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SERVICE DATE - MAY 24, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42059

NORTHERN STATES POWER COMPANY
MINNESOTA D/B/A XCEL ENERGY

v.

UNION PACIFIC RAILROAD COMPANY

MOTION TO COMPEL DISCOVERY

Decided: May 23, 2002

By complaint filed on January 26, 2001, Northern States Power Company Minnesota d/b/a Xcel Energy (NSP or complainant) challenges the reasonableness of the rates assessed by Union Pacific Railroad Company (UP) on various unit-train movements of coal from UP origins in the Powder River Basin of Wyoming and a St. Paul, MN, UP interchange point to NSP's electric generating facilities at Burnsville and Bayport, MN.¹ Complainant alleges that UP possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed, along with other relief. In addition, complainant requests an award of reparations. UP answered on February 15, 2001.

UP's service was formerly provided under rail transportation contracts that expired on December 31, 2000. When NSP and UP could not agree on new contract terms, NSP asked UP to establish applicable common carrier rates under 49 U.S.C. 11101 and 49 CFR 1300. In

¹ The interchange movements originate in Montana on The Burlington Northern and Sante Fe Railway Company (BNSF) and are interchanged to UP at St. Paul for delivery to Bayport. NSP only challenges UP's rate from St. Paul to Bayport because BNSF provides its portion of the service under contract, and the Board has no jurisdiction over the contract portion of the movement, 49 U.S.C. 10709(c). The rate applicable to UP's segment of the Montana movements can be separately reviewed. Central Power & Light Co. v. Southern Pac. Transp. Co., Nos. 41242 *et al.* (STB served Dec. 31, 1996), clarified (STB served Apr. 30, 1997), aff'd sub nom. Mid America Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999). See also Union Pac. R.R. v. STB, 202 F.3d 337 (D.C. Cir. 2000).

response to this request, UP established common carriage rates and service terms, effective January 1, 2001.

The parties subsequently held a conference pursuant to 49 CFR 1111.10(b), and entered into a partial settlement of their rate dispute that obviates the need for a stand-alone cost (SAC) presentation.² The parties also agreed that, should UP be found to have market dominance over NSP's coal traffic, the rate should be limited to 180% of UP's variable cost of providing service to NSP. They also agreed on a procedural schedule with somewhat shorter time frames than those set forth at 49 CFR 1111.8, due to the fact that no SAC evidence will be presented in this case. By decision served March 9, 2001, the Board adopted the parties' proposed procedural schedule and granted their joint motion for a protective order with respect to evidentiary submissions and discovery. Subsequently, by decision served April 24, 2001, the Board granted the parties' joint motion to suspend the procedural schedule to allow time to address discovery issues.

On November 9, 2001, NSP filed a motion to compel responses to certain interrogatories and document production requests. UP replied on December 7, 2001. On December 21, 2001, complainant filed a petition for leave to file a reply to a reply, together with a tendered reply to UP's reply. On January 10, 2002, UP filed a response in opposition to NSP's petition for leave.³ In a letter filed February 1, 2002, NSP indicates that UP increased its applicable rates, effective on that day. In letters filed February 15 and 26, 2002, NSP withdrew or amended certain of its discovery requests.⁴

² The SAC test evaluates the reasonableness of a railroad's rates by comparing the challenged rate to the rate that a hypothetical, fully efficient railroad would need to charge to cover all of the costs to serve a selected traffic group, including the complainant shipper. Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 542-46 (1985); Wisconsin Power & Light Company v. Union Pacific R.R., STB Docket No. 42051 (STB served Sept. 13, 2001) (WPL) at 12-13.

³ Under the circumstances and in the interests of a complete record, we will grant NSP's petition for leave to file a surreply and consider its response to UP's reply, together with UP's assertions and evidence in its reply in opposition to the request.

⁴ In its February 15 letter, NSP withdrew its motion to compel as to Request For Production (RFP) 24 (Train Activity Reports) and RFP 99 (Train and Crew Wage Records). In its February 26 letter, complainant withdrew its motion as to RFP 20(e) (Train Performance Simulator). In view of NSP's withdrawal of those requests, they will not be discussed.

DISCUSSION AND CONCLUSIONS

Our discovery rules permit a party to “obtain discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding other than an informal proceeding.” 49 CFR 1114.21(a)(1). Our discovery rules further provide “[i]t is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence.” 49 CFR 1114.21(a)(2).

The parties have classified their discovery pleadings as highly confidential and filed them under seal, consistent with the protective order the Board issued in this proceeding on March 9, 2001. Accordingly, we limit our discussion to only those matters needed to decide the outstanding specific, highly technical discovery issues, which, we should note, we would have expected the parties to have been able to resolve themselves.

Discovery Cut-Off Date. As a preliminary matter, UP asks us to establish a December 31, 2001, cut-off date for data responsive to NSP’s discovery requests. UP states that, if NSP agrees with the proposed date, UP will begin compiling the information and producing it to NSP as it becomes available. NSP responds that it cannot currently agree to a cut-off date because, among other things, it does not know when we will rule on its motion to compel nor the extent of what follow-up discovery will be needed. Because many of NSP’s data requests range from some past period to the present, we believe that the establishment of a cut-off date is appropriate. Inasmuch as the first quarter of 2002 has only recently been completed, UP’s proposed date of December 31, 2001, is reasonable and will be established as the cut-off date for discovery purposes.

NSP Train Dispatcher Sheets. In RFP 51, NSP asks UP to provide its train dispatcher sheets related to NSP trains for the years 2000 and 2001.⁵ UP responds that it does not physically maintain these dispatcher sheets for a very long period of time, but does input data from these sheets into its computer database files. Although UP does not deny possession of the dispatcher sheet information that NSP requests, the carrier objects to retrieving it on the grounds that the records that need to be searched are voluminous and producing them would be an undue burden to UP. Specifically, UP claims that searching the databases for NSP train data alone would require that one person spend 8 months to conduct the 2,400 searches called for by RFP 51.

NSP responds that it is requesting access to the databases so that it, not UP, can isolate the pertinent dispatching information. However, because UP objects to providing the requested material, NSP has modified its request, asking UP to provide representative samples of the reports, along with

⁵ NSP initially sought the data from 1998 to the present, but narrowed the time period to 2000 and 2001 in its motion to compel.

field descriptions, decoders, and record layouts necessary to understand the reports. NSP claims that the representative samples would allow it to evaluate the possibility of narrowing the scope of its request.

It appears that UP's objection to RFP 51 is based on the assumption that NSP is asking UP to search its entire dispatching operating system for NSP data. However, NSP has stated that it is not seeking access to UP's dispatching operating system; it is only seeking access to the NSP databases generated by that system. Furthermore, NSP has subsequently proposed to accept representative samples of those databases. We believe that representative samples of the dispatching data, along with information to interpret that material, would give NSP the basis to determine if the sample data received from UP do suffice or if it needs any additional data from UP. Accordingly, we require UP at this time to provide representative samples of the requested NSP databases. UP may, of course, elect to provide the databases in their entirety if it so chooses.

Maintenance-Of-Way Records. In RFP 5(k)(iii) and RFP 6(f)(iii), NSP asks UP to provide NSP-specific and system-wide heavy wheel load traffic data for general freight. NSP claims that UP possesses train movement records responsive to this request. NSP states that these records contain the weight and route of movement for each train moving over the UP system and that the records are computerized so that it can extract the heavy wheel load data necessary as inputs into the so-called Speed Factored Gross Ton (SFGT) formula. The records, according to NSP, exist and merely need to be copied. NSP has informed UP that it is willing to use train movement records that UP has previously given to NSP's counsel in another case. NSP notes that UP routinely answered discovery questions in the instant proceeding by authorizing complainant's counsel to use documents UP has produced in other proceedings.

UP replies that it has no documents responsive to NSP's request. UP notes that it has already produced in this case, as it has in prior rate complaint cases, the so-called TUC data⁶ in electronic format containing average train weight by individual train symbol and number of cars by train symbol. UP claims that its TUC data are no different than the train movement records NSP seeks. UP argues that NSP refuses to accept what every shipper in previous rate cases and the Board has accepted. According to UP, system-wide train movement records do not contain weight by carload. Thus, UP states that the Board should not countenance NSP's attempt to obtain system-wide train records under the guise of wheel load discovery because those records are not responsive to the requests as drafted by NSP. UP does admit that it has produced system-wide train movement records in two civil actions,

⁶ The parties do not explain what "TUC" stand for. UP does explain that its TUC data provide for each line segment the weight of each train by symbol, but do not provide heavy wheel load data that are the objective of NSP's discovery requests.

neither of which was a rate proceeding, for the purpose of applying the SFGT formula to maintenance-of-way expenses.

