

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, DC 20423**

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

**COMMENTS OF
ARKANSAS ELECTRIC COOPERATIVE CORPORATION**

Arkansas Electric Cooperative Corporation (“AECC”) respectfully submits these comments in response to the notice served by the Board on March 29, 2006 regarding the definition of “contract” under 49 U.S.C. § 10709 and the regulatory treatment of railroad tariffs which contain term and volume commitments such as those found in one of the options in the western railroads’ multi-tier rate structures currently employed for the movement of Powder River Basin coal.¹

I. STATEMENT OF INTEREST

AECC is a membership-based generation and transmission cooperative that provides wholesale electric power to electric cooperatives, which in turn serve approximately 460,000 customers located in each of the 75 counties in Arkansas. In order to serve its member distribution cooperatives, AECC has entered into arrangements with other utilities within the state to share generation and transmission facilities. The largest of AECC’s generation assets are its ownership interests in the White Bluff plant at

¹ 72 Fed. Reg. 16316 (Apr. 4, 2007) (“Decision”).

Redfield, AR and the Independence plant at Newark, AR, each of which typically burns in excess of 6 million tons of Powder River Basin (PRB) coal annually. AECC holds a 35 percent interest in each of these plants (for which Entergy is the operator and majority owner). In addition, AECC holds a 50 percent interest (with AEP) in the Flint Creek plant, which is located in Gentry, AR. This plant normally burns in excess of 2 million tons of PRB coal annually.

As a result of the large volume of PRB coal used by these plants and the essential role of rail transportation for these movements, AECC has a direct interest in the Board's regulation of railroad transportation services.

II. COMMENTS

The Board proposes to treat any railroad rate arrangement involving a commitment by the railroad to maintain the rate level for a specific period of time in exchange for the shipper agreeing to tender a specified volume of freight or to make specific investments in rail facilities as a "contract" subject to Section 10709 of the Act and therefore exempt from Board jurisdiction. This determination would apply no matter how the railroad or the shipper characterizes the service relationship, or whether the shipper is captive and therefore has no effective alternative to the serving railroad, making the volume commitment redundant.

This rulemaking arises out of the recent rate proceeding in Docket No. 42095 involving Kansas City Power and Light Company ("KCP&L") and Union Pacific Railroad ("UP") in which KCP&L is challenging the UP's Circular 111 "Option 2" rates which provide a commitment by UP to observe a particular volume of rates in exchange for the shipper making certain term and volume commitments. The alternative available

to KCP&L was UP's "Option 1" rates, which are not subject to a term or volume commitment and are both substantially higher and subject to change on 20 days' notice.² The Board found that it had jurisdiction over the Option 2 service offering, albeit not on the grounds that the offering is common carrier service *per se* but rather that the parties had relied on prior agency rulings and that upsetting the parties' expectations could amount to an abuse of discretion.³ Contemporaneously, the Board initiated this proceeding.

AECC respectfully submits that the Board's proposed position on unilaterally determined railroad service offerings which contain rate, term, volume or other commitments is wrong both as a matter of law and as a matter of policy.

Both KCP&L and also Ameren Energy Fuels and Service Company ("Ameren") have addressed the issue that the courts and not the Board constitute the appropriate forum empowered to determine if a contract exists.⁴ AECC will not repeat those arguments and citations of authority, but rather incorporates said citations into these Comments. Moreover, whether a contract exists is a matter of the intent of the parties.⁵ The Board's Decision initiating this proceeding takes the position that jurisdiction is statutory, and that "only Congress, not parties, may confer jurisdiction."⁶ Given the Board's position that jurisdiction is a product of statute, it should be evident that where an agreement of the parties may not serve to determine the Board's jurisdiction, so too

² See Opening Brief of KCP&L, Docket No. 42095 at p. 2 (Sept. 25, 2006).

³ *Kansas City Power and Light Co. v. Union Pacific RR Co.*, STB Doc. No 42095 (rel. Mar. 29, 2007).

⁴ See Opening Brief of KCP&L, *supra* at pp. 7-14; Reply of Ameren at pp. 7-11, Petition of Union Pacific Railroad Company for a Declaratory Order, F.D. No. 35021 (May 8, 2007).

⁵ See Opening Brief of KCP&L, *supra*, at pp. 15-16; UP's Brief in Response to Order to Show Cause, Docket No. 42095 at pp. 2-4 (Sept. 25, 2006).

⁶ Decision at p. 6.

the Board by interpretation may not vest or divest itself of jurisdiction. For the Board to find that it had jurisdiction in the KCP&L/UP rate proceeding but will not have jurisdiction in future rate litigation over the very same tariff inherently is contradictory. While AECC necessarily agrees that for an agency to change its position on which parties have relied without notice is arbitrary and capricious and therefore unlawful,⁷ since jurisdiction is statutory the position proposed in the instant Decision would require the Board to find that the precedents adopted both by itself and by its predecessor Interstate Commerce Commission extending back over almost 50 years⁸ were erroneous. This the Board has not done.

The logical extension of the Board's proposal would be that no railroad rate is subject to agency jurisdiction. Rail shipments are made in accordance with a bill of lading, which is deemed, at "common law, the written evidence of a contract for the carriage and delivery of goods . . ." ⁹ But, there has been no suggestion that shipments made under bills of lading constitute exempt contract traffic. Moreover, to the extent a transportation arrangement would be exempt based on the shipper being called upon "to make specific investments in rail facilities,"¹⁰ inasmuch as the railroads require the shippers to maintain certain infrastructure in order to obtain service,¹¹ all railroad service to new locations, if not to all locations, could be considered to constitute exempt contract carriage under the Board's proposed position.

⁷ *Kansas City Power and Light Co. v. Union Pacific RR Co.*, *supra* at p. 4.

⁸ See Opening Brief of KCP&L, *supra*, at pp. 22-25.

⁹ Black's Law Dictionary at p. 168 (6th ed., 1990).

¹⁰ Decision at proposed section 1300.1(c)(1).

¹¹ See, e.g., UP Guidelines for Rail Service to New Industry Locations (Sept. 14, 2006), http://www.uprr.com/customers/attachments/industry_guidelines.pdf.

The most fundamental flaw in the instant proposal is that adoption of the position proposed by the Board would allow the railroads to “self-exempt” themselves from all rate regulation accountability to their customers by the manner in which they structure their service offerings. Congress carefully crafted the exemption process. Currently, there are two methods for exempting service from regulation: the Section 10502 exemption process and through the shipper entering into a transportation service contract with the railroad. Under Section 10502, an exemption may only be established (i) after a public proceeding, and (ii) upon a finding that application of the statutory conditions and remedies is not necessary to carry out the transportation policy of the Act and either the transaction or service is of limited scope or the application of the statute is not needed to protect shippers from an abuse of market power.¹² Alternatively, pursuant to Section 10709, a service will be exempt where the shipper and carrier enter into a transportation contract.¹³

Under the instant proposal, for a service to be exempt a railroad need only structure its service offering to entail “indicia of a contract”.¹⁴ The railroad need not negotiate terms with its customer, and the service may be offered on a take-it-or-leave-it basis; but if the offering includes “indicia of a contract,” according to the instant proposal the service would be exempt from STB oversight. Indeed, UP informed the Board that it

... has made clear to shippers in the process of discussing Circular 111 rates and service terms that the rates and terms are not “arrived at through mutual agreement,” which Board precedent requires for a “contract rate.” [Citation omitted.] UP establishes Circular 111 rates and service terms unilaterally. . . . UP has made clear to customers that Circular 111 rates and terms will ultimately reflect its own determination regarding

¹² 49 U.S.C. § 10502.

¹³ 49 U.S.C. § 10709(a) – (c).

¹⁴ *Kansas City Power and Light Co. v. Union Pacific RR Co.*, *supra* at p. 1.

appropriate rate levels and service terms. UP's customers understand that Option 2 rates and service terms are established unilaterally by UP and are not the product of an agreement between any specific customer and UP.³

. . . a railroad and a shipper can enter into a rail transportation contract only by mutual agreement, and UP clearly did not intend to enter into contracts through Option 2 rates.¹⁵

3. Option 2 rates would still be common carrier rates even if the shipper-specific rate levels had been mutually agreed upon between UP and the shippers to which the rates apply. *See Nat'l Grain & Feed*, 8 I.C.C.2d 437 ("Rail carriers have long followed the practice of incorporating rates they have negotiated with shippers into tariffs.")

True, UP offers shippers under Circular 111 the alternative of Option 1 rates, but those rates were sufficiently higher than the Option 2 rates to motivate KCP&L to select Option 2.¹⁶ Indeed, since a railroad initially may establish "any rate,"¹⁷ the rate option which does not bear "indicia of a contract" may be so draconian as to present no realistic choice to a shipper. Shippers operate in a commercial environment, and rate litigation is a last resort when the customary commercial relationship fails to resolve issues with railroads or other third parties. To accept an outrageous rate and undertake litigation that may take years, cost millions of dollars, and is filled with the uncertainties, including those faced by the shipper community in recent years as the Board has revised rate regulatory policies, in order to have the opportunity to challenge rates and service terms unilaterally imposed by the railroad is a burden which is both unreasonable and impracticable. This is clearly in conflict with the statutory scheme, whereby exemption from regulation is provided where regulation is not needed to protect shippers from the abuse of market power or where a shipper voluntarily and knowingly has entered into a

¹⁵ UP's Brief in Response to Order to Show Cause, *supra*, at pp. 4-5. This is not to say that where a shipper and carrier agree to use the carrier's tariff, "Option 2" or otherwise, as a baseline for an agreement with negotiated and mutually agreed upon customized terms, that said arrangement is not a valid transportation agreement under Section 10709. *See H.B. Fuller Co. v. Southern Pacific Transp. Co.*, 2 S.T.B. 550 (1997).

