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JUN 4 2007
MANAGEMENT

June 4, 2007

219451

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20423-0001

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Office of Proceedings
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Public Record

Re: STB Ex Parte No. 669, Interpretation of the Term Contract in 49 U.S.C. 10709

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and ten (10) copies of Opening Comments of Dairyland Power Cooperative.

Please date stamp the extra copy of this cover letter and the enclosed pleading and return it to our messenger. Thank you for your attention to this matter.

Respectfully submitted,

John H. LeSeur
An Attorney for Dairyland Power Cooperative

JHL:cef
Enclosure

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STB

BEFORE THE
SURFACE TRANSPORTATION BOARD

219457

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

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OPENING COMMENTS OF DAIRYLAND POWER COOPERATIVE

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Dated: June 4, 2007

BEFORE THE
SURFACE TRANSPORTATION BOARD

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MANAGEMENT
STB

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

OPENING COMMENTS OF DAIRYLAND POWER COOPERATIVE

Dairyland Power Cooperative ("Dairyland") files these Comments in response to the Surface Transportation Board's ("STB" or "Board") Notice of Proposed Rulemaking ("NPR") served on March 29, 2007. In these Comments, Dairyland urges the Board not to adopt its proposed rule defining the term "contract" for purposes of 49 U.S.C. § 10709. Instead, Dairyland urges the Board to continue its practice of determining its regulatory jurisdiction over common carrier traffic on a case-by-case basis.

I.

IDENTITY AND INTEREST

Dairyland is a generation and transmission utility based in LaCrosse, Wisconsin that provides wholesale electricity and other services for 25 electric distribution cooperatives and 18 municipal utilities. These cooperatives and municipals, in turn, supply the energy needs of more than half a million people.

Dairyland's service area encompasses 62 counties in five states (Illinois, Iowa, Michigan, Minnesota, and Wisconsin), providing reliable electrical energy and related services to its customers. The utility's mission is to provide competitively priced

energy and services to its customers and maximum value to its owners, consistent with the wise use of resources.

Dairyland owns and operates three coal fired stations: Alma, Genoa and Madgett. These stations collectively burn approximately 3 million tons of coal annually. This has been sourced from western mines with low-sulfur coal because use of western coal has been the most cost-effective method of compliance with Dairyland's sulfur-dioxide emission limits. All of this coal has been transported in whole, or in part, by western rail carriers under contract or common carrier arrangements. Like many utilities served by western rail carriers, Dairyland has experienced significant rail service problems in recent years. At the same time, its rail rates have skyrocketed. Both developments have significantly injured Dairyland's consumer-members. As summarized in a recent Dairyland Annual Report:

> Like other shippers who rely on the railroads for transportation, Dairyland has experienced severe deterioration in the quality of rail service. In the last two years, failure by the railroads on several occasions to meet contractual delivery obligations forced Dairyland to seek alternative coal sources or curtail power plant generation due to inadequate coal inventories. This has led to higher costs, since replacement coal has generally cost more, and energy purchased on the market is usually based on natural gas prices, which are dramatically higher than coal.
>
> Even as service quality is suffering, railroads are taking advantage of a lack of competition in the rail industry to impose drastically higher rail rates. Dairyland experienced a 93 percent average increase in rail rates as of January 2006. On an annual basis, it will now cost about $75 million to ship $30 million worth of coal. This

> means transportation will account for over 70 percent of Dairyland's delivered coal cost in 2006.
>
> The magnitude of this increase, combined with coal supply and purchased power costs, forced Dairyland's Board of Directors to raise rates by about 20 percent to maintain our cooperative's financial strength. While our members have worked hard to absorb some of the impact, cost increases must ultimately be passed on to our consumer-members. Unfortunately, this is at a time when consumers are also being subjected to dramatic price increases in home heating fuels, gasoline and diesel fuels.

Dairyland's 2005 Annual Report at 2.

As a significant purchaser of western coal transportation, Dairyland has a direct and substantial interest in the issues raised in the Board's NPR.

II.

COMMENTS

The STB, like its predecessor the Interstate Commerce Commission ("ICC"), is charged with regulating common carrier service by rail. See, e.g., 49 U.S.C. § 10501(a) (STB has general jurisdiction over "rail carrier[s]"); 49 U.S.C. § 10102(5) (defining "rail carrier" as "a person providing common carrier railroad transportation"). Conversely, the STB has no regulatory authority over transportation that is governed by a rail transportation contract. See 49 U.S.C. § 10709(c)(1) (contracts between railroads and shippers "shall not be subject" to STB regulation).

Over the years, the ICC and STB have addressed issues concerning their regulatory jurisdiction on a case-by-case basis. The most recent example of the Board's application of this approach is its decision in Kansas City Power & Light Co. v. Union Pac. R.R., STB Docket No. 42095 (STB served March 29, 2007), at 3 ("KCPL") ("whether a contract or common carrier rate exists has been examined on a case-by-case basis in light of the parties' intent").[1] In KCPL, the Board reviewed all pertinent facts and determined, based upon these facts, that the parties intended the involved arrangements to be common carrier service subject to the STB's regulatory jurisdiction. Id. at 3.

To the best of Dairyland's knowledge, no carrier, shipper or other member of the public has asked the Board to change its longstanding case-by-case approach to address, by rule, whether particular arrangements constitute common carrier subject to the STB's regulatory jurisdiction. Nevertheless, the Board instituted the instant proceeding and proposes to adopt a rule to apply to transportation arrangements entered into after April 4, 2007 that defines "contract" service, as follows:

> (1) The term *contract* in 49 U.S.C. 10709 is defined as any bilateral agreement between a carrier and a shipper for rail transportation in which the carrier agrees to a specific rate for a specific period of time 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.

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[1] Accord Union Pac. R.R. – Petition For Declaratory Order, STB Finance Docket No. 35021 (STB served May 16, 2007) at 2-3.

> (2) Notwithstanding any representation that a rate specified in an agreement is a common carrier rate, a bilateral agreement as described in paragraph (c)(1) of this section will be treated by the Board as a rail transportation contract authorized under 49 U.S.C. 10709 and therefore outside the Board's jurisdiction.

NPR at 8.

Dairyland asks the Board not to adopt its proposed "one-size fits all" definition of a "rail contract." Instead, Dairyland urges the Board to continue to address issues concerning the existence of common carrier service on a case-by-case basis, guided by governing Board precedent, for the following reasons.

First, the STB's current practice of deciding the involved jurisdictional issues on a case-by-case basis has worked well. The old axiom "if it ain't broke, don't fix it" applies here. Dairyland observes here that the Board's current interest in the NPR jurisdictional issues is entirely self-made. The parties in KCPL agreed that the involved rates were common carrier rates and did not ask the Board to address jurisdictional issues. Instead, the Board raised the jurisdictional issues on its own motion. The Board's ruling in KCPL evidently led the Board to institute the present action, which, like KCPL, was not instituted at the request of the rail transportation community.

Second, the Board's proposed definition of contract carriage appears to encompass many types of coal transportation arrangements that historically have been considered common carrier arrangements. For example, the ICC typically considered arrangements to constitute common carrier service where a carrier held out to provide unit

coal train service at specified rates for annual time periods if a shipper committed in writing to tender a specified amount of rail traffic.[2] These arrangements appear to fall within the scope of the Board's proposed contract definition.

In the NPR text, the Board attempts to distinguish these types of arrangements, which it refers to "unilateral contracts" from "bilateral contracts." NPR at 4-6. The Board goes on to state that "unilateral contracts" are subject to its regulatory jurisdiction whereas "bilateral" contracts are not. Id. at 5-6. The governing statutory text, 49 U.S.C. § 10709, makes no distinction between "unilateral" contracts and "bilateral" contracts, and the introduction of these terms does little to clarify the line of demarcation between STB-regulated and STB-unregulated service. Dairyland is particularly concerned that if the Board adopts its proposed rule railroads will respond by offering only one type of common carrier rate for unit train service – a high "spot" rate that entails no shipper volume commitment.

Third, the STB's proposed rule raises complex jurisdictional issues that are likely to result in court appeals – appeals that complicate the transportation landscape to the benefit of no one. The STB clearly has the power to determine whether an arrangement constitutes common carrier service subject to its regulatory jurisdiction. See KCPL at 2 n.4. However, the STB does not have the corresponding authority to determine whether an arrangement constitutes a contract under 49 U.S.C. § 10709. That

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[2] See, e.g., San Antonio, Texas v. Burlington N., Inc., 355 I.C.C. 405, 418 (1976) (referring to a unit train tariff containing an "agreed upon tonnage requirement"); Arkansas Power & Light Co. v. Burlington N. Inc., 361 I.C.C. 504, 505 (1979) (referring to a unit train tariff with multiple year minimum annual volume requirements)

is an issue for the courts to decide under governing state law.[3] By proposing a rule to define the term "contract" in 49 U.S.C. § 10709, the STB is inserting itself into a jurisdictional quagmire it need not enter. The proper course for the Board is not to issue a rule defining the term "contract" but to continue to apply a case-by-case determination of whether the involved arrangements constitute common carrier service under 49 U.S.C. § 10501(a).

Fourth, the STB properly expresses concerns in the NPR that the coal transportation market is highly concentrated. NPR at 4-5. This concentration, along with other factors (including public pricing), has led to market abuses. Dairyland's experience is illustrative here. As discussed above, Dairyland's rail rates in the concentrated western coal transportation marketplace have nearly doubled in 2006. Dairyland was forced to accept the huge rate increases and new one-sided terms and conditions for three different western coal movements on a "take it or leave it" basis. The new commercial instruments that replaced expiring contracts were deemed to be common carrier tariffs by the carriers for two of Dairyland's three western coal movements.

Dairyland's experience is far from unique. However the answer to these severe problems does not lie in the Board's adoption of a new rule defining rail contracts. Instead, the Board should exercise its regulatory authority over common carrier service to

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[3] See Cleveland Cliffs Iron Co. v. I.C.C., 664 F.2d 568, 591-92 (6th Cir. 1981) (courts to determine existence of § 10709 contracts); Burlington N. R.R. v. I.C.C., 679 F.2d 934, 941-42 (D.C. Cir. 1982) (same); Kansas City Power & Light Co. v. Burlington N. R.R., 740 F.2d 780, 785 (10th Cir. 1984) (same); Toledo Edison Co. v. Norfolk & Western Ry., 361 7.C.C. 869, 872-73 (1983) (same).

prevent monopoly pricing abuses;[4] exercise the authority granted to it by Congress to increase intermodal rail competition;[5] and aggressively protect shippers from abusive rail practices (e.g., carrier imposition of fuel surcharges that have no correlation to movement-specific fuel cost changes).[6]

CONCLUSION

Dairyland appreciates the opportunity to present these Comments to the Board and requests that the Board decide this matter in conformance with Dairyland's Comments.

Respectfully submitted,

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Dated: June 4, 2007

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[4] See 49 U.S.C. § 10701(d) (rail rates on market dominant traffic must be reasonable).

[5] See 49 U.S.C. § 11102 (authorizing the Board to grant competitive access remedies).

[6] See 49 U.S.C. § 10702 (rail practices must be reasonable); Rail Fuel Surcharges, STB Ex Parte No. 661 (STB served Jan. 26, 2007) at 6 (holding that it is an unreasonable practice for railroads assess fuel surcharges that do not "reflect[] the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied").