

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41191 (Sub-No. 1)

AEP TEXAS NORTH COMPANY

v.

BNSF RAILWAY COMPANY

STB Docket No. 42088

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

v.

BNSF RAILWAY COMPANY

Decided: November 22, 2006

In STB Docket No. 41191 (Sub-No. 1), AEP Texas North Company (AEP Texas), successor in interest to West Texas Utilities Company, challenges the reasonableness of rates charged by BNSF Railway Company (BNSF) for movements of coal from mines in the Powder River Basin (PRB) of Wyoming to AEP Texas' Oklaunion Generating Station near Vernon, TX. In STB Docket No. 42088, Western Fuels Association, Inc., and Basin Electric Power Cooperative, Inc., challenge the reasonableness of rates charged by BNSF for movements of coal from the PRB to Basin Electric's Laramie River Station near Wheatland, WY.

In both proceedings, extensive evidence has been submitted under the stand-alone cost (SAC) test set forth in Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985) (Guidelines), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987). The SAC test seeks to determine the lowest cost at which a hypothetical, optimally efficient carrier – a stand-alone railroad (SARR) – could provide service to the complaining shipper. Guidelines, 1 I.C.C.2d at 528.

On February 27, 2006, the Board instituted a rulemaking in STB Ex Parte No. 657 (Sub-No. 1) to address major, recurring issues regarding the proper application of the SAC test in rail rate cases and the proper calculation of the floor for any rail rate relief.¹ Due to the potential implications of that rulemaking on STB Docket Nos. 41191 (Sub-No. 1) and 42088, the Board held these proceedings in abeyance until the resolution of the rulemaking proceeding. On

¹ See Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), et al. (STB served Feb. 27, 2006).

October 30, 2006, the Board completed its work in the rulemaking proceeding and issued a final decision adopting several changes to how the SAC test will be applied.²

On November 8, 2006, the Board issued an order in these proceedings instructing the parties to submit certain limited supplemental evidence to implement the changes adopted in Major Issues. In particular, the parties were instructed to provide (1) variable cost information using the Uniform Railroad Costing System (URCS) without any movement-specific adjustments, and (2) the information needed to calculate revenue divisions under the Average Total Cost approach. To minimize the delay, the Board instructed BNSF, which possess that information, to submit the necessary calculations together with all workpapers necessary to support its calculations. The complainants would then have an opportunity to review and critique those calculations.

On November 14, 2006, both complainants filed motions for reconsideration of that order. Neither complainant objected to the substance of the order, but only to the procedures set forth for obtaining the information needed to complete these cases. Specifically, they object to the railroad submitting opening and closing supplemental evidence; they argue that the party who bears the burden of proof in the case (the complainant) is entitled to that privilege. They also assert that broad discovery of traffic routings and train event data is necessary for the complainants to develop the information needed to implement the new ATC revenue allocation.

On November 17, 2006, BNSF filed in opposition to the request for reconsideration, arguing that the process outlined in the November 8 order was the more efficient and straightforward way to supplement the record and objecting to the discovery sought as overly broad, burdensome, and unnecessary.³

DISCUSSION AND CONCLUSION

In their comments in the Major Issues rulemaking, both complainants urged the Board to resolve these cases as expeditiously as possible upon the completion of the rulemaking proceeding. In particular, AEP Texas argued against the submission of new evidence beyond that already produced by the parties, asserting that “[a]ll of the changes proposed by the Board . . . are methodological, and do not rely on evidence that is not already on record . . . for their execution.”⁴ AEP Texas suggested that the Board could implement these changes based on the

² See Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1) (STB served Oct. 30, 2006) (Major Issues). Although this decision will not become effective until November 29, 2006, this order is being issued now to expedite the resolution of these two cases.

³ On November 21, 2006, complainants filed a joint letter in response to BNSF’s reply. A reply to a reply is not permitted by the Board’s rules. See 49 CFR 1104.13(c). As the complainants did not seek leave to file a supplemental pleading, the letter will not be considered.

⁴ STB Ex Parte No. 657 (Sub-No. 1), AEP Texas Open. at 6 & n.6.

existing record. WFA/Basin made similar claims.⁵ BNSF also asserted that the implementation of ATC, in particular, could be done quickly.⁶

Accordingly, in the November 8, 2006 order, the Board assigned the burden of production to the carrier to produce the supplemental calculations needed to complete these two cases. The agency did so largely for the benefit of the complainants, to expedite the resolution of these cases without imposing significant further litigation costs or delay. However, it was not the Board's intent to shift the burden of persuasion, just the burden of production.

On reconsideration, given the novel nature of the ATC revenue allocation procedure and the possibility that subtle methodological issues may arise, the earlier order will be modified to provide for the complainants to submit the opening and closing supplemental evidence, but there is no apparent reason for simultaneous submission on variable costs.

Moreover, as both complainants have now concluded that the evidence already produced by BNSF during discovery is insufficient to implement these changes, limited further discovery will be permitted. Discovery will be reopened for 45 days for the limited purpose of producing information needed to implement the changes set forth in the November 8 order. Following the normal practice, parties are required to meet and confer on any discovery requests, and a discovery conference with staff may be held (if necessary) to discuss any discovery disputes that might arise. Parties are instructed to inform the Board if a discovery conference will be necessary, and identify the parameters of any discovery disputes. Whether or not there is a discovery conference, motions to compel discovery will be resolved in accordance with 49 CFR 1114.31(a)(4) and the deadlines established in that provision. BNSF will not at this time be ordered to produce the broad data requested in the attachment to the complainant's motions for reconsiderations. A motion to compel is premature at this time, as the record has not been sufficiently developed to demonstrate the need for such information or the burden on the carrier.

The revised procedural schedules for these two proceedings are set forth below. As the issues should be similar, and the complainants are represented by the same counsel, there would be only one discovery conference (if necessary) to expedite these cases. The schedule for complainants' opening evidence is staggered, as requested by complainants. BNSF's reply evidence will be due 30 days after the complainants file their opening evidence on variable cost and revenue allocation. Rebuttal evidence by complainants is due 14 days later. Thus, if complainants are able to provide the necessary information more quickly, all deadlines will be moved up accordingly.

Revised Procedural Schedule:

Effective Immediately	-	Limited Discovery Permitted
December 5, 2006	-	Staff Discovery Conference If Needed

⁵ STB Ex Parte No. 657 (Sub-No. 1), WFA/Basin Open. at 29-30.

⁶ STB Ex Parte No. 657 (Sub-No. 1), BNSF Supp. at 10-11 (filed Oct. 4, 2006).

December 8, 2006	-	Motions to Compel Due in Both Cases
January 16, 2006	-	Close of Discovery in Both Cases
February 16, 2006	-	AEP Texas Opening Due
February 22, 2006	-	WFA/Basin Opening Due

All parties are strongly encouraged to meet and confer on both discovery issues and on the calculation of variable costs and revenue allocations for these two cases. It continues to be likely that the supplemental information needed will be largely a mechanical application of the new methodologies. If parties can reach agreement on how these calculations should be performed in these respective cases, the Board will be able to more promptly resolve these rate disputes.

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

It is ordered:

1. The parties to STB Dockets Nos. 41191 (Sub-No. 1) and 42088 should submit the requested information to the Board in accordance with the revised procedural schedule set forth above.

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

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary