DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Parts 1300 and 1313

[STB Ex Parte No. 669]

Interpretation of the Term ''Contract'' in 49 U.S.C. 10709

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Surface Transportation Board seeks 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.

DATES: Comments are due by June 4, 2007. Reply comments are due August 2, 2007.

ADDRESSES: Comments may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should comply with the instructions at the E-FILING link on the Board's Web site, at *http://www.stb.dot.gov.* Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: STB Ex Parte No. 669, 395 E Street, SW., Washington, DC 20423–0001.

Copies of written comments will be available from the Board's contractor, ASAP Document Solutions (mailing address: Suite 103, 9332 Annapolis Rd., Lanham, MD 20706; e-mail address: *asapdc@verizon.net*; telephone number: 202–306–4004). The comments will also be available for viewing and self-copying in the Board's Public Docket Room, Room 755, and will be posted to the Board's Web site at *http://www.stb.dot.gov*.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar at 202–245–0395. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: Until the late 1970s, the Board's predecessor, the Interstate Commerce Commission (ICC), had found contract rates between a railroad and a shipper to be per se unlawful. They were regarded as a destructive competitive practice that would have the effect of damaging existing rate structures and reducing competition.[1] In 1978, the ICC changed course, issuing a policy statement acknowledging that contract rates may be beneficial in many circumstances because ''a shipper is guaranteed a certain rate for the period of the contract while the carrier knows what service that shipper will receive.'' [2] In that proceeding, the ICC adopted the following definition of a rail ''contract rate'':

> a railroad freight rate arrived at through mutual agreement between a railroad * * * and a shipper in which the railroad agrees to provide service for a given price and the shipper agrees to tender a given amount of freight during a fixed period.[3]

Rather than finding all such agreements lawful, however, the ICC undertook to review the legality of contract rates on a case-by-case basis.

Congress viewed the ICC's changed policy as insufficient, because it had ''a number of restrictions and uncertainties and [had] resulted in the limited use of contracts.'' [4] To ensure that shippers and railroads would be free to enter into rail transportation contracts ''without concern about whether the ICC would disapprove a contract,'' [5] in the Staggers Rail Act of 1980 (Staggers Act),[6] Congress amended the statute to provide that railroads ''may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.'' Former 49 U.S.C. 10713(a) (1995) (now codified at 49 U.S.C. 10709(a)). When originally enacted, the provision further stated that ''a rail carrier may not enter into a contract with purchasers of rail service except as provided in this section.'' Former 49 U.S.C. 10713(a) (1995).

Congress also expressly removed all matters and disputes arising from rail transportation contracts from the ICC's (and now the Board's) jurisdiction. See former 49 U.S.C. 10713(i) (1995) (now codified at 49 U.S.C. 10709(c)). If the parties have a dispute regarding such a contract—such as whether there has been adequate performance or whether the contract is void because it was signed under duress—such matters are to be decided by the courts under applicable state contract law. See former 49 U.S.C. 10713(i)(2) (1995) (now codified at 49 U.S.C. 10709(c)(2)). Congress also explained that, if someone believes that a contract is anticompetitive, ''the antitrust laws are the appropriate and only remedy available.'' [7] Congress considered the contract rate provision of the Staggers Act to be ''among the most important in the bill.'' [8] But there is no clear distinction in the statute or our precedent between a contract and a common carrier rate.

In a recent proceeding, *Kansas City Power & Light Company* v. *Union Pacific Railroad Company,* STB Docket No. 42095 (*KCPL*), the Board asked the parties to submit briefs to discuss a hybrid pricing mechanism that the carrier designated a common carrier pricing arrangement, but could be viewed as a rail transportation contract. *See Kansas City Power & Light Co.* v. *Union Pac. R.R.,* STB Docket No. 42095 (STB served July 27, 2006). The parties took the position that the rates at issue were common carrier rates subject to the Board's jurisdiction. The parties cited agency precedent for the proposition that a common carrier rate ''is nothing more than a special kind of contract between a carrier and its shippers,'' citing *National Grain & Feed Assoc.* v. *BN RR. Co., et al.*, 8 I.C.C.2d 421, 437 (1992), and whether a contract or common carrier rate exists has been examined on a case-by-case basis in light of the parties' intent, citing *Aggregate Volume Rate on Coal, Acco, UT to Moapa, NV,* 364 I.C.C. 678, 689 (1981) (Utah). The parties also pointed out that the agency has in the past stated that the purpose of allowing for contract rates is to establish negotiated, mutually agreeable rates to which parties intend to be bound. *See Utah,* 364 I.C.C. at 689; *see also Product and Geographic Competition,* 2 I.C.C.2d 1, 11 (1985); *Market Dominance Determinations,* 365 I.C.C. 118, 125 (1981). The Union Pacific Railroad Company (UP) also argued that it can enter into any kind of bilateral agreement with a shipper, but maintain Board jurisdiction by labeling the agreement a common carrier rate rather than a contract rate. It contended that a carrier has the authority to designate what type of rate it is establishing, based on section 10701(c),

