

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35557

REASONABLENESS OF BNSF RAILWAY COMPANY COAL DUST MITIGATION
TARIFF PROVISIONS

Digest:¹ This decision affirms the February 27, 2012 decision in this proceeding, which was a decision of a Board employee related to the issuance of subpoenas and issued under authority delegated by the Board. The decision reschedules the previously postponed technical conference for July 11, 2012.

Decided: June 21, 2012

On February 27, 2012, the Director of the Office of Proceedings issued a decision in this proceeding finding that certain nonparties are subject to discovery by subpoena. Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions (February 27 Order), FD 35557 (STB served Feb. 27, 2012). We affirm that decision here. We also address and affirm here the Director's statements regarding privilege logs in Reasonableness of BNSF Railway Coal Dust Mitigation Tariff Provisions (March 5 Order), FD 35557, slip op. at 4 (STB served Mar. 5, 2012) and Reasonableness of BNSF Railway Coal Dust Mitigation Tariff Provisions (March 19 Order), FD 35557, slip op. at 3 (STB served Mar. 19, 2012).

BACKGROUND

In Docket No. FD 35305, the Board found that a BNSF Railway Company (BNSF) tariff intended to limit the amount of coal dust that blows off of rail cars during transit to be an unreasonable practice when considered as a whole. Ark. Elec. Coop. Corp.—Petition for Declaratory Order, FD 35305 (STB served Mar. 3, 2011). The Board further observed that a cost-effective safe harbor provision (i.e., specific coal dust suppression measures that would constitute compliance with the tariff) would significantly alleviate its concerns. Following BNSF's issuance of a new tariff, which includes a "safe harbor" coal dust suppression provision, the Board initiated this proceeding to consider the reasonableness of the new tariff's safe harbor provision, but denied the request of the Western Coal Traffic League (WCTL) to reopen Docket

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).

No. FD 35305. Ark. Elec. Coop. Corp.—Petition for Declaratory Order, FD 35305, et al. (STB served Nov. 22, 2011).

This proceeding is in the discovery phase, and various motions to compel discovery have been filed. On January 27, 2012, BNSF filed a motion to compel discovery from the Member Organizations of WCTL.² As an alternative, BNSF also filed a petition for the issuance of subpoenas to the Member Organizations under 49 C.F.R. § 1113.2. The Member Organizations objected to both of these requests.

Subsequently, the Director of the Office of Proceedings issued the February 27 Order finding that the Member Organizations are subject to discovery. The decision provided that, after BNSF and the Member Organizations had an opportunity to negotiate discovery issues, Board staff would, if necessary, hold a technical conference on March 13, 2012, with counsel for the Member Organizations and BNSF, and issue subpoenas to the Member Organizations.

On March 1, 2012, the Member Organizations filed a joint appeal of the February 27 Order under 49 C.F.R. § 1115.9, which governs appeals of employee decisions to the Board. On March 6, 2012, the following pleadings were filed in response to the Member Organizations' appeal: a reply in support by Arkansas Electric Cooperative Corporation (AECC); separate replies in opposition by BNSF and Union Pacific Railroad Company (UP); and a comment on the appeal by the Association of American Railroads. On March 9, 2012, two statements supporting the Member Organizations were filed by two groups of trade associations.³

On March 2, 2012, the Member Organizations jointly petitioned the Board to postpone the technical conference pending resolution of their appeal. On March 8, 2012, BNSF filed a reply in opposition to the joint petition to postpone the technical conference. The motion to postpone the technical conference (including the portion of the conference involving Ameren Missouri) was granted. Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions,

² The 16 members of WCTL are Ameren Energy Fuels & Services Company (AFS); Arizona Electric Power Cooperative, Inc.; Austin Energy; CLECO Corporation; CPS Energy; Entergy Services, Inc.; Kansas City Power & Light Company; Lower Colorado River Authority; MidAmerican Energy Company; Minnesota Power; Nebraska Public Power District; Omaha Public Power District; Texas Municipal Power Agency; Western Farmers Electric Cooperative; Western Fuels Association, Inc.; and Wisconsin Public Service Corporation (collectively, the Member Organizations).

³ One statement was filed by National Grain and Feed Association (NGFA) and North America Freight Car Association (NAFCA). The second statement was filed by Alliance for Rail Competition, American Chemistry Council, American Public Power Association, The Chlorine Institute, Consumers United for Rail Equity, Edison Electric Institute, The Fertilizer Institute, The National Industrial Transportation League, National Rural Electric Cooperative Association, and WCTL. Although these statements were filed late under 49 C.F.R. § 1115.9(b), we will accept them in the interest of a complete record and because they will not prejudice any party.

FD 35557 (STB served Mar. 9, 2012). The decision stated that, if necessary, the technical conference would be rescheduled in the Board's decision addressing the appeal. Id. at 2.

DISCUSSION AND CONCLUSIONS

Interlocutory appeals, including an appeal of a decision of the Director of the Office of Proceedings, are governed by 49 C.F.R. § 1115.9. The Board applies a highly deferential standard of review to such appeals. Wisc. Power & Light Co. v. Union Pac. R.R., NOR 42051, slip op. at 2 (STB served June 21, 2000). Under § 1115.9(a), the bases for appeal includes instances where “[t]he ruling grants a request for the inspection of documents not ordinarily available for public inspection” or “[t]he ruling may result in . . . substantial detriment to the public interest, or undue prejudice to a party.”

The Member Organizations appeal the February 27 Order on the above bases. The Member Organizations argue that the Director misapplied the legal standard. Alternatively, they argue that the Director's application of the law will be substantially detrimental to the public interest, claiming BNSF's request for discovery is retaliation against WCTL members for participating in this proceeding. A number of other trade associations filed statements in support of the Member Organizations, because they are concerned that permissive nonparty discovery directed at members will have a chilling effect on the participation of shipper trade associations in Board proceedings.

For the reasons discussed below, we will deny this appeal. We first discuss our conclusion that the Director applied the correct legal standard. We then address the concerns raised by the shipper trade associations that this decision could deter shipper trade associations from participating in Board proceedings, as their participation has long been important to ensure that the views expressed in agency proceedings reflect the interests of all stakeholders. We then conclude with a short clarification on the production of privileged logs and reschedule the technical conference so this proceeding can move forward.

The Director Applied the Correct Legal Standard.

The February 27 Order described correctly the applicable legal standard to govern this request for nonparty discovery. In Board proceedings, “parties are entitled to discovery ‘regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.’” February 27 Order, slip op. at 3 (quoting 49 C.F.R. § 1114.21(a)(1)). Further, it “is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Id. (quoting 49 C.F.R. § 1114.21(a)(2)). The February 27 Order explained that the requirement of relevance means “that the information might be able to affect the outcome of a proceeding.” Id. (citing Waterloo Ry.—Adverse Aband.—Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. In Aroostook Cnty., Me., AB 124 (Sub-No. 2), et al. (STB served Nov. 14, 2003)).

The February 27 Order balanced the relevance of the information sought against the burden. The order stated that: “In determining whether to issue a subpoena, the Board will

examine whether the subpoenas could cause undue burden on third parties, especially those with a limited connection to the matter before the Board.” February 27 Order, slip op. at 2. The February 27 Order then noted that the weight given to the burden on the nonparty will be influenced by that party’s relationship to the proceeding. If a party seeks a subpoena “to compel from a stranger to the litigation . . . actions which may be expensive, oppressive or burdensome,” then a strong foundation regarding the relevance of the information sought would be required. Id. (citing Asphalt Supply & Serv., Inc. v. Union Pac. R.R. (Asphalt Supply 1987), NOR 40121 (ICC served Mar. 27, 1987)). Where, however, a party seeks a subpoena from a nonparty that has a clear interest in the proceeding and will be directly affected by its outcome, the Director concluded that a very strong foundation is not a prerequisite to the issuance of a nonparty subpoena. Id.

The Member Organizations claim the Director applied the wrong legal standard. The Member Organizations cite Asphalt Supply 1987, arguing under that decision the February 27 Order wrongly treated the request for subpoenas as equivalent to party-based discovery.⁴ That case involved a dispute over undercharges assessed by the railroad defendants after movement of goods. Asphalt Supply & Serv., Inc. v. Union Pac. R.R., NOR 40121, slip op. at 1-2 (ICC served Mar. 1, 1988). The complaint was filed by Asphalt Supply, the receiver of the goods, which had negotiated the rate. Id. at 1. The railroads assessed the undercharges on Asphalt Supply, and sought a subpoena to be served on the consignor of the goods—a nonparty. Id. There, an administrative law judge denied the request for a subpoena, stating that the agency requires a party to present a strong foundation if it seeks a subpoena “to compel from a stranger to the litigation . . . actions which may be expensive, oppressive or burdensome.” Asphalt Supply 1987 slip op. at 2. The Member Organizations argue that Asphalt Supply 1987 requires a uniformly strong showing of relevance to issue a subpoena to a nonparty, regardless of that nonparty’s relationship to the proceeding. The Member Organizations also argue that under the Federal Rules of Civil Procedure (FRCP), trade associations are “jural entities” and their members are not subject to party-based discovery.

We find no error in the balancing test applied by the Director. All discovery requests entail the balancing of the relevance of the information sought against the burden of producing that information. Moreover, the Director properly determined that where the information is sought from a nonparty, greater weight should be given to the burden and thus a stronger showing of relevance is required. The more tangential the nonparty is to the proceeding, the greater the weight given to the burden being imposed in the balancing test. Indeed, if a party

⁴ The Member Organizations also cite Rice v. Cincinnati, Washington & Baltimore Railroad, 3 I.C.C. 186 (1889), but that decision predates our modern discovery regulations. In Rice, the Interstate Commerce Commission reasoned that the burden on the nonparties from which discovery was sought would be significant, and that the evidence they could provide would likely be inadmissible. Id. at 212. However, our discovery regulations provide that “[i]t is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” 49 C.F.R. § 1114.21(a)(2).

seeks a subpoena to compel from a nonparty unrelated to the litigation discovery that may be expensive, oppressive or burdensome, then we require a strong foundation regarding the relevance of the information sought to overcome the burden on that nonparty.⁵ But even in the case of a nonparty with no interest in the proceeding, we still balance the relevance against the burden.

A strong foundation is not required in all cases before we will permit nonparty discovery. Rather, a request for a subpoena is considered based on the specific facts of the case where we consider the relevance of the material sought, and the burden on the nonparty.⁶ And the “jural entities” precedent is not the proper inquiry, as the February 27 Order addressed whether the Member Organizations were subject to subpoenas as *nonparties*, and not as parties to the proceeding.⁷

The Director’s Decision Will Not Result in Manifest Injustice.

Applying the proper balancing test, the Director concluded that the Member Organizations could be subjected to reasonably tailored subpoenas for information relevant to this proceeding. The Director noted that, while the Member Organizations are not parties to the proceeding in their individual capacities, they have a clear interest in the proceeding and will obviously be affected by its outcome. “Indeed, the impact of this case on the Member Organizations is neither derivative nor indirect. To the contrary, there is no separate impact of the tariff on WCTL as an organization – the impact of any ruling on the BNSF tariff is directly upon the Member Organizations that would be shipping under the tariff. Likewise, the effects of the tariff on individual shippers are also known, in the first instance, by the Member Organizations.” February 27 Order, slip op. at 2. The Director examined the information sought

⁵ The Member Organizations argue that the February 27 Order misconstrues the meaning of the phrase “stranger to the litigation” from Asphalt Supply 1987, and that the phrase is simply a synonym for nonparty. However, the outcome of Asphalt Supply 1987 is consistent with our findings here and the February 27 Order, because the subpoena at issue in the Asphalt Supply proceeding was directed at a nonparty without any apparent interest in the outcome of the proceeding or a relationship to the proceeding. The instant situation—discovery requests of nonparties with both a clear relationship to and impact from the proceeding—was not considered in the Asphalt Supply proceeding, making that case inapplicable here.

⁶ See, e.g., Ariz. Pub. Serv. Co. v. Burlington N. & Santa Fe Ry., NOR 41185, slip op. at 1-2 (STB served Dec. 23, 2003) (subpoena issued to nonparty whose coal shipments were grouped with the complainant’s in prior rates decisions); Pub. Serv. Co. of Colo. d/b/a/ Xcel Energy v. Burlington N. & Santa Fe Ry., NOR 42057, slip op. at 3 (STB served Feb. 1, 2002) (subpoena issued to manufacturer of electronic fuel gauges used by defendant); Wisc. Power & Light Co., slip op. at 2-4 (subpoena seeking traffic forecasts issued to complainant’s nonparty consultant).

⁷ We further see no error in the Director’s decision not to allow the constraints of the accelerated procedural schedule to preclude legitimate nonparty discovery in this proceeding. February 27 Order, slip op. at 3.

and concluded that “BNSF’s discovery requests are related to the subject matter of the proceeding and may lead to admissible evidence.” *Id.* However, “in the hope of narrowing the scope and burden of the current discovery requests, the Board will defer issuing any subpoenas to the Member Organizations or compelling discovery from Ameren Missouri to permit the resolution of these issues by agreement.” *Id.*

The Member Organizations believe that the February 27 Order will produce a manifestly prejudicial result that is substantially detrimental to the public interest. They observe that shippers participate in many STB proceedings through their trade associations. They are concerned that trade associations will “be forever leery of participating in proceedings before this agency—and many will not do so—if they believe their members will be subject to onerous retaliatory discovery requests issued at the whim of their rail carriers, which is exactly what will happen in this case if the Director’s Decision is allowed to stand.”⁸ These concerns are echoed by shipper trade associations that filed comments in this appeal.

The Board greatly values the role trade associations play in its proceedings. Trade associations (both shipper and railroad) permit the voices of numerous Board stakeholders to be heard on matters of industry-wide significance. Those voices help the Board carry out its mission in the balanced manner contemplated by Congress. It is often more efficient for these stakeholders to share their views through a common trade association than to file hundreds of individualized pleadings.

But the valuable role of trade associations cannot shield their members from reasonably tailored discovery of relevant information in appropriate cases. We are aware of the considerable expense of participating in Board proceedings and strive to ensure that participation is accessible to all interested parties. In this instance, however, given the nature of the inquiry, issuance of subpoenas is necessary to develop the record for this proceeding.

This decision will not cause the use of nonparty subpoenas to increase, as this case presents unusual circumstances that are unlikely to arise in the vast majority of cases where trade associations appear before the agency. Here, the parties to the proceeding do not possess the complete range of information that may be necessary for the development of a full record. A full record requires information related to the impacts and effectiveness of the safe harbor at issue. AECC, however, argues that the information sought by BNSF is not relevant to this proceeding, which is focused solely on the safe harbor provision of the tariff. But the question of a “cost effective” safe harbor provision includes, among others, “issues raised by WCTL that are related to the reasonableness of the safe harbor provision [including] the absence of penalties for noncompliance, the lack of cost sharing, and shipper liability associated with the use of the BNSF-approved topper agents.” Ark. Elec. Coop. Corp.—Petition for Declaratory Order, FD 35305, *et al.*, slip op. at 4 n.5 (STB served Nov. 22, 2011). Some of the information sought by BNSF is relevant to these issues. While the Board recognizes that the Member Organizations

⁸ Joint Appeal 6-7.

are entities separate and apart from WCTL, the Member Organizations possess relevant information regarding the reasonableness of the safe harbor provision.

