

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte 669

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

COMMENTS

Submitted on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League
1700 North Moore Street
Arlington, VA

By its attorneys:

Nicholas J. DiMichael
Karyn A. Booth
Thompson Hine LLP
1920 N Street, N.W.
Washington, D.C. 20036
(202) 263-4103

Dated: June 4, 2007

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte 669

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

COMMENTS
of
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League ("League") is pleased to submit these Comments in response to the Notice of Proposed Rulemaking served March 28, 2007. In that Notice, the Board is seeking public comments on a proposal to interpret the word "contract" in 49 U.S.C. 10709 as embracing any bilateral agreement between a shipper and a carrier for rail transportation in which the railroad agrees to a specific rate for a specific period of time in exchange for consideration from the shipper, such as a commitment to tender a specific amount of freight during a specific period or to make specific investments in rail facilities.

Because of the potential importance of the proposed rule, the League surveyed the members of its Rail Committee, which is composed of League members with particular interest in rail transportation. The results of that survey indicated that League members strongly believe that greater clarity is needed in identifying rate offers as "contracts" or "tariffs," and that the agency's proposed rule is a useful regulation to clarify the status of contracts and tariffs. Thus, the League supports the general thrust and intent of the Board's proposed rule. The League suggests, however, that the Board adopt several changes in order to clarify the rule's scope and intent; to avoid unnecessary restrictive features; and to insure that the rule is not circumvented.

I. APPLICATION OF THE PROPOSED RULE: TARIFFS THAT LOOK LIKE CONTRACTS, AND CONTRACTS THAT LOOK LIKE TARIFFS

In its Notice, the Board noted that in a recent proceeding in *Kansas City Power & Light Company v. Union Pacific Railroad Company*, STB Docket No. 42095, ("KCPL"), the Board considered a "hybrid" pricing mechanism that the carrier designated a "common carrier" pricing arrangement, but could be viewed as a rail transportation contract. Under that mechanism, the carrier offered a rate that contained a mutuality of obligation between the carrier and the shipper: the shipper had to promise to ship a certain volume over a certain period of time, and the carrier committed to a specific rate and service over a specific term.

The Board's proposed rule will clearly apply to this particular "hybrid" situation, to clarify that *KCPL*-type bilateral arrangements are to be treated as contracts, and not common carrier tariffs.¹ The League agrees with the Board that the increased use of these hybrid pricing mechanisms – in the form of "tariffs that look like contracts" -- could create an environment where collusive activities in the form of anticompetitive price signaling could occur without the arrangements being subject to the antitrust laws, and for this reason alone, the League believes that the Board's proposed rule would be useful.

However, the Board should *also* be aware that the Board's proposed rule would *also* appear to apply – usefully, in the League's view -- to what might be viewed as the *reverse* of the type of *KCPL* "tariffs-that-look-like-contracts" situation that is explicitly considered by the Board in the proposed rule.

Specifically, the League is aware from its survey and reports from its members that carriers are *also* beginning to impose on shippers "contracts" that *bear all the earmarks of tariffs*. In these "contracts-that-look-like-tariffs" situations, the carrier submits to the shipper a unilateral

offer in the form of a document that is designated on its face a 10709 "contract." But, unlike the common understanding of a contract, in which the parties agree beforehand on rates and terms of service that are to apply over an agreed term, these "contracts" are unilateral "offers"; demand no minimum volume; have a rate that can be changed on very short notice (20 or 30 days); are subject to the terms and conditions published in the carrier's tariffs; and are "accepted" simply by tendering traffic. This form of "contract" is, in any practical sense, a common carrier tariff. As the Board noted, "[t]raditionally, common carrier pricing has been a holding out to the public to provide specified transportation services for a given price that a shipper accepts by tendering traffic." Notice, p. 4. The League believes that carriers are labelling these documents "contracts" in order to immunize the activity from Board jurisdiction.²

As the League reads the Board's proposed rule, these type of "contracts-that-look-like-tariffs" would be classified as *common carrier tariffs*, and not as "contracts," no matter what label was placed on the document. This is because such a document would *not* be a "bilateral agreement between a carrier and a shipper for rail transportation in which the carrier agrees to a specific rate for a specific period of time in exchange for consideration from the shipper . . . ", since the shipper would be exchanging *no* consideration on its part (*e.g.*, a minimum amount of traffic, specific investments, etc.) See proposed 1300.1(c)(1).³ However, as noted below, the League asks the Board to verify this interpretation of the proposed rule.

The League believes that the proposed rule is useful, as applied to both the *KCPL* "tariffs-that-look-like-contracts" as well as the "contracts-that-look-like-tariffs" situations. As

¹ As discussed below, the League believes that the Board needs to clarify the scope of the proposed rule.

² Frequently, these "contracts" are tendered in a market-dominant situation in which the shipper has little option but to accept the "contract" "offer." If the shipper insists on a tariff rate, the carrier often publishes a rate substantially higher than the "contract" offer despite the otherwise identical nature of the transportation terms.

³ As discussed below, in its final rule, the Board may want to clarify that, just as an agreement that *contains* a "bilateral agreement" with the specific requirements *is* a contract under the proposed rule, no matter what the

noted by the Board in its proposed rule, in the instance of *KCPL*-type "tariffs that look like contracts," the rule will help prevent collusive activity, since it will make such arrangement subject to the antitrust laws. In the second instance of "contracts that look like tariffs," the rule will clarify *which* rates are under the Board's jurisdiction and which are not, and avoid an "end around" the Board's jurisdiction simply by labelling a document a "contract."

II. THE BOARD SHOULD CLARIFY THE MEANING, SCOPE AND INTENT OF THE PROPOSED RULE

The League believes that, while the proposed rule is useful, the Board needs to think through more carefully and clarify the meaning and scope of the proposed rule. In particular, there is substantial uncertainty as to the meaning and scope of the term "bilateral agreement." While the proposed rule clearly applies to the *KCPL*-type situation, there are other annual volume type situations which have traditionally have been considered as tariffs, and the application of the proposed rule in such situations is not at all clear. Finally, the wording of the rule should be improved, to clarify the rule; to avoid what appears to be unintended effects; and to prevent circumvention of the proposed rule.

A. The Scope of the Term "Bilateral Agreement" Should Be Clarified

The proposed rule defines the term "contract" in 49 U.S.C. 10709 as "*any* bilateral agreement" between a carrier and a shipper, in which the "carrier agrees to a specific rate for a specific period of time in exchange for consideration from the shipper" Proposed 49 C.F.R. 1300.1(c)(1).

In the *KCPL* situation, the Board was confronted with an arrangement in which the carrier set forth a tariff that contained two options for rates, Option 1 and Option 2. Option 1

document says (see proposed 1300.1(c)(2), an agreement that *does not contain* those features is *not* a contract (i.e., is a tariff) under the rule.

rates were higher than Option 2 rates applicable to the same movement. In Option 1, the tariff contained no volume requirement, but contained rates that could be changed on twenty days' notice. Under Option 2, the carrier committed itself to charge the specified rates for the full term specified, subject only to a fuel surcharge adjustment. However, the shipper seeking to obtain Option 2 rates had to execute a Volume Commitment Certificate, in which the shipper "acknowledge[d] the reciprocal benefits under Option 2 terms and conditions and agrees to be bound by the applicable terms and conditions set forth" in the tariff circular. See, *Kansas City Power and Light Company v. Union Pacific Railroad Company*, STB Docket 42095, decision served July 27, 2006, pp. 2-3. By executing the Volume Commitment Certificate, the shipper committed to tender for transportation an annual minimum volume of coal for the term of the agreement, and if it failed to do so, the shipper was liable for liquidated damages. The Option 2 rate also contained a service commitment if the shipper supplied its own cars, under which if the carrier failed to meet that commitment, the carrier would be liable for liquidated damages. *Id.*

The *KCPL* situation may be unusually clear, but there are many other situations that are not so clear. For example, annual volume tariffs have been approved by the Board and its predecessor, the Interstate Commerce Commission, for decades. Under an annual volume tariff arrangement, the carrier usually publishes two rates, one conditioned on the shipper transporting a certain volume, and then a higher "fallback" rate, which applies if the volume minimum is not met. If the volume is not met, then either the "fallback" rate applies to the volume actually shipped, or the shipper can "pay for air" by paying the carrier the amount that would have been paid had the volume condition been met.

Is this type of annual volume tariff a "bilateral agreement" under the Board's proposed rule? Or is the existence of the *certificate* or other document stating a *promise*, as was present in

the *KCPL* situation, necessary for there to be a "bilateral agreement"? The proposed rule is ambiguous in this regard. On the one hand, in the traditional annual volume tariff situation, there is no explicit "promise" by the shipper to ship the annual volume. Yet, a promise can be implied, especially since the shipper is required to pay the "fallback" rate if the stated annual volume is *not* shipped, and the difference between the annual volume rate and the fallback rate can easily be interpreted as a form of "liquidated damages" for failing to ship the stated annual volume. Moreover, in a typical annual volume arrangement, without more, the carrier may be perceived at least implicitly promising not to raise the rate for the annual volume period, and therefore it could be argued that implicit promise is the carrier's consideration, and indeed sometimes in the past carriers have made those promises explicit. Do shipper and carrier implicit (or explicit) promises constitute a bilateral agreement within the scope of the proposed rule? The Board's rule is unclear. The League believes that traditional annual volume arrangements, in which the shipper is given an incentive in the form of a lower rate to ship a certain annual volume, should remain as tariffs subject to the Board's jurisdiction and should not be deemed "contracts."

In addition, the wording of the Board's proposed rule does not fit easily into other situations in which contracts might be negotiated. For example, a carrier and shipper might enter into a special demurrage arrangement. Is this a "contract" under the Board's proposed rule? What type of commitment must it contain for it to be a contract?

The League believes that the most important benefit of the Board's proposed rule is to clarify the status of certain documents. After all, neither shippers nor carriers desire situations in which the beginning of any litigation, either in court or at the agency, is spent determining the correct forum. The League urges the Board to consider more broadly and deeply the types of situations that might be covered by the proposed rule, and insure that the coverage is appropriate.

B. The Board Should Clarify That an Arrangement In Which There is No Bilateral Agreement Will Be Considered a Tariff, Regardless of the Label Applied

Under the proposed rule, the Board has stated that a "bilateral agreement" described under subsection (a)(1) will be treated by the Board as a rail transportation contract under 49 U.S.C. 10709 "notwithstanding any representation that a rate specified in an agreement is a common carrier rate" See proposed 49 C.F.R. 1300.1(a)(2)

As noted in Section I above, carriers have been submitting to shippers documents labelled on their face as "contracts," but which are unilateral offers that can be changed at any time by the carrier on little or no notice. Under the Board's proposed rule, the agency proposes to define "contract" as a "bilateral agreement" in which the carriers agrees to a specific rate for a specific period of time in exchange for consideration from the shipper. If a document does *not* set forth a "bilateral agreement," then it seems that such a document would *not* be considered a "contract" under 49 U.S.C. 10709, and would be considered a tariff.

However, the Board's rule is not entirely clear in that regard. The proposed rule contains a statement in proposed 49 C.F.R. 1300.1(c)(2) to the effect that a "representation" in a document would not transform what would otherwise be a contract into a tariff. The League urges the Board to clarify the meaning of its proposed rule to insert wording that would clarify that if a document is *not* a "bilateral agreement," then a representation in a document that it is a contract would not transform what would otherwise be a tariff into a contract.

C. The Board Should Take Steps to Avoid Circumvention of its Proposed Rule

As discussed above, carriers have been offering tariff-like documents in the form of unilateral offers which provide that the carrier can change the rate entirely in its own discretion on short notice. Under the proposed rule, these "contracts that look like tariffs" would be deemed to be a tariff, regardless of the label. However, a carrier could circumvent this result

simply by putting into the "contract" a *de minimus* volume commitment. Thus, the League suggests that the proposed rule should be drafted so that there is a rebuttable presumption that a document that is labelled a "contract" and which contains a *de minimus* volume commitment does not transform what would otherwise be a unilateral tariff into a contract.

D. The Board Should Clarify That the Contract Rule Applies to More Than One Shipper

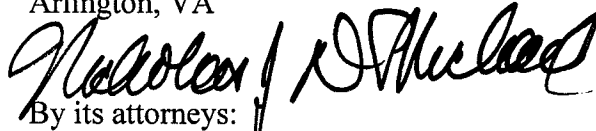
The Board's proposed rule defines a 10709 contract as a bilateral agreement "between a carrier and a shipper" for rail transportation. However, the statute indicates that a rail carrier may enter into a contract with "one *or more* purchasers of rail services. . . ." 49 U.S.C. 10709(a). The Board should clarify that a contract is a bilateral agreement between "one or more carriers" and "one or more shippers," to insure that the wording of the rule is consistent with the statute and that the scope of the rule is clear.

III. CONCLUSION

The League appreciates this opportunity to present its views to the Board on this important matter.

Respectfully submitted,

The National Industrial Transportation League
1700 North Moore Street
Arlington, VA



By its attorneys:
Nicholas J. DiMichael
Karyn A. Booth
Thompson Hine LLP
1920 N Street, N.W.
Washington, D.C. 20036
(202) 263-4103

Dated: June 4, 2007