

210979

ENTERED
Office of Proceedings

MAY 19 2004

SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036-3003

Part of
Public Record

TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:

rdr@sloverandloftus.com

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PFOHL
DANIEL M. JAFFE
KAREN HASSELL HERREN
KENDRA A. ERICSON

May 19, 2004



BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board - Case Control Unit
1925 K Street, N.W.
Washington, D. C. 20423

Re: Docket No. 42058, Arizona Electric Power Cooperative, Inc. v.
The Burlington Northern and Santa Fe Ry. and Union Pacific R.R.

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and sixteen (16) copies of Complainant Arizona Electric Power Cooperative, Inc.'s Motion to Strike Defendants' "Clarification." In addition, we have enclosed three computer diskettes containing electronic versions of this Reply in WordPerfect 9.0 format.

We have enclosed an additional hard-copy of this Reply to be date-stamped and returned to the bearer of this letter. Thank you for your attention to this matter.

Sincerely,

Robert D. Rosenberg

Enclosures

cc: Counsel for Defendants

210979

ENTERED
Office of Proceedings

MAY 19 2004

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

ARIZONA ELECTRIC POWER
COOPERATIVE, INC.,

Complainant,

v.

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

Defendants.

Docket No. 42058



COMPLAINANT ARIZONA ELECTRIC POWER COOPERATIVE, INC.'S
MOTION TO STRIKE DEFENDANTS' "CLARIFICATION"

ARIZONA ELECTRIC POWER
COOPERATIVE, INC.

By: Patrick Ledger
Corporate Counsel
Arizona Electric Power Cooperative, Inc.
100 S. Highway 80
Benson, AZ 85602

William L. Slover
Robert D. Rosenberg
Christopher A. Mills
Andrew B. Kolesar III
Daniel M. Jaffe
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

OF COUNSEL:

Slover & Loftus
1224 Seventeenth St., N.W.
Washington, D.C. 20036

Dated: May 19, 2004

Attorneys for Complainant

ARIZONA ELECTRIC POWER	)	
COOPERATIVE, INC.,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42058
	)	
THE BURLINGTON NORTHERN AND	)	
SANTA FE RAILWAY COMPANY and	)	
UNION PACIFIC RAILROAD COMPANY,	)	
	)	
Defendants.	)	
	)	

Pursuant to 49 C.F.R. §§ 1104.13 and 1117.1, Complainant Arizona Electric Power Cooperative, Inc. (“AEPCO”), hereby moves to strike the “Clarification” (“Clarification”) that Defendants The Burlington Northern and Santa Fe Railway Company (“BNSF”) and Union Pacific Railroad Company (“UP”) (jointly, “BNSF/UP” or “Railroads”) filed in the above-captioned proceeding on May 7, 2004. This filing addresses only threshold defects in Defendants’ filing, and AEPCO reserves the right to reply at some later time to the substance of the “Clarification” if its motion is not granted.

1

January 26, 2004, their filing unmistakably consists of new evidence. Defendants have not shown, or even alleged, the existence of good cause for their new evidence, which showing is plainly required under the circumstances. Instead, Defendants have merely stated in footnote 1 that good cause is requested “[t]o the extent necessary.” Such a statement is patently inadequate under the present circumstances where Defendants are asserting matters that could and should have been included, if at all, in Defendants earlier Supplemental Reply (if not their original Reply filed May 27, 2003).

That Defendants’ Clarification presents new evidence is beyond doubt. At p. 3 of their Clarification, Defendants note that AEPCO’s Supplemental Rebuttal Evidence and Argument (“Supplemental Rebuttal”) at III-A-29 to 30 criticized Defendants’ efforts to claim, through their witness Berry, an enhanced division for their intermodal terminal costs by “allegedly compar[ing] the variable costs of providing line-haul service with the full costs of providing terminal services.”¹ Defendants then acknowledge the validity of AEPCO’s criticism by admitting that “[i]n fact, Mr. Berry did not limit his terminal costs to variable costs.” *Id.*

Defendants’ concession as to the validity of the criticism in AEPCO’s Supplemental Reply is, by itself, sufficient to dispose of the intermodal terminal divisions issue on the merits. Defendants, who have the burden of establishing the basis for their

¹In fact, Defendants misstate AEPCO’s position, which was that Defendants’ calculations also understated the variable line-haul costs for the intermodal traffic.

posited increase in the standard divisions under the Modified Straight Mileage Prorate (“MSP”) methodology, relied upon a distorted and thus unacceptable comparison of terminal and line-haul costs. Since their underlying comparison is flawed, their adjustment cannot be accepted for that reason alone, regardless of the other flaws and distortions identified by AEPCO.

Obviously recognizing their grave predicament, Defendants assert that there is a “simple adjustment” available to the Board to remedy what the Defendants (mostly) acknowledge is a defect in their evidence, and Defendants then proceed to attach two spreadsheets to their filing to implement the “simple adjustment.” *Id.* at 3-4. Not content with that, Defendants then proceed to criticize the adjustment procedure that AEPCO presented in its Supplemental Rebuttal in response to Defendants’ Supplemental Reply, although Defendants’ criticism rests on assertions that Defendants state they will present in their brief as well a misleading comparison of terminal costs for intermodal, manifest, and automotive traffic.²

If Defendants perceived any flaw in their approach, Board precedent -- including authorities discussed below that Defendants cited in their own July 23, 2003 motion to strike AEPCO’s rebuttal evidence -- required that Defendants remedy the

²AEPCO made clear that it was presenting its adjustment procedure on a qualified basis, *i.e.*, only if Defendants were otherwise deemed to have met the threshold standard of acceptability. Defendants’ Clarification makes clear that the analysis they presented in their Supplemental Reply is too deficient to meet that standard.

defect at the time and not wait until after AEPCO had filed its responsive Supplemental Rebuttal. In Docket No. 42069, Duke Energy Corp. v. Norfolk S. Ry. Co. (STB served March 21, 2003) at 2, and Docket No. 42070, Carolina Power & Light Co. v. Norfolk S. Ry. Co. (STB served May 9, 2003) at 1-2,³ the Board rejected NS's attempts to include additional evidence in its brief after evidentiary filings were completed, explaining that such an effort must be accompanied by a petition showing "that the information sought to be introduced is central to the petitioning party's case, could not reasonably have been introduced earlier, and would materially influence the outcome of the proceeding." In no event can Defendants make the second required showing (and even claims as to the first and third required showings would be dubious).

Furthermore, in Docket No. 42070, Duke Energy Corp. v. CSXT Transp., Inc. (STB served March 21, 2003) ("Duke/CSXT") at 4, the Board rejected a shipper's efforts to respond on rebuttal to errors that the defendant had identified on reply concerning the location of a yard in a gorge and the extension of a tunnel to conform to an operating plan that did not include an existing switchback at the tunnel's exit. The Board, citing Ex Parte No. 347 (Sub-No. 3), General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases (STB served March 12, 2001) at 5, explained that "[r]ebuttal may not be used in SAC cases as an opportunity to introduce new evidence

³Defendants did not cite these two decisions, which rejected the railroad's attempt to introduce new evidence, in their earlier motion to strike.

that could and should have been submitted in the party's case-in-chief," and that such a submission required a petition to supplement the evidentiary record accompanied by the three-part showing noted above. Duke/CSXT at 4. The Board further found that the shipper's modification of its earlier position went "beyond the proper scope of rebuttal" because in responding to its adversary's criticism, the party was not "simply seeking to support what it presented in its opening evidence or adopting evidence submitted by" the adversary. The Defendants in this case are engaged in an equivalent maneuver, i.e., they seek to offer a new calculation rather than support their original figure or accede to AEPCO's criticism.

Accordingly, Defendants' "Clarification," consisting of revised calculations that could and should have been submitted, if at all, with their Supplemental Reply, cannot possibly be accepted into the record. See, e.g., Docket No. 42057, Public Serv. Co. of Colorado d/b/a Xcel Energy v. The Burlington N. & S.F. Ry. Co. (STB served April 4, 2003) at 2 ("The interests of fairness and orderly handling of a case dictate that parties submit their best evidence on opening, so that each party has a fair opportunity to respond to the other's evidence."); accord Docket No. 42056, Texas Mun. Power Agency v. The Burlington N. & S.F. Ry. Co. (STB served March 24, 2003). To accept a defendant's revisions when shippers' revisions have been routinely rejected would be

blatantly unfair and inconsistent.⁴ The treatment would be especially pernicious here given AEPCO's previously stated position that the case should have been resolved without recourse to any Supplemental Reply Evidence from Defendants.