We agree with NSP that UP has not been responsive to its request. NSP is not requesting carload-specific data, as UP contends. Rather, it is requesting individual, train-specific data. UP's TUC records do not contain the same information as UP's system-wide train movement records. This is apparent from UP's own description that TUC records provide information relative to average train weight by individual train symbol and number of cars by train symbol, whereas the train records sought by NSP contain individual train movement data. Further, simply because UP has provided different data, addressing the same or similar discovery requests, in other proceedings does not automatically make NSP's request unreasonable or irrelevant. UP has not shown that the data requested by NSP cannot be used to produce SFGT results that are more accurate than the TUC data used in other proceedings. UP readily admits that it possesses the train movement records that NSP seeks and UP has not objected to providing this information on the basis that the data do not provide train-specific information; rather, UP objects on the basis that system-wide data do not provide weight by carload. NSP argues that the train movement records can be used to adjust UP's system-average maintenance-of-way costs and UP has not shown otherwise. Accordingly, we will require UP to provide the information requested in RFP 5(k)(iii) and RFP 6(f)(iii).

Direct Expenditure Data (Maintenance-of-Way and Structure). NSP's RFP 9 asks UP to provide line-specific or location-specific maintenance-of-way data for each UP line segment traversed by any NSP train and for UP's entire system. UP initially refused to provide these data, claiming they were unduly burdensome and would require a special study. However, prior to the filing of NSP's motion to compel, UP agreed to make available relevant cost information it provided in WPL. UP informed NSP that the information from the WPL proceeding was developed from its FIST⁷ accounting records.

Now, in response to NSP's motion, UP states that it does not have data responsive to RFP 9 and only agreed to make FIST data available so that NSP could confirm UP's explanation that that information is not useful for developing line-specific costs. UP argues that FIST data can never be used to produce line-specific costs and thus it would be unproductive to respond to any further questions from NSP concerning FIST. UP contends that MOW expenses in FIST are not broken down by line segment or geographic cost centers and that FIST data have never been used by either shippers or railroads in a rate case. According to UP, NSP errs in assuming that FIST is a geographic cost center accounting system, because UP's cost centers are tied to the individuals responsible for managing those

⁷ According to UP, FIST is a computerized general ledger system containing all of UP's financial transactions.

costs and not to territories or line segments. Therefore, UP maintains that the information sought in RFP 9 either does not exist or cannot be reconstructed from its existing accounting system.

UP must provide the FIST data similar to those it provided in WPL, data UP originally agreed to give to NSP. Perhaps those data will merely confirm UP's claim that that information is not useful for developing line-specific costs, but the railroad initially agreed to provide it and NSP is entitled to review the data in order to make its own determination as to their usefulness. We will not, however, require UP to provide line-specific or location-specific maintenance-of-way data. These data apparently do not exist and to require UP to conduct a special study would not accomplish a different result. As far as the system data sought by NSP, the carrier's publicly available annual reports are the best available source for the information.⁸

Locomotive Maintenance Records. NSP's RFP 18 asks UP to provide locomotive maintenance and repair reports and corresponding total locomotive unit-miles for locomotives used in NSP service and for all locomotives in UP's fleet. During discovery, UP stated that it did not maintain locomotive-specific maintenance records and that, while some maintenance costs may be assigned to specific locomotives, its records do not capture all maintenance costs associated with individual locomotives. UP also claimed that it only maintains locomotive maintenance records by shop and that retrieving locomotive data by each shop would be too burdensome.

NSP responded by asking UP to provide representative sample copies of UP's locomotive repair and maintenance shop records. NSP represented to UP that, upon receipt of these samples, NSP would review those samples and discuss with UP how it wished to proceed. UP subsequently produced computerized sample records from four locomotive maintenance shops for November 2000.

In its motion to compel, NSP complains that UP did not provide all decoders and other information necessary to decipher the sample maintenance records adequately. NSP argues that UP's response was insufficient because the carrier's own records contain detailed information about repair costs incurred on specific locomotives. Complainant asks us to compel production of the two databases from which UP provided its samples. On reply, UP asserts that, while NSP selectively chose portions of the sample data showing that UP maintains locomotive-specific maintenance costs, the sample data viewed in their entirety demonstrate that only a small percentage of maintenance costs are assigned to specific locomotives. UP indicates that, in most instances, its shop expense records do not identify the locomotive unit on which work was performed.

⁸ The annual report filed with the Board contains Schedule 410, which reflects expenses for the entire railroad, including MOW data.

In a letter filed February 12, 2002, UP indicates that it has recently located an internal study containing information that is responsive to RFP 18 and that it is producing that study to NSP. UP will be required to produce this study to NSP.⁹ Further, we will require UP to provide the decoder and other materials necessary to understand the sample maintenance records for the four maintenance shops for November 2000. However, to the extent that the information is not already included in the two previously mentioned data requirements (the internal study and the records from the four maintenance shops) and in light of UP's statement that it does not systematically maintain unit-specific locomotive maintenance costs, the carrier need not provide the additional data requested in RFP 18.

Locomotive Maintenance Agreements. RFP 19 seeks the amounts UP paid under locomotive maintenance agreements with outside contractors and the number of locomotive unit miles corresponding to the listed amounts. NSP complains that UP has yet to produce all the information requested in RFP 19. UP responds that it will provide the requested data once the parties have agreed on a discovery cut-off date. Because we have established a discovery cut-off of December 31, 2001, UP is required to provide all information responsive to RFP 19 up to that date.¹⁰

Locomotive Performance and Utilization Records. RFP 47 asks UP for its locomotive utilization and performance records for each locomotive owned or leased for each year or partial year, from 1998 to the present. Both parties agree that, prior to NSP's motion, UP agreed to provide information responsive to RFP 47. On reply to the motion, however, UP states that it does not have information responsive to this request. UP states that, at an earlier stage in the discovery process, UP's outside counsel had understood that UP possessed information that would show utilization and performance rates for individual units powering NSP trains, but further investigation within UP revealed that such data do not exist because UP does not track individual unit performance. Therefore, UP claims that NSP's motion is moot with respect to RFP 47.

NSP contends that UP misinterprets RFP 47 and improperly narrows the scope of the request. NSP insists that it is entitled to all UP locomotive data, whether aggregated as a unit, as a class of units, or on some other aggregated basis. To assist its review, NSP asks UP to identify and provide sample copies of all locomotive utilization and performance reports that UP prepares. NSP maintains that, while it is willing to limit the scope of its request, it first needs to know what types of documents UP possesses and what information those documents contain.

⁹ In a letter filed April 11, 2002, UP stated that it had developed further information relevant to RFP's 18, 19 and 47 while preparing the study. UP noted that this supporting information is also being produced to NSP.

¹⁰ In its February 15, 2002 filing, NSP indicates that, although UP has produced three responsive agreements, its RFP 19 motion to compel stands as initially presented.

NSP has modified its request so that it encompasses samples of locomotive data aggregated in any way UP maintains this information. This is a narrowing of NSP's initial request for data for each locomotive. Even though UP does not track individual unit performance and thus cannot supply the initially requested information, this should not prevent UP from providing aggregated data, and we order it to do so.

Fuel Consumption Documents. RFPs 20, 102, and 104 request various documents relating to locomotive fuel consumption. Although UP responded that it does not maintain the requested data in the ordinary course of business, it agreed to produce whatever relevant information it found and to provide that information to NSP within a short period of time.¹¹ In its February 15 letter, NSP indicates that, in view of UP's statement that it did not withhold any relevant documents pursuant to its "ordinary course of business" objection, it withdraws the motion to compel as to its fuel discovery requests.

Withheld Inputs to Management Costs. RFPs 37 and 38 seek documents relating to UP's internal costing system for unit-train coal service. NSP contends that, while a carrier's cost system or outputs from that system are not generally discoverable, Board precedent permits discovery of inputs used by carriers to make management cost determinations.¹² As a consequence, NSP states that it is limiting its requests to the inputs UP uses to make internal management cost calculations.

UP objects to both document requests as seeking competitively sensitive and highly proprietary information. According to UP, in previous rail rate proceedings the Board has consistently prohibited discovery of a railroad's internal management costing system. UP notes that NSP is seeking the same cost information that the Board shielded from discovery in a recent rate complaint proceeding.¹³

The requests in RFP 37 and 38 are denied because NSP's informational requests are virtually identical to the discovery requests disallowed in TMPA. Contrary to NSP's claim, the decisions cited by NSP to support its discovery requests in RFP's 37 and 38 in fact support UP's position that we

¹¹ See UP Reply, V.S. Gomez, at 12, wherein UP witness Gomez states that the carrier will supplement its production with a fuel study recently conducted for purposes other than this rate proceeding.

¹² See Potomac Electric Power Co. v. CSX Transportation, Inc., 2 S.T.B. 290, 294 (1997); Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Ry. Co., STB Docket No. 42038 (STB served July 8, 1999) (DMIR) at 3.

¹³ See Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry., STB Docket No. 42056 (STB served Feb. 9, 2001) (TMPA).

should not permit discovery of these types of data: “[R]equiring [the carrier] to reveal that sort of information would be tantamount to giving access to [its] proprietary costing system.” DMIR at 3.

It is ordered:

1. Defendant’s request to establish a December 31, 2001 cut-off date for discovery is granted.
2. Complainant’s motion to compel production of documents is granted and denied to the extent discussed in this decision, subject to the provisions of the protective order in this proceeding.
3. Defendant is ordered to produce the documents as required by this decision no later than ten (10) days after the service date of this decision.
4. This decision is effective on its service date.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary