

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35021

UNION PACIFIC RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

Decided: May 15, 2007

By a petition for declaratory order filed on April 26, 2007, Union Pacific Railroad Company (UP) asks the Board to issue an order declaring that our Rail Fuel Surcharges decision,¹ requiring railroads to change their practice of computing rail fuel surcharges for their common carriage rates as a percentage of the base rate, applies to traffic presently moving under Option 2 of UP's Circular 111.² Ameren Energy and Fuels Services Company (Ameren)³ and Arkansas Electric Cooperative Corporation (AECC) replied separately on May 8, 2007. The petition for declaratory order will be denied for the reasons discussed below.

BACKGROUND

In Rail Fuel Surcharges, we concluded that computing rail fuel surcharges as a percentage of a base rate is an unreasonable practice and directed carriers to change this practice for their common carriage movements. Railroads were given until April 26, 2007, to adjust their fuel surcharge programs. On that date, UP filed its petition for declaratory order, stating that it has developed a mileage-based fuel surcharge program for traffic moving under Circular 111, but has delayed implementation because it risks legal proceedings by one of its customers who faces a higher charge under the new mileage-based fuel surcharge. According to UP, this shipper argues that Rail Fuel Surcharges does not apply to Option 2 traffic and that UP must continue to apply the rate-based mechanism that was in place when the customer signed its Option 2

¹ Rail Fuel Surcharges, STB Ex Parte No. 661 (STB served Jan. 26, 2007) (Rail Fuel Surcharges).

² UP Circular 111, "Unit Train Coal Common Carrier Circular Applying On: Unit Coal Trains from the Powder River Basin of Wyoming," contains two classes of rates for customers. One class, referred to as Option 1, contains a higher rate, but no volume requirement. The second class, referred to as Option 2, contains a lower rate and commitments from both parties for term, volume, rates, and service.

³ Ameren also filed a motion for protective order, which is being addressed in a separate decision.

Commitment Certificate, because the Certificate states that the fuel surcharge mechanism will be held constant for the term of the Certificate.

UP argues that traffic moving under Option 2 is regulated common carriage traffic that is subject to Rail Fuel Surcharges, a decision which UP argues overrides the provision in the Option 2 Certificate that would otherwise require the fuel surcharge mechanism to remain constant for the term of the Certificate. UP interprets our decision in Kansas City Power & Light Company v. Union Pacific Railroad Company, STB Docket No. 42095 (STB served Mar. 29, 2007) (KCPL), as confirming that the Board would treat traffic currently moving under Option 2 as common carriage traffic. UP seeks expedited consideration of its petition.

Ameren identifies itself as the shipper in question and argues that UP's petition should be denied because: (1) the Board lacks the authority to make the broad declaration that UP seeks; (2) granting UP's petition would interfere with a pending rulemaking proceeding; and (3) the evidence shows that it entered into a contract with UP and Rail Fuel Surcharges does not apply to rail transportation contracts. AECC criticizes UP's new fuel surcharge methodology as lacking transparency.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. It will not be necessary for the Board to issue a declaratory order here, because whether Rail Fuel Surcharges applies to Option 2 of Circular 111 is controlled by our already established precedent, as discussed below, and we have no specific facts or evidence before us that would justify issuing a declaratory order.

The key issue presented by UP's petition is whether Option 2 of Circular 111 reflects a rail transportation contract or a common carriage tariff. The holding of Rail Fuel Surcharges applies to all common carriage tariffs and supersedes any contrary fuel surcharge terms in such tariffs. However, that holding does not apply to any traffic handled under rail transportation contracts, because under 49 U.S.C. 10709 we have no authority to regulate rail rates and services that are governed by a contract.⁴

There has been, however, no clear distinction in the statute or our precedent between a contract and a common carrier rate.⁵ Under our precedent, whether a contract or common carrier

⁴ Rail Fuel Surcharges at 13.

⁵ The Board has instituted a rulemaking proceeding proposing to interpret the term "contract" in a manner that would include agreements such as Option 2 of Circular 111, and, if the proposed interpretation is adopted, such agreements would consequently be deemed to be contracts outside of the Board's jurisdiction in the future. Interpretation of the Term "Contract"

(Continued . . .)

rate exists is examined on a case-by-case basis in light of the parties' intent. See KCPL at 3; Aggregate Volume Rate on Coal, Acco, UT to Moapa, NV, 364 I.C.C. 678, 689 (1981). In KCPL, we explored the nature of Option 2 of Circular 111 in some detail, noting that it has many indicia of a rail transportation contract.⁶ But in that case, both UP and the shipper submitted contemporaneous evidence of their intent to employ a common carriage rate. Id. at 2-3. Accordingly, we asserted jurisdiction over those challenged rates.

Absent similar persuasive contemporaneous evidence of the parties' intent to enter into a common carriage agreement, we would presume that Option 2 of Circular 111 is a contract based on the terms of the agreement itself. As in KCPL, we are mindful that issues of contract interpretation (including the existence of a contract) are ordinarily a matter for the courts. We do have primary authority to determine our own jurisdiction.⁷ We cannot, however, issue a blanket declaratory order as to the nature of Option 2 agreements, as we have no evidence of the facts surrounding the execution of each particular Option 2 agreement. UP's request for a declaratory order will therefore be denied.

We will not address in this decision other issues raised by Ameren and AECC that relate to whether UP's mileage-based fuel surcharge program would comply with the Board's decision in Rail Fuel Surcharges if it were applied to traffic handled by UP under tariff and not under contract.

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

(. . . continued)

in 49 U.S.C. 10709, STB Ex Parte No. 669 (STB served Mar. 29, 2007) (Interpretation of the Term "Contract").

⁶ Option 2 agreements contain fixed rates for a term of 3 years, minimum volume requirements, service commitments, liquidated damages provisions, and *force majeure* clauses. Furthermore, a shipper seeking to obtain Option 2 rates must sign a certificate that states: "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." KCPL at 2.

⁷ See Burlington N., Inc. v. Chicago & N.W. Transp. Co., 649 F.2d 556, 558 (8th Cir. 1981).

It is ordered:

1. Petitioner's request for a declaratory order is denied.
2. This decision is effective on its date of service.

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

Vernon A. Williams
Secretary