

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41191 (Sub-No. 1)

AEP TEXAS NORTH COMPANY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: March 19, 2004

By complaint filed and served on defendant The Burlington Northern and Santa Fe Railway Company (BNSF) on August 11, 2003, AEP Texas North Company (AEP Texas), successor in interest to West Texas Utilities Company,¹ alleges that the carrier's rates for the movement of coal from origins in the Powder River Basin (PRB) of Wyoming to AEP Texas' Oklaunion Generating Station (Oklaunion), located near Vernon, TX, are unreasonably high. AEP Texas alleges that BNSF possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed along with other relief.

On September 2, 2003, BNSF filed a motion to dismiss AEP Texas' complaint. AEP Texas replied on September 22, 2003. On December 22, 2003, AEP Texas filed a motion to supplement its complaint to include BNSF's most recent rate increase. On December 31, 2003, BNSF filed a reply, again asking the Board to dismiss AEP Texas' rate complaint because AEP Texas had not paid the lawfully established common carrier rates, and to dismiss the supplement to the complaint as moot. On January 7, 2004, AEP Texas filed a reply to BNSF's December 31 filing. The Board will accept AEP Texas' supplement to the verified complaint. BNSF's motion to dismiss will be denied.

BACKGROUND

In West Texas Utilities Co. v. Burlington N.R.R., 1 S.T.B. 638 (1996), aff'd sub nom. Burlington N.R.R. v. STB, 114 F.3d 206 (D.C. Cir. 1997), the Board found that BNSF's common carrier rate applicable to movements from the Rawhide mine in the PRB to Oklaunion was unreasonable. BNSF voluntarily applied the Rawhide mine prescribed rate (\$13.68 per ton) to other PRB origins moving to Oklaunion, subject to minimum volume requirements. In July of 2000, BNSF sought a ruling from the Board that the 1996 prescription applied only to the Rawhide mine and that it could lawfully raise its rates on non-Rawhide movements to \$15.78 per ton. In West Texas Utilities Company v. Burlington Northern Railroad Company, Docket No.

¹ For convenience, both the original complainant and its successor are herein referred to as AEP Texas.

41191, slip op. at 4 (STB served Nov. 7, 2000), the Board confirmed that the rate prescription applied only to movements from the Rawhide mine to Oklaunion and that BNSF could increase its rates on movements from non-Rawhide mines to Oklaunion. BNSF raised its common carrier rate, but AEP Texas continued to pay the original rate.

According to BNSF, in the late summer or early fall of 2000, it began contract negotiations with AEP Texas' parent company, American Electric Power Company (AEP), to transport coal to multiple generating facilities owned by AEP. BNSF informed AEP that it was aware of the short payments for shipments to Oklaunion and one point of discussion between the parties was the possibility that BNSF might retroactively forgive the short payments on movements to Oklaunion as part of a comprehensive commercial arrangement. BNSF states, however, that it never represented that AEP Texas was free to pay a lower rate or that BNSF would forgo pursuing its right to those payments in the event negotiations were unsuccessful. During the course of negotiations, BNSF again increased its common carrier rate (to \$17.25 per ton) on the non-Rawhide movements to Oklaunion. AEP Texas, however, continued to pay the original rate. The negotiations ended without an agreement on traffic moving from non-Rawhide mines to Oklaunion. The current rate is \$18.83 per ton.

DISCUSSION AND CONCLUSIONS

In considering a motion to dismiss, the factual allegations in a complaint must be construed in a light most favorable to the complainant. See Sierra Pacific Power Co. and Idaho Power Co. v. Union Pac. R.R., STB Docket No. 42012, slip op. at 4 (STB served Jan. 26, 1998). A decision on a motion to dismiss is not an indication of how the case will ultimately be decided on the merits after all of the evidence is submitted. Rather, it is simply a determination of whether the factual allegations, when considered in a light most favorable to the complainant, would provide a basis for relief. A complaint will be dismissed only when the Board finds that there is no basis on which it could grant the relief sought.

In its complaint, AEP Texas asserts that BNSF's coal rates are unreasonable for movements originating in the PRB and terminating at Oklaunion. BNSF argues that the statutory scheme requires AEP Texas to pay the established common carrier rate in full and, because AEP Texas has not, the Board should dismiss the complaint.

The parties should note that, under 49 U.S.C. 10701(c), a rail carrier is free to establish any common carrier rate it chooses and has the rate freedom to increase its rates without precondition, except for the notice requirement of 49 U.S.C. 11101(c). A shipper may seek a Board determination of the reasonableness of the rates, but it may not withhold payment of a legally established rate. If the Board determines that the rates are unreasonable it can order reparations to make the shipper whole. However, under 49 U.S.C. 11705(a), the only way for a carrier to be made whole, when a shipper does not pay the legally established rate, is to bring a civil action to recover the charges for the transportation or service provided.

BNSF is correct that AEP Texas must pay the existing legally established common carrier rate in full. However, AEP Texas' failure to do so does not mean that there is no basis, in law, on which to review the reasonableness of BNSF's rates. Section 10704(a)(1) (49 U.S.C. 10704(a)(1)) provides that when the Board decides "that a rate charged or collected by a rail carrier for transportation subject to the jurisdiction of the Board under this part, or that a classification, rule, or practice of that carrier, does or will violate this part, the Board may prescribe the maximum rate"

Therefore, for the reasons discussed above, BNSF's motion to dismiss must be denied.

This decision 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 dismiss is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary