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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42124

STATE OF MONTANA v. BNSF RAILWAY COMPANY

Docket No. EP 693¹

ORAL ARGUMENT

Decided: October 27, 2010

The Surface Transportation Board will hold oral argument on Tuesday, November 30, 2010, at 9:30 a.m., in the hearing room at the Board's headquarters located at 395 E Street, S.W., Washington, DC. The argument will address State of Montana v. BNSF Railway Company, NOR 42124. The oral argument will be open for public observation, but only counsel for the parties will be permitted to present argument.

The State of Montana (Montana) filed a complaint alleging that a BNSF Railway Company (BNSF) tariff constitutes an unreasonable practice in violation of 49 U.S.C. § 10702 because it allegedly 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 construction and operation of grain elevators in Montana capable of loading 52-car trains and 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. Although Montana notes that a 52-car elevator could still tender 52-car trains (i.e., it may "tender 48-car shipments at the 48-car rate and pay single car rates on cars in addition to the 48-car lots"), Montana states that in response to the BNSF tariff most 52-car elevators now ship wheat in 48-car lots, which reduces elevator efficiencies and underutilizes those facilities. Montana alleges the tariff change affects the revenue-to-variable-cost ratios because movements of 49 cars or less are subject to the make-whole adjustment under the Uniform Rail Costing System (URCS), while the make-whole adjustment is not applied to shipments of 50 cars or more because of the cost efficiencies of longer trains. Montana requests that the Board find BNSF's tariff to be an unreasonable practice, and order BNSF to cease and desist from those practices and to accept 52-car trains at 52-car rates.

BNSF filed its answer on July 29, 2010. By motion filed on August 23, 2010, BNSF requested that the Board dismiss Montana's complaint or hold the proceeding in abeyance

¹ The Board will no longer use Docket Number EP 693 for noticing oral arguments. In the future, oral argument notices will be docketed in that proceeding's respective docket number.

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. Montana responded to the motion on September 13, 2010. The Board is setting this case for oral argument on the motion to dismiss.

BNSF will have 20 minutes of argument time. Montana will have 20 minutes of argument time. BNSF may reserve part of its time for rebuttal if it so chooses.

By November 23, 2010, the parties shall submit to the Board the name of the counsel who will be presenting argument and the name of the party counsel will be representing. BNSF's filing shall also address the requested time reserved for rebuttal, if any. Absent a request by the Board, no additional written comments or other submissions may be filed in connection with this oral argument. Parties should prepare a short oral statement and be prepared to answer questions from the Board. The purpose of oral argument is not to restate the written arguments previously presented or to present evidence, but to summarize and emphasize the key points of a party's case, and provide an opportunity for questions that the Board may have.

Counsel for the parties shall check in with Board staff in the hearing room prior to the argument. Any exhibit used at the oral argument must be based on materials previously submitted as part of the record. Electronic presentations at oral argument will be treated as exhibits. Counsel shall provide a printed copy of each exhibit to opposing counsel and shall provide 9 copies, on 8 1/2 by 11 inch paper, of each exhibit to Board staff.

A video broadcast of the oral argument will be available via the Board's website at <http://www.stb.dot.gov>, under "Information Center"/"Webcast"/"Live Video" on the home page.

Instructions for Attendance at Hearing

The STB requests that all persons attending the hearing use the Patriots Plaza Building's main entrance at 395 E Street, S.W. (closest to the northeast corner of the intersection of 4th and E Streets). There will be no reserved seating, except for those scheduled to present oral arguments. The building will be open to the public at 7:00 a.m., and participants are encouraged to arrive early. There is no public parking in the building.

Upon arrival, check in at the first floor security desk in the main lobby. Be prepared to produce valid photographic identification (driver's license or local, state, or Federal government identification); sign-in at the security desk; receive a hearing room pass (to be displayed at all times); submit to an inspection of all briefcases, handbags, etc.; then pass through a metal detector. Persons choosing to exit the building during the course of the hearing must surrender their hearing room passes to security personnel and will be subject to the above security procedures if they choose to re-enter the building. Hearing room passes likewise will be collected from those exiting the hearing upon its conclusion.

Laptops and recorders may be used in the hearing room, but no provision will be made for connecting personal computers to the Internet. Cellular telephone use is not permitted in the hearing room; cell phones may be used quietly in the corridor surrounding the hearing room, or in the building's main lobby.

The Board's hearing room complies with the Americans with Disabilities Act, and persons needing such accommodations should call (202) 245-0245, by the close of business on November 23, 2010.

For further information regarding the oral argument, contact Chris Oehrle at (202) 245-0391. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

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

It is ordered:

1. Oral argument in State of Montana v. BNSF Railway Company, NOR 42124, will be held on Tuesday, November 30, 2010, at 9:30 a.m., in the Surface Transportation Board Hearing Room, at 395 E Street, S.W., Washington, DC, as described above.
2. By November 23, 2010, the parties shall submit to the Board the names of the counsel who will be presenting argument and the name of the party counsel will be representing. BNSF's filing shall also address the requested time reserved for rebuttal, if any.
3. This decision is effective on the date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.