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Via Electronic Filing

The Honorable Anne Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20423

**RE: STB Docket Ex Parte 676, Rail Transportation Contracts Under 49
U.S.C. 10709**

Dear Secretary Quinlan:

Attached for filing in the above-referenced matter are Union Pacific Railroad Company's comments. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "Gabriel S. Meyer".

Gabriel S. Meyer

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 676

INTERPRETATION OF THE TERM "CONTRACT" IN 49 U.S.C. 10709

COMMENTS OF UNION PACIFIC RAILROAD COMPANY

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INTERPRETATION OF THE TERM "CONTRACT" IN 49 U.S.C. 10709

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I. Introduction and Background.

Union Pacific Railroad Company ("UP") respectfully submits these comments in response to the Board's decision served January 6, 2009 in this proceeding. *Rail Transportation Contracts Under 49 U.S.C. 10709*, STB Ex Parte 676, STB served Jan. 26, 2009 ("Notice"). UP commends the Board for revising its original proposal with the goal of establishing a practical way to allow a clear demarcation between contract and common carrier rates without hindering contracting.¹ Unfortunately, the proposed rule does not completely achieve this goal of reducing uncertainty. As currently proposed, it creates new uncertainties regarding the applicability of the proposed contract disclosure requirement and its effects on a wide range of railroad-shipper agreements.

As described in these comments, UP proposes that the Board adopt a more succinct disclosure statement, whose sole purpose would be to advise shippers that a transportation agreement is a contract. The disclosure statement should not provide

¹ Notice at 5.

any additional information regarding the distinction between contract and common carriage rates, as such information may mislead or confuse shippers. UP further proposes that the Board modify its proposed rule §1301.1(b) to clarify the scope of its application.

II. UP Supports the Board's Efforts to Add Clarity and Supports a Modified Contract Disclosure Statement.

UP recognizes the value of the Board's efforts to clarify the distinction between contracts and common carriage rates, and supports the use of a modified contract disclosure statement. Indeed, UP already includes a header or provision in each of its rail transportation contracts for movement of regulated traffic reading, "Confidential Rail Transportation Contract Pursuant to 49 U.S.C. Section 10709." UP is concerned, however, that the Board's proposed disclosure statement is an incomplete and incorrect statement of law in some circumstances. Therefore, UP encourages the Board to adopt a simpler disclosure statement that is less prone to raising confusion or questions. UP respectfully requests that the Board revise its proposed disclosure statement in accordance with the recommendations detailed below.

a. UP supports modified disclosure statement.

The Board's concerns about clear demarcation can be addressed effectively with a simple notation such as, "Confidential Rail Transportation Contract Pursuant to 49 U.S.C. Section 10709," which UP already includes in its contracts. Such a statement would remove any ambiguity regarding the business relationship. UP supports a disclosure statement consisting of only the first sentence of the Board's proposed language, which would read as follows: "Disclosure Statement - This agreement

constitutes a rail transportation contract under 49 U.S.C. 10709." Alternatively, UP supports the language that Norfolk Southern Railway Co. ("NS") proposed in its January 29, 2009 reply in this matter. Either of these alternatives would create a clear demarcation between a contract and a common carriage rate.

b. Railroad marketing personnel should not be providing legal advice to shippers.

Most shippers are sophisticated entities that do not require an extended disclosure statement to inform them of their rights to common carriage rates. For shippers who are smaller or are less familiar with the distinctions between contracts and common carriage rates, a simple disclosure statement will provide adequate notice that their contracts are not common carriage rates. If the Board believes that shippers need additional information regarding their rights to common carriage rates, it should adopt the NS proposal which refers shippers to the Code of Federal Regulations for further information.

c. Most of the proposed disclosure is misleading and incorrect in certain circumstances.

The last three sentences of the Board's proposed disclosure requirement could mislead shippers to believe they could receive common carriage rates and terms with pricing and service identical to that in contracts. However, contract rates ordinarily include benefits as a result of bargaining by the parties in developing a rail transportation package.

In many circumstances, the proposed disclosure language is simply incorrect. For example, a shipper is not entitled to a common carrier rate for all traffic under a contract if the contract contains a mix of regulated and exempt commodities. The

disclosure statement would be an inaccurate statement of the shipper's rights as it relates to the exempt commodities in the contract. Further, when a shipper executes an amendment to a contract, except in the case of a term renewal or extension, the shipper is not entitled to a common carriage rate for the traffic that is already covered by the contract. Requiring a railroad to include the disclosure statement on a contract amendment creates a Catch-22 situation: On the one hand, if the railroad does not include the disclosure, then the Board will presume that the contract amendment is a common carriage rate. The railroad could not overcome the presumption unless it could provide clear and convincing evidence that the "shipper was made aware that it could request service under a common carrier tariff rate that would be subject to STB jurisdiction."² On the other hand, if the railroad includes the disclosure statement, this may lead the shipper to believe it can demand a common carriage rate, when in fact, under the terms of the original contract, it has no such right. Including the disclosure requirement on the amendment could even lead a shipper to believe it no longer has to honor the original contract. Railroads should not be required to give legal advice, and they should certainly not be a requirement that they give incorrect legal advice.

