STB DOCKET NO. 41604

WESTERN RESOURCES, INC.
v.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

Decided May 21, 1997

The Board dismisses Western Resources, Inc.'s complaint seeking the establishment of reasonable rates for the transportation of coal in unit-train service by The Atchison, Topeka and Santa Fe Railway Company from (a) either of the two of Santa Fe's interchange points (either Kansas City of Topeka, KS) with other rail carriers to (b) two of its generating plants served by Santa Fe.

BY THE BOARD:[1]

Western Resources, Inc. (Western) has filed a complaint seeking the establishment of reasonable rates for the transportation of coal in unit-train service by The Atchison, Topeka and Santa Fe Railway Company (Santa Fe)[2] from (a) either of two of Santa Fe's interchange points (either Kansas City or

[1] The *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803 (the *ICCTA*), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the *ICCTA* provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the *ICCTA*. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to new 49 U.S.C. 10702, 11101, and 11701.

[2] On December 31, 1996, The Atchison, Topeka and Santa Fe Railway Company merged with the Burlington Northern Railroad Company. The name of the surviving corporation of the merger is The Burlington Northern and Santa Fe Railway Company. In this decision, we will continue to refer to the railroad defendant as Santa Fe.

Topeka, KS) with other rail carriers to (b) two of its generating plants served by Santa Fe. Western has also filed a motion requesting that Santa Fe be required to file an appropriate tariff establishing rates that would apply while the complaint was pending. Based on our decisions in the "*Bottleneck Proceedings*," we are dismissing Western's complaint.

BACKGROUND

Western is an investor-owned electric utility that serves customers in Kansas. Western operates coal-fired electric generating plants in Lawrence and Tecumseh, KS. These plants are directly served only by the Santa Fe.

Currently, the coal supplying the Lawrence and Tecumseh stations is being transported under a long-term rail transportation contract with the Southern Pacific Lines (SP)[3] and Santa Fe (the contract). Shipments under the contract are transported in unit-trains over SP from Colorado mines to an interchange with Santa Fe at Kansas City, KS, for delivery to the Lawrence and Tecumseh stations. The contract will expire on December 31, 1998. Coal is not currently moving through the Topeka interchange requested in the complaint.

In its complaint, Western states that it seeks to ship unit-trainloads of coal in common carriage over the lines of origin carriers other than SP to the interchange points with Santa Fe at Kansas City, KS, or Topeka, KS, for movement via Santa Fe to the plants at Lawrence and Tecumseh. Currently, the only rates in effect for the Santa Fe portion of the movements are single-car class rates, which both parties agree are inappropriate for movement of coal in unit-train service. Western requests the Board to prescribe maximum rates solely for the services from Kansas City or Topeka to the generating stations.

Santa Fe has moved to dismiss the complaint. Its motion initially focused principally on contract issues, but the parties have recently filed a stipulation agreeing that, pursuant to recent state court rulings interpreting the contract, certain shipments could be shipped only under the contract, while other shipments could be shipped, if permitted under applicable law, outside of the

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[3] "Southern Pacific Lines" refers to four affiliated rail carriers (Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCL Corp., and The Denver and Rio Grande Western Railroad Company), whose holding company parent merged into a wholly owned subsidiary holding company of the Union Pacific Corporation, which controls the Union Pacific Railroad Company (UP), on September 11, 1996. In this decision, we will refer to these affiliated rail carriers collectively as SP.

contract.[4] Thus, the request for dismissal, which both sides have addressed in pleadings filed subsequent to the original motion to dismiss, now focuses on whether, in light of our "*Bottleneck Proceedings*" decisions in *Central Power & Light Co. v. Southern Pacific et al.*, 1 S.T.B. 1059 (1996), (*Bottleneck I*), clarified by *Central Power & Light Co. v. Southern Pacific et al.*, 2 S.T.B. 235 (1997) (*Bottleneck II*), we lack jurisdiction to prescribe rates that would apply solely over the "bottleneck segments" owned by Santa Fe.[5]

DISCUSSION AND CONCLUSIONS

In *Bottleneck I*, we found that:

- A bottleneck carrier cannot refuse to provide service to a shipper from an origin that it does not serve, but instead must accept traffic from the origin carrier at a reasonable interchange point and provide a route and rate to complete the transportation.

- A shipper can use existing competitive access procedures to obtain the prescription of a new through route from an origin that is served by the bottleneck carrier.

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[4] Pursuant to decisions in *Atchison, Topeka and Santa Fe Railway Co. v. Western Resources, Inc.*, Civil Action No. 96-CV-134, District Court, Shawnee County, issued on August 1, 1996, and December 20, 1996, the parties stipulated, among other things, that:

(a) During the remaining terms of the parties' Contract, all coal shipments that Western makes by rail to its Lawrence and Tecumseh electric generating stations from Energy, Empire or Converse, Colorado must be shipped under and shall be governed by the terms of the Contract, and Western may not seek to tender such shipments to Santa Fe under common carrier rates or seek prescription of common carrier rates to apply to such shipments; and
(b) During the remaining term of the parties' Contract, Western is not prohibited by the terms of the Contract from tendering coal for shipment over Santa Fe's lines to the Lawrence and Tecumseh electric generating stations from mine origins other than those located in Energy, Empire and Converse, Colorado, and the existence of the parties' Contract does not preclude Western from requesting establishment or seeking prescription of common carrier rates to apply to such shipments, if such common carrier rates are otherwise available under applicable law.

[5] A "bottleneck segment" is the portion of a rail movement for which no alternative rail route is available.

- And notwithstanding prior precedent generally restricting rate reasonableness challenges to origin-to-destination rates, when the non-bottleneck segment of a through route is covered by a rail/shipper contract, the rate covering the bottleneck segment is challengeable separately.

Here, Western seeks to challenge Santa Fe's bottleneck rates separately, but it does not have a contract for the non-bottleneck segment of the movements it contemplates. Although, as Western notes, bottleneck carriers must interchange with connecting carriers to complete service from origins that they do not serve, Western's basic complaint is not that Santa Fe will not provide service from new origins. Instead, Western wants the Board to first prescribe local rates solely over the bottleneck segments between Kansas City and Topeka, on the one hand, and, on the other, Western's generating stations, which Western intends to then use to obtain separate contract rates from non-bottleneck carriers for their portions of the service. As we noted in the decisions in the *Bottleneck Proceedings*, we will prescribe a bottleneck-segment rate for a portion of an origin-to-destination service, but only when a contract for the non-bottleneck segment of the movement is obtained beforehand.

Finally, as we have noted, Western seeks to ship its "new source" coal through either Kansas City or Topeka. Santa Fe, however, indicates that it considers only Kansas City to be a feasible interchange. Western argues that the question of "whether Topeka, Kansas is a reasonable point of interchange at which Santa Fe must interchange traffic with UP/SP in accordance with 49 U.S.C. 10742" is an issue that is unaffected by the decisions in the *Bottleneck Proceedings,* and that we should decide now.

We disagree. In the decisions in the *Bottleneck Proceedings*, we described two circumstances in which we could order a carrier to serve through a particular interchange against its will: (1) when a shipper brings a competitive access case in connection with a same-source bottleneck proceeding; or (2) when a bottleneck carrier disagrees with the interchange chosen by the shipper and the non-bottleneck carrier in a new-source bottleneck proceeding. Because Western has simply sought a separate bottleneck rate prescription that would apply under all circumstances, neither form of relief is available at this time. If Santa Fe begins providing service with a connecting carrier through the Kansas City interchange, and Western is dissatisfied with the interchange, Western may file a competitive access case seeking an alternative routing over the Topeka

interchange. If Western and one of the connecting carriers agree to route over Topeka, and Santa Fe resists, then the matter can be brought to us for the determination of whether Kansas City or Topeka is a more appropriate interchange. At this point, however, any action on our part determining whether Topeka is an appropriate interchange would be clearly premature. *See Bottleneck II.*

SUMMARY

The Board's decisions in the *Bottleneck Proceedings* provided substantial opportunities for shippers to obtain relief. The allegations in Western's complaint, however, which preceded the decisions in the *Bottleneck Proceedings*, do not establish a basis on which relief can be granted. Therefore, Western's complaint must be dismissed, without prejudice to Western's filing of a new complaint in conformity with the *Bottleneck* decisions.

It is ordered:

1. Western's complaint is dismissed.
2. This decision is effective on May 28, 1997.

By the Board, Chairman Morgan and Vice Chairman Owen.