

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42071

OTTER TAIL POWER COMPANY
v.
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

Decided: April 14, 2004

On March 26, 2004, Otter Tail Power Company (Otter Tail) filed a motion to strike portions of the supplemental reply evidence of The Burlington Northern and Santa Fe Railway Company (BNSF). On April 2, 2004, BNSF replied to the motion. For the reasons discussed below, Otter Tail's motion to strike will be denied.

BACKGROUND

After reply evidence had been filed in this stand-alone cost (SAC) rate complaint proceeding, Otter Tail requested a supplemental round of evidence in light of the Board's decision in Duke Energy Corporation v. Norfolk Southern Railway Company, STB Docket No. 42069 (STB served Nov. 6, 2003) (Duke/NS). In a decision served on November 21, 2003, the Board granted Otter Tail's request to supplement the record, explaining that "[a]llowing the parties here to address new issues raised by recent decisions is reasonable because it will provide the Board with more relevant evidence and allow it to apply recent precedent." Slip op. at 1. On January 9, 2004, Otter Tail filed supplemental opening evidence, including a new proposal to allocate cross-over traffic revenue based on the modified straight mileage prorate (MSP) revenue allocation procedure first used by the Board in Duke/NS.

After the filing of Otter Tail's supplemental opening evidence and prior to the scheduled filing of BNSF's supplemental reply evidence, the Board issued a decision in Duke Energy Corporation v. CSX Transportation, Inc., STB Docket No. 42070 (STB served Feb. 4, 2004) (Duke/CSX). In Duke/CSX, slip op. at 16, the Board addressed the inclusion of hypothetically rerouted traffic and stated that "for reroutings that would result in a longer overall haul, the rebuttable presumption is that the longer route is less efficient; and the greater the disparity in distance, the stronger that presumption." See also Duke/NS, slip op. at 26 (discussion of the presumption that longer routes are generally less efficient than shorter ones). The Board elaborated on the standards governing the exclusion of the rerouted traffic where the traffic does not share facilities used by the issue traffic. Duke/CSX, slip op. at 16-17.

In its supplemental reply evidence filed on March 22, 2004, BNSF argues that certain rerouted traffic included in Otter Tail's SAC analysis should be excluded because those moves would be re-routed over longer distances than current BNSF movements. BNSF further argues that the MSP procedures for assigning revenue block credits for originating and terminating cross-over traffic should be modified here. Otter Tail argues that BNSF could have raised these arguments earlier and should not be allowed to raise them now.

DISCUSSION AND CONCLUSIONS

In granting Otter Tail's request to provide for a supplemental round of evidence based on new issues raised by the Board in Duke/NS, the Board found that the submission of additional evidence was reasonable in light of that Board decision issued in the interim. In its motion to strike, Otter Tail seeks to deny BNSF the same opportunity to address new issues raised in recent rate cases, including Duke/NS. Otter Tail argues that BNSF should have made these arguments in its original reply. Yet, BNSF's original reply was filed before the Board's decisions in Duke/NS and Duke/CSX, both of which raised, or elaborated upon, the issues addressed by BNSF arguments. Thus, Otter Tail fails to reconcile why it would be fair to allow it to file new evidence based on new precedent but not allow BNSF to do the same.

In this case, BNSF's supplemental reply argument to exclude certain traffic rerouted over longer routes than BNSF's current service is responsive to the Board's recent decisions in Duke/NS and Duke/CSX. Additionally, BNSF's supplemental argument regarding the MSP methodology origination and termination procedures is responsive to Otter Tail's opening supplemental evidence, wherein Otter Tail first presented the MSP methodology in this case, and is responsive to the Board's decision in Duke/NS. Finally, Otter Tail is not prejudiced by any of BNSF's supplemental reply arguments because it has an opportunity to address them in its rebuttal evidence, due on April 29, 2004. For the foregoing reasons, Otter Tail's motion to strike will be denied.

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

It is ordered:

1. Otter Tail's motion to strike portions of BNSF's supplemental reply evidence is denied.

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

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary