BEFORE THE
SURFACE TRANSPORTATION BOARD

In the Matter of:	)	
INTERPRETATION OF THE TERM "CONTRACT" IN 49 U.S.C. 10709	)	STB Ex Parte No. 669

OPENING COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE

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The Western Coal Traffic League ("WCTL" or "League")[1] hereby submits the following comments in response to the Notice of Proposed Rulemaking ("NOPR" or "Notice") that the Surface Transportation Board ("STB" or "Board") served in the above-captioned proceeding on March 29, 2007.

I. INTRODUCTION AND SUMMARY

WCTL appreciates the Board's decision to initiate this proceeding. While the NOPR is not entirely clear on the point, it appears that the Board's concerns are directed to the nature of the "public pricing" rate arrangements that BNSF Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") have established in BNSF 90068, UP Circular 111, and similar documents for unit train transportation of Powder River Basin ("PRB") and other coal, especially those involving commitments of a year or more or a tonnage commitment, which were addressed in *Kansas City Power & Light Co. v. Union Pacific Railroad Co.,* STB Docket No. 42095 (STB served March 29,

[1]WCTL 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 140 million tons of coal by rail each year. A list of WCTL's members is attached as Exhibit A.

2007) ("*KCP&L"),* served the same day as the Notice, and also in STB Finance Docket No. 35021, *Union Pacific Railroad Co. – Petition for Declaratory Order* (STB served May 16, 2007) ("*Declaratory Order*") (involving fuel surcharges to Ameren).[2]

The Notice observes at 3-4 that these arrangements include elements of both contracts and more traditional common carrier arrangements, and they thus constitute a "hybrid," raising uncertainty as to whether they should be treated as contract or common carrier rates. The Notice further observes at 4-5 that the railroads' public pricing facilitates price signaling and collusion.

As a representative of major shippers of western coal, WCTL shares the Board's concerns as to the status, nature, and effect of these arrangements. Toward that end, WCTL sought declaratory judgment and injunctive relief from a federal district court in Texas that the BNSF and UP arrangements did not meet all of the requirements for being deemed common carrier rates, especially disclosure of the rates themselves to the full public. However, WCTL's complaint was dismissed at BNSF's and UP's request for lack of standing. *Western Coal Traffic League v. BNSF Ry. and Union Pacific R.R. Co.,* No. 4:05-CV-679-Y (N.D. Tex. Mar. 29, 2006).

WCTL is particularly concerned about the effect of the public pricing on competition. The railroads' public pricing represents a complete departure from their prior mode of doing business. Moreover, the railroad coal transportation marketplace has the characteristics that make it very subject to collusive pricing. *See, e.g.,* Richard A. Posner, *Antitrust Law* (2d ed. 2001), at 69-79, discussed *infra*. Such collusion and price

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[2]Both KCP&L and Ameren are League members.

coordination is directly contrary to the national rail transportation policy "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101(1).

There is overwhelming evidence that the railroads' public pricing has resulted in massive rate increases that have redounded to the railroads' bottom lines at the expense of utilities and the customers that they serve. WCTL is very concerned that the railroads have sought to recast what are essentially contractual arrangements as common carrier offerings in an attempt to immunize them from scrutiny, especially for so-called competitive shippers that have no effective remedies at the Board.

As WCTL explained in its Texas lawsuit, the railroads' efforts to limit the dissemination of the rates themselves may prevent their basic public pricing structure from being deemed a common carrier offering. The minimum condition for having a rate be a common carrier offering is that the rate be disclosed "to any person," 49 U.S.C. § 11101(b), and the carriers have instead sought to limit dissemination of the rates under BNSF 90068 and UP Circular 111 only to eligible customers. This restricted disclosure prevents the offerings from being deemed common carrier rates.[3]

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[3]However, as discussed *infra*, a finding that the basic structure does not qualify for common carrier status is not necessarily tantamount to finding that it creates a contract. For example, the Board could find that: (a) the structure is only an offer that constitutes neither a contract nor a tariff by itself, (b) the shipper's filing of the actual rate as part of a complaint fulfills the disclosure condition sufficiently to provide the Board with jurisdiction to provide a maximum reasonable rate remedy, and/or (c) the structure constitutes an unreasonable practice. Likewise, a court would not be bound by the Board's finding that a contract exists, and/or a court decide that the contract can not or should not be enforced.

While WCTL thus shares the Board's concerns articulated in the Notice, WCTL is also concerned that the Board's proposed rule may overreach in various respects and have unintended and undesirable consequences. The proposed rule would need to be reconciled with previously recognized limitations on the Board's jurisdiction to determine whether a contract exists. Even assuming *arguendo* that jurisdiction exists, the Board's proposed rule appears to be too broad in that the mutually beneficial exchange, cooperation, and commitment inherent in such common transportation arrangements as unit train transportation and annual volume rates could cause such arrangements to be deemed contracts, notwithstanding ample precedent to the contrary. The Board's proposed approach also ignores the issue of intent, which is a basic requirement for finding a contract exists and which entails an inherently fact-specific determination. In other respects as well, the Board's proposed rule appears to have the potential to make it harder or riskier for shippers to bring rate cases, and the Board should not be doing anything at this time to increase the burdens on captive shippers.

WCTL believes that the Board's approach should be guided by pragmatic considerations. In particular, where a shipper has indicated that it is entering into the arrangements contemplated by the public pricing documents with the intent to bring or reserve the right to bring a rate case, the shipper should be allowed to proceed with a complaint and the carrier should be estopped from claiming that the arrangement amounts to a § 10709 contract. However, if the shipper instead wishes to take the position that the arrangement constitutes a contract for purposes of holding the carrier to its bargain or seeking some other remedy beyond the Board's jurisdiction, the shipper should have that

option as well. There is no inconsistency in affording the shipper the option as to how it may wish to proceed. The hybrid mechanism, as devised by the railroads, is, by its nature, ambiguous, and the established rule is that ambiguities are to be construed against the drafter. Here, the railroads have adopted these arrangements unilaterally, and they should bear the burden of any ambiguities or uncertainties their actions have created.

At the same time, the Board should make clear that it is not granting any sort of antitrust or other immunity on the railroads' decision to adopt public pricing. The status of a rate that is actually filed with the Board (even if it is filed by the shipper), and thus disclosed to the public, in a rate complaint is one thing; the railroads' decision to adopt semi-secret, semi-public rates is another, and it should not be afforded any protections by the Board. It may be possible and desirable for the Board to treat the railroads' actions as an unreasonable practice, without limiting the remedies available to shippers.

II. BACKGROUND

From the time of the Staggers Rail Act of 1980 and the entry of the UP (Chicago and North Western) into the PRB,[4] the standard vehicle for arranging for unit train coal transportation in the West for both competitive shippers (largely meaning those in a position to benefit from intramodal competition between BNSF and UP) and shippers captive to BNSF or UP (and their various predecessors) has been a confidential contract entered into pursuant to 49 U.S.C. § 10709 (or § 10713, its predecessor). With at most

[4]UP signed its first PRB coal transportation contract in 1983 and commenced service in 1984.

rare exception, common carrier arrangements were established only when a shipper sought to bring a rate case at the Board or the predecessor Interstate Commerce Commission ("ICC"), and even then, the carriers were reluctant to establish common carrier rates significantly in advance of the commencement of service, typically meaning the expiration of the prior contact.

From all appearances, this procedure worked reasonably well for all concerned. Coal was, and remains, the railroads' most profitable commodity, and there was a significant amount of competition and cost and rate decreases, driven in large part by productivity gains, leading to volume growth and further productivity gains. In general, the benefits accrued more to so-called competitive coal shippers as opposed to captive shippers, but some benefits accrued to captive shippers as well.

During this period, the railroads went to great lengths to protect the confidentiality of their contracts, claiming that great harms would occur if these contracts or their rates were ever publicly exposed. Discovery of contracts and rate information in railroad rate cases and mergers always requires at least a protective order with the information to be designated as "highly confidential," and some carriers, such as UP, insist on an order requiring production of the contracts before the information is produced. In addition, the railroads have insisted on "masking" their contract rates in preparation of the waybill sample. Moreover, the ICC and STB relied upon contract confidentiality in finding that railroad mergers would not be anticompetitive or contrary to the public interest, as noted in the Board's NOPR at 5 n.12.

Starting with BNSF 90068 in 2003, and followed by UP with Circular 111 in 2004, and thereafter by various progeny, BNSF and UP adopted their public pricing arrangements instead. Additionally, they publicly refused to negotiate or enter into contracts for PRB and other unit train coal transportation. In effect, they have been marketing their services on a "take it or leave it" basis.

Of course, the situation has been exacerbated by UP's recently concluded twenty-month embargo, in which UP refused to offer or provide service to new customers or to serve its present customers beyond existing commitments, which themselves were ostensibly curtailed to service only at a level of 80-85% of the carrier's commitment. UP has attributed its service difficulties to maintenance problems on the BNSF/UP Joint Line in the PRB, but BNSF, which has immediate operational responsibility for the line, never declared an embargo on its PRB shipments and declared force majeure on its contract shipments only for a limited period of time. Despite their operational problems, and their failure to deliver large volumes of coal needed by utilities to serve their customers efficiently and reliably, the railroads have reaped record revenues and profits, driven in substantial part by major increases in their rates for transporting coal.

The BNSF and UP public pricing arrangements are quite similar in most respects. In particular, they provide the option for the shipper to elect either a "spot" arrangement that carries no volume commitment or a second option that contains a volume commitment for 1-3 years. The second option is of the most value in current circumstances because it carries more of an expectation of service and is naturally of the most interest to shippers, such as KCP&L, seeking to bring a rate case, and such shippers

can reasonably be expected to seek the lowest rate(s) available. In any case, a signed undertaking is required, and the implication of the railroads' "take it or leave it" approach is that no service will be provided without a signed undertaking.

As noted in the NOPR, both BNSF and UP have sought to depict their public pricing arrangements as constituting common carrier as opposed to contractual arrangements. Yet, as noted in the Notice, the arrangements have all or most of the characteristics of a contract entered into pursuant to 49 U.S.C. § 10709, especially for those arrangements that carry a volume commitment. In particular, the arrangements require a signed undertaking by the shipper.

Ironically, the rates themselves are the one element that is generally not publicly disseminated by either carrier. BNSF and UP have stated that they will directly disclose the rates only to members of the class at issue,[5] although neither carrier, to the best of WCTL's knowledge, has sought to prohibit secondary dissemination by the class of customers to whom the rates are directly distributed. Disclosure to any person of "the carrier's rates and other service terms" for common carrier service is specifically required by 49 U.S.C. § 11101(b) and the Board's implementing regulations at 49 C.F.R. Part 1300.

Because the BNSF and UP public pricing initiatives did not appear to meet the basic standard for qualifying as a common carrier offering, WCTL sought declaratory judgment and injunctive relief against the carriers in federal district court in Texas.

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[5]Other rates have been disclosed to the general public through the carriers' websites. The rates in BNSF 90068 were initially disclosed to the general public, but then BNSF limited their dissemination.

However, the carriers' motion to dismiss on grounds of lack of standing was granted. *Western Coal Traffic League v. BNSF Ry. and Union Pacific R.R. Co.,* No. 4:05-CV-679-Y (N.D. Tex. Mar. 29, 2006).

III. THE RAILROADS' PUBLIC PRICING FACILITATES COLLUSION AND HIGHER RATES

As noted in footnote 12 of the NOPR, the use of confidential contracts facilitates competition and limits the potential for collusion in duopoly markets, such as that for PRB coal transportation. The railroads' decisions to switch from confidential pricing to public pricing, where the prices are no longer protected by confidentiality clauses, facilitates the exercise of collusion and higher rates.

While public dissemination of prices generally facilitates competition in already competitive markets, it tends to have the opposite effect in concentrated markets and has great potential to facilitate collusion. *See, e.g.,* Comments of the U.S. Department of Justice dated January 25, 2007, in FERC Docket No. AD06-11-000, *Transparency Provisions of the Energy Policy Act of 2005*, available at http://www.usdoj.gov/atr/public/comments/223049.pdf. *See also* Maurice E. Stucke, *Evaluating the Risks of Increased Price Transparency,* ABA 19 Antitrust Magazine 81 (Spring 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927417#PaperDownload.

Indeed, the PRB coal transportation market has all or most of the characteristics that make it susceptible to collusion. In its comments to FERC noted above at pp. 4-7, the Department of Justice explained how transparency, high concentration, impediments to entry, homogeneous products, and low elasticity of

demand combine to facilitate coordinated actions by suppliers that can harm consumer welfare. These conditions are certainly present in the market for transportation of PRB coal. Similarly, Judge Richard A. Posner in *Antitrust Law* (2d ed. 2001) at pp. 69-79 lists 17 conditions that make a market favorable to collusion, and most apply to PRB coal transportation. Those factors are: (1) market concentrated on the selling side (two sellers), (2) no fringe or small sellers (also applicable), (3) inelastic demand at competitive price (confirmed by continued demand despite recent increases in rates), (4) entry takes a long time (absolutely true of railroading), (5) buying side of market unconcentrated (the number of utilities and power plants is large, especially as compared to the number of railroads, creating substantial asymmetry), (6) standard product (certainly true of unit train transportation, especially given the use of standardized circulars), (7) nondurable product (public pricing offerings do not exceed three years, a substantial volume of PRB coal transportation comes up for renewal every year, and coal cannot be stockpiled for more than a few months at the most), (8) principal firms sell at the same level in the chain of distribution (railroads are end-to-end competitors for transportation), (9) price competition more important than other forms of competition (price is key, especially in light of standardized service offerings), (10) high ratio of fixed to variable costs (while fixed costs are high, the railroads have stated an intent and demonstrated an ability to condition their capital expenditures on higher rates), (11) similar cost structures and production processes (both railroads use what is for all practical purposes identical technology, and even share a number of facilities, including the Joint Line), (12) demand static or declining over time (PRB coal demand is growing,

but demand is very predictable and stable, and the number of customers is stable or declining), (13) prices can be changed quickly (carriers can increase rates on twenty days' notice), (14) sealed bidding (which the railroads avoid by public pricing), (15) market is local (not necessarily, but there are only two railroads, and they have ample opportunity to communicate), (16) cooperative practices (trade association, the Joint Line, frequent use of trackage rights, etc.), and (17) industry's antitrust record (ETSI litigation plus frequent opportunities for interaction as a result of regulation, joint bids, and other factors).

Additionally, there is overwhelming evidence that the railroads' switch to public pricing was intended to facilitate major rate increases. In a September 10, 2002 presentation to the National Coal Transportation Association, the BNSF Chief Executive Officer explained that it was preparing to implement "market-based public pricing" as a "way to unlock" railroad coal transportation that was "undervalued." *See* http://www.bnsfcom/media/news/articles/2002/09/2002-09-10a.html. Similarly, the UP CEO in his letter to stockholders in the 2004 Annual Report at p. 1 stated that the carrier had "instituted new coal pricing mechanisms for all shipments from the Southern Powder River Basin (SPRB) in Wyoming, as well as spot movements out of Colorado and Utah . . . by clearly communicating the revenue we need in order to reinvest in our coal business." As the Board has previously found, rates for transportation for coal and other commodities declined rather continuously from the time of the Staggers Act through at least 2000.[6] The railroads' public pricing has caused a reversal of that trend, a fact that

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[6]*See* STB Report, "Rail Rates Continue Multi-year Decline" (Dec. 2000), available at http://www.stb.dot.gov/stb/docs/RI.pdf; GAO Report GAO-07-94, "*Freight Railroads: Industry Health Has Improved, but Concerns about Competition and Capacity Should Be*

the railroads have been proud to publicize. It is difficult to dismiss that the fact that the rate increases have occurred since the adoption of public pricing as a mere coincidence.

The Board thus has ample reason to be concerned about the railroads' public pricing. Indeed, if public pricing were deemed to be common carrier activity, the Board would be well-advised to consider whether aspects of the carriers' activities constitute an unreasonable practice. WCTL adds that one possibility would be to allow shippers to bring an action for damages and other relief in court based on the Board's finding that the carrier had engaged in an unreasonable practice. *See, e.g., Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.,* 127 S.Ct. 1513 (April 17, 2007), *citing, inter alia, Chicago and N.W. Transp. Co. v. Atchison, T. & S.F. Ry. Co.,* 609 F.2d 1221 (D.C. Cir. 1979); *see also* STB Ex Parte No. 661, *Rail Fuel Surcharges* (STB served Jan. 26, 2007) (finding that computing railroad fuel surcharges as a percentage of a base rate constitutes an unreasonable practice).

In addition, or in the alternative, the Board should make clear that any finding as to the public pricing is not meant to preclude the pursuit of other potential remedies. In particular, the Board should avoid granting any express or implied antitrust immunity or protection from antitrust damages under *Keogh v. Chicago & N.W. Ry. Co.,* 260 U.S. 156 (1922), for potentially collusive activity. *See also* STB Ex Parte No. 656, *Motor Carrier Bureaus – Periodic Review Proceeding* (STB served May 7, 2006) (terminating STB approval and associated antitrust exemption for agreements of motor carrier bureaus to engage in rate-related collective activities).

Addressed" (Oct. 2006).

IV. THE BOARD'S PROPOSAL MAY OVERREACH IN VARIOUS RESPECTS

As noted, WCTL strongly shares the concerns that appear to provide the impetus for the proposal in the Board's Notice. At the same time, however, WCTL is concerned that the Board's proposal may overreach in several respects. First, the broad rule proposed in the NOPR may exceed whatever jurisdiction the Board has to determine if a contract exists. Second, the Board's definition of what constitutes a contract appears to be so broad that it could be deemed to make all unit train transportation arrangements, annual volume rate arrangements, and other arrangements involving mutually desirable arrangements between carriers and shippers into contracts. Third, the proposed rule ignores the important issue of intent in determining whether a contract is present. Fourth, the Board's broad rule could make it more difficult for captive shippers to bring rate cases by forcing them to pay even higher rates in order to bring a rate case and/or increasing their risks that they will be unable to obtain adequate service.

A. Jurisdictional Issues with the Board's Proposed Rule

A significant threshold matter that appears not to have been discussed at all in the Notice is potential limitations on the Board's authority to recognize the existence of a contract subject to 49 U.S.C. § 10709.[7] Section 10709(c)(1) specifies that "[a] contract .

