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ENTERED
Office of Proceedings

AUG 8 2002

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August 8, 2002



VIA 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. 42059, Northern States Power Company Minnesota
D/B/A Xcel Energy v. Union Pacific Railroad Company

Dear Secretary Williams:

By this letter, Complainant Northern States Power Company Minnesota ("NSP") responds to the letter ("UP Letter") submitted by counsel for Defendant Union Pacific Railroad Company ("UP") on August 2, 2002. Therein, UP informs the Board that it will develop its reply filing evidence based upon its asserted "understanding" of governing law unless the Board issues an order finding that UP's "understanding is incorrect." UP Letter at 1. Specifically, UP asserts its "understanding" that NSP cannot obtain a rate prescription "from origin mines from which no traffic has moved under the challenged rates." Id.

The Board has no obligation to issue decisions responding to UP's asserted "understandings." Nor, of course, does non-action by the Board affirm any "understandings" UP may have. NSP suggests that the Board follow its usual procedure in maximum rate cases and defer ruling on disputed issues of fact and law until the record closes. This procedure avoids needless complications that arise from piecemeal litigation. If, however, the Board decides to issue an interlocutory ruling, the Board should find UP's "understanding" to be in error: the law clearly allows NSP to obtain rate prescriptions in advance of any traffic moving under the challenged rates.

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I.
BACKGROUND

This case is a maximum rate case. As pertinent here, NSP requested, and UP supplied, common carrier rates applicable to UP's transportation of coal from all UP-served Powder River Basin ("PRB") mines to NSP's King and Black Dog electric generating stations. These rates went into effect on January 1, 2001.

On January 26, 2001, NSP filed its maximum rate complaint. In this complaint, NSP alleged that UP's common carrier rates from all UP-served PRB origin mines to NSP's King and Black Dog generating facilities exceeded a reasonable maximum. Shortly thereafter, the parties entered into a joint stipulation wherein both sides agreed not to submit stand-alone cost evidence. Pursuant to this joint stipulation, if the Board determines UP exerts market dominance over the issue traffic, maximum rates will be set at the jurisdictional threshold (180 percent of UP's variable service costs). Following extensive discovery delays, the parties submitted their opening evidence on July 19, 2002.

As publicly revealed in UP's August 2 letter,¹ NSP's opening evidence develops UP's variable service costs for transporting coal from all UP-served Wyoming PRB origins. In its August 2, 2002 letter, UP asserts its "understanding" that the Board's WPL decision² precludes NSP from obtaining a rate prescription "from origin mines from which no traffic has moved under the challenged rates." UP Letter at 1. UP asks the Board to issue a decision if UP's "understanding" is "incorrect." Id. Absent such a decision, UP states that it will not include in its reply filing (due September 20, 2002) any variable cost evidence regarding UP service from origin mines other than North Antelope – the only Wyoming PRB origin mine "from which ... traffic has moved under the challenged rates." Id. at 1, 3.

¹ Both NSP and UP designated their entire opening submissions as "highly confidential," and filed them under seal.

² Wisconsin Power & Light Co. v. Union P.R.R., STB Docket No. 42051 (STB served Sept. 13, 2001) ("WPL").

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II.
THE BOARD SHOULD DEFER RULING
ON DISPUTED ISSUES UNTIL THE RECORD CLOSES

UP's letter asks the Board to confirm UP's "understandings." Via this odd request, UP appears to be asking the STB for some type of declaratory ruling on an issue arising in the context of an on-going maximum rate case. A decision whether to issue a ruling responsive to such request, and the timing of any such ruling, rest in the Board's informed discretion. See 5 U.S.C. §554(e). NSP suggests the Board exercise its discretion here by waiting until the record closes in this case before addressing legal argument and evidence. This approach avoids unnecessary side-bar litigation and is consistent with Board practice in maximum rate cases.

The Board's applicable maximum rate case procedures call for parties to submit three rounds of evidence and argument. See 49 C.F.R. 1111.8. Following receipt of these materials (and any briefs) the record closes and the Board issues a decision addressing the disputed legal and evidentiary issues.

NSP has now presented its opening evidence. UP has focused on one legal/evidentiary issue among many issues raised in the parties' opening statements and has asked the Board to separately address it.³ NSP submits that the Board should not address the issues in this case on a piecemeal basis. Instead, the parties should submit a complete record on all issues presented and, with the benefit of this record, the Board can decide the case.

The Board's disposition of motions to dismiss is analogous here. Though not so styled, UP's letter is really a disguised partial motion to dismiss. UP wants the Board to affirm UP's asserted view that a shipper cannot obtain a rate prescription "from origin mines from which no traffic has moved under the challenged rates." UP Letter at 1. If that standard applies, the Board would have no choice but to dismiss NSP's

³ UP claims the origin issue it raises merits special attention because of the "resources" UP will have to expend to develop its cost evidence. UP Letter at 3. However, developing cost evidence for the involved origins (all of which are in close proximity to each other) is not a difficult or time consuming exercise – particularly when compared to resources that must be expended to develop other variable cost evidence in maximum coal rate cases.

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complaint as applied to origins other than North Antelope – the only PRB origin mine from which NSP has originated traffic subject to UP's common carrier rates.

Motions to dismiss are "disfavored" and "rarely granted."⁴ The STB's usual procedure is to develop a complete record and then decide disputed issues.⁵ There is no need to depart from this standard practice here.

Finally, if the Board intervenes now, it should expect to receive requests similar to the one made here by UP in all subsequent maximum rate cases. This will open up a Pandora's Box of new procedural complications in cases that are already extremely complex. NSP can only imagine the degree of complication that will emerge if the Board encourages railroad defendants to present motions and letters during the evidentiary phase of maximum rate cases concerning the carrier's "understanding" of governing law.

III. UP'S UNDERSTANDING IS WRONG

Should the Board choose to address the merits of UP's request now, it should issue a decision stating UP's "understanding" is wrong.

According to UP, a shipper cannot obtain a rate prescription unless its traffic has moved under the assailed rates. UP Letter at 1. This assertion is simply wrong. A rail carrier's duty to maintain reasonable rates is codified at 49 U.S.C. §10701(d)(1). This provision states:

If the Board determines, under section 10707 of this title, that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by

⁴ Garden Spot & Northern Ltd. P'ship – Purchase and Operate – Indiana R.R. Line, ICC Finance Docket No. 31593 (ICC served Jan. 5, 1993), slip op. at 2. Accord Nat'l Grain and Feed Assn. v. Burlington N. R.R., ICC Docket No. 40169 (ICC served June 1, 1990), slip op. at 4.

⁵ See, e.g., Texas Municipal Power Agency v. Burlington N. and S.F. Ry., STB Docket No. 42056 (STB defers ruling on the defendant carrier's motion to dismiss filed after the parties submitted their opening evidentiary presentations).

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such carrier for such transportation must be reasonable.

Id.

The statute says nothing about transporting traffic under challenged rates. In fact, UP wants to re-write the statute by adding the underscored language:

If the Board determines, under section 10707 of this title, that a rail carrier has market dominance over the transportation to which a particular rate applies, and traffic has moved under the rate, the rate established by such carrier for such transportation must be reasonable.

Obviously, UP cannot re-write federal statutes. Nor have the governing Title 49 provisions been construed in accordance with UP's "understanding." For example, in the landmark San Antonio case, the complainant shipper instituted a maximum rate case, and obtained a maximum rate prescription, before any traffic moved under the challenged rates. See San Antonio, Tex. v. Burlington N., Inc., 355 I.C.C. 405 (1976), aff'd sub nom. Burlington N., Inc. v. United States, 555 F.2d 637 (8th Cir. 1977). Similarly, in numerous other cases, the Interstate Commerce Commission ("ICC") adjudicated maximum rate complaints even though no traffic had moved under the assailed rates.⁶

UP claims the Board's WPL decision supports its "understanding." It does not. In WPL, the complainant shipper, Wisconsin Power & Light Co. ("WPL"), limited

⁶ See, e.g., Incentive Rate on Coal – Gallup N.M. to Cochise, Ariz., 357 I.C.C. 683 (1977) and Incentive Rate on Coal – Cordero, Wyo. to Smithers Lake, Tex., 358 I.C.C. 537 (1977); both aff'd sub nom. Houston Lighting & Power Co. v. United States, 606 F.2d 1131 (D.C. Cir. 1979); Northeast Ky. Coal Bureau v. Chesapeake & O. Ry., 201 I.C.C. 165 (1934), aff'd, 206 I.C.C. 445, injunction denied sub nom. Chesapeake & O. Ry v. United States, 11 F. Supp. 588 (S.D. W.Va.), aff'd, 296 U.S. 187 (1935); Southern Agric. Chem. Corp. v. Cleveland, C.,C.,C. & St. L. Ry., 109 I.C.C. 227 (1926), aff'd, 144 I.C.C. 454 (1928); Lum v. Great N. Ry., 21 I.C.C. 558 (1911).

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its variable cost submissions to origins it was actually using in the first eight months of 2000 (Black Thunder, Antelope and North Rochelle). UP, in its opening submission, costed movements from the four origins WPL used in 1999 (Black Thunder, Antelope, North Antelope and Coal Creek) but in its reply and rebuttal filings UP voluntarily limited its variable cost evidence to the mine origins WPL had used in the first six months of 2000: Black Thunder and Antelope. Both WPL and UP presented stand-alone cost evidence that encompassed all UP-served PRB mines.

