

interline service and the Board's rate prescription in this case did not remove or otherwise restrict that discretion. AEPCO's purported "convenience" concerns and its vague speculation about future adverse actions by the defendants provide no basis for limiting the discretion that railroads have as to the form of rates they may establish.

Background

On November 22, 2011 the Board served a decision in this proceeding finding that the rates charged by BNSF and UP for unit coal train transportation to AEPCO's Apache Generating Station were unreasonably high.¹ The Board ordered the railroads "to establish and maintain rates for movements of the issue traffic that do not exceed the maximum reasonable revenue-to-variable cost levels prescribed in this decision." Decision at 39. The Board prescribed rates at the jurisdictional threshold, directing that the prescribed rates should "not exceed 180% of the variable costs of providing the service." *Id.* Variable costs were to be calculated "pursuant to unadjusted URCS, with indexing as appropriate," *id.*, and were to be "defendants' actual variable costs." *Id.* at 38.

In compliance with the order, each railroad published proportional rates set at 180% of its variable costs for its portion of the movements in question. UP published proportional rates from Deming, New Mexico, and Pueblo, Colorado, to the Apache Generating Station on December 28, 2011. BNSF published proportional rates from New Mexico mines to Deming, New Mexico, and from Powder River Basin mines to Pueblo, Colorado, both for ultimate delivery by UP to Apache Generating Station, on December 30, 2011. The proportional rates became effective January 1, 2012.

¹ *Arizona Electric Power Cooperative, Inc. v. BNSF Railway Co.*, STB Docket No. 42113 (served Nov. 22, 2011) (prescribing rates at 180% of defendants' URCS variable costs) ("Decision").

Argument

I. Proportional Rates Are Permissible Under the Board's Order and the Statute

AEPCO's claim that defendants should have established single factor joint through rates is based on the mistaken premise that the Board in its November 22, 2011 decision ordered defendants to establish single factor joint rates. But AEPCO does not cite any language in the decision ordering defendants to establish single factor joint rates. In fact, the November 22, 2011 decision does not require publication of a single factor joint rate. Indeed, the decision does not speak to the *form* of the rate to be published. The Board prescribed the *maximum level* of the rates, leaving it to the defendant carriers to determine the form that those rates would take. The Board ordered that rates may "not exceed 180% of the variable costs of providing the service." Decision at 39. As the Board recently acknowledged, a rate prescription is defined by its express terms. *Texas Municipal Power Agency v. Burlington Northern & Santa Fe Railway Co.*, STB Docket No. 42056, slip op. at 2 (served Jan. 20, 2012). The rate prescription in this case expressly limited the amount that defendants could charge AEPCO but it said nothing that would require defendants to establish single factor joint through rates.

The Board was explicit about how the railroads were to comply with this rate cap when setting their rates. Rates were to be based on the actual variable costs of providing the service calculated using unadjusted URCS. Since UP and BNSF have separate URCS costs, the practical effect of the Board's order was that the prescribed rates should be calculated based on the separate URCS costs of each railroad for its segment of the movement.² In effect, the decision requires each railroad to calculate a separate factor set at 180% of its variable cost of providing service and the total rate for any particular through routing is the sum of the individual

² BNSF's portion of the New Mexico movements includes a movement over the Southwest Railroad, whose costs are determined using Western Regional URCS.

factors. The decision did not say that the railroads were required to publish a single rate that consisted only of the sum of the two separately calculated portions of the rate. The decision left the defendants free to determine what form the prescribed rates would take.

AEPCO argues that since the challenged rates were single factor through rates, “the prescriptive effect of the Board’s decision runs to joint rates alone.” Petition at 5. AEPCO’s argument appears to be that the Board must have intended to require that the defendants establish joint through rates because the rates that were challenged were joint through rates. In support of this argument, AEPCO cites a 1945 ICC decision, *Tex-O-Kan Flour Mills Co. v. Abilene & S. Ry.*, 263 I.C.C. 91 (1945), that actually demonstrates that the form of the challenged rate does *not* determine what type of rate defendant railroads may establish to comply with a rate prescription. There, the challenged rates were joint through rates and the ICC concluded that, for reasons peculiar to the circumstances of that case, joint through rates should be maintained in the future. However, the ICC’s decision expressly stated that the prescribed rates should be joint through rates. Moreover, the ICC made it clear that if it had not specified that joint through rates should be maintained, the railroads would have been free to establish rates in the form of their choosing: “[W]e could have prescribed merely the maximum through rates without requiring their establishment as joint rates, leaving to the defendants the determination of the method of publication.” *Id.* at 95. In the present case, the Board did precisely what the ICC suggested: The Board prescribed the maximum level of the rates while “leaving to the defendants the determination of the method of publication,” including the publication of proportional rates by each railroad.

The railroads’ publication of proportional rates is entirely consistent with the statute, as well as the Board’s prescription. Under 49 U.S.C. § 10701(c), a railroad “may establish any

rate” unless the Board finds under 49 U.S.C. § 10701(d) that the rail carrier has “market dominance.” Only when the Board finds market dominance does the statute impose a limitation on the railroad’s rate, and that limitation is that the *level* of the rate must be reasonable. 49 U.S.C. § 10701(d). In this case, the Board determined the maximum reasonable level of rates and the railroads complied with the Board’s prescription by publishing rates at that maximum reasonable level. Under the statute, AEPCO is entitled to transportation from origin to destination at reasonable rates and that is what the proportional rates published by BNSF and UP provide.

AEPCO claims that the Board’s discussion in the November 22, 2011 decision of the issue regarding the interchange assumptions that should be used in the SAC analysis supports AEPCO’s position that defendants are required to establish joint through rates. In the November 22, 2011 decision, the Board concluded, among other things, that since BNSF and UP had established joint through rates through particular interchange points when they had the discretion to establish separately challengeable rates to or from those interchange points, they were not in a position to insist that AEPCO respect their choice of an interchange in presenting SAC evidence. Decision at 13.

AEPCO’s reliance on this aspect of the Board’s decision to support its claim that the Board in fact prescribed joint through rates is unfounded. The premise of the Board’s discussion of the form-of-rate issue was that railroads have discretion with respect to the form of the rate they will establish. Having rejected defendants’ arguments regarding the interchanges that can be assumed in the SAC evidence on grounds that the defendants had broad discretion as to the form of rates they can establish, it would be inconsistent and illogical to deny defendants the

discretion as to the form of the rates they may now establish to comply with the Board's rate prescription.

The railroads fully complied with the Board's November 22, 2011 decision when they established separate proportional rates at 180 percent of each railroad's respective variable costs to provide service.

II. AEPCO Has Presented No Valid Basis for Limiting the Defendants' Discretion as to the Form of Rates They Will Use to Provide the Issue Traffic Service

As shown above, AEPCO's principal argument in the Petition – that the Board ordered defendants to establish joint through rates – is wrong. AEPCO also presents various additional reasons the Board should now order defendants to establish joint through rates. None of the reasons AEPCO suggests provides a valid basis for limiting the statutory discretion that railroads have as to the form of the rates they choose to establish for interline service.

First, AEPCO claims that defendants' use of proportional rates will "maximize BNSF's and UP's opportunity to thwart any challenges to their rates." Petition at 7. This argument makes no sense. AEPCO has already prevailed in its challenge to defendants' rates. AEPCO succeeded in obtaining a Board ruling ordering defendants to charge no more than the jurisdictional threshold. The form of rates that defendants establish in the future has no bearing on the results of the rate reasonableness analysis that the Board already carried out. While AEPCO professes a vague concern about future actions by defendants, AEPCO never explains what future actions it is concerned about, why the defendants' use of proportional rates might be relevant to such unspecified future actions, or why the Board would be unable to deal with any such unspecified future actions when or if they occur. In any event, it would be improper to limit defendants' discretion as to the form of the rates they charge based only on vague speculation about actions that defendants might take in the future.

AEPCO's arguments about the supposed complexity and inconvenience of proportional rates are also without merit. AEPCO's claim that it must now "pay two separate freight bills for each shipment" borders on the frivolous and it hardly amounts to a justification for taking away the railroads' statutory discretion as to the form of the rates. AEPCO also claims that it "has been unnecessarily burdened with having to determine whether each railroad properly calculated its portion of the rate." Petition at 10. But as described above, the rates prescribed by the Board must be calculated based on each railroad's individual URCS costs. This must be done regardless of whether the ultimate rates are published as proportional rates or as single factor joint through rates. The relief AEPCO demands – a single factor joint rate – does not address the supposed concern that AEPCO has identified. If the accuracy of the rates is AEPCO's true concern, it would appear that AEPCO should prefer separately published proportional rates. With proportional rates, in case of errors, AEPCO would be able immediately to identify which calculations it disagrees with rather than having to untangle the calculations of the individual railroads that would be obscured if a single factor joint rate were published.

Finally, AEPCO points to a difference in certain URCS assumptions used by BNSF and UP in calculating their respective proportional rates for movements from New Mexico origins. Petition at 10-11. But AEPCO's technical concerns about the URCS assumptions used to calculate variable costs have nothing to do with the form of the rate. It will be necessary for the parties to reach an understanding as to the assumptions that will be used to calculate the prescribed rates regardless of whether those rates are published as single factor joint through rates or as separate proportional rates. BNSF is willing to sit down with UP and AEPCO to work out these very minor differences that have a negligible impact on the level of the rates. There

was no need for AEPCO to seek a Board order requiring the publication of single factor joint through rates to deal with these minor technical issues.

Conclusion

For the foregoing reasons, the Board should deny AEPCO's petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that this 30th day of January, 2012, I served a copy of BNSF's Reply to Complainants' January 9, 2012 Petition on the following by hand delivery:

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