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August 2, 2007

Via ELECTRONIC FILING

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: STB Ex Parte No. 669 – Interpretation of the Term “Contract” in 49 U.S.C. 10709

Dear Secretary Williams:

Pursuant to the Notice served by the Board on March 29, 2007, in the above proceeding, attached is a copy of the Reply Comments of BNSF Railway Company. Please direct any questions concerning these comments to the undersigned.

Sincerely yours,



Samuel M. Sipe, Jr.
Counsel for BNSF Railway Company

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 669

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

REPLY COMMENTS OF BNSF RAILWAY COMPANY

BNSF Railway Company (“BNSF”) submits these Reply 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 opening comments taken together raise serious doubt about the need for any rule defining the term “contract” used in 49 U.S.C. § 10709. Neither the Board’s Notice nor the opening comments identify a problem that the Board needs to address through a rulemaking. Disputes about the nature of particular commercial arrangements are rare. Moreover, the comments of both shipper and railroad interests make clear that in attempting to deal with a problem that does not exist, the Board’s proposed bright-line, one-size-fits-all rule could do significant harm to existing commercial relationships. The proposed rule would inject uncertainty and contention into commercial practices that have until now been largely free of dispute, and would curtail the ratemaking flexibility that Congress strongly intended to promote. The inquiry into whether a particular arrangement is a contract or a common carrier arrangement should remain a case-by-case inquiry. BNSF therefore believes that the Board should terminate this proceeding without adopting any rule, including that proposed by the Board.

The rule proposed by the Board elicited significant concern by almost all commenters. No commenter except the U.S. Clay Producers Traffic Association supported the definition of “contract” as proposed by the Board.¹ Many commenters expressed the view that the Board’s proposed definition of a “contract” was too broad. These commenters were concerned that the proposed rule would remove from the Board’s jurisdiction commercial arrangements that should be viewed as regulated common carrier offerings.² For example, one commenter suggested that the Board’s proposed rule might treat as non-jurisdictional contracts virtually all unit coal train arrangements, where pricing “is intertwined with [various other] commitments over specified time periods.”³ Other commenters concluded just the opposite – that the Board’s proposal did not define “contract” sufficiently broadly to encompass arrangements that have traditionally been viewed as contracts.⁴ For example, some commenters suggested that the Board’s rule would treat as a contract only those arrangements that include an agreement as to a “specific rate,” but there are many types of traditional contracts that do not involve the payment of a “specific rate.”⁵

¹ The Clay Producers Association appears to support the rule solely because the Association believes that it would expand the scope of pricing authorities that would be subject to the Board’s jurisdiction. Most other commenters concluded that the proposed rule would have the opposite effect.

² Comments of Arkansas Electric Cooperative Corporation, at 5-8; Opening Comments of Dairyland Power Cooperative, 5-6; Comments of DuPont, at 1-2; Opening Comments of Entergy Services, Inc., at 9-10; Comments of National Grain and Feed Association, at 6-8, 16-19; Comments of the National Industrial Transportation League, 6-7; Opening Comments of the Western Coal Traffic League, at 18-21; Comments of the Association of American Railroads, at 4; Opening Comments of BNSF Railway Company, at 2-3; Comments of Union Pacific Railroad Company, at 6-8.

³ Opening Comments of Entergy Services, Inc., at 9.

⁴ Comments of National Grain and Feed Association, at 5-6, 15-16; Comments of the Association of American Railroads, at 4; Comments of Canadian Pacific Railway Company, at 3-6; Opening Comments of CSX Transportation, Inc., at 3-8; Comments of Norfolk Southern Railway Company, at 7-8; Comments of Union Pacific Railroad Company, at 12-13.

⁵ See, e.g., Comments of National Grain and Feed Association, at 15.

Still other commenters expressed concern that they could not tell how the Board's rule would apply to common types of commercial arrangements.⁶

The confusion and uncertainty reflected in the opening comments result from the inherent difficulty in establishing abstract, bright-line rules that would categorize the multitude of varied commercial arrangements into two clear-cut and exclusive groups. The opening comments make it clear that any attempt to establish such a one-size-fits-all rule would generate substantial uncertainty and create conflicts that do not exist today. Disputes among railroads and shippers as to the status of particular commercial arrangements are rare. In most cases, railroads and shippers have reached a common understanding as to whether or not their arrangements are contractual in nature or subject to the Board's jurisdiction. The Board's proposal would disrupt settled relationships and could result in substantial unnecessary litigation.

Any attempt to establish a bright-line rule defining contracts could do significant harm to existing commercial arrangements and to the ability of railroads to develop innovative service offerings. Both shipper and railroad commenters described numerous current arrangements that could be adversely affected by the Board's proposed rule.⁷ Future innovation could also be

⁶ See, e.g., Comments of DuPont, at 2. National Grain and Feed Association ("NGFA") and BNSF both requested that if the Board issues its proposed rule, the Board should clarify that BNSF's Certificates of Transportation ("COTs") do not constitute "contracts" under 49 U.S.C. §10709. BNSF agrees with NGFA that BNSF's COTs are special common carrier arrangements under 49 U.S.C. §10722.

⁷ Comments of DuPont, at 2 (time/volume tariff rates); Opening Comments of Entergy Services, Inc., at 9 (unit train coal movements); Comments of National Grain and Feed Association, at 6 (agricultural commodity contracts) and 15-19 (arrangements not containing specific rates); Opening Comments of the Western Coal Traffic League, at 18-19 (unit train coal movements, annual volume rates, grain transportation arrangements); Comments of Canadian Pacific Railway Company, at 4-5 (contracts that incorporate a rate from a tariff); Opening Comments of CSX Transportation, Inc., at 6-8 (CSXT Private Price Quotations); Comments of Norfolk Southern Railway Company, at 3 (NS signatureless contracts); Comments of Union Pacific Railroad Company, at 12-13 (contracts accepted by tender and contracts that incorporate a tariff price).

stifled. The comments make it clear that the law as currently applied has given rise to a wide variety of commercial relationships, consistent with Congress' clear intent that railroads are to be permitted maximum flexibility to establish commercial offerings that are responsive to the needs of the market. Any new regulation by the Board that reduced such flexibility would be contrary to the deregulatory thrust of the Staggers Act and ICCTA.

