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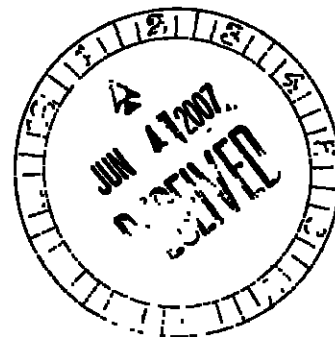


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FOI SID 1806



June 4, 2007

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

ENTERED
Office of Proceedings
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Public Record

Re: Ex Parte No. 669 Interpretation of the Term "Contract" in 49 U.S.C. 10709

Dear Secretary Williams:

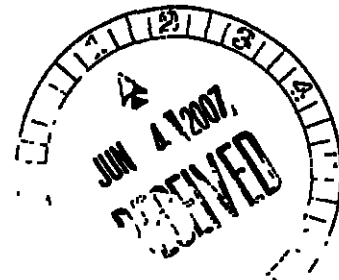
Enclosed for filing in the above-referenced proceeding are an original and ten copies of the Comments of Canadian Pacific Railway Company. A diskette containing an electronic version of the Comments is also enclosed.

Please acknowledge receipt of the enclosed Comments for filing by date-stamping the enclosed extra copies and returning them via our messenger. If you have any questions, please contact the undersigned counsel

Sincerely,

A handwritten signature in black ink, appearing to read "Terence M. Hynes".
Terence M. Hynes

TMH:aat
Enclosures



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 669

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

**COMMENTS OF
CANADIAN PACIFIC RAILWAY COMPANY**

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Dated: June 4, 2007

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 669

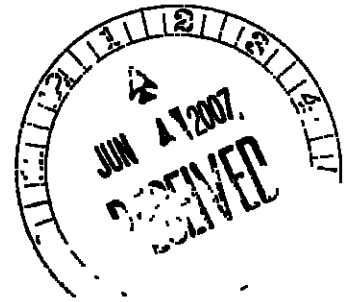
**INTERPRETATION OF THE TERM "CONTRACT"
IN 49 U.S.C. 10709**

**COMMENTS OF
CANADIAN PACIFIC RAILWAY COMPANY**

Pursuant to the Decision served in the above-captioned proceeding on March 28, 2007 (the "*NPRM Decision*"), Canadian Pacific Railway Company and its U.S. subsidiaries, Soo Line Railroad Company and Delaware and Hudson Railway Company, Inc. (collectively "CPR") submit the following Comments regarding the Board's proposal to promulgate a rule interpreting the term "contract" in 49 U.S.C. § 10709. For the reasons discussed hereinafter, CPR believes that it is neither necessary nor appropriate for the Board to issue such a rule. Moreover, the definition of a "contract" proposed in the *NPRM Decision* is unduly narrow, and could call into question the status of a variety of contractual arrangements that are currently entered into between carriers and shippers pursuant to Section 10709

Section 10709, enacted as part of the Staggers Rail Act of 1980 (Pub. L. No. 96-448, 94 Stat. 1895 (1980)) authorizes rail carriers to "enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions."

49 U.S.C. § 10709(a) The legislative history of Section 10709 makes clear Congress' intent "affirmatively [to] encourage[] railroads to use new marketing practices by permitting contracts between carriers and shippers." H.R. Rep. No. 96-1430 at 79 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.S.C.A.N. 4110, 4111. *See also id.* at 98, 1980 U.S.S.C.A.N. at 4130 ("The Senate provision clarifies the status of contract rate and service agreements in an effort to encourage



carriers and purchasers of rail service to make widespread use of such agreements”) (emphasis added).

The ability to enter into transportation contracts with customers has proven to be one of the most successful deregulatory freedoms granted to the rail industry. As the 1995 Conference Report on ICCTA observed, “[t]his landmark legislation [the Staggers Act] deregulated most railroad rates, legalized railroad shipping contracts and stimulated an explosion of service and marketing alternatives that would not have been possible” in the pre-Staggers era. H.R. Rep. No. 104-422, at 90-91 (1995) (ICCTA Conf. Rep.) *See also* H.R. Rep. No. 104-422, at 174 (1995) (Conf. Rep.), (“[ICCTA] retains the Staggers Act’s very successful encouragement and legal authorization of customized and confidential rate contracts between shippers and carriers, including the immunity of contracts from challenge under common-carrier reasonableness standards.”). This agency has likewise acknowledged the benefits of transportation contracts for both carriers and shippers. *See, e.g., Coal Rate Guidelines Nationwide*, 1 I.C.C. 2d 520, 524 (1985) (negotiated contracts often produce arrangements more advantageous to railroad and shipper than prescribed rates), ICC, *Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 210(a) of the Trucking Industry Regulatory Reform Act of 1994*, available at 1994 WL 639996 at *18 (Oct. 25, 1994) (“The rail rate contracting authority is a cornerstone of the modern rail economic regulatory scheme. It is generally hailed as significantly benefiting both railroads and contracting shippers. . .”)

There is no need for the Board to attempt to define the types of rate and service arrangements that fall within the scope of Section 10709. Section 10709 itself articulates such a definition, stating that a rail carrier may “enter into a contract with one or more rail shippers to provide specified services under specified rates and conditions.” 49 U.S.C. § 10709(a). This

statutory language clearly authorizes (and deregulates) agreements between carriers and shippers that address the rates, service standards or other terms and conditions under which rail transportation is provided. There is no need for the Board to embellish or “clarify” this statutory definition, nor would it be appropriate for the Board to do so

Indeed, the definition of a Section 10709 “contract” proposed in the *NPRM Decision* appears to narrow the scope of that term as articulated by Congress. In particular, the Board proposes to define a transportation contract as an agreement under which “the railroad agrees to a specific rate for a specific period of time” in exchange for consideration from the shipper. *NPRM Decision* at 1, 6. However, Section 10709 contains no requirement that a transportation contract include “a specific rate for a specific period of time.” Rather, Section 10709 encompasses any agreement that establishes rates, service terms or other conditions upon which a rail carrier provides transportation to the subject customer. As the legislative history discussed above indicates, Congress clearly intended to give railroads and shippers broad freedom to structure their commercial arrangements in a manner that best addresses their respective needs. It would not be lawful for the Board to curtail that freedom by promulgating regulations that impose non-statutory requirements (or restrictions) on the type of arrangements that carriers and shippers may enter into pursuant to Section 10709.

Nor would it be appropriate for the Board to attempt in this proceeding to fashion bright-line rules defining whether an arrangement between a carrier and a shipper is, or is not, a “contract.” It is well-established that the interpretation and enforcement of contracts (including the determination whether a valid contract exists in a particular case) are issues governed by state law. *See, e.g., Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989); *Parental Guide of Texas, Inc. v. Thomson, Inc.*, 446 F.3d

1265, 1269 (Fed. Cir. 2006). Indeed, Section 10709(c) makes clear that such questions are to be decided by the courts, not this Board. Moreover, both the STB and its predecessor, the ICC, have consistently held that the question whether a particular rate is a “contract” or “common carrier” rate must be considered on a case-by-case basis in light of the parties’ intent. *See, e.g.,* Finance Docket No. 35021, *Union Pacific Railroad Company – Petition for Declaratory Order*, (Decision served May 15, 2007 at 3); Docket No. 42095, *Kansas City Power & Light Company v. Union Pacific Railroad Company*, (Decision served March 26, 2007) at 3 (citing *Aggregate Volume Rates on Coal, Acco. UT to Moapa, NV*, 364 I.C.C. 678, 689 (1981)). Given the wide variety of pricing mechanisms utilized by railroads in response to the competitive challenges they face in the post-Staggers environment, it would be (at best) exceedingly difficult for the Board to articulate a bright-line distinction between “contract” and “common carrier” rates that took account of the full range of such pricing mechanisms. Nor is there any compelling reason for the Board to do so; rather, it should continue its longstanding practice of determining the status of particular rate arrangements on a case-by-case basis.

If the Board nevertheless decides to promulgate a definition of “contract” transportation, CPR urges the Board to reconsider the definition proposed in the *NPRM Decision*. Specifically, the Board should not require that a contract include, in all cases, a “specific rate for a specific period of time.” Not all transportation contracts set forth a “specific rate” for the transportation involved, nor do they always guarantee that a rate referenced in the agreement will continue to apply for a “specific period of time.”

Indeed, it is not uncommon for a transportation contract (particularly those involving agricultural shipments) to contain a variety of “customized” terms relating to car supply, service standards or guarantees, shipper volume commitments and/or construction of new facilities, but

to incorporate a published "tariff" rate as the price agreed upon by the carrier and shipper. (Such contracts may, or may not, also provide for rebates or discounts from the incorporated tariff rate upon the satisfaction of specified conditions by the shipper) Contracts that incorporate tariff rates may also give the carrier the right to adjust the referenced tariff rates from time to time during the term of the contract. Under such arrangements, the shipper contractually binds itself to pay the prevailing tariff rate (and, perhaps, to ship a certain minimum volume of traffic) in consideration for the carrier's promise to dedicate equipment to handling the shipper's traffic and/or to guarantee a specified level of service performance

The definition of "contract" proposed in the *NPRM Decision* could call into question the status of such agreements. Specifically, a requirement that a Section 10709 contract must contain a "specific rate for a specific period of time" might be construed to exclude an agreement under which a shipper agrees to pay a "tariff" rate that is incorporated by reference, or to permit the railroad unilaterally to adjust that rate during the term of the agreement, in exchange for other consideration. Such an interpretation of the term "contract" would conflict with prior Board precedent holding that tariff terms incorporated into a contract are "contract" terms and not subject to regulation. For example, in Docket No. 41510, *H B. Fuller v Southern Pacific Transportation Co* , (Decision served Aug. 22, 1997), a railroad and shipper entered into an agreement that incorporated by reference certain tariffs, rules and regulations that would have applied in the absence of a contract. The shipper later filed a complaint challenging the reasonableness of the railroad's storage charges and its practice of assessing demurrage charges on privately-owned freight cars, both of which were based upon tariff provisions incorporated into the contract. The Board dismissed the complaint on the ground that it had no jurisdiction over the challenged charges.

In this case, the transportation was performed under contract, even though the terms of the contract refer to the carrier's tariff. Thus, even if, as SP alleges, the referenced tariffs would have applied generally to storage and demurrage charges, the Board would not have jurisdiction over services provided under contracts incorporating those tariffs. The contract, even though it may rely on the tariff for certain terms, reflects the bargain of the parties. The fact that the parties may have chosen to incorporate tariff terms into their contract does not make transportation under the contract subject to regulation. Rather, the referenced tariff terms became contract terms for purposes of transportation performed under the contract. As such, issues regarding the breach, or precise construction of those terms will have to be resolved in an appropriate court of law.

Fuller (Decision served Aug 22, 1997 at 3) See also Finance Docket No. 33582, *Cross Oil Refining & Marketing, Inc. v Union Pacific Railroad Company*, (Decision served Oct. 27, 1998) ("Rail contracts can incorporate tariff terms and still be outside the Board's jurisdiction").

An interpretation of the term "contract" that excluded existing agreements that incorporate "tariff" rates (or permit a railroad to adjust such rates during the term of the agreement) would have significant adverse consequences. Rates set forth in agreements that both parties believed were "contracts" might be reclassified as "common carrier" rates subject to the jurisdiction of the Board rather than the courts (contrary to the intention of the parties). Reclassification of existing rate arrangements would discourage carriers from entering into similar arrangements in the future. At a minimum, imposing a requirement that every transportation contract contain a "specific rate for a specific period of time" would restrict the ability of railroads and their customers to devise creative commercial solutions to the challenges they face in today's highly competitive marketplace. In the *NPRM Decision* (at 6), the Board disavowed any intention "to stifle innovation in transportation markets or otherwise disadvantage any party." However, the proposed interpretation of the term "contract" could have precisely such negative effects.

The *NPRM Decision* indicates that the proposed rule is intended to address the Board's concern that certain "hybrid" pricing mechanisms might be used by carriers (and shippers) to manipulate the Board's rate jurisdiction by labeling as "common carrier" rates prices set forth in bilateral agreements that otherwise have the characteristics of a contract. Rather than attempting to craft a definition of the term "contract" that might have unintended adverse impacts on the ability of railroads and their customers to continue to negotiate creative commercial arrangements, the Board should consider addressing its concerns by promulgating rules that identify the features (such as guaranteed minimum volume commitments, liquidated damages provisions or other non-price consideration) that may (or may not) be included in "common carrier" rate quotations. The Board can also distinguish (on a case-by-case basis) between "contract" and "common carrier" rates by considering, *inter alia*, whether the rate at issue is available only to a particular customer (or customers) or to all shippers, and whether the terms of the pricing document are confidential or public and other relevant factors. CPR urges the Board to pursue such alternatives in lieu of the proposal set forth in the *NPRM Decision*.

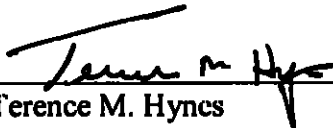
CONCLUSION

For all of the foregoing reasons, CPR urges the Board not to promulgate a rule adopting the interpretation of the term "contract" in 49 U.S.C. § 10709, as proposed in the *NPRM*

Decision.

Respectfully submitted,

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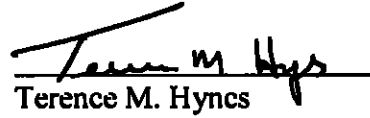

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Attorneys for Canadian Pacific Railway Company

Dated: June 4, 2007

CERTIFICATE OF SERVICE

I hereby certify this 4th day of June 2007 that I have served all parties of record in this proceeding by first class mail, postage prepaid


Terence M. Hynes