

211315

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.

JUN 8 2004
RECEIVED

Docket No. 42058

ENTERED
Office of Proceedings

JUN 08 2004

Part of
Public Record

**DEFENDANTS' REPLY TO COMPLAINANT'S MOTION
TO STRIKE DEFENDANTS' CLARIFICATION**

Defendants The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company (hereafter jointly referred to as "Railroads") jointly reply herein in opposition to Arizona Electric Power Cooperative, Inc.'s ("AEPCO") May 19, 2004 Motion to Strike the Defendant's Clarification ("Motion to Strike"). AEPCO asks that the Board strike the Railroads' May 7, 2004 Clarification ("Clarification") on the grounds that it is new evidence that the Railroads were not entitled to submit at this stage of the proceeding. As discussed below, the Railroads' Clarification was a limited and appropriate response to AEPCO's criticism of evidence in the Railroads' Joint Supplemental Reply on an important issue in this case relating to the division of revenues from cross-over traffic. The Board should deny AEPCO's Motion to Strike.

BACKGROUND

On January 26, 2003, the Railroads submitted Supplemental Reply Evidence in which they challenged AEPCO's reliance on the Modified Mileage Prorate ("MMP") approach for

calculating revenue divisions for cross-over traffic and further challenged the use of the Modified Straight-Mileage Prorate ("MSP") approach adopted by the Board in recent stand-alone cases. The Railroads proposed a modified MSP approach that adjusted the mileage-block credits for originating and terminating traffic based on an analysis of the costs of originating and terminating traffic compared to line-haul costs for each type of traffic handled by the SARR.

In its April 2, 2004 Supplemental Rebuttal, AEPCO asserted that in determining cost-based divisions for intermodal traffic, the Railroads miscalculated the mileage block equivalents for intermodal terminal services because their witness, Mr. William K. Berry, compared the variable costs of providing line-haul service with the full costs of terminal services. AEPCO Supp. Reb. at III-A-29 to 30. In their May 7, 2004 Clarification, the Railroads acknowledged that Mr. Berry had not limited his analysis of terminal costs to variable costs. However, the Railroads explained that their evidence was the best evidence of record for appropriate divisions because: (1) even if the Board were to accept AEPCO's criticism that the Railroads' expert assessed the full costs of terminal service while assessing only the variable costs of line-haul service, the resulting cost comparison is still appropriate since terminal costs are nearly 100 percent variable; and (2) if the Board wanted to adjust the Railroad's evidence to exclude any non-variable costs for terminal services, only a simple adjustment was required.¹ Clarification at 3-4.

¹ The Railroads' filing also criticized a "correction" that AEPCO had proposed in its Supplemental Rebuttal (which was based on an apples-to-oranges comparison of the URCS-based line-haul costs and non-URCS-based terminal costs). The supposed "correction" was the first time that AEPCO had advanced any sort of methodology for developing cost-based divisions.

ARGUMENT

In its Motion to Strike, AEPCO argues that the Railroads' Clarification constitutes impermissible new evidence that should be barred from consideration by the Board. First, AEPCO argues that the Clarification should be struck from the record because it is inconsistent with the standards governing evidence that can be included in a final brief after the close of the record. Motion to Strike at 4-5. This argument is irrelevant and the standards that AEPCO cites are inapplicable because the Clarification was not included in a final brief, but instead was submitted in order to clarify the record before final briefs are submitted.

Second, AEPCO argues that the Clarification should be struck because it exceeds the scope of evidence that a complainant can submit on rebuttal in response to a defendant's reply evidence. The Railroads agree that in the circumstances of this case, it is appropriate to assess the Clarification under standards that apply to the complainant's submission of rebuttal evidence. Here, as a result of the timing of this case, the Railroads were the first to take into account the Board's decision that rejected MMP and stated that divisions should be cost-based.² The Railroads therefore were the first parties to submit cost-based evidence on this critical issue. Accordingly, with respect to this issue, the Railroads should be given the opportunity to respond to the opposing party's criticism of their evidence.

However, the Railroads do not agree that their Clarification would be outside of the scope of evidence that a complainant could submit on rebuttal. As noted above, the Railroads' Clarification makes two points. First, it explains why the Board should accept the Railroads' Supplemental Reply Evidence on the proper allocation of revenues on intermodal cross-over

² See *Duke Energy Corp. v. Norfolk Southern Ry. Co.*, STB Docket No. 42069, slip op. at 20 (served Nov. 5, 2003); *Carolina Power and Light v. Norfolk Southern Ry. Co.*, STB Docket No. 42072, slip op. at 20-1 (served Dec. 23, 2003).

traffic. This is clearly within the proper scope of a complainant's rebuttal. In *Duke/NS*, the Board explained that a complainant is entitled to present argument on rebuttal in support of evidence it presented on opening.³ Second, the Railroads' Clarification provides a limited explanation of how the Board could adjust the Railroads' calculations if it accepted AEPCO's criticism of the Railroads' methodology. This explanation is also within the scope of permissible rebuttal. The Board's *Duke/NS* decision also made it clear that a complainant has the alternative of accepting on rebuttal a defendant's criticism. In their Clarification, the Railroads have merely shown how their mileage blocks would be modified if the Board were to accept AEPCO's criticism of the approach taken by the Railroads' expert. Consequently, the Clarification falls within the scope of permissible rebuttal evidence for a complainant, and the Board should accept it here.⁴

AEPCO also asserts that if the Board does not grant its Motion to Strike, it should be permitted an opportunity to respond to the Clarification. If the Board were to deem it necessary, the Railroads would not object to AEPCO being given an opportunity to respond to their Clarification.

Furthermore, AEPCO asserts that there should be a staggering of final briefs. Motion to Strike at 7-8. The Railroads do not agree. The Board has always provided that final briefs be submitted simultaneously by the parties to a proceeding. The fact that the Railroads identified certain issues that they intend to address in the final briefs provides no reason to depart from the Board's standard practice here.

³ *Duke/NS*, slip op. at 14-15.

⁴ AEPCO also makes an obscure argument about the timing of the Railroads' Clarification and the filing of complainant Otter Tail Power Company's Supplemental Rebuttal Evidence in an entirely separate proceeding, Docket No. 42071. AEPCO's argument is based on the faulty assumption that Otter Tail would somehow be entitled to respond to evidence filed in this proceeding, and that the Railroads were maneuvering to avoid that occurrence.

For the reasons stated above, the Board should deny AEPCO's Motion to Strike the Railroad's Clarification from the record in this proceeding.

Respectfully submitted,

J. MICHAEL HEMMER
LOUISE A. RINN
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179
(402) 271-3309

Michael Rosenthal

CAROLYN F. CORWIN
DAVID L. MEYER
MICHAEL L. ROSENTHAL
Covington & Burling
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 662-6000

*Attorneys for Union Pacific
Railroad Company*

RICHARD E. WEICHER
MICHAEL E. ROPER
DAVID M. PRYOR
The Burlington Northern and Santa Fe
Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

Linda S. Stein

SAMUEL M. SIPE, JR.
ANTHONY J. LAROCCA
LINDA S. STEIN
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

*Attorneys for The Burlington Northern and
Santa Fe Railway Company*

June 8, 2004

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2004, I caused a copy of the foregoing Defendants' Reply to Complainant's Motion to Strike Defendants' Clarification to be served by hand upon the following counsel for Arizona Electric Power Cooperative, Inc.:

William L. Slover
Christopher A. Mills
Robert D. Rosenberg
Andrew B. Kolesar III
Daniel M. Jaffe
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036



Linda S. Stein