

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Ex Parte 676  
*RAIL TRANSPORTATION CONTRACTS UNDER 49 U.S.C. 10709*

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COMMENTS  
of  
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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Dated: May 12, 2008

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Ex Parte 676

*RAIL TRANSPORTATION CONTRACTS UNDER 49 U.S.C. 10709*

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COMMENTS  
of  
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League ("League") submits these Comments in response to the invitation of the Board set forth in its joint decision in Ex Parte 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709* and in this proceeding, Ex Parte 676, *Rail Transportation Contracts Under 49 U.S.C. 10709*, served March 12, 2008 ("Decision"). In that Decision, the Board terminated its proceeding in Ex Parte 676 since all parties allegedly "oppose[d the Board's] proposal" (see Decision, p. 2); because it would "not adequately resolve the concerns that motivated the proposal" (Decision, p. 4); and because it "could well result in unintended consequences that are best avoided" (Decision, p. 4).

However, in the Decision, the Board indicated that it "remained concerned with the lack of any clear demarcation between common carriage rates and contract pricing arrangements . . ." and it noted the "blurring between common carriage and contract rates . . . particularly regarding the 'take-it-or-leave-it,' unilateral rate arrangements that resemble a tariff but are deemed a contract by carriers." Decision, p. 4, footnote omitted. The Board indicated that, instead of pursuing its proposal in Ex Parte 669, it "intend[ed] to pursue this concern through another means," specifically this rulemaking to consider requirements for a "full disclosure statement" and "informed consent" when a carrier seeks to enter into a rail transportation contract. The

Board asked for "suggestions" from parties as to what language should be included in this full disclosure/informed consent requirement. Decision, p. 4

For the reasons set forth herein, the League strongly believes that the Board's proposal would do nothing to alleviate the concern about "'take-it-or-leave-it' unilateral rate arrangements that resemble a tariff but are deemed a contract by carriers" and would in fact tend to exacerbate the problem by providing carriers with a ready means of enforcing, over a shipper's objections, such "take-it-or-leave-it" unilateral "contract" arrangements

The League is disturbed by the fact that the Board, in its Joint Decision, ignored the proposal that numerous shipper groups and individual shippers provided in Joint Reply Comments submitted on August 2, 2007. See Joint Reply Comments submitted on behalf of 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, August 2, 2007, p. 3 ("Joint Proposal"). That proposal, which the Board never even mentioned in its Decision, would have provided a sound means to address the concerns about "take-it-or-leave-it unilateral rate arrangements" voiced by the shippers, and seemingly shared by the Board. That proposal would have also cured the uncertainty between common and contract arrangements identified by the Board and would have resolved questions about the legal basis for the Board's original proposal.

The shippers' August 2, 2007 Joint Proposal deserves better. The League believes that the shippers' Joint Proposal should be noticed by the Board as set forth in the Joint Reply Comments, as the Board reviews other means to address its concerns. See, Joint Reply Comments, pp. 3-4 and Decision, p. 4.

**I THE BOARD MISCHARACTERIZED SHIPPER OPPOSITION TO ITS ORIGINAL PROPOSAL AND IGNORED THE SHIPPERS' JOINT PROPOSAL**

In its Joint Decision, the Board noted that "both shippers and carriers oppose our proposal " Joint Decision, p. 2. With respect to the shippers' position in this case, the League believes that this statement, while "correct" on one level since shippers (including the League) did not endorse the text of the Board's proposed wording in Ex Parte 669, does not fairly characterize the thrust of the shippers' views. For example, the League in its opening comments noted that it supported "the general thrust and intent of the Board's proposed rule, and that it believed that "the proposed rule is useful " NITL opening Comments in Ex Parte 676, June 4, 2007, pp 2, 4. However, the League did believe that the Board needed to clarify the meaning, scope and intent of the proposed rule *Id* at 5-9. Specifically, the League's opening Comments noted that the Board needed to clarify the meaning of the term "bilateral agreement" in its proposed rule, and make certain other clarifications. *Id*. However, it was clear in the League's opening Comments that the League supported a rule that would clarify the structure of contracts versus tariffs. In its Reply Comments in Ex Parte 669 filed on August 2, 2007, the League noted that other parties agreed with the League that a clarification of the legal status of the structure of contracts versus tariffs would be useful. NITL Reply Comments, August 2, 2007, p 3 and fn 1

The League did not simply criticize the text of the Board's proposal. Specifically, on August 2, 2007, the League, along with several other national organizations and individual shippers, submitted to the Board carefully-considered Joint Reply Comments dated August 2, 2007, which contained within them a suggested text of a rule for the Board's consideration, namely the Joint Proposal identified above. In those Joint Reply Comments, the Joint Commenters noted that shippers and carriers needed clarity as to what is, or is not, a common carrier relationship as distinct from a contractual relationship. The Joint Commenters believed

that the Board should correctly define the common carrier relationship between a shipper and a rail carrier. Thus, the Joint Commenters noted that, instead of attempting to define what is a contract, a sounder, more legally defensible approach 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. See Joint Reply Comments, pp. 2-3.

Accordingly, the Joint Commenters recommended 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

Joint Reply Comments, August 2, 2007, p. 3. Because that approach was different from the approach suggested by the Board, the Joint Commenters asked the Board to re-notice that proposal and provide the public with an opportunity for comments.

The Joint Proposal submitted by the League and other organizations would, in the League's view, have cured the problems in the text of the rule proposed by the Board, and thus would have "resolve[d] the concerns that motivated the proposal . . . ." See Decision, p. 4 and NITL Reply Comments in Ex Parte 669, August 2, 2007, pp. 6-7. The Joint Proposal would also have resolved the "unintended consequences" noted by the Board, which involved the potential disruption to various well established common carriage pricing arrangements, including unit train tariffs, annual volume rates, the Certificate of Transportation ("COT") program, and similar arrangements. As noted by the League in its Reply Comments, the text of the Joint Proposal would "would encompass such common tariff offerings as annual volume rates, COTS, etc "

NITL Reply Comments in Ex Parte 669, August 2, 2007, p. 6

Moreover, the Joint Proposal would have also cured the legal problem identified by a number of parties to the Ex Parte 669 proceeding, namely, the extent of the Board's authority to define a "contract." See, NITL Reply Comments in Ex Parte 669, August 2, 2007, pp 3-4 and fn 3, see Decision, p. 2. Rather than defining a rail transportation "contract," the Joint Proposal would have instead defined a rail "tariff," a matter over which both shippers and carriers agreed that the Board had authority. See NITL Reply Comments in Ex Parte 669, August 2, 2007, p. 4 and fn. 4.

However, despite the care that the Joint Commenters took and effort which the Joint Reply Commenters made to provide the Board with an approach that would have cured the major problems in the text of the Board's approach, and would have provided a cure to the "take-it-or-leave-it" unilateral rate arrangements that many commenters noted were becoming increasingly prevalent in the rail industry, the Board totally ignored the Joint Proposal in its Decision

## **II THE BOARD SHOULD NOTICE THE SHIPPERS' JOINT PROPOSAL INSTEAD OF ITS FULL DISCLOSURE/INFORMED CONSENT PROPOSAL**

The League continues to believe that the Joint Proposal submitted by the Joint Reply Commenters on August 2, 2007 should be considered by the Board as it reviews "other means" to achieve its objective. In its Decision, the Board noted that it remained "concerned" about the lack of any clear demarcation between common carrier rates and contract pricing arrangements, and in particular noted the concerns of shippers over "'take-it-or-leave-it,' unilateral rate arrangements that resemble a tariff but are deemed a contract by carriers." However, the Board's proposed full disclosure/informed consent proposal will do nothing to alleviate the problem of "'take-it-or-leave-it,' unilateral rate arrangements" identified by shippers and cited by the Board in its decision

Indeed, since the Board's Decision, additional information has come to light which shows the need for the proposed rule set forth in the Joint Proposal. In the recent hearing held by the Board in Ex Parte 677, *Common Carrier Obligation of Railroads*, the Board heard testimony from witnesses that should raise the Board's concerns. For example, Mr. Charles F. Cogliandro of Calabrian Corporation, in Panel IV-C, noted at the hearing that his company was subject to a "take-it-or-leave-it approach" to contracts with forced "acceptance" of the rate. Mr. Cogliandro noted that he had contacted the STB about this matter and did not get effective relief – an indication, the League believes, that the Board is lacking regulatory tools in this area. Mr. Cogliandro, in responding to a question from Commissioner Buttrey, indicated that the carrier had refused to quote his company a tariff rate – again a clear indication of a "take it or leave it" contract practice. Similarly, Ms. Robin Burns of Occidental Chemical, in Panel IV-D, noted at the hearing that a carrier had indicated that if her company requested a tariff rate for any movement, then all contract rate offers would be pulled – again, in the League's view a clear "take it or leave it" approach.

Accordingly, the League is submitting, for the record in this proceeding, both the Joint Reply Comments dated August 2, 2007 submitted by the League and other parties in Ex Parte 669, as well as its separate Reply Comments dated August 2, 2007 which discuss in more detail the merits of the Joint Proposal. The League requests the Board to consider the Joint Proposal in this proceeding, and to notice the Joint Proposal for comment by the industry.

**III. THE BOARD'S PROPOSED FULL DISCLOSURE / INFORMED CONSENT REQUIREMENT WILL NOT CURE AND WILL LIKELY EXACERBATE THE PROBLEM OF "TAKE-IT-OR-LEAVE-IT" UNILATERAL RATE ARRANGEMENTS**

In its Decision, the Board appears to believe that its proposed "full disclosure / informed consent" requirement will cure the Board's concerns. However, the League believes that a full

disclosure / informed consent requirement will do nothing to cure the problem of "take-it-or-leave-it," unilateral rate arrangements, and in fact will likely exacerbate the problem. This is because, once the Board prescribes full disclosure / informed consent language, that language is very likely to appear on any and all correspondence involving rates from a carrier to a shipper, and will likely require a shipper's "consent" no matter how unwilling the shipper is to accept the carrier's "offer." The language is likely also to migrate to the public price lists posted on carriers' websites and other locations, and/or to carrier responses to shipper requests for service based on those public price lists. Through "full disclosure / informed consent" language, public price lists will be transformed into contract "offers." Carriers will thereby obtain a complete means of insulating themselves from the Board's jurisdiction, which will be restricted to situations in which shippers make a specific request for a tariff rate subject to the Board's jurisdiction – in which case the carrier will make clear that such a request will void all existing contract offers.

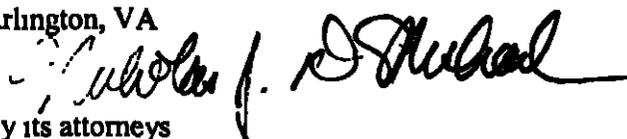
There is a strong and growing need for the Board to clarify what constitutes a contract, and what constitutes a tariff. But the Board's proposal, instead of clarifying that situation, simply hands to carriers the ability to make that determination. A shipper without transportation options – an increasing fact of life in an increasingly transportation-capacity-constrained world – will be forced to accept "contracts" that are, in form and substance, indistinguishable from tariffs regulated by the Board. This would be a far cry from the concept of a "contract" as an agreement entered by two willing parties for their mutual benefit.

#### IV. CONCLUSION

The League asks the Board to notice the Joint Proposal submitted in the Joint Reply Comments filed in Ex Parte 669 for comment by the public.

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Dated: May 12, 2008

# **ATTACHMENT A**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 669

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

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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  
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Dated: August 2, 2007

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Ex Parte No. 669

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

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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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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.

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# **ATTACHMENT B**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Ex Parte 669

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

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REPLY COMMENTS

of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Ex Parte 669

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

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REPLY COMMENTS  
of  
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League ("League") is pleased to submit these Reply Comments in response to the Notice of Proposed Rulemaking served March 28, 2007. In that Notice, the Board is seeking public comments on its proposal to interpret the word "contract" in 49 U.S.C. 10709 as embracing any "bilateral agreement" between a shipper and a carrier for rail transportation in which the railroad agrees to a "specific rate for a specific period of time in exchange for consideration from the shipper, such as a commitment to tender a specific amount of freight during a specific period or to make specific investments in rail facilities."

In its Comments filed June 4, 2007, the League noted that greater clarity was needed in identifying rate offers as "contracts" or "tariffs," and that therefore the Board should clarify the metes and bounds of the relationship between a shipper and a carrier. The League pointed out that such a clarification was particularly necessary because carriers have been issuing documents which on their face are labeled as "contracts," but which bear all the indicia of tariffs. However, the League also noted several significant problems with the Board's proposed approach, and

strongly urged the Board to adopt several changes in order to clarify the rule's scope and intent; to avoid unnecessary restrictive features; and to insure that the rule is not circumvented.

Specifically, the League noted that the Board's definition was ambiguous and substantially overbroad, since it would encompass arrangements such as minimum annual volume arrangements that have been treated as tariffs for decades. Moreover, the wording of the Board's proposed rule did not fit easily into other situations in which contracts might be negotiated, such as demurrage arrangements. The League urged the Board to consider more broadly and deeply the types of situations that might be covered by the proposed rule, and insure that the coverage is appropriate

The League has carefully reviewed the comments filed by the other parties in this proceeding. Its review of those comments reveal several common threads. First, a number of parties agree with the League that a clarification of the legal relationship between rail common carriers and their shippers would be useful.<sup>1</sup> Second, virtually all parties, even those who believe that clarification in this area would be useful, are confused and troubled by the many uncertainties and ambiguities in the Board's proposed rule. While a wide variety of uncertainties and problems are discussed, a number of parties indicate that the Board's proposed rule could, on the one hand, apparently turn many common tariff mechanisms (such as annual volume tariffs) into "contracts," and on the other, exclude from "contract" status a wide variety of non-rate arrangements.<sup>2</sup> Third, many parties – both shippers and carriers -- question, to a greater or lesser degree, the Board's authority to issue a rule defining a "contract," on the grounds that the

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<sup>1</sup> See, e.g., CSX Transportation, Inc ("CSXT") Comments, p 1, Comments of E I. DuPont de Nemours (DuPont"), p 1, Comments of U S Clay Producers Traffic Association ("Clay Producers"), p 3, Comments of Ameren Energy Fuels and Services Company ("Ameren"), p 2

<sup>2</sup> See, e.g., BNSF Railway ("BNSF") Comments, p 3, Canadian Pacific Railway ("CP") Comments, pp 4-5, Dairyland Power Cooperative ("Dairyland") Comments, p 5; Entergy Services Inc. ("Entergy") Comments, p. 9, Western Coal Traffic League ("WCTL") Comments, p. 18 et seq

existence and terms of a contract is a matter for the courts and state law<sup>3</sup> Fourth, many parties – both shippers and carriers -- believe that the Board does have the authority to define a "tariff."<sup>4</sup>

I. THE BOARD SHOULD REVISE ITS PROPOSAL AS ADVOCATED IN THE JOINT REPLY COMMENTS, AND RE-NOTICE THIS PROCEEDING

In view of these commonalities, the League has combined with several other commenters to submit "Joint Reply Comments" to the Board. These Joint Reply Comments, which are in the nature of a brief "Statement of Principles," urge the Board to take a different tack in this case, and to reconsider and think through more clearly the meaning and implications of its proposal.

As emphasized in the Joint Reply Comments, the League strongly believes that shippers and carriers need more clarity as to what is, or is not, a common carrier relationship as distinct from a contractual relationship. The need for clarity has arisen particularly as carriers have developed more varied "hybrid" mechanisms. Indeed, the comments filed in this proceeding have confirmed the accuracy of the League's opening comments, that carriers, in addition to developing KCPL-type "tariffs that look like contracts", are also developing highly ambiguous arrangements that are labeled "contracts" but that have all the earmarks of a tariff. Arkansas Electric Cooperative Corporation ("AECC"), for example, reports on the existence of "non-signatory contracts" that appear designed to "self-exempt" a carrier and evade regulatory scrutiny. AECC Comments, p. 8. The Clay Producers comment on the same phenomenon. Clay Producers' Comments, p. 2. CSXT freely concedes that it has developed "Private Price Quotations" that it considers to be contracts, even though they do not require the shipper to transport a single carload of freight, make any investments, or in fact make any commitment of

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<sup>3</sup> See, e.g., Ameren Comments, p. 5, AECC Comment, p. 3, Association of American Railroad ("AAR") Comments, p. 3; CP Comments, pp. 3-4, CSXT Comments, p. 5, Dairyland Comments, p. 6, Entergy Comments, p. 8, Norfolk Southern Railroad Company ("NS") Comments, pp. 4-6; WCTL Comments, pp. 15-17

<sup>4</sup> See, e.g., Ameren Comments, p. 6, CSXT Comments, p. 17, Dairyland Comments, p. 6, NS Comments, p. 8; WCTL Comments, p. 27.

any kind whatsoever. CSXT Comments, pp. 6-7. These "PPQs" appear to be indistinguishable from tariff rates. NS concedes that it has a similar program, called "NSSCs", or "signatureless contracts." NS Comments, p. 3. DuPont reports that the arrangements that it has seen allow the carrier to change the rate on 30 days' notice, are otherwise governed by published tariffs, and are accepted by tendering traffic, with no commitment to tender any volume of traffic. DuPont Comments, p. 2. Union Pacific Railroad Company ("UP") similarly indicates that it has "unilateral" contract arrangements which are "accepted" simply by tendering traffic, which contain no other commitments, but which can be unilaterally cancelled by UP on just 30 days' notice. UP Comments, pp. 12-13. Entergy correctly notes that the "hybrid pricing" vehicles being developed by carriers appear to be crafted to allow carriers the "maximum flexibility to fend off any review by either the STB or the courts." Entergy Comments, p. 10. The Board should not permit such unilateral attempts to evade its regulatory jurisdiction.

Given this uncertain landscape, the League disagrees with those parties who suggest that there is no need for the Board to better define the relationship between shippers and carriers.<sup>5</sup> More clarity is needed. Moreover, the League strongly believes that rail transportation contracts should be the product of negotiation and agreement between shippers and carriers, and that contracts under Section 10709 should result in an exchange of mutual promises. The League agrees with the Association of American Railroads that the Board should not stifle innovative developments between shippers and carriers, see AAR Comments, p. 3, but the League also believes that the Board should insure that contracts are the product of an agreement between shippers and carriers, and are not simply a unilateral offering by the carrier. Carriers should not be able to "self-exempt"<sup>6</sup> by imposing documents on shippers that are in reality in the nature of

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<sup>5</sup> See, e.g., CP Comments, p. 2.

<sup>6</sup> See, AECC Comments, p. 5.

"a holding out to the public to provide specified transportation services for a given price that a shipper accepts by tendering traffic,"<sup>7</sup> and calling such documents "contracts" exempt from regulatory scrutiny.

The Joint Reply Comments note that, instead of trying to define a "contract," the sounder, more legally defensible approach would be for the Board to define what is a common carrier tariff, a matter that is clearly within the jurisdiction and legal authority of the Board. The Joint Reply Comments recommend for the Board's consideration a definition of a "tariff," which would be defined as a "unilateral offering" by a rail carrier or carriers of rates, charges, conditions or service terms. A "unilateral offering" would be one that could be used or accepted by tendering, or stating an intent to tender, traffic to the carrier.

Several points should be noted. The definition of a "tariff" suggested in the Joint Reply comments is, and should be, broad. In this respect, the League agrees with BNSF that the Board should not seek to discourage or artificially preclude public common carrier pricing. BNSF Comment, p. 2; see also, UP Comments, p. 10. Indeed, BNSF correctly notes that "publicly available common carrier rates subject to regulatory oversight have always been a central feature of railroad pricing," and that common carrier rates "can benefit shippers and the public" by facilitating efficient competitive markets *Id.*

The proposed Joint Reply Comment definition of common carriers rates would encompass such common tariff offerings as traditional annual volume rates, COTS, etc., which are unilateral offerings by the rail carrier. See, *e g*, *Coal to New York Harbor Area*, 311 I C C. 355 (1960). Tariffs could, under the proposed definition and as supported by long precedent, contain conditions on their use, such as a minimum volume requirement to qualify for the rate stated in the tariff, which if not satisfied, a different rate would apply. *Id.* Other conditions, such

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<sup>7</sup> See Notice, p 4

as notification requirements or force majeure provisions that are common in tariffs, would similarly not transform a unilateral offering by a carrier into a contract. See, UP Comments, pp. 6-7. Of course if, instead of a unilateral offering, an exchange contained mutual promises by the shipper and the carrier, such a document might be a contract, but that question would be one for the courts and state law.

The proposed definition of a tariff would encompass all arrangements that could be used or accepted by tendering, or stating an intent to tender, traffic to the carrier. The "used or accepted" and "intent to tender" language would clarify that an inquiry by a shipper of the carrier for a rate and service terms, or a notice from the shipper that traffic is available to the carrier, or similar actions, would not transform a unilateral offering by the carrier into a contract between the parties.

Finally, a shipper's use of such a tariff, as conditioned, would not, without more, transform an minimum annual volume tariff into a contract. Mere use of a unilateral offering does not and should not make a tariff "bilateral" and therefore a "contract" under the proposed Joint Reply Comment definition. The League strongly agrees that the Board should clarify that matter in any rule. See, NGFA Comments, p. 7.<sup>8</sup> Thus, the proposed definition notes that "[t]ariffs cannot be used to form a contract under Section 10709." Of course, tariff provisions may be incorporated into contracts by agreement of the parties, but the suggested rule indicates that tariffs by themselves should not form contracts under Section 10709.

The League strongly urges the Board, in view of the points stated in the Joint Reply Comments, to revise its approach in line with the suggestions in the Joint Reply Comments

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<sup>8</sup> The Joint Reply Comments note that common carrier transportation as evidenced in bills of lading is a type of "contract, but that it is also clear that the mere use of a bill of lading does not create a Section 10709 contract. See also, AECC Comments, p. 4, CSXT Comments, p. 10, fn. 8

## II OTHER REPLY COMMENTS

In addition to the comments above, the League would like to address a few other specific points raised in the opening Comments of several parties

As noted above, CSXT notes the Board's desire to clarify the distinction between public tariffs and Section 10709 contracts in order to reduce the potential for confusion and uncertainty. CSXT Comments, p. 1 Like other parties, CSXT has problems with the definition proposed by the Board, and CSXT suggests three possible approaches that the Board might use to address its concerns.

The League agrees with CSXT that the Board's proposed definition poses uncertainties and problems, but does not agree with a number of the solutions advanced by the carrier. CSXT suggests that the Board could establish a rule that all non-public price mechanisms that quote a specific rate for a specific customer will be deemed contracts for Section 10709 purposes, regardless of structure. CSXT Comments, p. 14, 15-16 But such a rule would be both too narrow and far too broad The CSXT proposal is too narrow because, as BNSF correctly points out, contracts may be formed even if they are not confidential, and there is no statutory requirement for contract confidentiality. BNSF Comments, pp. 3-4. But the CSXT proposal would also be far too broad Tariffs can effectively apply to a single shipper (for example, a utility shipping coal between two named points). Indeed, tariffs can apply even to named shippers. *Rates for a Named Shipper or Receiver*, 367 I.C.C. 959 (1984). Moreover, as a policy matter, "signatureless" contracts, or other unilateral offers, should not be "deemed" contracts Additionally, the CSXT proposal, to define a contract by "deeming" that certain kinds of documents are contracts, is flatly inconsistent with numerous commenters who note that the courts, and not the Board, have the jurisdiction to determine the existence and terms of a "contract." See, e.g., NS Comments, p.p. 4-6, CP Comments, p. 3

CSXT also suggests that the Board could forbid public tariffs that are stated to be effective for a specific duration or a specific period of time. CSXT Comments, p. 17. While the League believes that the Board could and should more clearly define common carrier tariffs as set forth in the Joint Reply Comments, CSXT's proposed tariff solution, which would define a tariff by its content rather than its structure, would be inconsistent with 40 U.S.C. 10701(c) and sound public policy.

Indeed, the League does not believe that the distinction advanced by CSXT, between "public prices . . . made available to any and all customers" and "private pricing agreements . . . made available to specific individual customers," see CSXT Comments, p. 13, is either a lawful or sound basis upon which to distinguish between common carrier tariffs and contracts. As noted above, BNSF correctly notes that contracts may be public BNSF Comments, pp. 3-4. As noted above, common carrier tariffs may apply to a single shipper or even to a named shipper.<sup>9</sup> Indeed, UP argues that its Circular 111 is "valid common carrier pricing document that does not reveal prices publicly," a position at odds with the "public" versus "private" distinction advanced by CSXT. UP Comments, p. 11.

Norfolk Southern, like a number of other parties and like the Joint Reply Commenters, indicates that the Board should focus on pricing authorities that are within its jurisdiction – tariffs – rather than on contracts. See, NS Comments, pp. 8-13. However, NS would have the Board limit its inquiry solely to "what is required of a railroad when a customer formally requests a common carrier rate . . . ." NS Comments, p. 8. The League respectfully believes that

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<sup>9</sup> It should be noted that there is a distinction in the statute between Section 11101(b), the statutory provision applicable to common carrier rates which states that a rail carrier must "provided to any person, on request, the carrier's rates and other service terms", and Section 11101(d), the statutory provision applicable to agricultural common carrier rates, in which the carrier must, in *addition* to the requirements in Section 11101(b), "*publish, make available and retain for public inspection* ." 49 U.S.C. 11101(d). The difference in statutory wording can be argued to mean that ordinary (i.e., non-agricultural) common carrier rates need not be published, made available, and retained for public inspection

such a limited inquiry would not meet the needs of either the Board or the transportation community. The problem faced by the Board and the shipping public is not uncertainty in the case when a shipper makes a formal request for a tariff. Rather, it is the pervasive, ongoing uncertainty and confusion over the status and legal effect of rate and service offerings in the absence of a formal request – the legal nature and effect of day-to-day, business-to-business exchanges for transportation rates and service, which the Board needs to clarify for both legal/jurisdictional and business reasons.

**III. CONCLUSION**

The League appreciates this opportunity to present its views to the Board on this important matter.

Respectfully submitted,

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