There is no need for the Board to invite the uncertainties and disputes that appear likely to flow from the Board's proposed rule. The Board's present approach of addressing whether a particular commercial arrangement is a contract or a common carrier arrangement on a case-by-case basis should continue.⁸ Questions concerning the characterization of a particular commercial arrangement are best resolved through an individualized inquiry that permits evaluation of the specific characteristics of the arrangement, the facts concerning its development, and the intentions of the shipper and railroad making use of the arrangement. A bright-line, one-size-fits-all rule is too crude a mechanism to take account of the many individualized circumstances that pertain to such arrangements.

Another reason for the Board to continue its present case-by-case approach is the complexity of jurisdictional issues involved. Many commenters suggested that there are serious questions as to whether the Board has the legal authority to define what constitutes a contract for purposes of determining the Board's jurisdiction.⁹ Given the complexity of the issue, the Board

⁸ Where there is an actual controversy, a shipper is always free to initiate such a proceeding by complaint or by requesting a declaratory order from the Board.

⁹ Comments of Ameren Energy Fuels and Services Company, at 5; Comments of Arkansas Electric Cooperative Corporation, at 3; Opening Comments of Dairyland Power Cooperative, at 6-7; Opening Comments of Entergy Services, Inc., at 8-9; Opening Comments of the Western Coal Traffic League, at 13-17; Comments of the Association of American Railroads, at 3; Comments of Canadian Pacific Railway Company, at 3-4; Comments of Norfolk Southern Railway Company, at 4-5.

should leave the question of jurisdiction to a case-specific inquiry that would allow the Board to evaluate all potentially relevant factors.

The potential for mischief unleashed by the Board's proposal is illustrated by the comments of several parties who improperly ask the Board to expand the scope of this proceeding beyond its proposed purpose of defining by rule what constitutes a transportation contract. The National Grain and Feed Association ("NGFA"), for example, urges the Board to expand the proposed rule to include standards governing the negotiation of contracts. NGFA asks that the Board require that contracts "are negotiated fairly, or at a minimum formed under circumstances providing a fair opportunity for negotiations."¹⁰ There is no need or authority for the Board to inject itself into the commercial negotiations between railroads and shippers that lead to transportation contracts. When Congress largely deregulated the rail industry it obviously did not intend that the Board would step in, as NGFA requests, to referee the negotiation and terms of rail transportation contracts over which it would have no jurisdiction.

The Western Coal Traffic League ("WCTL") also seeks improperly to expand the scope of this rulemaking. WCTL invites the Board to use this proceeding to declare that use of "hybrid" pricing mechanisms, such as the UP Circular 111 that is at issue in *Kansas City Power & Light Co. v. Union Pacific Railroad Co.*, STB Docket No. 42095, is an unreasonable practice.¹¹ The relief requested by WCTL is clearly outside the scope of the present proceeding, which is focused on the question whether a bright-line definition of the term "contract" as used in 49 U.S.C. §10709 is possible or appropriate. In any case, WCTL's proposed declaration would not be justified. Indeed, WCTL offers conflicting and contradictory grounds for its proposed declaration. On the one hand, WCTL complains that use of such "hybrid" mechanisms

¹⁰ Comments of National Grain and Feed Association, at 15.

¹¹ Opening Comments of the Western Coal Traffic League, at 30-31.

leads to price signaling and the potential for collusion among railroads because each railroad knows the rates that other railroads are charging.¹² On the other hand, WCTL complains that hybrid pricing mechanisms such as Circular 111 are unreasonable precisely because they *do not* disclose rates to the public, including to other railroads, and therefore supposedly are not valid common carrier rates.¹³ Expanding this proceeding to cover the collateral issues raised by WCTL is clearly unwarranted.

On the question that is the subject of this rulemaking, WCTL expresses concern that the Board's proposed definition of the term "contract" would have "unintended and undesirable consequences."¹⁴ One alternative proposed by WCTL is that shippers be permitted to choose whether any given commercial arrangement is a contract or common carrier rate.¹⁵ This proposal is self-serving and unprincipled, and it should be rejected out of hand. Congress removed from the Board's jurisdiction transportation provided under contract, and it clearly did not intend to give shippers the power to circumvent this deregulation of contract transportation by invoking the Board's jurisdiction any time they choose.

Given the broad dissatisfaction with the Board's rule as proposed, the complete lack of consensus among commenters concerning alternative formulations, the absence of any evidence that a new rule (as opposed to case-by-case determinations) is necessary, and the risk that the proposed rule will curtail railroad pricing flexibility, the Board should terminate this proceeding. Where there is no evidence that a problem exists in the first place and the proposed remedy is likely to foster contention and confusion, restraint is the most sensible course.

¹² *Id.* at 30.

¹³ *Id.*

¹⁴ Opening Comments of the Western Coal Traffic League, at 4.

¹⁵ *Id.*, at 27-29.

Respectfully submitted,

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by
FJN

Attorneys for BNSF Railway Company

August 2, 2007

CERTIFICATE OF SERVICE

I, Frederick J. Horne, hereby certify that on August 2, 2007, I caused a copy of BNSF Railway Company's Reply Comments to be served by first-class mail upon all persons identified in the Board's service list for STB Ex Parte No. 669.



Frederick J. Horne