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SEC

SERVICE DATE - JUNE 9, 1999

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42038

MINNESOTA POWER, INC.

v.

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

Decided: June 8, 1999

In a decision served May 11, 1999 (May 11 decision), the Board granted in part the motions to compel discovery filed February 22, 1999, by defendant Duluth, Missabe and Iron Range Railway Company (DMIR), and on March 22, 1999, by complainant Minnesota Power, Inc. (MPI).<sup>1</sup> The Board also adopted a new procedural schedule that had been stipulated by the parties.<sup>2</sup> As pertinent, the new procedural schedule provided that discovery must be completed by June 10, 1999. On May 24, 1999, MPI filed a motion requesting modification of the discovery deadline. DMIR replied on June 1, 1999.<sup>3</sup>

In its motion, MPI asserts that it expects DMIR to delay turning over the bulk of its discovery materials until the very end of the discovery period. MPI contends that such a tactic,

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<sup>1</sup> An earlier motion by MPI to compel discovery was granted in part in a decision served March 10, 1999 (March 10 decision).

<sup>2</sup> Under the general procedural schedule established in Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527 (STB served Oct. 1 and Nov. 15, 1996), aff'd sub nom. United Transp. Union-III. Legis. Bd. v. STB, 132 F.3d 71 (D.C. Cir. 1998), discovery was to have been completed on or before March 15, 1999. The March 10 decision, supra n.1, suspended the general procedural schedule because insufficient time was available to complete meaningful discovery.

<sup>3</sup> DMIR also filed on the same date a petition for reconsideration (in part) of the May 11 decision. DMIR's petition for reconsideration addresses the scope of allowable discovery—specifically, whether certain hypothetical transportation alternatives would constitute admissible evidence of modal competition or prohibited evidence of geographic competition. See Market Dominance Determinations—Product and Geographic Competition, STB Ex Parte No. 627 (STB served Dec. 21, 1998), pets. for reconsideration and clarification pending (Ex Parte No. 627). DMIR's petition will be addressed by the Board in a forthcoming decision. Under 49 CFR 1115.3(f), the filing of a petition for reconsideration does not stay the effect of a prior action. Accordingly, for administrative efficiency, the discovery deadline will be suspended with respect to the discovery covered by the petition for reconsideration.

which it construes as being contrary to the intent of our discovery order, will preclude follow-up discovery.<sup>4</sup> Accordingly, MPI requests that the June 10 discovery deadline be redesignated as the deadline for DMIR to comply with the May 11 order; that MPI be permitted to engage in follow-up discovery between June 11 and 25, 1999; and that DMIR be directed to respond to follow-up discovery requests within 5 business days of their service.

In its response, DMIR asserts that it has not been dilatory in producing materials under the discovery order. It also expresses the view that it is MPI that is violating the Board's discovery order, which, it states, set a firm date for the conclusion of discovery with no provision for follow-up discovery.

DMIR is correct that the Board's decision set a firm date for completion of discovery, but it is incorrect if it believes that the Board intended to turn a deaf ear to all discovery issues once the completion date has passed. Consistent with the new policy in Expedited Procedures,<sup>5</sup> the Board resolved the parties' disputes but left the actual conduct of discovery to the parties. The schedule itself contemplated follow-up discovery; it was incumbent upon the parties to facilitate it; and the Board expected the parties to act in a way that would permit completion of the entire process in a timely way. It is not necessary to determine at this time whether either party has been dilatory. However, if primary discovery is delayed until the deadline, then some additional time may be required for follow-up discovery.<sup>6</sup>

DMIR also points out that MPI has not identified any specific areas requiring additional discovery and contends that its motion is therefore premature. DMIR indicates that it expects its forthcoming production to be fully responsive, but that it will respond voluntarily to reasonable requests for clarification. Otherwise, it asks that MPI be required to make a showing of where its compliance is deficient.<sup>7</sup> MPI's lack of specificity is not surprising, as MPI in its motion indicated that, at least at that time, substantial discovery remained to be completed. MPI must make an appropriate showing in support of particular follow-up discovery, but all it seeks in the instant

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<sup>4</sup> Follow-up discovery is customarily employed when materials already provided require elaboration or explanation. The Board recognized (in its March 10 decision) and the parties contemplated (in their stipulated procedural schedule) the possibility that follow-up discovery would be required.

<sup>5</sup> Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No. 527 (STB served Oct. 1 and Nov. 15, 1996), aff'd sub nom. United Transp. Union-III, Legis. Bd. v. STB, 132 F.3d 71 (D.C. Cir. 1998). Parties now undertake discovery without the necessity of Board approval or direct supervision.

<sup>6</sup> DMIR has offered to hold depositions after the discovery deadline.

<sup>7</sup> DMIR also contends that it cannot reasonably be required to reply in 5 business days.

motion is simply the opportunity to make the showing demanded by DMIR. Construing the current discovery deadline as barring all follow-up discovery would not permit such a showing.

MPI's request for additional time to pursue follow-up discovery is reasonable, is consistent with both the May 11 decision and the understanding of the parties as expressed in their proposal for a procedural schedule, and will be granted. Either party may pursue follow-up discovery under the amended schedule. The 5-day response time proposed by MPI is not unreasonable for responding to interrogatories and holding depositions.

MPI has not requested any changes to the schedule for the submission of evidence, but DMIR asks that, if the discovery deadline is amended, the evidentiary schedule be amended commensurately. DMIR has not demonstrated why the evidentiary schedule be amended, and indeed, the parties' inability to work out their discovery in a reasonable manner has already unduly delayed the procedural schedule in this proceeding.

It is ordered:

1. On or before June 10, 1999, the parties must comply with the motions to compel to the extent provided in the Board's decision served May 11, 1999.
2. The parties may pursue follow-up discovery until June 25, 1999. Follow-up discovery requests shall be limited to clarification of prior discovery responses. Responses to follow-up requests are due 5 business days after service or the June 25 deadline, whichever is earlier.
3. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary