

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. 42104

ENTERGY ARKANSAS, INC. AND ENTERGY SERVICES, INC.
v.
UNION PACIFIC RAILROAD COMPANY
AND
MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.

Finance Docket No. 32187

MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY, INC.
—LEASE, ACQUISITION AND OPERATION EXEMPTION—
MISSOURI PACIFIC RAILROAD COMPANY AND BURLINGTON NORTHERN RAILROAD
COMPANY

INTERVENOR ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
REPLY TO
MISSOURI & NORTHERN ARKANSAS RAILROAD COMPANY'S
MOTION TO DISMISS

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Dated: September 8, 2009

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Intervenor Arkansas Electric Cooperative Corporation (AECC) adopts and incorporates Entergy's 1/ reply to MNA's 2/ Motion to Dismiss. Supplementing Entergy's response, AECC makes the following comments:

Entergy initiated this proceeding to challenge the interchange commitment in the UP 3/- MNA lease, which Entergy and AECC contend "unlawfully restricts MNA from interchanging the [Independence] plant's coal traffic with other carriers, including BNSF Railway Company

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- 1/ Entergy Arkansas, Inc. and Entergy Services, Inc. are referred to herein as Entergy.
2/ Missouri & Northern Arkansas Railroad Company is referred to herein as MNA.
3/ Union Pacific Railroad Company is referred to herein as UP.

(BNSF).” Entergy Arkansas, Inc. v. Union Pacific RR, STB Docket No. 42104, et al., Decision served June 26, 2009, at 1. In the June 26 Decision, the Board ruled that the statute under which Entergy sought relief, 49 U.S.C. 10702, was “an inappropriate provision”, because 49 U.S.C. 10705 “is a more specific provision that governs the behavior at issue and its effects.” Id., at 1-2. The Board “provide[d] Entergy an opportunity to amend its complaint” to seek relief under Section 10705. Id., at 8. MNA’s motion to dismiss the Amended Complaint ignores the procedural history of this case, and this Board’s June 26 Decision.

First, MNA argues that BNSF is a necessary party to this proceeding, presumably because it would be the other participant (with MNA) in any through-route to be established. MNA Motion to Dismiss, at p. 4. But as Entergy points out in its Reply, BNSF has been a de facto (although inactive) party to this proceeding from the outset, and its counsel is on the Service List in this Docket. Moreover, the Board has indicated that the focus of the proceedings will be on whether “due to this interchange commitment, UP and MNA are providing inadequate service or foreclosing more efficient service over another carrier”. Decision, at p. 7. BNSF need not be an active party in the proceedings for the Board to address those issues, but if the Board believes that active participation by BNSF is necessary, Entergy has indicated that it would file an amendment to its complaint to add BNSF as a party.

Second, MNA argues that this proceeding is premature, because UP and Entergy have a contract for the transportation of coal to the Independence plant. Entergy has shown that this argument is without merit. Furthermore, MNA’s argument ignores the fact that the Board expressly authorized Entergy to file an amended complaint under Section 10705 “by July 27,

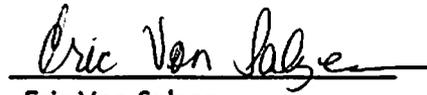
2009.” That ruling by the Board is “law of the case” and bars the argument MNA is now making regarding the timeliness of this complaint.

Third, MNA argues that there is already a “through route” involving MNA and BNSF, referring to a tariff establishing Rule 11 rates. MNA Motion to Dismiss, at p. 5. Entergy shows in its Reply that MNA’s contention is without merit. Furthermore, MNA does not even contend, much less prove, that any traffic moves under that tariff from the Powder River Basin to the Independence plant. Certainly the mere existence of a tariff cannot preclude a rail customer from seeking to “demonstrate[] that the bottleneck railroad has exploited its market power by (1) providing inadequate service over its lines or (2) foreclosing more efficient service over another carrier’s line.” June 26 Decision, at p. 7.

Finally, it is important to observe that the objective of this proceeding is not to injure or inconvenience MNA. Favorable Board action on this complaint would mean that MNA could begin to provide competitive rail service, which the restrictions imposed by the UP lease do not now permit it to do.

WHEREFORE, MNA’s Motion should be denied.

Respectfully submitted,

A handwritten signature in black ink, reading "Eric Von Salzen", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September 2009, I caused a copy of the foregoing document to be served by first class mail, postage prepaid, on those person listed on the Board's Service List in Docket No. 42104.


Eric Von Salzen