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SEC

SERVICE DATE - SEPTEMBER 11, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42058

ARIZONA ELECTRIC POWER COOPERATIVE, INC.

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
AND UNION PACIFIC RAILROAD COMPANY

Decided: September 10, 2002

On December 29, 2000, Arizona Electric Power Cooperative, Inc. (AEPCO or complainant) filed a complaint challenging the reasonableness of joint rates of The Burlington Northern and Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UP) (collectively, defendants) for unit-train movements of coal from mines at North Tipple and Lee Ranch, NM, to AEPCO's Apache Generating Station in Cochise, AZ.¹ On March 9, 2001, AEPCO amended the complaint to also challenge joint BNSF-UP rates to Cochise from BNSF-served mines in the Powder River Basin (PRB) of Wyoming and Montana,² and UP rates for single-line service from UP-served mines in Colorado. In this decision, we address motions to compel BNSF to provide discovery and petitions for clarification with regard to the UP rates.

¹ BNSF transports the coal from the New Mexico mines to Deming, NM. UP transports the coal from Deming to Cochise. Because Cochise is served exclusively by UP, movements originating on BNSF at any origin would necessarily require a subsequent move by UP to reach Cochise. The rates challenged by AEPCO provided for BNSF-originated joint-line movements with UP.

² Shortly after the amended complaint was filed, the defendants canceled the PRB joint rates on the ground that AEPCO had contracted to satisfy its 2001 coal needs from New Mexico and Colorado mines, making shipments from the PRB unlikely at that time. AEPCO objected and, in Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, STB Finance Docket No. 34041, et al. (STB served May 8, 2001), defendants were ordered to establish common carrier rates for trainload movements of coal from PRB origins to Cochise. In response, on May 14, 2001, defendants published new joint rates, which subsequently expired on June 30, 2001. In a decision served on December 31, 2001 (December 2001 decision), defendants were ordered to reestablish appropriate PRB rates. Defendants have complied with that order, but have also sought judicial review of that requirement in Burlington N.& S.F. Ry. v. STB, No. 02-1054 (D.C. Cir. filed Feb. 11, 2002).

BACKGROUND

In the December 2001 decision, the Board disposed of AEPCO's first motion to compel discovery. As pertinent, the Board denied AEPCO's motion to compel documents relating to defendants' traffic without prejudice to AEPCO's refining its discovery request, and the Board denied the remainder of AEPCO's discovery requests pertaining to: (1) operational information for nonissue movements to Arizona performed by defendants; and (2) defendants' revenue divisions on the existing joint-line issue traffic. On January 7, 2002, AEPCO served amended discovery requests on both defendants, and on March 20, 2002, AEPCO filed a motion for an order compelling BNSF to provide discovery (AEPCO's second motion to compel). BNSF and UP filed separate replies on April 9, 2002.³ Also on April 9, 2002, AEPCO filed a motion for an order compelling BNSF to provide additional discovery (AEPCO's third motion to compel). BNSF filed a reply on April 29, 2002. Finally, on April 22, 2002, UP filed a petition to clarify the Colorado rate dispute (UP's clarification petition). On April 30, 2002, AEPCO filed a reply, which also requested clarification. UP replied to AEPCO's request for clarification on May 20, 2002.

Action on these requests was deferred pending a decision on a joint petition of defendants, filed on February 15, 2002, asking the Board to direct AEPCO to make separate evidentiary submissions—including separate stand-alone cost (SAC) presentations—for each of the three sets of challenged rates.⁴ In a decision served on August 20, 2002 (August 2002 decision), the Board denied defendants' petition, but provided guidance with respect to the permissible boundaries of AEPCO's SAC complaint.

DISCUSSION AND CONCLUSIONS

The parties have classified their discovery pleadings as highly confidential and filed them under seal, consistent with the protective order issued in this proceeding on February 16, 2001. Accordingly, this discussion will be limited to those matters needed to address the outstanding discovery issues.⁵

³ While the discovery motion is not addressed to UP, UP replied to protect its interests.

⁴ Defendants were concerned that a SAC presentation based on a hypothetical single, unified stand-alone railroad (SARR) serving all three coal origin areas would include cross-subsidies in contravention of SAC principles.

⁵ Issue numbers 1-5 are contained in AEPCO's second motion to compel; number 6 is contained in AEPCO's third motion to compel; and number 7 discusses the requests for clarification.

1. Colorado-related information. As noted previously, UP single-line service is provided for coal movements from points in Colorado to Cochise. AEPCO notes, however, that BNSF also operates over portions of the route.⁶ AEPCO submits that a hypothetical SARR is entitled to realize the same economies of density as the incumbent carrier and, accordingly, seeks discovery of BNSF's traffic and costs over the portions of the UP route available to BNSF.

In the August 2002 decision, the Board found that it would be inappropriate for complainant to include non-UP traffic in the traffic group of any part of a SARR aimed at testing UP's single-line rates for the Colorado coal traffic.⁷ Consistent with this guidance, AEPCO's motion to obtain BNSF's traffic and costs with respect to this UP single-line route (other than that needed to determine the fees paid by BNSF to UP or the benefits derived by UP from the presence of BNSF traffic on the line) will be denied.

2. PRB-related information. In the December 2001 decision, AEPCO was directed to narrow its discovery requests, which originally sought information regarding all traffic moving in a 10-state area. The Board found that the discovery request was overly broad in light of the limited portion of the 10-state area through which AEPCO's traffic moves, and again expressed concern regarding the possibility of an impermissible cross-subsidy of AEPCO's traffic in its SAC analysis. In response, AEPCO narrowed the geographic scope of its request to specified coal-carrying routes in nine states ("SARR states"). Within this geographic area, AEPCO now seeks production of potential SAC-related and variable-cost information pertaining to PRB-originated BNSF coal movements.⁸

⁶ The route includes track segments that are jointly owned by BNSF and UP, segments that are owned by UP over which BNSF has trackage rights, and segments that are owned by BNSF over which UP has trackage rights.

⁷ The Board explained that UP's single-line rates should not be judged as if UP has the benefit of revenues from traffic in which it does not participate. Thus, a SARR may replicate the existing cost-sharing arrangements but may not hypothesize non-existent revenue or cost-sharing arrangements. August 2002 decision, slip op. at 6-7.

⁸ AEPCO's interrogatories seek extensive information regarding movements from the PRB to other (non-Cochise) Arizona destinations. AEPCO's Requests for Production (RFP) variously seek documents pertaining to traffic moving over any portion of the AEPCO route, traffic moving in the SARR states, and traffic moving to other Arizona destinations. AEPCO's motion to compel does not discuss specific discovery requests, but cites traffic tapes as an example of the discovery it seeks. BNSF submits in its reply that AEPCO's second motion to compel is effectively a request for guidance on the scope of discovery in that it focuses on broad areas but, for the most part, does not address

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In response, BNSF argues first that the proposed discovery suffers from the same infirmity noted in the December 2001 decision with regard to cross-subsidies. BNSF points out that the vast majority of its PRB traffic shares few if any facilities or movement characteristics with traffic moving in New Mexico and Arizona. It reiterates its concern that the results of an overall SAC analysis based on a single SARR that combines PRB traffic with traffic moving in New Mexico and Arizona would be driven by the relative costs and revenues associated with the PRB traffic. BNSF argues that, absent prior assurances against cross-subsidies, discovery would be unduly burdensome.

In the August 2002 decision, the Board explained that, for each of the three sets of challenged rates, AEPCO may not include any traffic or revenues (or exclude any costs) that could not have been treated in the same manner had AEPCO filed a separate complaint for that set of rates. It follows that AEPCO is entitled to the same scope of discovery that it could have had if it had challenged the PRB rates alone. BNSF's objections relating to burden are conclusory and unpersuasive, and its demand for prior assurances will only serve to prolong the discovery process.⁹ Accordingly, although the merits of AEPCO's SAC analysis will ultimately be judged by the Board after all of the evidence has been submitted, AEPCO's motion to obtain variable-cost and potential SAC-related information on PRB movements will be granted.

3. Transportation Contracts. AEPCO seeks discovery of BNSF's transportation contracts governing volume movements of coal over the possible routes of its SARR.¹⁰ BNSF does not object to this general line of discovery, but suggests that: the parties should first reach agreement on the scope of the request; a "highly confidential" designation should be imposed under the protective order already issued in this proceeding; and any affected shipper should be allowed time to make its views known to the Board.

⁸(...continued)
specific discovery requests. Accordingly, BNSF declines to address individual discovery requests. UP's reply is similar.

⁹ BNSF's reply raises two other objections. It notes that AEPCO has not modified its complaint to encompass the latest adjustment to the challenged rate. This is an unnecessary formality that will not be permitted to interrupt the proceeding. BNSF also submits that AEPCO has no present intention of moving PRB coal in continuous, unit-train service. Nevertheless, traffic has moved, and AEPCO is entitled to complain about the reasonableness of the charges.

¹⁰ In its RFP No. 43, AEPCO initially sought all contracts and common carrier documents governing rates and service terms for shipments handled by BNSF to, from, or through the SARR states in and after year 2000. Although it has narrowed its request, it reserves the right to seek additional discovery after reviewing BNSF's traffic tapes.

It is well settled that a protective order ensures that confidential, proprietary, or commercially sensitive information may be used solely for the involved proceeding and not for other purposes. See Pennsylvania Power & Light Company v. Consolidated Rail Corporation, CSX Transportation, Inc., and Norfolk Southern Railway Company, STB Docket No. 41295 (STB served Mar. 10, 1997) (Pennsylvania Power). As such, the scope of contract discovery has not generally been limited unless the parties agree to do so. In Pennsylvania Power, a request to delay action on the motion to compel production of transportation contracts to afford affected shippers an opportunity to object to disclosure was denied on the basis that shippers who are apprehensive regarding disclosure of extremely sensitive materials can allay their fear by expressing their concern to the defendant, who can specify what level of confidentiality should be assigned to the material produced. Pennsylvania Power, slip op. at 2. Accordingly, AEPCO's motion to obtain transportation contracts will be granted.

4. SAC-related information on non-coal movements. AEPCO requests production of traffic tapes for non-coal BNSF movements that it might seek to include in its SAC analysis.¹¹ As noted above, in response to the Board's earlier criticism of the breadth of its request, AEPCO's request has been narrowed to traffic that moves over the specific coal-moving lines that the SARR is reasonably likely to replicate. Nevertheless, BNSF objects to providing non-coal traffic data related to the Colorado or PRB routes, for the same reasons cited in its objections to providing traffic data for coal movements over those routes.¹² The analysis of those objections applies here as well. Thus, AEPCO is not entitled to BNSF non-coal traffic data for movements over the UP single-line route from Colorado. AEPCO's motion to obtain traffic tapes for non-coal BNSF movements elsewhere in the SARR states will be granted.

5. Locomotive fuel consumption. AEPCO seeks information regarding how BNSF determines the fuel consumption of locomotives used in AEPCO service. It cites Minnesota Power, Inc. v. D.M.I.R. Ry. Co., STB Docket No. 42038 (STB served May 11, 1999), where the Board distinguished between internal management accounting systems, which were not discoverable, and the inputs to such systems, as to which the Board ordered discovery. Based on an internal investigation, BNSF contends that it has no data that can be used to calculate the actual volume of fuel consumed. It

¹¹ AEPCO contemplates sequential discovery with respect to some of the matters that can be resolved here. Thus, AEPCO's review of the traffic tapes sought here would be followed by requests for such materials as contracts and traffic forecasts pertaining to movements described in such traffic tapes.

¹² BNSF states that it is complying with AEPCO's discovery request with respect to New Mexico non-coal traffic.

notes that AEPCO construes its request to include production of train performance simulation models,¹³ but contends that such materials were not mentioned in AEPCO's discovery requests. Nevertheless, BNSF's train performance simulator models or programs would appear to fall within the purview of AEPCO's fuel consumption requests and, as such, are subject to discovery.¹⁴ Accordingly, AEPCO's motion with respect to locomotive fuel consumption will be granted.

6. Line-specific variable-cost data. In AEPCO's third motion to compel, it seeks information from BNSF¹⁵ regarding line-specific road property investment and depreciation.¹⁶ AEPCO submits that these cost elements normally form a very significant portion of the variable costs for a coal unit train movement over a Western railroad; that Board and Interstate Commerce Commission precedent favors the use of movement-specific cost data where practicable; and that line-specific road property costs have usually been substantially lower than system-average costs in coal rate cases. Moreover, AEPCO notes that such data have routinely been provided in the past, and that BNSF's resistance represents a change in position.¹⁷

BNSF contends that system-average data developed under the standards of the Uniform Railroad Costing System (URCS) is preferred unless movement- or line-specific adjustments produce demonstrably superior results. BNSF admits that it possesses line-specific data, but contends that it cannot be used to calculate road property investment costs that are compatible with URCS.¹⁸ BNSF

¹³ AEPCO contends that its fuel-related requests, taken together, seek any information in BNSF's possession that can be used to estimate or calculate locomotive fuel consumption.

¹⁴ BNSF's reliance to the contrary on Wisconsin Power and Light Company v. Union Pacific Railroad Company, STB Docket No. 42051 (STB served Sept. 13, 2001) (Wisconsin Power), is misplaced. In that case, the Board simply upheld the shipper's objection that the carrier had shown no correlation between the results of its Train Performance Simulator (TPS) model and measured fuel consumption of any actual trains. Wisconsin Power, slip op. at 55. It did not find that the TPS model was inherently an invalid indicator of fuel consumption.

¹⁵ UP has not resisted comparable discovery requests by AEPCO.

¹⁶ AEPCO's motion seeks to compel compliance with its RFP No. 12.

¹⁷ Although AEPCO narrowed its discovery request in response to the December 2001 decision, BNSF, in responding to the revised discovery request, withdrew its prior commitment to produce these data in the format in which they may be available.

¹⁸ Specifically, BNSF notes that aggregating its segment-specific, gross investment data
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concludes that no valid purpose would be served by requiring BNSF to produce incomplete and unreliable data because those data cannot be used in the presentation of evidence under the Board's regulatory costing standards.

AEPCO correctly notes that line-specific road property investment and depreciation data were provided by BNSF and other railroads on discovery in prior coal rate reasonableness cases. Indeed, these types of data were provided on discovery in the two other most recent coal rate cases involving BNSF rates.¹⁹ Nowhere in its reply does BNSF refute AEPCO's statement concerning use of this type of road property investment and depreciation data in other coal proceedings. BNSF's reply focuses mainly on the reliability of the requested data, not specifically addressing the crux of AEPCO's request (discovery of that data). In fact, BNSF admits that it possesses data that are responsive to this request.

BNSF's assertions of defects in the potential evidence go to the merits of the case. As such, they are more appropriately addressed in the evidentiary phase of the proceeding. But given the Board's stated preference for line-specific data, where reliable, BNSF will be required to produce, to the extent available, all data, workpapers, and any other materials called for in AEPCO's RFP No. 12.

7. Scope of the Colorado rate dispute. The UP 4244 rate resulted from negotiations between UP and AEPCO beginning on November 20, 2000, when AEPCO asked for a common carrier rate quotation in light of the impending expiration of its contract, and ending on March 26, 2001, when UP published the rate.²⁰ In a letter dated December 18, 2000, UP initially advanced an array of eight rates reflecting the possible combinations of origins (the Axial and Energy mines), car source (railroad-owned or shipper-supplied), and car type (steel or aluminum). AEPCO asked UP to publish these rates, but after further negotiation, limited its request to rates for movements from the Axial and Energy mines in shipper-supplied, aluminum cars. Nevertheless, AEPCO's March 9, 2001 amended complaint challenged all eight rates described in UP's December 18, 2000 letter. UP now asks that the Board

¹⁸(...continued)

contained in its Fixed Asset Database would understate investment when compared to systemwide URCS values, and that use of its depreciation calculator program to reduce gross values to depreciated values would result in a further understatement of net investment.

¹⁹ PPL Montana, LLC v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42054, and Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056.

²⁰ The UP 4244 rate has subsequently been amended to reflect a rate increase and to clarify the annual volume requirement.

clarify that AEPCO may challenge only the two Colorado rates in UP 4244, assertedly the only two Colorado rates that AEPCO actually uses. UP acknowledges that the amended complaint preceded the publication of UP 4244, but states that AEPCO refuses to amend its complaint or to confirm that it will challenge only the UP 4244 rates. Absent clarification, UP states that it will be forced to submit opening revenue-to-variable cost evidence on rates that may not even be in issue.

In reply to UP's clarification petition, AEPCO contends that its November 20, 2000 letter, assertedly a formal rate request, and UP's December 18, 2000 letter in response, were sufficient under 49 U.S.C. 11101, 49 CFR part 1300, and the discussion in Disclosure, Pub. & Not. of Change of Rates—Rail Carriage, 1 S.T.B. 153 (1996), to establish common carrier rates, all of which it had a right to challenge in its amended complaint. Moreover, AEPCO contends that its right to challenge all permutations of these rates is not limited by the fact that it has not shipped coal under all of them. It acknowledges that it may ultimately choose not to challenge all of the rates in UP's December 18, 2000 letter, but states that it cannot make that decision until the completion of discovery. Nevertheless, it offers to provide advance notice to UP of the specific Colorado rates that will be challenged, if UP in turn will specify in advance whether it will be submitting variable-cost evidence in its opening presentation.²¹ As part of its reply, AEPCO makes its own request for clarification. Noting that the UP 4244 rate was set to expire on August 31, 2002, and relying on the December 2001 decision, AEPCO requests that the Board clarify that UP has an ongoing duty to maintain these rates.

UP has a right to be advised of the rates AEPCO intends to address in its evidence. Accordingly, AEPCO must inform UP sufficiently in advance of the filing of opening evidence as to what rates it intends to contest. This, of course, does not foreclose UP from arguing that the rates quoted in the December 18th letter are not subject to challenge.

As far as AEPCO's request for clarification is concerned, the evidence here shows that AEPCO does not intend to resume shipments from Colorado until January 2003 at the earliest, if at all.²² Accordingly, it is incumbent upon AEPCO to request a new rate if and when it has a requirement for one.

²¹ In a letter filed on May 20, 2002, UP states that it will file opening variable-cost evidence, as envisioned in the Board's rules.

²² This is unlike the situation in the December 2001 decision, where the unrebutted evidence showed a continuing need identified by AEPCO for common carriage rates from the PRB origins.

It is ordered:

1. The motions to compel are granted or denied to the extent discussed above.
2. AEPCO's amended complaint, as it pertains to UP's Colorado rates, is limited to the published rates in UP 4244, as amended.
3. AEPCO's request for clarification is denied.
4. BNSF must furnish the discovery authorized in this decision within 30 days after the date of service.
5. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary