

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42128

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION

v.

NORFOLK SOUTHERN RAILWAY COMPANY

Digest:¹ This decision establishes a procedural schedule for this proceeding and clarifies that the parties to this large rate case should have conferred with each other on procedural matters within 7 days after the shipper filed its complaint with the Board.

Decided: March 14, 2011

This decision grants a motion of South Mississippi Electric Power Association (SMEPA) to establish a procedural schedule for this proceeding.

BACKGROUND

In a complaint filed on December 28, 2010, SMEPA challenges the reasonableness of rates, rules, and other terms established by Norfolk Southern Railway Company (NSR) for the transportation of coal from NSR-served mine origins and origin groups in Kentucky, Virginia, West Virginia, Tennessee, and Alabama, and from NSR-served docks in Mobile, Ala., to SMEPA's R.D. Morrow, Sr. Generating Station, near Richburg, Miss.²

On January 11, 2011, SMEPA filed a motion to establish a procedural schedule in which it requests that the Board implement the procedural schedule attached to its motion as Appendix A. On January 31, 2011, NSR filed a reply in which it contends that it would be premature to establish a procedural schedule because parties are not required to confer regarding procedural

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).

² In its complaint, SMEPA also states that the challenged NSR tariffs, circulars, and publications may contain unreasonable charges and may constitute unreasonable practices in violation of 49 U.S.C. §§ 10702 and 10746. On January 18, 2011, NSR filed a motion to dismiss the unreasonable practice claim, and SMEPA filed a reply on February 7, 2011. The Board will address NSR's motion to dismiss in a separate decision.

matters until the 7th day following the end of mediation, which remains ongoing in this dispute. Alternatively, NSR requests that the Board adopt the procedural schedule attached to its reply as Exhibit A.

In its motion, SMEPA states that NSR has refused to negotiate a procedural schedule that would govern this case, as required by Board rules. SMEPA states that, as a basis for its refusal to negotiate a procedural schedule, NSR cites 49 C.F.R. § 1111.10(b) of the Board's regulations, which provides:

Stand-alone cost or simplified standards complaints. In complaints challenging the reasonableness of a rail rate based on stand-alone cost or the simplified standards, the parties shall meet, or discuss by telephone, discovery and procedural matters within 7 days after the mediation period ends. The parties should inform the Board as soon as possible thereafter whether there are unresolved disputes that require Board intervention and, if so, the nature of such disputes.

SMEPA acknowledges that the language of the regulation appears unambiguous, but argues that other Board regulations contradict it, including 49 C.F.R. § 1109.4(f), which provides: "Absent a specific order from the Board, the onset of mediation will not affect the procedural schedule in [SAC] rate cases, set forth at 49 CFR 1111.8(a)." Section 1111.8(a) establishes a default schedule for use in SAC rate cases, like this one, and provides that parties must meet to discuss discovery and procedural matters within 7 days following the filing of the complaint.

SMEPA submits that the Board may have adopted 49 C.F.R. § 1111.10(b) in error, as part of a rulemaking in which the Board established rules governing rate cases using the Board's simplified standards.³ SMEPA argues that the rulemaking dealt "exclusively with rate disputes *other than* those brought under the SAC constraint."⁴ SMEPA contends that while the Board intended to permit parties to confer as late as 7 days following the end of mediation in simplified standards rate cases, it erroneously made this deadline applicable to SAC cases as well.

In its reply, NSR argues that the "unambiguous, express language" of § 1111.10(b) controls in this matter, and that the Board should deny SMEPA's motion as premature.⁵ NSR contends that § 1111.10(b) is controlling because the Board adopted it more recently than the other regulations cited by SMEPA, and that waiting until after the conclusion of mediation to implement a procedural schedule will not harm SMEPA. Alternatively, NSR argues that if the Board establishes a procedural schedule at this time, it should use NSR's proposed schedule rather than SMEPA's, because SMEPA's schedule does not allow NSR sufficient time to analyze

³ See Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1) (STB served Sept. 5, 2007), aff'd sub nom. CSX Transp., Inc. v. STB, 568 F.3d 236 (D.C. Cir. 2009), and vacated in part on reh'g, CSX Transp., Inc. v. STB, 584 F.3d 1076 (D.C. Cir. 2009).