III. The Proposed Rule's Application Would Create Uncertainty in Everyday Commercial Dealings.

The Board's stated objective throughout these rulemakings has been to provide a "clear demarcation between a contract and a common carriage rate." The current proposed disclosure language, if simplified, represents progress towards that objective. However, the Board's proposed rule inadvertently creates uncertainty in everyday

² Notice at 5.

complex commercial dealings that does not exist now. If the Board refuses to opt for the simple approach of narrowing the scope of the application of the proposed rule, the Board should provide much more guidance and specificity regarding application to various contract documents, subject matter, term sheets, and effective date.

a. The proposed rule does not clearly define what contracts would require disclosure.

The proposed rule includes no definition of what transportation service agreements are subject to the rule. Yet the Notice states that the rule is not intended to “apply to separate contracts for accessorial services such as demurrage and storage, transloading to and from other modes, incidental warehousing during transloading, and local drayage.”³ This list is clearly illustrative and not exhaustive. The definition of transportation and services under the ICCTA is very broad, making the potential scope of 49 U.S.C. §10709 transportation services agreements wide-ranging,⁴ but the language of the rule does not address where the line should be drawn between linehaul transportation and all other services, or between linehaul and related services and accessorial services. Currently, since the enforceability of such agreements depends on generally understood principles of contract law, parties to such contracts have not had to concern themselves about how to categorize such services. Under the proposed

³ Notice at 4, FN 4.

⁴ 49 U.S.C. 10102 Section (9).

(9)transportation includes—

- (A) a locomotive, car vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
- (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property;...

rule, such categories would matter, but the rule provides incomplete guidance on what the categories are. Moreover, this could cause a conflict with the proposed requirement that all amendments, supplements and modifications should contain the disclosure. For example, if the proposed amendment deals only with demurrage, would it require a disclosure statement?

An additional area of concern is the use of term sheets. Executed term sheets are contracts that generally include only the most significant commercial terms of the deal. Usually the parties to them expect to later execute a more detailed contract that incorporates those basic terms which will supersede the term sheet. Often, however, the parties operate under the executed term sheet for extended periods of time, sometimes even for the duration of the contract. The Board has not indicated how it would treat such documents under the proposed rule. UP suggests that the Board treat term sheets executed by all parties as contracts, provided they bear appropriate disclosure language.

b. The Board's rule should apply to master or main contracts only.

The Board's proposed requirement that railroads include the disclosure statement on all amendments and supplements to contracts⁵ is problematic. However, it is not clear how amendments and supplements would be identified. Additionally, the application of the proposed rule to these "supporting documents" is not clear or even logical in many cases.

The proposed rule must provide additional clarification on how to identify documents that would be considered amendments and supplements. An amendment

⁵ Notice at 7.

or supplement to a contract is not always a formal writing in a form similar to a contract. These modifications to agreements often occur in informal emails, verbal acknowledgements, letters, spreadsheets, meetings, and presentations. Identifying exactly when an "amendment" or "supplement" has occurred is an exercise for lawyers. In the daily course of business, railroad marketing personnel and shippers just handle the current issue using whatever mechanism is most convenient for the parties. The proposed rule would inject much uncertainty about what can be relied on and how it impacts the overall deal and business relationship. UP recommends that the Board only apply the rule to original contracts or renewals.

Further, the proposed rule fails to recognize that many contracts grow and evolve through a course of dealing and reflect ongoing interactions and exchanges between parties regarding their performance. Once a shipper and railroad enter into a 49 U.S.C. §10709 contract bearing the disclosure statement, both parties should reasonably expect that any amendments or supplements to the contract would also be considered parts of that 49 U.S.C. §10709 contract. A rule that an amendment or supplement to a 49 U.S.C. § 10709 contract must contain the disclosure statement or be presumed a tariff creates uncertainty where none now exists.

For example, under the proposed rule, if a shipper's contract has an agreed-upon rate adjustment and the shipper requests a listing of the adjusted rates, that listing would be considered a supplement requiring the 49 U.S.C §10709 contract disclosure language even if sent as an attachment to a letter. Must that disclosure be on the transmittal letter (because it comes first)? Or should it be at the beginning of the listing of updated rates (because that listing is the supplement)? Furthermore, if the railroad

sends the list to the shipper without the disclosure, the statement of the rule requires the Board to presume that the adjusted rates are common carriage rates for the effective time period of that listing. Oddly, if the rate listing for the next time period included the disclosure statement, the rates would revert to contract rates again.

As another example, if a rail carrier sends a letter temporarily waiving a notice that a shipper must provide under its a contract, does that mean the shipper cannot rely on that letter unless it contains the required disclosure? Alternatively, if the shipper sends a similar letter to a rail carrier, is the disclosure statement still necessary? Or does the need for the disclosure requirement disappear when a non-railroad party drafts a contract supplement?

Today, railroads and shippers can take such routine correspondence relating to existing contracts at their face value and act accordingly. If the application of its proposed rule is not directed at original contracts and agreements renewing or extending the term of a 49 U.S.C. §10709 contract, parties will likely overreact and over-labeling will become a problem to the point that it may no longer be clear what documents are intended to be contracts. By mandating use of prescribed disclosure language on all amendments, supplements, and modifications to existing contracts, the proposed rule would create uncertainty and complicates now routine business correspondence.

Even if application of the rule to amendments were more clear, it would still increase complexity. In the updated price listing example above, a dispute between the railroad and shipper regarding the updated prices would be bifurcated. To the extent the dispute rested upon terms contained in a master contract, the shipper could pursue

relief in court. The shipper would then turn to the Board for relief associated with the updated prices. Additionally, the Board's proposed rule leaves open the question of what terms and conditions found in a master contract would apply to the updated rates that the STB presumes to be tariff rates. The courts and the Board would need to determine which terms and conditions found in the master contract would apply to this new "tariff" rate.

Situations like these could be avoided by modifying the proposed rule to require the disclosure statement on only original or master contract documents. The Board should presume that supplements, amendments, updates, waivers, etc. executed in furtherance of a 49 U.S.C. §10709 contract, where the original document displays the disclosure language, are contracts.

c. Clarification is required on how the proposed rule will apply with various execution scenarios.

The Board has stated that it intends to apply its proposed rule prospectively only, but is not clear where the Board draws the line. If a contract without disclosure language is signed and sent to other parties before the rule becomes effective, but the last party signs after the rule becomes effective, will the contract be presumed to be a tariff? Alternatively, what if it is a signatureless contract, but the first shipment is tendered after the effective date? Union Pacific urges the Board to incorporate a bright line for determining how to apply the effective date to contracts underway when the final rule is announced.

IV. The Combination of Two Board Rulings Led to Uncertainty about the Nature of Circular 111 Option 2.

The Notice points to the ambiguity exhibited in two Board proceedings involving Union Pacific's Circular 111 Option 2 as illustrating the need for a contract disclosure rule to provide a clear line of demarcation between contract rates and common carrier rates. Notice at 2-3. While Union Pacific endorses the value of having 10709 contracts explicitly declare their nature and supports the proposed rule with certain improvements and clarifications as discussed above, we respectfully disagree with the characterization of Circular 111 and the source of ambiguity regarding its nature.

Union Pacific believes that the current proposal to rely on the presence of a contract disclosure statement to apply a presumption on whether a price document is a contract is clearly superior to the Board's initial attempt in Ex Parte No. 669 to impose an interpretative statement that would classify any rail rate with bilateral terms as a contract.⁶ In its March 12, 2008 decision instituting this proceeding, the Board acknowledged that its original proposal would have unintended consequences and that both shippers and rail carriers disagreed with how it defined what terms could only be found in a contract rate and could not be included in a common carrier rate. *Id.* At 4. One consequence of the Ex Parte No. 669 proposal was the inconsistent outcomes involving KCPL and Ameren for the same price document.

Union Pacific consistently maintained for both shippers that Circular 111 established common carrier rates and terms and was subject to STB authority to

⁶ Ex Parte No. 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709* (Decision served March 29, 2007 at 3).

establish maximum reasonable rates and reasonable practices. KCPL exercised its rights to challenge both the rates and certain features of the Circular 111 terms and conditions by filing a complaint at the STB. That proceeding was well underway when the Board, not a shipper, raised the question of whether the Option 2 rates and terms at issue were a contract.

