

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 669

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

COMMENTS OF
NATIONAL GRAIN AND FEED ASSOCIATION

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I. INTRODUCTION

The Board in its Decision of March 29, 2007 (the “Decision”) has proposed to define by rule the term “contract” in 49 U.S.C. § 10709 and has solicited comments on the proposed definition. The Decision especially calls attention to contracts involving the transportation of agricultural commodities, stating: “Parties are asked to consider whether the proposed changes would have unforeseen consequences for agricultural contracts and whether there are differences between agricultural and other types of rail transportation contracts.” Decision at 6.

These Comments are the response of National Grain and Feed Association (“NGFA”) to the Decision. NGFA is a nationwide organization comprised of over 900 companies engaged in the shipment or production of grain, grain products, animal feeds, and bio-fuels, both domestically and for export. Its members make extensive use of rail service, in most instances as shippers or receivers of bulk shipments moving over long distances between origins or destinations that are served by a single railroad and for which there is no practical or economic transportation alternative. Since rail transportation contracts were recognized by statute, NGFA members have entered into thousands of such contracts with railroads in addition to using rail common carrier service. The Decision has potential implications which are of great concern to NGFA.

II. AGRICULTURAL CONTRACTS

49 U.S.C. § 10709 authorizes railroads to enter into contracts “to provide specified services under specified rates and conditions” but does not otherwise define the term “contract.” The Decision proposes to define the term contract “as any bilateral agreement between a carrier and a shipper for rail transportation in which the carrier agrees to a spe-

cific 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.” Proposed 49 C.F.R. 1300.1(c)(1) and (2). NGFA is concerned that the proposed definition is problematic, particularly as applied to agricultural commodity shipments. There are multiple reasons for these concerns.

Rail transportation contracts for the transportation of grain and grain products (i.e., agricultural contracts) are *sui generis* under Section 10709. Because of the extremely high degree of sensitivity in agricultural markets to small differences in competitive advantage or disadvantage, including transportation costs and conditions, Congress recognized that agricultural shippers should be accorded the right to special remedies and protections not otherwise provided to the marketplace for other commodities that may be the subject of rail transportation contracts. These special provisions in the case of agricultural commodities contracts are reflected in Sections 10709(d) and (g) and the Board’s implementing regulations at 49 C.F.R. Part 1313. In brief, agricultural contracts singularly can be challenged by an affected shipper under Section 10709(g)(2)(B) –

“on the grounds that such shipper individually will be harmed because –

- (i) the rail carrier has unreasonably discriminated by refusing to enter into a contract with such shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue, and that the shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; or
- (ii) the proposed contract constitutes a destructive competitive practice under this part.

The Board's rules define a "contract" for Part 1313 purposes as "an agreement ... to provide specified transportation of agricultural products (including grain ...) under specified rates and conditions." 49 C.F.R. 1313.1(c).

To permit affected parties to utilize these rights, Section 10709 contains certain disclosure directives, as implemented by the Board's rules at 49 C.F.R. Part 1313. To begin with, the contracting carrier must file a written summary of the contract with the Board "as soon as possible, but no longer than 7 days after the date of the contract." 49 C.F.R. 1313.4(a). Section 10709(d)(1) requires the Board to "publish special rules for [agricultural] contracts in order to insure that the essential terms of the contract are available to the general public." The Board's rules at 49 C.F.R. 1313.6 thus require the summary to identify, among other things, the specific commodity to be transported, shipper name, origin and destination, commencement and termination dates, and special features, if any. Specific rates need not be disclosed, but the summary must disclose if the contract provides for rate concessions.

Upon filing of the summary, affected parties have 18 days in which to file a complaint against the contract based on the information required to be disclosed in the summary and to seek discovery of the entire contract. "Immediately upon the filing of a complaint, the rail carrier filing the contract summary shall forward to the Board ... the subject contract." 49 C.F.R. 1313.10(a)(5). The Board then has up to 12 days in which to deny the discovery request or direct production of the contract, and thereafter the complaint can go forward if the affected parties' interests are not resolved through negotiations. The Board is authorized, by 49 U.S.C. § 10709(g)(3)(B), to order a rail carrier to

provide rates and service “substantially similar to the contract at issue with such differentials in terms and conditions as are justified by the evidence.”

Summaries of agricultural contracts are reviewed by the more active agricultural shippers immediately upon filing with the Board.¹ Although it is our understanding that only one or two formal complaints against contracts have been filed (and those occurred shortly after the commencement of contract summary filings), the summaries and the disclosure process, backed up by the possibility of statutory remedies to bring about equivalent treatment for affected shippers, often result in informal discussions between shippers and carriers regarding contracts that have been summarized and lead to many informal adjustments in the marketplace. NGFA would not like to see the contract disclosure process further diminished; if anything, it needs to be better enforced by the Board. As discussed below, there is some concern that the proposed rules may have the opposite result.

III. ISSUES RAISED BY THE DECISION

A. The Proposed Definition of “Contract” May Conflict With the Definition Of “Contract” Adopted by the Board for the Purpose of its Agricultural Commodity Contract Rules

As noted, the statute allows a railroad to enter into a contract with its customers “to provide specified services under specified rates and conditions” and says nothing further about what constitutes such a “contract.” However, at least for purposes of applying

¹ Shippers interested in agricultural contract summaries have noticed an increasing trend on the part of railroads to either not file the summaries in a timely fashion (for example, summaries sometimes are filed months after the contract effective date) or because origins and destinations are masked in overly broad descriptions. There are many instances, in fact, in which the summary is not filed until after the contract has been completed, which of necessity means it is not filed within 7 days of when it is dated. These issues have informally been brought to the attention of the Board’s staff and we understand that efforts have been made to bring about better summary filing compliance. However, it does not appear as if those efforts have been successful. As a result, use of the contract summary disclosure procedures in the manner intended by Congress has been hampered.

the Congressionally-mandated rules to specially govern agricultural contracts, the Board has determined that “the term contract means an agreement ... entered into by one or more rail carriers and one or more purchasers of rail services to provide specified transportation of agricultural products (including grain ...) under specified rates and conditions.”

The Decision contains no discussion of any possible distinction between the proposed definition and that already promulgated for agricultural contracts – a definition that closely mirrors the terms of the statute itself. Arguably, an agreement “to provide specified services under specified rates and conditions” is not as narrow a definition of the term “contract” as is the proposed definition of “bilateral agreement” which requires a “specific rate for a specific period of time in exchange for consideration from the shipper....” Under the Part 1313 definition of “contract,” as well under the statute itself, it would appear that a mere specification of services under specified rates and conditions would provide a proper contractual foundation. The Decision recites no benefit to be gained by departing from the statutory language, if that is indeed the import of the proposed definition or from Part 1313, particularly insofar as agricultural contracts are concerned, and especially if to do so would raise doubts about the validity of existing contracts for the transportation of agricultural commodities.²

B. The Decision Provides Insufficient Definition of a Bilateral Contract

The Board’s proposal is that, regardless of any contract disclaimers made by a carrier, “any 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 considera-

² The Decision indicates that the Board regards the definition of the term “contract” as a jurisdictional issue.

tion 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,” will be deemed a contract under Section 10709 and outside the Board’s jurisdiction.

However, the Decision fails to define the term “bilateral.” There is no indication of whether a bilateral contract must be in writing or must be an instrument signed by both parties. This void opens the door for carriers to claim that the mere use by a shipper of a tariff that contains a specific rate for a specific period of time and imposes a volume requirement on the shipper would constitute a bilateral agreement. As indicated previously, it is far from clear that the Board can define “contract” more narrowly than permitted by the language of the statute. Even if a revised definition is permissible, there are numerous reasons why a “mere use” result should be assiduously avoided, including the fact that such an approach is inconsistent with the provisions in Section 10709 for agricultural contracts.

If the Board is going to pursue a “bilateral” definition, it should require that a bilateral agreement be a written instrument signed by the parties. The Board’s rules should not permit a carrier to publish a tariff that has the characteristics of a bilateral agreement contained in the proposed definition (“the carrier agrees to a specific rate for a specific period of time in exchange for consideration from the shipper”) and claim that mere use of such a tariff forms a bilateral agreement. As discussed below, such an approach permits unnegotiated contract terms to be imposed on shippers, contrary to the purpose of Section 10709, and may also lead to unilateral and selective total deregulation of whatever services a carrier chooses to embrace in any such tariff.

