

SERVICE DATE – JULY 27, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42095

KANSAS CITY POWER & LIGHT COMPANY

v.

UNION PACIFIC RAILROAD COMPANY

Decided: July 26, 2006

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 movement 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. Both KCPL and UP assert that the Board has jurisdiction to determine the reasonableness of the challenged rates. However, the challenged rates are part of an agreement executed between KCPL and UP that has some of the indicia of a contract: set 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(c), we have no jurisdiction over rail transportation contracts. Therefore, we are instructing the parties to submit briefs on the threshold issue of whether we have jurisdiction to entertain this rate complaint.

Legal Status of Rail Contracts

Originally, our predecessor (the Interstate Commerce Commission (ICC)) had found contract rates between a carrier and a shipper to be void *per se*. 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 and codified the following definition of a "contract rate":

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) ("contract rates and agreed charges are deemed unlawful *per se*").

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

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

But rather than finding all such agreements lawful, the ICC decided to review the legality of contract rates on a case-by-case basis.

In the Staggers Rail Act of 1980,⁴ Congress eliminated any uncertainty by declaring 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)). Congress regarded the ICC’s change in policy as insufficient, because it had “a number of restrictions and uncertainties and [had] resulted in the limited use of contracts.”⁵ Congress therefore acted 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.”⁶ Congress expressly removed all matters and disputes arising from 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 someone believes that a contract is anticompetitive, “the antitrust laws are the appropriate and only remedy available.”⁷ And if the parties have a dispute regarding such a contract – such as whether there has been adequate performance or whether the contract was void because it was signed under duress – the matter would 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 considered the contract rate provision of the Staggers Act to be “among the most important in the bill.”⁸

Origin and Provisions of Challenged Rates

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). The Circular contains two classes of rates for its 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 in shipper-supplied equipment. In general, and

³ Former 49 CFR 1039.1 (1979).

⁴ Pub. L. No. 96-448, 94 Stat. 1895 (1980) (Staggers Act).

⁵ 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”).

⁶ House Report at 58; see also Senate Report at 24.

⁷ House Report at 58.

⁸ Senate Report at 9.

for KCPL in particular, Option 1 rates are higher than the Option 2 rates applicable to the same movement.

Under Option 2 of the Circular, UP will agree to provide service for a given price 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, 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."⁹

By executing the Volume Commitment Certificate, a shipper commits to tender for transportation an annual minimum volume of coal for the term of the agreement. If a 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).

The Circular 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 parties are also obligated 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 Volume Commitment Certificate to UP, notifying UP that KCPL would ship coal under the Option 2 rates established 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."¹⁰ UP's answer admits that "it has represented that Option 2 rates are common carrier rates, and that it has represented that a shipper's execution of a 'Volume Commitment Certificate' does not create a contract under 49 U.S.C. 10709."¹¹

⁹ KCPL Complaint, Exhibit A at 11 (emphasis added). The certificate also states that, should the terms of the certificate conflict with the terms of a contract, the contract terms shall govern.

¹⁰ KCPL Complaint at 6-7.

¹¹ UP Answer at 4.

Threshold Jurisdiction Issue

Both KCPL and UP characterize Option 2 of the Circular as establishing common carrier rates, rather than contract rates. However, Option 2 has some of the characteristics of a rail transportation contract. Moreover, “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.” Columbia Gas Transmission Corp. v. FERC, 404 F.3d 459, 463 (D.C. Cir. 2005) (citations omitted); see also Weinberger v. Bentex Pharms., Inc., 412 U.S. 645, 652 (1973) (holding that only Congress, not parties, may confer jurisdiction). Thus, if Option 2 of the Circular establishes contract rates under section 10709, we have no jurisdiction over the challenged rates, notwithstanding the parties’ agreement.

We believe it is prudent to address this threshold jurisdictional issue at this time before the parties spend considerable resources in this proceeding. The substantial effort and expense of presenting a full stand-alone cost analysis would be wasted if a reviewing court were to conclude *sua sponte* that the agency had no jurisdiction over the challenged rates, or alternatively if a party dissatisfied with the outcome of the proceeding were to raise the jurisdictional issue on appeal (as subject-matter jurisdiction can be raised at any time and cannot be waived by a party).

Accordingly, parties are instructed to submit briefs showing cause why this proceeding should not be dismissed pursuant to 49 U.S.C. 10709. The briefs shall not exceed 30 pages. Each party shall file 10 copies of each submission, as well as 2 computer diskettes containing electronic versions.

It is ordered:

1. The parties are directed to submit briefs, not to exceed 30 pages in length, showing cause as to why this proceeding should not be dismissed for lack of jurisdiction pursuant to 49 U.S.C. 10709 by September 25, 2006.
2. Reply briefs are due October 10, 2006.
3. This decision is effective on the date of service.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams
Secretary