

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 669

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

STB Ex Parte No. 676

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

Decided: March 6, 2008

In a Notice of Proposed Rulemaking, in STB Ex Parte No. 669, served on March 29, 2007 (NPRM), and published in the Federal Register on April 4, 2007 (72 FR 16,316-18), the Board sought public comments on a 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.” Our objective was to address two issues arising from hybrid pricing mechanisms such as the one involved in Kansas City Power & Light Company v. Union Pacific Railroad Company, STB Docket No. 42095 (STB served Mar. 27, 2007) (KCPL), which, despite having characteristics of rail transportation contracts beyond the Board’s jurisdiction under 49 U.S.C. 10709, are designated by the carrier as common carriage rates subject to the Board’s jurisdiction.

The first issue is uncertainty. While Congress expressly removed all matters and disputes arising from rail transportation contracts from the Board’s jurisdiction, 49 U.S.C. 10709(c), the statute provides no clear demarcation between a contract and common carriage rate. Agency precedent offers little guidance. The issue of whether a rate is a contract or common carriage rate has been examined on a case-by-case basis in light of the parties’ intent. See Aggregate Volume Rate on Coal, Acco, UT to Moapa, NV, 364 I.C.C. 678, 689 (1981). With the enactment of the ICC Termination Act of 1995 (ICCTA), it became more difficult to distinguish between the two types of rates, as railroads are no longer required to file with the agency either tariffs containing their common carriage rates or summaries of their non-agricultural contracts.

The second issue was our concern that increased use of hybrid pricing arrangements could create an environment where collusive activities in the form of anticompetitive price signaling could occur. While terms of a rail transportation contract generally are kept confidential, the terms and conditions of common carriage rates must be publicly disclosed upon request, 49 U.S.C. 11101, thereby increasing the possibility of collusive behavior in a highly concentrated industry.

Both shippers and carriers oppose our proposal. After reviewing the comments submitted in this proceeding, the Board has decided not to adopt the proposed rule for the reasons discussed below. Instead, we will pursue a different course. We are instituting a separate proceeding, STB Ex Parte No. 676, to consider imposing a full disclosure/informed consent requirement on carriers' pricing practices. The public is invited to offer suggestions for an appropriate proposal.

PUBLIC COMMENTS

Shippers generally share the Board's concern regarding the potential for collusion and price signaling from hybrid pricing arrangements such as the one involved in KCPL, and they also express concern that such arrangements have resulted in higher rates.¹ Nevertheless, several shippers question the Board's authority to act with respect to contracts² and they argue that whether a contract exists is a matter governed by the intent of the parties.³

Carriers argue that section 10709 adequately defines the term contract⁴ and that the proposed rule conflicts with congressional intent to allow for and promote pricing flexibility and innovation by giving railroads broad pricing discretion.⁵ Further, carriers argue that public pricing is not per se anticompetitive.⁶ Like the shippers, carriers assert that the Board lacks jurisdiction over contracts and that a court, not the Board, is the sole forum for determining whether an enforceable contract exists.⁷ Carriers, like shippers, argue that the Board should rely on the parties' intent in determining whether a rate is for common carriage or contract carriage.⁸

¹ See Western Coal Traffic League (WCTL) Open. at 9-12; National Industrial Transportation League (NITL) Open. at 3; Entergy Services Inc. (Entergy) Open. at 7; Dairyland Power Cooperative (Dairyland) Open. at 7; WCTL Reply at 3-8.

² See WCTL Open. at 13-18; Entergy Open. at 8; Dairyland Open. at 6-7; Ameren Energy Fuels and Services Company (AFS) Open. at 5. But see, National Grain and Feed Association (NGFA) Open. at 14.

³ See WCTL Open. at 21; Arkansas Electric Cooperative Corporation (AECC) Open. at 3; Entergy Open. at 10; Edison Electric Institute (EEI) Open. at 5-7.

⁴ See CSX Transportation Inc. (CSXT) Open. at 4; Canadian Pacific Railway Company (CPR) Open. at 2-3.

⁵ See BNSF Railway Company (BNSF) Open. at 2; Union Pacific Railroad Company (UP) Open. at 5; CPR Open. at 3.

⁶ See UP Open. at 9-10; Association of American Railroads (AAR) Open. at 4.

⁷ See Norfolk Southern Rail Company (NS) Open. at 4-5; CSXT Open. at 12; AAR Open. at 3.

⁸ See UP Open. at 3-4.

