

STB DOCKET NO. 42038

MINNESOTA POWER, INC.

v.

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

Decided July 7, 1999

The Board denies railroad's request to use evidence of geographic competition to defend against a rate complaint. The Board also denies shipper's request for access to carrier's internal costing system.

BY THE BOARD:

By complaint filed December 30, 1998, Minnesota Power, Inc. (MPI), challenges the reasonableness of the rates charged by Duluth, Missabe and Iron Range Railway Company (DMIR) for movements of unit trains of coal from a connection with The Burlington Northern and Santa Fe Railway Company (BNSF) at Keenan, MN, to MPI's Laskin Energy Center (Laskin), a coal-fired electric generating facility near Colby, MN. MPI requests that maximum reasonable rates be prescribed, along with related rules and service terms for the movement, and also seeks reparations.

In *Minnesota Power v. Duluth, Missabe & Iron Range Rwy Co.*, 4 S.T.B. 64 (1999) (*May 11 decision*), we resolved various discovery disputes and established a procedural schedule for presentation of evidence on the merits. Among other things, we ruled that, in addressing the market dominance issues¹ in this "bottleneck" rate case,² we would consider evidence of truck competition

¹ Our jurisdiction to review the reasonableness of a rail rate is limited to situations in which the railroad has market dominance, which is defined as "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. 10707(a). The application of this statutory limitation has been addressed and refined in a series of decisions by the Board and its predecessor, including *Market Dominance Determinations*, 365 I.C.C. 118 (1981); *Product and Geographic Competition*, 2 I.C.C.2d 1 (1985) (*Product and Geographic I*); and, most recently, *Market Dominance Determinations*, 3 S.T.B. 937 (1998) (*Product and Geographic II*), *pets. for reconsideration and clarification denied* (STB served July 2, 1999).

² A bottleneck case involves a route which includes a "bottleneck" segment that can only be served by a single railroad.

only for the bottleneck-segment portion of the through movement. We also denied MPI's request for access to DMIR's proprietary costing system and all cost estimates produced by that system,³ but required DMIR, to the extent that it had not already done so in response to other of MPI's requests, to produce the operating and financial data used in its costing system.⁴

In a petition for reconsideration filed June 1, 1999, DMIR asks us to vacate our holding regarding truck competition and to hold instead that any evidence of competitive alternatives for receiving coal from the originating mines can be used to show effective competition. MPI replied on June 10, 1999. DMIR's petition for reconsideration will be denied.

In a motion filed June 23, 1999, MPI seeks an order directing DMIR to comply with our holding regarding disclosure of data used in its proprietary costing system.⁵ MPI's motion will likewise be denied.

DISCOVERY MOTION

MPI contends that our *May 11 decision* requires that DMIR: (1) inform MPI what operating and financial data it uses as inputs to its internal management costing system; and (2) either produce those data or tell MPI where those data can be found in documents that have previously been produced. Assertedly, DMIR failed to comply with the first step by the objections voiced

³ The statute requires the use of the Uniform Rail Costing System (URCS) to determine variable costs in rate proceedings, 49 U.S.C. 10707(d). DMIR's internal costing system will not produce URCS-compatible variable costs unless DMIR is using, for its internal costing system, the Board's URCS costing program. Because DMIR is not using URCS in its internal costing system, its costing system's specific inputs are not relevant to the variable cost calculations required by the system and its specific inputs may not be relevant to the variable cost calculations required by the statute. See, *Potomac Electric Power Co. v. CSX Transportation, Inc.*, 2 S.T.B. 290 (1997).

⁴ As a Class II rail carrier, DMIR, unlike Class I carriers, is not required to routinely file financial or operating data with the Board — data needed to develop carrier-specific variable costs. Accordingly, in an effort to develop such costs, MPI served document discovery requests on January 8, 1999, seeking specific DMIR financial and operating data. On March 22, 1999, MPI filed a motion to compel this, and other, discovery. DMIR replied, and our *May 11 decision* ensued.

