

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 669

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

JOINT REPLY COMMENTS
submitted on behalf of

EDISON ELECTRIC INSTITUTE
THE NATIONAL GRAIN AND FEED ASSOCIATION
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION
ARKANSAS ELECTRIC COOPERATIVE CORPORATION
E.I. DUPONT DE NEMOURS AND COMPANY

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Dated: August 2, 2007

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The Edison Electric Institute, the National Grain and Feed Association, The National Industrial Transportation League, the U.S. Clay Producers Traffic Association, Arkansas Electric Cooperative Corporation and E.I. DuPont de Nemours and Company ("Joint Reply Commenters"), having carefully reviewed the Comments submitted by all parties in this proceeding, in addition to their Comments and Reply Comments, wish to submit the following Joint Reply Comments to the Board, which are in the nature of a "Statement of Principles" for the Board's consideration. These Joint Reply Commenters note that many of them are also submitting individual Reply Comments that discuss the issues raised and the opening comments submitted in this proceeding.

1. Although many parties in this proceeding have opposed and some have supported with conditions the Board's proposed approach, it is clear that, among all parties, there is: (a) widespread uncertainty as to what the Board's proposed approach means; and, (b) apprehension that the scope of the Board's proposed approach goes too far and would harm useful commercial

arrangements. The Joint Reply Commenters urge the Board to reconsider and think through more clearly the meaning and implications of its proposal.

2. For commercial reasons and otherwise, shippers and carriers need clarity as to what is, or is not, a common carrier relationship as distinct from a contractual relationship. For those reasons, these Joint Reply Commenters believe that the Board should correctly define the common carrier relationship between a shipper and a rail carrier. The law has been clear for many years that common carrier transportation as evidenced in bills of lading is a type of "contract," but it is also clear that the mere execution of a bill of lading does not create a Section 10709 contract.

3. For various reasons, these Joint Commenters believe that, instead of attempting to define what is a contract, a sounder, more legally defensible approach – and one that would meet the Board's apparent concerns -- would be for the Board to define what is a common carrier tariff, a matter that clearly is within the jurisdiction and legal authority of the Board.

4. The Joint Commenters recommend for the Board's consideration the following definition of a "tariff" as a possible useful approach:

A "common carrier tariff" within the jurisdiction of the Board is defined as any unilateral offering by a rail carrier, or carriers, of rates, charges, conditions of service, or service terms, whether applicable to shippers generally, any class or group of shippers, or to specified individual shippers. A "unilateral offering" is any offering of rates, charges, conditions of carriage, or service that can be used or accepted by tendering, or stating an intent to tender, traffic to the carrier or carriers. Tariffs cannot be used to form a contract under Section 10709.

5. Because this approach is different from the approach suggested by the Board in this proceeding, the Board should re-notice this proposal and should provide an opportunity for comments and reply comments. This would assure that this proposal would meet all legal requirements, and would undergo broad scrutiny in order to assure its soundness.

6. If the Board does not re-notice this matter in the manner suggested in paragraph 4 above, then the Board should not adopt its proposed definition of "contract," and should revise its proposal, as set forth herein.

Respectfully submitted,

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