

STB FINANCE DOCKET NO. 34041<sup>1</sup>

ARIZONA ELECTRIC POWER COOPERATIVE, INC.

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY  
COMPANY AND UNION PACIFIC RAILROAD COMPANY

---

*Decided May 8, 2001*

---

In response to an emergency petition from a coal shipper, the Board orders two railroads to establish common carrier rates for services that the shipper does not now receive.

BY THE BOARD:

BACKGROUND

In STB Docket No. 42058, Arizona Electric Power Cooperative, Inc. (AEPCO), filed a complaint on December 29, 2000, challenging the reasonableness of certain rates charged by The Burlington Northern and Santa Fe Railway Company (BNSF) and Union Pacific Railroad Company (UP) (collectively, defendants) for transportation of coal from mines in the San Juan Basin of New Mexico to AEPCO's Apache plant, a coal-fired electrical generating plant near Cochise, AZ.<sup>2</sup> On March 9, 2001, AEPCO amended its complaint to embrace additional movements, including certain BNSF/UP rates applicable to movements of coal from the Powder River Basin (PRB) to the Apache plant.<sup>3</sup> The defendants then canceled the PRB rates, explaining that AEPCO could not meet the minimum annual volume requirements necessary to move traffic under those rates and thus would be ineligible to use the rates. In response to defendants' action canceling the rates, AEPCO filed a Petition for Emergency Relief, in which it asks that we order defendants to restore the

---

<sup>1</sup> STB Docket No. 42058, *Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company*, is included here for reference only because this decision resolves issues originally raised in that docket. The proceedings are not consolidated.

<sup>2</sup> BNSF transports the coal from the mine to Deming, NM. UP transports the coal from Deming to AEPCO's Apache plant in Arizona.

<sup>3</sup> Because the Apache plant is served exclusively by UP, any movement originating on BNSF would necessarily require a subsequent move by UP to reach the Apache plant.

canceled rates for PRB origins pursuant to 49 CFR 1117.1,<sup>4</sup> or, alternatively, order them to establish new common carriage rates and terms of service for movements from the PRB to the Apache plant pursuant to 49 CFR 1300.<sup>5</sup>

#### DISCUSSION AND CONCLUSIONS

In response to AEPCO's request for emergency relief, defendants suggest that this matter does not present a transportation emergency because AEPCO's immediate transportation needs are being met with coal from sources other than the PRB. To resolve this matter, however, we need not determine the extent to which, or the exact moment when, AEPCO would move PRB coal to the Apache plant. That is because railroads have a general duty under 49 U.S.C. 11101(b) to establish common carrier rates upon request.

Defendants take the position that they do not need to have common carrier rates in place for movements from PRB coal mines to the Apache plant because AEPCO does not intend to use that service. They maintain that AEPCO is seeking to have such rates in place simply "for the purpose of creating jurisdiction for a rate reasonableness case." Relying on *Burlington N.R.R. v. STB*, 75 F.3d 685 (D.C. Cir. 1996) (*BN v. STB*), they argue that a carrier is not required to publish a rate that will never be used except as part of a shipper's litigation strategy. But we have no basis for finding that AEPCO will not use the rates that it seeks here in the foreseeable future, and *BN v. STB* does not support defendants' position. There the court ruled that we could not require a carrier to establish a common carrier rate when that rate could not possibly be applied to the traffic, as that traffic was governed by a rail transportation contract that would not expire for more than a year. Here, in contrast, there is no rail transportation contract governing these movements. Nor is there a common carrier rate now applicable to the coal traffic AEPCO asserts it intends to move.<sup>6</sup> Thus, while we will not require the defendants to reestablish the particular rates that they have canceled, we find that they must establish common carrier rates for the movement of PRB coal to AEPCO's Apache plant.

---

<sup>4</sup> The provisions of 49 CFR 1117.1 allow petitions for relief not otherwise provided for in our rules.

<sup>5</sup> Because the petition involves the defendants' common carrier obligations and not the reasonableness of the challenged rates, we are docketing it separately, in STB Finance Docket No. 34041.

<sup>6</sup> Because AEPCO did not accept BNSF's offer of a contract rate, BNSF has an obligation to offer common carrier rates and service.

We understand defendants' concern that a party should not be permitted to request and obtain a common carrier rate for the sole purpose of "gaming" the rate review process. We do not intend to permit any party to manipulate our processes. But AEPCO is entitled to request PRB coal for its Apache plant. How any movements that may be performed under new PRB rates would or should affect AEPCO's pending rate complaint can be addressed in that case.

*It is ordered:*

1. Pursuant to 49 U.S.C. 11101, defendants shall, no later than May 14, 2001, establish a common carrier rate or rates for trainload movements of coal from PRB origins to AEPCO's Apache plant near Cochise, AZ.<sup>7</sup>
2. This decision is effective on May 8, 2001.

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

---

<sup>7</sup> While 49 CFR 1300.3 requires establishment of a rate or rates no later than 10 business days after receipt of a request for service, we are ordering establishment of the requested rates by May 14, 2001, because the carriers have been aware of the shipper's request for some time.