In its WPL decision, the STB limited its rate reasonableness review to the two UP-served PRB origins for which the Board found "complete variable cost" evidence had been submitted: Black Thunder and Antelope. The Board's decision states in pertinent part:

In this decision, we address the reasonableness of the rate for shipments from the Black Thunder and Antelope mines only, even though the parties' rate reasonableness evidence in this case encompasses all eleven mines, because we have complete variable cost evidence only for movements from those two mines.²

² Both parties submitted variable cost evidence on the movement of coal from the Black Thunder and Antelope mines. Because there had been some (pre-complaint) contract movements in 1999 from the North Antelope and Coal Creek mines, UP submitted variable cost evidence associated with movements from those mines as well in its opening evidence. On reply, WPL noted that no traffic had moved from the North Antelope or Coal Creek mines under the challenged common carriage rate. Accordingly, UP limited its rebuttal variable cost evidence to movements from the Black Thunder and Antelope mines. On rebuttal, WPL submitted new variable cost evidence on

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service from the North Rochelle and Black Thunder mines, but we do not consider that evidence here because UP had no opportunity to respond to it.

Id. at 7.

WPL is clearly distinguishable from the instant case. In WPL, WPL decided to limit its variable cost evidence to mines from which it was receiving coal when it filed its evidence with the Board. That was WPL's choice and one that UP accepted and followed in its reply and rebuttal filings. WPL holds that if a shipper makes such a choice, the Board will limit its maximum rate review to the specific origin-destination pairs for which the STB finds the rate/variable cost ratios exceed 180 percent.⁷

NSP did not make the same choice as WPL. NSP decided to present "complete" variable cost evidence for all UP-served Wyoming PRB origins covered by NSP's complaint. NSP is of course free to make such a choice and is not bound by the different choices made by WPL or any other shipper. Nor, of course, does WPL even address, much less decide, the issue of developing costs from specific PRB mines from which a shipper is not currently obtaining service. In WPL, all origins costed by both parties were ones WPL was utilizing during the time period costed.

Aside from its WPL claims, UP raises various criticisms of NSP's origin cost evidence. UP Letter at 2-3. All of the PRB mines involved in this case are located in close proximity to each other and NSP developed its opening cost evidence from mines it is not currently utilizing following long-established costing procedures. If UP presents any valid criticisms of this evidence, NSP will make appropriate revisions to its opening

⁷ In its Letter, UP argues that the Board found UP's costing of the WPL moves from North Antelope and Coal Creek "incomplete" because these "movements had not occurred under the challenged rates." Id. at 3. As both the Board and WPL observed, these movements did not move under UP's challenged common carrier rates (WPL at 7 n.2) but, of course, that is not the reason why the Board found the parties' evidence concerning these movements "incomplete." As discussed above, WPL never costed movements from these origins and UP did not address them at all in its reply and rebuttal filings. The parties' evidentiary focus – not the timing of the movements – dictated the Board's conclusions concerning "complete variable cost evidence." Id. at 7.

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evidence in its subsequent evidentiary filings. In any event, it is premature at this point in this proceeding for the Board to start making evidentiary rulings on NSP's opening evidence. Any such rulings can, and should, be made after all evidence is submitted and the record is closed.

UP also opines that if NSP obtains a rate prescription from North Antelope, NSP can try to negotiate an agreement with UP covering other origins or return to the STB to seek supplemental relief.⁸ UP Letter at 3. UP's preference for such approaches is obvious: they make it far more difficult, and costly, for NSP to obtain complete rate relief.

If NSP is forced to seek supplemental relief, its litigation costs and burdens will increase exponentially. NSP also has no agreement in place with UP covering the application of an STB prescription to all UP-served PRB origins. Nor, in any event, have such agreements provided shippers with the same protections that apply to STB prescribed rates. See, e.g., West Texas Utils. Co. v. Burlington N. R.R., STB Docket No. 41191 (STB served Nov. 7, 2000), slip op. at 4 (allowing a defendant carrier to substantially raise non-prescribed PRB coal rates despite the complainant shipper's objection that the parties agreed that an STB prescribed rate from one PRB mine origin would apply from all PRB mine origins).

NSP has properly elected to submit evidence in support of the relief requested in its complaint. That is NSP's prerogative. UP's "understanding" that NSP cannot do so is wrong.

IV. CONCLUSION

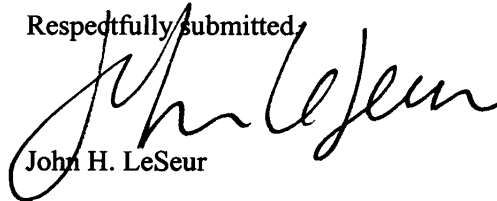
For the reasons set forth above, NSP respectfully submits that the Board need not take any action now concerning UP's letter. NSP will construe such non-action as neither agreeing with, nor disagreeing with, UP's "understanding." Should the Board decide to issue a responsive interlocutory decision, NSP requests that the Board rule that

⁸ In making these statements UP recognizes the obvious fact that NSP, like most utility PRB coal shippers, needs to have reasonable transportation rates in place from multiple PRB mine origins. Such rates are needed because most utility PRB coal shippers, over time, use (or consider using) multiple PRB mine origins.

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UP's "understanding" is error.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. LeSeur". The signature is fluid and cursive, with the first name "John" being particularly prominent and stylized.

John H. LeSeur

JHL:cef
cc: Michael L. Rosenthal, Esq.