

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41191 (Sub-No. 1)

AEP TEXAS NORTH COMPANY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

MOTION TO COMPEL DISCOVERY

Decided: November 14, 2003

By complaint filed and served on defendant The Burlington Northern and Santa Fe Railway Company (BNSF) on August 11, 2003, AEP Texas North Company (AEP Texas)¹ alleges that the carrier's rates for the movement of coal from origins in the Powder River Basin of Wyoming to AEP Texas' Oklaunion Generating Station (Oklaunion), located near Vernon, TX, are unreasonably high. AEP Texas alleges that BNSF possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed along with other relief.

On October 31, 2003, AEP Texas filed a second motion to compel. In its motion AEP Texas seeks two categories of information: (1) Request for Production No. 27 (RFP 27), which includes agreements related to the sale, lease, maintenance and/or operation of a rail line between Sterling and Wallace, NE; and (2) to the extent both parties agree on the proper scope of production, material related to joint facilities, equipment leases, and real estate transactions associated with lines in the stand alone railroad (SARR) States that are used or could reasonably be used to transport coal. AEP Texas asks for an order compelling BNSF to produce the contracts and other responsive documents because they contain confidentiality provisions that would preclude their production absent such an order. BNSF replied to the motion on November 7, 2003.

As to the first category of information, BNSF states that it does not oppose production of documents in response to RFP 27 but, because of a confidentiality provision, it cannot produce responsive material without an order from the Board. As to the second category of information, BNSF states that, although it has not completed its investigation of materials, it believes that responsive materials exist. However, those materials may contain confidentiality provisions restricting disclosure to third parties. Thus, BNSF states that it is not opposed to an order compelling the production of the requested materials, to the extent that both parties agree on the scope of production.

¹ AEP Texas is the successor in interest to West Texas Utilities Company.

The second motion to compel filed by AEP Texas will be granted. The protective order for this proceeding served on September 11, 2003, resolves any concerns arising out of third-party confidentiality agreements contained in the contracts.²

It is ordered:

1. AEP Texas's second motion to compel production of BNSF's agreements related to the sale, lease, maintenance and/or operation of a rail line between Sterling and Wallace, NE, is granted.
2. AEP Texas's second motion to compel production of material related to joint facilities, equipment leases, and real estate transactions is granted to the extent agreed upon by both parties.
3. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

² See Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056, slip op. at 2-3 (STB served Feb. 9, 2001) (“While we understand the concerns raised by those shippers here, we are satisfied that the parties’ agreements regarding scope and the application of the ‘highly confidential’ provisions of the protective order are sufficient to protect the interests of third-party shippers.”).