⁵ On June 10, 1999, DMIR produced a 12-page document purportedly containing "some of the data that was used in DMIR's cost analyses for the Laskin traffic," and stated that "the other data used in DMIR's internal analyses of DMIR's costs relating to the Laskin movement have already been produced * * *." On June 16, 1999, MPI took the deposition of a DMIR witness familiar with DMIR's internal management costing system. MPI posed numerous questions regarding inputs into DMIR's system, and DMIR objected on the ground that our *May 11 decision* did not require this disclosure. MPI then filed the instant motion. MPI's motion includes the June 10 document and an extract from the June 16 deposition.

at the taking of depositions, and with the second step both by its objections and by failing to specify where, in the documents already produced, the relevant data are found.⁶

In our *May 11 decision*, we attempted to reconcile the parties' conflicting arguments over the discoverability of DMIR's internal costing procedures. Thus, when we ordered DMIR to produce the operating and financial data used in its proprietary costing system, we assumed that DMIR was using DMIR-specific data. However, DMIR's witness has testified that DMIR uses national and/or regional data as inputs to its proprietary costing program, and DMIR has produced these publicly available data. Moreover, it was implicit in our *May 11 decision* that discovery would be limited to the financial and operating data required by MPI to develop URCS costs.

An examination of the responsive document produced by DMIR and the deposition extract convinces us that DMIR has complied with our *May 11 decision*. DMIR asserts, without contradiction, that it has produced all the raw data that go into its costing system. The dispute arises from DMIR's refusal to specify whether any particular item of data is actually used in the system, the purpose for which any such item is used, the variability factors of particular items, and the like. But requiring DMIR to reveal that sort of information would be tantamount to giving access to DMIR's proprietary costing system. And in any event, MPI has not demonstrated that it needs such information to determine the URCS-based variable costs of providing the transportation service. In calculating URCS-based costs, MPI is not bound by DMIR's choice of which inputs and factors it uses in its proprietary costing model. Indeed, DMIR's choices are irrelevant to the computation of URCS costs.

MPI's motion is, accordingly, denied.

⁶ MPI seeks an order requiring DMIR to identify and produce, by written description and value, all operating and financial data used in its costing system, or, for any input alleged to have been produced, a written reference to its location in the documents produced.

PETITION FOR RECONSIDERATION

In the so-called *Bottleneck* decisions,⁷ the Board held that when a shipper obtains an (unregulated) rail transportation contract for service over the non-bottleneck segment of an established through route, a separately challengeable common carriage rate that is limited to the bottleneck segment must be made available.⁸ In this case, BNSF moves coal in unit trains from mines in Montana and Wyoming to a connection with DMIR at Keenan pursuant to a rail transportation contract with MPI. From Keenan,⁹ DMIR moves the trains in common carrier service to Laskin, their ultimate destination. Because the BNSF portion of the through service is provided under contract, MPI was entitled to separately challenge the common carriage rate for the DMIR segment of the through movement.

The petition before us concerns the permissible scope of discovery regarding market dominance as it relates to such a separately challengeable bottleneck rate. DMIR seeks information regarding what it argues is an intermodal alternative for the traffic at issue. That alternative involves existing single-line rail service that BNSF provides from the same Montana and Wyoming mines to MPI's Boswell power plant near Cohasset, MN.¹⁰ DMIR contends that MPI could ship its Laskin-bound coal to Boswell via BNSF and transload the coal there for subsequent truck transport from Boswell to Laskin, thereby enabling MPI to bypass DMIR entirely.

In our *May 11 decision*, we found that truck transportation from Boswell to Laskin represents a geographic, not intermodal, alternative to the transportation at issue in the complaint.¹¹ Thus, under our recent decisions in *Product and*

⁷ *Central Power & Light Co. v. Southern Pacific et al.*, 1 S.T.B. 1059 (1996), *clarified* (2 S.T.B. 235 (1997)), *aff'd sub nom. MidAmerican Energy Co. v. Surface Transp. Bd.*, 169 F.3d 1099 (8th Cir. 1999) (*MidAmerican*).

⁸ In *MidAmerican*, the court declined to rule on a challenge to the Board's authority to require separately challengeable bottleneck-segment rates where a rail transportation contract covers the non-bottleneck segment, on the ground that none of the cases before it presented such a situation.

⁹ The actual junction of BNSF and DMIR is at Hibbing, MN. BNSF moves the coal from Hibbing to DMIR's Keenan yard under an operating agreement. The evidence submitted by the parties treats Keenan as the bottleneck point.

¹⁰ The Boswell plant is situated about 85 miles from Laskin and receives substantially greater volumes of coal than the Laskin plant.

¹¹ Geographic alternatives refer to the ability of the complaining shipper to avoid using the defendant railroad by obtaining its product from a different source, or by shipping its product to a different destination. In this case, intermodal alternatives are limited to movements that originate

(continued...)

Geographic II (holding that product and geographic competition will no longer be considered in determining whether the defendant railroad has market dominance over the traffic involved), evidence as to a trucking alternative from any point other than Keenan may not be considered. DMIR asks that we nevertheless allow discovery as to a rail-truck alternative from the coal mine through Boswell.

The position advocated by DMIR is contrary to both our *Bottleneck* and *Product and Geographic II* decisions. Under 49 U.S.C. 10707, our market dominance inquiry is limited to whether there are effective competitive alternatives "for the transportation to which [the rate at issue] applies." In the *Bottleneck* decisions, the Board concluded that, where there is a contract over the non-bottleneck segment of a through movement, a rate challenge must necessarily be confined to the bottleneck segment. Thus, the transportation to which the separately challengeable bottleneck-segment rate applies is not the full through movement (from the mines to Laskin), but rather only DMIR's movement (from Keenan to Laskin). Accordingly, under the circumstances presented here, the fact that the coal MPI receives at Laskin comes from the Montana and Wyoming mines served by BNSF is irrelevant.¹² Because the transportation to which the rate at issue applies is limited to the movement between Keenan and Laskin, transportation alternatives involving service to or from other points would constitute geographic competition.¹³

DMIR charges that this result is arbitrary (petition at 7 n.3) and allows the shipper to dictate the permissible scope of the market dominance evidence by choosing the rates that it will challenge. That is not so. As explained more fully

¹¹(...continued)

at the Keenan interchange (the origin point for purposes of the separately challengeable bottleneck segment).

¹² Under the *Bottleneck* decisions, if there were no rail transportation contract in effect for the BNSF portion of the through movement, MPI could only challenge the combined through rate for the entire movement from the origin mines to Laskin; the transportation to which the challenged rate applied would be the complete through movement from the mines to Laskin; and evidence of inter- and intramodal transportation alternatives from the mines to Laskin would be acceptable.

¹³ Because no coal actually originates at Keenan, DMIR argues that our ruling contravenes *Product and Geographic I*, 2 I.C.C.2d at 20-21, in which inter- and intramodal competition were defined as involving transportation alternatives between the same origin and the same destination. That decision, however, which was issued long before the *Bottleneck* decisions, did not need to distinguish cases in which a rate must necessarily be confined to the bottleneck segment of a through movement. For a separately challengeable bottleneck-segment rate, transportation alternatives between the "same origin and destination points" (*Product and Geographic II* at 10, 12) must necessarily refer to those between the interchange point at which the bottleneck carrier obtains the traffic and the point of delivery.

in the *Bottleneck* decisions, we will not consider the movement prior to the interchange point for rate complaint purposes because that movement is governed by a rail transportation contract and is thus beyond our regulatory purview under 49 U.S.C. 10709(c). Thus, the shipper here had no choice; it could only challenge the rate for the transportation from Keenan to Laskin.

DMIR also argues that, because no complex non-transportation issues would be involved here, the exclusion of such alternative transportation goes beyond what was contemplated in *Product and Geographic II*. To the contrary, in *Product and Geographic II* we considered, and expressly declined to take, a case-by-case approach under which consideration of "indirect" forms of competition would depend upon a determination of the relative complexity of the particular issues to be raised in each individual case.

Finally, DMIR argues that limiting the market dominance evidence that a railroad can submit to modal competition from the interchange point to the point of delivery would foreclose the carrier's opportunity to show lack of market dominance. We disagree. While our decisions in *Product and Geographic II* have narrowed the scope of the market dominance inquiry, DMIR is not foreclosed from attempting to show that potential motor carrier competition from Keenan to Laskin effectively constrains the rate at issue.

Accordingly, we deny DMIR's petition.

It is ordered:

1. MPI's motion for an order compelling DMIR to comply with our *May 11, 1999, decision* is denied.
2. DMIR's petition to reopen and reconsider our *May 11, 1999, decision* is denied.
3. This decision is effective on July 8, 1999.

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