

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42057

PUBLIC SERVICE COMPANY OF COLORADO D/B/A XCEL ENERGY
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: September 25, 2002

In this case, the Public Service Company of Colorado d/b/a Xcel Energy, Inc. (Xcel), challenges the reasonableness of rates charged by The Burlington Northern and Santa Fe Railway Company (BNSF) for movements of coal from origins in the Powder River Basin (PRB) of Wyoming to Xcel's Pawnee Steam Electric Generating Station (Pawnee) near Brush, CO. Xcel alleges that BNSF possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed and reparations awarded.

On March 15, 2002, Xcel filed a Third Motion to Compel Discovery and for Sanctions (Third Motion to Compel)¹ seeking more complete responses from BNSF to Xcel's Request For Production (RFP) Nos. 12 and 102 in its First Set of Discovery Requests, and RFP No. 114 in its Second Set of Discovery Requests. Xcel seeks the production of documents relating to movement-specific data, specifically road property investment and depreciation data attributable to the segments of the track used by BNSF to provide rail transportation service to Pawnee. BNSF filed its reply on April 4, 2002. The motion to compel will be granted, and the request for sanctions will be denied.²

¹ Xcel's two earlier motions to compel production of documents in aid of discovery were granted in an earlier decision served on February 1, 2002.

² On April 12, 2002, Xcel filed a Motion for Leave to Reply to Defendant's Reply to Complainant's Third Motion to Compel and for Sanctions (Motion for Leave to Reply), and concurrently filed a reply. BNSF replied to Xcel's Motion for Leave to Reply on April 24, 2002. Xcel contends that BNSF's reply contains new evidence and argument to which Xcel should be permitted to respond. In light of the discussion below and the decision to grant Xcel's motion to compel, Xcel's Motion for Leave to Reply will be denied.

DISCUSSION AND CONCLUSIONS

Xcel seeks from BNSF information regarding movement-specific road property return on investment and depreciation expense information and data.³ Xcel argues that failure to make a proper adjustment to system-average variable costs can distort other calculations, and is particularly important given the potential impact on the revenue-to-variable cost ratio and thus on the Board's jurisdiction to review the reasonableness of a challenged rate. According to Xcel, the use of system-average costs for road property investment and depreciation expenses would produce an inaccurate variable cost calculation. Xcel cites, among other decisions, Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056, slip op. at 3 (STB served Feb. 9, 2001), where the Board stated that "adjustments to a defendant carrier's system-average costs are appropriate to reflect the economies and efficiencies that are associated with high-volume, repetitive movements such as . . . unit-train service . . ." Xcel also argues that BNSF presumably provided line-specific road property investment and depreciation data in two previous cases⁴ and that BNSF's refusal here is a change in position.

BNSF states that it does have data of the type sought by Xcel, and that it does not contest the relevance of that data to these proceedings. According to BNSF, it has not produced the corresponding documents because the data are neither complete nor reliable. It argues that it should not be compelled to produce data that, because of these defects, are unable to be used in the presentation of evidence under the Board's Uniform Rail Costing System.

As discussed in Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, STB Docket No. 42058, slip op. at 7 (STB served Sept. 11, 2002), the possibility of defects in the potential evidence is an issue that goes

³ In RFP No. 12, Xcel requests information on the basis for, and items included in, the accounting methodology for each BNSF valuation section traversed in whole, or in part, by Xcel trains, for a given time period. In RPF No. 102, Xcel requests documentation related to the book value of The Atchison, Topeka and Santa Fe Railway Company (ATSF), the actual amount paid at the time of the merger between the Burlington Northern Railroad Company and ATSF, and the manner in which BNSF treated the differential in its accounting system. In RFP No. 114, Xcel asks BNSF to provide documents underlying the aggregate and segment-specific figures appearing in a specified section of ATSF's 1995 Annual Report Form R-1, as well as the basis for allocating each amount to a given line segment.

⁴ 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.

to the merits of the case, and is more appropriately addressed in the evidentiary phase of the proceeding. BNSF's contention that the data it possesses are incomplete and unreliable is not sufficient grounds for failure to comply with Xcel's discovery requests. Accordingly, Xcel's motion to compel BNSF to produce, to the extent available, all data, workpapers, and any other materials called for in response to Xcel's Request Nos. 12, 102, and 114, will be granted.

Xcel has also requested sanctions against BNSF under 49 CFR 1114.31 for breach of agreements with Xcel during discovery. The Board's authority to penalize parties under 49 CFR 1114.31 for being unresponsive during discovery is limited to instances of failure to comply with a Board order, and does not extend to an alleged failure to answer. Thus, Xcel's request for a remedy under 49 CFR 1114.31 will be denied.

It is ordered:

1. Xcel's Third Motion to Compel is granted, and its request for sanctions is denied. BNSF is directed to produce the documents by October 25, 2002.
2. Xcel's Motion for Leave to Reply is denied.
3. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary