

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42012

SIERRA PACIFIC POWER COMPANY AND IDAHO POWER COMPANY

v.

UNION PACIFIC RAILROAD COMPANY

Decided: April 15, 1998

BACKGROUND

In a complaint filed, and served on defendant, Union Pacific Railroad Company (UP), on August 1, 1997, Sierra Pacific Power Company and Idaho Power Company (complainants) allege that rates assessed by UP to move complainants' unit trains of coal from Sharp, UT, to complainants' North Valmy Station (North Valmy), an electric generating plant in north central Nevada, exceed a maximum reasonable level and that UP possesses market dominance over the traffic. Complainants request that maximum reasonable rates be prescribed, along with related rules and service terms for the movement.

By decision served January 26, 1998 (January 26 decision), we denied a motion to dismiss the complaint, resolved several outstanding discovery requests, bifurcated this proceeding for separate market dominance and rate reasonableness determinations, held the rate reasonableness phase of the proceeding, including all motions related to rate reasonableness, in abeyance pending completion of the market dominance phase, and established a procedural schedule for the submission of market dominance evidence.¹ On February 13, 1998, complainants filed a petition for reconsideration of that portion of our January 26 decision that denied their October 24, 1997 motion to compel answers to request Nos. 5 and 6 of their second set of discovery requests, served September 29, 1997. On February 25, 1998, complainants filed another petition, this time to reopen our January 26 decision for the purpose of ruling on their October 24, 1997 motion to compel answers to request Nos. 5(d), 8, 9, and 11(h) and (i) of their first set of discovery requests, served August 15, 1997. UP replied to the petition for reconsideration on February 24, 1998, and to the petition to reopen on March 3, 1998.² As discussed below, we will deny the petition for

¹ We also granted The Burlington Northern and Santa Fe Railway Company (BNSF) leave to intervene and denied its motion for a protective order. In addition, we denied complainants' request for the appointment of an ALJ to resolve certain discovery matters.

² In addition, on March 16, 1998, UP filed a request for clarification of a decision served March 13, 1998, granting complainants' request to extend the due date for submitting their opening evidence on market dominance from March 27 to April 17, 1998. The decision adjusted the remainder of the schedule accordingly, so that UP's reply market dominance evidence is due May 7, 1998, and complainants' rebuttal market dominance evidence is due May 18, 1998. UP seeks to clarify that the due date for opening market dominance evidence applies to both parties, not just to complainants. Similarly, UP seeks to clarify that the dates for reply and rebuttal market dominance

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reconsideration and grant in part and deny the remainder of the petition to reopen.

DISCUSSION AND CONCLUSIONS

Complainants' petition for reconsideration.

In our January 26 decision, we denied complainants' October 24, 1997 motion to compel answers to request Nos. 5 and 6 of their second set of discovery requests, because these requests deal with rate comparisons that are not relevant to the issue of market dominance for the transportation at issue.³ It is this aspect of the decision that complainants claim is based on material error and which they seek to have overturned. Complainants state their position as follows:

[I]nformation regarding the coal transportation rates established by UP in comparable situations where it has directly competed with other railroads in single line and joint-line service before and after the merger of UP and Southern Pacific Lines ("SP") [footnote omitted] is *crucial* to the resolution of the primary issue in this case, namely whether a joint-line alternative presented by [BNSF] and [URC] replaced SP as the provider of "effective competition" to UP for the transportation by rail of Complainants' base coal tonnages to their North Valmy electric generating station.

In support of their position, complainants contend that this is not a typical rate reasonableness case and a different standard should apply, i.e., "the level of competition which existed between UP and SP prior to their merger in 1996." According to complainants, we established this standard in the UP/SP merger proceeding⁴ and in the UP/SP oversight proceeding,⁵

²(...continued)

evidence apply to both parties. On April 3, 1998, complainants filed in support of UP's request. We will grant the requested clarification.

³ Request No. 5 seeks the production of all requests or solicitations to UP, all correspondence between UP and issuers of the solicitations and/or makers of the requests, all documents analyzing the solicitations and possible responses by UP, and all letter agreements and contracts between UP and coal shippers for contract and/or common carrier coal transportation service, between January 1, 1992, and September 11, 1996, that originated, terminated, or was handled as overhead traffic in Colorado, Nevada, Utah and Wyoming (except for Powder River Basin origins). Request No. 6 seeks the same information, but as to service by UP, Utah Railway Company (URC)/UP and/or BNSF/UP.

⁴ Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, Finance Docket No. 32760, Decision No. 44 (STB served Aug. 12, 1996) (UP/SP).

⁵ Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific

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and created a presumption of effective intramodal competition in our January 26 decision. Specifically, complainants submit that, even though we denied UP's motion to dismiss, we gave substantial weight to UP's position, going so far as to express our doubts as to complainants' ability to demonstrate market dominance in this case. Complainants argue that it is material error for us to accord substantial weight to UP's conclusions regarding the ability of BNSF/URC to constrain UP's rates for the base contract tons⁶ and then bar discovery of information from the merged carrier that would enable complainants to present evidence that could support a contrary position.⁷

Complainants also argue that the information which they seek in these discovery requests is required under our traditional market dominance guidelines⁸ in order to demonstrate that the combined truck-BNSF/URC movement from Savage does not effectively compete with UP, resulting in UP being able to exert market power over this traffic. In support of allowing this discovery, complainants cite the court's admonition in Arizona Public Service Co. v. United States, 742 F.2d 644, 651 (D.C. Cir. 1984), that "the mere existence of some alternative does not in itself constrain the railroads from charging rates far in excess of the just and reasonable rates that Congress thought the existence of competitive pressures would ensure." According to complainants, in determining what constitutes market pressures on the railroads, our market dominance guidelines require that we examine the transportation costs associated with each alternative and evidence of past circumstances is of little use for these purposes. Thus, complainants submit that we must fully develop the facts bearing on the question of whether BNSF/URC is now an effective competitor to UP for the base contract tons.

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Railroad Company--Control and Merger--Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company, STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 10 (STB served Oct. 27, 1997).

⁶ Under their long-term contract with Southern Utah Fuels Company (SUFCO), this is the minimum tonnage (approximately 700,000 tons of coal) that complainants must purchase each year from the SUFCO mine in Utah.

⁷ Complainants state that they seek to discover information concerning how UP responds to competitive constraints that result from head-to-head single-line competition on coal movements similar to the base contract tons and then compare UP's responses in competitive situations with its conduct in response to complainants' requests for rates for transportation of the base contract tons. According to complainants, their request Nos. 5 and 6 seek precisely this information and are tailored to include movements that are comparable to the base contract tons in terms of distance, origin mines, routing, etc., and to exclude movements that are not comparable, such as those from the Powder River Basin.

⁸ Market Dominance Determinations, 365 I.C.C. 118 (1981) (MD Guidelines I), aff'd sub nom. Western Coal Traffic League v. United States, 719 F.2d 772 (5th Cir. 1983) (en banc), cert. denied, 466 U.S. 953 (1984), modified, Product and Geographic Competition, 2 I.C.C.2d 1 (1985) (MD Guidelines II).

Under 49 CFR 1115.3, a petition for reconsideration will be granted only upon a showing of new evidence, changed circumstances, or material error. In its opposition to the petition for reconsideration, UP argues that complainants have failed to make this showing, and we agree.

Contrary to complainants' arguments, we have not changed the market dominance standards for this case. Market dominance is defined by statute,⁹ and we must find that it exists before we may consider whether a challenged rail rate is unreasonably high. The standards for determining market dominance are set out in MD Guidelines I and MD Guidelines II and need not be reiterated here.¹⁰ Our statements in the January 26 decision were intended merely to point complainants in the appropriate direction, not to replace the market dominance guidelines.¹¹ We stated in the January 26 decision that we would not prejudge the complaint in advance of receiving and considering evidence and argument on market dominance, and we do not believe that we have. While we will withhold judgment until we receive the evidence, it does not mean that we must allow complainants to conduct a fishing expedition in discovery when it is clear that the information they are seeking is not relevant to the issue of market dominance under the facts of this case. As UP points out in its opposition to the petition for reconsideration, the rate comparisons that complainants want to make against other coal movements to other shippers at other destinations would inherently involve different costs, different lengths of haul, different competitive circumstances, and an entire range of factors that are not probative of whether UP faces effective competition in the movement of coal to North Valmy. According to UP, it has already produced documents from its marketing files for all coal utility customers located in Nevada, Utah and Colorado relating to movements that arguably are comparable to complainants' traffic in terms of distance, origin mines, and routing.¹² Requiring UP to produce every UP or SP contract over the last six years involving any movement of Utah, Colorado or Southern Wyoming coal to any destination would clearly be beyond the scope of permissible discovery, and we will not allow it when such information would not be relevant to the market dominance issue in this case. Accordingly, the petition for reconsideration will be denied.

⁹ Market dominance is "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. 10707(a).

¹⁰ For a full discussion of the market dominance limitation, see Southwest Railroad Car Parts Company v. Missouri Pacific Railroad Company, Docket No. 40073 (STB served Feb. 20, 1998).

¹¹ We stated that "given our findings in UP/SP, it might be to complainants' advantage to focus the bulk of their evidence and argument with regard to intramodal and intermodal competition on whether truck-URC/BNSF movements from the SUFCO mine via the Savage load-out effectively constrain the baseload contractually committed SUFCO coal tonnage now moving truck-UP/SP via the Sharp load-out."

¹² In a clarification to its opposition to the petition for reconsideration, filed February 26, 1998, UP corrects its previous statement, contained in note 2 on page 2 of its February 24, 1998 opposition statement, that it had produced the contracts for these customers. While it objects to producing the contracts, UP notes that the contract rates for these coal utility customers can be discerned from the traffic tapes produced in response to request No. 26 of complainants' first set of discovery requests.

Complainants' petition to reopen.

In our January 26 decision, we postponed consideration of complainants' October 24, 1997 motion to compel answers to discovery requests related to rate reasonableness, until after the market dominance phase of the proceeding. In their petition to reopen, complainants, for the first time, indicate that request Nos. 5(d), 8, 9, and 11(h) and (i) of their first set of discovery requests relate to information necessary for the calculation of variable costs for jurisdictional purposes.¹³ Complainants note that UP has not stipulated that the revenue-to-variable cost (r/vc) percentage for the transportation of complainants' traffic is above 180%. Complainants also indicate that UP intends to include evidence of variable costs in its opening evidence on market dominance, assertedly to support its claim that qualitatively it does not possess market dominance.¹⁴

In reply, UP argues that complainants have improperly filed a petition to reopen under 49 CFR 1115.4, which pertains to administratively final actions, and should have filed instead a petition to reopen under 49 CFR 1115.3. Accordingly, UP argues that the petition is untimely and procedurally barred.

On the merits of the petition, UP argues that it has already provided all the information in its possession regarding request Nos. 5(d) and 8. According to UP, complainants have moved to compel a more complete response to these requests because some of the information provided is stated by rail division rather than by line segment. In order to generate additional information on local traffic by line segment, UP contends that it would have to undertake a "burdensome" special computer study, diverting needed personnel from their ongoing support of UP's railroad operations.

Regarding discovery request No. 9 relating to land valuation, UP states that it does not possess the information requested in subparts (a), (b), (d) and (f). The information on ton-mile data sought in subparts (g) and (h) assertedly has already been provided in responding to request No. 8, to the extent that it is available. UP also states that it has responded to subpart (i). The remaining subparts, (c) and (e), seek information on "gross values by ICC/STB property account" for each UP valuation section in Nevada, Utah, California, Wyoming and Colorado.¹⁵ The gross values reflect

¹³ Under 49 U.S.C. 10707(d)(1)(A), we are precluded from finding market dominance where the rail carrier shows that the revenue produced by the movement is less than 180% if its variable cost of providing the service.

¹⁴ Apart from the 180% jurisdictional threshold, which has been set by law, we do not use rate-cost relationships as a basis for determining qualitative market dominance. Potomac Electric Power Company v. CSX Transportation, Inc., et al., STB Docket No. 41989 et al., slip op. at 4 (STB served May 27, 1997).

¹⁵ Request Nos. 9(c) and (e) are as follows:

For each UP valuation section in Nevada, Utah, California, Wyoming and Colorado, please produce documents, in a computer-readable format to the extent available, which provide the following information for each year or partial year 1994 to the present:

(c) Gross values by ICC/STB property account included within the UP valuation section

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historic property costs that are depreciated on a system-wide basis under a group depreciation methodology. UP maintains that the requested gross values for particular land sections are not relevant to the determination of variable costs and do not reflect asset-specific original values or depreciation that could be used for computing line-specific variable costs. UP notes that complainants' original motion to compel did not state that these requests related to the calculation of variable costs, but rather related to the calculation of stand-alone costs.

Regarding request Nos. 11(h) and (i), relating to information on annual and accrued depreciation for locomotives used to provide UP's service to North Valmy, UP states that it has already responded in full and does not maintain any other information. UP notes that complainants can derive annual and accrued depreciation figures sought in these requests from the information that UP has already provided.

We will exercise our discretion and consider the merits of complainants' petition. Unlike most rate reasonableness cases, the defendant has not stipulated that its rate for this transportation exceeds the statutory jurisdictional r/vc threshold of 180%. Accordingly, we will consider at this point complainants' motion to compel as it relates to variable costs and the jurisdictional threshold.

With the exception of request Nos. 9 (c) and (e), we find that UP has adequately responded to the requests contained in complainants' petition to reopen. We cannot require UP to provide information that it does not have, and parties in litigation are not required to conduct burdensome special studies to produce information in the form requested by complainants. With regard to request Nos. 9 (c) and (e), UP does not state that it does not have the information requested or that it would be a burden to produce, only that it is not relevant for determining variable costs for purposes of the jurisdictional threshold. Complainants, on the other hand, assert that the information is required to calculate UP's variable cost portion of return on investment (ROI) for road property for the issue movement. Without this information, complainants state that they have no basis to adjust UP's system average variable costs. It is conceivable that complainants could use this information for adjusting system average variable costs. Therefore, if UP has this information, it must provide it to complainants.

We will give the parties an additional 20 days from the service date of this decision to complete all discovery matters related to market dominance. We will also vacate our March 12 decision and establish a new procedural schedule for the market dominance phase of this proceeding.¹⁶

¹⁵(...continued)

identified in 'a' above [a. A description by milepost and station name of the properties encompassed by each UP valuation section] (as of December 31st for each year);
(e) Gross values by ICC/STB property account of only those properties used by Sierra/Idaho unit trains for each valuation section identified in 'a' above (as of December 31st each year).

¹⁶ On April 9, 1998, complainants filed a request for a further extension of time to submit opening evidence on market dominance. They suggest that the deadline be extended to 20 days
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This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Complainants' petition for reconsideration, filed February 13, 1998, is denied.
2. Complainants' petition to reopen, filed February 25, 1998, is granted with respect to request Nos. 9(c) and (e) of complainants' first set of discovery requests, served August 15, 1997, and denied in all other respects.
3. UP is ordered to provide the information requested in Nos. 9(c) and (e).
4. UP's request for clarification of the procedural schedule for the market dominance phase of the proceeding is granted. The new schedule is as follows:

Market dominance-related discovery in compliance with this decision must be completed by May 6, 1998.

Complainants' and UP's opening market dominance evidence is due May 26, 1998.

Complainants' and UP's reply market dominance evidence is due June 15, 1998.

Complainants' and UP's rebuttal market dominance evidence is due June 25, 1998.

5. This decision is effective on the date of service.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

¹⁶(...continued)

following service of this decision, in the event we deny their petitions, or 20 days from the date UP completes discovery, in the event we order additional discovery. UP replied on April 10, 1998, proposing a 10-day extension in lieu of 20 days, in the event complainants' petitions are denied. Because we are granting additional discovery, UP's 10-day proposal is moot and we will adopt complainants' 20-day proposed extension instead.