

**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
Washington, DC 20423**

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

**REPLY COMMENTS OF  
ARKANSAS ELECTRIC COOPERATIVE CORPORATION**

Arkansas Electric Cooperative Corporation (“AECC”)<sup>1</sup> respectfully submits these reply comments in response to the opening comments submitted by other parties regarding the Board’s planned use of a disclosure statement to differentiate common carrier tariffs from rail transportation contracts. AECC’s reply comments focus primarily on assertions made by railroad parties to the effect that:

- there is no need for Board action;
- shippers do not enjoy common carrier protections on movements of exempt commodities; and,
- the existence of a contract absolves the railroad of any responsibility to quote a common carrier rate.

As described in further detail below, these assertions should not dissuade the Board from its pursuit of effective remedies for the problems stemming from public pricing it has

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<sup>1</sup> AECC and its interests in this proceeding were described in AECC’s comments submitted February 5, 2009.

identified.<sup>2</sup> Specific comments regarding each of the three rail arguments are presented below.

1. The need for Board action – Carriers such as BNSF and KCS claim that there is basically no evidence of disputes between carriers and shippers that would justify the actions the Board has proposed in this proceeding. Such assertions flatly disregard the Board’s explicit and candid recognition of the public interest problems associated with “hybrid” rail pricing arrangements, including the shell game they create regarding the Board’s jurisdiction, and the possibility that such arrangements may facilitate anticompetitive price signaling. It is not surprising that the railroads would be happy to preserve the status quo. However, for shippers affected by public pricing, including big PRB coal shippers, the problems identified by the Board would not go away if the Board were to follow the railroad advice to pretend there is no reason to do anything.
2. Common carrier protections and movements of exempt commodities. UP and KCS refer to the general proposition that shippers of exempt commodities do not receive the Board protections afforded to common carriage. While this may be a tautology within any given set of class exemptions, it overlooks the underlying fact that the exemptions themselves exist largely or entirely on the basis of the presumed effectiveness of competitive market forces for specific types of movements. If shippers of exempt commodities perceive that they have need for

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<sup>2</sup> As described in the Board’s January 6 notice, the effort to clarify the definition of rail contracts that began in Ex Parte No. 669, Interpretation of the Term “Contract” in 49 U.S.C. § 10709, sought to address (a) “uncertainty” in the “... demarcation between a contract rate and common carriage rate”; and, (b) the possibility “...that increased use of hybrid pricing arrangements could create an environment where collusive activities in the form of anticompetitive price signaling could occur.”

the Board protections associated with common carriage, this would provide clear confirmation that the railroads are not competing as vigorously as they once did, and that the rationales for current class exemptions may no longer be valid. The railroads may fantasize that they can do whatever they want to exempt traffic, but they cannot change the fact that the Board has both the authority and the obligation to revisit and, if necessary, revoke the exemptions if the price/service options being offered to shippers reflect anything other than appropriately vigorous competition.

3. Existence of contract vs. obligation to quote rate – UP’s comments contain assertions to the effect that the existence of a contract means a shipper is not entitled to request a common carrier rate. While § 10709(c) is abundantly clear that the transportation provided under a contract occurs outside the jurisdiction of the Board, UP’s comments imply that a shipper entering a contract is making a broader waiver than this. Even with a contract in place, there are many scenarios under which a shipper might reasonably seek a common carrier rate quotation. For example, a shipper may face a need to move volumes above the level specified in an existing contract, or between points not specified in the contract. While such movements might hypothetically be handled through an amendment of the existing contract, UP asserts without foundation that the shipper is not entitled to request a common carrier rate for such movements. As long as the shipper is not seeking Board involvement in the specific movements that have been committed under an existing contract, there is no blanket rationale for a railroad to refuse to answer a common carrier rate request from a contract shipper.

Whatever action the Board may take regarding the proposed disclosure statement, it should not become complacent about the public pricing concerns it has identified.

Notwithstanding the railroad smokescreens, confidential contracting is an essential component of the competitive environment envisioned in the Staggers Act, and Board vigilance in response to the threats posed by public pricing is certainly warranted.

Even if a disclosure statement is adopted, there likely will be a need for the Board to enforce vigorously the carrier obligations to publish a common carrier rate (49 U.S.C. § 11101 (b)) and to provide notice at least 20 days prior to changing an existing common carrier rate (49 U.S.C. § 11101 (c)). Also, as discussed in further detail in AECC's opening comments, it may be advisable for the Board to take additional steps to prevent anti-competitive price signaling. With these types of support, confidential contracting can reassume its key role in stimulating competition, improving productivity and promoting the public interest.

AECC appreciates the Board's continuing efforts to review and adapt its practices to the changing circumstances of the rail industry.

Respectfully submitted,

Arkansas Electric Cooperative Corporation



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