

the Flint Creek plant, which is located at Gentry, AR. This plant normally burns in excess of 2 million tons of PRB coal annually

As a result of the large volume of PRB coal used by these plants and the essential role of rail transportation for these movements, AECC has a direct interest in actions by the Board that affect its rail transportation options

II. COMMENTS

As described in the Board's January 6 notice, the Board's effort to clarify the definition of rail contracts that began in Ex Parte No. 669, Interpretation of the Term "Contract" in 49 U.S.C. § 10709, sought to address two concerns arising from hybrid rail pricing mechanisms. Those concerns included (a) "uncertainty" in the "...demarcation between a contract rate and common carriage rate", and, (b) the possibility "...that increased use of hybrid pricing arrangements could create an environment where collusive activities in the form of anticompetitive price signaling could occur."

AECC believes that the proposal presented in the Board's January 6 notice provides a reasonable basis for addressing the uncertainty issue. The Board should clarify that a railroad appending the disclosure statement to a published common carrier tariff does not extinguish either its obligation under 49 U.S.C. § 11101 (b) to publish a common carrier rate or its obligation under 49 U.S.C. § 11101 (c) to provide notice at least 20 days prior to changing an existing common carrier rate. As long as a railroad cannot unilaterally use the disclosure statement during negotiations with shippers as a "cloaking device" to shield common carrier rates from Board scrutiny, the Board's proposal should provide a straightforward method for distinguishing contracts from common carrier tariffs

Unfortunately, aside from the reference to Ex Parte No. 669, the January 6 notice is virtually silent with respect to the “collusive activities” that experience has shown have been fostered by rail public pricing practices. Since the onset of public pricing, AECC’s plants have certainly experienced dramatic rate increases, diminished responsiveness to our needs, and in some instances, outright refusals to bid, all of which are hallmarks of the diminished competitive pressure that results when duopolists collude. While the recently-released Christensen study purports to explain away the rate increases, AECC has already demonstrated to the Board how this finding is contradicted by the Christensen study’s own data¹, not to mention the experiences of numerous coal shippers. The tangible competitive problems occurring in the marketplace under public pricing justify and require careful Board attention to this issue.

To protect against collusive activities, the Board in this proceeding should take steps to ensure that the information published in a common carrier tariff does not reflect information garnered by railroads in contract discussions with a shipper unless the shipper explicitly requests such a tariff. As summarized succinctly in the Board’s January 6 notice:

“Although the terms of a rail transportation contract generally are kept confidential, the terms and conditions of common carriage rates must be publicly disclosed upon request, 49 U.S.C. 11101, thereby increasing the possibility of collusive behavior in a highly concentrated industry.”

While railroads are certainly free in the first instance to publish any rates and associated service terms that they choose, their discussions with shippers to explore contracting opportunities may reveal all types of new information regarding shipper plans for

¹ See STB Ex Parte No. 680, Study of Competition in the Freight Railroad Industry, “Comments of Arkansas Electric Cooperative Corporation Regarding Study of Competition in the U.S. Freight Railroad Industry Conducted By Christensen Associates” (December 22, 2008)

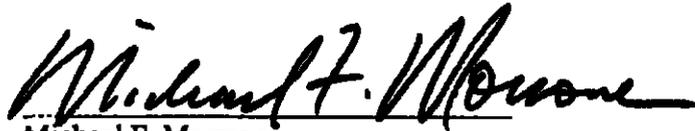
everything from coal volumes and sourcing patterns to future car leasing intentions to potential investments in improved unloading capabilities or even new generation facilities. Whether or not such discussions are governed by confidentiality agreements, it is appropriate for the Board, having recognized the threat to competition potentially posed by public disclosure, to take steps to prevent gratuitous carrier-initiated disclosures of the shipper-specific commercial arrangements that a carrier is willing to enter.

Prior to 2004, the railroads and their PRB coal customers enjoyed a 20-year period during which confidential contracting yielded a consistent overall record of productivity improvements and inflation-adjusted rate reductions. It is only since the advent of public pricing, where all of the terms and conditions of a customer's traffic movement via one railroad (including price) are revealed to or are easily discovered by a potential competing railroad, that this pattern has been undermined. Under these circumstances, Board action to curtail unnecessary disclosure is necessary and appropriate to implement the Congressional intent that contracting be used to stimulate competition, improve productivity and promote the public interest.

AECC appreciates the Board's continuing efforts to review and adapt its practices to the changing circumstances of the rail industry.

Respectfully submitted,

Arkansas Electric Cooperative Corporation



Michael F Morrone
Keller and Heckman LLP
1001 G Street, N.W., Suite 500W
Washington, DC 20001
202-434-4124
morrone@khlaw.com

Michael A. Nelson
131 North Street
Dalton, MA 01226
413-684-2044
mnelso6@berkshire.rr.com

Transportation Consultant

Attorney for Arkansas Electric Cooperative Corporation

February 5, 2009