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[7] *KCP&L* at 2 n.4 dismissed this concern by citing *Burlington N., Inc. v. Chicago & N.W. Transp. Co.,* 649 F.2d 556, 558 (8th Cir. 1981) ("The ICC has primary authority to determine its own jurisdiction."), and did not address any of the specific court and agency precedent on the limitations of the ICC and Board jurisdiction over contracts. However, under the Board's proposed approach, it is not merely determining that the railroads' public pricing fails to constitute a valid common carrier offering, but is instead finding that it constitutes a contract, which, as noted, is not subject to the Board's

. . authorized by this section, and transportation under such contract, shall not be subject to this part" and (c)(2) adds that "[t]he exclusive remedy for any alleged breach of a contract entered into under this section" shall be a court action, absent other agreement by the parties.

For many years, the ICC and STB held that only a court can determine if an arrangement constitutes a contract and that common carriage will be presumed unless a party claims otherwise in court. While the ICC initially claimed it had the authority to determine if pre-Staggers Act agreements constituted contracts under § 10709's predecessor (§ 10713(j)),[8] that claim was rejected by three circuit courts. First, *Cleveland Cliffs Iron Co. v. I.C.C.,* 664 F.2d 568, 591 (6th Cir. 1981), ruled that:

> The Commission also appears to imply that it has authority under subsection 10713(j) to entertain and decide questions concerning the existence and validity of contracts in terms of the common law of contracts. This is the first indication to this court that the Commission intended to undertake such a purely judicial task, and we are unable to find support in the Staggers Rail Act or prior law for it. Certainly, the Commission never before has claimed any expertise as to the existence and interpretation of contracts . . . .

Accord Hanna Mining Co. v. Escanaba & Lake Superior R.R. Co., 664 F.2d 594, 600 (6th Cir. 1981) ("The question of the legality and existence of such contracts remains subject

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jurisdiction. Moreover, even assuming that the Board could exercise such broad jurisdiction in theory, it would still need to provide a reasoned explanation for its change in position.

[8]*Increased Rates on Coal, BN, Montana to Superior, WI,* 362 I.C.C. 625 (1980); *Rates on Iron Ore, Randville to Escanaba via Iron Mountain*, 365 I.C.C. 144, 151 (1981) ("we consider it both legally sound and administratively practical for the Commission to determine the lawful existence of a pre-act contract").

to challenge . . . in . . . court . . . . It is not thereafter subject to further review by the ICC"). The next year, the D.C. Circuit rejected the ICC's claim "that it is the proper forum of first instance to 'adjudicate a dispute . . . concerning the (1) existence or (2) the lawfulness of a pre-Act agreement,'" finding that:

> we conclude that the paramount design of Congress to reduce the ICC's regulatory role, and the clear legislative intent to place contract disputes in court, must direct the Commission's course. Accordingly, . . . the ICC should accept the tariff and leave contract enforcement questions to the plenary authority of the district court.

Burlington N. R.R. Co. v. I.C.C., 679 F.2d 934, 937, 939-40 (D.C. Cir. 1982) (footnote omitted). The opinion added that "[t]he courts to which the Staggers Act has committed contract questions are adequately equipped to determine whether alleged agreements are in fact binding legal contracts." *Id.* at 942 (citing *Cleveland Cliffs*, 664 F.2d at 592). The Tenth Circuit similarly stated in a later case involving a disputed contract that "[t]he courts, not the ICC, . . . is the appropriate forum for determining the existence of an enforceable contract." *Kansas Power & Light Co. v. Burlington N. R.R. Co.*, 740 F.2d 780, 785 (10th Cir. 1984).

Following these Circuit Court decisions, the ICC conformed its position to acknowledge its lack of jurisdiction to determine the existence of contracts:

> In *Cleveland Cliffs* . . . , a Federal court ruled that, after the enactment of the Staggers Act, the Commission retained jurisdiction to evaluate only the reasonableness of pre-Staggers Act contract rates that were in effect and under administrative challenge at this Commission on October 1, 1980 . . . . Otherwise, the sole remedy for breaches of an alleged contract, or a determination of whether in fact a contract exists, lies in an appropriate court . . . .

> If the existence of a contract rate was an issue . . . , then, based on the analysis above, the only jurisdiction which this Commission or State agencies would have is that set forth in *Cleveland Cliffs* and *Burlington Northern*, *supra*. This would preclude the [ICC] . . . from ruling on the existence of a contract rate . . . .

Docket No. 39060, *Petition for Review of a Decision of the Public Service Commission of Utah Pursuant to 49 U.S.C. 11501* (ICC served March 2, 1983), at 2, 3 ("*Utah*"). The ICC added that "no administrative agency may determine the existence and validity of an alleged rate contract." *Utah* at 4; *accord Rates on Iron Ore, Randville to Escanaba via Iron Mountain*, 367 I.C.C. 506, 510 (1983) ("to entertain and decide questions concerning the existence and validity of contracts . . . is a purely judicial task which is not to be performed by the Commission").

The ICC explained that where issues arose as to the existence of a contract rate in the context of a rate reasonableness proceeding, the proper course was to "defer any consideration of the rate reasonableness issue until the extent of our jurisdiction is determined by a court's ruling on the possible existence of a contract rate," *Utah* at 3, but this procedure was appropriate only if one of the parties claimed that a contract existed and submitted actual evidence to support the claim:

> We caution all litigants in administrative rate proceedings . . . that the potential jurisdictional issue of an alleged rate contract must be raised in some minimal evidentiary fashion to require the agency to defer to the courts under *Cleveland Cliffs* and *Burlington Northern*.

Utah at 4.

