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SERVICE DATE - DECEMBER 31, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42058

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
AND UNION PACIFIC RAILROAD COMPANY

STB Finance Docket No. 34041¹

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
AND UNION PACIFIC RAILROAD COMPANY

Decided: December 26, 2001

BACKGROUND

In a complaint filed and served on defendants, The Burlington Northern and Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UP), in STB Docket No. 42058, Arizona Electric Power Cooperative, Inc. (AEPCO) alleges that the defendants' common carriage through rates on unit-train movements of coal from mines located at North Tipple and Lee Ranch, NM, to AEPCO's Apache Generating Station at Cochise, AZ, are unreasonably high.² On March 9, 2001, AEPCO sought to amend its complaint to expand the scope of the complaint to include BNSF/UP through rates from BNSF-served mine origins in the Powder River Basin (PRB) of Wyoming and Montana, as well as UP single-line rates from UP-served mine origins in Colorado.

¹ These proceedings are not consolidated. Rather, issues arising in these two proceedings are being addressed in a single decision for administrative convenience.

² Prior to January 1, 2001, service was provided under a rail transportation contract. Since then, AEPCO's coal has moved under a BNSF/UP common carriage through rate.

This decision denies a motion for partial dismissal of the amended complaint; rules on certain discovery disputes and, as to others, suggests that the shipper refine its discovery requests; and suspends the procedural schedule in STB Docket No. 42058 until all discovery is completed. The decision also clarifies our earlier ruling in STB Finance Docket No. 34041 directing defendants to establish and maintain common carriage rates for service requested by AEPCO from PRB origins.

DISCUSSION AND CONCLUSIONS

1. Defendants' Motion for Partial Dismissal of the Amended Complaint.

On April 4, 2001, defendants filed a motion to dismiss the amended complaint to the extent it challenges the reasonableness of unit-train coal rates from PRB mines.³ They first argued that AEPCO could not challenge the reasonableness of the previously effective rates for coal transportation from Wyoming and Montana because AEPCO had never shipped coal under those rates. Motion to Dismiss at 1. However, AEPCO has since moved at least one trainload of coal from the PRB,⁴ and AEPCO states that it intends to acquire additional PRB coal pursuant to a new coal blending program that it has undertaken, which requires procurement of coal from a variety of regions.

The defendants' other objection to expanding the scope of the complaint to include AEPCO's PRB traffic is their concern that inclusion of PRB traffic in a single stand-alone cost (SAC) analysis that also embraces movements from New Mexico and Colorado mines might be used in an attempt to effect an inappropriate cross-subsidy of the transportation from the New Mexico and Colorado mines. While we take this potential cross-subsidy issue seriously,⁵ we do not believe that it provides a basis for dismissal of the complaint at this point; rather, it raises an issue that the parties can and should address in their evidentiary submissions. As AEPCO correctly observes, until the complainant has identified the hypothetical stand-alone system upon which it seeks to base its case, the extent to which a potential inappropriate cross-subsidy may or

³ Defendants evidently do not object to the expansion of the original complaint to include Colorado mine origins.

⁴ Prior to filing the motion to dismiss, the defendants had cancelled the rates applicable to AEPCO's traffic from PRB mines. In our decision served May 8, 2001, in STB Finance Docket No. 34041, we directed the carriers to establish appropriate common carriage rates for any traffic AEPCO sought to move from PRB mines.

⁵ See PPL Montana, LLC v. Burlington N.&S.F. Ry., STB Docket No. 42054 et al. (STB served Nov. 27, 2001) (PPL Montana), slip op. at 5-7.

may not be implicated cannot be determined. Reply to Motion to Dismiss at 3. Thus, we are not yet in a position to consider this issue. However, as discussed infra in connection with the discovery disputes, there are basic limitations on the traffic that can appropriately be included in a SAC analysis.

2. AEPCO's Continuing Request for Rates.

On May 14, 2001, defendants notified us that they had complied with our directive (see n.4, supra) by establishing a common carriage through rate for trainload movements of coal from specified Wyoming PRB origins to AEPCO's Apache power plant. AEPCO contends that the carriers' compliance is deficient because no rate was established for the PRB origins of Nerco Junction and Decker, MT, and because the rate that was established for Wyoming mine origins was set to expire on June 30, 2001. AEPCO states that it has both an immediate and a long-term interest in securing a portion of its coal supply requirements from PRB mines, that it has tested coals from several PRB producers, and that it is investing in expensive new equipment that will permit it to blend PRB coals with coals from other origins.

Defendants have not replied on this issue. Because the un rebutted evidence shows a continuing need for common carriage rates from the PRB origins identified by AEPCO, including the points named in Montana, the rate already established shall be held open or reinstated (or replaced by another rate covering the same service) and the carriers shall provide through rates from the PRB Montana mines requested by AEPCO.

3. Discovery.

a. Defendants' Discovery Requests. On February 23, 2001, defendants filed a petition for subpoenas duces tecum directed to five nonparty entities: Gold Fields Mining Company and Lee Ranch Coal Company (the owner and operator, respectively, of the Lee Ranch mine); Chevron Corporation and the Pittsburgh and Midway Coal Mining Company (the owner and operator, respectively, of the North Tipple mine); and Phelps Dodge Mining Company (the largest consumer of AEPCO-produced power). Defendants contend that the information sought is needed to establish that the North Tipple mine does not have sufficient coal reserves to supply coal for the 20-year period that is usually included in a stand-alone cost (SAC) presentation.

Replies in opposition were filed by Gold Fields and Lee Ranch jointly on March 14, 2001,⁶ and by complainant on March 15, 2001.⁷ Gold Fields and Lee Ranch object to document requests 1-6 as duplicative because the information is available from AEPCO, and they object to requests 7-8 as seeking commercially sensitive “highly confidential” material about the Lee Ranch mine. They also argue that there is no justification for documents relating to contract negotiations, as opposed to final agreements, and that, in any event, the search would be unduly burdensome and expensive because those documents are located throughout offices in several states. Finally, they argue that the defendants should focus on AEPCO’s future plans and projections for coal supplies for its Apache power plant, rather than on the Lee Ranch mine’s potential supply.

In response to these arguments,⁸ defendants assert that it was necessary for them to seek this information from third parties because AEPCO had objected to producing the requested information itself. Defendants have narrowed their third party discovery to: (1) the current agreement (with any amendment) between AEPCO and each mine; (2) any documents reflecting written or oral communications between AEPCO and each mine about procuring coal under the current agreement in 2001 and beyond; (3) any documents showing projections of AEPCO’s coal procurement from each mine in 2001 and beyond; (4) documents showing when each mine expects to run out of coal; and (5) answering the sole interrogatory (identifying respective third party witnesses) as to the above.

AEPCO has now offered to supply this information itself if we order the information to be produced. However, it argues that the discovery request has been mooted by its amendment of the original complaint so as to encompass movements for which there would be a reliable 20-year coal supply.

We are not persuaded that the defendants’ discovery request is mooted by AEPCO’s amendment of its complaint, as the complaint still covers movements from the Lee Ranch and North Tipple mines. Because AEPCO is willing to furnish the information related to these

⁶ Intervention is granted to those parties for this limited purpose.

⁷ In a letter filed March 19, 2001, defendants withdrew their request as to Phelps Dodge and reported that Pittsburgh and Midway Mining does not oppose the subpoena to it. Chevron has not appeared.

⁸ In a motion filed April 2, 2001, defendants sought leave to file a tendered reply brief. Complainant objected to defendants’ filing of a reply to a reply, but addressed the issues raised therein. In the interest of a complete record, we will accept all the tendered pleadings.

mines, there is no need to subpoena third parties. AEPCO is directed to respond to defendants' amended document requests.

b. AEPCO's Discovery Requests. On April 16, 2001, AEPCO filed a motion to compel responses to its amended interrogatories and requests for production of documents served on the defendants on March 9, 2001. BNSF and UP filed separate replies on May 7, 2001.

i. Traffic Information. AEPCO has sought information regarding all traffic moving from or to a 10-state area that AEPCO may potentially seek to include in its SAC presentation.⁹ Even if the requests were limited to coal movements only, as AEPCO seems to suggest,¹⁰ the defendant carriers object to the discovery request as too broad and unduly burdensome. The carriers make a strong argument that inclusion in a SAC traffic group of non-issue traffic that does not use the facilities needed by the issue traffic could lead to an impermissible cross-subsidy of the rates for the issue traffic.