In *Kansas City Power & Light Company v. Union Pacific Railroad Company*, Docket No. 42095 (“KCPL”), cited in the Decision, which is the case that apparently led the Board to the institution of this proceeding, the railroad published a tariff with two sets of rate options: the first option contained a relatively high rate available without strings attached so that it could be changed, presumably on just 20 days’ notice, by the carrier and there was no obligation on the part of the shipper to use the rate for any volume of traffic whatsoever. The second option contained a lower rate that was guaranteed for three years provided the shipper tendered a minimum volume of traffic and subjected itself to a per car penalty for failing to meet the minimum. The shipper was required to show its assent to the conditions of the second option by signing and submitting to the carrier a certificate to that effect. Arguably, it was the execution of this certificate that committed the shipper and carrier to the mutual rights and obligations of the second option and would suffice in the Board’s view to convert those rates into a bilateral contractual agreement. However, the Decision does not specifically indicate whether such a written exchange is required for there to be a bilateral contract. The Board should clarify that issue to the extent it may continue to use bilateral” to define “contract” and find that there not only must be a binding, mutual written declaration of the parties, but also one that encompasses the entire agreement.³

There are dangers inherent in concluding that a bilateral agreement is formed merely upon use of a carrier’s tariff. As discussed in more detail below, permitting carriers to offer tariffs as the foundation for the essential elements of a bilateral contract invites unfair bargains, agreements of adhesion, and unconscionable contract provisions. In

³ NGFA reiterates that it does not support a definitional change that would narrow the scope of 49 C.F.R. Part 1313.

the case of agricultural contracts, it would appear that an independent written agreement should be necessary for other reasons, as well; namely, the statute inferentially contemplates a written agreement between shipper and carrier.

To begin with, the statute and the Board's rules require that "a summary" of an agricultural contract be filed with the Board within 7 days of the date of the contract. Obviously, any such summary not only must be written, but must summarize a contract in existence.

The purpose of the summary is to allow the challenge process available to affected agricultural parties under Section 10709 to commence in time for those parties to utilize their rights meaningfully, including an opportunity to seek similar terms from the carrier at a contemporaneous time, rather than after performance under the first shipper's contract has begun or is even completed. In instances where use of a carrier's tariff, rather than the execution of a contract prior to its use, is what triggers the making of a bilateral agreement, then the Board's rules for agricultural commodity contracts will mean that no summary can be filed until after performance under a contract has begun, automatically putting affected shippers at a disadvantage to seek comparable contract terms on a contemporaneous basis.

Further, the Board's rules implementing Section 10709 require a carrier "immediately upon the filing of a complaint" to submit the contract to the Board. 49 C.F.R. 1313.10(a)(5). That requirement plainly assumes the existence of a written contract and does not mean a contract implied or even created after the fact. Even if the Board does not require independent, executed written contracts for all Section 10709 transportation,

it should impose that requirement for agricultural commodity contracts as necessary to implement the complaint and discovery provisions of that section.

C. The Board Should Exercise Its Jurisdiction Over Contracts to Require That All Contracts Be Fairly Negotiated

The Decision aptly observes that “the purpose of allowing for contract rates is to establish negotiated, mutually agreeable rates to which parties intend to be bound.” Decision at 3. If the Board has the jurisdiction to define the term “contract” as consisting of a bilateral agreement, the Board surely has jurisdiction to require that any such agreement be negotiated under fair circumstances and not dictated unilaterally. The Board should add a requirement for fair negotiations to its proposed rule.

NGFA believes it might be helpful to the Board to have before it some discussion of contracts exacted by railroads under conditions of adhesion or unconscionability. Indeed, contracts of adhesion and unconscionability are becoming so widespread that NGFA would be remiss if it failed to bring this issue to the Board’s attention and ask the Board to take corrective action in this proceeding.

Contracts of adhesion often take the form of a standard contract prepared by one party, to be signed by the party in a weaker position, who adheres to the contract with little choice about the terms. Black’s Law Dictionary, (8th Ed. 2004).

An adhesion contract may be a take-it-or-leave-it proposition, or there may be no possibility of bargaining at all. *Allan Farnsworth, Contracts* § 4.26 at 296-97 (3rd Ed. 1999). Although an adhesion contract is not necessarily invalid, where the terms of a contract of adhesion unreasonably favor the other party, such a contract is invalid. *CJS CONTRACTS*, § 12. See, also, *Telxon Corp. v. Hoffman*, 720 F. Supp. 657 (ND Ill. 1989)

(Adhesion contracts include all “form contracts” presented on a take-it-or-leave-it basis). Tariffs with unilaterally established railroad terms fit that mold.

