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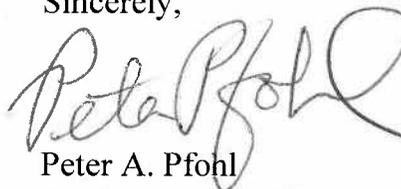
The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
Attn: Ex Parte No. 676
395 E Street, SW
Washington, D.C. 20423-0001

Re: Ex Parte No. 676, Rail Transportation Contracts
Under 49 U.S.C. 10709

Dear Ms. Quinlan:

Please find enclosed the Reply Comments of the Western Coal Traffic League in the above-referenced proceeding.

Sincerely,



Peter A. Pfohl

An Attorney for Western Coal Traffic League

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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STB Ex Parte No. 676

REPLY COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE

WESTERN COAL TRAFFIC LEAGUE

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Dated: March 9, 2009

Its Attorneys

BEFORE THE
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STB Ex Parte No. 676

REPLY COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE

The Western Coal Traffic League (“WCTL” or “League”)¹ hereby submits the following reply comments in response to the Notice of Proposed Rule (“Notice” or “NPR”) that the Surface Transportation Board (“STB” or “Board”) served in the above-captioned proceeding on January 6, 2009, and the opening comments filed by others on or about February 5, 2009.

The Board has now spent almost two years in self-initiated rulemaking proceedings attempting to forge new rules designed to (i) create more certainty over the agency’s jurisdiction over railroad rate instruments and (ii) address concerns over “the increased use of [railroad] pricing arrangements [that] could create an environment where collusive activities in the form of anticompetitive price signaling could occur.” See NPR

¹ WCTL is a voluntary association, whose regular membership consists entirely of shippers of coal mined west of the Mississippi River that is transported by rail. WCTL members presently ship and receive in excess of 175 million tons of coal by rail each year. WCTL’s members are: Ameren Energy Fuels and Services, Arizona Electric Power Cooperative, Inc., CLECO Corporation, Austin Energy (City of Austin, Texas), 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.

at 2. WCTL does not, and has not taken issue with the Board's objectives in initiating this proceeding. However, it is clear from the opening comments by parties on the new rules proposed by the Board in its Notice that the proposed rules have not garnered much, if any, real enthusiasm from any commenting party, nor does it appear that any of the commentors view the proposed rule as a particularly effective and reasonable approach to addressing the stated NPR objectives.

Under the Board's NPR, a rate instrument that purports to be a railroad transportation contract under 49 U.S.C. § 10709 (and outside of the Board's jurisdiction) would need to contain a prescribed disclaimer on its first page, and, absent such a disclaimer, the rate instrument would be deemed subject to the Board's jurisdiction, absent "clear and convincing" evidence to the contrary. The railroad commentors appear to generally support the inclusion of some sort of "simple" disclosure statement in agreements, but in a modified, stripped down manner.²

WCTL continues to respectfully submit that the Board's proposed rules may bring some clarity, but that clarity can be achieved on the basis of appropriate case-by-case determinations based upon a review of all pertinent facts, as the Board has done in recent matters involving two WCTL members. See Kansas City Power & Light Co. v. Union Pac. R.R., STB Docket No. 42095 (STB served March 29, 2007), at 3 ("whether a

² See, e.g., BNSF Comments at 4 n.1; UP Comments at 2-3; NS Comments at 2-3. Interestingly, the railroads' opening comments suggest that similar language already is contained in many railroad contracts (see, e.g., UP Comments at 2-3; KCS Comments at 4), although the Board's initiation of its NPR would appear to suggest a Board view that these existing carrier disclosure statement policies alone are insufficient in removing ambiguity over railroad pricing instruments.

contract or common carrier rate exists has been examined on a case-by-case basis in light of the parties' intent"); accord Union Pac. R.R. – Petition For Declaratory Order, STB Finance Docket No. 35021 (STB served May 16, 2007) at 2-3. Furthermore, by proceeding on a case-by-case basis, the Board can hold the carrier(s) responsible for the ambiguity and uncertainty they have created through their actions. Holding carriers responsible for their actions is an appropriate approach for an agency that has a responsibility to regulate carriers subject to its jurisdiction. This approach deserves additional consideration by the agency.

Finally, WCTL continues to share the Board's expressed concerns over potential collusion brought about by the pricing actions/instruments instituted by market dominant carriers in recent years. Of course, the answer to these concerns does not lie in the Board's adoption of a new rule defining or demarking rail contracts – and the Board has not even attempted to address the issue of potential railroad collusion as part of any of its proposals in this proceeding. Instead, resolving the market problems brought about by a highly concentrated rail industry likely requires additional oversight vigilance, a willingness to reexamine past agency decisions where appropriate in light of today's market realities, and a firm resolve by the Board to exercise its regulatory authority in a manner that will help prevent monopoly pricing abuses and enhance intermodal rail competition.

WCTL appreciates the opportunity to submit these reply comments.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE

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