

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35305

ARKANSAS ELECTRIC COOPERATIVE CORPORATION—PETITION FOR  
DECLARATORY ORDER

Digest:<sup>1</sup> BNSF Railway Company has issued a tariff that implements a program intended to limit the amount of coal dust that blows off of rail cars during transit. Western Coal Traffic League (WCTL) has asked the Board to prevent the tariff from taking effect. In this decision, the Board denies the request because WCTL has failed to show that allowing the rule to take effect will cause irreparable harm to coal shippers.

Decided: August 31, 2011

This decision denies a petition of the Western Coal Traffic League (WCTL) asking the Board to stay or enjoin the effective date of a tariff issued by BNSF Railway Company (BNSF).

In December 2009, in response to a petition filed by Arkansas Electric Cooperative Corporation (AECC), the Board instituted a declaratory order proceeding under 49 U.S.C. § 721 and 5 U.S.C. § 554(e). The issues raised in the 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 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 provisions of the tariff, when considered as a whole, were not reasonable and, therefore, violated 49 U.S.C. § 10702. On July 20, 2011, BNSF issued a revised tariff, BNSF Price List 6041-B Item 100. The revised 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 one of BNSF's three approved suppression methods (topper agents) or submit an alternative method for approval by BNSF. Under the revised tariff, shippers must begin taking these measures by October 1, 2011.

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<sup>1</sup> 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).

In addition, shippers must provide BNSF with written notice of their compliance efforts at least 30 days before loading cars for shipment by BNSF.

On August 12, 2011, WCTL filed a petition requesting that the Board reopen the record, institute mediation (either by agreement of BNSF or by order of the Board), and stay or enjoin the effective date of the revised tariff pending Board-supervised mediation. WCTL interprets the tariff as establishing that the deadline for providing BNSF with written notice of compliance efforts for most PRB coal shippers is September 1, 2011.<sup>2</sup> 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. On August 26, 2011, Union Pacific Railroad Company filed a reply supporting denial of injunctive relief.

This decision will address the request for a stay or injunction; WCTL's request to reopen and request for mediation will be addressed in a separate decision.

#### DISCUSSION AND CONCLUSIONS

WCTL seeks a housekeeping stay or an injunction under 49 U.S.C. § 721(b)(4). Both approaches would result in the same outcome—an order enjoining BNSF from applying its tariff during mediation. Therefore, both approaches are properly analyzed under 49 U.S.C. § 721(b)(4), and the Board will address them together in this decision.

Under 49 U.S.C. § 721(b)(4), the Board may, “when necessary to prevent irreparable harm, issue an appropriate order without regard to” the procedural requirements of 5 U.S.C. §§ 551-559. In deciding a petition for stay, the Board follows the traditional stay criteria by requiring a party seeking a stay to establish that: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of the stay. Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921, 925 (D.C. Cir. 1958). A party seeking a stay carries the burden of persuasion on the elements required for injunctive relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974). WCTL has failed to meet this burden.

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<sup>2</sup> 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.

WCTL has not demonstrated that PRB coal shippers will be irreparably harmed if the tariff goes into effect under the circumstances here, pending the Board's decision on WCTL's reopening request and any mediation that the Board may order. WCTL argues that shippers will be harmed financially by the necessity of entering into contracts with suppliers of topper agents and that shippers may not be able to comply with the tariff due to topper agent and water supply issues. However, such alleged harm appears to be limited to economic loss, which can be remedied in the absence of an injunction. While damages may not be awarded as part of a declaratory order proceeding, shippers could seek to recover their economic damage in a timely unreasonable practices complaint.

In addition, BNSF states in its reply that it has not established any specific enforcement measures, and that "if . . . it should become necessary to take enforcement action with respect to one or more individual common carrier shippers . . . BNSF will provide 60 days' advance notice before implementing any enforcement action."<sup>3</sup> We previously found in this proceeding, when shippers requested an injunction or stay of the prior tariff, that BNSF's commitment to provide 60-days notice established that there would be no imminent, irreparable harm to any shippers, given that shippers faced no current possibility of a sanction for noncompliance. See Ark. Elec. Coop. Corp.—Petition for Declaratory Order, FD 35305 (STB served November 5, 2010). Should BNSF, contrary to its statements in this proceeding, attempt to impose penalties for violating the tariff without giving 60-days notice, the Board could act quickly to enjoin such actions upon a petition for injunction from the penalized shipper. Furthermore, if BNSF were to give 60-days notice of an enforcement action, the penalized party would have sufficient time to petition the Board for an injunction. Because WCTL fails to carry the burden of persuasion as to irreparable harm, we need not address the other requirements for injunctive relief.<sup>4</sup> As noted earlier, we do not address here WCTL's request for reopening or mediation, which raises issues other than irreparable harm.

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 petition for stay or injunction is denied.
2. This decision is effective on its service date.

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

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<sup>3</sup> BNSF Reply 19.

<sup>4</sup> See, e.g., Effingham R.R.—Operation Exemption—Line Owned by Total Quality Warehouse, FD 33528 (STB served Dec. 16, 1997).