

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42095

KANSAS CITY POWER & LIGHT COMPANY

v.

UNION PACIFIC RAILROAD COMPANY

Decided: March 26, 2007

By complaint filed on October 12, 2005, Kansas City Power & Light Company (KCPL) alleges that the rates charged by the Union Pacific Railroad Company (UP) for transportation of coal from origins in the Powder River Basin (PRB) of Wyoming to KCPL's Montrose Generating Station (located near Ladue, MO) are unreasonably high. In a decision served on July 27, 2006 (July decision), the Board asked the parties to address as a threshold issue whether the Board has jurisdiction to entertain this rate complaint. The Board noted that KCPL and UP had executed an agreement that has certain indicia of a contract: fixed rates for a term of 3 years, a minimum-volume requirement for KCPL, a service commitment for UP, a liquidated damages provision if either party fails to meet its obligations under the agreement, and a *force majeure* clause. Under 49 U.S.C. 10709, the Board has no jurisdiction over rail transportation contracts.

Under the circumstances present in this proceeding, including the fact that the parties reasonably relied on prior agency precedent, we will assert jurisdiction over the challenged rates and instruct the parties to submit a revised procedural schedule to govern this rate complaint proceeding. We will also, however, institute a rulemaking proceeding to propose an interpretation of the term "contract" in 49 U.S.C. 10709 to distinguish between a common carrier rate and a contract rate for the future.

BACKGROUND

The challenged rates are set forth in UP Circular 111, "Unit Train Coal Common Carrier Circular Applying On: Unit Coal Trains from the Powder River Basin of Wyoming" (Circular 111). Circular 111 contains two classes of rates for customers. One class, referred to as Option 1, contains no volume requirement, although it does require shippers to estimate the tons of coal they anticipate shipping. The second class, referred to as Option 2, contains commitments from both parties for term, volume, rates, and service. The Option 1 rates are higher than the Option 2 rates for the same movement.

Under Option 2 of Circular 111, UP will provide service for a given rate during a 3-year term. Thus, unlike the rates in Option 1, which UP can change on 20 days' notice, UP commits itself to charge the Option 2 rates for the full term specified, subject only to a fuel surcharge

adjustment. A shipper seeking to obtain Option 2 rates must execute a Volume Commitment Certificate (Certificate), in which the “Shipper acknowledges the reciprocal benefits under Option 2 terms and conditions and agrees to be bound by the applicable terms and conditions set forth in this Circular and Rate Item associated with Destination.”¹

Under Circular 111, by executing the Certificate, a shipper commits to tender for transportation an annual minimum volume of coal for the term of the agreement. If the shipper fails to meet its minimum volume requirement, the shipper must pay liquidated damages (in the amount of \$3.00 for each shortfall ton). If the shipper provides its own equipment, then Option 2 contains a “service commitment,” under which UP agrees to transport for each quarter and year the amount of coal specified by the shipper. If UP fails to meet its service commitment, UP must pay liquidated damages (in the amount of \$3.00 for each shortfall ton).

Circular 111 also contains a *force majeure* clause, which relieves both parties of their respective obligations for the duration of events beyond their control (such as acts of God, adverse weather conditions, war, insurrection, riot or other civil disturbance, explosion, fire, derailment, and destruction or damage to the right-of-way). This provision requires written notice in a timely fashion as to the nature of the *force majeure*, when it began, and its projected duration. The provision also requires the parties to make “reasonable efforts” to eliminate or abate such *force majeure* and resume their obligations expeditiously upon its cessation.

On January 1, 2006, KCPL transmitted a Certificate to UP, notifying UP that KCPL would ship coal pursuant to Option 2 in Item 4140-C of Circular 111. According to KCPL, it did so stating that “it was executing the Certificate under duress; that the Circular 111 rates were not the product of any agreement between KCPL and UP; that KCPL does not consider those rates to be reasonable . . . and that KCPL’s execution of the Certificate was specifically conditioned on the understanding that the Option 2 rates and related service terms are common carrier rates and practices, fully subject to the jurisdiction of this Board as to their reasonableness.”² For its part, UP admits that “it has represented that Option 2 rates are common carrier rates, and . . . that a shipper’s execution of a ‘Volume Commitment Certificate’ does not create a contract under 49 U.S.C. 10709.”³

KCPL and UP have each responded to the Board’s July decision. KCPL argues that the Board is without jurisdiction to determine whether KCPL and UP entered into a lawful, binding contract.⁴ Assuming *arguendo* that the Board has jurisdiction to decide the question, KCPL asserts that KCPL and UP did not enter into a rail transportation contract, because each party

¹ KCPL Complaint, Exhibit A at 11.

² KCPL Complaint at 6-7.

³ UP Answer at 4.

⁴ KCPL Opening at 7-14. The cases relied upon by the complainant do not support the position that the Board lacks the authority to decide if it has jurisdiction. *Cf. Burlington N., Inc. v. Chicago & N.W. Trans. Co.*, 649 F.2d 556, 558 (8th Cir. 1981) (“The ICC has primary authority to determine its own jurisdiction.”).

manifested its specific intent not to do so.⁵ Lastly, KCPL contends that the characteristics of Circular 111 are typical of common carrier transportation arrangements, particularly those applicable to unit-train coal movements.⁶

Similarly, UP asserts that the parties' intent determines whether a document establishes common carrier rates or contract rates; thus, it argues, UP's manifested intent to establish a common carrier rate rather than a contract rate under Circular 111 precludes any finding that Option 2 rates are contract rates.⁷ UP also argues that the features contained in Option 2 are all permissible elements of common carrier rates.⁸

DISCUSSION AND CONCLUSIONS

There is no clear distinction in the statute or our precedent between a contract and a common carrier rate. The term "contract" is not defined in the statute, nor is there a definition of a common carrier rate. Our predecessor, the Interstate Commerce Commission (ICC), has stated that a common carrier rate "is nothing more than a special kind of contract between a carrier and its shippers." National Grain & Feed Assoc. v. Burlington N. RR., et al., 8 I.C.C.2d 421, 437 (1992). The ICC further stated that whether a contract or common carrier rate exists 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), the distinction became more difficult to discern, as railroads were no longer required to file either their tariffs or summaries of their non-agricultural contracts with the agency. Against this backdrop, the parties could reasonably have concluded that entering into the sort of agreement reflected by Option 2 would not preclude review of the reasonableness of the challenged rate by this agency.⁹ We conclude, therefore, that the lawfulness of the challenged rate can be reviewed by this agency.

It is agency precedent and the parties' reasonable reliance thereon, not their intent to confer jurisdiction on the Board, that governs our decision here. Cf. Weinberger v. Bentex Pharms., Inc., 412 U.S. 645, 652 (1973) (only Congress, not the parties, may confer jurisdiction); 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.").

Even if we should ultimately disagree with prior ICC precedent distinguishing contract from common carrier rates after further review, this dispute is not the appropriate vehicle for the agency to change course, as it would deprive KCPL of any regulatory review of the rate, a right

⁵ KCPL Opening at 14-21.

⁶ Id. at 21-26.

⁷ UP Opening at 2-5.

⁸ Id. at 6-8.

⁹ See KCPL Opening Brief, Exhibit 1; UP Answer at 4.

that it sought to preserve for the full 3-year term. While we have the authority to modify or change the ICC's interpretation of section 10709, "there may be situations where the [agency's] reliance on adjudication [to announce or change a rule or interpretation of the statute] would amount to an abuse of discretion . . ." NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974). One such instance may be where a party has reasonably relied to its detriment on prior agency announcements. See generally Williams Natural Gas Co. v. FERC, 3 F.3d 1544, 1553 (D.C. Cir. 1993) (in deciding whether to give retroactive effect to a new rule or interpretation, agencies should consider the extent to which the party against whom the new rule is applied relied on the former rule or interpretation).

Nevertheless, we have serious concerns about the lack of any clear demarcation between contract and common carrier rates. The carrier in this 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. When Congress removed rail transportation contracts from the Board's regulatory purview, it expressly stated that not only state contract laws but also federal and state antitrust laws would apply fully to those agreements.¹⁰ In contrast with this hybrid pricing mechanism, the terms and conditions in rail transportation contracts are to be confidential, which this agency has recognized as one factor that makes collusion in a highly concentrated industry more difficult.¹¹ There is thus a significant question as to whether treating such pricing arrangements as establishing common carrier rates may frustrate Congressional intent. Moreover, under the carrier's interpretation of its choice of rate formats, the contract provision in section 10709 would become almost superfluous. There would appear to be no type of "agreement" between the carrier and a shipper – no matter how long the term or how individualized or how bilateral the responsibilities created – that the carrier could not unilaterally label a "common carrier rate" rather than a contract.

Therefore, contemporaneously with this decision, we are instituting a rulemaking proceeding to propose an interpretation of the term "contract" that would distinguish public common carrier rates from confidential rail transportation contracts so as to avoid confusion in the future as to what type of rate is involved and what the legal consequences of that will be.

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

¹⁰ See H. Rep. No. 96-1035, 96th Cong., 2nd Sess. (May 16, 1980) at 58.

¹¹ See, e.g., Canadian Nat., 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).

It is ordered:

1. The parties have shown cause why this proceeding should not be dismissed pursuant to 49 U.S.C. 10709.

2. The parties should submit a proposed procedural schedule to govern this rate complaint proceeding by April 18, 2007.

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

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

Vernon A. Williams
Secretary