The Member Organizations also argue that the discovery BNSF seeks is retaliatory. They maintain that “BNSF initiated this unprecedented maneuver in this case for one reason and one reason only: retaliation.”⁹ They assert that BNSF views WCTL as a rogue trade association whose members should be punished for the association’s litigious ways.¹⁰ As support, they cite a BNSF motion to compel, where the railroad stated that “WCTL is not a typical trade association WCTL is little more than a vehicle for WCTL’s members to engage in litigation”¹¹

We will not tolerate retaliatory conduct by any party in this or any agency proceeding. Here, however, we do not believe the discovery request can be interpreted as retaliatory. WCTL is the primary petitioner in this proceeding, but WCTL does not itself ship coal under the tariff. Although WCTL plans to argue that the safe harbor provision is unreasonable, WCTL was unable or unwilling to provide any discovery responses to BNSF about issues such as coal shippers’ plans to comply with the tariff. Often, shipper trade associations work collaboratively with the railroad to narrow the scope of discovery on its members and reach a mutually agreeable solution. For instance, as NGFA and NAFCA note in their comments, NAFCA and UP, in another proceeding, privately reached an agreement on the dissemination of information in a similar situation without the need for Board intervention.¹² We encourage parties to follow the model of collaboration used by NAFCA and UP. But when WCTL declined to provide any relevant information, it was proper for BNSF to seek a nonparty subpoena. While BNSF’s initial request was overly broad and burdensome—which justified the Director’s decision to order the parties to meet and negotiate—we do not view the decision to seek a subpoena as improper retaliation against the members of WCTL.

Privilege Logs.

On February 13, 2012, AECC filed a motion to compel discovery from BNSF. On February 27, 2012, AECC filed a motion to compel discovery from UP. In these motions, AECC requested that the Board compel BNSF and UP to produce privilege logs. In the March 5 Order, slip op. at 4, and the March 19 Order, slip op. at 3, the Director of the Office of Proceedings held, among other things, that BNSF and UP respectively should produce privilege logs to AECC.

Although the current appeal did not raise the issue of privilege logs, we will address the Director’s orders regarding privilege logs to be produced by BNSF and UP to AECC in order to

⁹ Joint Appeal 7.

¹⁰ Id.

¹¹ Id.

¹² NGFA Comments 4-5.

clarify our view on the issue. We recognize the burden of producing privilege logs, but we agree with the decision that they are appropriate here. In this proceeding, unique circumstances make knowledge of the existence of privileged material important. This is the second proceeding regarding the efforts of BNSF to establish a tariff to control coal dust emission. As such, this second round of discovery is likely to capture far more privileged material created during the prior proceeding than in an ordinary Board proceeding, and the risk of inadvertent labeling of relevant non-privileged material as privileged is thus far higher. Accordingly, we believe it is appropriate in these circumstances to require the parties to bear the burden of producing privilege logs.

In sum, the Board will deny this appeal and reschedule the technical conference for July 11, 2012. The technical conference will address the discovery requests directed at the Member Organizations (with the exception of the requests directed to AFS, as BNSF has withdrawn its petition for subpoena of AFS).¹³ If BNSF and the Member Organizations agree to revised discovery requests before the technical conference, they may file a motion to request that the technical conference be cancelled (or that a particular entity's participation be excused). After the technical conference (or after a request that the technical conference be cancelled or certain parties be excused), the parties may file a proposed revised procedural schedule.

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

It is ordered:

1. The Member Organizations' appeal of the February 27 Order is denied.
2. The Board will hold a technical conference with counsel for the Member Organizations (except AFS) and BNSF on discovery from the Member Organizations on July 11 2012, at 10:00 a.m., at the Board's headquarters at 395 E Street, S.W., Washington, DC. Ameren Missouri is excused from the technical conference. Following the technical conference, the Board will issue subpoenas for discovery from the Member Organizations, as appropriate.
3. This decision is effective on its service date.

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

¹³ Ameren Missouri, which is a party to the proceeding, is also excused from the technical conference.