⁴ SMEPA's Mot. 5.

⁵ NSR's Reply 4.

SMEPA's evidence and prepare a reply, and does not allow NSR sufficient time to prepare its final brief.

DISCUSSION AND CONCLUSIONS

As noted above, 49 C.F.R. § 1111.10(b) provides that in both SAC and simplified standards rate cases, parties are not required to confer regarding discovery and procedural matters until 7 days after the conclusion of mediation. However, both 49 C.F.R. §§ 1109.4(f) and 1111.8(a) indicate that in SAC cases, parties must confer regarding discovery and procedural matters no later than 7 days after a complaint is filed. While SMEPA contends that §§ 1109.4(f) and 1111.8(a) control in this matter, and NSR argues that § 1111.10(b) controls, both parties note that the rules require clarification.⁶

We agree that there is ambiguity in the Board's rules regarding when litigants must discuss procedural matters in SAC rate cases. However, given that the weight of the Board's rules holds that the mediation period does not toll the parties' obligation in SAC rate cases to confer regarding procedural matters, including negotiating a procedural schedule, and given that it is unclear from the decision adopting final rules in Simplified Standards whether the changes to § 1111.10(b) were intended to apply in SAC rate cases, we find that the better reading of the rules in this case is to follow §§ 1109.4(f) and 1111.8(a). Moreover, this reading is consistent with Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc., NOR 42110 (STB served Oct. 21, 2008), which denied a motion to hold in abeyance the default SAC procedural schedule pending the conclusion of mediation. Citing § 1109.4(f), that decision reiterated that the Board intended for mediation and the early stages of the procedural schedule to run concurrently in SAC rate cases. Seminole Elec., slip op. at 1-2. As a result, SMEPA's motion to establish a procedural schedule is timely and will be considered.

Because SMEPA and NSR have not yet agreed upon a procedural schedule to govern in this matter, the Board will implement one, drawing upon the proposed schedules that the parties submitted in their pleadings. The proposed schedules are identical through September 2, 2011, which both parties agree should be the deadline for SMEPA to file its opening evidence. The schedules then diverge. NSR requests until January 20, 2012, to file its reply evidence, while SMEPA's proposed schedule provides until December 2, 2011. In support of its later proposed reply deadline, NSR notes that SMEPA plans to challenge its rates using the revenue adequacy constraint, in addition to the SAC constraint. Because the Board has limited precedent on the revenue adequacy constraint, NSR contends that additional time to address novel and complex issues will be required. We agree that the revenue adequacy aspect of SMEPA's complaint will likely introduce into this proceeding novel and complex issues. However, there is no reason to

⁶ SMEPA's Mot. 3 ("[T]he Board . . . should . . . clarify the procedural obligations of parties to SAC cases pending formal correction of the language in question."); NSR's Reply 10 n.7 ("To eliminate confusion, the Board may wish to . . . clarify[] that the timing of the conference of the parties suggested by the former schedule has been superseded by Section 1111.10(b).").

believe at this juncture that those issues will require the full amount of time proposed by NSR. NSR's reply, therefore, will be due on December 16, 2011.

SMEPA and NSR propose nearly identical timeframes for calculating the deadline for SMEPA to file its rebuttal evidence. As a result, SMEPA's rebuttal will be due on March 2, 2012. Following rebuttal evidence, the parties' proposed deadlines once again diverge. SMEPA requests 31 days to file closing briefs following rebuttal, while NSR requests 48 days. Thirty-one days should provide the parties with sufficient time to prepare closing briefs. See M&G Polymers USA, LLC v. CSX Transp., Inc., NOR 42123, slip op. at 2 (STB served Feb. 24, 2011) (adopting jointly proposed 30-day deadline for closing briefs). Closing briefs will therefore be due on April 2, 2012.

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

It is ordered:

1. SMEPA's motion to establish a procedural schedule is granted.
2. The procedural schedule for this proceeding is as follows:

June 15, 2011	Discovery completed
July 15, 2011	Joint submission of operating characteristics
September 2, 2011	Complainant's opening evidence due
December 16, 2011	Defendant's reply evidence due
March 2, 2012	Complainant's rebuttal evidence due
April 2, 2012	Closing briefs due

3. This decision is effective on its service date.

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