



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
202 736 8000
202 736 8711 FAX

phemmersbaugh@sidley.com
(202) 736-8538

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June 4, 2007

ELECTRONIC FILING

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

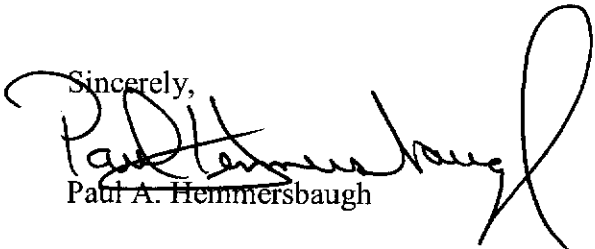
Re: STB Ex Parte No. 669, "Interpretation of the 'Term Contract' in 49 U.S.C.
10709

Dear Secretary Williams:

Enclosed, for filing in the above-referenced proceeding, is an electronic copy of the Opening Comments of CSX Transportation Inc. in the above-referenced proceeding. We will serve the one party on the service list with a copy of this filing.

Thank you for your assistance in this matter. If you have any questions regarding this filing, please contact the undersigned.

Sincerely,


Paul A. Hemmersbaugh

Counsel to CSX Transportation, Inc..

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE No. 669

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

OPENING COMMENTS OF CSX TRANSPORTATION, INC.

Peter J. Shudtz
Paul R. Hitchcock
Mark S. Hoffman
Steven C. Armbrust
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

G. Paul Moates
Paul A. Hemmersbaugh
Sidley Austin, LLP
1501 K Street, N.W.
Washington, D.C. 20005

Counsel to CSX Transportation, Inc.

Dated June 4, 2007

INTRODUCTION

CSX Transportation, Inc. (“CSXT”) respectfully submits its opening comments regarding the Board’s proposed interpretation of the term “contract” in 49 U.S.C. § 10709. CSXT appreciates the Board’s concern regarding the lack of a clearly understood, generally applicable dividing line between Section 10709 “contracts,” and Section 11101 public tariffs.¹ *See generally*, Notice, “Interpretation of the Term ‘Contract’ in 49 U.S.C. 10709,” *Ex Parte* 669 (served March 29, 2007) (“Notice”). CSXT also understands the Board’s desire to clarify the distinction between public tariffs and Section 10709 contracts in order to reduce the potential for confusion and uncertainty about whether certain rail transportation arrangements that the parties characterize as public tariffs may nonetheless constitute “contracts.” *See id.*² CSXT does not issue public tariffs that mutually bind the carrier and a customer for a specified period of time or that obligate the customer to ship a specific volume over a specific period of time (although the ICA requires carriers to provide 20 days’ notice of a change to the terms or conditions of a public tariff or tariff. *See* 49 U.S.C. § 11101(c)). While public pricing has its role in marketing both exempt and regulated business, CSXT and its customers generally prefer to use privately negotiated, confidential contracts for many of their substantial commercial relationships.

CSXT commends the Board for seeking comments on the proposed rule changes in order to ensure that any changes it adopts continue to serve and advance important rail transportation policies, do not stifle innovation in transportation markets, and do not

¹ The public rates, terms and conditions for rail transportation over which the Board has regulatory responsibility are often referred to as “common carrier rates,” even though they generally include terms and conditions beyond the rate. For clarity and consistency, these Comments will refer to those public pricing and terms documents as “public tariffs.”

² CSXT is not familiar with, and takes no position concerning, the particular “hybrid pricing mechanism” described in the Notice. More generally, CSXT takes no position in this proceeding regarding the effect or potential effect of “public pricing” on competition in the rail transportation industry.

disadvantage any party. *See id.* at 6. As described below, these comments afford CSXT the opportunity to explain a potential application of the proposed definition that could cause precisely the types of negative effects the Board appropriately seeks to avoid. *See id.*

SUMMARY

CSXT has no particular disagreement with the Board's concerns, summarized above. CSXT *is* concerned, however, that the Board's proposal could have the additional unintended effect of invalidating existing private rate agreements and pricing arrangements, thereby potentially *reducing* the utility and number of private agreements, and *increasing* the use of public tariffs. Paradoxically, the Board's well-intentioned effort to address a perceived problem (seeking to define Section 10709 "contracts" in a manner that prevents parties from inappropriately expanding the Board's public tariff jurisdiction) could have the opposite, collateral effect of discouraging *private* pricing arrangements. CSXT does not believe the Board would intend such results, and requests that the Board adjust its proposal to more narrowly target its specific concerns and to avoid the unintended negative consequences described below.

As proposed, elements of the Board's definition could have significant negative effects on private transportation rate arrangements including deeming agreements that the parties believe and intend to be contracts to be void; invalidating or discouraging privately negotiated transportation agreements; and reducing parties' flexibility to develop innovative commercial arrangements to respond to the needs and challenges of the marketplace. Such consequences would be contrary to a central purpose of national rail policy over the last three decades – to allow and encourage privately negotiated agreements, and the commercial and market conditions, forces, and opportunities they reflect, to establish the prices and terms governing the movement of rail freight in the United States. Accordingly, CSXT urges the Board to take care to ensure that any definition or criterion it may adopt does not generate collateral negative effects

such as prohibiting or discouraging, mutually beneficial private rail transportation rates and arrangements or stifling the future development of innovative private commercial arrangements.

Below, CSXT describes its concerns regarding the Board's proposal in more detail, and offers alternative means to achieve the Board's objectives without unduly restricting the ability of rail carriers and customers to negotiate and enter contracts that serve the interests of the parties and the public.

I. THE BOARD'S PROPOSED DEFINITION OF CONTRACT IS UNDULY NARROW AND WOULD UNNECESSARILY EXCLUDE EXISTING ARRANGEMENTS THAT WORK WELL FOR CSXT AND ITS CUSTOMERS.

The definition proposed in the Notice narrowly defines the term "contract" to encompass only 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*, such as a commitment to tender a specific amount of freight during a specific period or to make specific investments in rail facilities.

Notice at 8 (proposed text of new 49 C.F.R. § 1300.1(c)(1)) (emphasis added). CSXT believes this proposed definition is too narrow, is unnecessary to achieve the Board's aim in this proceeding, and would inappropriately limit the ability of carriers and their customers to enter negotiated private agreements.

A. The Proposal Would Unduly Narrow the Scope of the Contract Provision of the Statute.

As a threshold matter, the Board's proposed regulation would unintentionally narrow the scope of the definition of contract enacted by Congress. Section 10709 authorizes rail carriers to enter into a contract with one or more purchasers of rail services³ "to provide

³ The Board's proposed definition, by its terms, would apply only to agreements between rail carriers and *shippers*. See Notice at 1, 6, 8. The statute, however, applies to all "purchasers of

specified services under specified rates and conditions.” 49 U.S.C. § 10709(a). The proposed regulation would limit that broad statutory definition by adding requirements that the contract at issue be “bilateral,” that it apply for a “specific period of time,” and that the customer must provide “consideration,” such as a commitment to ship a specific volume during a specific period of time. *See* Notice at 8. Congress did not so limit Section 10709, and it would not be appropriate for the Board to effectively amend the language of the statute – and thereby expand the Board’s exercise of regulatory authority --without clear authorization from Congress.⁴ Stated differently, because the statute itself adequately defines what may constitute a Section 10709 contract, the Board might better address the concerns expressed in the Notice by focusing on what may (and may not) constitute a public tariff. *See infra* at IV (suggesting that the Board consider addressing its concerns by clarifying limitations on a public tariff).

The proposed requirement that, in order to be a “contract,” the agreement must be bilateral and include certain specified consideration by the customer, could effectively compel the Board to intervene in private business relationships, delve into the terms and structure of myriad private pricing arrangements that the parties consider to be binding agreements, and to evaluate and rule upon the validity of those private arrangements under a particular theory of

rail services,” thereby encompassing other rail customers, including consignees and consignors, receivers, and third-party logistics providers. The proposal’s presumably unintended narrowing of the scope of Section 10709 illustrates the peril of attempting to create a simple, one-size-fits-all definition of “contract” for purposes of distinguishing between public tariffs and Section 10709 contracts. For purposes of these comments, CSXT will use the term “customer” to refer to purchasers (and potential purchasers) of rail services.

⁴ Given the very strong policy preference of Congress and the Board favoring private pricing and privately negotiated commercial agreements over public tariffs, any such private pricing agreement or mechanism should be presumed to be a “contract” for purposes of Section 10709. *See generally*, H.R. Rep. No. 96-1430 (96th Cong. 2d Sess. 80 (1980) (Conference Report on Staggers Act) (“In general, the freedom to make contracts with shippers helps railroads to tailor prices to [] specific cost and demand circumstances . . . Carriers are thus able to lower individual prices significantly where warranted by particular circumstances and to compete more effectively for traffic.”).

