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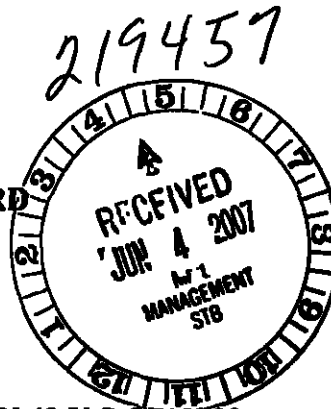
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Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 669

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



OPENING COMMENTS OF BNSF RAILWAY COMPANY

BNSF Railway Company ("BNSF") submits these Opening Comments on the proposed rule set out in the Board's March 29, 2007 Notice of Proposed Rulemaking in Ex Parte No. 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709* ("NOPR"). The Board proposes to adopt a rule that defines the term "contract" used in 49 U.S.C. § 10709 as 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 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." As provided in 49 U.S.C. § 10709, the transportation provided under such an agreement would not be subject to the Board's jurisdiction.

The Board explained that its proposed rule is based on two considerations. First, the Board expressed a concern "about the lack of any clear demarcation between contract and common carrier rates." NOPR at 4. The Board noted that some pricing structures used by common carriers "contain a mutuality of obligation between the carriers and shippers that appear to have the hallmarks of a contractual relationship." *Id.* According to the Board, "[w]hile Congress intended to permit carriers to have the pricing flexibility to enter into these kinds of agreements, we believe that Congress also intended for these contractual agreements to be

confidential, outside Board jurisdiction, and subject to the scrutiny of the antitrust laws, rather than regulation under the Interstate Commerce Act.” *Id*

Second, the Board expressed concern about the potential competitive effects of a railroad’s use of common carrier rates that have some characteristics of traditional contracts. According to the Board, “anticompetitive price signaling” could result from the use of such “hybrid” pricing mechanisms since common carrier rates “must be publicly disclosed under section 11101.” *Id*.

BNSF does not agree with the Board’s rationale for the proposed rule. There is no evidence that the proposed rule is justified on the basis of congressional intent. Congress’s intent was to promote innovative pricing of railroad services by giving railroads broad pricing discretion. Congress did not intend for the Board to intrude upon the railroads’ pricing prerogative by adopting rules that could lead to restrictions on pricing flexibility. Indeed, the statute expressly states that “a rail carrier providing transportation subject to the jurisdiction of the Board under this part may establish any rate for transportation or other service provided by the rail carrier.” 49 U.S.C. §10701(c). Furthermore, BNSF does not believe that the Board should seek to discourage or artificially preclude public common carrier pricing. Publicly available common carrier rates subject to regulatory oversight have always been a central feature of railroad pricing since the inception of railroad regulation over a century ago. Congress has long recognized that publicly available common carrier rates can benefit shippers and the public interest by facilitating efficient, competitive markets.

If the Board adopts the proposed rule, BNSF requests that the Board clarify that the new rule will not affect the current status of BNSF’s Certificates of Transportation Covering Agricultural Commodities (“COTs”) as special common carrier arrangements under 49 U.S.C.

§10722. BNSF's COTs are not transportation contracts. COTs are guarantees, sold through public auctions, of the future availability of grain cars. BNSF's COTs program is described in detail on BNSF's website. When the COTs program was originally implemented by BNSF's predecessor in 1988, certain grain shipper associations challenged its lawfulness under the Interstate Commerce Act, arguing among other things that COTs should be considered to be "contracts" subject to the specific limitations in the governing statute on a carrier's use of contracts for transportation of agricultural commodities. *See National Grain & Feed Assoc v Burlington N. RR et al* 8 I.C.C.2d 421, 424-25 (1992). The ICC rejected the shippers' claim, finding that COTs are not "contracts" under the statute but rather are special common carrier tariffs authorized by the predecessor to 49 U.S.C. §10722. *Id.* at 437-38. On appeal, the U.S. Court of Appeals for the Eighth Circuit upheld the ICC's conclusion. *National Grain & Feed Assoc v United States*, 5 F.3d 306, 309 (1993).

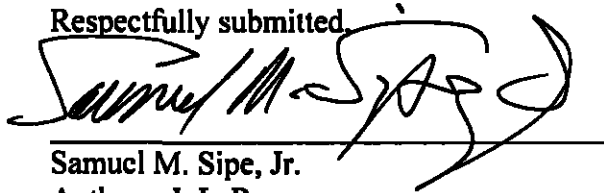
It does not appear that the Board intends to modify the current treatment of COTs as special common carriage arrangements under 49 U.S.C. §10722. The Board's NOPR acknowledges that special arrangements under section 10722 are distinguishable from "contracts" under section 10709. NOPR at 5. Moreover, while BNSF's COTs involve future transportation, they do not involve a volume commitment by the shipper or a commitment to make infrastructure investments. Nevertheless, to avoid any disruptions in a program that has brought substantial benefits to grain shippers, the Board should make it clear that BNSF's COTs will continue to be treated as common carrier arrangements, not as contracts.

Finally, the NOPR contains a misstatement of the law governing the confidentiality of transportation contracts formed under section 10709. The NOPR states that "the terms of rail transportation contracts are to be kept confidential." NOPR at 4. While the parties to

transportation contracts often agree to restrictions on the disclosure of contract terms, there is no statutory obligation to maintain the confidentiality of contract terms. In 49 U.S.C. §10709, Congress limited the information about contracts that must be disclosed but it did not create an affirmative confidentiality requirement. The Board should clarify that the statute protects the confidentiality of contract terms but it does not create an affirmative obligation that rail transportation contracts be treated as confidential.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Samuel M. Sipe, Jr.", written over a horizontal line.

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