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SERVICE DATE – NOVEMBER 14, 2024

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42180

EVERGY, INC., EVERGY METRO, INC., AND EVERGY KANSAS CENTRAL, INC.

v.

BNSF RAILWAY COMPANY

Digest:¹ This decision grants BNSF Railway Company's motion to dismiss Count IV of the complaint.

Decided: November 13, 2024

On January 31, 2024, Evergy, Inc. (Evergy), Evergy Metro, Inc. (Evergy Metro), and Evergy Kansas Central, Inc. (EKC) (collectively, Complainants), filed a complaint against BNSF Railway Company (BNSF), alleging that BNSF has violated its obligations under 49 U.S.C. §§ 11101(a), 10702(2), and 11121(a)(1). Complainants also seek an order declaring the scope of BNSF's service obligations to Complainants. On May 17, 2024, BNSF filed a motion to dismiss, seeking dismissal of Complainants request for a declaratory order.² Complainants replied to that motion on June 5, 2024. The Board will grant BNSF's motion to dismiss Complainants' request for a declaratory order.

BACKGROUND

Evergy, a Missouri corporation, engages in the transmission and distribution of electrical power generated by operating subsidiaries across a system territory covering major portions of Missouri and Kansas. (Compl. ¶ 2.) Evergy Metro and EKC are operating subsidiaries of Evergy. (Id. ¶ 3.) As relevant here, Evergy Metro operates a 1,725-megawatt, coal-fired generating station in Iatan, Mo., and EKC operates a 484-megawatt, coal-fired generating station in Lawrence, Kan. (Id. ¶¶ 3-4.) Complainants state that Evergy is responsible for procuring coal and coal transportation for both stations. (Id. ¶ 5.)

According to Complainants, for more than 20 years, BNSF transported coal from the Southern Powder River Basin region of Wyoming to the Iatan and Lawrence stations in private railcar unit train configurations pursuant to a series of contracts. (Id. ¶¶ 4, 8, 9.) Complainants

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² BNSF filed its answer on May 20, 2024.

state that BNSF informed them in 2020, for the Lawrence station, and 2021, for the Iatan station, that their rail service would no longer be provided under contract but rather pursuant to tariffs. (Id. ¶¶ 14-15.)³ The tariffs included a “service limitation notice,” providing that “[t]he provision of service and acceptance of any tenders for movement under this publication . . . shall, for the foreseeable future, be subject to BNSF’s sole discretion.” (Id. ¶ 14.) The tariffs were renewed annually and, until June 2023, continued to include the service limitation notice. (Id. ¶¶ 14-15.)

Complainants allege that, beginning in early 2022, BNSF restricted the number of private railcars it accepted in service for Iatan and Lawrence, citing the service limitation notice.⁴ (Id. ¶ 18.) Complainants further state that BNSF conditioned its service on Complainants’ scheduling shipments “ratably” throughout the year, meaning that the volume of coal scheduled each month was required to be approximately one-twelfth of the total nomination for the year. (Id. ¶ 19.) Complainants assert that, in response to their requests for trainsets, BNSF stated that it was constrained by train crew shortages and limited locomotive power availability. (Id. ¶ 22.) According to Complainants, as a result of the shortages, they have lost opportunities to earn revenues and profits, and incurred significant additional costs related to coal conservation measures, coal inventory, and system reliability protection.⁵ (Id. ¶ 23.)

In Count I of the complaint, Complainants allege that BNSF refused to meet their reasonable transportation needs in violation of BNSF’s common carrier obligations under 49 U.S.C. § 11101(a). (Compl. ¶ 26.) In Counts II and III, Complainants allege that BNSF’s establishment and use of the service limitation notice constituted, respectively, an unreasonable practice in violation of 49 U.S.C. § 10702(2) and a failure to furnish adequate car service and to establish reasonable rules and practices on car service in violation of 49 U.S.C. § 11121(a)(1). (Compl. ¶¶ 28, 30.) Complainants seek damages under 49 U.S.C. § 11704(b) for Counts I through III. (Compl. ¶¶ 26, 28, 30.)

³ The fifteenth numbered paragraph of the complaint is erroneously numbered as a second paragraph 14. All references to that paragraph will be to paragraph 15. The remaining paragraphs in the complaint are numbered correctly.

⁴ Complainants assert that they received 1,756,531 tons (36%) less than Iatan’s total requirements for 2022 and 240,137 tons less than Lawrence’s total requirements, 190,411 tons of which were needed at Lawrence during the summer months. (Compl. ¶ 20.)

⁵ Complainants are members of the Southwest Power Pool (SPP), a regional transmission organization responsible for managing the contributions of electricity from individual generating stations to meet consumer demand within its jurisdiction. (Id. ¶ 21.) Complainants state that, as members of SPP, they are required to supply SPP with enough available generating capacity to serve the demand within their operating service territories, along with a reserve margin. (Id.) Under certain circumstances, such as coal inventories falling substantially below target levels, Complainants can be required to implement coal conservation measures. (Id.) According to Complainants, coal conservation measures are steps that can force a utility to increase the prices at which its coal-fired generation is offered so that the market passes on the utility’s generation in favor of another source, and the utility conserves the coal that otherwise would have been used. (Id.)

In Count IV of the complaint, Complainants seek declaratory relief, asking the Board to “act to ‘remove uncertainty’ as to future service to Iatan and Lawrence.” (*Id.* ¶ 32.) According to Complainants, BNSF has demonstrated that it will restrict service to Complainants for “its own internal operational convenience,” and that “[t]here is a very real prospect that unless otherwise constrained, BNSF in the future will repeat the type of actions that it took with respect to service in 2022 that violated 49 U.S.C. §§ 10702(2), 11101(a), and 11121(a).” (*Id.*) Complainants ask the Board to clarify that, so long as the shipments to the Iatan and Lawrence stations are transported in common carrier service, BNSF is required under 49 U.S.C. §§ 10702(2), 11101(a), and 11121(a)(1) “to accept into service a sufficient number of private Evergy railcars to transport Iatan’s and Lawrence’s respective nominated coal volumes, consistent with historic volumes and subject to Complainants’ scheduling of shipments using BNSF’s prescribed procedures.” (Compl. 17.)

On May 17, 2024, BNSF filed a motion to dismiss Count IV. First, BNSF argues that there is no ongoing controversy that would warrant a declaratory order. (Mot. to Dismiss 7.) According to BNSF, all of the factual allegations in the complaint relate to service received in 2022 and the complaint does not allege any current violations. (*Id.* at 8.) Second, BNSF argues that a declaratory order is ill-suited to set a common carrier’s future requirements since doing so would require a fact-specific analysis of future circumstances. (*Id.* at 9.) According to BNSF, such an analysis cannot be accomplished in the abstract without knowing the particular circumstances that will confront the rail carrier at the time of a future service request. (*Id.* at 11.)

On June 5, 2024, Complainants filed a reply to BNSF’s motion. Complainants argue that BNSF misapplies the standard for declaratory orders. (Reply 6, June 5, 2024.) They assert that, while BNSF addresses the first part of the standard, under which the Board may issue a declaratory order to terminate a controversy, BNSF fails to address the second part of the standard, under which the Board may issue a declaratory order to remove uncertainty. (*Id.* at 6-7.) Complainants also argue that BNSF mischaracterizes their request as a request to set service levels. (*Id.* at 11.) Lastly, Complainants argue that, because the complaint includes three other counts, the Board should refrain from acting on the declaratory order component until the record is fully developed. (*Id.* at 14.)

On October 15, 2024, BNSF filed a supplement to its motion to dismiss, providing an update on Evergy’s 2024 shipment volumes. (BNSF Suppl. 1-2, Oct. 15, 2024.) According to BNSF, Evergy’s “declining and volatile demand for coal transportation” significantly impacts BNSF’s ability to resource plan and highlights why it would be inappropriate for the Board to establish BNSF’s future common carrier obligations based on historical volumes. (*Id.* at 3-5). On October 25, 2024, Evergy filed a reply to BNSF’s supplement. Evergy argues that BNSF’s supplement is a prohibited reply to a reply, (Evergy Reply to Suppl. 2), and that the supplement “does not provide merit” to BNSF’s motion to dismiss, which Evergy argues the Board should deny, (*id.* at 3-4).⁶

⁶ In the interest of compiling a complete record, the Board will accept into the record both BNSF’s supplement and Evergy’s reply to that supplement. *See, e.g., City of Alexandria, Va.—Pet. for Declaratory Ord.*, FD 35157, slip op. at 2 (STB served Nov. 6, 2008).

DISCUSSION AND CONCLUSIONS

The Board may dismiss a complaint if it “does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b). In reviewing a motion to dismiss, the Board will view the alleged facts in the light most favorable to the complainant. Cent. Valley Ag Grinding, Inc. v. Modesto & Empire Traction Co., NOR 42159, slip op. at 4 (STB served July 25, 2018) (citing Consumers Energy Co. v. CSX Transp. Inc., NOR 42142, slip op. at 1 (STB served June 15, 2015); Montana v. BNSF Ry., NOR 42124, slip op. at 3 (STB served Feb. 16, 2011)). A complaint is dismissed under § 11701(b) only when the Board finds that there is no basis upon which it could grant the relief sought. Grain Land Coop. v. Canadian Pac. Ltd., NOR 41687, slip op. at 2-3 (STB served Dec. 8, 1999).

Even viewing the allegations in Count IV in the light most favorable to Complainants, the Board finds that Count IV does not state reasonable grounds for investigation or action. Complainants request that the Board issue a declaratory order clarifying that, as long as BNSF moves the coal shipments to the Iatan and Lawrence stations in common carrier service, BNSF is statutorily required to accept into service “a sufficient number of private Evergy railcars to transport Iatan’s and Lawrence’s respective nominated coal volumes, consistent with historic volumes and subject to Complainants’ scheduling of shipments using BNSF’s prescribed procedures.” (Compl. 17; see also Reply 2, June 5, 2024.) In order to define a particular carrier’s obligations to a particular shipper under 49 U.S.C. §§ 11101(a), 10702(2), or 11121(a)(1), the Board must consider the facts surrounding that service request. Savannah Port Terminal R.R.—Pet. for Declaratory Ord.—Certain Rates & Pracs. as Applied to Cap. Cargo, Inc., FD 34920, slip op. at 8 (STB served May 30, 2008) (under 49 U.S.C. § 11101, “the Board looks to what is reasonable under the circumstances”); Montana v. BNSF Ry., NOR 42124, slip op. at 3 (STB served Apr. 26, 2013) (“Whether a particular practice is unreasonable under 49 U.S.C. § 10702 depends upon the facts and circumstances of the particular case.”); Elgin Coal Co. v. Louisville & Nashville R.R., 277 F. Supp. 247, 250 (E.D. Tenn. 1967), aff’d, 411 F.2d 1043 (6th Cir. 1969) (with respect to what is now 49 U.S.C. § 11121, “the law exacts only what is reasonable of the railway under all of the existing circumstances”). Here, Complainants do not dispute BNSF’s argument that there is no current service request the Board is being asked to evaluate. As for a hypothetical service request, the Board does not know at present the circumstances that might apply to such a request, and the Board declines to define the scope of a carrier’s future service obligations in the abstract. See Town of Smithtown, N.Y.—Pet. for Declaratory Ord., FD 36575 (Sub-No. 1), slip op. at 5 (STB served Feb. 23, 2024).⁷

⁷ In its reply to BNSF’s motion to dismiss, Complainants, for the first time, describe their request for relief under Count IV to encompass “BNSF’s *current* and future statutory service obligations.” (Reply 1, June 5, 2024 (emphasis added).) However, there are no allegations in the complaint regarding a recent request for service or other indications in the record that any such request is at issue. (See Mot. to Dismiss 1-3.) Thus, any request for a declaratory order related to BNSF’s current statutory obligations to the Iatan and Lawrence stations would raise the same concerns discussed above.

In their reply, Complainants argue that they are not asking the Board to “set a specific number of required trainsets in advance or otherwise to ‘fix common carrier service levels’ without regard to relevant circumstances,” but rather are asking the Board to “clarify the *standard* that should be used in the future to gauge whether BNSF is meeting its obligations under the facts as they exist at the time.” (Reply 11-12, June 5, 2024.) But a merits decision on Complainants’ remaining three counts addressing BNSF’s 2022 conduct would serve as precedent that the Board would consider should BNSF in the future “repeat the type of actions that it took with respect to service in 2022.” (Compl. ¶ 32.)

For these reasons, the Board finds that Count IV of the complaint presents no actionable claim before the agency and no basis for the Board to investigate or act. Accordingly, the Board will grant BNSF’s motion and dismiss Count IV of the complaint.

It is ordered:

1. BNSF’s motion to dismiss is granted.
2. Count IV of the complaint is dismissed.
3. This decision is effective on the date of service.

By the Board, Board Members Fuchs, Hedlund, Primus, and Schultz.