[1] *See Contract Rates on Rugs and Carpeting from Amsterdam, N.Y., to Chicago*, 313 I.C.C. 247, 254 (1961); *Guaranteed Rates from Sault Ste. Marie, Ontario, Canada, to Chicago*, 315 I.C.C. 311, 323 (1961).

[2] *Change of Policy Railroad Contract Rates,* Ex Parte No. 358–F (ICC served Nov. 9, 1978).

[3] *See* former 49 CFR 1039.1 (1979).

[4] H.R. Rep. No. 96–1035, 96th Cong., 2nd Sess. (May 16, 1980) at 57 (*House Report*); *see also* S. Rep. No. 96–470, 96th Cong., 1st Sess. (Dec. 7, 1979) at 24 (*Senate Report*) (the changes are ''intended to clarify the status of contract rate and service agreements in an effort to encourage carriers and purchasers of rail service to make widespread use of such agreements'').

[5] *House Report* at 58; *see also Senate Report* at 24.

[6] Pub. L. No. 96–448, 94 Stat. 1895 (1980).

[7] *House Report* at 58.

[8] *Senate Report* at 9.

arguing ''[u]nless a specific prohibition applies, 'a rail carrier may establish any rate for transportation or other service provided by the rail carrier.' Rail carriers thus have broad flexibility to design common carrier offerings as alternatives to rail transportation contracts in response to business needs.'' [9] Because the parties could have reasonably relied on prior agency precedent to conclude that this kind of hybrid pricing mechanism is subject to Board jurisdiction, we concluded that it would be inappropriate to set aside or reexamine that ICC precedent in that adjudication.

Nevertheless, we have serious concerns about the lack of any clear demarcation between contract and common carrier rates because of the boundaries on our jurisdiction. The carrier in the *KCPL* proceeding has crafted a hybrid pricing mechanism that appears to have all of the characteristics of a rail transportation contract, but avoids some important consequences of entering into such a contract by its choice of label. Traditionally, common carrier pricing has been a holding out to the public to provide a specified transportation services for a given price that a shipper accepts by tendering traffic. Under these unilateral contracts,[10] the carrier has the right to change the common carrier rates or terms upon 20 days' notice under 49 U.S.C. 11101(c). In other words, where there is no mutuality of consideration, a carrier can unilaterally withdraw one offer and replace it with another.

The new pricing structures we are witnessing as reflected in the *KCPL* proceeding, however, contain a mutuality of obligation between the carriers and shippers that appear to have the hallmarks of a contractual relationship. These bilateral agreements mutually bind both the shipper and the carrier for a given period of time. In exchange for some sort of consideration from the shipper, the carrier commits to a specific rate or service for a specific term. While 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.

We also have concerns that the increased used of these hybrid pricing mechanisms could create an environment where collusive activities in the form of anticompetitive price signaling could occur. Whereas the terms and conditions of common carrier rates must be publicly disclosed under section 11101,[11] the terms of a rail transportation contract are to be kept confidential, a factor that makes collusion in this highly concentrated industry more difficult.[12] Thus, a carrier's hybrid pricing mechanism may not contain the same protections against collusion as do traditional confidential transportation contracts. An important competitive benefit of contracts is that they often enable shippers to obtain service commitments and lower rates that carriers might not otherwise offer through the public tariff process.

We also question whether the position advanced by UP that these sorts of rates are authorized by section 10701(c) is consistent with the statutory scheme. Read in context with the other provisions of section 10701, we believe that subsection (c) addresses the *level* of the rate that a carrier may set in the first instance, and does not allow the carrier to control the designation of the type of rate that is involved. Moreover, under the railroad's interpretation, there would appear to be no type of agreement between a carrier and a shipper—no matter how long the term or how individually tailored or bilateral the responsibilities created—that a carrier could not unilaterally label common carrier rate and service terms. If that were so, the contract provision in section 10709 would become largely superfluous.

Similarly, the carrier's interpretation would render section 10722 redundant. In that provision, Congress expressly authorized rail carriers to establish premium charges in common carrier rates for special services or special levels of service in order to encourage more efficient use of freight cars. *See* 49 U.S.C. 10722. If, however, section 10701 authorizes common carrier tariffs that embrace any kind of special rates and terms, it would not have been necessary for Congress to separately authorize special rates in section 10722.

We are inclined to find that a more reasonable interpretation of the statute is that section 10701 does not authorize carriers to enter into either special common carrier rates or bilateral contractual agreements. Both the authority for, and limitations on, those types of rates are set forth in sections 10722 and 10709, respectively. Section 10709, in turn, removes those contracts from the regulatory scheme associated with common carrier service.

In light of the above concerns, we seek public comment on our proposed interpretation of the term ''contract'' in section 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. Under the proposed interpretation, notwithstanding any carrier representation that the rate specified in the agreement is a common carrier rate, such a bilateral agreement would be regarded by the Board as a rail transportation contract under section 10709 and therefore outside the Board's jurisdiction. *See Columbia Gas Transmission Corp.* v. *FERC,* 404 F.3d 459, 463 (D.C. Cir. 2005) (''jurisdiction cannot arise from the absence of objection, or even from affirmative agreement. To the contrary, as a statutory entity, [the agency] cannot acquire jurisdiction merely by agreement of the parties before it.''); *see also Weinberger* v. *Bentex Pharms., Inc.,* 412 U.S. 645, 652 (1973) (only Congress, not parties, may confer jurisdiction).

Though we need not seek public comments before issuing an interpretative rule of this nature, we do so here to ensure that we have fully considered the issues and ramifications before taking this action. We do not intend to stifle innovation in transportation markets or otherwise disadvantage any party.

To the extent this interpretation could be seen as contradicting past agency statements regarding whether a bilateral agreement can constitute a common carrier rate, we would apply this

[9] *See* STB Docket No. 42095, UP's Response to Order to Show Cause, at 8 (filed Sept. 25, 2006).

[10] A unilateral contract is one in which one party makes an express engagement or undertakes a performance, without receiving in return any express engagement or promise of performance from the other. The essence of a unilateral contract is that neither party is bound until the promisee accepts the offer by performing the proposed act. Black's Law Dictionary 277 (6th abr. Ed. 1991).

[11] *See* 49 CFR 1300.2 (''A rail carrier must disclose to any person, upon formal request, the specific rates(s) requested * * *. as well as all charges and service terms * * *.'').

[12] *See, e.g., Canadian National, et al.—Control—Illinois Central, et al.,* 4 S.T.B. 122, 149 (1999) (''As we explained in the *UP/SP* decision affirmed by the court, there are three elements, all of which are present here, that each make tacit collusion unlikely for markets in which two railroads operate. First, tacit collusion cannot flourish where, as in railroading, rate concessions can and are made secretly through confidential contracts.''); *see also Water Transport Ass'n* v. *ICC,* 722 F.2d 1025 (2d Cir. 1983) (''[I]t has long been recognized under the antitrust laws that public disclosure of contract terms can undermine competition by stabilizing prices at an artificially high level.''); *see generally Petition To Disclose Long-Term Rail Coal Contracts,* ICC Ex Parte No. 387 (Sub-No. 961) (ICC served July 29, 1988) (lengthy discussion of the confidentiality of rail transportation contracts).

interpretation prospectively only. However, we do not want to create incentives for a carrier to rush to put into place as many rates as possible in hybrid ''common carrier'' agreements during the period of unavoidable delay associated with seeking public comments. Therefore, should we adopt this interpretative rule, we intend to apply the rule to all agreements entered into after the date of publication of this decision in the **Federal Register**. Parties are hereby placed on notice that if this proposal is adopted, the reasonableness of a rate reflected in a bilateral agreement entered into after this date will be treated as a confidential contract governed by section 10709 and outside the Board's jurisdiction.