In *Toledo Edison Co. v. Norfolk & Western Ry. Co.*, 367 I.C.C. 869 (1983), the ICC elaborated that "the party raising the contract issue . . . has the burden of

showing the presence or absence of a contract," *id.* at 871, and indicated that the burden was best discharged by the initiation of a court action proceeding to support its contract claim:

> [D]efendant's evidence is largely circumstantial and does not convince us of the possibility that a contract exists. Some greater showing is necessary in order for the Commission to separate genuine from frivolous contract rate defenses. The potential for delay in deferring to a court's jurisdiction is a serious concern and we must assure ourselves that the action is correctly taken. Additional evidence that would be persuasive would be the defendant's initiation of a court proceeding in support of its contract claim. This would demonstrate the defendant's good faith belief in its contract arguments . . . . however, in the absence of a commitment from the defendant to pursue this matter in court, there is insufficient evidence to show a reasonable possibility that a contract between the parties may have existed. In order to give the defendant the opportunity to correct this defect, we will hold this proceeding in abeyance and defer consideration of the requested relief for 30 days . . . during which time N&W will be required to notify us whether it intends to seek a judicial determination of its contract clam. *If it does not respond or if it states its intent not to proceed judicially, we will resume consideration of this proceeding. . . . we emphasize that this decision does not reflect a conclusion that a contract in fact does or does not exist. That issue has been delegated to the courts by the contract provisions of the Staggers Act.*

367 I.C.C. at 872-73 (emphasis added).

More recently, the Board has found that a contract is present without the pendency of a court action. *See, e.g.* Docket No. 33582, *Cross Oil Refining & Mktg, Inc. v. Union Pacific R.R. Co.* (STB served Oct. 27, 1998) ("*Cross Oil*"). However, the document in question was rather clear on its face that it purported to create a contract, *i.e.* the document explicitly stated that "This **CONTRACT** is made pursuant to 49 U.S.C.

10709." *Id.,* at 3 (original emphasis). The *Cross Oil* situation thus appears to be far more straightforward than that presented by the railroads' public pricing initiative. Before adopting such a broad rule as proposed in the NOPR, the Board would need to reconcile its current position with its previously acknowledged limitations on its jurisdiction.

B. Potential Inconsistency of the Board's Proposed Rule with Unit Train Coal Transportation, Annual Volume, and Other Accepted Common Carrier Arrangements

WCTL is also concerned that the Board's proposed rule for what constitutes a contract may go too far substantively. The concept that "a commitment" from the shipper, such as "to tender a specific amount of freight during a specific period," in exchange for the establishment of a rate would create a contract could cause all unit train coal transportation arrangements to be deemed contracts because unit trains entail a considerable amount of agreed-upon and mutual coordination to achieve efficiencies that are ultimately reflected, at least to some extent, in a lower rate for the shipper. Annual volume rates and other established forms of common carrier rate offerings could face the same problem as well.

The basic notion of unit train transportation is predicated upon a joint undertaking by the rail carrier and the shipper to achieve efficiencies that are to be reflected in the transportation rate. For example, the ICC observed more than twenty years ago in *Arizona Pubic Service Co. and PacifiCorp v. The Atchison Topeka and Santa Fe. Railway Co.* (ICC served March 17, 1985), that "the unit-train tariff contained provisions (that are not in the annual-volume tariff) associated with high-volume unit train operations, provisions that are designed to reduce the carrier's cost of providing

service" and added in a footnote that these provisions included "a requirement of a minimum number of cars or tons per shipment," "more stringent free times for loading and unloading," "placement and bunching of trains and requires that both consignor and consignee provide track facilities that are sufficient to avoid switching of individual cars [,] . . . requirements [that] all serve to lower the carrier's cost of providing service. *Id.* at 8 & n.13.

A similar (albeit lesser) degree of agreed-upon coordination is also present in annual volume rates. *See, e.g., Natural Gas Pipeline Co. of America v. New York Cent. R.R. Co.,* 323 I.C.C. 75, 76 (1964); *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); *Unit Train Rates on Coal – Burlington Northern, Inc.,* 361 I.C.C. 655, 667 (1979). Where the specified minimum annual volume was not met, these tariffs typically required additional payments by the shipper, whether in the form of higher "fallback" rates or a fixed sum payable after-the-fact. *Natural Gas Pipeline Co.,* 323 I.C.C. at 77; *Coal to New York Harbor Area*, 311 I.C.C. at 360.

Common carrier arrangements for the transportation of grain have also involved mutual service-related commitments. For example, in *Grain By Rent-A-Train, IFA Territory to Gulf Ports*, 339 I.C.C. 579, 583-85 (1971), the ICC approved tariffs under which the railroad held out to dedicate locomotive power to shippers who supplied their own railcar. *Id*. at 584-86. The ICC later endorsed a common carriage program in which dedicated service at agreed-upon rates with damages payments for the railroad's failure to perform was offered to grain shippers, as a specific alternative to rail

transportation contracts. *National Grain and Feed Ass'n v. Burlington Northern Railroad Co.,* 8 I.C.C.2d 421 (1992), *aff'd in relevant part, rev'd on other grounds sub nom., National Grain and Feed Ass'n v. United States*, 5 F.3d 306 (8th Cir. 1993).

Common carrier arrangements reviewed in past rate cases have also included force majeure provisions[9] and provisions that fix the rates to apply for an extended period of time.[10] Arrangements that provide for some rate and/or service or volume commitment by the carrier in exchange for a volume commitment by the shipper have the potential to help carriers address their so-called capacity problems.[11]

It is difficult to see how effectively prohibiting such customer commitments could be consistent with sound common carrier policy. Allowing customer commitments in common carrier relationships furthers a number of elements of the national rail transportation policy, including "a safe and efficient rail transportation system," "a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense," "operat[ion of]

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[9]*See, e.g., Investigation Into the Need for Defining Reasonable Dispatch,* 355 I.C.C. 162, 173 (1977)*, National Grain and Feed* Ass'n, 8 I.C.C.2d at 436 n.23, and complaints filed in Docket No. 42088, *Western Fuels Ass'n, Inc. and Basin Elec. Power Coop., Inc. v. BNSF Railway Co.* (Oct. 19, 2004), and Docket No. 42058, *Arizona Elec. Power Coop., Inc. v. BNSF Ry. Co.* (Dec. 29, 2000).

[10]*See, e.g.,* the pending complaints filed in *Western Fuels* and the complaints addressed in the Board's decisions in Docket No. 42057, *Public Service Co. of Colorado d/b/a/ Xcel Energy v. BNSF Ry. Co.* (STB served June 8, 2004), Docket No. 42054, *PPL Montana, LLC v. BNSF Ry. Co.* (STB served August 20, 2002), and Docket No. 42056, *Texas Mun. Power Agency v. BNSF Ry. Co.* (STB served March 24, 2003).

[11]WCTL hastens to add that the railroads' problems may not involve capacity as such, but instead a failure to plan, operate, maintain, and expand their systems properly.

transportation facilities and equipment without detriment to the public health and safety," and "honest and efficient management of railroads." 49 U.S.C. § 10101(3), (4), (8), and (9).

In short, the nature of unit train and other long-accepted common carrier transportation arrangements is that "the carrier agrees [to establish] a specific rate . . . in exchange for consideration from the shipper, such as a commitment to tender a specific amount of freight during a specific period or to make specific investments in rail facilities." Yet, this is the type of arrangement that the Board's proposed rule would define as a contract and not a common carrier arrangement. Surely, the Board's intent cannot be to outlaw unit train and other standard forms of common carrier transportation, yet that is the potential effect of the NOPR's proposed rule. Nor should it the Board's intent to make it more difficult for captive shippers to obtain adequate service while preserving their rights to seek rate relief, yet that, too, could well result from the Board's proposal.

C. The Board's Proposed Rule Ignores the Critical Issue of Intent

By purporting to determine whether a contract exists strictly on the basis of the terms stated, the Board's proposed rule would eliminate any consideration of the parties' intent as to whether they meant to enter into a contract or instead intended to create a common carrier arrangement potentially subject to the Board's jurisdiction. Indeed, the Board's approach could cause the Board to find that a contract exists when the parties intended just the opposite.

While an explicit intent to enter into a binding contract may not generally be required to form a contract, a manifested intent not to create a contract will generally prevent the formation of a contract. "[T]he controlling question as to whether a binding agreement was entered into is the matter of intent of the parties." *Kansas Power & Light Co.*, 740 F.2d at 785. As explained in the *Restatement, Second, Contracts* § 21:

> Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of an intention that a promise shall not affect legal relations may prevent the formation of a contract.

Accord The Catholic Univ. of America v. Bragunier Masonry Contractors, Inc., 775 A.2d 458, 472 (Md. Ct. Spec. App. 2001) ("when the parties have expressed the intention *not* to affect their legal relations, a contract will not have been formed") (original emphasis).

Even assuming *arguendo* that the Board has sufficient jurisdiction to consider whether the document(s) in question could create a contract, a finding that a document creates a contract without any consideration of the parties' intent thus appears to exceed the bounds of general contract principles. Unlike the situation in *Cross Oil, supra,* where the instrument plainly purported to be a contract on its face, BNSF 90068 and UP Circular 111 at least purport in substantial part to create a tariff, and the carriers, at least UP in *KCP&L, supra,* have been willing to confirm (and reiterate) in response to shipper requests that the agreement amounts to a tariff that is subject to the STB's jurisdiction and not a contract. The Board reached the opposite conclusion in *Declaratory Order,* but noted there was no "similar persuasive contemporaneous evidence of the parties' intent to enter into a common carrier contract."

Moreover, the Board's approach has the potential to create a quagmire if the Board finds that a contract exists, and a court then finds that no contract exists because the parties did not intend themselves to be bound. Related complications could arise if a court determines that the contact is unenforceable in some respect. The Board's prior approach had the distinct virtue of avoiding situations that could result in perpetual limbo.

D. The Board's Proposed Rule May Have Unintended and Undesirable Consequences, Including Making it More Difficult for Captive Shippers to Bring Rate Cases

WCTL appreciates, as stated above, that the Board is seeking to prevent collusion among railroads and is thus attempting, consistent with national rail transportation policy, "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101(1). However, it is also the national rail transportation policy "to maintain reasonable rates where there is an absence of effective competition," *id.* at § 10101(6), and it is in this area that the Board's proposed rule may prove problematic.

It is already an exceedingly difficult undertaking for a captive shipper to bring a rate case. WCTL doubts that the Board could find any shipper that has received a stand-alone cost decision in the past five years that has not been distressed with the outcome of its litigation or the process that culminated in the decision. Moreover, actions recently taken by the Board to "improve" the stand-alone cost process and standards have made it even more difficult to obtain meaningful relief. In addition, recent developments may make it necessary to expand the definition of what is traditionally thought to be a captive shipper. While a number of PRB coal shippers can ostensibly be served by both

BNSF and UP, that competition is not at all effective when one railroad declares an embargo for twenty months at a time and the other railroad also appears unable to meet the coal needs of its customers. The presence of collusion and coordination is also inconsistent with the existence of effective competition.

The Board's proposed rule could cause captive shippers seeking to bring rate cases to encounter more obstacles and risk. Since the "Option 2" rates would presumably constitute contract rates immune from Board review, captive shippers would have to pursue some other option in order to be able to bring a rate case. One approach would be to ship under the first option, but that "option" provides no assurance as to rates or volume, which is not a viable path for a utility obligated to serve load in the current environment. Moreover, there would be a question whether the rate would even be treated as conferring unit train service. An alternative would be to request a new rate, but then the shipper would confront the related question of whether an arrangement that confers common carriage status if, for example, it contains unit train, annual volume, force majeure, liquidated damages, or other provisions often found in contracts. As noted, a common carrier rate devoid of such provisions would likely provide inadequate service or entail unacceptable rates.

Furthermore, in requesting the establishment of an additional rate, the shipper would risk ending up with terms that are even more unfavorable. If a shipper commitment is not required, the carrier might seek a higher rate or refuse to make a service commitment, or the shipper might have to forego some measure of rate certainty,

service commitment, force majeure relief, etc.[12] The resulting arrangements might well be worse for both the carrier and the shipper.

WCTL doubts that the Board truly intends to create such consequences. However, if the Board is going to pursue its proposed rule, or any variant thereof, it should provide a clear path so that a shipper can obtain a suitable and adequate common carrier rate that it can then challenge for unreasonableness before the Board, which "require[s] fair and expeditious regulatory decisions when regulation is required." 49 U.S.C. § 10101(2).

V. MORE PRAGMATIC APPROACHES ARE AVAILABLE TO THE BOARD

For the reasons explained above, WCTL believes that the Board is entirely right to focus on the potential for the railroads' public pricing to result in collusion, but WCTL is concerned that the Board's proposed rule may constitute an inappropriate solution that may exceed the Board's jurisdiction, potentially eliminate unit train and other long accepted features of common carrier transportation, afford insufficient weight to intent in determining whether a contract exists, and make it even more difficult for captive shippers to obtain appropriate rates and service. However, there are more pragmatic ways in which the Board could achieve what appear to be its objectives in issuing the Notice while avoiding or mitigating the noted problems and issues. A number of these approaches are closely related and could thus be combined to yield a unified, coherent approach.

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[12]Given recent experience, the carrier might effectively refuse to provide service altogether.

A. The Carriers' Basic Public Pricing Structure Does Not, By Itself, Create Either a Contract or a Tariff

One approach is to find, as noted *supra,* that the basic public pricing structure does not create or confer common carriage rate status. The fact that the rates themselves are not fully disclosed is sufficient by itself to compel this conclusion. Additional supporting factors are that the carriers adopted this structure without any apparent shipper need and/or request. The Board could also reach a similar result by finding, as discussed *infra,* that the carriers' actions constitute an unreasonable practice for the same reasons as well as the abrupt departure from the carriers' previous and more competitive practice of relying on contracts, which the Board has relied upon in accepting past merger proposals.

Under this approach, the Board's determination would be limited to finding that the railroads' basic public pricing structure does not constitute a valid common carrier offering, and the Board would not need to address the further question of whether the structure somehow creates a contact, a matter that may well lie beyond its jurisdiction. Nonetheless, it should be clear that from a contract perspective, the railroads' public pricing structure is at most an offer that would have to be accepted in some manner before a contract could be deemed to have been formed.

Finding that the basic pricing structure does not, by itself, create a tariff or a contract would still leave the issue of whether a contract or tariff would result upon subsequent action by the shipper, *e.g.,* the filing of a rate complaint with the Board that does fully disclose the rate in question. However, the Board would be acting with restraint in the sense that it would not be deciding matters that it need not decide

prematurely. Additionally, the Board would also avoid creating the scenario that its finds a contract to exist only to have a court later declare that a contract does not exist or cannot be enforced. Furthermore, the issue of whether a tariff or a contract exists in a particular instance (a dispute brought to the agency's attention) could then be addressed on other grounds more consistent with the Board's jurisdiction, precedent, and interpretation principles, as discussed next.

B. Any Findings as to Whether a Tariff Exists in a Particular Case Should Reflect the Shipper's Choice

As noted, the Board might then be called upon to decide if a valid tariff has been created in particular circumstances. WCTL submits that this determination should be guided by two primary considerations. First, the Board should recognize that the railroads have chosen to create an inherently ambiguous arrangement that should be construed against them as the drafter of the arrangement. Second, the Board should give full recognition to the shipper's intent in entering into the arrangement. The synthesis of these two considerations is that the railroads' public pricing creates a hybrid structure that is inherently ambiguous such that the shipper should be afforded the choice to determine whether to treat the resulting arrangement as a contract or as common carriage.

The notion of "shipper's choice" is well-founded. "It is well-settled that, where an ambiguity exists in a tariff, the ambiguity is resolved in favor of the shipper." Docket No. 40819, *UARCO Inc. v. James B. Orr* (STB served June 25, 1999), at 4 (citing *Rebel Motor Freight, Inc. v. ICC,* 971 F.2d 1288, 1294-95 (6th Cir. 1992)); *see also* Docket No. 41997, *NSL, Inc. v. Owen Eugene Whitlock* (STB served Nov. 18, 1999), at 8 ("the general rule [is] that an ambiguous tariff is to be construed against the maker"). The

same principle that ambiguities are to be resolved against the drafter is also fully applicable to general contract interpretation:

> In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.

Restatement, Second, Contracts § 206. Comment a to the *Restatement* explains that:

> Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party [and] . . . to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party.

The comment goes on to state that the rule is often invoked in circumstances where the contract is one of adhesion and its effect can be to render an arrangement unenforceable:

> The rule is often invoked in cases of standardized contracts and in cases where the drafting party has the stronger bargaining position, but it is not limited to such cases. It is in strictness a rule of legal effect, sometimes called construction, as well as interpretation: its operation depends on the positions of the parties as they appear in litigation, and sometimes the result is hard to distinguish from a denial of effect to an unconscionable clause.

Id. This description is fully applicable to the railroads' "take it or leave it" public pricing offering insofar as it is deemed to be a contract.

The *Restatement* elsewhere explains that the same principle of construing ambiguities against the drafter applies specifically to the determination of whether a contract has even been formed:

> Parties to what would otherwise be a bargain and a contract sometimes agree that their legal relations are not to be affected. In the absence of any invalidating cause, such a term is respected by the law like any other term, but such an agreement may present difficult questions of interpretation; it may mean that no bargain has been reached . . . it may reserve a power to revoke or terminate a promise under certain circumstances but not others. In a written document prepared by one party it may raise a question of misrepresentation or mistake or overreaching; to avoid such questions it may be read against the party who prepared it.
>
> The parties to such an agreement may intend to deny legal effect to their subsequent acts. . . . In other cases the term may be unenforceable as against public policy because it unreasonably limits recourse to the courts or as unconscionably limiting the remedies for breach of contract.

Id., § 21, Comment b ("Agreement not to be legally bound").

Since the railroads chose to adopt an ambiguous, "hybrid" offering structure, did so without even attempting to obtain any Board guidance or approval (such as through a request for declaratory order), and thwarted shipper, *i.e.,* WCTL, efforts to obtain such clarification in court, it is fully appropriate to allow individual shippers to determine whether to seek agency or judicial rights and remedies pertaining to the offerings.

Furthermore, as explained *supra,* the issue of intent is of primary importance in determining whether the parties have formed a contract, *i.e.,* if there is no intent to be bound in a contract, a contract should not be found to exist. Where the railroads' intent is ambiguous, the shipper's intent should govern for the reasons discussed above.

The Board's decisions in *Kansas City Power & Light* and *Declaratory Order* appear to hinge on the critical issue of the intent. The circumstances in the two cases were very similar in that both shippers had elected Option 2 under UP Circular 111, but the Board found that there was a valid tariff subject to rate challenge in the first instance and that in the second instance there was a contract that mooted the request for declaratory order. The basis for distinction is that there was "persuasive contemporaneous evidence of the parties' intent to enter into a common carriage agreement" in the first instance, but an absence of any such evidence in the second. The decisions thus appear to be generally consistent with the approach recommended by WCTL, except for providing the shipper with an explicit choice derived from the carrier's decision to employ ambiguous terms.

