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February 5, 2009

VIA E-FILING

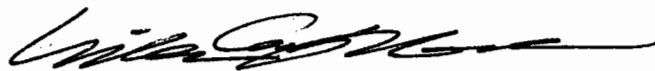
The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: STB Ex Parte No. 676
Rail Transportation Contracts Under 49 U.S.C. 10709

Dear Acting Secretary Quinlan:

Pursuant to the Surface Transportation Board's decision in the above-captioned proceeding issued on January 6, 2009, The Kansas City Southern Railway Company hereby submits its Comments via e-filing. If there are any questions concerning this filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,



William A. Mullins

Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE NO. 676

RAIL TRANSPORTATION CONTRACTS UNDER 49 U.S.C. 10709

**COMMENTS OF THE KANSAS CITY
SOUTHERN RAILWAY COMPANY**

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**Attorneys for The Kansas City
Southern Railway Company**

Dated: February 5, 2009

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

EX PARTE NO. 676

RAIL TRANSPORTATION CONTRACTS UNDER 49 U.S.C. 10709

**COMMENTS OF THE KANSAS CITY
SOUTHERN RAILWAY COMPANY**

In a Notice of Proposed Rulemaking (“NPR”) served in this proceeding on January 6, 2009, the Board proposed to amend its rules to provide that: (1) where an agreement for rail carriage contains the disclosure statement set forth in the proposed new rule, the Board will treat that agreement as a rail transportation contract governed by 49 U.S.C. 10709 and will find that it does not have jurisdiction over any disputes arising from that agreement; and, conversely, (2) where an agreement for rail carriage fails to contain the Board-prescribed disclosure statement, the Board will treat the arrangement as one involving common carriage and will presume to have jurisdiction over any dispute involving the rate or service terms contained in the document.¹ The Board requested comments in response to its NPR.

The Kansas City Southern Railway Company (“KCSR”) questions the need for the proposed disclosure requirement and prefers that the Board continue with its existing practice of

¹ As indicated, the Board’s proposal states that a carrier’s failure to include the proposed disclosure statement creates a presumption that the parties intended the traffic to move under a common carrier tariff rate. The parties may rebut this presumption by presenting clear and convincing evidence that they intended the agreement to be a rail transportation contract governed by 49 U.S.C. 10709, and the shipper was advised that it could request service under a common carrier tariff rate that would be subject to the Board’s jurisdiction. If these showings are made, the Board’s proposal indicates that the Board will treat the arrangement as a contract, despite the lack of the prescribed statement.

resolving on a case-by-case basis whether rail traffic was moved under contract or pursuant to common carriage. However, if the Board chooses to adopt its new rules as proposed, KCSR intends to alter its contracting practices with respect to its non-signatory contracts as described herein to strengthen the support for and to solidify what KCSR understands the presumptions created by the proposed rule to be.²

FACTUAL BACKGROUND

KCSR offers shippers both common carrier rates and contract rates. As required by law, KCSR stands willing and able to provide common carrier service upon reasonable request for non-exempt commodities. However, the majority of KCSR's traffic is carried pursuant to contracts, not common carrier rates.

KCSR uses two principal forms of contract. The first is the traditional, or "signatory," form in which both parties negotiate a variety of specialized terms, conditions and rates, and then both sign a written document reflecting the negotiated terms. The second is the so-called "non-signatory" contract (colloquially referred to by KCSR as "non-sigs") whereby the parties do not sign a written document, but nonetheless intend for the agreement to constitute a binding contract. KCSR understands the Board's proposal to apply to both of these types of documents.

Unlike some parties' descriptions of non-signatory contracts and the Board's discussion on page 6 of the NPR of "unilateral" or "signatureless" contracts, KCSR's non-sig contracts are not "unilateral" or "adhesion" contracts. Rates are discussed with shippers, as are anticipated shipping needs and any specialized service requirements. These discussions are usually more

² KCSR's comments herein are premised on KCSR's understanding that the Board's proposal means that use of the Board-designated disclosure statement would merely be "evidence" that the parties have entered a Section 10709 contract, which implies that parties could present contrary "evidence" to show that the agreement was really a tariff. If that is not the Board's intention with regard to its proposal, KCSR requests that the Board clarify that issue.

limited in scope and duration than are those that underlie signatory contracts, where discussions often can last over several months and consume large amounts of time for both KCSR and the shipper's personnel.

Indeed, this is the principal reason that KCSR uses non-sig contracts – to provide a simplified and streamlined means for shippers to get their particular rate and service needs addressed. The non-sig contract offer can be delivered very quickly to customers and expedites the acceptance process. The non-sig contract gives KCSR greater pricing responsiveness and ability to compete in connection with fast-paced market changes.

