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BEFORE THE
SURFACE TRANSPORTATION BOARD

In the Matter of.

RAIL TRANSPORTATION
CONTRACTS UNDER 49 U S C 10709

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) STB Ex Parte No 676
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OPENING COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE

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Dated. February 5, 2009

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The Western Coal Traffic League (“WCTL” or “League”)¹ hereby submits the following opening comments in response to the Notice of Proposed Rule (“Notice” or “NPR”) that the Surface Transportation Board (“STB” or “Board”) served in the above-captioned proceeding on January 6, 2009

Under the Board’s NPR, a rate instrument that purports to be a railroad transportation contract under 49 U.S.C. § 10709 would need to contain a prescribed disclaimer on its first page in order to qualify for what amounts to a safe harbor exclusion from the Board’s jurisdiction over common carrier transportation. Absent such a disclaimer, the rate instrument would be deemed subject to the Board’s jurisdiction, absent “clear and convincing” evidence to the contrary

¹WCTL is a voluntary association, whose regular membership consists entirely of shippers of coal mined west of the Mississippi River that is transported by rail. WCTL members presently ship and receive in excess of 175 million tons of coal by rail each year. WCTL’s members are: Ameren Energy Fuels and Services, Arizona Electric Power Cooperative, Inc., CLECO Corporation, Austin Energy (City of Austin, Texas), CPS Energy, Kansas City Power & Light Company, Lower Colorado River Authority, MidAmerican Energy Company, Minnesota Power, Nebraska Public Power District, Omaha Public Power District, Texas Municipal Power Agency, Western Farmers Electric Cooperative, Western Fuels Association, Inc., Wisconsin Public Service Corporation, and Xcel Energy.

While the Board has obviously strived to take into account prior criticisms of its proposals offered by WCTL and others, WCTL is able to offer only qualified support for the STB's proposal for several reasons.

First, the Notice identifies two concerns that motivate its actions in this proceeding. The first is uncertainty in distinguishing between common carrier and contract rates, especially with hybrid arrangements, and the second is the potential for increased use of common carrier arrangements to facilitate collusion. Notice at 2

WCTL shares both concerns, but is uncertain that the Notice's proposal is an optimal means to address them. Indeed, WCTL does not perceive anything in the Notice that will directly address the potential for collusion. Nor does the Notice provide any relief for "bundling" (Notice at 6-7) and other attempts at exercising coercion by carriers. Indeed, the Board's proposal could facilitate the railroads' exercise of market power by allowing them to include the disclaimer language at the very end of whatever discussions that may occur, under the threat that if the shipper insists on receiving a common carrier rate, the railroad will then impose rate, service terms, and/or other conditions will be so onerous as to not present a viable option for the shipper.

As for uncertainty, WCTL believes that the Board has correctly resolved the uncertainty issue in the individual situations where it has been presented (two of which have involved WCTL members with arrangements under UP Circular 111). WCTL expects that if the Board continues to develop a sound case-by-case approach, especially one that holds railroads responsible for the ambiguity and uncertainty that they create, the

railroads will eventually get the message and address any ambiguities in their rate instruments.

WCTL is also concerned that the proposal advanced in the Notice, a before-the-fact requirement (at least a safe harbor) to apply in all cases, may be more intrusive and burdensome than an after-the-fact determination in those instances where a dispute arises. In that regard, WCTL's impression is that the number of actual disputes that have been made public is quite low. The Board should thus carefully consider whether imposing general conditions to be met before entering into a contract, as opposed to a case-by-case approach, will result in a net benefit, even if it facilitates the Board's adjudicatory role in a few cases.

However, WCTL is particularly concerned that the low number of publicized disputes may be the result of a perception that the Board is unwilling or unable to intervene when a carrier refuses to establish a common carrier rate in response to a clear request for one. WCTL members have experienced this railroad tactic in various instances, and the problem is likely to be worse for small shippers. Accordingly, the Board should make clear a willingness to take remedial action when shippers submit what is plainly a request for common carrier rates, but receives back a murky response or one designed to push the shipper into relinquishing its rights to seek relief from the Board.

All that said, the Notice's proposal does have some desirable features. In particular, the disclaimer language is styled as a safe harbor, rather than an absolute requirement. Also, the proposal evinces some willingness to find a contract exists absent

such language, although WCTL is concerned that the "clear and convincing evidence" standard may be too demanding, especially where railroads apply coercion.

While the Notice claims (at 5 n 11) that the specific language is based on language suggested by WCTL, there are very significant differences. In particular, railroad transportation contracts often specify enforcement through arbitration rather than a court of competent jurisdiction. Similarly, WCTL's suggested language noted the possibility that contracts may be superior to common carrier transportation under certain circumstances, WCTL believes it important that the Board not be viewed as implying that common carrier remedies are effective or superior in all circumstances, especially since common carrier remedies are non-existent or meaningless in many instances. WCTL also *questions the wisdom of referencing a particular regulation rather than the underlying statute, which is generally more accessible, especially for shippers that have only limited dealings with the railroads.*

In short, WCTL continues to have serious concerns about the efficacy and details of the Board's proposal, and whether it will represent a net improvement, especially compared to the informed case-by-case approach that the Board appears to have been developing in individual disputes

Respectfully submitted.

WESTERN COAL TRAFFIC LEAGUE

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