



## **The Nuts and Bolts of Railroad Transportation Contracts**

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### **§ 7.01. Introduction: Lawfulness of Pre-1980 Railroad Transportation Contracts.**

Before non-governmental transportation contracts were explicitly permitted by statute, it was thought by some people that they were illegal because they were, by definition, discriminatory. (In contrast, the Federal Government was always permitted by statute to have unique transportation arrangements when it acted as a shipper.) However, for unique movements, at least, such as long-haul coal transportation for one shipper, the discrimination argument is essentially theoretical. Contracts can be challenged as discriminatory,<sup>1</sup> but no such case has ever been successfully argued.

In 1982, the United States Court of Appeals for the D.C. Circuit opined that the legality of such pre-1980 contracts was “less than crystal clear.”<sup>2</sup>

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<sup>1</sup> 49 U.S.C. § 10709(g)(2)B.

<sup>2</sup> *Burlington Northern, Inc. v. ICC*, 679 F.2d 934, 936 (D.C. Cir. 1982) (Ruth Bader Ginsburg, J.).

Reversing a district court opinion that pre-1980 transportation contracts were illegal, the Court of Appeals for the Tenth Circuit held that such a contract was not “per se illegal.”<sup>3</sup> The current statute provides that contracts in effect on October 1, 1980 are lawful.<sup>4</sup>

### **§ 7.02. Statutory Authority for Railroad Transportation Contracts in the Staggers Rail Act of 1980.**

In Section 208 of the Staggers Rail Act of 1980, Congress for the first time explicitly authorized railroad transportation contracts.<sup>5</sup> Congress also adopted a “grandfather” clause ratifying the legality of pre-Staggers Act contracts.<sup>6</sup>

When railroads carry freight under contract, they are contract carriers, not common carriers. When they do not carry under contract, they are referred to as “common carriers.”

Former 49 U.S.C. § 10713 contained few restrictions on such contracts (except for agricultural contracts or those involving ports), beyond requiring their (eventual) filing with the Interstate Commerce Commission (ICC).

Such contracts may be kept confidential<sup>7</sup> and nearly all such contracts — except for those involving agricultural products — are confidential, because railroads and many shippers demand that. Importantly, however, Section 10713 was crystal clear in providing that neither party to a contract had any liability to the other except as provided in the contract. Obviously, therefore, the terms of the contract became critical.

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<sup>3</sup> *Kansas Power & Light Co. v. Burlington Northern R.R.*, 740 F.2d 780 (10th Cir. 1984), *cert. dismissed*, 469 U.S. 1200 (1985); *see also* *Iowa Power & Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796, 808-09 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (same); *Cleveland Cliffs Iron Co. v. ICC*, 664 F.2d 568, 574 (6th Cir. 1981)(same); *Change of Policy, Railroad Contract Rates*, Ex Parte No. 358-F, 45 *Fed. Reg.* 21,719 (Apr. 2, 1980).

<sup>4</sup> *See new* 49 U.S.C. § 10709(e), and Section 208 of the Staggers Rail Act of 1980, Pub. L. No. 96-448.

<sup>5</sup> Section 208 was codified at 49 U.S.C. § 10713 (since revised and renumbered as 49 U.S.C. § 10709).

<sup>6</sup> *Id.*, § 10713(j).

<sup>7</sup> 49 U.S.C. § 10709(d)(2)(new).