We agree that the discovery request appears to be overly broad in light of the limited portion of that ten-state territory through which the complainant's traffic moves¹¹ and the defendants' expressed concern that a SAC analysis not be allowed to be structured in such a way as to give rise to an impermissible cross-subsidy of the complainant's traffic. Moreover, we continue to be concerned that discovery in SAC cases not become overreaching.¹² But rather

⁹ UP objects that this request is so broad as to include what it charges is:

obviously irrelevant data on chemical shipments from the Texas Gulf Coast to the Mississippi River gateways; shipments of grain from Nebraska, Kansas and Oklahoma to the Pacific Northwest or the Gulf Coast, and exports to Mexico via Laredo, Brownsville, or Eagle Pass. None of these shipments ever touch the Complaint route. Some never come within 800 miles of the Complaint route.

UP Reply to Motion to Compel, at 14.

¹⁰ See AEPCO Motion To Compel, at 1-2.

¹¹ As Exhibit 1 to UP's reply to the motion to compel shows, AEPCO's discovery request includes a variety of movements that are, at best, only tangentially related to the routes over which AEPCO's traffic moves.

¹² See FMC Wyoming v. Union Pac. R.R., Docket No. 42022 (STB served Apr. 17, 1998 (continued...))

than attempt to delineate in advance permissible boundaries of discovery, we offer the following guidance to the parties so that they may narrow the scope of discovery themselves.

As we observed in our recent decision in PPL Montana, at 5-7, the defendants' cross-subsidy concerns raise a significant issue. We agree that a basic principle of the SAC test is that traffic not be subsidized by other traffic. Indeed, the purpose of the SAC test is to remove such cross-subsidies, while allowing traffic to enjoy the benefits of cost-sharing for those railroad services and facilities that they have in common. Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 528 (1985). Thus, revenues from non-issue traffic should not be relied upon to pay for portions of a SAC system over which that non-issue traffic would not move.¹³

While we do not wish to prejudge the configuration of any stand-alone railroad that AEPCO may seek to present, we note that AEPCO must be prepared to demonstrate the reasonableness of that configuration, if challenged. A SAC presentation should be reasonably tied to its purpose, which is to assess the reasonableness of the rates charged for the traffic at issue. Here, we are not persuaded that AEPCO would need information on traffic encompassing a broad 10-state area for a SAC presentation that is properly structured to avoid obvious cross-subsidies. Thus, we will afford AEPCO an opportunity to narrow its discovery requests.

ii. Operational Information. AEPCO also seeks information and documents concerning BNSF and UP coal movements from PRB (and apparently Colorado) origins¹⁴ to

¹²(...continued)
and Aug. 31, 1998) (limiting railroad discovery that we found to be overreaching and unduly burdensome).

¹³ The defendants speculate that AEPCO's broad discovery is designed to gather sufficient information for it to combine PRB traffic of BNSF and UP together in a single SAC analysis, and they argue that to do so would also be inappropriate. This is also a serious issue. However, as we noted above, AEPCO has not yet indicated what traffic it may or may not seek to include in its SAC analysis. Moreover, because we are clarifying here that revenues from PRB traffic may not be used to cover the costs of a portion of a SAC system over which the traffic would not move, we doubt that seeking to combine the PRB traffic of both defendants would be helpful to AEPCO's rate challenge. Therefore, we do not believe that we need to consider the defendants' argument here.

¹⁴ AEPCO's original request was limited to PRB origins, but its discussion and argument regarding this request consistently refer to coal movements from the PRB and Colorado. Motion to Compel, at 10, 11 n.9, and 15.

other coal-fired electric plants in Arizona served by either BNSF or UP.¹⁵ AEPCO submits that this information is needed to develop appropriate operating parameters and unit costs for movements to the Apache station because only one shipment moved from the PRB to the Apache station in 2000.

