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SERVICE DATE – LATE RELEASE APRIL 23, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42113

ARIZONA ELECTRIC POWER COOPERATIVE, INC.

v.

BNSF RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY

STB Docket No. 42113 (Sub-No. 1)

ARIZONA ELECTRIC POWER COOPERATIVE, INC.

v.

UNION PACIFIC RAILROAD COMPANY

Decided: April 23, 2009

This decision orders a portion of Arizona Electric Power Cooperative, Inc.'s (AEPCO's) rate reasonableness complaint to be held in abeyance pending a determination by the U.S. District Court for the District of Arizona whether, and to what extent, a rail transportation contract exists between Union Pacific Railroad Company (UP) and AEPCO for traffic originating in Colorado and Wyoming's Southern Powder River Basin (SPRB). This decision also orders that the above-mentioned portion of AEPCO's complaint be moved to a sub-docket of this proceeding, and orders that AEPCO's motion to compel discovery filed April 2, 2009, be held in abeyance pending a Board decision to resume the newly sub-docketed proceeding.

BACKGROUND

From February 2003 until December 31, 2008, AEPCO and UP operated under a transportation services contract in the form of a term sheet dated February 3, 2003 (2003 term sheet), which governed the transportation of coal from mines in Colorado and the SPRB to AEPCO's Apache Generating Station located in Cochise, Arizona (Apache Station). On April 2, 2008, prior to the expiration of the 2003 term sheet, UP provided AEPCO with a confidential proposal for a new transportation services contract that would govern that transportation beginning January 1, 2009. UP states that its proposal addressed the same basic transportation terms as the 2003 term sheet; would expire on May 4, 2008, if not accepted by AEPCO; and would be binding on both parties and incorporated into a transportation service agreement between UP and AEPCO, which would be prepared by UP upon receipt of written acceptance of the proposal.

By letter dated June 4, 2008, AEPCO stated that it accepted UP's proposal and attached a copy of it signed by AEPCO's senior vice president and chief operating officer. On June 26, 2008, UP emailed to AEPCO a draft document that, according to UP, incorporated the terms of UP's proposal in a more formalized transportation services agreement.

On September 22, 2008, AEPCO wrote to UP requesting that UP establish common carrier rates for transporting coal from mines in Colorado and SPRB to Apache Station beginning January 1, 2009. On October 10, 2008, UP wrote to AEPCO, declining to establish common carrier rates, stating that contract rates already exist for the transportation described in AEPCO's September 22 letter. AEPCO responded by letter dated October 29, 2008, disputing that there was a contract between the parties and renewing its request for common carrier rates.

On December 30, 2008, AEPCO filed with the Board a complaint, under 49 U.S.C. 10701 and 11701, against BNSF and UP, requesting that the Board determine that the joint rates established for unit train coal transportation service between coal mine origins in New Mexico and Apache Station, are unreasonably high and prescribe a reasonable rate, along with reasonable practices and other service terms for such transportation.

On January 20, 2009, UP sought a declaratory judgment from the United States District Court for the District of Arizona that, beginning January 1, 2009, the UP-served traffic from Colorado and SPRB to Apache Station is subject to the contract terms detailed in the original proposal submitted to AEPCO from UP on April 2, 2008. On January 30, 2009, AEPCO amended its complaint before us to add the UP single-line service from Colorado and SPRB to Apache Station¹ and to seek a Board decision ordering UP to establish common carrier rates for the aforementioned transportation.

On February 24, 2009, UP filed a motion with the Board seeking to hold in abeyance the Colorado and SPRB portion of AEPCO's rate complaint, arguing that the Board should defer to a court for a determination on whether a contract exists before proceeding, if at all, with that portion of AEPCO's complaint. AEPCO filed a reply on March 16, 2009, arguing that UP has failed to meet its burden of demonstrating that there is a reasonable possibility that a rail transportation contract governs the transportation in question. AEPCO also argues that even if a contract exists, UP is still obligated to establish common carrier rates because the alleged contract does not contain a minimum annual volume requirement and therefore the alleged contract does not require AEPCO to ship under UP's contract rates.

On April 2, 2009, AEPCO filed a motion to compel discovery from UP. AEPCO states that UP is refusing to produce information relating to the transportation of coal from UP-served mines in Colorado and SPRB, citing its motion before the Board to hold the proceeding in abeyance. On April 13, 2009, UP filed a reply.

¹ In the same filing, AEPCO amended its complaint to include BNSF-served traffic from Northern Powder River Basin (Wyoming and Montana) to Apache Station.

DISCUSSION AND CONCLUSIONS

The parties here dispute whether they have entered into an enforceable rail transportation contract. If a contract exists for rail services between one or more rail carriers and one or more shippers under 49 U.S.C. 10709(c), a party to the contract may seek redress related to that contract only in an appropriate state or federal court, unless the parties otherwise agree. The Board has no jurisdiction to hear a rate reasonableness complaint for rates established by a contract. Where parties to a rate complaint proceeding under 49 U.S.C. 10701 and 11701 dispute whether a contract governs a challenged movement, the Board will defer that question to the appropriate court if there is a reasonable possibility that a contract that would govern the subject movement exists.²

It is uncontested that there is a signed document that was negotiated by the parties. UP argues it made an offer for what both parties understood was a rail transportation contract and AEPCO attempted to accept that offer. This exchange is strong evidence of the reasonable possibility that a contract exists between these parties. Whether AEPCO's acceptance was effective to form an enforceable contract or whether UP's tender of further documents constituted an acceptance of a counter-offer are state law issues that will be properly resolved in the ongoing court proceeding. Also, the fact that UP sought declaratory relief from a court regarding whether a valid contract exists for those movements prior to AEPCO's amending its complaint with the Board to include the movements from Colorado and SPRB to Apache Station is also evidence that there is a reasonable possibility a contract exists.³ Based on the exchange leading to the signed document, the signed document itself and UP's court filing, we conclude that there is a reasonable possibility that a contract exists between the parties. Therefore, we will defer to the court to rule on whether, and to what extent, a rail transportation contract governs this traffic.

However, it is our responsibility, not that of a court, to determine when a carrier must establish a common carrier rate under 49 U.S.C. 11101(b). If the court rules that AEPCO and UP have entered into a valid contract that governs AEPCO's traffic from the Colorado and SPRB mines to Apache Station, we would not order UP to establish a common carrier rate. We therefore reject AEPCO's argument that, even if the contract is valid and binding on the parties, UP must still establish alternative common carrier rates because the purported contract contains no minimum volume requirement. The Board rejected such an argument in Cross Oil Refining & Marketing, Inc. v. Union Pacific Railroad Company, STB Finance Docket No. 33582, slip op. at 2-3 (STB served Oct. 27, 1998), holding that the subject movements of that complaint were governed by a contract even though the complainant argued that the contract was unenforceable

² See, e.g., E.I. DuPont De Nemours and Company v. CSX Transportation, Inc., STB Docket No. 42099 et al., slip op. at 5 (STB served Dec. 20, 2007).

³ See Toledo Edison Co. v. Norfolk & Western Railway Co., 367 I.C.C. 869, 872 (1983).

because it lacked a minimum quantity requirement. Moreover, the Board has ordered carriers to establish common carrier rates only for services not covered by a rail transportation contract.⁴

We will order UP to establish, within 10 business days, common carrier rates and service terms to apply to AEPCO's Colorado and SPRB traffic in the event that the court rules that the parties have not entered into an enforceable contract. We will do so to avoid a scenario in which AEPCO would be without either common carrier or contract terms for any traffic that it may tender from the relevant mines. However, these common carrier rates will only apply if the court rules or the parties agree that no contract exists between the parties that governs that traffic at issue. In the interests of administrative economy, any challenge to these common carrier rates before the Board would be held in abeyance unless and until the court makes such a ruling or the parties reach such an agreement.

For these reasons, we will grant UP's motion to hold the relevant portion of this proceeding in abeyance until there is a resolution in court regarding whether, and to what extent, a contract exists for the Colorado/SPRB traffic. If the court holds that there is a contract governing the movements between Colorado/SPRB and Apache Station, that portion of the complaint will be dismissed here. If the court holds that a contract does not govern those movements, we will adjudicate AEPCO's complaint relating to the Colorado/SPRB traffic.

Because the portion of AEPCO's rate complaint against rates for BNSF and UP's joint-line service can move forward independent of the Colorado/SPRB portion, we will remove the Colorado/SPRB portion of the complaint from STB Docket No. 42113, and move it into a newly created sub-docket, STB Docket No. 42113 (Sub-No. 1). In light of our decision to hold the Colorado/SPRB portion of the complaint in abeyance pending a court decision on whether, and to what extent, a contract governs the subject movements, we will also hold in abeyance AEPCO's motion to compel discovery.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UP's motion to hold a portion of AEPCO's complaint in abeyance is granted, as discussed above.

⁴ See Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, STB Finance Docket No. 34041 et al., slip op. at 2-3 (STB served May 8, 2001) (requiring carrier to establish common carrier rates because no contract existed that would govern the subject movements); Western Resources, Inc. v. The Atchison, Topeka and Santa Fe Railway Company, STB Docket No. 41604, slip op. at 3 (STB served May 17, 1996) (requiring carrier to establish common carrier rates for service not covered by an existing transportation contract).

2. UP is ordered to establish within 10 business days of the service date of this decision common carrier rates for the Colorado/SPRB to Apache Station rail transportation. Such rates will govern only if a court of proper jurisdiction rules, or the parties agree, that the purported contract between the parties is invalid or otherwise unenforceable.

3. The Colorado/SPRB portion of AEPCO's rate complaint is removed from STB Docket No. 42113, and placed in STB Docket No. 42113 (Sub-No. 1).

4. AEPCO's motion to compel discovery is held in abeyance.

5. This decision is effective on its service date.

By the Board, Acting Chairman Mulvey, and Vice Chairman Nottingham.

Anne K. Quinlan
Acting Secretary