Our proposed changes to the Code of Federal Regulations are set forth in the appendix. Parties are specifically invited to comment on the proposed rules, particularly concerning 49 CFR 1313.1(c). 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.

Pursuant to 5 U.S.C. 605(b), the Board certifies that this action will not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

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

Authority: 49 U.S.C. 721, 49 U.S.C. 10709.

Decided: March 28, 2007.

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

Vernon A. Williams,

Secretary.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend part 1300 and 1313 of title 49, chapter x, of the Code of Federal Regulations as follows:

PART 1300—DISCLOSURE, PUBLICATION, AND NOTICE OF CHANGE OF RATES AND OTHER SERVICE TERMS FOR RAIL COMMON CARRIAGE

1. The authority citation for Part 1300 continues to read as follows:

Authority: 49 U.S.C. 721(a) and 11101(f).

2. Amend § 1300.1 by adding paragraphs (c)(1) and (c)(2) to read as follows:

§ 1300.1 Scope; definitions.

* * * * *

(c) * * *

(1) The term *contract* in 49 U.S.C. 10709 is defined 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.

(2) Notwithstanding any representation that a rate specified in an agreement is a common carrier rate, a bilateral agreement as described in paragraph (c)(1) of this section will be treated by the Board as a rail transportation contract authorized under 49 U.S.C. 10709 and therefore outside the Board's jurisdiction.

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PART 1313—RAILROAD CONTRACTS FOR THE TRANSPORTATION OF AGRICULTURAL PRODUCTS

3. The authority citation for Part 1313 continues to read as follows:

Authority: 49 U.S.C. 721(a) and 10709.

4. Amend § 1313.1 by revising the first sentence of paragraph (c) to read as follows:

§ 1313.1 Scope; definitions of terms.

* * * * *

(c) For purposes of this part, the term *contract* means a contract as defined in 49 CFR 1300.1(c), including any amendment thereto, to provide specified transporation of agricultural products (including grain, as defined in 7 U.S.C. 75 and products thereof). * * *

[FR Doc. E7–6215 Filed 4–3–07; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 070330073–7073–01; I.D. 030507A]

RIN 0648–AU87

Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Quota Specifications and Effort Controls

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments; notice of public hearings.

SUMMARY: NMFS proposes initial 2007 fishing year specifications for the Atlantic bluefin tuna (BFT) fishery to set BFT quotas for each of the established domestic fishing categories and to set effort controls for the General category and Angling category. This action is necessary to implement recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT), as required by the Atlantic Tunas Convention Act (ATCA), and to achieve domestic management objectives under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). A minor administrative change to the permit regulations is also proposed. NMFS solicits written comments and will hold public hearings in April 2007 to receive oral comments on these proposed actions.

DATES: Written comments must be received on or before May 4, 2007.

The public hearings dates are:

1. April 24, 2007, 7 p.m. to 9 p.m., Morehead City, NC.

2. April 26, 2007, 6:30 p.m. to 8:30 p.m., West Islip, NY.

3. April 27, 2007, 3:30 p.m. to 5:30 p.m., Gloucester, MA.

ADDRESSES: Comments may be submitted through any of the following methods:

• E-mail: *07BFTSPECS@noaa.gov*. Include in the subject line the following identifier: ''Comments on 2007 Atlantic bluefin tuna specifications.''

• Federal e-Rulemaking Portal: *http://www.regulations.gov*.

• Mail: Sarah McLaughlin, Highly Migratory Species Management Division, Office of Sustainable Fisheries (F/SF1), NMFS, One Blackburn Dr., Gloucester, MA 01930.

• Fax: (978) 281–9340.

The hearing locations are:

1. Morehead City — Carteret Community College (Joselyn Hall, H.J. McGee, Jr. Building), 3505 Arendell Street, Morehead City, NC 28557.

2. West Islip — West Islip Public Library, 3 Higbie Lane, West Islip, NY 11795.

3. Gloucester — NMFS, One Blackburn Drive, Gloucester, MA 01930.

Supporting documents including the Environmental Assessment, Initial Regulatory Flexibility Analysis, and Regulatory Impact Review are available by sending your request to Sarah McLaughlin at the mailing address specified above.

FOR FURTHER INFORMATION CONTACT: Sarah McLaughlin, 978–281–9260.