The Board should also consider the curious timing of Defendants' submission. AEPCO submitted its Supplemental Rebuttal on April 2, 2004, yet Defendants waited until May 7, 2004, five weeks later, to submit their "Clarification." Defendants provide no explanation for their conspicuous delay. AEPCO suspects, however, that Defendants' motivation for delay was to avoid tipping BNSF's hand in Docket No. 42071, Otter Tail Power Co. v. The Burlington N. and S.F. Ry. Co., where BNSF submitted very similar testimony from witness Berry at pp. 5-11 of Exh. III.A-9 of its Supplemental Reply Evidence and Argument on March 22, 2004. Otter Tail filed its Supplemental Rebuttal on April 29, 2004 (although the public version is not currently available on the Board's web site). Had Defendants filed their "Clarification" before Otter Tail's Supplemental Rebuttal was due, Otter Tail would have had an opportunity to

⁴AEPCO believes that shippers should be afforded some flexibility when faced with railroad discovery responses that are typically belated, incomplete, or inconsistent as was the case here (e.g., the mismatch between the train movement and traffic tape data). In contrast, BNSF and UP had a full panoply of internal information concerning their intermodal terminal and line-haul costs from which to draw, and thus they are not entitled to the benefit of any doubt.

respond to BNSF's (and BNSF/UP's) "clarified" contentions. Delaying the

"Clarification" in AEPCO's case thus furthered BNSF position in the Otter Tail case.⁵

Such gamesmanship -- delaying a "Clarification" in one case so as not to compromise the party's position in another case -- should not be encouraged and constitutes an additional reason for striking Defendants' filing. If the Board is concerned about why stand-alone cost rate cases take so long and cost so much, then AEPCO's rate case provides an apt object lesson. The Railroads have filed multiple motions that have resulted in extended delay and great costs, so much so that AEPCO's case is in its fourth year and will likely not be decided until its fifth year, notwithstanding statutory and regulatory deadlines that ostensibly require cases to be decided in sixteen months. The Board now has the opportunity-- indeed, the duty -- to prevent the occurrence of yet another departure from sound and established procedures by striking Defendants' filing.

Defendants' Clarification also alludes to other matters that they intend to address in their brief in response to AEPCO's Supplemental Rebuttal. AEPCO expects

⁵Indeed, on May 12, 2004, BNSF filed a "Motion for Extension of Time" in the Otter Tail case seeking to extend the 20-day period under 49 C.F.R. §1104.13(a) to file "a reply or motion addressed to any pleading" by an additional 20 days to respond to alleged (but unidentified) abuses of rebuttal evidence by Otter Tail. BNSF's filing noted both "the disturbing trend in recent SAC litigation of complainants presenting new evidence on rebuttal, when the defendant no longer has an opportunity to respond" and that "[t]he Board has articulated strict limits on the type of evidence that can be presented on rebuttal in a SAC case in order to eliminate these abuses." It thus appears that BNSF has in AEPCO's case engaged in the same abuses of which it accuses Otter Tail. Also, in AEPCO's case, BNSF and UP made no pretense of seeking to proceed under 49 C.F.R. §1104.13(a) .

that briefing procedures will be among the matters to be discussed at the technical conference that is in the process of being scheduled in this case. For the moment, AEPCO will simply note that Defendants' stated intent to raise matters for the first time, even if the matters constitute valid argument and not impermissible new evidence of the sort presented in Defendants' Clarification, will require that AEPCO be given the opportunity to respond, and that staggered, rather than simultaneous, briefing will thus be required.

For the reasons stated above, the Board should strike Defendants' Clarification as constituting impermissible new evidence that should have been submitted, if at all, no later than with Defendants' Supplemental Evidence.

Respectfully submitted,

ARIZONA ELECTRIC POWER
COOPERATIVE, INC.

By: Patrick Ledger
Corporate Counsel
Arizona Electric Power Cooperative, Inc.
100 S. Highway 80
Benson, AZ 85602

William L. Slover

Robert D. Rosenberg 

Christopher A. Mills

Andrew B. Kolesar III

Daniel M. Jaffe

1224 Seventeenth Street, N.W.

Washington, D.C. 20036

(202) 347-7170

OF COUNSEL:

Slover & Loftus
1224 Seventeenth St., N.W.
Washington, D.C. 20036

Dated: May 19, 2004

Attorneys for Complainant

Certificate of Service

I hereby certify that this 19th day of May 2004, I have caused a copy of the foregoing Motion to be served upon counsel for Defendants as follows:

By Hand:

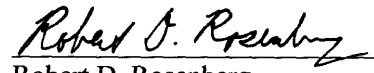
Anthony J. LaRocca, Esq.
Cynthia L. Quarterman, Esq.
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Carolyn F. Corwin, Esq.
Michael L. Rosenthal, Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

By Federal Express:

Richard E. Weicher, Esq.
Michael E. Roper, Esq.
David M. Pryor, Esq.
The Burlington Northern and Santa Fe
Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131

J. Michael Hemmer, Esq.
Louise A. Rinn, Esq.
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179


Robert D. Rosenberg