A contract of adhesion, if not invalid *per se*, may rise to a level of unconscionability, in which case the entire contract or all of its terms also may be held invalid. Whether a contract bargain has been exacted unconscionably depends on the facts of each case, but there are certain hallmarks of unconscionability in general and those hallmarks are increasingly emerging in rail transportation contracts. For instance, a gross imbalance in the values exchanged may be an important factor in a determination that a contract is unconscionable. *Restatement (Second) of Contracts*, § 208. It should be evident that “contract” terms published in a tariff, such as those under Option 2 in the *KCPL* case, *supra*, are not merely nonnegotiable, but present a genuine possibility of imbalance. For example, should any carrier following a pattern similar to the publication viewed in *KCPL* offer an Option 1 rate that was commercially untenable, contrasted with an Option 2 rate of useable proportions but coupled with provisions obnoxious to the shipper, all on a take-it-or-leave-it basis, and the shipper had no alternative but to use the carrier’s rail service, one might conclude that the tariff was designed in the first instance to compel acceptance of Option 2 and its one-sided conditions and in that respect was unconscionable.

Disparities in bargaining positions resulting in the imposition of non-negotiated, one-sided terms against shippers with no genuine transportation alternatives to rail but who plainly require rail service to make their businesses work may be more evident where the contract is not one for a rate, but instead involves an ancillary service.⁴ A recent car supply contract offered by one railroad gave a shipper a “choice” to sign up to

⁴ The Board’s proposed definition appears aimed largely, if not exclusively, at rate contracts, rather than other types of contracts, which is a concern discussed *infra*.

obtain railroad-supplied cars from a carrier-managed pool for the movement of certain commodities, subject to a guarantee that the shipper agree for a period of one year to make a certain minimum number of loads per month or pay a substantial per car penalty for failure to do so. The carrier's only obligation was to provide cars for those loads. The shipper's so-called alternatives were to furnish and operate private cars independently of the pool (but the carrier's compensation to the shipper for furnishing its cars failed to cover the acquisition and operating costs of the private cars) or to rely on the carrier's general distribution fleet of cars, which the carrier admitted to be inadequate. The pool, in other words, provided the only reliable, feasible plan for car supply. But the contract that the carrier offered, on a take-it-or-leave-it basis, made no provision for relief from penalty charges if the carrier raised freight rates to the point where use of the minimum required volume of pool cars became infeasible due to the fact that truck transportation became more economical in light of increased rail rates, and the carrier refused to negotiate any such clause. In fact, the carrier raised its freight rates and penalties were exacted by the carrier when the increased freight rates made use of the full pool commitment uneconomical in some markets.

At least one carrier maintains tariff provisions that limit liability for loss and damage to only the actual value of goods transported and to no other foreseeable damages, without providing for a written agreement that allows the shipper voluntarily to waive its right to choose full liability, as required by 49 U.S.C. § 11706(c). In a common carrier context, this type of limitation would be deemed unlawful and void. *Liability for Contaminated Covered Hopper Cars*, 10 I.C.C. 2d 154, 165 (1994) ("damages beyond injury to the property are recoverable under [Section 10706]"). This carrier, however,

incorporates its liability limitation as a standard practice in rail transportation contract forms that are non-negotiable, thereby imposing what would otherwise be an unlawful liability limitation even though such a limitation was not negotiated by the shipper.

One recent agreement that was presented to a shipper on a take-it-or-leave-it basis actually contained a clause requiring the shipper to falsely state that the terms of the agreement had been negotiated freely.

We anticipate that some railroads might respond that each concession required by such a contract has a value and formed part of the consideration for any reduced rate offered to the shipper, and that the Board is not in a position to assess the separate value of each element of a contract. Any such argument, however, might have validity if concessions demanded of shippers in rail transportation contracts were contract-specific so that they could be associated with a particular reduced rate or other benefit. Instead, the same painful conditions – generally a whole array of conditions such as one-sided indemnity clauses, liability limitations, choice of applicable law, and credit terms with late payment penalties – uniformly are imposed through standardized contract forms regardless of how great or small the benefit received by the shipper. Limitations imposed on the rights of shippers in this manner thus have become standard fare without relation to any particular shipper-carrier bargain.

NGFA is aware that the Board's outlook in the past toward shipper dissatisfaction with any aspect of a contract, including provisions not contained within the four corners of the contract but found in the carrier's common carrier tariff and incorporated into the contract by reference, has been that the dissatisfied party *must* seek recourse only in a civil court, if anywhere at all. See, e.g., *H.B. Fuller Co. v. Southern Pac. Transp. Co.*,

Docket No. 41610, *slip op.* at 3 (August 22, 1997). That policy, however, should not stand in the way of an assertion of jurisdiction by the Board over a negotiation requirement for contracts.

First, the Board does not lose jurisdiction over contracts, and the courts do not gain jurisdiction over contracts, unless the contract “is authorized by this section” (i.e., 49 U.S.C. § 10709). See Section 10709(c)(1). If the Board undertakes to define the elements of a contract that qualify under Section 10709, then the Board plainly has jurisdiction to determine whether a particular contract meets those elements. If the contract does not have the required elements, jurisdiction over the involved transportation does not pass from the Board to the courts. Should the Board determine to require that a Section 10709 contract be one that has been fairly negotiated between carrier and shipper, the Board obviously has the power to determine whether such negotiations took place and thereby to determine if the contract is one “authorized by this section.”

Second, it makes more sense for the Board to exercise such jurisdiction than to allow disputes of that type to wander off into the uncertain haze of civil litigation. Normally, if a court finds that a contract was adhesively or unconscionably exacted, it can set aside the contract, set aside a provision of the contract, or reform the contract as necessary under principles of equity. However, where the subject matter of a contract is rail transportation that would be under the Board’s jurisdiction but for a contract that complies with Section 10709, a judicial finding that such a contract is invalid in whole or in part may be viewed as undoing any further civil jurisdiction over the transportation involved because the invalidity of the contract in effect returns the transportation to common carrier status over which the Board has continuing jurisdiction. Assume, perhaps,

that the contract involved is one containing rail rates and a court finds that those rates were exacted under unconscionable conditions. The result might well be that the railroad's service reverts to that of a common carrier so that it would be up to the Board, and not the court, to establish the lawful rate in replacement of the invalid contract rate. In any event, it certainly would seem to be more in keeping with the overall statutory scheme for the Board to make such determinations, rather than a court. If the Board were to require that Section 10709 contracts be negotiated under fair conditions, it could provide some much needed oversight for this type of growing concern.

To summarize NGFA's views on this issue, we urge the Board to clearly assert jurisdiction to insure that contracts meeting the requirements of Section 10709 are negotiated fairly, or at a minimum formed under circumstances providing a fair opportunity for negotiations.

D. The Proposed Definition Appears Applicable to Rate Contracts and Unsuitable for Other Contracts, and May Produce Unnecessary Confusion

The proposed definition of "bilateral" contracts expressly requires that the "carrier [agree] to a specific rate for a specific period of time." Not all contracts, however, involve a "specific rate" or even a rate at all. For instance, some contracts involve per car refunds dependent on shipper traffic volumes and may not qualify as a "specific rate" agreement because the carrier's rates may be free to rise or fall despite the payment of refunds. Some contracts involve the use of carrier facilities, the payment for services performed by shippers in lieu of carrier service, car supply, demurrage, or other ancillary matters other than "a specific rate for a specific period of time."

NGFA presumes that it was not the intent of the Board to preclude Section 10709 agreements between shippers and carriers that fail to involve “a specific rate for a specific period of time,” for to do so would be a clear regression in the use of rail transportation contracts and in all likelihood would contravene Section 10709(a) permitting contracts “to provide specified services under specified rates and conditions.”⁵ Nevertheless, strictly read, the proposed definition would not allow for anything but a rate contract. Were the Board to simply rely on the statutory description of a contract as one “to provide specified services under specified rates and conditions,” such questions might not continue to be bothersome. Certainly, and in any event, the statutory language that now defines the proper scope of grain transportation contracts under 49 C.F.R. Part 1313 for many years has proven to be workable and should not be disturbed.

E. The Board Should Clarify the Status of Special Common Carrier Rates

The Decision indicates that the Board harbors the view that “section 10701 does not authorize carriers to enter into either special common carrier rates or bilateral contractual agreements.” The Decision also suggests that “special common carrier rates” are authorized under Section 10722 and need not fit under either Section 10701 or Section 10709. Decision at 5.

Section 10722 is aimed at car utilization and its provisions are prefaced by the phrase: “In order to encourage more efficient use of freight cars ... rail carriers shall be permitted to establish premium charges for special services or special levels of services not otherwise applicable to the movement.” The Decision contains no hint of how a

⁵ Carriers and their customers routinely have entered into contracts for “specified services” under “specified conditions” but do not necessarily involve rates. These types of contracts were never deemed faulty for lack of a “specified rate” even when full contracts were filed with and reviewed by the ICC. See *Railroad Transportation Contracts*, Ex Parte No. 387 (Sub-No. 964) (March 6, 1992), slip op. at 2.

shipper or carrier might determine whether a “special common carrier rate” that does not belong in the common carrier category authorized by Section 10701 becomes eligible for publication under Section 10722. Similarly, the Decision fails to indicate whether only those rates qualifying under Section 10722 are regarded by the Board as “special common carrier rates,” or whether there are other types of rates that the Board might also regard as falling into that category even though they do not involve “premium charges for special services.” If so, the Decision suggests the unwelcome possibility of rates that fall under neither Section 10701 nor Section 10722, and yet are also not contracts under Section 10709.

Railroads maintain a variety of special rate offerings for the grain industry, including shuttle train rates and equipment guarantee programs, perhaps the best known of which is the BNSF Railway Certificate of Transportation (“COT”) system. COTs initially were offered by BNSF under the former Section 10734, the predecessor of Section 10722, and were approved by the ICC and the courts as common carrier rates under Section 10734, rather than as contract rates even though the ICC noted that COTs “have many, if not all, of the elements of a lawful contract.” *National Grain and Feed Association v. Burlington Northern Railroad Company, et al.*, 8 I.C.C. 2d 421, 436 (1992), *aff’d in part and reversed in part*, *National Grain and Feed Association v. United States*, 5 F.3d 306 (8th Cir., 1993).

NGFA would be disappointed were the Decision to upend or undermine the various approaches taken by railroads to allocate grain car capacity through tariff mechanisms such as COTs. Admittedly, some such programs might meet the “more efficient use of freight cars” goal of Section 10722, but it is not certain that all would. NGFA

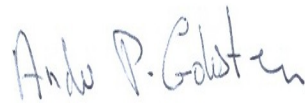
cannot undertake a review of every railroad's complete array of tariffs, but here are two actual examples of current special rate offerings about which status questions may arise under the Decision.

Carrier "A" maintains a grain shuttle program in its tariffs. A shipper wishing to avail itself of the program may book a shuttle train for a year as provided in the tariff, but the carrier does not publish its shuttle train rates a full year ahead. Currently, for instance, Carrier A's shuttle train rates are available through the early fall of 2007 and will be published for succeeding months as those months approach. Nevertheless, once the shipper books the train for a year, it is subject to a substantial penalty if the train is not used for the entire year notwithstanding the absence of a specific rate for that entire year when the shuttle program is engaged. On the other hand, the shuttle rates of Carrier A invariably are lower than its rates for the same commodities from the same origins to the same destinations in same-sized trains that are not operated as shuttles, so that the shuttle rates do not in any respect represent "premium charges." This program, then, might be regarded as involving "special common carrier rates" that are not subject to Section 10701 within the unexplained meaning of the Decision, and yet are neither contracts under Section 10709 nor special rates under Section 10722.

A second carrier, "B", maintains a grain shuttle tariff program under which trains are booked for a year but rates for those trains are not published for the full year at the time the trains can be booked. Similar to the first carrier's shuttle program, this carrier's program does not charge premium rates for the shuttles and entails a penalty for non-use by the shipper. It presents the same uncertainties under the Decision as discussed in the preceding paragraph regarding Carrier A.

Grain shuttle programs have proven to be highly effective and workable. NGFA requests the Board to be extremely cautious before adopting final rules or making further pronouncements that might result in a carrier tariff being regarded as a special common carrier rate not eligible for Section 10701 treatment and likewise not falling under Section 10722 because it does not involve “premium charges for special services.”

Respectfully submitted,

A handwritten signature in blue ink that reads "Andrew P. Goldstein". The signature is written in a cursive, slightly slanted style.

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