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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42034

PSI ENERGY, INC.

v.

CSX TRANSPORTATION, INC.

and

SOO LINE RAILROAD COMPANY

(MOTION TO MODIFY PROCEDURAL SCHEDULE)

Decided: September 10, 1998

We are granting the motion of defendants CSX Transportation, Inc., and Soo Line Railroad Company, d/b/a/ Canadian Pacific Railway ("CSXT/CP" or "the carriers") to hold this proceeding in abeyance pending resolution of a court action to interpret a railroad transportation contract.

BACKGROUND

Prior to June 30, 1998, complainant PSI Energy, Inc. ("PSI" or "the shipper") received coal at its Cayuga Station generating plant in Vermillion County, Indiana, from two mines in Indiana, i.e., the Hawthorne Mine near Sanborn, IN, and the Solar Mine near Wheatland, IN. PSI's Cayuga Station is served only by CSXT. The coal moved under two rail transportation contracts. One contract governed a single line service from the Solar Mine by CSXT. The other contract governed a service provided jointly by CP, the origin carrier serving the Hawthorn Mine, and the destination carrier, CSXT. These contracts both expired on June 30, 1998.

After these contracts expired, the carriers established common carrier rates for movements from the two origins. The common carrier rates, however, are limited to annual volumes of 400,000 tons (200,000 tons from each origin), which is considerably less than the total volume of approximately 2.545 million tons shipped from these origins in 1997. The carriers' rationale for the volume restriction is that, when the contracts expired on June 30, 1998, provisions of a third, master contract, "Contract 851,"¹ automatically went back into effect so as to require that 85% of the

¹ Contract 851 is so named apparently because it was identified as contract ICC-CSXT-C-00851 before enactment of the ICC Termination Act of 1995, which eliminated the requirement that non-agricultural contracts be filed with the Board's predecessor, the Interstate Commerce Commission. This contract is reproduced in the Confidential Appendix that was separately filed with the Board on July 29, 1998. The Confidential Appendix is subject to a protective order served

(continued...)

requirements of the Cayuga Station plant be met from CSXT-served origins other than the two origins at issue here,² a percentage requirement that would limit the carriers' common carrier duty to the transportation of not more than about 400,000 tons (approximately 15% of the current volume of 2.6-2.7 million tons) from the two origins at issue here (200,000 tons per origin).

On July 2, 1998, PSI responded by filing a petition in federal court for an order declaring that Contract 851 does not allow the carriers to restrict shipments from the Wheatland and Hawthorne mines to 15% of the requirements of the Cayuga Station plant's requirements. This action is still pending.³ Pending the court's decision, the carriers have published supplements to the replacement common carrier rates allowing shipments in volumes exceeding 400,000 tons, but any such shipments are subject to CSXT's claim for the liquidated damages provided under Contract 851 in the event that the court rules in CSXT's favor.

By complaint filed on July 6, 1998, PSI requests that we: (1) require the carriers' to transport higher tiered-rate annual volumes of 200,000 tons, 1,800,000 tons, and 2,400,000 tons from each of the two origins to the Cayuga Station plant; (2) order CSXT/CP to establish reasonable, tiered rates for the movement of coal in the specified volumes; and (3) and order reparations and "further relief as the Board may consider" for shipments after July 1, 1998. On July 27, 1998, the carriers filed an answer contesting the allegations and relief sought in the complaint.

By motion filed on July 21, 1998, CSXT/CP request that we modify the procedural schedule that would ordinarily apply to this case pursuant to 49 CFR 1111.8. Specifically, the carriers request that we hold the proceeding in abeyance pending the outcome of the court action to interpret Contract 851. Alternatively, the carriers request that we bifurcate this proceeding so as to consider market dominance issues before we consider rate reasonableness and service issues.

On August 10, 1998, PSI replied in opposition to the carriers' motion to suspend action or to bifurcate.

DISCUSSION AND CONCLUSIONS

We will suspend action in this proceeding until the court rules on the interpretation of Contract 851.

¹(...continued)
on August 17, 1998.

² In other words, the expired contracts superseded Contract 851 while they were in effect.

³ PSI's petition and CSXT's reply are reproduced in the carriers' Confidential Appendix filed on July 29, 1998.

It is well established that, where there is a genuine dispute regarding the scope of a railroad transportation contract, the interpretation of which is necessary to resolve essential issues in a railroad rate complaint, we do not interpret the contract ourselves, but instead suspend proceedings in the rate complaint until the contract is interpreted in court.⁴ While we do not presume to predict the outcome of the court proceeding here, PSI has not shown that the dispute before the court as to whether Contract 851 limits the volumes that the carriers must transport for the movements at issue is not genuine. We could be perceived as attempting to displace the jurisdiction of the court if we were to proceed based on PSI's bald assertion that court will enter summary judgment in its favor on the contractual issue. Thus, until the court rules, there will remain a genuine issue here as to whether Contract 851 limits CSXT's common carrier duty to shipping not more than 400,000 tons per year from the two origins at issue.

The outcome of this contractual dispute over allowable tonnage is relevant to our ability to proceed efficiently with this complaint. This complaint will be decided under our stand-alone cost (SAC) methodology. Our SAC methodology is based on the rates that would be charged by a hypothetical, least-cost, stand-alone railroad. The rates that would be prescribed under our SAC methodology depend on the volume of coal that would be transported by a hypothetical stand-alone railroad. Generally, the greater the volume, the more fixed and common costs can be spread among service units, which, in turn, allows rates to be lower. Moreover, many costs of operating a stand-alone railroad vary with volume, and the variance is not always proportionate. A SAC case based on a contractually limited total volume of only 400,000 tons per year is likely to be a much different case than the one filed by PSI, which is based on the higher volume of 2.6-2.7 millions tons per year that PSI would like to ship. The resources of the Board and the carriers would be wasted if we were to proceed with a complaint predicated on the shipment of 2.6-2.7 million tons per year and the court were later to uphold the carriers' interpretation of the contract.

PSI will not be prejudiced by our holding this proceeding in abeyance. PSI will be able to receive reparations plus interest for rates charged after June 30, 1998, to the extent that we find them to have been unreasonable. Moreover, PSI will benefit along with the carriers from knowing more about the proper volume parameters of the controversy case after the court rules.

⁴ See, e.g., Toledo Edison Co. v. Norfolk & Western Railway Co., 367 I.C.C. 868 (1983); and Western Resources, Inc. v. The Atchison, Topeka and Santa Fe Railway Company, No. 41604 (STB served May 17, 1996). We have refused to stay our proceedings only where there was no genuine basis for believing in the existence of a contract bearing on the complaint. See Pennsylvania Power & Light Company v. Consolidated Rail Corporation, No. 41295 (ICC served Jan. 17, 1995, correction served Feb. 3, 1995).

Since we are suspending action on the proceeding until the court rules on the scope of Contract 851, the carriers' alternative motion to bifurcate the proceeding to hear the issue of market dominance first is moot.⁵

It is ordered:

1. The procedural schedule that would normally apply pursuant to 49 CFR 1111.8 is suspended.

2. If PSI desires to continue with its complaint as filed when the court rules on the scope of Contract 851, PSI will file a notice to this effect, the procedural schedule of 49 CFR 1111.8 will automatically go back into effect as of the effective date of the court's decision, and the parties will jointly file (if they can agree) a revised list of due-dates under the revived schedule.

3. If PSI does not desire to continue with its complaint as filed after the court's decision, PSI will promptly notify us and move for amendment or withdrawal.

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

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

⁵ If we were to proceed with the case, the market dominance issue would also be affected by the interpretation of the contract because the carriers argue that the feasibility of trucking as a competitive alternative would be "even clearer, if not self-evident," if volume is limited to 400,000 tons per year. Motion for Suspension at 21.