¹⁶ *See* Opening Brief of KCP&L, *supra*, at p. 2.

¹⁷ 49 U.S.C. § 10701(c).

contract which it has negotiated with the railroad. The latter has been recognized by the courts: “It is clear that the purpose of § 10709 is to allow parties the ability to alter federal mandates, or to avoid federal control and oversight over rail contracts.”¹⁸

Moreover, Congress made clear in adopting the Staggers Rail Act of 1980, “Shippers who do not elect to enter into contracts, or are unable to do so, are assured that carriers will have the same common carrier obligations as in existing law,”¹⁹ and inherent in those obligations is being subject to accountability under the statutory scheme.

The Board’s statement in the Decision that it does “not want to create incentives for a carrier to rush to put into place as many rates as possible in hybrid ‘common carrier’ agreements during the period of unavoidable delay associated with seeking public comments”²⁰ reflects, in AECC’s perspective, a fundamental misunderstanding of the dynamics of the shipper-railroad relationship. UP is to be commended, in responding to the Show Cause order in the KCP&L litigation, for adhering to its position in its dealings with KCP&L that its Circular 111 Option 2 is a common carrier service offering fully subject to Board jurisdiction, and not succumbing to the opportunity to back-track in an effort to escape accountability. However, AECC does not foresee that railroads welcome the opportunity to spend millions of dollars litigating rate disputes with their utility customers so to “rush into place” similar arrangements. Rather, the proposal advanced by the Board offers the railroads the opportunity to put their captive shippers in the box of accepting a rate schedule that precludes legal challenge or to accept a potentially egregious rate with the attendant risks, costs and other burdens for the right to challenge

¹⁸ *Dow Chemical Co. v. Union Pacific Corp.*, 8 F. Supp.2d 940, 941 (S.D. Tex, 1998) (emphasis added).

¹⁹ Report of the Committee on Conference on S. 1946, H.R. Report No. 96-1430 at p. 100 (Sept. 29, 1980) (emphasis added).

²⁰ Decision at p. 6.

the rate. Already railroads are publishing service terms denominated as “non-signatory contracts,” bearing clauses stating that shipping under the published terms constitutes a contract under 49 U.S.C. § 10709, which implicitly is exempt from regulatory challenge.²¹ To AECC, such service offerings constitute a railroad’s compliance with its Section 11101 obligation to render service on reasonable request and to provide rates and terms upon request; and would have even less claim than UP’s Circular 111 or any similar offering from any other railroad to be deemed a contract as that term is used in Section 10709. However, an expanded view of the contract exemption as proposed in this proceeding could give support to the position that such a clause is binding on the shipper.

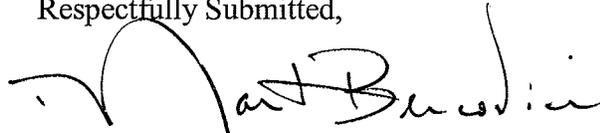
Adoption of the proposal advanced by the Board will enable railroads to self-exempt themselves from all rate accountability, contrary to Congressional intent and to the statutory scheme. To adopt this proposal, the Board effectively will be hanging a sign in front of the entrance to its new quarters reading: “CLOSED TO SHIPPERS.”

WHEREFORE, THE PREMISES CONSIDERED, Arkansas Electric Cooperative Corporation respectfully requests the Surface Transportation Board to terminate this proceeding without amendment of the Board’s rules, and in doing so to reaffirm that the well established precedents concerning the courts being the appropriate forum to determine if a contract exists, that whether a contract exists is a matter of the

²¹ Such clauses typically read: “This **CONTRACT** is made pursuant to 49 U.S.C. 10709 and shall become binding on the parties upon acceptance by the shipper named above. Shipper may accept this **contract** either by written notice, or by tender of [traffic] under its terms.” For an example, *see, e.g.*, Exhibit D, to Reply of The Louisiana and North West Railroad Company, Albemarle Corporation-Petition for Declaratory Order-Certain Rates and Practices of the Louisiana and North West Railroad Company, Docket No. 42096, at ¶ 15 (Feb. 28, 2006).

intent of the parties, and that common carrier rates may incorporate volume and term commitments will continue to be observed by the Board.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Martin W. Bercovici". The signature is fluid and cursive, with a large initial "M" and "W".

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