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BEFORE THE
SURFACE TRANSPORTATION BOARD

In the Matter of:)	
)	
RAIL TRANSPORTATION)	STB Ex Parte No. 676
CONTRACTS UNDER 49 U.S.C. 10709)	
)	

COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE

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Dated: May 12, 2008

Its Attorneys

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The Western Coal Traffic League (“WCTL” or “League”)¹ hereby submits the following comments in response to the decision and/or notice (“Notice”) that the Surface Transportation Board (“STB” or “Board”) served in both the above-captioned proceeding and in STB Ex Parte No. 669, *Interpretation of the Term “Contract” in 49 U.S.C. 10709*, on March 12, 2007.

I. SUMMARY

WCTL generally supports the concerns that appear to motivate the Board’s Notice, especially the desirability of distinguishing between contract and common carriage arrangements. WCTL also shares the Board’s concerns about the potential anti-competitive effects of the so-called “public pricing” arrangements used by the Western

¹WCTL is a voluntary association, whose regular membership consists entirely of utility shippers of coal mined west of the Mississippi River that is transported by rail. WCTL members presently ship and receive in excess of 140 million tons of coal by rail each year. WCTL’s members are: Alliant Energy, Ameren Energy Fuels and Services, Arizona Electric Power Cooperative, Inc., Austin Energy (City of Austin, Texas), CLECO Corporation, CPS Energy, Kansas City Power & Light Company, Lower Colorado River Authority, MidAmerican Energy Company, Minnesota Power, Nebraska Public Power District, Omaha Public Power District, Texas Municipal Power Agency, Western Farmers Electric Cooperative, Western Fuels Association, Inc., Wisconsin Public Service Corporation, and Xcel Energy.

railroads for coal transportation. Moreover, the Board's specific proposals are a vast improvement over those in the Notice of Proposed Rulemaking ("NPR") that the Board issued over a year ago in Ex Parte No. 669.

At the same time, WCTL has a number of concerns about the Board's current proposal. In particular, WCTL is concerned that the Board continues to focus on what constitutes a contract, which may exceed the Board's jurisdiction and create the potential for arrangements that a court will not recognize as a contract, even if the Board does not recognize them as common carriage. Moreover, requiring that a contract specifically reference 49 U.S.C § 10709 may be inconsistent with legislative and regulatory history.

WCTL continues to believe that the better approach would be for the Board to construe any ambiguities against the railroads as the drafter of the documents. To the extent that the Board wishes to proceed further, it could adopt a "safe harbor" approach rather than prescribe specific language in advance and otherwise, consistent with its jurisdiction, focus on what constitutes a common carriage arrangement rather than what constitutes a contract. Also, in terms of a general disclosure, the Board should recognize that its regulatory activities may have significant bearing on contracts and their performance, and the Board should avoid overstating the availability of rate relief or other implications that common carriage arrangements are always superior.

These and related matters are discussed below. WCTL also presents alternate suggested disclosure/disclaimer language for the Board's consideration.

II. DISCUSSION

WCIL remains very supportive of the concerns expressed by the Board that appear to provide the impetus for both the instant Notice and for the earlier NPR. Specifically, actions by the railroads, especially the two major Western carriers in their adoption of hybrid pricing arrangements for coal transportation, have served to obscure what was previously in practice a fairly clear line of demarcation between common carrier transportation and transportation contracts entered into pursuant to 49 U.S.C. § 10709. Additionally, there is good cause to be concerned that the railroads entered into these hybrid arrangements for the purpose and the effect of charging higher rates. The Board is fully justified in being concerned about both of these developments.

WCIL is also pleased that the Board has decided to back away from the proposal that it advanced in its NPR in Ex Parte No. 669 that would have adopted a very encompassing position as to what constitutes a contract under § 10709. Indeed, the NPR proposal accomplished the rare feat of attracting near unanimous opposition from both shippers and railroads.

The Board's new proposal as articulated in its Notice is a vast improvement. It appears to recognize that whether a specific arrangement between a shipper and carrier is intended to, and thus amounts to, a contract or common carriage is a question of intent, as opposed to being a contract if the arrangement involves any element of bilateralism, no matter how coerced. Moreover, the proposal places the onus for providing a clear demonstration that the parties intend to enter into a contract on the carrier. In essence, the proposal seeks to prevent carriers from engaging in ambiguity as

to whether the resulting arrangement will be one of contract or of common carriage. *Additionally, the Board upholds the duty of common carriers to establish common carriage arrangements upon request.*

WCTL strongly supports these elements of the Board's proposal. The same, or virtually the same, arrangement could constitute a contract or common carriage, depending on the intent of the parties. Clarity as to what is intended will help minimize and/or eliminate the potential for ambiguity. Moreover, the Board is entirely correct in recognizing that the onus for avoiding ambiguity should be placed on the railroads, and not shippers. There are far fewer railroads than there are shippers, and railroads are in a position to be far better informed as to the distinctions between contracts and common carriage when it comes to the transportation that railroads provide. Railroads also have much greater leverage than shippers, especially when it comes to the intricacies of commercial arrangements. Railroads are thus, by far, the cheaper or most efficient cost-avoider when it comes to avoiding problems. Accordingly, railroads, rather than shippers, should thus be held responsible for avoiding ambiguity in the commercial arrangements that railroads create.

While WCIL thus agrees with what it perceives to be the Board's core intentions in its Notice, WCTL nonetheless has several basic and largely related concerns about the Board's proposal.

A. Limitations on the Board's Jurisdiction

First, the proposal would have the Board determine, under an *a priori* rule, what arrangements suffice to constitute a contract, *i e* . the carrier must have given the

shipper a specified notice in advance, and the putative contract must contain specific language. However, the agency itself as well as the courts have previously said that the determination of what constitutes a contract falls within the jurisdiction of the courts and not the Board.² Such an expansion of the Board's jurisdiction is inherently problematic.

This uncertainty is not merely a battle over turf, but instead creates the possibility that a shipper will find itself without a forum to seek a needed remedy in the event a carrier fails to honor its commitments. Specifically, the Board may find that the arrangement constitutes a contract, yet a court, which is supposedly the exclusive forum under § 10709 for hearing a dispute about the putative contract, may then decide that the parties have failed to enter into a contract. This sort of "neither fish nor fowl" predicament should be avoided, especially as it is likely to redound to the carrier's benefit and to the shipper's detriment. While the Board does not appear to intend such an untoward consequence, it could nonetheless be the result under the Board's approach

B. Possible Inconsistency with Legislative Intent and Regulatory History

WCTI is also concerned by the possibility that the specifics of the Board's proposal may be inconsistent with legislative intent and regulatory history. Specifically, the regulations of the former Interstate Commerce Commission implementing now

²See, e.g., *Cleveland Cliffs Iron Co. v I C C*, 664 F.2d 568, 591 (6th Cir. 1981), *Hanna Mining Co v Escanaba & Lake Superior R R Co*, 664 F.2d 594, 600 (6th Cir. 1981), *Burlington N R R Co v I C C*, 679 F.2d 934, 937, 939-40 (D.C. Cir. 1982), *Kansas Power & Light Co. v Burlington N R R Co*, 740 F.2d 780, 785 (10th Cir. 1984), Docket No. 39060, *Petition for Review of a Decision of the Public Service Commission of Utah Pursuant to 49 U S C 11501* (ICC served March 2, 1983), *Rates on Iron Ore, Randville to Escanaba via Iron Mountain*, 367 I.C.C. 506, 510 (1983), *Toledo Edison Co v Norfolk & Western Ry Co*, 367 I.C.C. 869 (1983).

repealed U.S.C. § 10713 (which was effectively replaced by 49 U.S.C. § 10709), stated that in order for an arrangement to qualify as a contract, it must “[s]pecify that the contract is made pursuant to 49 U.S.C. § 10713.” 49 C.F.R. § 1313.1(b)(1)(1995).

The Board is thus effectively proposing to reinstate a regulatory requirement that was adopted to implement a legislative provision that has subsequently been repealed (except as to agricultural products, where a filing requirement remains). The Board’s reversion to a regulation for which an explicit jurisdictional basis has been eliminated appears at least potentially problematic.

C. The Better Approach is to Hold Railroads Responsible for their Ambiguities

Because of the above and related concerns, WCIL continues to believe that the superior substantive standard would be the one that WCIL presented in its comments on the NPR in Ex Parte No. 669, namely, that where there is some room for ambiguity as to whether a particular arrangement presents a contract or a common carriage arrangement, the ambiguity should be construed against the railroad as the drafter of the relevant document(s) and/or the party that is in the best position to avoid the creation of the ambiguity

Such an approach would achieve both fairness and efficiency, and do so in terms of not only any instant dispute, but also the potential for future disputes. It would minimize both the Board’s potential usurpation of any court jurisdiction and the potential for the creation of orphan arrangements that are subject to the jurisdiction of neither the Board nor any court. Such an approach would not unduly punish or burden the railroads as they could avoid the ambiguity simply by establishing the nature of their transportation

arrangements with clarity. The approach is also entirely consistent with Board and court precedent, as well as the basic principles that ambiguities are to be construed against the drafter and/or the party with the most responsibility, power, or control over the arrangement.³

D. The Board Should Focus on Common Carriage and Not Contracts

If the Board is still determined to proceed with the establishment of some rule or clear standard in this area, it would seem more appropriate for the Board to focus on defining what constitutes a valid or viable common carrier arrangement, rather than seeking to determine what is required to create a valid rail transportation contract. The focus on what constitutes a common carrier arrangement, as opposed to what constitutes a valid contract, is more in keeping with the limitations on the Board's jurisdiction, and would also reduce the prospects that an arrangement would be found to be neither common carriage nor a contract.

E. The Board Should Consider a "Safe Harbor" Approach

To the extent that the Board is nonetheless committed to addressing what constitutes a contract, it should give consideration to having its pronouncements define

³See, e.g., Docket No. 40819, *UARCO Inc v James B Orr* (STB served June 25, 1999), at 4 (citing *Rebel Motor Freight, Inc v. ICC*, 971 F.2d 1288, 1294-95 (6th Cir. 1992)) ("It is well-settled that, where an ambiguity exists in a tariff, the ambiguity is resolved in favor of the shipper"); Docket No. 41997, *NSL, Inc v Owen Eugene Whitlock* (STB served Nov. 18, 1999), at 8 ("the general rule [is] that an ambiguous tariff is to be construed against the maker"); *Restatement, Second, Contracts* § 206 ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds).

what amounts to a "safe harbor," as opposed to prescribing what is necessarily required to establish a contract in each and every instance. In other words, the safe harbor would establish the limits for what the Board will normally treat as a contract without further analysis (at least absent unusual factors), and a case-by-case approach would still be used for situations that do not fall within the safe harbor.

This safe harbor approach would achieve several related objectives. First, it would carry little risk that situations that truly constitute contracts would be misclassified as common carriage arrangements simply because of some technical defect as to form. An arrangement qualifying for the contract safe harbor under the terms outlined in the Board's Notice would be unlikely to be classified as a tariff in any event. Second, and related to the first, the safe harbor approach would minimize the possibilities that (a) a court would usurp the Board's authority over common carriage (thereby precluding a shipper from bringing a maximum reasonable rate case), and (b) that the Board's jurisdiction would be expanded to encompass contracts. Third, the safe harbor approach would allow for the possibility that individual arrangements that do not fit within the safe harbor might still be classified as contracts based on the particular facts; WCTI suspects that such an outcome would and should be the appropriate treatment in various instances. In that regard, WCTL believes that there would, and should, still be room for construing ambiguities against the railroad as the drafter or cheapest cost-avoider for the reasons noted *supra*.

F. Board Actions May Well Have an Impact on Contracts

Sixth, WCTL has some doubt about the Board's statement or implication that transportation provided under a contract is not subject to regulation by the Board. It is certainly true that contract transportation is not subject to direct regulation by the Board. *e.g.*, the Board lacks jurisdiction to determine that a contract rate is unreasonable (except for agricultural products in limited instances). However, WCTL notes that there are instances, at least potential ones, where regulatory actions taken by the Board could potentially have some, perhaps even considerable, impact upon the transportation provided under a contract.

A number of examples come to mind. For example, a contract might obligate the carrier to provide a level of service equivalent to that of common carriage. Statements by the Board specifying, clarifying, or otherwise addressing the extent of the common carriage obligation might then bear upon the level of service that the shipper could hope to receive, and thus the transportation might be subject to considerable indirect regulation by the Board.⁴ Second, a finding that a carrier had impermissibly embargoed service on a line or invoked force majeure under a tariff might have some bearing (albeit not necessarily direct) on whether any analogous provisions in a contract could be successfully utilized. Third, a contract shipper might claim under 49 U.S.C. §

⁴WCTL notes that today's contract shipper may be tomorrow's common carriage shipper. Indeed, a shipper can simultaneously have arrangements to move the same (or otherwise identical) goods from the same origin to the same destination via both contract and common carriage. For example, a shipper that has a contract might also make a request for common carrier service if the contract service proves to be inadequate or to otherwise supplement contract service.

11101(a) that a carrier should not be able to refuse to provide contract service on the grounds that it was required to provide common carrier service. Such an issue might conceivably be entertained by the Board in response to a request for declaratory order by the contract shipper, or in response to filings by the railroad carrier or common carriage customer(s) before the Board. In either event, the Board's ruling could have considerable bearing on what level of service the contract shipper would actually receive. While the contract shipper might be entitled to some measure of damages, such damages, especially if they are deemed liquidated, might be insufficient to make the shipper whole.

Fourth, a contract customer might seek to oppose an abandonment that would bear upon its contract service. Fifth, a contract shipper, either alone or in conjunction with common carriage customer(s), might contend that the carrier has unreasonably refused to expand capacity along a line or other portion of its operations. Sixth, a contract shipper should have some ability to initiate or join in a request for directed service or, alternatively, to oppose such a request. Seventh, contract shippers have regularly, and properly, participated in railroad merger and other control proceedings. Eighth, contract shippers also participate in general rulemaking and other proceedings (such as the instant one).

Ninth, a contract might not necessarily govern all aspects of the relationship between a shipper and a railroad. *e g*, the parties might specify that the contract does not govern such matters as car hire or demurrage. WCTL recognizes in this regard that the Board has held in cases such as Docket No. 41510, *II B. Fuller Co v Southern Pac Transp Co* (SFB served Aug. 20, 1997), the Board held that it did not have jurisdiction

over a dispute over tariff provisions incorporated into a contract because “the referenced tariff terms became contract terms for purposes of transportation performed under the contract.” *Sl. op.* at 3.⁵ However, if the contract explicitly provides that the parties’ agreement or bargain does not affect the separate application of a tariff, then the tariff may well still be applicable.

In short, a claim that a railroad shipper necessarily foregoes all regulatory options by entering into a contract appears somewhat simplistic.

G. Pitfalls in Suggesting Common Carriage Rates are Open to Challenge

WCTL has similar concerns over requiring the railroad to inform the shipper that a common carriage rate “might be open to challenge before the Board.” Because of the impact of the jurisdictional threshold, the market dominance test, exemptions, the nature of the Board’s maximum rate reasonableness standards (especially as they are currently applied), and the heavy litigation costs to bring a case under those standards, statements that a rate “might be open to challenge before the Board” may inspire unfounded hopes on the part of shippers. Moreover, the fact is that in various instances, contract shippers will have remedies not available to common carriage shippers. While much obviously depends on the relative features of the contract and the common carriage arrangements, the Board should be very careful about imposing any

⁵To a similar effect is the Board’s recent decision in STB Docket No. 42094 (Sub-No. 1), *PCI Transportation Inc. v Fort Worth & Western R.R. Co* (STB served Apr. 25, 2008). WCTL notes that the Board prudently made its dismissal “without prejudice to PCI filing a tariff-based complaint in the event a court decision or other action justifies such a filing.” *Sl. op.* at 6.

requirement that would force a carrier to indicate or imply that a common carriage arrangement is superior to a contract in any particular instance.

II. Potential to Create Additional Transactional Costs

The Board should also be wary of imposing additional transactional costs on railroad transportation arrangements. In the case of the unit train arrangements that are typical of WCTL members, the dollars involved are very substantial, and clear disclosure and opportunity for discussion of the nature of the arrangement is certainly appropriate. However, in the case of smaller movements, shippers may find it difficult to get the attention of railroad marketing representatives at all, and imposing requirements may make the railroads less willing to market their services or lead to higher rates.⁶

I. Alternate Disclosure Language

With the foregoing in mind, WCTL suggests that an appropriate general disclosure might read as follows:

Railroad XXX may provide railroad transportation services under either (1) common carriage or (2) contract. Under federal law, shippers may require Railroad XXX to establish a rate for common carriage transportation and then to provide that common carriage service. Under some circumstances, the shipper may be able to challenge the rate or other aspects of that common carriage transportation before the Surface Transportation Board ("STB"), part of the United States Department of Transportation. Contract arrangements are generally not subject to challenge before the STB, but shippers may prefer contract arrangements over common carriage service under some circumstances

⁶WCTL understands from the Board's recent hearing in Ex Parte No. 677 on the common carrier obligation that at least one carrier appears to be imposing a service fee on telephone calls made merely for the purpose of inquiring as to the status of a shipment.

WCTL does not contend that the above language is perfect, but it seems less problematic than that proposed by the Board's Notice. Additionally, in terms of safe harbor language regarding contracts, WCTL language such as: "This agreement constitutes a contract under 49 U.S.C. 10709, and not a common carriage arrangement" would be helpful, clear, and relatively non-invasive. Similarly, a common carrier publication that stated: "This document establishes a rate for common carriage service under 49 U.S.C. 11101(a) and not a contract under 49 U.S.C. 10709" would seem relatively clear and useful. WCTL adds that merely labeling an arrangement as common carriage does not necessarily make it so. *e.g.* there is still the duty to disclose the arrangement, including the rate, to others. In particular, an intent from the outset not to disclose the rates raises a serious question as to whether a common carriage arrangement has been properly established. Furthermore, as the Board's Notice seems to recognize, dissemination of rate information in a concentrated market can have a negative effect on competition, regardless of whether rate disclosure could have a pro-competitive effect in a competitive market.

III. CONCLUSION

Accordingly, for the reasons stated above, WCTL submits that the better approach for the Board to adopt in this area would be to hold the railroads responsible for any ambiguities they create in establishing arrangements that may be subject to classification as either common carriage or contract. Beyond that the Board would be better advised to establish a safe harbor rather than provide definitive guidance as to what constitutes a contract or common carriage. The Board should avoid providing any

implication that common carriage service is necessarily superior for shippers. The Board should also recognize that its actions can have a significant impact on contract carriage that is beyond its direct jurisdiction, and the Board should avoid instructing or encouraging railroads to make any statements to the contrary. Finally, the Board should continue to be concerned about the anti-competitive consequences of the hybrid pricing arrangements undertaken by the western railroads in recent years

Respectfully submitted,

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