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SEC

SERVICE DATE – LATE RELEASE MAY 7, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42104

ENTERGY ARKANSAS, INC. AND ENTERGY SERVICES, INC.

v.

UNION PACIFIC RAILROAD COMPANY

AND

MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.

Finance Docket No. 32187

MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.

– LEASE, ACQUISITION AND OPERATION EXEMPTION –

MISSOURI PACIFIC RAILROAD COMPANY AND BURLINGTON NORTHERN  
RAILROAD COMPANY

MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Decided: May 7, 2008

The Board is granting in part the motion of Entergy Arkansas, Inc., and Entergy Services, Inc. (jointly, Entergy) to compel the production of documents by the Union Pacific Railroad Company (UP).

BACKGROUND

By motion filed on April 29, 2008, Entergy seeks an order compelling UP to produce certain documents requested in its first set of discovery requests directed to that carrier.

Division of Revenues. Entergy moves to compel production of the documents sought in its Request Nos. 6, 9(t), and, to the extent necessary to interpret the information sought in 9(t), the information sought in its Request No. 10. All of these requests pertain to the division of revenues and fees paid by UP to Missouri & Northern Arkansas Railroad Company, Inc. (MNA or M&NA).<sup>1</sup> Entergy asserts that UP has committed to produce responsive documents regarding

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<sup>1</sup> Request for Production No. 6: Please produce any and all documents showing the division of revenues and fees paid to M&NA by UP for moving freight for each of the years

(continued . . . )

its payments to MNA that it has been, or will be, able to locate but that UP's description of the documents that it has been able to locate indicates that its production of documents may be inadequate to allow a precise calculation of the actual division amounts that UP has paid to MNA. Entergy is concerned that UP's search for these documents may not be broad enough to obtain the requested information. According to Entergy, it is reasonable to expect that UP maintains such records in a form that should enable it to produce the required information without undue burden. Entergy argues that the Board should not excuse UP from providing the requested information on the grounds that it will be provided by MNA because there may be limits to MNA's records. Entergy requests that the Board compel UP's production of a complete record of its payments to MNA in the machine-readable form requested by Entergy.

Profitability Differential. Entergy also moved to compel production of what it considers to be two related classes of documents in its Request Nos. 11 and 12. In its Request No. 11, Entergy has asked UP to identify the revenues and contribution/profitability associated with each of its coal transportation movements originating in the Powder River Basin (PRB) for the last 8 years.<sup>2</sup> In its Request No. 12, Entergy has asked for information comparing the profitability differential between captive and competitive coal transportation movements.<sup>3</sup>

Entergy argues that the requested information on profitability differential is necessary to determine the economic impact of the interchange commitment. Entergy asserts that a

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( . . . continued)

1992 to the present, including documents showing the basis for calculating the revenues and fees owed M&NA, such as the number of carloads of each commodity forwarded to or received from M&NA, by location and origin or destination.

Request for Production No. 9(t): Please produce, in a computer-readable format (with all documentation related to any data bases or computer programs used to generate the requested information), the information listed below for each movement UP interchanged to or received from M&NA, for each year or partial year 1992 to the present: . . . (t) M&NA's share or division of the total freight revenues, including any adjustments thereto; . . . .

Request for Production No. 10: Please provide all documents, including programs, decoders, field descriptions, record layouts, and instructions, necessary to identify and understand the data produced in response to Request for Production No. 9.

<sup>2</sup> Request for Production No. 11: For each UP coal movement originating in the Powder River Basin from January 1, 2000 to the present, please identify: (i) the specific PRB coal origin; (ii) the destination; (iii) the rate applicable to such transportation for each calendar quarter; and (iv) the contribution and/or profitability index calculated by UP for such transportation for each time period that such contribution and/or profitability index was calculated.

<sup>3</sup> Request for Production No. 12: Please produce any analyses, studies, or reports comparing the profitability of one or more UP coal movements to customers whose destinations are served by a single rail carrier to the profitability of one or more UP coal movements to customers whose destinations are served by more than one rail carrier.

determination of the economic impact of the interchange commitment requires analysis of two considerations: (1) the past benefit to UP of maintaining control over the destinations served by MNA (as opposed to having to compete to retain the traffic); and (2) the future benefit, if any, that UP might lose if the Board were to find that UP must compete to retain the traffic in the future. According to Entergy, the past and future benefit to UP of the interchange commitment is relevant under language in Review of Rail Access and Competition Issues – Renewed Petition of the Western Coal Traffic League, STB Ex Parte No. 575, et al. (STB served Oct. 30, 2007) (Review of Rail Access and Competition), at 10-11, where the Board discussed the issue of whether an interchange commitment might over-compensate the seller or lessor carrier.<sup>4</sup>

UP's Reply. On May 1, 2008, UP filed a reply in opposition to Entergy's motion to compel discovery. With regard to the information on revenue divisions, UP asserts that it has already agreed to produce the computerized information that Entergy seeks in its Request Nos. 6 and 9(t) and other documents that would together give Entergy, or allow it to calculate, the requested information from 1993 through 2007. UP argues that it has made a good faith effort to produce the information on divisions that Entergy seeks, even though it may not be in a form that is as convenient to Entergy as it would like.

Regarding the profitability comparison information sought in Entergy's Request Nos. 11 and 12, UP argues that Entergy is seeking highly confidential profitability analyses from its internal costing system and that the Board has consistently refused to require carriers to produce such information in maximum rate reasonableness proceedings. UP also argues that the comparison that Entergy is seeking, i.e., a comparison of the profits that UP would be earning on the lease with and without the interchange commitment, is not relevant to this proceeding under the agency's decision in Review of Rail Access and Competition and that the only relevant comparison under that decision is between "how the world actually looked before and after the parties entered into the interchange commitment." In any event, according to UP, any comparisons that could be developed from the data would be invalid because the rates that would be compared were negotiated under different market conditions or were the result of litigation settlements. UP also points out that more than just coal moves over the MNA line. Finally, UP represents that it will not be making arguments in this proceeding based on its internal management costing information.

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<sup>4</sup> Entergy quotes the following language from pages 10-11 of the decision:

[A] carrier considering a line sale or lease of line with traffic that makes a revenue contribution presumably calculates the net present value of the stream of revenue contribution from the traffic it would be forgoing and either (a) demands an equivalent value in the sale price or rental fee, or (b) includes interchange limiting provisions in the sale or lease. The revenue stream resulting from the agreement should be no more than what the carrier would have received had it not divested or leased the rail facilities in question, or had it demanded more in the sale price or rental fee. So long as that is the case, the interchange limiting provision would not overcompensate the carrier and may shift the risk of unexpected traffic loss to the selling or leasing (Class I) carrier – the party that was more able to assume the risk. [Emphasis supplied by Entergy.]

## DISCUSSION AND CONCLUSIONS

UP will be required to produce the division-of-revenues information that it has represented that it will produce, but the carrier will not be compelled to provide the requested information on its internal profitability data and analysis.

Division of Revenues. In its reply to Entergy's motion to compel production of the information sought in its Request Nos. 6 and 9(t), UP has agreed to produce the computerized information sought by Entergy to the extent that it is available and, to the extent that it is not available, to produce other documents in the best reasonably available form. It appears that with the data that UP has committed to provide, Entergy can develop the information that it seeks. While Entergy may have to do further calculations to get the division of revenues information that it seeks for certain periods of time, the Board's discovery rules do not require UP to conduct a special study to provide information precisely in the form sought by Entergy. UP has represented that it is making a good faith effort to produce the information sought, and this decision will hold UP to the representations it made in its reply to Entergy's motion. To the extent UP's representations do not include production of actual payment data in its possession, custody, or control, UP shall be required to produce such data even if not in machine-readable form.

Profitability Differential. UP will not be required to produce the coal profitability information sought in Entergy's Request Nos. 11 and 12. The information Entergy seeks appears to be very similar to the internal management costing systems (which would permit the calculation of internal profitability assessments) that are sometimes requested in discovery in maximum rate reasonableness proceedings. To the extent that Entergy is seeking this type of information, disclosure would be contrary to a well-established line of precedent developed in rate cases.<sup>5</sup> The Board has denied these discovery requests given both the highly proprietary and sensitive nature of the data and the lack of clear relevance to the Board's inquiry. In those cases, the Board has also accepted a carrier's representation that it would not make arguments based on such information, a representation that UP has made here.

Given the agency's precedent and the highly sensitive nature of the information sought, Entergy has not established that its broad request for profitability data is relevant to the facts of this case. The language quoted by Entergy from Review of Rail Access and Competition has little to do with the data Entergy seeks or the theory it purports to be developing. In the cited passage, the Board explained why, when a sale or lease is first executed, the agency would not presume that a transaction overcompensated the vendor or lessor carrier solely because an interchange commitment lasts longer than 5 years. As explained by the Board, when the

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<sup>5</sup> Typical of these decisions is Kansas City Power & Light Company v. Union Pacific Railroad Company, STB Docket No. 42095 (STB served Feb. 15, 2006) (KCPL). See also Minnesota Power v. Duluth, Missabe and Iron Range Ry., STB Docket No. 42038 (STB served July 8, 1999); Potomac Elec. Power v. CSX Trans., STB Docket No. 41989, et al. (STB served May 27, 1997), which were cited in KCPL.

sale/lease is being negotiated, the selling carrier will most certainly consider the capitalized value of the expected revenue stream from the line to be spun-off and insist that the purchase or lease terms reflect that value through either the purchase price or some other mechanism, such as an interchange commitment.

Here, in contrast, Entergy appears to be seeking the profitability data in order to support a theory that UP has been overcompensated because it has been deriving revenues from a line that was not opened up for competitive interchange after the lease. Presumably, Entergy seeks to establish that a UP line out of the PRB that is subject to competition earns lower profits than a line that is not. But UP also controlled interchange on the line prior to the lease. Thus, a comparison of the profits UP could earn if the MNA line were subject to an interchange commitment versus not subject to an interchange commitment is not related to the Board's analysis in the quoted language from the decision in Review of Rail Access and Competition, which sought only to compare the different ways a carrier could value a line in determining whether and how to divest it.

Moreover, the comparison Entergy seeks to make – profitability of UP's other PRB coal traffic versus that of the traffic on the MNA line – would not be particularly reliable. As UP notes, the MNA line carries commodities other than coal and the rates on UP's PRB lines are determined by a host of factors that have no bearing on MNA's traffic. Examining a similar request for information in a prior case, the Board denied discovery on the grounds that a comparison of a vast number of diverse movements with “different costs, different lengths of haul, different competitive circumstances, and an entire range of other factors” was not probative to the question before the Board.<sup>6</sup> Given the differences between the PRB traffic and the traffic on the MNA line, the PRB profitability information sought would not appear to allow Entergy properly to compare UP's past and future benefits from the interchange commitment on the MNA line.

Entergy also claims that the profitability information it seeks is relevant to the likely impact on UP of any relief that might be ordered by the Board in this case. There appears to be no connection, however, between the information sought – profitability data on UP's PRB coal traffic that is subject to a host of different market factors - and the speculative inquiry into how UP might adjust its pricing strategy on the MNA line in response to a hypothetical Board order regarding the enforcement of the interchange commitment.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

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<sup>6</sup> Sierra Pacific Power Company and Idaho Power Company v. Union Pacific Railroad Company, STB Docket No. 42012 (STB served Apr. 15, 1998) at 4.

It is ordered:

1. UP must produce the information that it has represented in its reply that it will produce in response to Entergy's Request Nos. 6, 9(t), and, to the extent necessary to interpret the information sought in 9(t), the information sought in its Request No. 10. To the extent UP's representations do not include production of actual payment data in its possession, custody, or control, UP shall produce such data even if not in machine-readable form.

2. Entergy's request to compel UP to produce the information sought in its Request Nos. 11 and 12 is denied.

3. This decision is effective on its service date.

By the Board, Anne K. Quinlan, Acting Secretary.

Anne K. Quinlan  
Acting Secretary