

STB DOCKET NO. 41989¹

POTOMAC ELECTRIC POWER COMPANY

v.

CSX TRANSPORTATION, INC.

Decided May 14, 1997

The Board denies Potomac Electric Power Company and the Pennsylvania Power & Light Company's motions to compel discovery.

BY THE BOARD:

On February 20, 1997, in STB Docket No. 41989, Potomac Electric Power Company (PEPCO) filed a motion to compel discovery from CSX Transportation, Inc. (CSXT), of the carrier's internal management costing system. On March 7, 1997, in No. 41295, Pennsylvania Power & Light Company (PP&L) filed a motion to compel the production of internal costing systems from CSXT, Norfolk Southern Railway Company (NS), and Consolidated Rail Corporation (Conrail), the three defendants in that proceeding. CSXT replied to PEPCO's and PP&L's motions to compel; and NS and Conrail replied to PP&L's motion. The Association of American Railroads (AAR) filed a petition for leave to intervene in opposition to the

¹ This proceeding also includes Docket No. 41295, *Pennsylvania Power & Light Company v. Consolidated Rail Corporation, Et Al*. These proceedings are not consolidated. However, a single decision disposing of a common discovery dispute is being issued for administrative convenience.

motions in both cases.² PEPCO and PP&L filed responses to the railroads' replies.³

The shippers⁴ argue that the internal costing systems should be produced because the systems potentially could be used to develop variable costs, components of stand-alone cost, or even qualitative market dominance evidence, and thus may lead to the development of admissible evidence.⁵ They submit that cost evidence is clearly admissible, and that any arguments about the nature of the costs generated by the railroads' internal methodologies go to the weight to be accorded those costs, not their admissibility.

The railroads assail the proffered discovery standard as overly broad and contrary to the discovery criteria in *Coal Rate Guidelines*.⁶ Furthermore, the railroad interests assert that the internal management costing systems are proprietary, and not relevant to an evaluation of the reasonableness of the rates in these cases. Their position is that, because the internal costing systems differ substantially from the Uniform Rail Costing System (URCS), the approved regulatory costing method, the outputs of the internal costing systems are of no use in addressing the complaints filed by PEPCO and PP&L. Finally, they submit that any need for the costing

² AAR, a nonprofit trade association of the nation's major railroads, contends that the issues raised in the motions to compel are of importance to the industry, the interests of which it represents, and that intervention would neither disrupt the procedural schedule nor broaden the issues.

³ CSXT contends that PEPCO has not supported a departure from the rule prohibiting replies to replies, 49 CFR 1104.13(c). CSXT requests that we reject PEPCO's response or, alternatively, that we accept a tendered substantive reply. In view of the significance of this matter, we accept the responses of PEPCO and PP&L, and CSXT's reply thereto, and grant AAR's intervention.

⁴ Because PP&L and PEPCO raise similar arguments, we refer to both parties collectively as the shippers. Similarly, we refer to the various railroads and AAR collectively as the railroads.

⁵ Our discovery rules, which are set out at 49 CFR Part 1114, subpart B, follow generally those in the Federal Rules of Civil Procedure. Thus, as a general matter, parties may obtain discovery regarding any matter that is not privileged and that is relevant to the subject matter involved in a proceeding.

⁶ "[A] shipper seeking discovery must state with particularity the nature and substance of the charges it seeks to prove, as well as the basis for its belief in those charges. In other words, it must demonstrate a real practical need for the information. The discovery must be reasonably tailored to the particular charges to be proved * * *." *Coal Rate Guidelines—Nationwide*, 1 I.C.C.2d 520, 548 (1985).

systems is outweighed by the burden of producing the material and the harm that would be occasioned by its disclosure.

DISCUSSION

The orderly administration of coal rate cases requires limits on what ordinarily would be broad discovery.⁷ As was noted in *Coal Rate Guidelines*, we require more than a minimal showing of potential relevancy before we will grant a motion to compel discovery. Here, the shippers' relevancy presentations are unpersuasive. The material sought does not appear to be necessary for an evaluation of the jurisdictional revenue-to-variable cost percentage of 49 U.S.C. 10707(d),⁸ the qualitative determination of market dominance, the evaluation of the reasonableness of the rates using stand-alone cost, or the prescription of a maximum rate.⁹

PEPCO and PP&L assert that access to the railroads' internal costing systems may allow the shippers to generate movement-specific costs that can be substituted for URCS system average costs in their respective variable cost presentations.¹⁰ Based on the evidence of record, however, we conclude that the railroads' costing systems are unsuitable for these purposes. Without modification, the output of the railroads' internal costing systems and URCS are not equivalent, and there is simply no basis for substituting one measure for another.

⁷ Under our rules, coal rate cases are to be completed within 16 months of the filing of the complaint. *Expedited Procedures for Processing Rail Rate*, 1 S.T.B. 754 (1996).

⁸ CSXT has conceded that the revenue-to-variable cost percentage exceeds the 180% threshold in STB Docket No. 41989.

⁹ Because we may not prescribe a rate below the 180% revenue-to-variable cost level, variable costs are relevant in determining the rate floor for a rate prescription. See, *West Texas Utilities Company v. Burlington Northern RR Co.*, 1 S.T.B. 638 (1996), *pet. for judicial review pending sub nom. Burlington N. R.R. v. Surface Transp. Bd.*, No. 96-1229 (D.C. Cir. filed July 2, 1996).

¹⁰ In *Uniform Railroad Costing System*, 5 I.C.C.2d 894 (1989), URCS was adopted as the preferred general purpose costing system for railroad regulatory purposes. URCS allocates historical system-wide costs to specific movements on the basis of service units and applies prescribed variability percentages to determine intermediate-run average variable unit costs for historic periods. The URCS decision, however, did not foreclose the use of demonstrably superior cost allocation procedures. *Id.* at 899 n.12. Here, as we discuss further, PEPCO and PP&L have not shown that the information they seek will produce superior cost data.

The shippers acknowledge that the output of the proprietary management costing systems will not produce URCS-compatible variable costs,¹¹ but they suggest that they might be able to manipulate the incremental costs from the railroads' costing models to determine URCS-type average variable costs by changing variability percentages and inputting omitted cost elements. We do not encourage reprogramming of the railroads' models in an attempt to produce URCS-compatible costs, especially given that we have never passed on the appropriateness of the railroads' individual costing systems. The statute¹² specifically envisions use of URCS to determine variable costs in rate cases, and we have neither the time nor the resources to evaluate the appropriateness of variable costs developed by a modified version of an individual railroad's internal costing system in each rate case.¹³ Our experience in developing URCS variability factors convinces us that assessing new factors for a single, unique application such as this would be a daunting, time-consuming task both for the parties and the agency.¹⁴ For that reason, and because the outputs from the railroads' systems would be of little value as a substitute for URCS calculations, we will not grant access to the railroads' internal costing systems. Parties, of course, are free to substitute movement-specific data as inputs for the system average data in URCS in developing their variable cost evidence. This, however, does not require access to the railroads' costing

¹¹ URCS determines average historic variable unit costs over an intermediate time horizon, whereas the railroads' internal systems estimate prospective (short-term) incremental costs. URCS includes certain fixed, joint and common costs that are not included in an incremental costing model.

¹² 49 U.S.C. 10707(d).

¹³ As PP&L observed in its March 28, 1997 pleading at page 5, the railroads contend that their costing system is "an elaborate and complex set of interrelated computer programs * * * which consist of hundreds of (often undocumented) assumptions about cost groupings, cost allocations, service units and other matters." Use of the carriers' costing system would require that we review all of the programs and assumptions that affect the output of the costing models.

¹⁴ For example, the use of an alternative method of computing maintenance-of-way costs known as SFGT in *Bituminous Coal—Hiawatha, UT, to Moapa, NV*, 6 I.C.C.2d 1 (1989), generated a substantial dispute over what variability factor to use in the single cost category involved. *Id.* at 30-32. PEPCO's proposal could multiply the problem over all cost categories. Given the Board's limited resources relative to those of the ICC in 1989, when *Bituminous Coal* was decided, such an evidentiary submission would be counterproductive to the resolution of the cases at issue.

models, but rather information on actual costs and traffic data, which the railroads have already produced during discovery.

The shippers also contend generally that the output from the railroads' costing systems would be relevant to the development of stand-alone costs. They claim that the costs from the internal management costing systems are "the product of unit costs and service units; thus, multiplying unit costs by service units for a particular movement may enable determination of its aggregate cost components."¹⁵ This assertion, however, does not support a need for the railroads' costing systems. What is needed to determine stand-alone cost elements is not the individual railroads' costing systems but the aggregate costs and service units that go into any costing model. Again, this information already has been supplied to the shippers.

The shippers also suggest that incremental costs from the railroads' costing systems "may help show that a considerably lower rate would still represent very desirable business and thus demonstrate that competition does not pose a very effective constraint" on the rates charged by the railroads.¹⁶ We disagree. Apart from the 180% jurisdictional threshold, which has been set by law, we do not use rate-cost relationships as a basis for qualitative market dominance determinations. See, *Market Dominance Determinations*, 365 I.C.C. 118, 122 (1981), *aff'd sub nom. Western Coal Traffic League v. United States*, 719 F.2d 772 (5th Cir. 1983) (en banc), *cert. denied*, 466 U.S. 953 (1984) (price/cost ratios do not reliably indicate the presence or absence of market dominance).

CONCLUSION

We conclude that the railroads' internal management costing methodologies have not been shown to be relevant to the issues in these proceedings. In light of this conclusion, we need not discuss in detail the railroads' contention that competitive and commercial harm could result from disclosure of their internal costing methodologies. Moreover, although we need not dwell on this issue, there is substantial validity to the railroads' arguments that production would be burdensome, particularly given that the

¹⁵ Response of PEPCO dated March 26, 1997 at 11.

¹⁶ Response of PEPCO dated March 26, 1997 at 12.

carriers already have made cost information relevant to these particular rate cases available through discovery.

It is ordered:

1. PEPCO's motion to compel discovery, filed February 20, 1997, and PP&L's motion to compel discovery, filed March 10, 1997, are denied.
2. This decision is effective on May 27, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.