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June 4, 2007

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

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

Dear Secretary Williams:

E.I. DuPont de Nemours and Company ("DuPont") submits the following comments in response to the proposal of the Surface Transportation Board ("STB") to interpret the term "contract" as applied under 49 U.S.C. § 10709 to rail transportation services. Specifically, the STB issued a Notice of Proposed Rulemaking ("NPRM") on March 29, 2007, in which it proposed to define a § 10709 rail transportation contract as:

any bilateral agreement between a carrier and a shipper for rail transportation in which the carrier agrees to a specific rate for a specified 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.

DuPont Supports the Proposed Rule With the Modifications and Clarifications Proposed Herein

The Board's proposal is helpful to industry to the extent that it distinguishes between tariff and contract services offered by railroads by requiring the existence of a "bilateral agreement" in order to have a valid contract. Because rail services performed under 10709 contracts are outside the scope of the regulatory regime, the proposed rule also assists in clarifying the circumstances in which the STB has jurisdiction over the services performed by a railroad. DuPont supports the proposed rule to the extent that it provides such greater guidance and clarity, subject to the comments set forth below.

However, DuPont would like to inform the Board that the basis upon which the proposal was initiated, i.e. to address the scenario where railroads are offering shippers tariff rates and terms that appear to be packaged as a contract, has not been experienced by DuPont. Rather, DuPont

has experienced the opposite scenario, i.e. it has been offered a 10709 contract that includes terms more like those contained in tariffs. This other type of arrangement -- contract offers that look like tariffs -- would also be directly affected by the proposed rule.

For example, DuPont has received a contract proposal that was labeled a 10709 contract, but the contract allows the carrier to unilaterally change the rates after 30 days, the contract is based on terms contained in the carrier's tariffs, and the contract does not include a volume commitment but takes effect once DuPont tenders a shipment that is accepted for transportation by the carrier. This type of contract would not appear to qualify as valid agreement under the Board's proposed rule because it lacks a bilateral agreement. Whether the carrier's offer was in fact a tariff or contract is significant since it would determine whether the Board has jurisdiction over the services provided by the railroad.

While DuPont supports the greater clarity provided by the proposed rule, we are concerned that the requirement that a 10709 contract include a "bilateral agreement" could be easily manipulated by the railroads. For example, based on the scenario described above in which railroads are offering shippers contracts that are outside of the jurisdiction of the Board, but which include terms more typical of tariffs, the railroads could satisfy the bilateral requirement simply by adding a de minimus volume commitment, such as 1 or 2 rail cars. This would allow the carrier to retain unilateral control over the rates and terms and also keep the service outside of the Board's jurisdiction. One possible solution for addressing this concern would be to add a rebuttable presumption that a "de minimus" volume commitment, such as a single shipment or less than 12 cars in multiple shipments, would not transform what is otherwise a tariff into a 10709 contract that is outside of the Board's jurisdiction.

Impact of the Rule on Traditional Time/Volume Tariff Rates

DuPont believes that it is important for the Board to clarify whether traditional time volume tariff rates would remain a tariff and not be transformed into a contract under the proposed rule. The traditional time volume tariff rate that we are referring to are rates that require a shipper to tender a specific volume of traffic to a carrier during a specified period of time, in exchange for which the shipper will receive a specific (usually lower) tariff rate. If the shipper fails to meet the time/volume requirement specified in the tariff, then the shipper is required to pay a higher tariff rate at the end of the period.

We believe that this arrangement would not meet the "bilateral agreement" requirement in the proposed rule. We also believe that this arrangement is distinguishable from the scenario described in the NPRM, in which the shipper was required to *certify* in advance that it would satisfy the volume requirement contained in the tariff. It is the certification requirement that would appear to transform the tariff into an arrangement more akin to a contract.

The Board Should Clarify That a Bill of Lading Is Not a Contract Under the Proposed Rule

DuPont believes that the Board should also clarify whether shipments moving solely under a bill of lading issued by the railroad would qualify as a contract under the proposed rule. Although bill of lading shipments would not appear to qualify as a contract because they typically do not

include express consideration on the part of the shipper, i.e. a minimum volume commitment or an investment in rail facilities, DuPont is concerned that a railroad could attempt to convert such documents into contracts by adding a volume commitment. Shippers have no control over the terms of rail bills of lading, as they are not negotiated between the parties. In addition, they generally are issued on a shipment-by-shipment basis and, thus, do not individually cover a "specific period of time." Shipments tendered solely under a railroad bill of lading, where there is no other agreement between the parties, are generally moving under a tariff rate. DuPont believes that these types of shipments should not be covered by the Board's rule and should continue to be subject to the Board's jurisdiction.

The Board Should Clarify Whether Multiple Shippers Can Participate in a Rail Contract Under the Proposed Rule

The proposed rule defines a 10709 contract as "any bilateral agreement between *a carrier and a shipper* for rail transportation" This wording is a change from the current statute that specifies that a rail carrier may enter into a contract with "one or more purchasers of rail services" 49 U.S.C. § 10709(a). DuPont believes that multiple shippers should continue to have the right to jointly enter into rail contracts, subject to application of the antitrust laws. Accordingly, DuPont requests that the Board revise the proposed rule to continue to allow joint shipper and joint carrier contracts.

DuPont appreciates the opportunity to make its views known to the Board in this important proceeding concerning the interpretation of rail contracts. We respectfully ask the agency to clarify the rule and adopt the changes to the rule suggested herein.

Respectfully submitted,

A handwritten signature in cursive script, reading "Mary Pileggi".

Mary Pileggi
U.S. / Canada Region Logistics Manager