KCPL and Union Pacific had no doubts on that score. They did not reach agreement on the rates and terms in Circular 111 Option 2 and did not intend to enter into a transportation service agreement when KCPL began shipping under Circular 111. Both KCPL and Union Pacific cited prior ICC and STB decisions finding that the Option 2 features which caused the Board to ask whether it was a contract could be found in other common carrier tariffs that were subject to regulation.⁷ The Board concluded that based on prior decisions and the intent of the parties that the Circular 111 rates and terms at issue were common carrier rates and terms subject to its jurisdiction. Kansas City Power and Light v. UP, Docket 42095 (Decision served March 29, 2007).

Unfortunately, that decision did not acknowledge that the similarity of Option 2 terms and services to terms found in contracts derived from the similarity of the underlying transportation, unit coal trains moving in shipper-supplied equipment, and

⁷ The requirement of a minimum annual volume is a well-established common carrier tariff provision. See, e.g. *Coal to New York Harbor Area*, 311 I.C.C. 355, 360 (1960); *Coal from Kentucky, Virginia, and West Virginia to Virginia*, 308 I.C.C. 99, 101 (1959). Likewise, terms and conditions similar to other 'bilateral' provisions in Option 2 have been accepted as common carrier terms. See, e.g., *Grain By Rent-A-Train, IFA Territory to Gulf Ports*, 339 I.C.C. 579 (1971) (ICC approved rail tariff with transit time guarantee with payments to shipper if standard not met.) *National Grain and Feed Association v. Burlington Northern Railroad Co.*, 8 I.C.C. 2d 421, 436n.23 (1992), *aff'd in relevant part, rev'd on other grounds sub nom., National Grain and Feed Association v United States*, 5 F.3d 306 (8th Cir. 1993) (force majeure).

not because Option 2 was a contract. That explains why on the same day that the Board served its decision finding that the KCPL Option 2 rates and terms were common carrier terms subject to its jurisdiction, it also instituted Ex Parte No. 669 promulgating an interpretative rule that would declare the same terms and conditions to be a 10709 contract.

At the same time, Union Pacific was revising its fuel surcharge program to comply with the Board's decision that fuel surcharges applied to common carrier traffic could not be revenue-based but must reflect distance.⁸ Union Pacific was preparing to apply that ruling to all of its Circular 111 traffic, both Option 1 and Option 2. The STB-mandated shift from revenue-based to distance-based calculation of fuel surcharges meant that Ameren would pay more for its Circular 111 traffic. Ameren participated in the fuel surcharge proceeding and supported the Board's conclusion that revenue-based surcharges were an unreasonable practice presumably in anticipation that the ultimate result of applying the rule would reduce its fuel surcharges.

After Ameren learned what application of the new rule would mean an increase and the STB had instituted its Ex Parte No. 669, Ameren asserted that it had entered into a 10709 contract beyond the reach of the common carrier surcharge ruling. This was despite the fact that the cover page of Circular 111 declared that it was: UNIT TRAIN COAL COMMON CARRIER CIRCULAR APPLYING ON UNIT COAL TRAINS FROM THE POWDER RIVER BASIN OF WYOMING. Unlike the 10709 contracts that were still in place for other Ameren destinations served by Union Pacific, Circular 111 included no reference to 49 U.S.C. 10709. Union Pacific stated consistently that

⁸ Rail Fuel Surcharges, STB Ex Parte No. 661 (Decision served January 26, 2007).

Circular 111 established common carrier rates and terms.⁹ So despite clear disclosure that Circular 111 established common carrier rates and terms, the only Circular 111 shipper so far to have claimed that it had entered a contract did so (i) after the Board had announced a rule that would classify Circular 111 Option 2 as a 49 U.S.C. 10709 contract, and (ii) in order to escape, not pursue, the remedy resulting from another STB rule declaring reasonable practices for common carrier fuel surcharges.

V. Conclusion.

For the reasons detailed above, UP respectfully requests that the Board (i) modify its proposed disclosure requirement language to include only the first sentence of the proposed disclosure statement or, in the alternative, to adopt NS' proposed language, (ii) modify the rule to clarify the scope of contracts that rule applies to, (iii) limit the disclosure requirement to only original contracts and agreements extending the term of a 49 U.S.C. §10709 contract, and (iv) clarify how the effective date will be applied to contracts in the process of being executed.

⁹ Indeed, Kansas City Power & Light included a recital of the various public statements by Union Pacific that manifested its intent that Circular 111 Option 2 was not a contract. See, Opening Brief of Kansas City Power & Light submitted on September 25, 2006 in Docket 42095. In addition, Union Pacific's position is that Ameren could challenge the mileage-based fuel surcharge if applied to its Circular 111 rates since that would have been common carriage.

Respectfully submitted,



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