At the same time, WCTL is concerned that the approach advanced in the NOPR has considerably less nuance than those in the two recent decisions in that the NOPR would lay down a general rule that ignores both the underlying ambiguity and the primary role of intent. Furthermore, the NOPR's approach involves the Board's making a definitive finding as to the existence of a contract, as opposed to addressing the narrower question of whether there is a tariff that is subject to the Board's jurisdiction.

C. The Unreasonable Practice Alternative

A third and also related approach, noted *supra*, is for the Board to treat the public pricing structure as an unreasonable practice because of the potential for price signaling and associated collusion, the failure to disclose the rates publicly, and/or the fact that the carriers established their pricing structure without any shipper request that

they do so. *See, e.g.,* STB Ex Parte No. 661, *Rail Fuel Surcharges* (STB served Jan. 26, 2007) (finding that computing rail fuel surcharges as a percentage of a base rate constitutes an unreasonable practice).

In finding that the railroads have engaged in an unreasonable practice, the Board should also allow each adversely affected shipper to pursue an appropriate remedy. Some shippers, for example, might wish to be relieved of their obligation and should be allowed to do so, similar to the result that might occur under a contract of adhesion. Other shippers, like KCP&L, might wish to pursue rate cases. Still other shippers, like Ameren, might wish to have the carrier held to its bargain, which the Board could do under its unreasonable practice jurisdiction. Still other shippers might wish to pursue extra-contractual remedies such as fraud, damages for failure to provide service, or even antitrust. The Board should not constrain shippers from pursuing their options. *See, e.g., Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.,* 127 S.Ct. 1513 (April 17, 2007) (allowing court claims for damages for unreasonable practices under the Federal Communications Act), *citing, inter alia, Chicago and N.W. Transp. Co. v. Atchison, T. & S.F. Ry. Co.,* 609 F.2d 1221 (D.C. Cir. 1979) (relying on equivalent provisions in the Interstate Commerce Act).

D. The Board Should Not Confer Any Protection or Immunity on the Railroads' Actions

Whatever approach or approaches that the Board should decide to take, the Board should be careful not to confer any antitrust or other immunity or other form of protection or deference to the railroads' public pricing.

As noted *supra,* WCTL agrees fully with the Board's concerns that "public pricing" has ample potential to "create an environment where collusive activities in the form of an anticompetitive price signaling could occur" as "the same protections against collusion as . . . traditional confidential transportation contracts" are not present. NOPR at 4, 5. In fact, western coal transportation rates have increased enormously since the introduction of public pricing, the carriers appear to have introduced public pricing with the intent of achieving higher rates, and public pricing appears to have had the effect intended by the railroads. Moreover, public pricing has been accompanied by at least the appearance of a lack of capacity to handle coal shippers' traffic. The increase in rates and the shortage of service is not what one would expect from carriers that are competing to serve what is by all measures highly desirable traffic in view of its inherent efficiencies and low risks.

Accordingly, the Board should specify that its actions are not intended and should not be construed to confer any antitrust or other immunity or other form of protection or deference to the railroads' public pricing. This outcome could be achieved in several ways. In particular, the Board could, as noted, first specify that public pricing by itself does not create a valid common carrier offering because of the failure to fully disclose the rates. By then making clear that completed arrangements would be treated as common carrier only if the individual shipper then affirmatively seeks rate or unreasonable practice relief from the Board, other shippers would retain their full panoply on non-STB remedies (contract or otherwise). A potential alternative would be to declare the public pricing an unreasonable practice, while also making clear that such a finding is

in no sense inconsistent with or meant to preclude the availability of non-STB remedies and that such remedies are not repugnant to or inconsistent with the STB's regulation of common carrier rates and practices.

E. If the Board Adopts the Proposed Rule, or Anything Close to It, the Board Should Provide a Clear and Viable Path for Captive Shippers to be Able to Bring Rate Cases

In the event the Board adopts the rule or approach proposed in the Notice, or anything close to it, the Board should provide a clear and viable path for captive shippers to be able to exercise their rights to bring rate cases before the Board.[13] The proposed rule has ample potential to expose shippers to greater uncertainty, burdens, and risk, and the Board should provide appropriate protections.

In particular, the proposed rule could, as explained *supra,* cause normal and long-accepted common carrier unit train, annual volume, or even mere force majeure provisions and fallback rates to be deemed to create contracts, thereby precluding shippers from seeking relief from the Board. WCTL does not believe that the Board could intend such an outcome, but it is a distinct possibility, and the Board should clearly explain why that is not the case or provide clear guidance as to what shippers need to do in order to preserve their rights.

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[13]WCTL emphasizes that the universe of captive shippers may be effectively expanding. For example, if one of two carriers has established an embargo, or if a carrier without an embargo refuses to submit a reasonable bid or provide service, then the fact that two carriers might, in theory, be able to provide adequate service is not sufficient to demonstrate effective competition, much less adequate service. Likewise, collusion and coordination are inconsistent with effective competition.

The Board should also be wary of requiring shippers to obtain something more from the carriers than is available under Option 2 in order to be able to bring a rate case. If, for example, the shipper must arrange for a shorter time commitment, or is required to avoid as binding a commitment, then the carrier is likely to seek to extract an even higher rate or to make service even more discretionary, thereby exposing the shipper to higher rates, greater risk or non-delivery of coal, or potential retaliation. The Board has already made the process and standards for seeking rate relief extremely burdensome for captive shippers, and it should not make that process any more difficult or risky, or expose shippers seeking adequate service to greater jeopardy, in the guise of responding to dubious actions on the part of the carriers that are supposed to be subject to the Board's regulation.

VI. CONCLUSION

For the reasons stated above, WCTL asks for the Board to adopt a more appropriate or better reasoned approach to contract interpretation, but if the Board adopts its proposed rule, WCTL urges the Board to provide clear and adequate protection for captive shippers.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE

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Exhibit A

WESTERN COAL TRAFFIC LEAGUE MEMBERS

Alliant Energy
Ameren Energy Fuels and Services
Arizona Electric Power Cooperative, Inc.
Arizona Public Service
City of Austin, Texas
CLECO Corporation
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 Genco, LP
Texas Municipal Power Agency
Western Farmers Electric Cooperative
Western Fuels Association, Inc.
Wisconsin Public Service Corporation
Xcel Energy