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SEC

SERVICE DATE – MARCH 27, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42104

ENTERGY ARKANSAS, INC. AND ENTERGY SERVICES, INC.

v.

UNION PACIFIC RAILROAD COMPANY

AND

MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.

Finance Docket No. 32187

MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.
– LEASE, ACQUISITION AND OPERATION EXEMPTION –
MISSOURI PACIFIC RAILROAD COMPANY AND BURLINGTON NORTHERN
RAILROAD COMPANY

Decided: March 26, 2008

By complaint filed on February 19, 2008, in STB Docket No. 42104, Entergy Arkansas, Inc., and Entergy Services, Inc. (jointly, Entergy), allege that provisions of a lease between the Union Pacific Railroad Company (UP), as successor to the rights of the Missouri Pacific Railroad Company (MP), and Missouri & Northern Arkansas Railroad Company, Inc. (MNA), unlawfully prevent MNA from interchanging Entergy's traffic with rail carriers other than UP. Entergy asks the Board to take remedial action under various provisions of the Interstate Commerce Act. More specifically, Entergy argues that continued enforcement of the interchange commitment and related provisions of the lease constitute an unreasonable practice under 49 U.S.C. 10702. In the alternative, Entergy maintains that these provisions constitute a pooling and/or traffic division agreement for which agency authority was not properly obtained under 49 U.S.C. 11322 (or under the predecessor of this provision, former 49 U.S.C. 11342). Also, alternatively, Entergy petitions the agency under 49 U.S.C. 10502(d) to remedy its concerns by revoking in part the exemption under which the lease was approved by the Board's predecessor agency in Missouri & Northern Arkansas Railroad Company, Inc. – Lease, Acquisition and Operation Exemption – Missouri Pacific Railroad Company and Burlington Northern Railroad Company, Finance Docket No. 32187 (ICC served Dec. 22, 1992).

On March 10, 2008, MNA and UP filed answers to Entergy's complaint and petition. Both defendants dispute various factual allegations and ask the Board to dismiss the complaint for failure to state a statutory violation. UP further argues that: (1) Entergy's challenges to the

lease as an unreasonable practice and as unlawful pooling are barred by the statute of limitations; (2) Entergy's challenges to the lease as an unreasonable practice and as unlawful pooling and its petition to revoke the exemption are barred under the doctrine of laches; (3) the Board lacks jurisdiction to rule that the consummated transaction exempted from regulation in Finance Docket No. 32187 constitutes an unreasonable practice or a pooling arrangement, and to preclude the enforcement of individual contractual terms of the UP/MNA lease; and (4) the remedy sought by Entergy would result in an unconstitutional taking of UP's property. MNA contends that the lease should not be terminated as long as MNA continues to comply with the lease and fulfills its common carrier obligation.

Under 49 U.S.C. 11701(a) and 10502(d), a proceeding will be formally instituted to investigate the issues raised by the parties. A procedural schedule, as set forth below, is adopted to provide the parties with the opportunity to develop the record on these important matters. This action is consistent with the Board's recent decision in Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League, STB Ex Parte No. 575, et al. (STB served Oct. 30, 2007), in which the Board held that it would consider the propriety of interchange commitments on a case-by-case basis. Action on the defendants' requests for dismissal will be deferred until the record is further developed.

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

It is ordered:

1. A proceeding is commenced to consider the allegations and defenses raised by the parties.
2. The submission of evidence and argument will proceed as follows:
 - a. Opening statement by Entergy is due by April 28, 2008.
 - b. Reply statements by UP and MNA are due by May 13, 2008.
 - c. Rebuttal by Entergy is due by May 28, 2008.
3. This decision is effective on its date of service.

By the Board, Anne K. Quinlan, Acting Secretary.

Anne K. Quinlan
Acting Secretary