UP responds that all but two of its coal customers in Arizona are industrial users that receive coal in manifest service, not in unit-trains.¹⁶ Moreover, because it now handles shipments of Colorado coal to Cochise, UP submits that the variable costs for those movements can be computed based on actual movement characteristics, and there is thus no need for information relating to movements to other plants.¹⁷ Similarly, BNSF argues that the requested information would not be relevant, because the characteristics of specific transportation arrangements drive the variable cost calculations and each movement is different.

We agree. Even under our liberal discovery rules, a party seeking discovery must demonstrate the need for the materials it seeks. Where there are actual issue movements, there is no need to rely on surrogate movements (which are unlikely to have similar operating parameters) to establish variable costs. Accordingly, the motion to compel defendants to produce this information is denied.

iii. Revenue Divisions. In Interrogatory No. 5, AEPCO seeks information concerning the percentage of the revenues each of the defendant railroads receives from the through rates paid by AEPCO for the movements that are the subject of its amended complaint. UP objects to this discovery request on the ground that rate divisions are not relevant to the development of either variable costs or stand-alone costs.

AEPCO suggests that the information may be useful in demonstrating that UP exercises monopoly power on its “bottleneck” segment of a through movement, by showing that UP’s share is higher than a straight mileage prorate. UP counters that the market dominance inquiry is not conducted on a segment-by-segment basis, but rather is addressed to the movement as a whole. We do not see the relevance of revenue divisions in establishing market dominance. The market dominance inquiry is an examination of the availability of transportation alternatives, not an investigation of carrier pricing practices. See 49 U.S.C. 10707(a). Thus, we will not compel production of the information on this basis.

¹⁵ Interrogatory Nos. 1, 3, and 4, and Document Request Nos. 34, 39, and 41.

¹⁶ UP Reply to Motion to Compel, at 16 n.14.

¹⁷ UP states that it does not haul PRB coal to any other Arizona coal-fired electric plants.

AEPCO also submits that information concerning the division may be useful for analyzing the locomotive run-through arrangement for the movements from the New Mexico origins to Apache. BNSF points out, however, that in another discovery request (Document Request No. 6) AEPCO seeks “any run-through, horsepower equalization, or other arrangements, contractual or otherwise, that relate to locomotives used to move the AEPCO trains between Origin and Destination in both the loaded and empty directions.” Because BNSF has agreed to produce or make available materials responsive to Document Request No. 6, information on divisions is unnecessary for this purpose.

Finally, AEPCO submits that information concerning the division may be pertinent to an allocation of revenues between a stand-alone carrier and its connecting carriers for “cross-over” traffic. BNSF and UP respond that a single observation would have little significance in determining a reasonable revenue allocation on other traffic. We agree. Accordingly, the motion to compel defendants to produce this information is denied.

4. Procedural schedule.

AEPCO asks us to establish a procedural schedule to govern all future aspects of this case. Discovery, however, is not yet complete. Therefore, we will not be able to move this case forward until all discovery is completed, at which point the parties should propose an appropriate procedural schedule for this proceeding.

It is ordered:

1. The motion to dismiss the amended complaint is denied.
2. Defendants shall maintain rates for service requested by AEPCO from PRB origins to AEPCO’s Apache plant.
3. The request of Gold Fields Mining Company and Lee Ranch Coal Company to intervene and reply to the motion for issuance of subpoenas duces tecum is granted. Defendants’ reply brief and AEPCO’s reply thereto are also accepted for filing.
4. Defendants’ motion for issuance of subpoenas duces tecum is denied without prejudice. In lieu thereof, AEPCO is directed to provide the discovery specified herein.
5. AEPCO’s motion to compel documents relating to defendants’ traffic is denied without prejudice to AEPCO’s refining its discovery request.

6. AEPCO's motion to compel information and documents concerning BNSF and UP operations with respect to coal movements from PRB and Colorado origins to other coal-fired electric plants in Arizona is denied.

7. AEPCO's motion to compel information concerning the division of revenues between the defendants from the rates that are the subject of AEPCO's amended complaint is denied.

8. The procedural schedule in this matter is suspended. When discovery is completed, the parties shall submit a new proposed schedule.

9. This decision is effective on its date of service.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary