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SERVICE DATE – FEBRUARY 16, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42124

STATE OF MONTANA v. BNSF RAILWAY COMPANY

Digest:<sup>1</sup> This decision denies the motion to dismiss filed by the railroad and sets a procedural schedule.

Decided: February 14, 2011

In this proceeding, the State of Montana (Montana) challenges as an unreasonable practice BNSF Railway Company's (BNSF) replacement of a 52-car tariff for wheat from Montana to the Pacific Northwest with a tariff that allegedly limits the movements to 48 cars. Montana seeks an order that directs BNSF to cease and desist from the practice, accept 52-car shipments of wheat at 52-car tariff rates, and any other relief warranted. In this decision, we deny BNSF's motion to dismiss and set a procedural schedule.

BACKGROUND

On July 14, 2010, Montana filed a complaint claiming that a BNSF tariff constitutes an unreasonable practice in violation of 49 U.S.C. § 10702 because it places a 48-car limit on wheat shipments from Montana grain elevators with a 52-car or greater capacity. Montana alleges that for years, BNSF encouraged the construction and operation of grain elevators capable of loading 52-car trains, and as part of that effort, BNSF accepted tenders of 52 cars at published tariff rates. In February 2009, however, BNSF modified its rate publication to eliminate rates applicable to movements of 52 cars and replaced it with a tariff applicable to 48 cars. Montana states that in response to the new BNSF tariff, most 52-car elevators now ship wheat in 48-car lots, which reduces elevator efficiencies and underutilizes those facilities.

Moreover, Montana alleges the BNSF tariff change affects the revenue-to-variable-cost ratios applicable to those movements for purposes of our regulatory framework, because movements of 49 cars or less are subject to the make-whole adjustment under the Uniform Rail Costing System (URCS), which assigns higher costs to movements of less than 50 cars. The make-whole adjustment is not applied to shipments of 50 cars or more because of the cost efficiencies of longer trains. Montana claims that BNSF made this change to take advantage of the make-whole adjustment and ultimately to remove movements from the Board's rate

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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).

reasonableness jurisdiction, which would result from higher-assigned costs lowering the revenue-to-variable-cost ratio (R/VC) to below 180%. Montana requests that the Board find BNSF's tariff to be an unreasonable practice, and order BNSF to cease and desist from that practice and to accept 52-car trains at 52-car rates.

BNSF filed its answer on July 29, 2010, and an amended answer on September 1, 2010. On August 17, 2010, each party filed a letter advising the Board of that party's requested procedural schedule. The only difference in the requests was as to the amount of time for filing defendant's reply evidence. With knowledge that BNSF was planning to file a motion to dismiss, Montana agreed that a procedural schedule should not be established until after the resolution of the motion to dismiss.

By motion filed on August 23, 2010, BNSF requested that the Board dismiss Montana's complaint or hold the proceeding in abeyance pending the Board's review of the URCS make-whole adjustment. BNSF argues that there are no reasonable grounds for an investigation pursuant to 49 U.S.C. § 11701(b). BNSF notes that its 48-car tariff does not limit a particular tender to 48 cars, as a grain shipper could tender 52 cars under the 48-car rate and any number of additional cars at single car rates or tender two blocks of 26 cars at the 26-car rates.<sup>2</sup> BNSF makes two arguments in support of its motion: (1) that it has the right to establish the rate and related tender requirements that it chooses in the first instance, and (2) that the issue is not ripe for review, because the concerns Montana raises are hypothetical and speculative. In the alternative, BNSF argues the Board should hold this proceeding in abeyance while the Board conducts a review of URCS, which will include a review of the make-whole adjustment.

Montana responded to the motion on September 13, 2010. In its reply, Montana counters that its allegations that BNSF changed its rate structure to take advantage of the URCS make-whole adjustment provide reasonable grounds for investigation. Montana further claims that the issue is ripe for review, because the alleged abuse of the make-whole adjustment results in de facto deregulation of rates, and Montana has a clear interest in opposing such deregulation. In response to BNSF's alternative request to hold the proceeding in abeyance while the Board conducts a review of URCS, Montana noted that there is no ongoing URCS rulemaking and that such a rulemaking could take 2 years or more to initiate and complete.

In a decision served October 27, 2010, the Board set the motion to dismiss for oral argument, which was held on November 30, 2010. At oral argument, BNSF reaffirmed its position that it has the statutory prerogative to set and structure its rates as it so chooses in the first instance, and that Montana has not alleged any applicable exception to that statutory right. Montana reiterated its concern that BNSF is taking advantage of the URCS make-whole adjustment, thereby lowering the R/VC ratios for some Montana wheat shipments below the jurisdictional threshold of 180%, and that BNSF is instituting an unreasonable 48-car limit.

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<sup>2</sup> However, BNSF noted at oral argument that it no longer publishes 26-car rates and has replaced those rates with 24-car rates. Tr. at 9-10.

## DISCUSSION AND CONCLUSIONS

The Board may dismiss a complaint if it “does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b). Motions to dismiss are generally disfavored and are rarely granted.<sup>3</sup> In reviewing a motion to dismiss, all alleged facts are viewed in the light most favorable to the complainant, here Montana.<sup>4</sup>

Central to Montana’s complaint is that BNSF replaced its 52-car tariff with a 48-car tariff to take advantage of the make-whole adjustment in URCS. The make-whole adjustment assigns higher costs to movements of 49 cars or less, which, when applied to the 48-car tariff, could lower the R/VC ratios of the movements, if challenged, below 180%. Montana admits it is not challenging the level of the rates published, but whether it was a reasonable practice to make the shift in rates, given the effect of the rate change on the R/VC ratios and the practical effect of instituting a 48-car limit. Although its complaint noted that grain elevators could still theoretically ship 52 cars using the 48-car rate plus four single-car rates, Montana explained at oral argument that “[i]f you try to add single car[s] onto [the 48-car rate], you have no telling when you’re going to get [the single cars]. ... the presumption should not be made that just because four and 48 add up to 52, you will get 52 cars in a shipment at one time from [BNSF].”<sup>5</sup>

Moreover, at oral argument BNSF explained that it has shifted its entire grain rate structure in the state of Montana, replacing 52-car rates with 48-car rates and replacing 26-car rates with 24-car rates.<sup>6</sup> When asked whether the effect of the URCS make-whole adjustment was part of the reasoning for the rate shift, BNSF admitted that “[i]t was part of the thinking and the rationale in the way the structure was organized.”<sup>7</sup>

Given the allegation that BNSF strongly encouraged shippers (over the course of many years) to move grain in 52-car trains, the allegation and BNSF’s admission that one of its goals in shifting to a 48-car tariff was to have these movements costed differently under URCS, Montana’s concern as to whether requests to ship 52-car movements would be honored by BNSF under its common carrier obligation, and viewing all other facts in the light most favorable to Montana, we find reasonable grounds for an investigation. We will, therefore, deny the motion to dismiss and allow this case to proceed.

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<sup>3</sup> Dairyland Power Coop. v. Union Pac. R.R., NOR 42105, slip op. at 5 (STB served July 29, 2008); Garden Spot & N. Ltd. & Ind. Hi-Rail Corp.—Purchase & Operate—Ind. R.R. Line Between Newton & Browns, Ill., FD 31593, slip op. at 2 (ICC served Jan. 5, 1993).

<sup>4</sup> See North Am. Freight Car Ass’n—Protest & Pet. for Investigation—Tariff Publications of the Burlington N. & Santa Fe Ry., NOR 42060, et al., slip op. at 9 (STB served Aug. 13, 2004); W. Fuels Serv. Corp. v. Burlington N. R.R. & Santa Fe Ry., NOR 41987, et al., slip op. at 7 (STB served July 28, 1997).

<sup>5</sup> Tr. at 56-57.

<sup>6</sup> Tr. at 8-10.

<sup>7</sup> Tr. at 10.

The Board also will establish a procedural schedule. While the parties were unable to agree to a complete procedural schedule, the only point of disagreement was the amount of time that should be allowed for BNSF to file its reply evidence—Montana requested 45 days and BNSF requested 60 days. As we are giving 45 days for Montana to file its opening evidence, we will grant BNSF an equal amount of time for its reply evidence. As such, the Board adopts the following procedural schedule:

Period of Discovery	May 17, 2011
Montana's Opening Evidence	July 1, 2011
BNSF's Reply Evidence	August 15, 2011
Montana's Rebuttal	September 14, 2011

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

It is ordered:

1. BNSF's motion to dismiss is denied.
2. The procedural schedule set forth above is adopted.
3. This decision is effective on its date of service.

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