

SERVICE DATE – LATE RELEASE AUGUST 11, 2014

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 725

PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY AND CSX
TRANSPORTATION, INC., TO INSTITUTE A RULEMAKING PROCEEDING TO
EXEMPT RAILROADS FROM FILING AGRICULTURAL TRANSPORTATION
CONTRACT SUMMARIES

Digest:¹ The Board is denying a petition to institute a proceeding to exempt rail carriers as a class from the statutory requirement to file agricultural transportation contract summaries with the Board.

Decided: August 11, 2014

In a petition filed on May 13, 2014, Norfolk Southern Railway Company (NS) and CSX Transportation, Inc. (CSXT) (together Petitioners), request that the Board institute a rulemaking proceeding to exempt railroads as a class from the requirement at 49 U.S.C. § 10709(d)(1) to file agricultural transportation contract summaries. On June 2, 2014, the National Grain and Feed Association (NGFA) filed a reply objecting to the request, and on June 12, 2014, Cargill Inc. (Cargill) filed a letter in opposition. We deny Petitioners' request.

BACKGROUND

In the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (1980) (Staggers Act), Congress amended the Interstate Commerce Act 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.”² Congress also expressly removed all matters and disputes arising from rail transportation contracts from the Interstate Commerce Commission’s (ICC) jurisdiction.³ Any disputes regarding these contracts—such as whether there has been adequate

¹ The digest constitutes no part of the decision of the Board, but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² 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 When originally enacted, the provision further stated that “a rail carrier may not enter into a contract with purchasers of rail service except as provided in this section.”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 § 10713(a) (1995).

³ See former § 10713(i) (1995) (now codified at § 10709(c)).

performance or whether the contract is enforceable—are to be decided by the courts under applicable state contract law.⁴ Congress also explained that, if someone believes that a contract is anticompetitive, “the antitrust laws are the appropriate and only remedy available.”⁵ Congress considered the contract rate provision of the Staggers Act to be “among the most important in the bill.”⁶

Notwithstanding the importance it attached to the contract rate provision, Congress required, under former § 10713(b)(1), that a copy of each contract and a contract summary containing certain prescribed nonconfidential information be filed with the ICC. Certain essential terms of contracts for the transportation of agricultural commodities were to be made available to the public in tariff form, and the ICC was to provide liberal discovery to shippers seeking remedies for unreasonable discrimination and destructive competitive practices.⁷

The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), abolished the ICC and transferred responsibility for regulating rail transportation to the Board. The ICCTA also reduced regulatory oversight over rail transportation contracts in several ways. For example, new § 10709(d)(1) continued the requirement that rail carriers file contract summaries with the Board, but limited the filing requirement to the transportation of agricultural products, including grain as defined in 7 U.S.C. § 75.⁸ That section also left it to the Board to prescribe what non-confidential, essential information the contract summaries should contain.⁹ New § 10709(g) also reenacted the complaint provisions of former § 10713(d), but limited their applicability to contracts for the transportation of agricultural products.¹⁰

After enactment of the ICCTA, the Board adopted regulations that govern the filing of the agricultural contract summaries, including the information that must be included in the summaries. See Railroad Contracts, 1 S.T.B. 987 (1996). These

⁴ See former § 10713(i)(2) (1995) (now codified at § 10709(c)(2)).

⁵ H. Rep. No. 96-1035, 96th Cong., 2nd Sess. (May 16, 1980) at 58.

⁶ S. Rep. No. 96-470, 96th Cong., 1st Sess. (Dec. 7, 1979) at 24.

⁷ Former 49 U.S.C. §§ 10713(b)(2)(A) and 10713(d)(2)(B), respectively.

⁸ 7 U.S.C. § 75 is the codification of § 3 of the United States Grain Standards Act.

⁹ See 49 C.F.R. § 1313.6-8.

¹⁰ As to such contracts, four grounds of complaint were made available: (1) complaints by shippers alleging that they will be harmed because the contract will unduly impair the ability of the contracting rail carriers to meet their common carrier obligations to the complainants (new § 10709(g)(2)(A)(i)); (2) complaints by ports alleging that they will be harmed because the contract will result in unreasonable discrimination against them (new § 10709(g)(2)(A)(ii)); (3) complaints by agricultural shippers seeking matching terms (new § 10709(g)(2)(B)(i)); and (4) complaints by agricultural shippers alleging that a contract constitutes a destructive competitive practice. See 49 U.S.C. § 10709(g). See also 49 C.F.R. § 1313.9.

requirements are codified at 49 C.F.R. Part 1313. After the filings are received by the Board, they are posted on the Board's website at: <http://www.stb.dot.gov/stb/index.html> (under the drop-down menu titled "Industry Data.").

In their petition, NS and CSXT request that the Board institute a rulemaking proceeding to exempt railroads as a class from the § 10709(d)(1) requirement to file agricultural transportation contract summaries. Petitioners argue that they have met the requirements for an exemption under 49 U.S.C. § 10502. Specifically, they claim that contract summaries are rarely if ever reviewed or used and thus are not needed to carry out the rail transportation policy or protect shippers from the abuse of market power.

In support of this claim, Petitioners contend that a Freedom of Information Act request filed by NS on April 24, 2014, confirmed that the Board's website is the primary (and possibly only) source of the contract summaries accessed by the public. They claim that between May 2, 2008, and April 24, 2014, NS's and CSXT's contract summaries at most were accessed only 699 and 560 times, respectively. Further, Petitioners assert that, to their knowledge, contract summaries have never been relied on by the Board in any matter nor have they been used by a party to a Board proceeding.

Given the relatively few times the contract summaries have been accessed (according to Petitioners), Petitioners argue that the burden of preparing them outweighs their value. NS claims that the preparation of contract summaries is a time-consuming manual process, especially for signatureless contracts,¹¹ and that the development of unique technology support was required both to fulfill the filing obligation and to maintain the process with updated information. According to NS, its Contract Publications unit spends approximately six hours a week (four for signatureless contracts and two for signature contracts) to prepare contract summary filings for submission to the Board. For the four-year period beginning with 2010 and extending through 2013, NS claims that it filed 1,492 contract summaries and paid \$4,735.50 in filing fees.

CSXT states that it combines manual reviews with technology support to assist in filing the contract summaries and maintaining the process. It claims that it devoted considerable time and expense to developing its data system and that administration and maintenance of the compliance system involves substantial employee time and information technology maintenance costs. According to CSXT, for the three-year period beginning with 2010 and extending through 2012, it filed 3,138 contract summaries and paid \$11,640.33 in filing fees.

Petitioners also note that this requirement was identified as a potential target for exemption by the Association of American Railroads (AAR) in Improving Regulation and Regulatory Review, EP 712 (STB served Dec. 21, 2011). There, AAR asserted that

¹¹ Unlike conventional signed contracts, signatureless contracts allow rail customers to agree to contract terms and conditions by (1) tendering traffic to the rail carrier under the terms of the contract and (2) inserting the contract identification number in waybills or other appropriate shipping papers.

the requirement is burdensome and unnecessary and that rail carriers and Board staff no longer need to commit resources to this activity. Petitioners further argue that, if the Board grants an exemption from the contract summary filing requirement, shippers could still seek to obtain a summary by seeking revocation of the exemption under 49 U.S.C. § 10502(d).

In its reply, NGFA contends that the statutory requirement to file contract summaries with the Board is intended to provide the Board and agricultural shippers with critical information about railroad contracting practices. That information, according to NGFA, helps to prevent abuses of market power and helps to assure that railroads fulfill their common carrier obligations for agricultural commodities. NGFA claims that a few of its members regularly review contract summaries as they pertain to their asset mix, and view the contract summary filing requirement as one of a limited number of protections against the abuse of railroad market power. Other members, NGFA claims, acknowledge not having accessed or used contract summaries in the past, but believe that rail contracts may become more prevalent in the future given existing rail service deficiencies and the prospect of continuing capacity challenges as the demand for rail service by agriculture and other sectors continues to increase. NGFA estimates that 20-25% of the grain and oilseed rail traffic currently moves under contract.

NGFA notes that widespread service problems and capacity constraints beset the rail industry during the past winter. Those problems, NGFA asserts, resulted in considerable harm to many agricultural shippers and culminated in the Board holding a hearing¹² and issuing orders related to agricultural movements. According to NGFA, the current need for information and transparency as to rail agricultural contracting practices is as great, if not greater, than in the past. Should any action be taken with respect to railroad contracting practices, NGFA contends that the Board should “make the information provided pursuant to Part 1313 more accessible and useable to agricultural shippers by publishing it in a readily accessible and searchable database.”¹³

NGFA also disputes Petitioners’ contention that the requirement to file contract summaries is unduly burdensome. NGFA notes that it is unclear whether the six hours per week NS allegedly spends on complying with the contract filing requirement is by one or more of its employees, that six hours per week can hardly be called excessive even if only one employee performs all of the involved tasks, and that six hours per week is the same amount of time reportedly spent on these tasks in 2010 and 2011. NGFA also points out that, according to NS, two-thirds of the allegedly burdensome work is attributable to signatureless contracts. Asserting that NS chose to use these signatureless contracts, NGFA argues that the burden NS has placed on itself cannot be used to argue against further compliance with § 10709’s filing requirement. NGFA further notes that CSXT has made no specific or quantified allegations to support its claim of undue burden. NGFA contends that neither NS nor CSXT can claim that the nominal filing fees

¹² See United States Rail Serv. Issues, EP 724 (STB served Apr. 1, 2014).

¹³ NGFA Reply at 5.

they have incurred are a financial burden, and neither railroad claims that other rail carriers are being unduly burdened by compliance with the filing requirement.

In addition, NGFA takes issue with Petitioners' contention that no party would be harmed because an individual party could seek revocation. NGFA questions how a party could seek revocation, inasmuch as the key information a party would require to demonstrate the need for revocation (i.e., abuse of market power or failure to fulfill the common carrier obligation) would no longer be publicly available. And even if the evidentiary rules for seeking revocation were surmountable, NGFA points to the cost and other resources that would be required to litigate the issue.

Cargill, in a letter filed on June 12, 2014, also expresses opposition to the proposed class exemption, which it asserts would undo "a provision that Congress put into law to 'protect' agricultural shippers from becoming uncompetitive after the passage of the Staggers Act."¹⁴ Cargill acknowledges that only a few companies may look at the contract summaries each month, but asserts that this information is still valuable to the agriculture industry. Cargill suggests that the number of times the contract summaries have been accessed has been affected by the lack of detail in the summaries. For example, Cargill points out that some rail carriers publish ranges of origins and destinations instead of actual origins and destinations, and asserts that this practice makes it difficult to identify and gather relevant information.

DISCUSSION AND CONCLUSIONS

The request to institute a proceeding to exempt rail carriers as a class from the statutory requirement to file agricultural transportation contract summaries is denied. Petitioners claim that the contract summary filing requirement is unduly burdensome, but their submission does not demonstrate that the statutory requirement is particularly burdensome to them, much less the railroad industry. CSXT makes no specific or quantified allegations to support its claim of undue burden. NS attributes the bulk of the alleged burden to signatureless contracts but, as NGFA points out, the use of these contracts may be for NS's own convenience.

Similarly, the evidence of record does not support Petitioners' claim that contract summaries are rarely, if ever, reviewed or used. The Petitioners assert that the summaries of only two railroads have been accessed more than 1,200 times in a period of less than six years. This cannot fairly be characterized as "rarely if ever."

In enacting the ICCTA, Congress determined that continuance of the requirement to file agricultural transportation contract summaries was warranted due to concerns about rail service to agricultural shippers. The evidence of record in this proceeding

¹⁴ Cargill Reply at 1.

indicates that these concerns persist, thereby demonstrating a continuing need for the filing of these contract summaries.¹⁵

For these reasons, we will deny Petitioners' request to institute a proceeding to exempt rail carriers as a class from the statutory requirement to file agricultural transportation contract summaries.

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

It is ordered:

1. Petitioners' request to institute a proceeding to exempt rail carriers as a class from the statutory requirement to file agricultural transportation contract summaries is denied.

2. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman. Vice Chairman Miller concurred with a separate expression.

VICE CHAIRMAN MILLER, concurring:

I concur in the result reached in this decision. My view is that when shippers have more information they can make better decisions and, as a consequence, fewer disputes will arise. As the NGFA states in its filing, "the Board should err on the side of increasing transparency." I agree with that statement and believe that the proper course of action here is to continue to require rail carriers to submit the agricultural contract summaries. However, I understand why CSX and NS may feel that the summaries are of limited use. But perhaps the reason these summaries are not accessed more frequently is not because they are of limited use, but because they have not been given sufficient attention by the agency. As NGFA notes in its filing, the Board could take the information that is contained in these filings and organize it into a more useful format. And as Cargill notes, the Board needs to ensure that the railroads are properly complying with the requirements, such as filing the summaries on time and including the correct information. Accordingly, I intend to work with the Board staff to make sure that these summaries are provided to our stakeholders in a more useful format and that the requirements are adhered to.

¹⁵ See, e.g., NGFA Reply at 3-5; Cargill letter at 1. See also Rail Transp. of Grain, Rate Regulation Review, EP 665 (Sub-No. 1) (STB served Dec. 12, 2013); United States Rail Issues—Grain, EP 724 (Sub-No. 2) (STB served June 20, 2014).