

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35557

REASONABLENESS OF BNSF RAILWAY COMPANY COAL DUST MITIGATION
TARIFF PROVISIONS

Decided: February 27, 2012

This decision finds that individual members (Member Organizations) of the Western Coal Traffic League (WCTL) are subject to discovery in this proceeding under the Board's subpoena power and that Union Electric Company D/B/A Ameren Missouri (Ameren Missouri) likewise is subject to discovery as a party-intervenor. This decision also establishes that the Board will hold a March 13, 2012 technical conference, if necessary, with counsel for Member Organizations, Ameren Missouri, and BNSF Railway Company (BNSF) to resolve any outstanding discovery issues.

In Docket No. FD 35305, the Board found a BNSF tariff intended to mitigate dispersion of coal dust from rail cars, when considered as a whole, to be an unreasonable practice. Following BNSF's issuance of a new tariff to mitigate coal dust, which includes a safe harbor coal dust suppression provision, the Board initiated this proceeding to consider the reasonableness of the new tariff's safe harbor provision, but denied WCTL's request to reopen Docket No. FD 35305. Ark. Elec. Coop. Corp.—Petition for Declaratory Order, FD 35305, et al. (STB served Nov. 22, 2011).

On December 16, 2011, the Board granted a motion to adopt a procedural schedule, which included a discovery period. On January 27, 2012, BNSF filed a motion to compel discovery from WCTL on behalf of the Member Organizations.¹ WCTL replied to the motion to compel on February 6, 2012.

On January 27, 2012, BNSF also filed a petition for subpoenas, in which it argues that, if the Board denies BNSF's motion to compel, the Board should instead issue subpoenas to the

¹ The members of WCTL are Ameren Energy Fuels & Services Company (AFS), Arizona Electric Power Cooperative, Inc., Austin Energy, CLECO Corporation, CPS Energy, Entergy Services, Inc., Kansas City Power & Light Company, Lower Colorado River Authority, MidAmerican Energy Company, Minnesota Power, Nebraska Public Power District, Omaha Public Power District, Texas Municipal Power Agency, Western Farmers Electric Cooperative, Western Fuels Association, Inc., and Wisconsin Public Service Corporation.

Member Organizations under 49 C.F.R. § 1113.2. The Member Organizations filed a joint reply to the petition for subpoenas on February 16, 2012. AFS filed a supplemental reply on February 16, 2012.²

In addition, on February 6, 2012, BNSF filed a motion to compel discovery from Ameren Missouri, which is a party to the proceeding.³ Ameren Missouri filed a reply on February 16, 2012.

On February 16, 2012, the Board issued a decision stating that, in order to manage this docket efficiently, it would issue a single decision addressing BNSF's three related filings.

The Member Organizations argue that subpoenas are an extraordinary remedy that the Board rarely grants. They also claim that BNSF does not need the documents it seeks, the requests are overbroad and unduly burdensome, and that non-party discovery is not permissible under the accelerated procedural schedule agreed upon by the parties in this proceeding.

In determining whether to issue a subpoena, the Board will examine whether the subpoenas could cause undue burden on third parties, especially those with a limited connection to the matter before the Board. While it is true that the Board has only occasionally issued subpoenas in proceedings before this agency, the Member Organizations do not cite to an analogous situation where the Board has declined to exercise its subpoena powers. Here, while the Member Organizations are not parties to the proceeding in their individual capacities, they have a clear interest in the proceeding and will obviously be affected by its outcome. Indeed, the impact of this case on the Member Organizations is neither derivative nor indirect. To the contrary, there is no separate impact of the tariff on the WCTL as an organization – the impact of any ruling on the BNSF tariff is directly upon the Member Organizations that would be shipping under the tariff. Likewise, the effects of the tariff on individual shippers are also known, in the first instance, by the Member Organizations.

The Member Organizations cite to Asphalt Supply & Service, Inc. v. Union Pacific Railroad, NOR 40121 (ICC served Mar. 27, 1987), for the proposition that the Board will grant a petition for subpoenas only if the moving party has established a “very strong foundation” for doing so. The “strong foundation” in Asphalt Supply & Service, Inc. was described as a requirement that must be met before subpoena power will be used “to compel from a stranger to the litigation . . . actions which may be expensive, oppressive or burdensome.” Id. at 1 (emphasis added). The Member Organizations clearly are not strangers to the instant litigation – WCTL, acting on behalf of the Member Organizations, is a party to the proceeding. Therefore, the standard cited in Asphalt Supply & Service, Inc. is inapplicable here. The Member Organizations cannot avoid legitimate discovery, and subpoenas are an appropriate means for that discovery.

² AFS also joins the Member Organizations' reply.

³ On February 13, 2012, Arkansas Electric Cooperative Corporation (AECC) filed a motion to compel discovery from BNSF. AECC's motion will be addressed in a future decision.

The Board will also not allow the constraints of the accelerated procedural schedule to preclude legitimate third-party discovery in this proceeding. The Member Organizations argue that discovery should be denied if it is inconsistent with expedited case procedures by citing to Canexus Chemicals Canada, L.P. v. BNSF Railway, NOR 42132 (STB served Feb. 2, 2012). That proceeding is a simplified Three-Benchmark rate case where the expedited discovery schedule is by rule, whereas here the schedule is by agreement between the parties. Furthermore, a Three-Benchmark case has different decision points and concerns driving the procedural schedule, and is distinct from the declaratory order proceeding here in which, while the Board has accommodated the parties' request seeking prompt resolution, there is not a prescribed deadline for decision. Thus, rather than unduly limit the discovery process, the Board instead will hold the procedural schedule in abeyance for a brief period while discovery issues are resolved. The Member Organizations will be subject to reasonable discovery.

Similarly, the Board will order Ameren Missouri to respond to legitimate, appropriately tailored discovery requests. Regardless of other possible disputes between it and BNSF, Ameren Missouri is a party to this proceeding with relevant information that it must produce.

In Board proceedings, parties are entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. § 1114.21(a)(1). Further, it "is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 49 C.F.R. § 1114.21(a)(2). "The requirement of relevance means that the information might be able to affect the outcome of a proceeding." Waterloo Ry.—Adverse Aband.—Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. In Aroostook Cnty., Me., AB 124 (Sub-No. 2), et al. (STB served Nov. 14, 2003). BNSF's discovery requests are related to the subject matter of the proceeding and may lead to admissible evidence. Although the Member Organizations and Ameren raise issues about the scope of discovery, neither argues that the requested discovery could not reasonably lead to admissible evidence.

In the hope of narrowing the scope and burden of the current discovery requests, the Board will defer issuing any subpoenas to the Member Organizations or compelling discovery from Ameren Missouri to permit the resolution of these issues by agreement. The Board is also scheduling a technical conference to be held on March 13, 2012.⁴ Both the Member Organizations and Ameren raise concerns about the breadth of the discovery requests and burden they create. BNSF has raised similar concerns about the breadth and burden of the discovery

⁴ Because the Board will grant the alternative form of relief sought by BNSF for subpoenas for discovery from the Member Organizations as appropriate, the motion to compel WCTL is moot.

requested of it in this proceeding.⁵ For example, both the Member Organizations and BNSF object to requests for “all documents”⁶ and the definitions of the parties to which the discovery requests are directed.⁷ The Board notes these parallel objections and the general validity of concerns about the breadth of discovery, and recognizes that the Member Organizations and the parties could privately negotiate to more narrowly tailor the bounds of discovery. The Board will not limit potential negotiations between the Member Organizations and the parties by addressing the merits of any individual discovery request at this time. Instead, the Board will provide the Member Organizations and the parties the opportunity to negotiate these issues, given the finding that the Member Organizations and Ameren are subject to discovery and that the Board will issue appropriate subpoenas and an order to compel Ameren following the technical conference, if necessary. The technical conference will address the scope of the subpoenas as needed. If BNSF and the parties agree to revised discovery requests before the technical conference, they may file a motion to request that the technical conference be cancelled (or that a particular entity’s participation is not necessary). After the technical conference (or after a request that the technical conference be cancelled), the parties may file a proposed revised procedural schedule.

Finally, the Board notes the concerns raised by AFS in its supplemental reply to the petition for subpoenas. AFS states that it is an inactive entity and is not capable of responding to discovery. That statement is more properly made in response to the issuance of a subpoena rather than in a petition to deny the issuance. Consistent with its ruling as to the other members of WCTL, the Board will issue the subpoena, but before doing so expects the parties to address its scope and burden during their informal discussions and, if necessary, at the technical conference.

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 compel discovery from WCTL is denied as moot.

⁵ Arkansas Electric Cooperative Corporation’s (AECC) Motion to Compel Discovery from BNSF, Exhibit B, BNSF’s Responses and Objections to AECC’s First Requests for Production of Documents.

⁶ Reply of Member Organizations at 13; Reply of Member Organizations, Exh. 2, BNSF’s Responses and Objections to Coal Shippers’ First Set of Interrogatories and Document Requests at 2.

⁷ Reply of Member Organizations at 14; Reply of Member Organizations, Exh. 2, BNSF’s Responses and Objections to Coal Shippers’ First Set of Interrogatories and Document Requests at 3.

2. The Board will hold a technical conference with counsel for Member Organizations, Ameren Missouri, and BNSF on discovery from the Member Organizations and/or from Ameren Missouri on March 13, 2012, at 10:00 a.m., at the Board's headquarters at 395 E Street, S.W., Washington, DC. Following the technical conference, the Board will issue subpoenas for discovery from the Member Organizations as appropriate and will rule on BNSF's motion to compel discovery from Ameren Missouri.

3. The procedural schedule is held in abeyance. After the technical conference (or after a request that the technical conference be cancelled), the parties may file a proposed revised procedural schedule.

4. This decision is effective on its service date.

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