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SERVICE DATE – DECEMBER 30, 2009

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.

Decided: December 29, 2009

In this decision, we address the motion to dismiss the amended complaint in STB Docket No. 42104 and the motion to make the amended complaint more definite, both filed on August 17, 2009, by defendant Missouri & Northern Arkansas Railroad Company, Inc. (MNA). We are denying MNA's motion to dismiss the amended complaint and denying MNA's motion to require complainant to make the amended complaint more definite.

BACKGROUND

Pursuant to the Board's June 26, 2009 decision in this proceeding,¹ Entergy Arkansas, Inc., and Entergy Services, Inc. (jointly, Entergy) filed an amended complaint on July 27, 2009. Entergy seeks the prescription of a through route (or routes) under 49 U.S.C. 10705, pursuant to which MNA and/or Union Pacific Railroad Company (UP) would be directed to interchange

¹ Entergy and AECC also have sought in Finance Docket No. 32187 the partial revocation of the exemption that authorized the lease containing the interchange commitments at issue here. See Missouri & Northern Arkansas Railroad Company, Inc. – Lease, Acquisition and Operation Exemption – Missouri Pacific Railroad Company and Burlington Northern Railroad Company, Finance Docket No. 32187 (STB served Dec. 22, 1992). MNA's motions in STB Docket No. 42104 do not pertain to the revocation request in Finance Docket No. 32187. Moreover, as noted in the June 26, 2009 decision, slip op. at 13, the Board has deferred consideration of the revocation request until after we rule on the amended complaint, because potential relief granted pursuant to the amended complaint could well moot any need to consider the revocation request. Accordingly, the parties should refrain from submitting additional evidence or argument pertaining to revocation during the pendency of the amended complaint proceeding.

traffic with a long-haul carrier other than UP in order to provide adequate and more economic or efficient transportation of coal from Powder River Basin (PRB) mines to Entergy's Independence Steam Electric Station near Newark, AR. Co-owner of the Independence plant, Arkansas Electric Cooperative Corporation (AECC), also filed a pleading on July 27, 2009, joining in and supplementing Entergy's amended complaint.

Entergy's amended complaint does not identify a particular through route that it is asking the Board to prescribe, i.e., it does not specifically name the connecting carrier, the interchange point(s), and the origin/destination points. Rather, Entergy points to several locations where MNA, the carrier now directly serving Entergy's plant, could potentially interchange with BNSF Railway Company (BNSF) and asks the agency to prescribe an appropriate through route. AECC also has suggested several possible points of interchange between MNA and BNSF, including interchange at Lamar, MO. BNSF is not named as a defendant in STB Docket No. 42104.

On August 21, 2009, the Board issued a decision adopting a procedural schedule proposed by the parties. That decision also noted that MNA had filed a motion to dismiss the amended complaint and a motion to make the amended complaint more definite; it stated that the Board would address MNA's motions in a subsequent decision, which we do here.

MNA's Motions

MNA has filed two motions. First, MNA has moved to dismiss the amended complaint. In support of its motion to dismiss, MNA argues that a necessary defendant party is missing – the railroad(s) to which MNA would have to connect to reach PRB mines via a through route not involving UP. MNA also argues that the traffic for which Entergy is seeking a through route is under contract of sufficient length to preclude Board action at this time. Finally, MNA argues that the relief sought is unnecessary, because there are already open through routes between MNA and BNSF, as shown by a tariff (attached to MNA's motion to dismiss) that quotes a local single-car rate between the Independence plant and interchange points with BNSF at Joplin, MO, and Aurora, MO.

Second, MNA has moved to require Entergy to make its amended complaint more definite. MNA argues that Entergy must name the connecting carrier and the interchange point(s) involved in the through route that it seeks. MNA argues that this information is needed for the Board to make the route comparisons under our rules at 49 CFR Part 1144 that govern prescription of through routes under 49 U.S.C. 10705.

On September 8, 2009, Entergy and AECC filed replies to MNA's motion to dismiss the amended complaint, and Entergy filed a reply to MNA's motion to require Entergy to make the complaint more definite. In response to MNA's motion to dismiss, Entergy argues that, under 49 U.S.C. 11701(b), the Board may dismiss a complaint only if it does not state reasonable grounds for investigation and action, and that, under Board practice, motions to dismiss are disfavored

and rarely granted.² More specifically, Entergy and AECC respond that: (1) no necessary parties are missing because (a) Entergy avers that BNSF would be the connecting carrier and states that BNSF is a party to the related proceeding in Finance Docket No. 32187, or, (b) if the Board were to find otherwise, the proper solution would be to grant Entergy leave to further amend its complaint and include BNSF as a defendant; (2) Entergy's contracts for the transportation of coal allow the diversion of a certain amount of coal traffic each year to carriers other than UP, and this potential diversion would be sufficient to justify the Board's prescription of a through route; and (3) the tariff cited by MNA is not appropriate because it offers only per-car rates, rather than the train-load service needed by Entergy, and use of such per-car rates for train-load movements would be impracticable and expensive. In response to MNA's motion to make the complaint more definite, Entergy states that BNSF would be the connecting railroad but argues that it must conduct discovery before it can specify the through route(s).

On October 27, 2009, the Board heard oral argument on MNA's motions. The parties further developed their arguments set forth above, particularly with regard to the tariff issued by MNA. Counsel for MNA indicated that use of the "existing through route ... for single car movements" would be appropriate because the complaint does not specify the type of movement and confirmed that it would honor the tariff if Entergy sought to ship under it. Oral Argument Tr. at 7, 22-24. Counsel for Entergy responded that it had indicated to MNA that it requires train-load service, and post-argument, Entergy submitted a September 9, 2009 letter to MNA specifying its request. In response to questioning, MNA's counsel conceded that the existence of the tariff would not preclude the Board from prescribing a through route not covered by interchange points in the tariff. Oral Argument Tr. at 57.

DISCUSSION AND CONCLUSIONS

A. Motion to Dismiss

The Board may dismiss a complaint if the complaint "does not state reasonable grounds for investigation and action." 49 U.S.C. 11701(b). We have stated frequently that motions to dismiss are disfavored and rarely granted. See, e.g., Dairyland Power Cooperative v. Union Pacific, STB Docket No. 42105 (STB served July 29, 2008). Here we find that MNA has not shown that Entergy's complaint offers no reasonable basis for further Board consideration.

Necessary Party. We need not dismiss the amended complaint merely because Entergy did not join as a defendant the other carrier that would participate in the through route sought by Entergy in STB Docket No. 42104. Entergy has averred that the other carrier in its preferred through route prescription would be BNSF. Entergy has not alleged that BNSF is foreclosing more efficient service by refusing to interchange traffic with MNA. Rather, Entergy is alleging that MNA, acting pursuant to the interchange commitments in its lease with UP, is unlawfully

² Entergy cites Garden Spot & Northern Ltd. Partnership and Indiana Hi-Rail Corporation – Purchase and Operate – Indiana Rail Road Company Line Between Newtom and Browns, IL, Finance Docket No. 31593 (ICC served Jan. 5, 1993), 1992 WL 389440 at *2.

refusing to interchange traffic with BNSF. Presumably, by structuring its complaint as it did, Entergy has determined that it could obtain adequate relief in this case via a Board order that requires action on the part of defendants MNA and UP. If Entergy subsequently determines that it desires relief that would require a Board order directed at BNSF, Entergy may seek leave to amend its complaint further to join BNSF as a defendant. Unless and until Entergy decides to do this, however, we need not make this decision for Entergy by ordering it to join BNSF as a defendant before it can proceed further with its amended complaint against MNA and UP.

Contract Rate. We will not dismiss the amended complaint on the basis of the contracts between Entergy and UP. MNA has not disputed in any concrete way Entergy's claim that its contracts with UP allow the diversion of part of its coal needs to carriers other than UP.³ The volume of traffic that could be diverted onto a through route with BNSF may well bear on Entergy's ability to show that the through route would be "more efficient or economic" under section 10705, but we cannot determine the extent to which this may be true without examining the evidence to be submitted in this proceeding.

