

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42136

INTERMOUNTAIN POWER AGENCY

v.

UNION PACIFIC RAILROAD COMPANY

Digest:¹ This decision denies a request to place on hold a rate proceeding while the Board, in a separate proceeding, considers modifying some of its rules and procedures in rate cases.

Decided: December 14, 2012

BACKGROUND:

On May 30, 2012, Intermountain Power Agency (IPA) filed a complaint in the instant proceeding challenging the reasonableness of rates established by Union Pacific Railroad Company (UP) for unit train coal transportation service from a point of interchange with the Utah Railway Company at Provo, Utah to IPA's electric generating facilities at Lynndyl, Utah. Prior to this, in December 2010, IPA filed a complaint in Docket No. NOR 42127 challenging the reasonableness of rates established by UP for unit train coal transportation service to IPA's facilities at Lynndyl for certain UP single-line service, as well as the traffic challenged in the instant proceeding. On May 2, 2012, IPA filed a motion for leave to withdraw its December 2010 complaint and to dismiss that complaint without prejudice. IPA determined that it could not prevail under its December 2010 complaint and, as a result, stated that it no longer sought relief under it. Instead, IPA stated that it intended to file a new complaint challenging only those rates at issue in this proceeding. On May 30, 2012, IPA filed a new complaint, despite the overlap between the two complaints and the fact that the Board had not decided whether to dismiss IPA's prior complaint without prejudice.² UP argued that the Board should dismiss with prejudice the portion of IPA's complaint challenging the rates as they applied to movements occurring before the Board's decision to dismiss the December 2010 complaint.

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 UP answered the complaint on June 19, 2012. The parties submitted a joint report on the parties' conference on June 27, 2012, in which the parties proposed a procedural schedule that the Board adopted on July 12, 2012. Per that schedule, the parties completed discovery in September, and IPA will file its opening evidence on December 17, 2012.

On July 25, 2012, the Board issued a notice of proposed rulemaking to propose six changes to its rate reasonableness rules. Rate Regulation Reforms, EP 715 (STB served July 25, 2012). For stand-alone cost (SAC) cases, the proposed changes include curtailing the use of cross-over traffic and modifying the approach used to allocate revenue from cross-over traffic. Id. at 3.

On August 14, 2012, UP filed a motion to hold this rate reasonableness proceeding in abeyance, pending completion of the Rate Regulation Reforms rulemaking. IPA filed a reply on September 4, 2012, arguing that the proceeding should not be held in abeyance.

On November 2, 2012, IPA received Board authorization to proceed in part with the complaint filed on May 30, 2012. Intermountain Power Agency v. Union Pac. R.R. (November Decision), NOR 42127 (STB served Nov. 2, 2012). In the current complaint, IPA alleges that UP possesses market dominance over the issue traffic and requests that maximum reasonable rates be prescribed pursuant to the Board's SAC test. The November Decision dismissed the prior complaint with prejudice as to the movements that occurred before the effective date of that decision, and without prejudice as to the remainder of the complaint.

DISCUSSION

The issue presented here is whether we should place this rate case into abeyance pending the outcome of the rulemaking proceeding in Rate Regulation Reforms. As the Supreme Court has said, “[a]n agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities.” Mobil Oil Exploration & Producing Se., Inc. v. United Distribution Cos., 498 U.S. 211, 230 (1991). Absent constitutional constraints or extremely compelling circumstances, administrative agencies are “free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.” Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 543 (1978).

The Board has no established practice of holding cases in abeyance pending the resolution of ongoing rulemakings. Cost of Capital—2005, EP 558 (Sub-No. 9), slip op. at 5 (STB served Feb. 12, 2007). The decision whether to do so in any particular situation is highly dependent on the facts and circumstances of the case. In Major Issues in Rail Rate Cases (Major Issues NPRM), EP 657 (Sub-No. 1) (STB served Feb. 27, 2006), the Board placed all three of the then-pending SAC cases in abeyance while it addressed a proposal to make several major changes to its rate review guidelines. There, the Board determined that the scale of the proposed changes in Major Issues NPRM was a fundamental change to the process and therefore merited an across-the-board hold on all pending rate cases because the Board was proposing to depart from Ramsey pricing principals, a basic precept of Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987), and one of the central economic underpinnings of Constrained Market Pricing. In Rate Regulation Reforms, while the Board has proposed changes that could, if adopted, have an impact on the way that stand-alone railroads (SARRs) are designed (cross-over traffic rules) and awards are determined (cost allocation methodology), these changes are not of the same

fundamental nature as those proposed in Major Issues NPRM so as to warrant a one-size-fits-all approach to abeyance. The Board is maintaining the underlying precepts that cross-over traffic is an acceptable and useful simplifying tool in building a SARR, and that revenue allocation for that traffic should be based on an average total cost (ATC) methodology. The proposals are modifications to these rate procedures, but the foundation remains the same. E.I. DuPont de Nemours & Co. v. Norfolk S. Ry., NOR 42125 et al., slip op. at 4 (STB served Nov. 29, 2012). Accordingly, the Board retains significant discretion as to whether a case should be placed in abeyance while the Board considers proposed rules. See, e.g., id. (declining to hold pending cases in abeyance while considering modifications to the rate review process).

We stated in Rate Regulation Reforms that we did not propose to apply new limitations adopted in Docket No. EP 715 to rate disputes already filed with the Board because of fairness concerns for parties that had relied on our prior precedent when bringing their complaint. Rate Regulation Reforms, slip op. at 17 n.11. Hence, it was the Board's intention that cases so situated should proceed as normal, absent some compelling reason or distinguishing factor that makes it more appropriate to place them into abeyance.

UP's argument for holding this proceeding in abeyance pending the outcome of Rate Regulation Reforms is based primarily on efficiency concerns. It argues that allowing the case to proceed may result in duplicative litigation because many issues raised in this proceeding will mirror those in Docket No. EP 715, and further that the parties may be required to submit new evidence to account for the Board's findings on such issues.³ UP states that it does not now request that the Board decide whether it would apply new rules resulting from Docket No. EP 715 to this case, but it also states it would appeal any decision not to apply meaningful improvements to the rate procedures in this proceeding.⁴ IPA counters that the proceeding should move forward because UP's motion is an attempt to require IPA to litigate its rate complaint under the proposals in Rate Regulation Reforms, specifically regarding modifications to the use of cross-over traffic and the ATC methodology, and that the Board should not apply those modifications to this case.⁵

After considering the relevant factors, we conclude that the case should move forward. First, as explained above, the changes proposed in Rate Regulation Reforms are not fundamental departures from long established and consistent practice. See E.I. DuPont de Nemours, slip op. at 6. Second, we may proceed with an adjudication while considering a broader rule change. See Aeolus Sys., LLC v. United States, 79 Fed. Cl. 1, 15 (Ct. Fed. Cl. 2007) (“[P]laintiff has cited no authority, and the court has found none, which supports plaintiff's argument that an agency may not interpret its own regulations while adjudicating a protest, and at the same time carry on more general rulemaking activities to address prospective application of its regulations.”). Third, we can address any aspects of the rate dispute resolution process that become issues in this proceeding, even though they may also be at issue in Docket No. EP 715.

³ UP Motion 2, 6.

⁴ UP Motion 4, 5 n.5.

⁵ IPA Reply 3, 14-22.

The parties should have been, and continue to be, on notice that use and application of cross-over traffic, as well as ATC revenue allocation methodologies, are potential issues in individual rate cases, and that parties are entitled to raise and respond to substantive arguments regarding those methodologies within those proceedings. See, e.g., Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113 (STB served June 27, 2011) (stating that the Board has concerns with the way cross-over traffic has been costed, and directing the parties to submit new evidence and arguments for how to rectify the identified issue). Fourth, we are directed by statute to ensure expeditious handling of challenges to the reasonableness of railroad rates and to avoid delay in the discovery and evidentiary phases of these proceedings. 49 U.S.C. § 10704(d). Here, we believe that we can accommodate the substantive arguments that may be raised without delaying this case. Balancing these factors against UP's efficiency claims, we find that the complaint should move forward.

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

It is ordered:

1. UP's motion to hold this proceeding in abeyance is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman. Vice Chairman Mulvey commented with a separate expression. Commissioner Begeman dissented with a separate expression.

VICE CHAIRMAN MULVEY, commenting:

Although I concur with the Board's decision to allow this proceeding to continue, I do so with some reservations. The Board recently allowed two other long-pending cases to move forward, despite requests from the railroad to hold them in abeyance. In making its determination in those cases, the Board considered not just its statement in Rate Regulation Reforms that it did not propose to apply any new rules to pending cases but also the nature of the proposed rules and the developing records in those two cases.

After the same examination here, I find it to be a much closer question given that it is less clear that IPA's complaint was fully pending at the time the Board proposed rules in Rate Regulation Reforms. Although IPA technically filed its complaint just before Rate Regulation Reforms, it did not receive the required Board authorization to proceed until much later. That is because IPA's May 2012 complaint challenges a subset of the same rates that were, at that time, still before the Board in IPA's December 2010 complaint. This procedural anomaly, as well as the boundaries of what would be adjudicated in the current proceeding, was not resolved until November 2012, well after the Rate Regulation Reforms proposal was issued. Nonetheless, because the Board allowed the May 2012 complaint to move forward procedurally, even as it

considered whether it should be dismissed, I have concluded that IPA's complaint should be given the benefit, for this purpose only, of its May 2012 filing date.

COMMISSIONER BEGEMAN, dissenting:

For the same reasons that I could not support the Board's recent decision concerning similar abeyance motions in E.I. DuPont de Nemours & Co. v. Norfolk Southern Railway, Docket No. NOR 42125, and Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway, Docket No. NOR 42130, I cannot support this decision.

Regardless of the outcome here, I hope the Board will move quickly to issue a final rule in the Rate Regulation Reforms rulemaking. The rate review process is extremely complex, as illustrated by the two IPA cases (Docket No. NOR 42127 and Docket No. NOR 42136), and the Board needs to make every effort to provide parties with the most fair, just, and certain rate procedures that it can. At a minimum, we should move swiftly to establish and apply improved methodologies for adjudicating rate complaints.

I dissent from the Board's decision.