

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42124

STATE OF MONTANA v. BNSF RAILWAY COMPANY

Digest:¹ In 2009, BNSF Railway Company (BNSF) modified its tariff governing medium-sized wheat shipments originating in Montana. The State of Montana subsequently filed a complaint alleging that this modification constitutes an unreasonable practice and was implemented by BNSF in an effort to manipulate the Board's rate reasonableness jurisdiction. This decision holds that BNSF's action does not constitute an unreasonable practice, but advises BNSF that it may not justify a refusal to provide requested 52-car service with a rationale related to the Board's Uniform Railroad Costing System (URCS). The decision also clarifies that 52-car service will continue to be costed as such under URCS, regardless of how such service is billed by BNSF.

Decided: April 25, 2013

In this proceeding, the State of Montana challenges as an unreasonable practice BNSF Railway Company's (BNSF) replacement of a 52-car tariff for wheat from Montana to the Pacific Northwest with a tariff that allegedly limits such movements to 48 cars. Montana seeks an order that would direct BNSF to cease and desist from the practice, require BNSF to accept 52-car shipments of wheat at 52-car tariff rates, and grant any other relief warranted. As an initial matter, we find that BNSF's tariff modification was structured in a specific attempt to exploit a loophole in the Board's Uniform Railroad Costing System (URCS) by trying to lower the revenue-to-variable cost (R/VC) ratios of 52-car shipments, thereby increasing the likelihood that such shipments would not be subject to regulatory challenge. We do not condone such conduct, and advise parties that if a shipper were to submit a request for 52-car service, any attendant denial—whether manifest or functional²—shall be deemed unreasonable if such denial

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² Denials of service can take various forms. Descriptively, a manifest denial of service refers to circumstances in which service is requested by the shipper and the railroad expressly refuses to provide it, while a functional denial of service refers to circumstances in which the railroad purports to provide the service, but for whatever reason the service provided falls short of the railroad's common carrier obligation (e.g., because of unreasonable delay in providing the total number of cars requested by the shipper).

is premised on a rationale related to URCS costing matters. However, because URCS costs a shipment based on its actual size rather than how it is billed by the railroad—thereby preventing BNSF from achieving its stated goal of manipulating the costing of 52-car shipments—the bare fact that BNSF switched from a 52-car tariff to a 48-car tariff does not itself constitute an unreasonable practice regardless of BNSF’s motive for doing so. Moreover, despite Montana’s assertion that the new tariff imposes a 48-car limitation on medium-sized wheat shipments, the record contains no evidence that any Montana wheat shipper has requested and been denied 52-car service. As a result, we are dismissing Montana’s complaint and discontinuing this proceeding.

BACKGROUND

On July 14, 2010, Montana filed a complaint claiming that BNSF’s modification of a tariff governing wheat shipments originating in the state constitutes an unreasonable practice in violation of 49 U.S.C. § 10702 because it places a 48-car limit on wheat shipments from Montana grain elevators with a 52-car or greater capacity. Montana states that BNSF’s longstanding policy was to encourage the construction and operation of grain elevators capable of loading 52-car trains and, as part of that effort, BNSF accepted tenders of 52 cars at published tariff rates. In February 2009, however, BNSF modified its rate publication to eliminate rates applicable to movements of 52 cars and replaced it with a tariff applicable to 48 cars.³ Montana alleges that in response to the new BNSF tariff, most 52-car elevators now ship wheat in 48-car lots, which reduces elevator efficiencies and underutilizes those facilities. Montana further alleges that BNSF specifically modified the rate structure for wheat shipments originating in Montana to take advantage of the “make-whole adjustment” in URCS, which generally assigns higher variable costs to movements of 49 cars or less.⁴ Montana claims that BNSF modified its

³ At or around the same time, BNSF reduced the unit increments available under its Certificate of Transportation (COT) program—an advance reservation system designed to allow BNSF agricultural products customers to bid for covered hopper cars according to a weekly schedule—from 26/52 cars to 24/48 cars, presumably in order to mirror the shipment sizes established by BNSF’s new tariff. *See* Opening Evidence, Attachment B. Montana and BNSF designated this information as “highly confidential.” Although the general practice is to avoid references to confidential or highly confidential information in Board decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. In this case, the Board has determined that we could not adequately present the parties’ arguments and our findings without describing such information here and elsewhere in the decision.

