

**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)	
)	
)	

**REPLY COMMENTS OF
ARKANSAS ELECTRIC COOPERATIVE CORPORATION**

Arkansas Electric Cooperative Corporation (“AECC”) respectfully submits these Reply Comments in the rulemaking initiated by the Board 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 the western railroads’ multi-tier rate offerings for the movement of Powder River Basin coal.¹

I. REPLY COMMENTS

In its opening comments, AECC expressed its concern that the proposed contract definition could allow the railroads unilaterally to preclude shippers from having the ability to seek remedial measures from the Board by the manner in which they structure their tariff offerings. AECC asked the Board to terminate the proceeding without adoption of a rule defining contracts and to reaffirm well established and long standing existing law that the courts are the appropriate forum to adjudicate whether a contract

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

exists, that the intent of the parties is a governing factor in determining whether a contract exists, and that common carrier rates may incorporate volume and term conditions.

The Class I railroads uniformly, in one fashion or another, urge the Board to forego the proposed definition of a rail transportation contract and to terminate this proceeding. While they do so from a different perspective than AECC, namely that the proposal would interfere with their marketing and pricing flexibility, each of the Class I railroads finds utility in special tariff offerings containing some nature of specific conditions in some form.²

Several of the Class I railroads suggest alternatives to the Board. For example, CP and CSX suggest that the Board define terms that could not be in a common carrier tariff, such as volume or term commitments. As other of the railroads and shippers point out, however, such terms have been recognized as legitimate common carrier offerings in agency decisions dating back over decades. Moreover, such a prohibition would interfere with the pricing flexibility provided by Section 10701(c) of the Act.

If the Board wishes to adopt a rule, the Board should adopt the definition of “common carrier tariff” set forth in the Joint Reply Comments of AECC and other shipper interests reiterating the legal standard as to what constitutes a “tariff,” a matter unquestionably within the Board’s jurisdiction. While tariffs may be, and commonly are to some extent, incorporated into contracts entered into under Section 10709, tariffs by

² Several of the railroads mention their use of “non-signatory contracts.” While a transportation contract need not be executed by both parties to be enforceable, unless so required under the Statute of Frauds of the governing jurisdiction, absent a meeting of the minds of the parties on the terms of the transportation service the mere act of shipping under the terms, as discussed at p. 8 and n. 21 of AECC’s opening comments, does not constitute a contract under Section 10709 of the Act. Section 11101(b) of the Act requires common carriers by rail to provide rates and service terms upon a request. Thus, without more, e.g., the negotiation of terms and acceptance by the shipper to evidence a meeting of the minds required to form a contract, the mere act of shipping does not serve to distinguish acceptance of a “non-signatory contract” from the shipper’s use of the railroad’s common carrier service.

themselves should not be considered to be contracts, nor does tendering traffic subject to a tariff rate turn the tariff into a contract.

It has been suggested in some quarters that whether the rates and terms are public may serve to determine whether a document is a tariff or a contract. Such a consideration must be qualified, however. If the terms are confidential by agreement of the parties, that could be considered evidence of a contract. If the terms are confidential by virtue that the carrier unilaterally has decided not to release the rate information, that should not affect whether the service is a common or contract carrier offering since the shipper is not part of that decision. This is another instance where the carrier should not be allowed, by its unilateral action, to affect whether a service is common or contract carriage. A carrier which refuses to disclose tariff information in violation of Section 11101(b) of the Act is subject to enforcement by the Board, but that carrier's decision should not serve to deprive the shipper of its statutory rights to secure an adjudication of the reasonableness of the carrier's rates and terms of service.

AECC recognizes the utility and desirability of maintaining rates and terms of service as confidential; however, the way to accomplish that objective is to enter into a transportation contract pursuant to Section 10709 of the Act. The mere fact that a service offering is considered a contract service does not by itself make the terms confidential in that Section 10709 does not address confidentiality.³ Only an agreement of the parties can serve to make the terms of transportation service confidential.

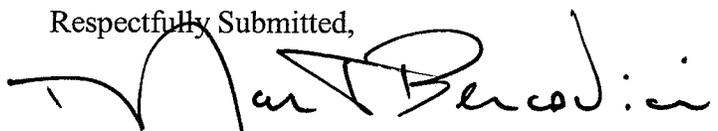
The shipper parties generally also oppose adoption of the proposed rule. Even those that would find some utility in having a rule of some nature have issues with the

³ Section 10709(d)(1) requires the filing with the Board of a summary of non-confidential information for contracts for the transportation of agricultural commodities. Even that provision does not prohibit the disclosure of confidential terms.

rule proposed. As reflected in the comments of the ten shipper parties, as well as those of the six railroad parties, any attempt to write a rule brings new issues and new concerns. The question of whether a contract has been formed is a factual issue which needs to be adjudicated on its particular circumstances, and no rule (with manageable complexity) can serve to define what constitutes a contract in all circumstances. As observed by at least one party to this proceeding, scholars have written books about the definition and legal concepts of the term "contract."⁴ This cannot be achieved in a mere 67 words as proposed by the Board.

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, or alternatively to issue a further Notice of Proposed Rulemaking to consider adoption of the definition of "common carrier tariff" as proposed in the Joint Reply Comments of AECC and other shipper interests.

Respectfully Submitted,



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⁴ See Comments of Norfolk Southern Railway Company at p. 3 (June 4, 2007).