contract endorsed by its regulations. Under the Act, such inquiries are properly the responsibility of the courts, not the Board. The statute removes all authorized contracts (not just bilateral contracts or those in which a certain type of consideration or acceptance is provided) from the Board's public tariff jurisdiction (*see* Section 10709(c)(1)), provides that a party to an authorized contract has no duty other than that specified in the contract, and vests authority for adjudicating contractual disputes in the courts. *See* 49 U.S.C. § 10709(b), (c). When a carrier enters an authorized contract within the terms of Section 10709(a), the Board may not reject or enforce it. *See, e.g.,* H.R. Rep. No. 96-1430 (96th Cong. 2d Sess. 80 (1980) (Conference Report on Staggers Act) ("Absent an undue impairment of the common carrier obligation, the [Board] is without jurisdiction to reject a contract, and enforcement of a contract must be in the courts. It is not intended that other provisions of [Staggers] provide the [Board] with the authority to reject a contract. Rail carriers and shippers should be free to enter into contracts without concern that the [Board] will disapprove a contract . . ."). If a party wishes to challenge a rail transportation contract (e.g. for lack of consideration), or have its rights under that contract authoritatively determined, it may do so only in a state or federal court.

B. The Proposed Definition Could Have the Unintended Effect of Prohibiting Useful Commercial Arrangements, Including CSXT's PPQs, and Limiting Parties' Ability to Enter Mutually Beneficial Private Agreements.

Contrary to the Board's intention, the proposed definition could upset existing private commercial arrangements and practices, and unnecessarily limit development of innovative new private arrangements. The definition would establish a *per se* rule that all contracts the Board deems "unilateral," regardless of their validity under applicable state law, are not "contracts" for purposes of regulation under the Interstate Commerce Act. *All* confidential rail transportation agreements – existing and future – that are deemed unilateral (or not "bilateral"), or lacking a certain type of consideration defined by the Board, would not be

Section 10709 “contracts.” At the same time, however, such agreements would not be valid public tariffs, because they are private and confidential, not published, and may not be available on the same terms to all potential customers. *See* 49 U.S.C. § 11101 (public tariffs must be made available to any person on request, and common carrier service must be provided on those rates and terms upon reasonable request); § 10741 (prohibiting unreasonable discrimination); 49 C.F.R. § 1300.1-1300.2. Thus, even if the Board were authorized to revise the statutory definition of “contract,” the proposed rule would be inordinately broad and could unnecessarily render unlawful a large number of useful and productive private contracts, and potentially foreclose development of beneficial new private pricing contracts and arrangements in the future.

An important example of useful contracts that could be negatively affected by the proposed definition are CSXT’s Private Price Quotations (“PPQs”). CSXT and its customers frequently use private pricing documents that provide for specific rail transportation (e.g. movement of a particular commodity between a specified origin-destination pair or between specified zones) at a specific price under specific terms and conditions. Those PPQs are negotiated between CSXT and a single specific customer (in response to a request by that customer) for the benefit of the customer, and apply to freight tendered by that specific customer that satisfies the PPQ’s parameters and requirements. Each PPQ is a private, confidential contract between CSXT and a specific customer – a PPQ is not published and its terms are not shared with anyone other than the specific customer to which it applies. The rate specified in a PPQ is almost invariably lower than the rate CSXT offers in an analogous public tariff.

Many customers find these PPQs to be convenient and valuable rail transportation options, particularly for certain types of infrequent or lower-volume traffic. PPQs do not require the customer to commit to ship a specific volume of freight, to make specific investments in rail

facilities, or to provide other specific consideration prior to tendering the freight to CSXT. The lack of such a prior obligation provides customers flexibility to ship small volumes or make infrequent shipments on short notice at a previously agreed price, without having to either (i) negotiate all of the terms (including non-price terms) of, execute, and deliver separate contracts; or (ii) request a public tariff quote for each such shipment.⁵

The number of PPQs in force attests to their utility and popularity with CSXT customers. In May 2007, for example, CSXT had more than 1800 PPQs in force (approximately 50% of those PPQs apply to regulated traffic) and available for use by CSXT customers. If the Board were to adopt a new definition of contract that would place PPQs outside the ambit of Section 10709, all PPQs applying to regulated traffic could be rendered void. This would leave CSXT and its many affected customers with the existing public tariff as the only legally applicable rate. Presumably, CSXT and its customers who presently use PPQ contracts would attempt to re-structure those contracts to conform to the Board's narrow new definition of a Section 10709 "contract," perhaps by providing for a specific duration with advance commitments by the customer or including other additional terms and requirements that comply with the new definition. At the very least, however, negotiations regarding such new commercial and contractual arrangements would consume significant time and resources of the parties, and the public tariff would apply to that traffic until the parties were able to negotiate a new private contract. Moreover, in some instances the parties ultimately might be unable to reach an agreement that satisfies the new definition (there are frequently compelling business

⁵ At the same time, of course, customers retain the options to negotiate a contract with a specified term and volume commitments and other terms, or to request a public tariff. CSXT's practice of making PPQs available thus increases the pricing options available to customers, thereby affording them greater choice and flexibility to choose the arrangement that best suits the customer's needs and circumstances with respect to specific traffic.

reasons that a PPQ customer is not willing to make volume commitments or provide other prior “consideration” of the sort proposed by the Board).⁶ Thus, the proposed definition would eliminate an option that both CSXT and its customers find valuable and useful, and likely would result in payment of higher rates (for at least some period of time) by customers who previously used PPQs.