Carriers and shippers both express concern with the potential impacts of the Board's proposal. Carriers contend that the proposal would arbitrarily restrict contracts to certain terms and circumstances, and would invalidate otherwise assertedly legitimate contractual arrangements that do not fit the proposed definition.⁹ They point to UP's unilateral contracts,¹⁰ NS's "signatureless contracts" (NSSCs),¹¹ and CSXT's "private price quotations" (PPQs).¹²

Shippers express concern regarding those arrangements. But they point out that, in contrast to the hybrid rate arrangement in KCPL, which was labeled a tariff but bore resemblance to a contract, arrangements like the PPQs and NSSCs are labeled "contracts" by carriers but bear all the earmarks of a tariff.¹³ Shippers decry the frequent practice of carriers offering these ambiguous arrangements, and describe them as unilateral, "take-it-or-leave-it" offers that demand no minimum volume, contain rates that may be changed on short notice, are subject to terms and conditions published in the carrier's tariffs, and are "accepted" merely by tendering traffic.¹⁴ Shippers say that they would welcome clarification regarding the status of these documents and action that would prevent carriers from immunizing their pricing from Board review.¹⁵ However, they warn that carriers could manipulate the proposed rule simply by adding, for example, a minimum annual volume commitment to create a bilateral agreement.¹⁶

Both carriers and shippers express concern about the potential disruption to various well established common carriage pricing arrangements. They point out that, under the Board's proposed definition, unit train transportation agreements, annual volume rates, the Certificate of Transportation program (COTs), and other long-accepted common carriage transportation arrangements could all be deemed private contracts.¹⁷ Finally, shippers note that the proposal could create more obstacles and risks for captive shippers seeking to bring rate cases. They

⁹ See id. at 12.

¹⁰ See UP Open. at 12-13.

¹¹ See NS Open. at 7.

¹² See CSXT Open. at 6.

¹³ See NITL at 3-4, E.I. DuPont de Nemours and Company (DuPont) Open. at 2; U.S. Clay Producers Traffic Association, Inc. (Clay Producers) Open. at 2.

¹⁴ See AECC Open. at 8; Clay Producers Open. at 2; DuPont Open. at 2; Entergy Open. at 10; NGFA Open. at 10-15.

¹⁵ See NITL Open. at 4; DuPont Open. at 2; Clay Producers Open. at 3.

¹⁶ See NITL Open. at 8-9; DuPont Open. at 2.

¹⁷ See WCTL Open. at 18-21; DuPont Open. at 2; NITL Open. at 6-7; Entergy Open. at 9; AECC Open. at 4; NGFA Open. at 17-18; BNSF Open. at 2-3.

suggest that, if given two “options,” with one option bearing the “indicia of a contract” (and thus exempt from Board jurisdiction), shippers would be compelled to accept the common carriage rate option in order to obtain rate relief before the Board, even though that rate often is significantly higher than the “contract” rate.¹⁸ Carriers respond that they are statutorily entitled to broad flexibility in designing common carriage rates, and they maintain that their existing common carriage rates are consistent with section 10709.¹⁹

We received no comments from federal, state or local officials addressing the antitrust concerns set forth in the NPRM.²⁰

DISCUSSION AND CONCLUSIONS

After considering the comments, we are persuaded that the proposed rule would not adequately resolve the concerns that motivated the proposal, and could well result in unintended consequences that are best avoided.

However, we remain concerned with the lack of any clear demarcation between common carriage rates and contract pricing arrangements and the resulting ambiguity regarding the Board’s jurisdiction. Numerous commenters recognize the blurring between common carriage and contract rates and support efforts to remove confusion, particularly regarding the “take-it-or-leave-it,” unilateral rate arrangements that resemble a tariff but are deemed a contract by carriers.²¹

We intend to pursue this concern through another means. Specifically, we are instituting a separate rulemaking proceeding to consider imposing a requirement that each carrier provide a full disclosure statement when it seeks to enter into a rail transportation contract under section 10709. The statement would explicitly advise the shipper that the carrier intends the document to be a rail transportation contract, and that any transportation under the document would not be subject to regulation by the Board. Moreover, it would advise the shipper that it has a statutory right to request a common carriage rate that the carrier would then have to supply promptly, and such a rate might be open to challenge before the Board. The proposal would also require that, before entering into a rail transportation contract, the carrier provide the shipper an opportunity to sign a written informed consent statement in which the shipper acknowledges, and states its willingness to forgo, its regulatory options. The Board welcomes suggestions from parties as to what language should be included in this full disclosure/informed consent requirement. Any such suggestions should be submitted in STB Ex Parte No. 676 by May 12, 2008.

¹⁸ See AECC Open. at 6-8; WCTL Open. at 24; see also Entergy Open. at 10.

¹⁹ See BNSF Open. at 2; UP Open. at 5; CPR Open. at 3.

²⁰ See NPRM at 5 & n.12.

²¹ See NITL Reply at 5; Joint Reply of EEI, et al. at 3; EEI Reply at 5-6.

Finally, we remain concerned about hybrid pricing arrangements such as those in KCPL and we remain open to individual complaints regarding the reasonableness of a particular pricing practice.²²

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The STB Ex Parte No. 669 proceeding is discontinued.
2. The STB Ex Parte No. 676 proceeding is instituted. Suggestions for an appropriate full disclosure/informed consent proposal should be submitted in that docket on May 12, 2008.
3. This decision is effective on the date of service.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary

²² See, e.g., WCTL Open. at 30-31 (suggesting that the Board address the public pricing structure issue as an unreasonable practice).