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SEC

SERVICE DATE – LATE RELEASE MAY 19, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42104

ENTERGY ARKANSAS, INC. AND ENTERGY SERVICES, INC.

v.

UNION PACIFIC RAILROAD COMPANY

AND

MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.

Finance Docket No. 32187

MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.

—LEASE, ACQUISITION AND OPERATION EXEMPTION—

MISSOURI PACIFIC RAILROAD COMPANY AND BURLINGTON NORTHERN
RAILROAD COMPANY

MOTION TO EXTEND PROCEDURAL SCHEDULE

MOTION TO COMPEL DISCOVERY

MOTION TO INTERVENE

Decided: May 19, 2008

To the extent set forth in this decision, the Board grants the motion of Entergy Arkansas, Inc., and Entergy Services, Inc. (jointly, Entergy) to extend the procedural schedule in these proceedings to allow for further discovery, grants Entergy's second motion to compel the Union Pacific Railroad Company (UP) to respond to discovery, and grants Arkansas Electric Cooperative Corporation's (AECC) petition to intervene.

MOTION TO EXTEND PROCEDURAL SCHEDULE

By decision served on April 15, 2008, the Board established the following procedural schedule:

End of Discovery	May 10, 2008
Entergy's Opening Evidence and Argument	June 10, 2008

Defendants' Reply Evidence and Argument	July 10, 2008
Entergy's Rebuttal Evidence and Argument	July 30, 2008

By motion filed on May 8, 2008, Entergy seeks to extend the procedural schedule in these proceedings, as follows:

Completion of production of documents in response to follow-up requests	May 30, 2008
Completion of deposition(s)	June 13, 2008
Entergy's Opening Evidence and Argument	July 10, 2008
Defendants' Reply Evidence and Argument	August 14, 2008
Entergy's Rebuttal Evidence and Argument	September 18, 2008

Entergy offers a number of arguments as grounds for the extension that it proposes. First, Entergy argues that, without an extension, its ability to prepare its case will be compromised because defendants have not completed their production of documents and likely will not do so before the existing May 10, 2008 discovery deadline. Second, Entergy argues that UP's document production is incomplete and raises issues requiring follow-up document production and depositions. Third, Entergy indicates that it would file a future motion to compel (now filed) because the follow-up discovery needed by Entergy has been refused by defendants. Finally, Entergy states that its lead counsel underwent surgery on May 7, 2008, and that his recovery is expected to last 2 weeks.

On May 12, 2008, the defendant carriers filed separate responses to Entergy's motion to extend the procedural schedule. MNA does not oppose the extension sought by Entergy but does oppose any attempt to depose MNA employees.¹ UP does not object to a 2-week extension of the deadlines for the parties' evidentiary filings in light of Entergy's counsel's recent surgery but opposes any extension of the deadline for discovery. UP argues that all of the information sought by Entergy in its first round of requests either is not available, has already been produced, or can be derived from what has been produced.² UP also argues that Entergy is not entitled to the follow-up discovery that it seeks, on the grounds that: (1) Entergy could have requested the

¹ As of the date of this decision, however, Entergy has not moved to compel MNA to submit to deposition of its employees.

² The only exception, according to UP, is information related to payments made to MNA for transporting freight, and UP maintains that it is still in the process of locating and producing more of that information and expects to produce any responsive documents within the next week.

information and depositions earlier, and (2) that the information sought by Entergy is not relevant to this proceeding.

SECOND MOTION TO COMPEL DISCOVERY

On May 9, 2008, Entergy filed a second motion to compel UP to submit to the discovery that is the basis for its motion to extend the procedural schedule. Entergy asks the Board to compel UP to respond to certain follow-up discovery and to make employees available for deposition. Entergy argues that UP has unduly delayed responses to discovery during the discovery period and thereby effectively eliminated the use of follow-up discovery. Entergy argues that it would be unreasonable for complainants to anticipate every potential issue in a single round of what would be a broad, burdensome discovery request at the outset of discovery.

On May 12, 2008, UP filed a reply in opposition to Entergy's second motion to compel. In its reply, UP reiterates the arguments made in its reply to Entergy's motion to extend the procedural schedule that: (1) Entergy could have requested the information and depositions earlier; and (2) UP has provided the available information sought by Entergy in its first round of requests. UP also argues that the additional information sought by Entergy concerning UP's pre-transaction expectations is neither useful nor relevant to this proceeding and would be unduly burdensome to produce.

The discovery at issue includes the following categories of requests by Entergy:

UP's Pre-Transaction Analysis. In response to Entergy's first set of discovery requests, UP submitted a 1992 document entitled "Union Pacific Railroad Company Approval for Line Disposition" (Approval for Line Disposition), in which UP personnel recommended approval of the 1992 lease and acquisition transaction pursuant to which MNA would commence operations over the line. This document summarizes and compares (1) UP's expected present value of the costs and revenues that it would incur with the transaction with (2) the present value of the costs and revenues that it would incur without the transaction. Entergy argues that further information about this analysis, including supporting information, is needed to develop its argument that the net financial benefit to UP of the lease substantially exceeds what UP would have realized had it not entered into the transaction. Entergy claims such analysis is relevant based on language in Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League, STB Ex Parte No. 575, et al. (STB served Oct. 30, 2007) (Review of Rail Access and Competition), at 10-11.

More specifically, Entergy seeks to compel UP to produce any (1) workpapers, spreadsheets, or databases supporting the Approval for Line Disposition analysis; and (2) documents that will enable Entergy to evaluate UP's assertion (in its May 2, 2008 letter conveying documents to Entergy) that the analysis in its Approval for Line Disposition did not reflect the final terms of the transaction. Entergy is also asking the Board to compel UP to make knowledgeable employees available for deposition concerning the Approval for Line Disposition.

UP disputes the relevance of the information that Entergy is attempting to gather concerning the Approval for Line Disposition. UP argues that, in a prior decision resolving an earlier motion to compel discovery, the Board rejected Entergy's attempt to cite language in Review of Rail Access and Competition in support of its theory that whether the lease has overcompensated UP is a relevant issue.³ UP also argues that the information is not needed because it has already told the Board that it would never have entered into the transaction without the ability to retain Entergy's coal and other on-line traffic. UP criticizes Entergy's theory of the case for improperly presuming that UP would ever enter into a transaction that would have left it worse off, or no better off, than had it not entered into the transaction.

Addressing the issues of need and burden concerning the pre-transaction analysis in its Approval for Line Disposition, UP argues that it should not have to produce the workpapers supporting this analysis because: (1) it has already produced traffic and payment data regarding its actual (as distinguished from its anticipated) experience under the lease; (2) it is uncertain whether the information has been preserved; and (3) the burden of searching for the information would be significant in light of its lack of relevance.

Effect of Transaction on Labor Costs. Entergy notes that UP's analysis in the Approval for Line Disposition stated that the benefits of the transaction would depend on the extent of future labor cost savings that would accrue from reduction in the number of employees on reserve boards and that this would depend on the extent to which these employees were able to "work themselves off" these boards. Entergy argues that this assertion requires that UP be compelled to respond to a follow-up question asking for "the complete records of the reserve board status of the 102 employees impacted by the M&NA transaction, including . . . the cost incurred by UP as a result of the transaction with respect to each of these employees, and the time period each employee spent on UP's reserve board." Entergy also requests that UP make available for deposition employees who know about this subject.

UP responds that Entergy does not need this information. Moreover, UP states that production of this information would require an unduly burdensome special study and that it has already identified one additional document analyzing labor cost issues that it will produce to Entergy.

Traffic Not Covered in Pre-Transaction Analysis. In its second motion to compel, Entergy asserts that the pre-transaction analysis in UP's Approval for Line Disposition excludes, to some degree, the traffic associated with service to Entergy's plant. Entergy asks the Board to compel UP to respond to a follow-up request for any analyses that relate in whole or in part to MNA's handling of Entergy's coal traffic, or any other traffic, that may not be reflected in its pre-transaction analysis in Approval for Line Disposition. Entergy also requests that UP make available for deposition employees who know about this subject.

³ See Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pacific Railroad Company and Missouri & Northern Arkansas Railroad Company, Inc., STB Docket No. 42104, et al. (STB served May 7, 2008), at 4-5.

UP responds that: (1) the traffic documents sought by Entergy have either already been produced or have not been located; (2) the documents that have been produced are clear on their face that Entergy's coal traffic was not included in its pre-transaction analysis; (3) drafts of the lease and correspondence about the drafts will not produce any more information about the contents of UP's traffic analyses than the contents of the analyses themselves; and (4) the requested documents would be unduly burdensome to produce in light of their limited usefulness to this proceeding.

Financial Impact of Diversion of Traffic to Another Carrier. Entergy argues that, in light of the fact that the analysis in UP's Approval for Line Disposition did not quantify the effect of revenues that could be lost or gained by MNA's diversion of traffic to other carriers, Entergy has requested information (through documents if available or by deposition) bearing on such diversion.

UP responds that it has conducted an additional search for this information and will produce the additional document that it earlier told Entergy it had found.

DISCUSSION AND CONCLUSIONS

The second motion to compel will be addressed first, as the need for time for additional discovery will be the basis for any extension of the procedural schedule. While it would have been more efficient for Entergy to have commenced its discovery earlier, it did so within the deadlines established in the procedural order. Moreover, UP had yet to complete its production as of May 12, more than a month after being served with the request. Under these circumstances, Entergy should not be denied an adequate opportunity for follow-up discovery, especially in light of the fact that this is the first case challenging an interchange commitment following the Board's decision in Review of Rail Access and Competition. With the guidance provided below, the discovery and the depositions can be completed without undue burden on UP and in a timely manner.

Although in our May 7 decision we denied certain discovery that was of a highly sensitive nature and was not relevant, as a general matter, a motion to compel is not the proper context to argue the merits of a case. The Board will be liberal in allowing Entergy to obtain the information to make its case under the theories it considers most relevant given that it is the first case of this nature following the Board's decision in Review of Rail Access and Competition. Ultimate issues of relevance, i.e., what Entergy must show to obtain the relief that it seeks, will be resolved in the final decision on the merits. Thus, for purposes of this proceeding, Entergy's discovery request will not be denied merely because UP may question Entergy's legal theories of its case.

UP will be ordered to respond to the discovery and depositions requested by Entergy, subject to limitations that are designed to alleviate the undue burden identified by UP. UP must conduct a reasonable search of its files for documents and information responsive to the request. The Board does not know enough about how UP maintains its files to establish the exact parameters of this search. At minimum, however, UP's search for records within its possession, custody or control should include files that are located on its premises, files that are kept

electronically, and the off-site storage or archived files of those individual employees or departments likely to have responsive information.

UP does not have to conduct special studies or attempt to recreate information that was not kept in the ordinary course of business. Also, UP will not be required to search the individual personnel files of the 102 employees who were placed on the reserve board, but UP must search for other responsive documents which discuss the labor costs associated with these employees regarding the transaction. With regard to any category of documents, if after conducting a reasonable search, UP determines that requested information is not available but can be derived from information that has already been submitted, UP must so indicate and describe the derivation process.

UP is required to produce the required documents and written responses sought in Entergy's motions to compel by June 2, 2008. This will give Entergy sufficient opportunity to examine these documents to determine whether they are to be the subject of deposition, while allowing the proceeding to move forward in a timely manner. UP is required to make a witness (or, as appropriate, witnesses) available to be deposed on the subject matters listed on page 18 of Entergy's second motion to compel. The parties are urged to cooperate fully with each other in completing the discovery process and narrowing the scope of discovery whenever possible so that all depositions are scheduled and completed to meet the June 16, 2008 deadline for all discovery.

Revised Procedural Schedule

To provide sufficient time for the additional discovery allowed in this decision, the procedural schedule will be extended as follows:

Close of all discovery, including depositions	June 16, 2008
Entergy's Opening Evidence and Argument	July 11, 2008
Defendants' Reply Evidence and Argument	August 11, 2008
Entergy's Rebuttal Evidence and Argument	September 2, 2008

Petition to Intervene

By petition filed on May 9, 2008, AECC asks the Board to allow it to intervene in this proceeding.

AECC's petition to intervene will be granted, based on its representations that it is a co-owner with Entergy of the Independence Steam Electric Station and that its intervention will neither disrupt the schedule adopted by the Board nor unduly broaden the issues raised in this proceeding.

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

It is ordered:

1. Entergy's second motion to compel discovery is granted to the extent set forth in this decision.
2. The procedural schedule in these proceedings is modified as set forth in this decision.
3. AECC's petition to intervene is granted.

By the Board, Anne K. Quinlan, Acting Secretary.

Anne K. Quinlan
Acting Secretary