C. The Proposed Definition is Inconsistent with the Strong and Successful Policy Favoring Broad Use of Privately Negotiated Rail Transportation Agreements.

The proposed narrowing of the statutory definition of “contract” is also inconsistent with the strong policy favoring the expansion of contracts and privately negotiated rates over public tariffs. The preference for negotiated contracts and their attendant benefits started in the late 1970s. Congress dramatically expanded and strengthened that preference in the landmark Staggers Rail Act, and affirmed the success and importance of that important policy in the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”). *See, e.g.*, H.R. Rep. No. 96-1430, at 79-80 (1980) (Conf. Rep.) (“The [revised] title also affirmatively encourages railroads to use new marketing practices by permitting contracts between carriers and shippers.”); *Id.* at 98 (“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.”); *Id.* at 100 (“The conferees stress that the establishment of contract rates is a significant aspect of the new freedom allowed to carriers to market rail transportation

⁶ The STB’s proposed definition might also make customers retroactively liable for “undercharges” representing the difference between the otherwise applicable public tariff rate and the PPQ rate. If the PPQs would be deemed void for non-compliance with the new definition, the carrier would presumably be required to bill its customer – retroactively to the March 28, 2007 effective date of that definition – for the difference between the applicable public tariff and the rate that applied under the PPQ. CSXT believes the Board would not intend such a result.

more effectively.”); H.R. Rep. No. 96-1035, at 57 (1980), (“The Committee believes contracts serve both shippers’ and rail carriers’ interests by reducing uncertainty about market and service conditions.”); Notice at 2-3 (citing authority).⁷

Increased use of contracts and negotiated commercial arrangements and reduced reliance on regulated tariffs has been a critical factor in the gradually improving health of the rail transportation industry and carriers’ progress toward revenue adequacy and their concomitant ability to make critical investments in rail infrastructure. *See, e.g.*, H.R. Rep. No. 104-422, at 90-91 (1995) (ICCTA Conf. Rep.) (“[L]andmark legislation [Staggers Rail Act of 1980] deregulated most railroad rates, legalized railroad shipping contracts . . . and stimulated an explosion of service and marketing alternatives that would not have been possible under the Kafkaesque regulatory regime of the pre-Staggers era. . . . The Staggers Act has produced a renaissance in the railroad industry.”) The proposed contract definition would undermine the policies and undisputed successes of the post-Staggers era. As demonstrated, the proposal would unnecessarily limit the ability of carriers and their customers to continue to structure their commercial arrangements and private agreements in the manner that best serves their commercial needs and the requirements of the marketplace under a variety of circumstances, and could stifle innovative commercial arrangements in the future.

⁷ *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.”); *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 524 (1985) (“[N]egotiated contracts can often produce an agreement which is more advantageous both to the railroad and to the shipper than the rate we would otherwise prescribe.”).

D. The Proposed Definition Could Require the Board to Engage in Complex Contractual Analysis Under the Laws of Many Different Jurisdictions.

Applying the Board's proposed definition, which adopts a particular model of contracts that is not followed in many jurisdictions, could prove difficult and confusing in practice. Moreover, adopting a particular theory or technical definition of contract is not necessary to achieve the Board's aim in this proceeding, to clearly delineate which rail transportation arrangements are public tariffs and which are not.⁸ What is important is that any definition or other dividing line the Board adopts is consistent with congressional intent and the policies that animate the rail transportation provisions of the ICA, including the facilitation and expansion of private agreements as the primary means of establishing rail transportation rates, terms, and conditions.

The distinction between bilateral contracts and unilateral contracts, to the extent it continues to exist in modern contract law, is not as sharp, or as readily administered, as it may once have appeared. Indeed, the Second Restatement of Contracts and other authorities have rejected the unilateral-bilateral contract distinction as having little utility and causing confusion. *See e.g.*, Restatement (Second) Contracts § 1, comment f. Instead, the Second Restatement defines all contracts – without regard to whether they might previously have been labeled “bilateral” – broadly:

⁸ Indeed, attempting to use, for purposes of Section 10709, a definition of contract used in other contexts or for other purposes could result in conflicts between statutory provisions that are intended to work as part of a single consistent framework. For example, the ICC noted that a public tariff “is nothing more than a special kind of *contract* between a carrier and its shippers.” *National Grain and Feed Ass’n v. Burlington Northern Railroad Co.*, 8 I.C.C. 2d 421, 437 (1992) (emphasis added). If such a broad, general common law definition of “contract” were used for purposes of Section 10709, however, public tariffs would be outside the Board's jurisdiction, and all provisions of the ICA regarding the Board's regulation of common carrier rates tariffs and practices would be rendered meaningless. Plainly, any definition of contract the Board might adopt must be both carefully tailored to serve the intent and purposes of the Act, and sufficiently flexible to allow for myriad different facts and circumstances.

