

SURFACE TRANSPORTATION BOARD

DECISION

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

AEP TEXAS NORTH COMPANY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

MOTION TO COMPEL DISCOVERY

Decided: December 4, 2003

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)¹ alleges that the carrier's rates for the movement of coal from origins in the Powder River Basin 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 November 21, 2003, BNSF filed a motion to compel seeking two categories of information: (1) Request for Production No. 3 (RFP 3), which includes production of agreements and other documents related to the purchase of coal for AEP Texas' Oklaunion facility; and (2) Request for Production No. 57, which includes reports and other documents submitted to public or governmental entities related to the transportation of coal to AEP Texas' Oklaunion facility. BNSF asks for an order compelling AEP Texas to produce the agreements and other responsive documents, to the extent both parties agree on the scope of production, because they contain confidentiality provisions that would preclude their production absent such an order. AEP Texas did not file a reply.

As to the first category of information, in its written responses and objections to discovery dated October 27, 2003, AEP Texas stated that it does not oppose production of currently effective agreements (and any amendments thereto) in response to RFP 3 but, because of confidentiality provisions, it cannot produce responsive material without a Board order. As to the second category of information, BNSF asserts that AEP Texas agreed to produce responsive documents, but that the responsive material contains information that is subject to confidentiality agreements restricting disclosure to third parties. BNSF notes that AEP Texas has communicated that it would not oppose a motion to compel production of such reports.

¹ AEP Texas is the successor in interest to West Texas Utilities Company.

The motion to compel filed by BNSF will be granted. The protective order in this proceeding served on September 11, 2003, resolves any concerns arising out of third-party confidentiality agreements contained in the contracts.²

It is ordered:

1. BNSF's motion to compel production of agreements and documents related to the production and transportation of coal to AEP Texas's Oklaunion facility is granted.

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

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

² See Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056, slip op. at 2-3 (STB served Feb. 9, 2001) (“While we understand the concerns raised by those shippers here, we are satisfied that the parties’ agreements regarding scope and the application of the ‘highly confidential’ provisions of the protective order are sufficient to protect the interests of third-party shippers.”).