

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42127

INTERMOUNTAIN POWER AGENCY
v.
UNION PACIFIC RAILROAD COMPANY

Digest:¹ The Board finds that the complainant shipper may not submit new evidence at this juncture in this case because the shipper has not demonstrated that there is sufficient justification to alter the record after both parties have submitted their initial arguments. The Board also establishes a procedural schedule for the remainder of the proceeding.

Decided: April 2, 2012

Intermountain Power Agency (IPA) challenges the reasonableness of rates established by Union Pacific Railroad Company (UP) for unit train coal transportation service to IPA's electric generating facilities at Lynndyl, Utah, for certain UP single-line service and one bottleneck section. IPA alleges that UP possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed pursuant to the Board's stand-alone cost (SAC) test. IPA also alleges that UP's failure to disclose its rates within 10 business days of when IPA requested them was an unreasonable practice. In accordance with the procedural schedule, IPA filed its opening evidence on August 10, 2011, and UP filed its reply evidence on November 10, 2011.

On December 8, 2011, IPA filed a petition to supplement the record, in which it requests that the Board modify the procedural schedule to accommodate the filing of supplemental evidence by both parties.² On December 28, 2011, UP filed a reply in opposition to IPA's petition.

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 At that time, under the procedural schedule adopted by decision served July 6, 2011, IPA's rebuttal was due by January 3, 2012. To provide adequate opportunity to consider IPA's petition and any UP reply, the Board issued a decision on December 16, 2011, holding the procedural schedule in abeyance pending a decision on IPA's petition.

BACKGROUND

IPA seeks leave to reduce the scope of its stand-alone railroad (SARR) by eliminating more than one-third of the SARR submitted in its opening evidence, and to “make further adjustments to its stand-alone system as well.”³ IPA argues several factors warrant a decision granting the relief that it seeks: (1) UP’s argument that IPA is precluded from challenging UP’s single-line rates and the failure of UP to modify the SARR accordingly, thereby not providing an adequate record for the Board to analyze the remaining bottleneck rate; (2) IPA’s conclusion that its future electric generating interests will be best served by limiting its challenge to the bottleneck section; (3) the impact of a linking error in IPA’s opening evidence regarding the calculation of Average Total Cost divisions on cross-over traffic; and (4) certain Board holdings regarding cost-of-capital arguments and the calculation of the terminal value of the SARR in Arizona Electric Power Cooperative v. BNSF Railway (AEPCO), NOR 42113 (STB served Nov. 22, 2011), which was served after IPA submitted its opening evidence.

UP argues that the new evidence IPA wishes to introduce could have been introduced earlier, and that IPA has made no effort to show that the new evidence would materially alter the outcome of the case. UP states that its own argument that rates for UP’s single-line service should not be prescribed does not warrant a modification to the SARR, noting the Board’s holding that there is no requirement that issue traffic share facilities with all of the traffic on the SARR.⁴ In regard to the issues arising out of holdings in AEPCO, UP argues that the Board did nothing unexpected that IPA could not have reasonably foreseen. UP claims that the cost-of-capital holding was consistent with precedent and that the terminal value holding simply corrected a flaw in the discounted cash flow model. UP further argues that IPA has not articulated how these holdings are connected with a need to reconfigure the SARR. Finally, UP argues that IPA’s correction of a linking error was a technical error, and the decision to challenge more than just the bottleneck rate was a strategic decision made on opening, neither of which meets the standard to permit the submission of supplemental evidence.

DISCUSSION AND CONCLUSIONS

The Board has held that where a complainant seeks to supplement the record in a rail rate case, it must show that “the material sought to be introduced is central to its case, could not reasonably have been introduced earlier, and would materially influence the outcome of the case.” Duke Energy Corp. v. CSX Transp., Inc. (Duke/CSX), NOR 42070, slip op. at 4 (STB served Mar. 25, 2003).

All of IPA’s arguments fail the Duke/CSX standard. Specifically, IPA has not shown that “the material sought to be introduced . . . could not reasonably have been introduced earlier.” Id. at 4. IPA does not explain how it was unforeseeable that UP would challenge portions of its

³ IPA Pet. 2.

⁴ UP Reply to Pet. 8 (citing AEPCO, slip op. at 9 and Otter Tail Power Co. v. BNSF Ry., NOR 42071, slip op. at 10 (STB served Jan. 27, 2006)).

evidence. UP's single-line rate argument is not a rationale for allowing IPA's filing of supplemental evidence. A SARR is a primary component of a SAC analysis, and its configuration is a litigation strategy that a complainant must determine in a manner most beneficial to its case. That a defendant carrier might make an argument on reply that potentially limits the benefits of a complainant's configuration is expected, and is not a reason to allow the reconfiguration of the SARR in an attempt to minimize the potential damage to the complainant's case. Furthermore, IPA's desire to now limit its challenge to only rates for the bottleneck traffic does not justify its request to supplement the record. A complainant may not significantly modify the foundation of its case after it and the defendant carrier have put forward their initial evidence and arguments, an expensive and time consuming effort, merely because the complainant believes the modification to be in its best interest.

Similarly, the technical error correction (i.e., the "linking error" IPA refers to) is not grounds for the supplement that IPA now seeks. It is the duty of the complainant to make its best case on opening. The complainant cannot claim that a technical error, brought on by the complainant's own mistake, is grounds for it to modify a core part of its evidence after the defendant carrier has already filed a reply to that evidence.

Finally, the holdings in AEPCO were consistent with Board precedent and foreseeable. With respect to the cost-of-capital issue, the Board merely reaffirmed that it will apply the previously published industry cost of capital unless a party demonstrates that a different cost of capital tailored specifically to the SARR at issue should be used because of the SARR's underlying characteristics. AEPCO, slip op. at 137. With respect to the terminal value issue, as UP notes in its reply, the Board was correcting a flaw in its DCF model such that the terminal value would be consistent with a 10-year rate prescription. This issue had been raised in the AEPCO proceeding before IPA had submitted its evidence. Moreover, we do not see how this calculation refinement is related to IPA's SARR configuration. In fact, IPA has not shown how either of the noted holdings in AEPCO would necessitate the reconfiguration of the SARR.

IPA's reliance on Duke Energy Corp. vs. Norfolk Southern Railway (Duke/NSR), 7 S.T.B. 89 (2003), for the premise that supplemental evidence is allowed where a carrier's reply does not provide the Board with a sufficient record to perform its SAC analysis is misplaced. In Duke/NSR, the Board stated that "[w]here the railroad has identified flaws in the shipper's evidence but has not provided evidence that can be used in the Board's SAC analysis, or where the shipper shows that the railroad's reply evidence is itself unsupported, infeasible or unrealistic, the shipper may supply corrective evidence." Id., 7 S.T.B. at 100-01 (footnote omitted). For example, where the railroad challenges the shipper's evidence because it lacks a cost of track components, but itself submits no evidence of track components costs, the shipper on rebuttal may submit evidence of those costs. The cited language was not meant to imply that every time a railroad challenges an argument of the shipper that has implications for the operations of the SARR—particularly where the railroad did not argue that the bounds of the shipper's SARR should be curtailed—the shipper may redesign its SARR on rebuttal. Rather, to be successful in a petition to supplement its case, a shipper must show, *inter alia*, that "the material sought to be introduced . . . could not reasonably have been introduced earlier," Duke/CSX, slip op. at 4, which IPA has failed to do in this case.

For the foregoing reasons, the Board finds that IPA has not satisfied the legal standard applicable to its request, and the petition to supplement the record will be denied.

The procedural schedule will be modified to allow the parties time to prepare the remaining pleadings in this proceeding. The schedule will be as follows:

Complainant Files Rebuttal Evidence	May 4, 2012
Parties File Closing Briefs	June 18, 2012

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

It is ordered:

1. IPA's petition to supplement the record is denied.
2. The procedural schedule in this proceeding is revised as described above.
3. This decision is effective on its service date.

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