsement is provided for by the Board's regulations, *see, Bills*, at 1139-41, and, if exercised, may not be superseded by tariff, *see, e.g., ICC v. Transcon Lines*, 513 U.S. 138, 147 (1995).

CSXT contends that the non-recourse clause does not apply to a light-density line surcharge because the surcharge, which is assessed on the patrons of unprofitable lines to help defray or recoup maintenance and operating costs, is different from freight charges, which are assessed for moving shipments between two points. CSXT attempts to draw an analogy with demurrage charges, which rail carriers assess when cars are detained beyond specified time periods.[29] Unlike demurrage, however, surcharges are not related to any separately identifiable service, and there is no penalty or time aspect. Rather, surcharges are assessed solely in connection with line-haul movements and form part of, or an addition to, the line-haul rate. Thus, we find no merit to CSXT's attempted analogy.

Accordingly, we find that, even if CSXT's assessment and collection of the disputed surcharges had not been found to constitute an unreasonable practice, P&H was unlawfully assessed, and would not be obligated to pay, surcharges on

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[28] The application section of Surcharge Tariff CSXT 9804-E through L provided that "[t]he surcharge will be billed by CSXT to the actual patron which originates or terminates the traffic." *See,* CSXT opening statement of fact and argument, Exhibit C.

[29] Demurrage charges are assessed against shippers when they hold cars beyond a certain "free time," in order to recoup the additional costs incurred by the carriers. *See, e.g., Car Demurrage Rules Nationwide*, 350 I.C.C. 777 (1975). Demurrage is analogous to rental charges, but it also functions as a penalty to deter undue car detention. *See, Exemption of Demurrage from Regulation*, Ex Parte No. 462 (STB served March 29, 1996), slip op. at 1.

those shipments that were accepted by CSXT f.o.b. origin when the Section 7 non-recourse provision of the bill of lading was endorsed.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.
2. This decision will be effective June 25, 2000.
3. A copy of this decision will be served on: United States District Court for the Eastern, District of Michigan, Southern Division (Attn: District Judge Nancy C. Edmunds) (RE: No. 96-75431) U.S. Courthouse, Room 211 231 West Lafayette, Detroit, MI 48226.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.