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August 2, 2007

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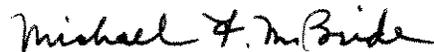
Mr. Vernon A. Williams, Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

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

Dear Mr. Williams:

In accordance with the Board's Decision issued March 29, 2007, in the above-referenced proceeding, enclosed for filing is the “Supplemental Reply Comments of Edison Electric Institute.”

Respectfully submitted,



Michael F. McBride

Counsel for Edison Electric Institute

Enclosure

cc: All Parties of Record

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD

Ex Parte No. 669

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

SUPPLEMENTAL REPLY COMMENTS OF EDISON ELECTRIC INSTITUTE

Pursuant to the Decision of the Surface Transportation Board ("STB" or "Board") served March 29, 2007 in this proceeding, Edison Electric Institute ("EEI") hereby submits its Supplemental Reply Comments. EEI is also submitting Joint Reply Comments with 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, which jointly suggest an approach to cure some of the problems with the Board's proposed rule that is the subject of this proceeding.

EEI's interest in this proceeding was set out in its opening Comments, and will not be repeated herein, except to say that it is obviously important that the Board maintains vigilant oversight of rail rates in common carriage for coal and other commodities as to which there is limited or no effective competition for the transportation involved. At issue herein is whether certain rates for the transportation of coal from the PRB to generating stations owned or operated by EEI's members (among others) are applicable to common carriage (and thus regulated by the STB) or are provided as part of a "contract" (in which event, under 49 U.S.C. § 10709 ("Section 10709"), the rate is immune from challenge before the STB).

Overview of EEI's Position

The following both summarizes EEI's position and, we believe, is consistent with most if not all of the comments filed to date in this proceeding:

1. All the comments filed in this proceeding make clear that shippers and carriers need clarity with respect to the nature of their relationship, *i.e.*, whether the service is being provided in common carriage or contract carriage. However, because of the nature of diverse commercial relationships governed by the varying laws of the 50 States, such clarity will not be provided by the Board's proposed rule, and cannot be provided by any single national rule defining a "contract" within the meaning of Section 10709.

2. While the STB may determine its own jurisdiction, and therefore may determine whether railroad transportation is provided in common carriage, under Section 10709 the STB arguably may not determine if a lawful contract exists, and it certainly may not determine the terms of a lawful contract.

3. Most railroad transportation contracts specify the law of the State which governs under the contract. While such contracts may include aspects of federal law (such as references to tariffs or to common carrier obligations with respect to other service provided by the carrier), for the most part the provisions of a contract are determined in accordance with the law of the State which is applicable to the contract.

4. The laws of the 50 States on what constitutes a contract are not necessarily the same from State to State and are certainly not the same in all 50 States.

5. Therefore, despite the best intentions of the STB, the STB's definition of "contract" may not resolve whether there is in fact a contract between a railroad and a customer, and certainly does not resolve what the terms of such a contract may be.

6. What a contract is and what its terms may be are necessarily matters for case-by-case determination under the law applicable to a particular contract.

7. The parties' intentions (whether manifested in words or actions or both) as to whether they have entered into a contract are at least relevant to, if not dispositive of, whether there is a lawful contract in effect between the parties.

8. It is in the interests of carriers, shippers, and the public that the STB state that whether a common carriage relationship or a Section 10709 contract exists between a carrier and a shipper is something that must be determined on a case-by-case basis and cannot be determined by rule without consideration of all the facts and circumstances. An important measure of whether a Section 10709 contract exists is whether the shipper has been able to negotiate the rates and terms of service with the carrier on an arms' length basis, or whether the carrier provides the rates and terms on a "take it or leave it" basis.

9. Accordingly, the STB should state that whether a Section 10709 contract between a carrier and a shipper exists is a matter for case-by-case determination, and should not be defined or determined by rule, because otherwise the STB may inadvertently determine that something is a lawful contract, when it is not, or is not a lawful contract, when a court would say it is a lawful contract.

