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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42099

STB Docket No. 42100

STB Docket No. 42101

E.I. DUPONT DE NEMOURS AND COMPANY

v.

CSX TRANSPORTATION, INC.

Decided: November 21, 2008

Pursuant to 49 U.S.C. 722(c), we reopen these proceedings to address the effect of a material error in the Revenue Shortfall Allocation Method (RSAM) formula.[1]

BACKGROUND

In these three proceedings, E.I. du Pont de Nemours and Company (DuPont) challenged the reasonableness of certain rates charged by CSX Transportation, Inc. (CSXT) for the movement of certain commodities, including hazardous materials. DuPont elected to pursue rate relief under the Three-Benchmark methodology as clarified and modified in Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1) (STB served Sept. 5, 2007) (Simplified Standards).

Under the Three-Benchmark methodology, the reasonableness of a challenged rate is determined by examining that challenged rate in relation to three benchmark figures. Each benchmark is expressed as a ratio of revenue to variable costs of providing rail service (R/VC ratio). The first benchmark, the Revenue Shortfall Allocation Methodology (RSAM) is intended to measure the average markup that the railroad would need to collect from all of its "potentially captive traffic" (traffic with an R/VC ratio above 180%) to earn adequate revenues as measured by the Board under 49 U.S.C. 10704(a)(2) (i.e., earn a return on investment equal to the railroad industry cost of capital). The second benchmark, the $R/VC_{>180}$ benchmark, measures the average markup over variable cost currently earned by the defendant railroad on its potentially captive traffic. The third benchmark, the R/VC_{COMP} benchmark, is used to compare the markup being

[1] These proceedings are not consolidated but addressed together for administrative convenience.

paid by the challenged traffic to the average markup assessed on other comparable potentially captive traffic.

In decisions served on June 3, 2008, the Board found: (1) in STB Docket No. 42099 that CSXT had market dominance over the transportation at issue and that the challenged rates were unreasonably high; (2) in STB Docket No. 42100 that CSXT had market dominance over two of the three transportation movements at issue and that the challenged rates for those two movements were unreasonably high and; (3) in STB Docket No. 42101 that CSXT had market dominance over the transportation movement at issue and that the challenged rate was unreasonably high.

In each case, however, CSXT argued that there was a flaw with the RSAM formula. CSXT contended that the RSAM formula failed to account for the effect of taxes on the amount of money a carrier would need to earn to be revenue adequate and argued that the Board needed to adjust the RSAM figure in each case. DuPont opposed this adjustment claiming that it was not necessary to correct RSAM, that it would be inappropriate to change the RSAM formula in the context of a simplified case, and that CSXT's proposed correction was itself flawed.

The Board declined to rule on CSXT's proposed adjustment to RSAM in the context of these cases because the expedited nature of the procedures under Simplified Standards could not accommodate collateral challenges to the methodologies used therein. Instead, the Board instituted a separate rulemaking proceeding in Simplified Standards for Rail Rate Cases—Taxes in Revenue Shortfall Allocation Method, STB Ex Parte No. 646 (Sub-No. 2), to consider the issue and obtain broad public input.

In that rulemaking, the Board concluded that the RSAM formula did contain a material error because it mixed pre-tax and after-tax revenue.[2] The Board, therefore, changed the formula to calculate the revenue shortfall (or overage) to pre-tax dollars consistent with the other elements of the formula. Simplified Standards for Rail Rate Cases—Taxes in Revenue Shortfall Allocation Method, STB Ex Parte No. 646 (Sub-No.2) (STB served November 21, 2008) (Taxes in Revenue Shortfall Allocation Method).

DISCUSSION & CONCLUSIONS

Under 49 U.S.C. 722(c), the Board may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances: (1) reopen a proceeding; (2) grant rehearing, reargument, or reconsideration of an action of the Board; or (3) change an action of the Board. Because the RSAM formula — an essential component of the Three-Benchmark methodology used in these three cases — contained a material flaw, we will reopen these proceedings.

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[2] The revenue shortfall ($REV_{short/overage}$) – i.e., the difference between the return on net investment that a carrier needs to earn in order to achieve revenue adequacy and the amount that the carrier actually earns – is calculated after all taxes have been paid, and thus is stated on an "after-tax" basis. However, the revenues to which the revenue adequacy shortfall is added ($REV_{>180}$) are calculated before any allowance for taxes, and are thus stated on a "pre-tax" basis.

In Taxes in Revenue Shortfall Allocation Method, we stated that we will institute a separate proceeding to ask the railroads for additional information to properly calculate state taxes. When we receive that information, we will issue new RSAM figures. Once new RSAM figures are issued, we will set a schedule for DuPont and CSXT to fully brief us regarding how to best apply the correct RSAM numbers in these proceedings.

Finally, following the policy announced in Major Issues in Rail Rate Cases, STB Ex Parte 657 (Sub-No. 1) (STB served Oct. 30, 2006), affirmed sub nom. BNSF v. STB, 526 F.3d 770 (D.C. Cir. 2008) (Major Issues), we will lift the prescriptive effect of the rate prescription as of the effective date of this decision. The railroad is instructed to maintain the status quo, i.e., continue to charge the prescribed rate, and the parties shall keep account of the amounts paid during the pendency of this reopening. Upon completion of the reopening, one party will be required to make the other party whole. Although this policy was announced for full stand-alone cost cases, we are extending the policy to cases decided under our simplified rate procedures. The purpose of the policy is to avoid causing irreparable harm to either party during the pendency of the reopened proceeding. See Major Issues at 70, 74. Those considerations apply equally to these cases.

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

It is ordered:

1. These proceedings are reopened.

2. The prescriptive effect of the rate prescriptions are removed, the railroad is instructed to maintain the status quo, and the parties shall keep account of the amounts paid during the pendency of this reopening.

3. This decision is effective on its date of service.

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

Anne K. Quinlan
Acting Secretary