

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42088

WESTERN FUELS ASSOCIATION, INC., AND
BASIN ELECTRIC POWER COOPERATIVE

v.

BNSF RAILWAY COMPANY¹

Decided: March 14, 2005

We will deny the request of BNSF Railway Company (BNSF) for an order requiring that, if Western Fuels Association, Inc., and Basin Electric Power Cooperative (collectively, WFA) include rerouted traffic in their stand-alone cost (SAC) presentation, they must submit on opening two stand-alone railroad (SARR) configurations, one that would include rerouted traffic and one that would not.

BACKGROUND

On October 19, 2004, WFA filed a complaint alleging that the rates that BNSF is charging for the transportation of coal to the Laramie River electricity generating station near Moba Junction, WY, are unreasonable. On January 28, 2005, BNSF filed a motion for a Board order establishing new procedures to govern the filing of SAC evidence in this case. Specifically, BNSF seeks an order directing WFA to present two SARR configurations in its opening evidence – one that includes rerouted traffic (if WFA wishes to include such traffic in its SARR), and one that does not.

BNSF notes that shippers have increasingly relied on rerouted non-issue traffic in their SAC presentations, and that, in several cases, disagreements over rerouted traffic have resulted in substantial, supplemental filings and increased litigation costs. Specifically, BNSF cites to Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42057 (Xcel); Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42071 (Otter Tail); and AEP Texas North Company v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 41191 (AEP Texas North). Accordingly, BNSF asserts that an order directing the presentation of two SARRs on opening would avoid the delays and burdens associated with the filing of supplemental evidence and argument, thereby expediting the handling and resolution of

¹ Effective January 20, 2005, defendant changed its name from The Burlington Northern and Santa Fe Railway Company to BNSF Railway Company. The title of this proceeding has been modified accordingly.

the proceeding. Finally, BNSF argues that such an order would reduce the scope of the complainants' rebuttal evidence, and would yield a "focused, consistent and usable record." BNSF Motion at 7.

WFA opposes BNSF's motion on the ground that a complainant has the right to select a single SARR traffic group to present in its opening evidence, and asserts that BNSF's proposal would add considerably to WFA's litigation costs and would complicate the case unnecessarily. WFA argues that BNSF's motion would require WFA to present a SARR that would not necessarily be the least cost alternative, and asserts that because BNSF created the need for supplementation of the record in Xcel (by failing to submit evidence that addressed the traffic group selected by the complainant), BNSF should not rely on Xcel.

WFA points out that, since the submission of opening evidence in the Xcel and Otter Tail proceedings, the Board has provided guidance on the factors it will consider in determining whether rerouted traffic should be included in a complainant's SARR.² WFA states that, if it includes rerouted traffic in this case, it will adhere to the standards set forth in TMPA and Duke/NS, which should reduce or eliminate litigation over the propriety of any reroutes. Also, WFA asserts that it intends to avoid certain modeling problems that complicated the issue over rerouted traffic in AEP Texas North.

DISCUSSION AND CONCLUSIONS

The motion before us highlights the tension between the shipper's interests in creating a least-cost SARR to handle the issue traffic and the defendant's interests in restricting or eliminating rerouted traffic. A complainant may choose a SARR that includes rerouted traffic, and a defendant may challenge the inclusion of that rerouted traffic. If at that point we determine that we need supplemental evidence to resolve the case, the Board has developed a process to get the information by requesting supplemental filings. As discussed below, a two-SARR requirement could deter shippers from presenting a least-cost SAC analysis, overlooks the recent development of standards to govern the inclusion of rerouted traffic in a SARR, and wrongly presumes that evidence relating to a SARR without rerouted traffic will be necessary. Therefore, we will deny BNSF's motion.

It is a long-standing principle of SAC cases that the shipper has the right to select its SARR traffic group. Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 542-43 (1958), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987). The Board presumes that a shipper choosing to litigate before the Board is aware of the Board's precedents, including TMPA and Duke/NS, and will attempt in good faith to adhere to them when selecting a

² WFA cites to Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056 (STB served Mar. 24, 2003) (TMPA) at 21-22; and Duke Energy Corporation v. Norfolk Southern Railway Company, STB Docket No. 42069 (STB served Nov. 6, 2003) (Duke/NS) at 25-26. The complainant in the Xcel case filed its opening evidence before the TMPA and Duke/NS decisions were served. The complainant in the Otter Tail case filed its opening evidence before the Board served the Duke/NS decision, which refined the TMPA guidelines.

traffic group that includes rerouted traffic. Here, BNSF would have us presume that WFA will select a traffic group that is inconsistent with precedent, but there is no reason for the Board to so presume.

A complainant would face significant increased litigation costs if it were required to tender on opening two potentially very different SARRs. This added cost could deter a shipper from selecting a SARR with rerouted traffic. Moreover, were the Board to, in keeping with the thrust of BNSF's motion, limit all subsequent evidence and argument to the two SARRS presented in the complainant's opening statement, this would further deter shippers from seeking to include rerouted traffic. To the extent such traffic is available to be included under the standards set out in TMPA and Duke/NS, and to the extent its inclusion would serve to reduce the portion the SARR's costs that would need to be met by the issue traffic, a SARR without the rerouted traffic would not represent the least cost case for a complainant. Thus, we will not require WFA to present such a case.

In light of our decisions in TMPA and Duke/NS, shippers have the guidance needed to make an initial determination whether particular rerouted traffic may be included in a SARR. The complainants in Xcel and Otter Tail lacked the benefit of such guidance when they filed their respective opening statements. Moreover, we expect that WFA's evidence will not present the modeling problems encountered in AEP Texas North. Thus, the precedent which BNSF cites is no indication that similar record deficiencies can be expected in this case. While BNSF might ultimately decide to challenge rerouted traffic that WFA may choose to include in its opening evidence, we see no compelling need to attempt to shape the record in advance by assuming that all rerouted traffic is suspect.

Finally, BNSF maintains that WFA ultimately will have to present a SARR configuration with no rerouted traffic, and so it should be required to do so up front. However, there is simply no reason to make such an assumption here.

For these reasons, BNSF's motion will be denied.

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

It is ordered:

1. BNSF's motion is denied.

2. This decision is effective on its service date.

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

Vernon A. Williams
Secretary