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SERVICE DATE – NOVEMBER 22, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35305

ARKANSAS ELECTRIC COOPERATIVE CORPORATION—PETITION FOR
DECLARATORY ORDER

Docket No. FD 35557

REASONABLENESS OF BNSF RAILWAY COMPANY COAL DUST MITIGATION
TARIFF PROVISIONS

Digest:¹ In a previous decision in Docket No. FD 35305, the Board found that a BNSF Railway Company (BNSF) tariff intended to limit the amount of coal dust that blows off of rail cars during transit was an unreasonable practice. In response to a new BNSF coal dust tariff, Western Coal Traffic League (WCTL) has asked the Board to reopen the proceeding in that docket and to institute mediation between BNSF and coal shippers. In this decision, the Board denies both requests. However, the Board will institute a new proceeding to consider whether the “safe harbor” provision of the new tariff is reasonable.

Decided: November 21, 2011

This decision denies a petition of the Western Coal Traffic League (WCTL) asking that the Board reopen the Docket No. FD 35305 proceeding and institute mediation regarding a new coal dust tariff issued by BNSF Railway Company (BNSF). Rather, the decision institutes a new proceeding to consider the reasonableness of the new tariff’s safe harbor provision.

BACKGROUND

In December 2009, in response to a petition filed by Arkansas Electric Cooperative Corporation (AECC) and the reply of BNSF, the Board instituted a declaratory order proceeding under 49 U.S.C. § 721 and 5 U.S.C. § 554(e). The issues raised in that proceeding included whether provisions of a BNSF tariff requiring shippers to limit the emission of coal dust from rail cars constitute an unreasonable practice and whether BNSF may establish rules regarding

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

coal dust dispersion from coal trains operating over its lines. On March 3, 2011, the Board issued a decision finding that coal dust emission from open hopper railcars is a significant problem and that BNSF may take reasonable steps to address the problem. Notwithstanding, the Board also found that the tariff, when considered as a whole, was not reasonable and, therefore, violated 49 U.S.C. § 10702. In particular, the Board found it problematic that coal dust emissions could exceed the maximum allowable level under the tariff even if shippers employed currently accepted methods of coal dust suppression. The Board observed that a cost-effective safe harbor provision (i.e., specific coal dust suppression measures that would constitute compliance with the tariff) would significantly alleviate its concerns.

On July 20, 2011, BNSF issued a new tariff, BNSF Price List 6041-B Item 100. The new tariff addresses coal dust emission from trains carrying coal loaded at any Powder River Basin (PRB) mine and requires that shippers of such coal take measures to reduce coal dust loss from cars. To comply with the tariff, shippers may use the safe harbor provision at Section 3.B, under which shippers would apply one of BNSF's three approved suppression methods (topper agents) to their cars after loading them pursuant to the profiling requirement. Under the safe harbor provision, shippers would be in compliance with the tariff regardless of actual coal dust release. As an alternative to the safe harbor provision, shippers may submit a different suppression method for approval by BNSF. Under the new tariff, shippers must begin taking these measures by October 1, 2011. In addition, shippers must provide BNSF with written notice of their compliance efforts at least 30 days before loading cars for shipment by BNSF.²

On August 12, 2011, WCTL filed a petition requesting that the Board reopen the proceeding in Docket No. FD 35305, institute mediation (either by agreement of BNSF or by order of the Board), and stay or enjoin the effective date of the new tariff pending Board-supervised mediation. AECC, Consumers United for Rail Equity, and the National Coal Transportation Association each filed separate statements supporting WCTL's petition, and the National Rural Electric Cooperative Association, Edison Electric Institute, and American Public Power Association jointly filed a statement supporting WCTL's petition. BNSF filed a reply to the petition on August 23, 2011, asking the Board to deny injunctive relief, reopening of the record, and mediation. On August 26, 2011, Union Pacific Railroad Company filed a reply supporting denial of injunctive relief, reopening, and mediation. On August 31, 2011, the Board issued a decision denying the injunction.

² WCTL interprets the new tariff as establishing that the deadline for providing BNSF with written notice of compliance efforts for most PRB coal shippers is September 1, 2011. We note that in its reply, BNSF states that its intent is for shippers to begin to take concrete steps toward compliance by having compliance plans in place by October 1, 2011. BNSF Reply 9; BNSF Reply, V.S. of Stevan B. Bobb 6. However, the language of the tariff states that "written notice of compliance plans" must be provided to BNSF 30 days before the October 1, 2011 deadline for shippers to begin taking dust reduction measures, which would require shippers to submit their notice of compliance plans to BNSF by September 1, 2011, if they wished to have cars loaded for shipment by BNSF as of October 1.

DISCUSSION AND CONCLUSIONS

Request for Mediation

WCTL argues that the Board should institute a Board-sponsored, non-binding mediation either by agreement of BNSF or by Board order. BNSF opposes mediation as requested by WCTL, but states that “mediation with specific common carrier shippers could become an option in the future if disputes arise with a particular shipper over compliance with BNSF’s coal dust rule.”³

We will not order mediation at this time. WCTL has not identified a specific conflict that is appropriate for mediation given the history of this case, where issues such as the significance of the coal dust problem, the reasonableness of controlling coal dust emissions from trains, and the need for a tariff that provides shippers with a certain method of compliance have already been decided. Instead, WCTL has described a wide range of concerns about the reasonableness of the new tariff, some of which were resolved in the Board’s prior decision in Docket No. FD 35305.

Petition to Reopen

Regarding WCTL’s petition to reopen this proceeding, we consider that request under 49 U.S.C. § 722(c), which provides that the Board may at any time, on its own initiative or on a party’s petition, reopen an administratively final proceeding because of material error, new evidence, or substantially changed circumstances. 49 U.S.C. § 722(c); 49 C.F.R. § 1115.4. The alleged grounds must be sufficient to convince us that, if taken as facially true and correct, they might lead us to materially alter our decision in this case. If petitioner has presented no new evidence or changed circumstances that “would mandate a different result,” then the Board will not reopen. See Montezuma Grain Co. v. STB, 339 F.3d 535, 542 (7th Cir. 2003); Tongue River R.R.—Constr. & Operation—W. Alignment, FD 30186 (Sub-No. 3), slip op. at 5 (STB served June 15, 2011).

WCTL requests that the Board reopen Docket No. FD 35305, arguing that the new tariff constitutes both new evidence and changed circumstances.⁴ BNSF opposes reopening. While the new tariff is related to the previous tariff because BNSF instituted both tariffs to address the same issue, WCTL does not explain how this new tariff would mandate a different result in the Board’s decision finding the former tariff to be an unreasonable practice.

WCTL further argues that reopening is appropriate because BNSF was not collaborative in developing the new tariff in violation of the March 2011 decision. While the Board encourages consensual resolution of disputes, the prior decision did not impose upon BNSF a

³ BNSF Reply 17.

⁴ Because WCTL does not allege material error, we do not address that criterion in this decision.

regulatory obligation to consult with its shippers prior to issuing a new tariff concerning coal dust suppression.

For the foregoing reasons, we will not reopen the proceeding in Docket No. FD 35305.

However, under 49 U.S.C. § 721 and 5 U.S.C. § 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty. We will institute a new declaratory order proceeding under 49 U.S.C. § 721 and 5 U.S.C. § 554(e) to consider the reasonableness of the safe harbor provision in the new tariff – Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions, Docket No. FD 35557. While tariffs typically should be challenged by complaint, the safe harbor provision’s reasonableness is an issue of broad importance to the railroad industry. A declaratory order proceeding will allow all views across the industry to be considered in one proceeding, and it will promote regulatory efficiency by addressing an area of uncertainty.⁵ The parties should file a proposed procedural schedule by December 12, 2011. If any party believes that confidential or highly confidential material produced in Docket No. FD 35305 would be useful in making a case in Docket No. FD 35557, that party may petition the Board to modify the protective order of the previous proceeding to extend to the new proceeding. Parties would need to demonstrate the relevance of such material to a determination of the reasonableness of the new safe harbor provision before the Board would extend the protective order.

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

It is ordered:

1. WCTL’s request to reopen is denied.
2. WCTL’s request for mediation is denied.
3. A declaratory order proceeding under 49 U.S.C. § 721 and 5 U.S.C. § 554(e) is instituted.
4. WCTL and BNSF should file a proposed procedural schedule by December 12, 2011.
5. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

⁵ The new proceeding will allow parties to address issues raised by WCTL that are related to the reasonableness of the safe harbor provision, such as the absence of penalties for noncompliance, the lack of cost sharing, and shipper liability associated with the use of the BNSF-approved topper agents.