10. Shippers and carriers typically provide that court litigation or alternative dispute resolution is the proper mechanism for resolving disputes arising under their contracts. The STB should not address contractual provisions or disputes, because if it does so, it may resolve a dispute in a manner that is inconsistent with the resolution of it by a court or arbitration panel or mediation process.

11. Therefore, the STB should provide clarity to shippers and rail carriers with respect to the nature of their relationships by defining that which is within the STB's authority to regulate: "common carrier tariffs." A suggested definition of "common carrier tariff" is provided in the Joint Reply Comments. If the Board is not inclined to adopt such a definition, EEI would urge the Board to terminate this proceeding rather than adopt a definition of "contract" that may only cause controversy rather than resolve it.

12. In no event should the STB determine that what is only a unilateral promise – a common carrier tariff rate – is somehow transformed into a Section 10709 "contract" merely because a shipper which has no alternative to rail service "accepts" a volume rate. Rather, whether that is a Section 10709 contract depends on all the facts and circumstances, not merely whether the shipper accepts the carrier's unilateral terms of its rate offering.

Reply Argument

EEI explained in its Opening Comments filed herein on June 4, 2007 that any interpretation of the term "contract" under Section 10709 must take into consideration the facts that surround the formation of any agreement for service, as the STB's recent decision on UP's Petition for Declaratory Order regarding Option 2 provides.¹ In that decision, the STB refused to issue a blanket declaratory order with respect to whether UP's Option 2 rates under Circular 111 would always be contract or common carrier rates, because it lacked "evidence of the facts surrounding the execution of each particular Option 2 agreement."² The facts surrounding the execution of agreements for service are, in fact, fundamental to understanding whether those agreements result in contract rates or common carrier rates.

¹ *Union Pacific Railroad Co.*, STB Finance Docket No. 35021, at 3 (STB served May 16, 2007).

² *Id.*

A basic requirement of contract formation is the "meeting of the minds" of the parties to that contract.³ Without such a "meeting of the minds," courts have typically found that a contract does not exist.⁴ A "meeting of the minds" is accomplished through the negotiation and acceptance of the terms of the contract by the parties. Tariffs for common carrier service are, however, unique in that they do not offer the shipper the ability to negotiate certain fundamental aspects of the agreement, such as the rate to be charged for the service. The shipper must choose between accepting the service at the published rate or not taking service, but the shipper has no ability to negotiate the rate for that service. This "take it or leave it" arrangement has often been referred to as a type of "contract of adhesion," which has historically been subject to heightened scrutiny by courts due to the potential that the agreement will be unconscionable.⁵

Certain of the opening comments filed by the railroads take the position that there is such a thing as a "unilateral contract," suggesting that such should be deemed "contracts" within the meaning of Section 10709 (and therefore not subject to the Board's regulatory jurisdiction). It is not entirely clear what the railroads mean by that term. EEI acknowledges that even a tariff (which is certainly "unilateral") may have aspects of a "contract" (such as the fact that, by statute, a shipper who tenders goods for shipment under a tariff is obligated, through the bill of

³ *Mutual Life Ins. Co. of New York v. Young's Adm'r*, 90 U.S. 85, 107 (1874).

⁴ *E.g.*, "To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." *Express Indus. & Term. Corp. v. N.Y. State Dep't of Transportation*, 93 N.Y.2d 584, 589 (1999), cited with approval in *Tractebel Energy Marketing, Inc.*, now known as *Suez Energy Marketing, Inc. v. AEP Power Marketing, Inc.* No. 05-4985, et al. (2nd Cir., May 22, 2007), slip op. at 7.

⁵ See, e.g., *Rakoff, Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv.L.Rev. 1173, 1179-80 (1983); *Slawson, Mass Contracts: Lawful Fraud in California*, 48 S.Cal.L.Rev. 1, 12-13 (1974); K. Llewellyn, *The Common Law Tradition*, 370-71 (1960).

lading, to pay the charges in the tariff for the transportation, unless the Board orders that different rates or charges shall apply). In that sense, all tariffs are "contracts."⁶

But it cannot possibly be true that all tariffs are "contracts" as Congress used that term in Section 10709, as the Board proposes to define and use that term in its proposed regulations, because that would ensure that *all* tariff rates published by railroads are "contracts" (at least, if the railroad so chooses to characterize the situation, or condition use of the rate on "acceptance" of a volume commitment, even if the shipper would prefer not to make such a commitment), and therefore that *no* rail rate (tariff or contract) is subject to the Board's regulatory jurisdiction (a preposterous outcome, given the legislative history). To conclude that a shipper who has no choice but to "accept" the volume commitment that a railroad demands for use of a unilateral rate offering has entered into a Section 10709 "contract," and therefore has no rate remedy before the STB, would prove far too much, and would be contrary to clear Congressional intent in preserving rate regulation before the STB.

In 1980, when Congress enacted the Staggers Rail Act and first authorized rail transportation contracts, it explained that the term "contract" in then-49 U.S.C. § 10708 (now § 10709) was meant to exclude situations where a shipper was unable to negotiate with a railroad: "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.... While the Conferees intend to encourage shippers to contract *they recognize the difficulty that small shippers may*

⁶ At law, a "unilateral contract" exists when, for example, a shoeshine stand posts its prices, and a customer sits down and has his shoes shined. The customer's actions demonstrate his acceptance of the price (and other terms of the service that may be posted). That concept does not fit the rail situation, where a customer by its actions "accepts" a tariff rate and has a duty to pay for the transportation, but has not thereby necessarily entered into a "bilateral" contract of the sort the Board contemplated in its proposed rule, because, *inter alia*, the railroad customer often has no choice but to accept the service the railroad provides, and in most instances these days, has no ability to negotiate the terms of service. (A shoeshine customer, by contrast, could either propose a different price, or just walk away.)

have in negotiating contracts, and therefore, the Conference substitute adopts the Senate provision establishing a railroad contract rate advisory service."⁷ So, because Congress excluded circumstances in which shippers were unable to negotiate a mutually agreeable contract from the definition of "contract" in the Staggers Rail Act's authorization of "contracts" in the law (which was the first time rail transportation contracts were authorized), it follows *a fortiori* that a "unilateral contract" (even assuming *arguendo* that such exists) cannot be a "contract" within the meaning of Section 10709. A "contract" is not a Section 10709 contract, therefore, unless all of the facts and circumstances demonstrate that the shipper bargained for such an outcome and agreed that the transportation the carrier is providing is under contract. Otherwise, the carrier would determine unilaterally whether a contract exists, and the STB has already rejected the notion that a carrier can unilaterally determine if a contract exists.⁸

The STB decided to exercise jurisdiction over the agreement in *KCPL*⁹ because of the parties' "reasonable reliance" that the agreement constituted a common carrier rate agreement, a result that would seemingly be impossible if all tariff rates are to be deemed "contracts" for purposes of the Board's jurisdiction over rates. In any event, the Board could also have reached the conclusion that it should have exercised jurisdiction because the agreement at issue shared the most fundamental characteristic of all common carrier tariffs: the "take it or leave it" rate that made the putative "agreement" a type of contract of adhesion (if a contract at all, other than an arrangement requiring the shipper to pay the rate quoted for the transportation it used, as with any bill of lading). The *KCPL-UP* "agreement" had some characteristics that are typically associated with non-tariff contracts (*e.g.*, specification of volumes and duration of service), as

⁷ H.R. Rep. No. 96-1430, at 100 (1980), *as reprinted in* 1980 U.S.C.C.A.N.4110, 4132.

⁸ *Union Pacific Railroad Company*, STB Finance Docket No. 35021 (served May 16, 2007).

⁹ *Kansas City Power & Light Co. v. Union Pacific Railroad Co.*, STB Docket No. 42095.

the STB noted in its NPR and in the *KCPL* decision, but it still contained the fundamental "take it or leave it" fixed-rate characteristic of a common carrier tariff. Had *KCPL* and UP negotiated at arms' length the rate and other terms for service under Option 2, there could be no question that there was a "meeting of the minds" with respect to the most fundamental aspects of that agreement and that the agreement constituted a contract. But the rate at issue in *KCPL* (and perhaps other terms) were fixed by UP, absent any negotiation with *KCPL*, as is the case with all tariff rates (but is often not the case with non-tariff rate agreements). Thus, in the instance of the Option 2 agreement between *KCPL* and UP, the common understanding of tariffs versus contracts would warrant a determination that the rate at issue was a common carrier rate, subject to the Board's authority to regulate such rates, as the Board so found.

Despite the "take it or leave it" nature of all tariff rates, in some instances shippers may have actual power to negotiate alternate rates or terms of service that make the ultimate agreement between the carrier and shipper more akin to a negotiated contract than a tariff (or contract of adhesion). Unlike in *KCPL* (where the shipper felt forced to take a rate increase under Option 2 because the other option resulted in an even greater rate increase), the shippers in these instances could demonstrate that they engaged in actions that resulted in a true "meeting of the minds" between the parties. Consistent with centuries of contract jurisprudence, where there is clear factual evidence of this "meeting of the minds" that has been achieved through a meaningful negotiation between parties, the Board could properly find that the agreement at issue is a contract. But, absent that meaningful power to negotiate, shippers must be able to avail themselves of the Board's authority over rates that Congress granted to balance the railroads' ability to issue unilateral tariffs (which, again, are essentially contracts of adhesion, if contracts at all).

In short, the determination that an agreement is in fact a Section 10709 contract should be based on the shipper's ability to enter into a negotiated agreement at arm's length, *i.e.*, that the shipper has the ability (if it so chooses) to negotiate meaningfully the rate and other fundamental components of the contract (and not just the duration or volumes under service which it must take at a set rate and under predetermined conditions). This determination is most properly made by a court, which could exercise jurisdiction over the agreement if the court determines that the agreement is or may be a contract under applicable State law. The determination that should be made by the Board, however, as is explained in the Joint Reply Comments, is whether what might appear to be a Section 10709 contract actually contains the characteristics discussed above that are fundamental and unique to common carrier transportation and which would render the apparent "agreement" a tariff that is subject to the Board's jurisdiction.

Conclusion

Congress clearly intended, by the use of the term "contract" in Section 10709, to refer to agreements reached on an arms-length basis between two sophisticated entities, each with the ability to achieve some of its desired objectives in such an agreement. Congress could not have intended, by the use of the word "contract," to refer to a "take it or leave it" type of imposed set of rates and other terms of carriage, because the latter is, in function and in effect, little if any different from a tariff (or "published rate," to use the modern terminology), and because, under that scenario, there would likely be few if any PRB rates (or other tariff rates) that come within the jurisdiction of the Board, a result that Congress also could not have intended.

The Board should maintain vigorous oversight of rates in common carriage when a shipper presents evidence to it that the carrier provided the rate on a "take it or leave it" basis or

otherwise where there is no claim by either party that a "contract" within the meaning of Section 10709 exists between the parties for the transportation at issue.

In any event, it may not possible to state, in a single rule, a definition of what constitutes a "contract" within the meaning of Section 10709. Any such effort would only create the potential for confusion and needless transaction costs for parties to railroad transportation contracts. Accordingly, the Board may wish to state that whether a contract exists is for a court or arbitration panel to resolve, under the law applicable to the contract as agreed to by the parties, on a case-by-case basis. The Board should not adopt a regulatory definition of "contract," but instead should adopt a definition of "tariff" as proposed in the Joint Reply Comments EEI is filing separately with other parties or, in the alternative, terminate this proceeding.

Respectfully submitted,



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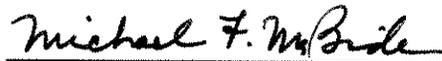
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 669

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

CERTIFICATE OF SERVICE

I hereby certify that I have served this 2nd day of August 2007, one copy of the foregoing "Supplemental Reply Comments of Edison Electric Institute" by first-class mail, postage prepaid upon all parties on the official service list.



Michael F. McBride