⁴ The make-whole adjustment, the purpose of which is to recognize the efficiency savings that a carrier obtains in its higher-volume shipments, is applied by URCS through a three-step process. First, URCS assumes that a movement’s costs are equal to that of a system-average movement. Next, URCS applies “efficiency adjustments” to multi-car shipments (6 to 49 cars) and trainload shipments (50 or more cars), thereby reducing the system-average unit costs of such movements. Last, URCS redistributes the total savings obtained in all of the multi-

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tariff in an effort specifically designed to lower the R/VC ratios associated with medium-sized Montana wheat shipments and thereby remove a variety of Montana shippers' movements from the Board's rate reasonableness jurisdiction, which would result from higher-assigned costs lowering R/VC ratios below 180%.⁵ Montana requests that the Board find BNSF's tariff to be an unreasonable practice, and order BNSF to accept 52-car trains at 52-car rates. BNSF filed its answer on July 29, 2010, and an amended answer on September 1, 2010, in which it generally denied the allegations in the complaint.

By motion filed August 23, 2010, BNSF requested that the Board dismiss Montana's complaint or hold the proceeding in abeyance pending Board review of certain URCS-related costing issues. Montana responded to BNSF's motion on September 13, 2010, countering that its allegations about the railroad modifying its rate structure provide reasonable grounds for investigation. Montana also opposed BNSF's alternative request to hold the proceeding in abeyance while the Board conducts a review of URCS. In a decision served October 27, 2010, the Board set the motion to dismiss for oral argument, which was held on November 30, 2010. In a decision served February 16, 2011, the Board denied BNSF's motion to dismiss and concluded that there were reasonable grounds for an investigation "[g]iven the allegation that BNSF strongly encouraged shippers (over the course of many years) to move grain in 52-car trains, ... BNSF's admission that one of its goals in shifting to a 48-car tariff was to have these movements costed differently under URCS, [and] Montana's concern as to whether requests to ship 52-car movements would be honored by BNSF under its common carrier obligation." State of Montana v. BNSF Ry. (Montana 2011), NOR 42124, slip op. at 3 (STB served Feb. 16, 2011).

Discovery closed on May 17, 2011, and Montana filed its Opening Evidence on July 1, 2011. BNSF subsequently filed its Reply Evidence on August 15, 2011, and Montana filed its Rebuttal Evidence on September 14, 2011.

DISCUSSION AND CONCLUSIONS

Whether a particular practice is unreasonable under 49 U.S.C. § 10702 depends upon the facts and circumstances of the particular case. Ark. Elec. Coop. Corp.—Petition for Declaratory Order, FD 35305, slip op. at 4 (STB served Mar. 3, 2011). Section 10702 does not limit the Board to a single test or standard for determining whether a practice is unreasonable; rather, Congress has provided the Board "broad discretion to conduct case-by-case fact-specific

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car and trainload shipments across all of the single-car shipments (1 to 5 cars) and multi-car shipments, such that the sum of variable costs across all of the carrier's movements remains the same. The make-whole adjustment in general, and its 50-car cutoff point in particular, are currently the subject of a pending rulemaking. See infra n.19 (discussing Review of the Gen. Purpose Costing Sys., EP 431 (Sub-No. 4) (STB served Feb. 4, 2013)).

⁵ 49 U.S.C. § 10707(d)(1)(A) (establishing jurisdictional threshold at 180%).

inquiries to give meaning to those terms, which are not self-defining, in the wide variety of factual circumstances encountered.”⁶ As a result, the Board gauges the reasonableness of a practice by analyzing what it views as the most appropriate factors. *Id.* at 5. At issue in this proceeding are two basic questions: (1) does BNSF’s replacement of its 52-car tariff for wheat shipments originating in Montana with a 48-car wheat tariff constitute an unreasonable practice, and (2) does BNSF’s alleged refusal to provide 52-car service to Montana wheat shippers constitute an unreasonable practice? We address each of these questions in turn.

Replacement of 52-car tariff with 48-car tariff. Montana claims that BNSF’s shift to a 48-car tariff is per se unreasonable because the sole reason for doing so was BNSF’s desire to take advantage of the URCS make-whole adjustment and thus remove a variety of movements from the Board’s rate reasonableness jurisdiction, as the higher-assigned costs of 48-car movements often result in a lowering of R/VC ratios below 180%.⁷ In Montana’s view, BNSF has sought to manipulate how the Board costs medium-sized wheat shipments by artificially inflating URCS variable costs under the make-whole adjustment and thereby immunizing a series of rate increases from regulatory challenge.⁸

BNSF responds that in changing the tariff it was exercising its statutory rate-setting prerogative and that its stated reason for the change—i.e., because it wished “to dispel the misimpression created by artificially high R/VC ratios generated by the URCS costing model on 52-car blocks of grain cars”⁹—in no way reflects deceptive or unreasonable behavior.¹⁰ BNSF argues that any concerns regarding potential “gaming” of URCS is appropriately addressed through Board implementation of changes to the costing system itself.¹¹

BNSF has acknowledged at various points in this proceeding that its motivation for modifying the tariff at issue was to impact the costing of certain movements in URCS. In its Amended Answer, BNSF “admits that it was knowledgeable that the change from 52-car rates to 48-car rates had an impact on the URCS costs associated with the 52-car and 48-car movements.”¹² At oral argument, BNSF equivocated that the make-whole adjustment “was part

⁶ *N. Am. Freight Car Ass’n v. BNSF Ry.*, NOR 42060 (Sub-No. 1), slip op. at 8 (STB served Jan. 26, 2007) (quoting *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005)), *aff’d sub nom. N. Am. Freight Car Ass’n v. STB*, 529 F.3d 1166 (D.C. Cir. 2008).

⁷ Opening Evidence 11-13.

⁸ *Id.* at 17-20.

⁹ Reply Evidence 33.

¹⁰ *Id.* at 33-43.

¹¹ *Id.* at 48-50.

¹² Amended Answer ¶ 32.

of the thinking and the rationale in the way the [rate] structure was organized,”¹³ and that the rate structure was designed at least in part “to protect [BNSF] from...regulatory challenges.”¹⁴ Possibly in response to the materials produced in discovery,¹⁵ BNSF ultimately acknowledged that its entire motivation for modifying the tariff structure was to increase the calculation of variable costs under URCS and thereby depress R/VC ratios associated with medium-sized Montana wheat shipments, allegedly because it “wanted to correct a misperception that had developed among some shipper interests by 2008 [that] the R/VCs for the 52-car rates” were unreasonably high.¹⁶ It is therefore apparent that BNSF intentionally sought to manipulate regulatory outcomes by shifting from 52-car rates to 48-car rates.

BNSF should be on notice that we are extremely concerned about its conduct here. “At the very heart of the common carrier obligation is the belief that railroads are in a position of unique public trust” and “are therefore held to higher standards of responsibility than other private enterprises.” GS Roofing Prods. Co. v. STB, 143 F.3d 387, 393 (8th Cir. 1998).¹⁷ Having discovered a loophole in URCS, BNSF blatantly sought to take advantage of that loophole in derogation of the public interest purely for its own pecuniary gain. However, even under these circumstances, we need not find BNSF’s tariff unreasonable because the tariff would have no impact on how movements would be costed under URCS in any rate challenge brought to the Board. Both Montana and BNSF appear to assume that the Board would base its costing of a shipment upon how the shipment is billed by the carrier. In fact, costing is determined by the characteristics of the actual movement rather than the peculiarities of a carrier’s invoicing practices. Thus, if a medium-sized elevator were to request and BNSF were to provide 52-car service,¹⁸ the Board would cost that movement under URCS as a 52-car shipment even if BNSF were to bill the movement differently—e.g., as a 48-car shipment plus four single cars in an effort to manipulate the Board’s regulatory costing model. Because BNSF is effectively

¹³ Oral Argument Transcript 10.

¹⁴ Id. at 11.

¹⁵ See, e.g., Opening Evidence, Attachment A.

¹⁶ Reply Evidence 38.

¹⁷ See also Pa. R.R. v. Int’l Coal Mining Co., 230 U.S. 184, 210 (1913) (noting that the Interstate Commerce Act “looks upon the common carrier as a public servant”) (Pitney, J., dissenting); Wheeling-Pittsburgh Steel Corp. v. McCune, 836 F.2d 153, 160 (3d Cir. 1987) (“The essence of common carrier status is service of the public interest.”). See Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 16 (STB served Oct. 30, 2006).

¹⁸ BNSF has specifically indicated that 52-car service remains available to medium-sized Montana grain elevators. See Reply Evidence 26 (acknowledging that such elevators continue to be able to ship “all the cars they need to ship, including blocks of 52 or more cars”). Montana disputes this assertion. See Rebuttal Evidence 14. Whether BNSF has denied, or theoretically would deny, requests for 52-car service is the subject of the following section.

prevented from achieving its stated goal of manipulating the costing of 52-car shipments, the bare fact that it switched from a 52-car tariff to a 48-car tariff does not itself constitute an unreasonable practice regardless of BNSF's motive for doing so.¹⁹

Alleged refusal to provide 52-car service. Throughout its filings, Montana repeatedly describes BNSF's current tariff as imposing a 48-car limitation on medium-sized wheat shipments.²⁰ While acknowledging that Montana grain elevators theoretically could ship 52 cars using the 48-car rate plus four single-car rates, Montana contends that the tariff imposes a functional 48-car limitation because a request for 52-car service invariably would result in the 48-car block and the four single cars arriving at different times.²¹ To support this argument, Montana asserts that medium-sized grain elevators may no longer reserve a shipment exceeding 48 cars under BNSF's COT program.²²

BNSF counters by arguing that nothing in the new tariff structure prevents medium-sized grain elevators from shipping wheat in blocks exceeding 48 cars, and that these elevators continue to be able to ship "all the cars they need to ship, including blocks of 52 or more cars."²³ BNSF further asserts that medium-sized elevators have shipped in blocks exceeding 48 cars "[o]n several occasions since February 2009."²⁴ Thus, according to BNSF, Montana's assertions

¹⁹ We note here that the Board has proposed changes to the make-whole adjustment in a recently-issued Notice of Proposed Rulemaking. Review of the Gen. Purpose Costing Sys., EP 431 (Sub-No. 4) (STB served Feb. 4, 2013). These changes are designed to better reflect actual operating efficiencies associated with larger shipments, thus minimizing any unwarranted difference in total variable costs attributable under URCS to 48-car and 52-car shipments and eradicating the incentive for rail carriers to engage in BNSF-style attempts at regulatory manipulation in places like Montana in the future.

²⁰ See, e.g., Opening Evidence 2 (referring to "shipment size limitations imposed by BNSF").

²¹ Id. at 15-16. Montana also contends that such shipments would be rendered more expensive both in terms of tariff rates and additional handling and detention charges that would not apply to 52-car trains. Id. at 16.

²² Rebuttal Evidence 14-15; Opening Evidence, Attachment B. Thus, even if BNSF were to publish 52-car tariff rates, Montana argues that BNSF's "unreasonable practice would continue" in the absence of a change to the COT program that would allow 52-car reservations. Opening Evidence 20.

²³ Reply Evidence 26.

²⁴ Id. However, the record contains some indication that while BNSF may have informally fulfilled orders exceeding the new 48-car COT program maximum for a short period of time following the tariff/COT program change in 2009, this informal practice was eventually discontinued. See Opening Evidence, Attachment B.

regarding the difficulties of shipping in medium-sized blocks exceeding 48 cars since the new tariff went into effect are not borne out by the data.

Montana contests the data cited by BNSF, claiming that “for the most part, [the shipments exceeding 48 cars identified by BNSF] were tenders of various sizes made into ‘blocks’ by BNSF.”²⁵ According to Montana, the primary problem with BNSF’s argument is that it “ignores the question of how many 52-car elevators attempted to ship more than 48 cars.”²⁶ However, Montana provides neither an answer to this question nor concrete data to support any such answer. While a compelling case could be made that the denial of a request for 52-car service would be a violation of BNSF’s common carrier obligation under the circumstances presented here, Montana has failed to meet its burden of proof in this regard. The record contains no evidence that any medium-sized elevator has ever requested and been denied 52-car service.

BNSF’s statutory common carrier obligation under 49 U.S.C. § 11101 creates two interrelated requirements. First, BNSF must provide, in writing, common carrier rates to any person requesting them. *Id.* § 11101(b). Second, BNSF must provide rail service pursuant to those rates upon reasonable request. *Id.* § 11101(a). What constitutes a reasonable request for service is not statutorily defined but depends upon all the relevant facts and circumstances.²⁷ When a specific request for service is made and is denied by the rail carrier, it is incumbent upon the carrier to provide a reasonable explanation for denying that request.²⁸

Citing the provisions of BNSF’s COT program, Montana asserts that the new tariff imposes a functional 48-car limitation because a request for 52-car service invariably would result in the 48-car block and the four single cars arriving at different times. The present record is unclear on this issue, however, with Montana acknowledging that at least some such requests have been honored since February 2009.²⁹ Whether the arrival of a 48-car block and four single cars at different times would constitute an unreasonable denial of service would depend upon the

²⁵ Rebuttal Evidence 14.

²⁶ *Id.*

²⁷ Union Pac. R.R.—Petition for Declaratory Order, FD 35219, slip op. at 3-4 (STB served June 11, 2009); Granite State Concrete Co. v. STB, 417 F.3d 85, 92 (1st Cir. 2005).

²⁸ See Pejepscot Indus. Park, Inc.—Petition for Declaratory Order, 6 S.T.B. 886, 897-99 (2003) (discussing whether carrier’s explanation for failing to provide rates/services was sufficient to relieve the carrier of its § 11101 common carrier obligations). In general, however, the Board tries to avoid micromanaging a carrier’s operational decisions.

²⁹ Rebuttal Evidence 14 (conceding that “for the most part, [the shipments exceeding 48 cars identified by BNSF] were tenders of various sizes made into ‘blocks’ by BNSF”) (emphasis added).

particular facts and circumstances of the case, though this scenario poses what certainly appears to be a legitimate concern.³⁰ But Montana has identified no specific instance in which BNSF has cited the provisions of the tariff or the COT program as the basis for manifestly or functionally denying a request for 52-car service. Were BNSF to do so, it would be required to provide a legitimate business justification for its actions. Simply citing the shift to its 48-car rate structure (or the associated change to the COT program) would not suffice, given BNSF's admissions regarding the underlying reason for that shift. A desire on BNSF's part to depress R/VC ratios to protect itself from regulatory challenges does not constitute a legitimate business justification for manifestly or functionally denying a request for 52-car service and thereby forcing the shipper to accept a less efficient alternative.³¹

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

It is ordered:

1. This complaint is dismissed and the proceeding is discontinued.
2. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

³⁰ See Nat'l Grain & Feed Ass'n v. United States, 5 F.3d 306, 310-11 (8th Cir. 1993) (raising the question of whether BN's COT program could result in a violation of the common carrier obligation if non-COT customers suffered undue car service delay).

³¹ Montana also alleges in its complaint that, prior to 2009, BNSF had a longstanding policy of encouraging the construction and operation of grain elevators in Montana capable of loading 52-car trains, thereby seemingly implying that operators of medium-sized grain elevators somehow detrimentally relied on BNSF representations that it would provide 52-car service and/or 52-car rates indefinitely. Complaint 3-4; see also Montana 2011, slip op. at 3 (referring to the "allegation that BNSF strongly encouraged shippers (over the course of many years) to move grain in 52-car trains" as one of the factors leading the Board to conclude that there existed "reasonable grounds for investigation"). However, Montana has not pursued this argument in either its Opening Evidence or its Rebuttal Evidence.