

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 669

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

COMMENTS OF AMEREN ENERGY FUELS AND SERVICES COMPANY

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I. INTRODUCTION

Ameren Energy Fuels and Services Company (“AFS”) hereby submits its comments in response to the Notice of Proposed Rulemaking (“NPRM”) of the Surface Transportation Board (“STB” or “Board”), concerning the interpretation of the term “contract” in 49 U.S.C. § 10709. STB Ex Parte No. 669, *Interpretation of the Term “Contract” in 49 U.S.C. § 10709* (Served March 28, 2007) (“*Ex Parte No. 669*”). As explained below, AFS generally supports the Board’s decision to examine more closely the distinction between contract and common carrier pricing, including so-called “hybrid” pricing, as it exists in the industry. AFS believes that the Board’s jurisdiction with regard to contracts is narrowly circumscribed by 49 U.S.C. § 10709, and that the agency should more appropriately be interpreting the railroads’ common carrier obligation for rail service.

II. IDENTITY AND INTEREST OF AMEREN ENERGY FUELS AND SERVICES COMPANY

Ameren Corporation, the parent company of AFS (collectively “Ameren”), is a public utility holding company that provides electricity to approximately 2.3 million customers in Missouri and Illinois. AFS provides fuel and energy-related products and services for Ameren and its affiliated operating subsidiaries. This includes processing and transporting all coal, natural gas and oil for Ameren’s 14,800 megawatts of generating capacity. AFS also is responsible for ash management and emission services for the generating facilities, as well as managing natural gas supplies for more than 900,000 Ameren retail gas customers, and 2,400 megawatts of gas fired generation.

Ameren Corporation, through its various operating subsidiaries, owns 11 coal-fired plants, most of which rely on rail service as the primary mode for transporting fuel. Ameren purchases over 35 million tons of coal each year from the Powder River Basin, its primary source of coal, and also purchases coal from Illinois and other sources. The primary rail carriers that serve Ameren’s plants are the Union Pacific Railroad Company and the BNSF Railway Company, both of which have used the “hybrid” pricing mechanisms questioned in this proceeding.

As the Board knows, Ameren has aggressively sought to establish competitive transportation alternatives at all of its coal-fired plants. In order to achieve this objective, Ameren has invested hundreds of millions of dollars in rail and related infrastructure, primarily in the construction or purchase of private or common carrier rail lines. Ameren has also made substantial investments in rail cars, unloading facilities, a coal transload terminal, barge unloading facilities, storage and side tracks, turn-outs, wye connections and related infrastructure in order to increase the efficiency of its rail service. It is very important to note that these

improvements inure not just to Ameren's benefit, but also to the benefit of the railroads serving its plants, enhancing (among other things) their utilization of assets and personnel.

By establishing rail-to-rail competition at its plants, Ameren's key strategic objectives are to increase coal sourcing options and gain bargaining leverage to negotiate the terms and conditions of rail service to its plants and to have its negotiated terms and conditions memorialized in private rail transportation contracts as was authorized in the *Staggers Act of 1980* ("Staggers Act").¹ As the Board recognized, the Staggers Act authorized contracts with the goal of encouraging widespread use of such agreements.² In fact, rail contacts flourished in the environment where there was rail competition between the many railroads that existed at that time. However, in light of the increasing concentration within the rail industry, the railroads' pricing practices have allowed some railroads to move away from contracts.

III. COMMENTS

A. This NPRM is Timely in Light of Recent STB Proceedings

In light of recent proceedings that raise questions about the distinction between common and contract carrier pricing,³ Ameren believes that *Ex Parte No. 669* is timely. Ameren hopes that comments submitted in this docket will better inform the Board (and the public) about the Class I railroads' current practices with regard to common carrier and contract arrangements, and so-called "hybrid" pricing mechanisms that, as the Board has stated, "have all of the characteristics of a rail transportation contract." *Ex Parte No. 669*, at 4. This has been

¹ Pub. L. No. 96-448, 94 Stat. 1895 (1980).

² *Ex Parte No. 699* at 2, n4.

³ STB Docket No. 42095, *Kansas City Power & Light v. Union Pacific Railroad Co.*, 2007 STB Lexis 137 (Served March 29, 2007) ("KCPL"); STB Finance Docket No. 35021, *Petition of Union Pacific Railroad Co. for a Declaratory Order*.

problematic since Class I railroads have been increasing their use of hybrid pricing mechanisms which has resulted in a blurred distinction regarding the status of various shipper arrangements.

B. The Board's Proposed Rule Should Define Common Carrier Service Instead of Attempting to Interpret the Term "Contract"

Ameren believes that the proposed rule in *Ex Parte No. 669* is somewhat misconstrued because overwhelming precedent establishes that the Board lacks authority to determine whether a shipper and a carrier have entered into a private contract under 49 U.S.C. § 10709 and thus the Board's interpretation of the term "contract" may also be outside of the Board's jurisdiction. In Ameren's recently filed Reply in STB Docket No. 35021, *Union Pacific Railroad Company—Petition for Declaratory Order*, Ameren presented case law from the Federal Courts of Appeals for the D.C. Circuit, the Sixth Circuit, and the Tenth Circuit that establishes that the Board lacks jurisdiction over questions related to contract existence. *See Kansas Power & Light Co. v. Burlington Northern Railroad Co.*, 740 F.2d 780 (10th Cir. 1984); *Cleveland Cliffs Iron Co. v. I.C.C.*, 664 F.2d 568, 591 (6th Cir. 1981); *Burlington Northern Railroad Co. v. I.C.C.*, 679 F.2d 934, 942 (D.C. Cir. 1982). These opinions make clear that such questions must be settled in court, rather than before the agency:

The Commission also appears to imply that it has authority under subsection 10713(j) to entertain and decide questions concerning the existence and validity of contracts in terms of the common law of contracts. This is the first indication to this court that the Commission intended to undertake such *a purely judicial task*, and we are unable to find support in the Staggers Rail Act or prior law for it. Certainly, the Commission *never before* has claimed any expertise as to the existence and interpretation of contracts and has *never* claimed that it can enforce a contract between a shipper and a carrier.

Cleveland Cliffs Iron Co., 664 F.2d 568, 591 (6th Cir. 1981) [emphasis added].

The foregoing precedent is consistent with the legislative history of the Staggers Act. The report of the U.S. House of Representatives notes,

The Committee believes that contracts shall be treated *as they are elsewhere in the economy*. Absent undue impairment of the common carrier obligation, the Commission is *without jurisdiction to reject a contract*, and enforcement of a contract must be in the courts. . . Rail carriers and shippers should be free to negotiate and enter into contracts without concern about whether the Commission will disapprove a contract *except for impairing the carrier's ability to fulfill the common carrier obligation*.

H. Rep. No. 96-1035, at 58 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 3978, 4003 [emphasis added]. Plainly, Congress intended to limit the ICC's jurisdiction over private contracts to the authority contained at current 49 U.S.C. § 10709(f). The agency could only decide whether a railroad's contracts impaired its ability to fulfill its common carrier obligation. All other matters, including contract existence, were for the courts to decide. Thus, the Board should more appropriately define what constitutes common carrier service, or tariffs, which are more squarely within the Board's jurisdiction.

IV. CONCLUSION

Ameren appreciates the opportunity to express its views in this proceeding and applauds the Board for taking the initiative to examine more closely Class I railroads' pricing practices, in particular as they relate to the distinction between contract and common carrier service. Ameren believes that before the Board takes any action in this proceeding, it should ensure that it collects sufficient information about such practices. Ameren also believes that rather than attempting to interpret a "contract" which the Board may lack the appropriate jurisdiction, the Board should address the pricing practices in the context of the increased industry concentration and the corresponding impact on the overall common carrier obligation of the railroads.

Respectfully submitted,

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