Non-sigs also offer greater flexibility to the shipper. A shipper may not want, for a variety of reasons, to incur the transactional costs associated with the negotiation of a more involved signatory contract, yet it may have particular services that it needs.³ For example, non-sig contracts typically are used for smaller volume and/or shorter-term shipments. They also have proven useful where a shipper seeks service terms for traffic of limited geographic scope, such as in cases where the customer seeks to transport goods between a single origin-destination pair (or a via small number of such pairs). A non-signatory contract is also very well-suited for rail transportation that does not require a large number of specialized service terms. For these reasons, KCSR and its shippers more frequently employ the non-sig contract form of agreement than the typically more involved signatory contract.

KCSR usually communicates the non-sig contract offer to the customer electronically. Each document bears a specifically-assigned number and sets forth the terms to govern the

³ To expedite and simplify matters, a non-signatory contract does not generally contain the full language of all of the terms and conditions but will instead incorporate standard tariff used in common carriage, such as demurrage and fuel surcharge, as part of the contract. These tariff provisions, incorporated by reference, thus become part of the contract if a shipper chooses to use a non-signatory contract.

transportation service if the contract is accepted by the shipper. In delivering the non-sig contract, KCSR advises the customer that the terms of this contract will apply when the shipper orders service from KCSR and uses the specifically-assigned number of the non-sig agreement.

Finally, in order to be sure that customers clearly understand that the non-sig is a contract under 49 U.S.C. 10709, KCSR's non-sigs have in recent years contained the following language:

This CONTRACT is made pursuant to 49 U.S.C. 10709 and shall become binding on the parties upon acceptance by the shipper named below. Shipper may accept this CONTRACT either by written notice, or by tender of traffic under its terms.⁴

DISCUSSION

A. The Board Should Continue With Its Case-By-Case Approach

KCSR has used its non-sig contracts without customer complaint. To KCSR's recollection, there has not been a dispute between KCSR and a shipper over whether a non-sig contract actually constituted contract service under Section 10709. Parties conducting business with KCSR in this fashion understand that they are entering into a contract with KCSR. This may be due to the clear language on each non-sig, stating that it is a "CONTRACT [which] is made pursuant to 49 U.S.C. 10709."

KCSR understands that there may have been a few instances in which carriers and their customers have disagreed (at least once they reached a point of dispute involving litigation)⁵ on whether a pricing mechanism provided for common carriage or a contract under Section 10709, and such disputes have led to confusion in the courts and at the Board. Nevertheless, KCSR

⁴ Attached hereto is an example of a typical non-signatory contract. The identity of the shipper, the rate, and the shipment destination have been redacted in order that the contract may be publicly disclosed.

⁵ Union Pacific Railroad Company – Petition for Declaratory Order, STB Finance Docket No. 35021, and Kansas City Power & Light Company v. Union Pacific Railroad Company, STB Docket No. 42095 (STB served Mar. 27, 2007).

believes that such rare occurrences do not require or justify the Board's proposal to create presumptions applicable to all Board proceedings.

B. If The Board Moves Forward, KCSR Will Modify its Practices Regarding Non-Sigs to Make Even Clearer That Non-Sigs Are Section 10709 Contracts

If the Board does move forward with its proposal, KCSR has determined that it should modify its procedures for using non-sigs to make clearer that non-sigs are indeed contracts. These changes unfortunately may make using non-sigs more time-consuming and less flexible, and may lead to some shippers paying class rates if they fail to follow the new procedures. Nevertheless, these changes appear necessary to respond to the Board's proposal.

The principal change in KCSR's non-sig procedures, other than adding the Board-designated statement on all non-sigs and deleting the statement about Section 10709 that KCSR has used, will be to require the shipper to respond in writing (including by e-mail) before non-sig rates can take effect. As indicated in the factual background section of these comments, currently KCSR non-sig rates are typically made available for the shipper's use simply by entering the non-sig contract information in the service-ordering process. KCSR has found this to be a convenience to its customers because it reduces the number of communications necessary to put the non-sig service terms into effect.

The Board's proposal, however, appears to require a change in KCSR's non-sig procedures. As KCSR has noted, there is no record of disputes arising between KCSR and its customers over whether non-sig rates are contract rates. However, the Board's proposal implies that even if KCSR adds the Board-designated statement to its non-sig contracts that will only be "evidence" that the non-sig was a contract; leaving open the possibility that someone could provide other "evidence" to rebut this presumption. Effectively, therefore, the Board's proposal

creates more doubt, rather than less, about whether KCSR can rely on its non-sigs as contract rates.

To counteract the invitation to dispute that some may see in the Board's proposal, KCSR will begin requiring shippers to specifically acknowledge in writing that non-sig rates are Section 10709 contract rates. Should the shipper fail to send KCSR such an acknowledgement, KCSR will not be able to make the non-sig rates available to the shipper, leaving common carrier rates applicable to that traffic movement. Moreover, should the shipper belatedly acknowledge the non-sig as contract rates at night, on a weekend or over a holiday period, it is possible that there will be a delay in the intended contract rates taking effect because making them effective will require approval of marketing personnel after receiving the acknowledgement from the shipper.

In effectuating this new process, KCSR intends to advise each shipper, when transmitting a proposed non-sig rate contract, substantially as follows:

Attached is a copy of the proposed contract for the rail shipment(s) we have discussed. To accept the terms of this contract and ship under the offered rate(s), YOU MUST either – (1) reply to this email acknowledging receipt and acceptance of the contract rate(s) for your shipment(s), or (2) send me a signed letter accepting the contract rate(s). The offered rate(s) cannot be deemed accepted and be entered into KCSR's system to be available for your use until you acknowledge and accept the contract rate(s) and terms as specified immediately above. This requirement cannot be waived.

Unfortunately, based on KCSR's experience, it is likely that some shippers will ignore this additional requirement and fail to confirm their acceptance of the non-sig contract rates. Were it not for the implication contained in the Board's proposal that a party could provide evidence to dispute the notion that a non-sig contract containing the disclosure requirement was intended as a tariff, KCSR would be comfortable continuing its practice of making the rates available upon the shipper's entry of the non-sig information when ordering service, but in light

of the Board's lack of clarity with respect to non-sig contracts, KCSR cannot both make the rates available in that manner and allow the shipper to later dispute that the non-sig was not a contract rate.

Finally, KCSR asks that, if the Board proceeds with its proposal, the Board clarify that the lack of the Board-designated statement will not be germane to determining whether any rate arrangement entered prior to the effective date of the Board's decision is a Section 10709 contract.

CONCLUSION

KCSR believes that the Board's proposal is unnecessary, and has the potential to be misinterpreted by the courts. However, should the Board proceed with its proposal, KCSR believes that it will need to add further steps to its non-sig contracting process in order to assure against the additional disputes that the Board's proposal invites.

Respectfully submitted,

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Attorneys for The Kansas City
Southern Railway Company

Dated: February 5, 2009

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SURFACE TRANSPORTATION BOARD**

EX PARTE NO. 676

RAIL TRANSPORTATION CONTRACTS UNDER 49 U.S.C. 10709

**COMMENTS OF THE KANSAS CITY
SOUTHERN RAILWAY COMPANY**

EXHIBIT A

KCS Non-Sig:
Account of:

KCS 48550

KANSAS CITY SOUTHERN RAILWAY COMPANY

Applies on the following commodities:

2819315 SULPHURIC ACID OR OIL OF VITRIOL 93-100% CONCENTRATION
2819330 ACID, SULPHURIC, SPENT

CUSTOMER RATES APPLYING TO

KCS

Effective: January 23, 2009

Expires: January 22, 2010

Issued By:

KANSAS CITY SOUTHERN RAILWAY COMPANY

427 West 12th Street

Kansas City, Missouri 64105-1403

Jaclyn Rudd, MANAGER MARKETING

Phone: 816-983-1871

Email: JRUDD@KCSOUTHERN.COM

This CONTRACT is made pursuant to 49 U.S.C. 10709 and shall become binding on the parties upon acceptance by the shipper named below. Shipper may accept this CONTRACT either by written notice, or by tender of traffic under its terms.

Reference this price authority in all correspondence
--

KCS 48550

CONFIDENTIAL RAIL TRANSPORTATION PRICE

Account of: :

Term: The Effective Date of this Agreement shall be January 23, 2009; expiring on January 22, 2010.

Reference: All shipping Documents must make reference to KCS 48550 as well as the seven digit STCC (where applicable), Origin, Destination and Equipment Identification Number on their face when tendered to the Origin Carrier.

General Shipment Conditions

Mileage allowance payments will not apply;

Price applies in Tank cars;

Price applies in shipper owned or leased equipment;

Freight charges must be prepaid;

Price is subject to cancellation on 30 day(s) notice;

Price is subject to KCS tariff 0000009012;

Price is subject to UFC tariff 0000006000;

Price is subject to Rule 35 of UFC;

Price is subject to fuel surcharge based on mileage;

The Mileage Basis being utilized is Fuel Surcharge Miles;

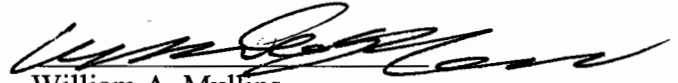
Customer		Role PAYER OF FREIGHT
STCC	Commodity	
2819315	SULPHURIC ACID OR OIL OF VITRIOL 93-100% CONCENTRATION	
2819330	ACID, SULPHURIC, SPENT	
Column	General Rate and Minimum Qualifiers	
All	Rate application is per car.	

Column	Shipment Condition		
All	Price must be used in combination with other prices for the portion of the shipment prior to specified origin. Separate freight bills will be issued for each price used according to the provisions of Railway Accounting Rule 11.		
From	To		
KANSAS CITY, MO			
Route: KCS-LOCAL-KCS			
COL 1	COL 2	COL 3	COL 4
Effective: 01/23/2009			
\$:			

CERTIFICATE OF SERVICE

I have this day served a copy of the foregoing Comments Of The Kansas City Southern Railway Company upon all known parties of record by depositing a copy in the U.S. mail in a properly addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Dated: February 5, 2009



William A. Mullins

Attorney for The Kansas City
Southern Railway Company