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SERVICE DATE – NOVEMBER 5, 2010

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35305

ARKANSAS ELECTRIC COOPERATIVE CORPORATION—PETITION FOR
DECLARATORY ORDER

Digest¹: In this case, shippers have asked the Board to declare unreasonable a BNSF Railway tariff that implements a program intended to limit the amount of coal dust that blows off of rail cars during transport. In the meantime, the shippers also have asked the Board to prevent the tariff from taking effect while the unreasonableness issue is litigated. In this decision, the Board denies the latter request because the shippers have failed to show that allowing the rule to take effect while the case is being litigated will cause irreparable harm to the shippers.

Decided: November 4, 2010

In response to a petition filed by Arkansas Electric Cooperative Corporation (AECC) on October 2, 2009, and the reply of BNSF Railway Company (BNSF) on October 21, 2009, the Board instituted a declaratory order proceeding under 49 U.S.C. § 721 and 5 U.S.C. § 554(e) on December 1, 2009. The issues raised in this proceeding include whether provisions of a BNSF tariff requiring shippers to limit the emission of coal dust from rail cars constitute an unreasonable practice, whether BNSF may establish rules regarding coal dust dispersion from coal trains operating over its lines, and whether refusal to provide service to shippers not in compliance with the provisions would violate BNSF's common carrier obligation. Tariff 6041-B Items 100 and 101, the provisions at issue, require that Powder River Basin (PRB) coal shippers using the Joint Line² or the Black Hills Subdivision ensure that the emission of coal dust from the cars does not exceed the coal dust emissions standards set forth in the tariff. The tariff was scheduled to go into effect on October 1, 2010.

On September 30, 2010, AECC filed a petition to enjoin BNSF from enforcing the tariff provisions until the Board resolves the underlying petition for declaratory order. AECC states

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The Joint Line is the rail line serving the southern PRB that is jointly owned by BNSF and the Union Pacific Railroad Company and operated and maintained by BNSF.

that it had requested that BNSF delay the effective date of the tariff provisions, but that BNSF denied this request and planned to implement the tariff provisions on October 1, 2010. Similarly, on September 30, 2010, the Western Coal Traffic League, American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association (collectively, Coal Shipper Organizations) filed a motion for a housekeeping stay asking that the Board issue an order enjoining the effective date of the tariff provisions pending a further order of the Board. Coal Shipper Organizations state that they are aware of the separate motion for injunctive relief filed by AECC in this proceeding, but argue that their housekeeping stay request does not require the type of showing advanced in AECC's motion. On October 7, 2010, BNSF replied to both petitions.

DISCUSSION AND CONCLUSIONS

The petitions by AECC and Coal Shipper Organizations seek the same outcome—an order enjoining BNSF from instituting its tariff until the Board has ruled on the merits of the petition for declaratory order. Therefore, both petitions are properly analyzed under 49 U.S.C. § 721(b)(4), and the Board will address them together in this decision.³

Under 49 U.S.C. § 721(b)(4), the Board may, “when necessary to prevent irreparable harm, issue an appropriate order without regard to” the procedural requirements of 5 U.S.C. §§ 551-559. To obtain an injunction under this provision, the requesting party must show: (1) it is likely to succeed on the merits; (2) it will be irreparably harmed in the absence of the requested relief; (3) issuance of the injunction will not substantially harm other parties; and (4) granting the injunction is in the public interest. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921, 925 (D.C. Cir. 1958). A party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). AECC and Coal Shipper Organizations have failed to meet this burden.

Based on the voluminous record developed in this proceeding, serious questions have been raised regarding the challenged tariff provisions: the lack of certainty that a shipper is in compliance with the tariff at the time the coal cars are loaded and are placed under BNSF's control; the lack of transparency in testing practices and concerns about the underlying science of the coal dust emissions monitoring; and the as yet unstated consequences when a shipment fails

³ BNSF argues that AECC lacks standing to seek an injunction against the tariff provisions because it is not a customer of BNSF, and therefore not subject to the tariff provisions. In a letter filed on October 7, 2010, AECC argues that its petition was expressly supported by American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association. Because we deny AECC's petition for stay, we do not need to rule on this argument.

the emission test. These uncertainties will be a part of the Board's consideration of the reasonableness of BNSF's approach in this particular tariff to controlling coal dust emissions.⁴

Notwithstanding these serious questions on the merits of BNSF's tariff, AECC and Coal Shipper Organizations have not demonstrated that they will be irreparably harmed if the tariff goes into effect under the circumstances here, pending our decision on the merits. In its reply, BNSF states that it has not established any specific enforcement measures, and that it has committed to providing at least 60-days notice before undertaking any such measures against common carrier shippers not in compliance with the tariff provisions. Hence, there is no imminent, irreparable harm to any shippers given that shippers face no current possibility of a sanction for noncompliance. Should BNSF, contrary to its statements in this proceeding, attempt to impose penalties for violating the tariff without giving 60-days notice, the Board could act quickly to enjoin such actions upon a petition for injunction from the penalized shipper. Furthermore, if BNSF were to take enforcement measures after giving 60-days notice, the penalized party would have sufficient time to petition the Board to enjoin the measure upon a showing of irreparable harm. Because AECC and Coal Shipper Organizations fail to carry the burden of persuasion as to irreparable harm, we need not address the other requirements for injunctive relief.⁵

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. AECC's petition for stay is denied.
2. Coal Shipper Organizations' motion for stay is denied.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.

⁴ BNSF's statements at the hearing suggested that it was amenable to creating more certainty by establishing an activity-based "safe harbor" that would clarify how a shipper could comply with the tariff. However, BNSF has not amended the tariff to include this type of provision.

⁵ See, e.g., Effingham R.R.—Operation Exemption—Line Owned by Total Quality Warehouse, FD 33528 (STB served Dec. 16, 1997).