Existing Through Route. As noted, MNA argues that the complaint should be dismissed because there are already through routes between MNA and BNSF, as shown in the single-car tariff cited by MNA.

Dismissal on the basis of the tariff is inappropriate at this time for two reasons. First, the tariff provided by MNA does not list all of the potential interchange points that Entergy could seek to have prescribed by the Board. In particular, it excludes Lamar, MO, which has been identified several times in this proceeding as a preferred point of interchange. This fact alone prevents us from dismissing Entergy's complaint against MNA.

Second, we have reservations about relying on a single-car tariff. Ordinarily, we will not presume the existence of an open interchange with regard to high-volume train-load traffic merely based on the existence of local single-car class rates that the carrier did not intend to apply to such movements. See Central Power & Light v. Southern Pacific, 1 S.T.B. 1059, 1064-65 (1996), clarified, 2 S.T.B. 235 (1997), aff'd sub nom., Mid-American Energy Co. v. STB, 169 F.3d 199 (8th Cir. 1999).⁴ This case is different, however. Here the carrier itself argues that its single-car tariff opens up a through route applicable to Entergy's traffic between the PRB and the Independence plant, has represented that it would honor the tariff for Entergy's Independence

³ At oral argument, MNA's counsel suggested that "the vast majority, if not all" of Entergy's coal traffic was under contract. Oral Argument Tr. at 7. On the other hand, Entergy has provided information on specific amounts of traffic that it argues could be diverted, pursuant to the contracts, to carriers other than UP.

⁴ Under Routing Restrictions Over Seatrains Lines, Inc., 296 I.C.C. 767, 774-75, 783-85 (1953), local rates cannot be used for through transportation unless the carrier acquiesces. Here, MNA's tariff explicitly provides that it applies to traffic interchanged with BNSF or KCS at Joplin or Aurora, MO.

traffic, and has stated that it has no intention of withdrawing the tariff.⁵ Given these representations to the Board, one might conclude that MNA is holding itself out to provide train-load transportation between Independence and Aurora or Joplin, MO, at the single-car rates and terms in its tariff, and would acquiesce to Entergy's use of the tariff to construct a through route involving BNSF. But because the MNA tariff does not encompass all of the possible through routes (as noted above), we need not, and will not, resolve the question of whether MNA is genuinely holding itself out to provide an alternative through route for Entergy.

Once Entergy has identified the specific interchange points that it seeks to use to connect with BNSF, MNA may renew its motion to dismiss. At that time, if MNA is genuinely holding itself out to grant Entergy access to BNSF at the desired points of interchange, MNA should quote rates that Entergy can use to transport train loads of coal from the PRB via those routes. This approach is preferred to the alternative: requiring us to weave the existing single-car tariff together with representations at oral argument to infer a genuine offer to grant Entergy access to an alternative through route.

We stress, however, that even a successful motion to dismiss by MNA would not necessarily dispose of this case. Entergy's complaint against UP may remain viable—even if MNA were dismissed from the case—given UP's contractual right to serve the Independence plant exclusively.

B. Motion to Make Amended Complaint More Definite

If Entergy is to pursue its amended complaint, it must identify the through route(s) that it seeks to have prescribed, and this will require identification of the origin/destination point(s), and the point(s) of interchange. We will require Entergy to do this in its opening evidence and argument pursuant to the recently revised procedural schedule.. Accordingly, MNA's motion to make the amended complaint more definite is denied.

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

It is ordered:

1. MNA's motion to dismiss the amended complaint in STB Docket No. 42104 is denied.
2. Entergy must identify the through route(s) that it seeks to have prescribed in its opening evidence and arguments. MNA's motion to require Entergy to make the amended complaint more definite is therefore denied as moot.

⁵ See Motion to Dismiss at 5; Oral Argument Tr. at 22-24.

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

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