

THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE No. 669

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

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

Of Counsel:

GEORGE A. ASPATORE
PAUL GUTHRIE
PAUL R. HITCHCOCK
THEODORE K. KALICK
ROBERT T. OPAL
DAVID C. REEVES
JOHN M. SCHEIB
PETER J. SHUDTZ
RICHARD E. WEICHER
LAWRENCE E. WZOREK

LINDA J. MORGAN
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-5214

LOUIS P. WARCHOT
ASSOCIATION OF AMERICAN
RAILROADS
50 F Street, N.W.
Washington, D.C. 20001-1564
(202) 639-2502

COUNSEL FOR THE ASSOCIATION OF AMERICAN RAILROADS

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The Association of American Railroads ("AAR") hereby submits comments in connection with the Surface Transportation Board's ("STB" or "Board") decision served March 29, 2007 ("March 29 decision"), in the above captioned proceeding. Since 1934, the AAR, a non-profit trade association, has represented the interests of major freight railroads in North America. All of its members have in place a variety of contractual arrangements with their customers, and thus the AAR has a keen interest in the focus of this proceeding.

I. Introduction

The AAR appreciates the opportunity to present comments on the important issue of rail contracts. These comments are filed on behalf of the AAR members to present general issues that the Board should consider in deciding how to proceed with its proposed fixed definition of the term "contract" for purposes of determining the application of 49 U.S.C. 10709. AAR members may be separately filing comments expressing more specific views based on their own commercial arrangements. The AAR takes no position on the specific arrangement between

Kansas City Power & Light Company and Union Pacific Railroad Company that is referenced in the Board's decision.

II. Overview of the Board's Proposal

In its March 29 decision, the Board specifically asks for comments on its proposal to interpret the term "contract" in 49 U.S.C. 10709 as:

"embracing any bilateral agreement between a carrier and a shipper 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."

The Board states in its decision that it is making this proposal because of concerns about a lack of "any clear demarcation between contract and common carrier rates."

It further indicates that this lack of demarcation has permitted the establishment of "hybrid" arrangements that are termed common carrier rates but in the Board's view look very much like contracts. And it suggests that such hybrids do not enjoy the confidentiality that contracts do and thus "could create an environment where collusive activities in the form of anticompetitive price signaling could occur."

III. The AAR Urges the Board to Consider Two Key Principles in Deciding How to Proceed With Any Proposed Definition.

The AAR suggests two key regulatory principles embodied in current law that it believes should guide the Board as it analyzes how to proceed in this matter. First, the authority for rail carriers and shippers to enter into contracts was one of the most important provisions of the

Staggers Rail Act of 1980 (the Staggers Act). The STB should not take any action that could limit the opportunity for full use of that authority.

Second, a key focus of the Staggers Act was to allow railroads greater ability to adapt their commercial arrangements with customers to the ever-changing marketplace. The STB should not take any action that could limit the ability of railroads to better compete and be innovative and flexible in response to the needs of the marketplace.

In any action that the Board may take, it must be cognizant of the need to insure that any legitimate unilateral or bilateral contract arrangements in place today would not be adversely affected under the proposed definition. The Board should not, by regulatory fiat, stifle innovative contractual and other commercial arrangements responsive to the marketplace.

The Board's regulatory authority does not extend to contract questions—such as whether a contract exists or what the terms of a contract are. 49 U.S.C. 10709. Given the risks to innovation and to the railroads' ability to meet their customers' needs, any regulatory attempt to establish a fixed definition of a contract is perilous. That question is governed by the various laws of the 50 states as those laws have evolved over the last 200 years.

Even if the Board proceeded to define a contract, its definition would not incorporate the nuances of contract law that exist in the several states. For example, in proposing its definition, the Board implies that contracts must be bilateral, which does not recognize that contracts can be unilateral. However, unilateral contracts are recognized commercial agreements and exist today throughout the industry. Conflicts between the state's law on contracts and any Board definition of a contract would result in uncertainty in the marketplace and restrict the flexibility of railroads and customers to address their commercial needs.

Also, the Board's proposed definition suggests that common carrier arrangements should only include rates, while contracts are to include other terms applicable to the transportation at issue. The statute does not require that common carrier arrangements and contracts are to be defined by these distinctions, and the commercial relationships within the industry reflect this fact. This type of bright line definition would straightjacket common carrier rates and contracts in a way that the law does not require and that is not reflective of commercial reality in the industry today.

Lastly, the Board suggests that its proposed definition is intended to provide for more arrangements to be considered contracts and thus kept confidential and not publicly disclosed. In this connection, the Board raises a concern about an asserted anticompetitive effect of public pricing. The AAR notes that, without addressing the particulars of any situation, there is legal precedent for the principle that public pricing is not anticompetitive; and that, as a result, no general conclusions regarding public pricing should be drawn one way or the other.

IV. Conclusion

The AAR urges the Board, in deciding how to proceed with its proposal in this proceeding, to approach this matter in a way that will allow full contracting opportunities and the overall commercial flexibility needed to respond to the marketplace. Care must be taken to ensure that the Board's decisions and interpretations do not have the unintended consequence of foreclosing types of contractual arrangements that have proven beneficial to rail carriers and shippers.

Louis P. Warchot
Association of American Railroads
50 F Street, N.W.
Washington, D.C. 20001-1564
(202) 639-2504

Respectfully submitted,

A handwritten signature in cursive script that reads "Linda J. Morgan".

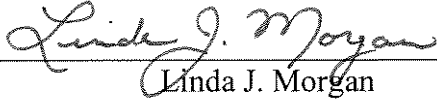
LINDA J. MORGAN
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-5214

Counsel for the Association of American Railroads

June 4, 2007

CERTIFICATE OF SERVICE

I, Linda J. Morgan, certify that, on this 4th day of June, 2007, I caused a copy of the foregoing document to be served by first-class mail, postage prepaid on all parties of record in Ex Parte No. 669.



Linda J. Morgan