

SERVICE DATE – MAY 22, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42113

ARIZONA ELECTRIC POWER COOPERATIVE, INC.

v.

BNSF RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY

Digest:¹ The Board denies a shipper's petition requesting that the Board order two carriers to charge a single rate to comply with a decision finding for the shipper in a rate dispute. The Board finds, in this instance, that billing the shipper separately does not compromise the relief to which the shipper is entitled, is consistent with the Board's underlying analysis in the decision regarding the rate dispute, and that the carriers' rationales for billing the shipper separately are reasonable.

Decided: May 21, 2012

BACKGROUND

In 2008, Arizona Electric Power Cooperative, Inc. (AEPCO) filed a complaint challenging the reasonableness of the joint rates established by BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP) (collectively, defendants) for unit train coal transportation service from New Mexico and the northern portion of the Powder River Basin in Wyoming and Montana, to AEPCO's Apache Generating Station located near Cochise, Ariz. In a decision served on November 22, 2011, the Board found that AEPCO had shown that defendants have market dominance over those movements, and that their rates were unreasonable. Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113 (STB served Nov. 22, 2011) (November 2011 Decision). Accordingly, the Board ordered defendants to reimburse AEPCO (with interest) for amounts previously collected above prescribed levels. Id. at 39. The Board further ordered defendants to establish and maintain rates for movements of the issue traffic that do not exceed 180% of the variable costs of providing the service. Id.

On January 9, 2012, AEPCO filed a petition requesting that the Board order BNSF and UP to publish joint rates to comply with the November 2011 Decision. AEPCO explains that the

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).

rates recently published by BNSF and UP are proportional rates, and claims that this violates the Board's order. AEPCO argues that the rates it challenged were joint rates, and that when the Board prescribed rates in the November 2011 Decision, defendants lost the authority to change the form of the common carrier rate.

BNSF and UP filed separate replies on January 30, 2012. Defendants both argue that the Board did not prescribe a particular rate type in the November 2011 Decision, but instead merely required that they quote AEPCO rates that do not exceed 180% of the variable costs to provide the service at issue. Defendants argue that they retained their freedom to establish the type of rates to quote. Defendants further state that they quoted proportional rates to help disentangle UP's rates from the issues surrounding Berkshire Hathaway's acquisition of BNSF and its possible effect on Board-prescribed BNSF rates.² UP further argues that the type of rate quoted does not affect the overall rate charged to AEPCO.³

DISCUSSION AND CONCLUSIONS

We will deny AEPCO's petition. In a rate case, the Board determines whether a carrier (in this case two carriers) has charged an unreasonable rate. If the Board determines that the carrier has charged an unreasonable rate, it prescribes a maximum lawful rate. When a shipper successfully challenges a rate for common carrier transportation, as AEPCO did here, the carrier loses some of its flexibility in setting the terms of carriage, at least in as much as those terms affect the level of the rate prescription.

Here, there is no dispute that the level of the rate, whether a joint or proportional rate, will not exceed 180% of the variable costs to provide the service. By seeking to change the type of rate charged from joint to proportional, the railroads argue they are exercising freedom they continue to have notwithstanding the rate prescription. Prior to this case, the Board had not been called upon to determine where a railroad's flexibility in setting terms of carriage ends when the rate is subject to a prescription.

AEPCO cites to Tex-O-Kan Flour Mills Co. v. Abilene & South Railway, 263 I.C.C. 91 (1945), for the premise that carriers cannot change the form of a tariff after the Board has prescribed a maximum lawful rate.⁴ That case, however, states that the Interstate Commerce Commission could have prescribed a maximum rate and left the form of the rate to the carrier to determine. Tex-O-Kan Flour Mills Co., 263 I.C.C. at 95 ("Having concluded that the through rates are unreasonable, we could have prescribed merely the maximum reasonable through rates

² The Board has instituted a declaratory order proceeding to explore the effect of the price that Berkshire Hathaway, Inc. paid to acquire BNSF in 2010 on the Board's annual Uniform Rail Costing System and revenue adequacy determinations, with respect to BNSF. Western Coal Traffic League—Petition for Declaratory Order, FD 35506 (STB served Sept. 28, 2011).

³ UP Reply 5.

⁴ AEPCO Pet. 5.

without requiring their establishment as joint rates, leaving to the defendants the determination of the method of publication.”). Thus, contrary to AEPCO’s argument, a Board determination in a rate case does not necessarily require the form of the prescribed rate to match the form of the challenged rate. However, UP’s argument on reply is too broad in claiming that defendants necessarily retain the discretion to determine the form of rate whenever the Board does not specifically require a certain form.⁵ The Board cannot determine at the time of prescription the myriad of carriage terms that must remain unchanged for its relief to take effect. Instead, following an award of rate relief, the Board will review an individual shipper’s concerns with proposed changes to the terms of the underlying tariff on a case-by-case basis.

To balance the interests of the shippers in securing the benefits of the rate prescription at the prescribed level, and the carriers in maintaining flexibility in the terms of carriage beyond the rate prescription, the Board will examine: (1) the impact on the relief to the shipper; (2) whether the changes to the tariff are inconsistent with the Board’s underlying rate reasonableness analysis; and (3) the rationale provided by the carrier for making those changes.⁶

We find the changes proposed by defendants permissible under this analysis. AEPCO has not shown or argued that its relief has been affected. Instead, AEPCO argues that it is being denied the benefits associated with a joint through rate, including the simplified determination of rates.⁷ But, as discussed above, the complaint concerned the rate level, and not the ease of administration of the rate prescription. Furthermore, the determination of rates issues that AEPCO points to regard differing calculations by the carriers. These differences would occur regardless of the rate type. The November 2011 Decision requires the parties to determine the prescribed maximum lawful rates by using the individual carriers’ actual costs for their segment of the movement. AEPCO and defendants would therefore perform the same calculations, about which there are disagreements, regardless of whether joint or proportional rates are quoted.

AEPCO also raises concerns about UP’s “creative maneuvering” of common carrier arrangements in recent rate disputes.⁸ Application of the standard discussed in this decision would prevent any improper post-decision maneuvering by a carrier. The standard considers both the Board’s underlying analysis and relief to the shipper. Should either of those factors be affected, a carrier would necessarily need to make a strong showing under the counterbalancing other factors for the Board to allow any changes to the tariff to take effect. Finally, we are not persuaded by AEPCO’s argument about joint and several liability.⁹ The only stated concern by

⁵ UP Reply 6.

⁶ This standard comports with the national rail transportation policy at 49 U.S.C. § 10101(2). Specifically, it balances the need for fair regulatory decisions while minimizing the need for Federal regulatory control over the rail transportation system.

⁷ AEPCO Pet. 9.

⁸ AEPCO Pet. 7-8 n.9.

⁹ Id. at 9.

AEPCO pertains to the collection of reparations.¹⁰ Reparations are required for past movements, that were joint movements, and therefore the carriers joint and several liability for those past movements are unaffected by the future change in rate type.

We do not believe that the relief to the shipper has been affected in a manner requiring Board intervention here. Furthermore, providing proportional rates, as opposed to joint rates, is not inconsistent with the Board's underlying analysis in the November 2011 Decision, and defendants' rationale regarding separating the rates because of the BNSF/Berkshire Hathaway issue is reasonable. Therefore, the Board will deny AEPCO's petition.

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

It is ordered:

1. AEPCO's petition requesting that the Board order BNSF and UP to publish joint rates is denied.
2. This decision is effective on its service date.

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

¹⁰ Id. (“While a particular BNSF/UP proportional rate must necessarily equal, in total, the rate that would be charged under a joint through rate, lest it violate the [Board's] prescription, AEPCO is potentially deprived of some of the real benefits of a joint through rate, including the simplified determination of rates and joint and several liability, which may yet be an issue for collecting reparations.”).