A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

Id. § 1.⁹

Similarly, courts have held that the *consideration* for a “unilateral” contract consists of the performance of the requested act by the promisee (for example, a customer’s tendering of freight in accordance with the carrier’s promise to move such freight between two points for a specific rate). *See, e.g., SouthTrust Bank v. Williams*, 775 So.2d 184, 188 (AL 2000) (in unilateral contract, performance by promisee constitutes consideration and acceptance); *Orr v. Westminster Village North*, 689 N.E.2d 712, 720 (IN 1997) (same). Under this view, it is not correct to state that a unilateral contract lacks consideration or mutuality. Rather, the consideration is simply provided when the promisee (e.g., the customer) performs the act requested by the promisor (the rail carrier).¹⁰

The broader point is that the laws of contract, including contract formation, vary significantly by state. Under the Board’s proposed rule, it might be called upon to determine,

⁹ Thus, as a matter of contract law and theory, a “unilateral” agreement is no less a contract than a “bilateral” agreement. And, once the promisee performs the act requested by the promisor, the agreement is certainly bilateral in the sense that both parties have binding obligations and rights with respect to the other party under the agreement. Another view or theory of contract might deem a PPQ to be an “offer” by a carrier, which is “accepted” by the customer (creating a mutually binding contract) when it tenders freight to be shipped in accordance with the terms of the offer. Here again, the parties’ obligations upon acceptance are clearly bilateral – the rail carrier promises to transport the freight in accordance with the terms of the offer, and the customer promises, among other things, to pay the specified rate for that transportation service.

¹⁰ Making the determination of whether a rail transportation agreement is a Section 10709 contract dependent on whether it is labeled “unilateral” and/or whether the customer provides consideration would create confusion and conflicts in the law. For example, once a customer has tendered freight for carriage under the terms of a “unilateral” private contract (i.e. provided the requested consideration), would that agreement be a Section 10709 “contract” (because it is supported by consideration) or Section 11101 public tariff (because it is not “bilateral”)? Moreover, if consideration transforms a unilateral agreement or offer into a Section 10709 “contract,” would all public tariffs become Section 10709 contracts once the customer tendered freight to be shipped pursuant to the terms of the tariff?

under the laws of at least 50 different jurisdictions (there is no general federal common law of contract that the Board could use to make such determinations),¹¹ whether a variety of different types of contracts are unilateral or bilateral (a jurisdiction that follows the Second Restatement may not recognize the distinction at all), whether they are supported by consideration, whether that consideration is adequate to support a contract, and at what point in time (*e.g.*, before or after the customer tenders freight in accordance with the terms offered by the carrier) the unilateral-bilateral distinction and evaluation of consideration or mutuality should be conducted. Given the variety of different circumstances and commercial situations in which these questions could arise, administering the Board's proposed definition could be a complex, difficult, and time-and-resource-consuming task. Moreover, the fact that similar questions and issues would likely arise from different jurisdictions raises the very real possibility of inconsistent determinations in similar cases, such as the same pricing arrangement being deemed a contract in one context and a public tariff in another, based upon different governing state laws.

The difficulty and complexity of determining, in a wide variety of different circumstances and contexts, whether an arrangement is sufficiently bilateral and or supported by sufficient consideration or mutuality to constitute a contract illustrates the wisdom of relying upon courts to make such determinations. Moreover, the salient distinction between a public tariff and a private rate agreement is not whether it is labeled "unilateral" or "bilateral," or the point in time at which the customer provides consideration, but rather whether the price

¹¹ See, *e.g.*, *Volt Info. Scis., Inc. v. Board of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) ("[T]he interpretation of private contracts is ordinarily a question of state law"); *Parental Guide of Tex., Inc. v. Thomson, Inc.*, 446 F.3d 1265, 1269 (Fed. Cir. 2006) ("Contract interpretation is a matter of state law."); *In re Bank of New England Corp.*, 364 F.3d 355, 363 (1st Cir. 2004) (to same effect); *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356 (3d Cir. 1986) ("The construction of contracts is usually a matter of state, not federal, common law.")

agreement or offer in question is public and available to all, or private and made available only to a specific customer.¹²

Thus, for purposes of categorizing various pricing agreements and arrangements, a more workable approach might be based on a simple distinction between: (1) public prices that are made available to any and all customers and do not offer more favorable prices or terms in exchange for an additional promise or commitment by the customer, which would be public tariffs; and (2) private pricing agreements and arrangements made available to specific individual customers, which, regardless of their form or structure, would be deemed “contracts.” *See infra* Sections II-IV.

E. The Proposed Definition is Not Necessary to Address the Board’s Concerns.

The Board could address the concerns expressed in the Notice without adopting the proposed definition of “contract” for purposes of Section 10709. As CSXT understands them, the Board’s two primary goals in this proceeding are: (i) to establish a clearer definition of what constitutes a Section 10709 contract, and thereby reduce potential confusion and disputes about the appropriate categorization of rail transportation arrangements (rates, terms and conditions); and (ii) to reduce the potential for use of the Board’s jurisdiction over public non-contractual arrangements (public tariffs) as a shield against scrutiny under otherwise applicable laws. *See* Notice at 3-4.

¹² It would be simplistic and incorrect to categorize a PPQ or other private transportation agreement as a public tariff, merely because it might, under one theory of contract, be labeled a “unilateral” contract. *Cf.* Notice at 4 (characterizing public tariffs as unilateral contracts). The difference between a PPQ and a public tariff is that a PPQ is intended by the parties to be a private agreement, governed by applicable common law of contract, while the latter is intended to be an offer to the public, which is subject to all of the regulatory rights and responsibilities of the Interstate Commerce Act and the Board’s regulations.

The Board could achieve these aims without imposing the significant limitations on the commercial options of carriers and their customers embodied in the narrow definition of “contract” proposed in the Notice. For example, the Board might simply specify certain types of terms that may not be included in a public tariff (such as provisions for a more favorable rate if a customer promises to ship a certain volume commitment in a specified period). To create a clear demarcation between Section 10709 contracts and public tariffs, the Board could establish a rule that all non-public price mechanisms and arrangements that quote a specific rate for a specific customer will be deemed contracts for Section 10709 purposes, regardless of the structure or other details of the private pricing mechanism or arrangement.

Such rules would be clear, simple, and easily administrable. Any private (i.e. non-public) pricing arrangement that specifies a price for a particular transportation service would be a “contract” for purposes of Section 10709 and related provisions of the Interstate Commerce Act. This would obviate the need for the Board to conduct inquiries into whether the arrangement in question is bilateral, whether the customer provided consideration, whether it applied for a specified time period, and whether it satisfied other technical and structural requirements of the varying laws of contract in the several States. Any public rate that contains prohibited terms or conditions would be null and void. Any carrier that published a tariff containing proscribed terms or conditions could be required promptly to publish a new public tariff that does not contain such terms and conditions.

Below, CSXT describes three alternative approaches that could achieve the Board’s objectives without discouraging the use of private agreements. Such alternative approaches would eliminate the need for the Board to make the fine distinctions between types of private agreements and types of consideration in myriad different commercial contexts and

circumstances that would be required under the Board's proposal. More important, such rules would further promote expanded use of private negotiated agreements, by narrowing the range of permissible common carrier public tariff provisions, and thereby increasing the potential advantages of private agreements to both customers and carriers. The definition of contract proposed in the Notice, in contrast, would limit parties' ability to enter certain types of mutually beneficial private agreements, require the Board to adjudicate disputes concerning whether an agreement is sufficiently "bilateral" or includes qualifying consideration, and could force carriers to convert existing private agreements to public tariffs.

II. THE BOARD COULD AMEND ITS PROPOSED DEFINITION TO CLARIFY THAT CERTAIN PRIVATE AGREEMENTS WILL CONTINUE TO BE CONSIDERED "CONTRACTS" FOR PURPOSES OF SECTION 10709.

If, despite the difficulties and concerns described above, the Board wishes to use the definition proposed in the Notice, it could preserve PPQs and similar mutually beneficial private contracts and arrangements by expressly providing that such agreements will be deemed to be contracts within the meaning of Section 10709. The Board could accomplish this by inserting a new section 1300.1(c)(2), immediately following proposed section 1300.1(c)(1), providing:

Notwithstanding paragraph (c)(1) of this section, the term contract in 49 U.S.C. § 10709 shall also include any *confidential, non-public* agreement or pricing arrangement in which a carrier offers or agrees to provide specific rail transportation to a specific customer for a specific rate.¹³

This additional provision would preserve an important commercial tool that has proven useful to CSXT and its customers. It would allow parties to continue to develop and use private agreements like PPQs when they believe it is in their mutual interest, and eliminate potential uncertainty and disputes about the validity of existing private pricing agreements. *See*

¹³ Proposed section 1300.1(c)(2) from the Notice could be retained and renumbered 1300.1(c)(3).

Notice at 6 (Board does not intend to stifle innovation in transportation markets or disadvantage any party). The resulting regulation (amended as CSXT proposes) would advance the goals described in the Notice and avoid the unintended consequences described in these Comments.

III. THE BOARD COULD ADDRESS ITS CONCERNS, AND SIMULTANEOUSLY PROVIDE WIDER FLEXIBILITY FOR PARTIES TO ENTER PRIVATE PRICING ARRANGEMENTS, BY ADOPTING A RULE THAT CONFIDENTIAL PRICING ARRANGEMENTS ARE “CONTRACTS” AND PUBLIC PRICING ARRANGEMENTS ARE REGULATED COMMON CARRIER TARIFFS.

Instead of amending its proposed definition, the Board could eliminate that definition, and substitute a simple rule that would differentiate between private “contracts” on one hand, and public tariffs on the other hand. The Board could establish such a bright line rule by adopting the following definition of “contract” (replacing the proposed changes to 49 C.F.R. § 1301(c)) for purposes of Section 10709 and related provisions of the ICA:

The term *contract* in 49 U.S.C. § 10709 shall mean any *confidential, non-public* agreement or pricing arrangement in which a carrier offers or agrees to provide specific rail transportation to one specific customer for a specific rate.

All other rail transportation pricing arrangements for non-exempt traffic would be “public tariffs and terms,” subject to the full panoply of ICA rights and requirements. If the Board also wished to ensure that carriers could not seek certain benefits of contracts in their public tariffs, it could further amend Part 1300 to provide:

the terms and conditions of public tariffs may not include a commitment or promise to ship a specific volume or amount of freight in a specific time period, or a promise or commitment to make specific investments in rail facilities, or provide that the parties shall be bound to its terms for a specific duration.

In combination, the simple proposed definition of a Section 10709 “contract” and the clarifying limitation on the terms of a public tariff would establish a clear and easily administered distinction between rail transportation contracts and public tariffs. This approach

would also avoid immersing the Board in difficult, fact-bound determinations of what is and is not a “contract” under applicable state law.

IV. ALTERNATIVELY, THE BOARD COULD ADDRESS ITS CONCERNS BY MORE CLEARLY DEFINING REQUIREMENTS FOR A PUBLIC TARIFF.

Third, instead of attempting to define what is and is not a “contract,” the Board could address its concerns about the use of public tariffs that incorporate contract-like terms and requirements simply by adopting clarifying limitations on the terms and conditions of such tariffs.¹⁴ The Board’s exclusive authority and responsibility to determine what common carriage rates, rules and practices are reasonable includes the authority to adopt regulations that are necessary and appropriate to implement that power, which presumably includes the power to prescribe general requirements and limitations on public tariffs and practices. *See generally*, 49 U.S.C. §§ 10701-10709; 49 C.F.R. Part 1300 (existing regulations governing public tariffs and practices). The Board could exercise this authority to prohibit the inclusion of certain terms, requirements, or arrangements in public tariffs, and thereby effectively limit or eliminate terms or practices that the Board finds are inconsistent with applicable requirements and policies of the Act.

For example, the Board might consider a regulation proscribing public tariffs that promise that they will be effective for a specific duration or period of time. Or, the Board might adopt a regulation prohibiting public tariffs from offering more favorable prices or terms to customers in exchange for the customer’s binding reciprocal commitment, such as promising to ship a particular volume in a specific period, or promising to make certain investments in rail

¹⁴ One such potential limitation is discussed in the preceding section. *See* III, *supra*.

facilities.¹⁵ Such regulations could further provide that any purported “common carrier” rate or practice that violates one of those regulatory requirements is void and has no effect. Carriers whose tariffs violated those requirements could be authorized (or required, in the case of a lawful request for the establishment of a public tariff) promptly to establish a replacement set of public rates and terms (a public tariff) that conformed to the requirements of the regulations.

Thus, using its authority over public tariffs and practices, the Board could effectively address the concerns described in the Notice with precision, while minimizing unintended effects.¹⁶ Such an approach would make it unnecessary for the Board to attempt to fashion and enforce a definition of “contract” under Section 10709. Parties who wished to establish a rail transportation arrangement having features not allowed in public tariffs would be required to employ private Section 10709 “contracts.”¹⁷

V. IF THE BOARD ADOPTS A DEFINITION OR RULE THAT WOULD PROHIBIT EXISTING PRIVATE RATE ARRANGEMENTS, THE RULE SHOULD APPLY PROSPECTIVELY FROM THE DATE THE BOARD PROMULGATES ITS FINAL RULES.

For all of the reasons described above, CSXT urges the Board not to adopt a new definition of contract, and certainly not the unduly narrow proposed definition. The Board can address its concerns in a variety of ways, including those suggested in these comments, that

¹⁵ Such regulations should not prohibit carriers from offering public tariffs that provide for rate discounts based upon a customer’s shipping of specified volume levels, or from offering other incentives that do not require the customer to make an additional reciprocal promise.

¹⁶ If the Board decides to follow this course, CSXT urges it to issue a new Notice of Proposed Rule and seek comments (or at least seek additional comments in this proceeding) regarding proposed new requirements or limitations on the terms of public tariffs.

¹⁷ The categorization of such a (non-tariff) mechanism as a “contract” for purposes of Section 10709 would not embody any determination regarding its validity or enforceability under applicable contract law. If a carrier, customer, or other party to such an agreement or arrangement wished to have its rights determined under applicable contract law, it could file an action in an appropriate court.

would not unduly disturb existing private agreements and practices. If the Board does adopt a new definition that may materially affect existing private pricing arrangements, it should apply prospectively only. Rail carriers and their customers have developed a wide variety of practices and pricing arrangements in the nearly 30 years since the ICC first authorized private contracts. Since the enactment of the Staggers Rail Act, neither Congress nor the agency (ICC on STB) has provided any additional guidance as to the scope and meaning of the term "contract" in Section 10709. In the absence of such guidance, carriers have developed their own understandings of the reach of Section 10709 and what private arrangements it allows. Because carriers and their customers have structured their commercial relationships and made business decisions based on those understandings, it would be unfair, inappropriate, and commercially disruptive for any new and materially different definition to operate retroactively.¹⁸ Indeed, it could take some time for carriers and customers to adjust their arrangements to conform to any rule that significantly narrows the scope of Section 10709 in comparison to their established understanding and interpretation of the scope of that provision. To allow parties time to make orderly adjustment to any such definition, CSXT requests that the Board postpone its effective date to 120 days after the issuance of the final rule.¹⁹ At a minimum, CSXT urges the Board to provide that any such

¹⁸ A retroactive rule would open the question of what rate should have applied to traffic that moved under a private arrangement that is invalidated by the new rule. If the Board were to determine that the most closely analogous public tariff should have applied, and that tariff was higher than the invalidated higher rate, the Board would be required to make determinations of whether carriers would be required (or allowed) to seek to recover undercharges. Fairness to both carriers and customers militates in favor of making any new rule entirely prospective.

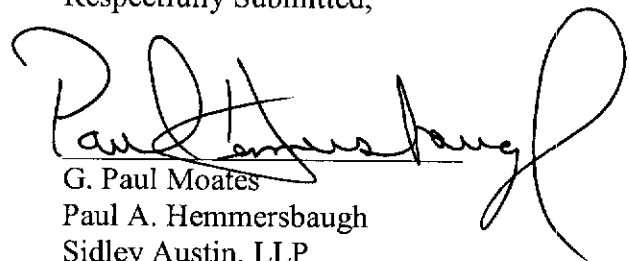
¹⁹ Such a deferred effective date would not be inconsistent with making the rule deeming certain bilateral agreements to be Section 10709 contracts effective as of the date of the Notice. In that instance, the Board is seeking to prevent parties from attempting to classify more pricing arrangements as within the Board's exclusive (non-contract) jurisdiction, which is contrary to a central goal of the Staggers Act and STB and ICC policy over the last 25 years. Here, in contrast, the Board would be temporarily preserving private arrangements that the parties

rules change will have no retrospective application and will apply prospectively from the date of promulgation of the final rule.

CONCLUSION

For the foregoing reasons, CSXT requests that the Board not adopt the definition of contract proposed in the Notice. If the Board does adopt a new definition of contract for purposes of Section 10709, CSXT requests that the definition apply prospectively only, and that the Board allow carriers and their customers a reasonable period to make necessary adjustments to their private rail transportation agreements and arrangements.

Respectfully Submitted,



G. Paul Moates
Paul A. Hemmersbaugh
Sidley Austin, LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Peter J. Shudtz
Paul R. Hitchcock
Mark S. Hoffman
Steven C. Armbrust
CSX Transportation, Inc.
500 Water Street
Jacksonville, FL 32202

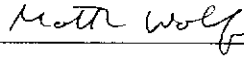
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intended and believed to be Section 10709 contracts, which furthers the statutory goals of encouraging greater use of private negotiations and agreements.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2007, I caused a copy of the foregoing Comments of CSX Transportation, Inc. to be served the following parties by first class mail, postage prepaid or more expeditious method of delivery:

Sandra J. Dearden
Highroad Consulting Ltd.
55 East Jackson Blvd., Suite 625
Chicago, IL 60604

A handwritten signature in cursive script, reading "Matthew Wolfe", is written over a horizontal line.

Matthew Wolfe