

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42180

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

v.

BNSF RAILWAY COMPANY

Decided: September 24, 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. BNSF filed its answer on May 20, 2024.¹ On August 5, 2024, BNSF filed a petition requesting that the Board issue a subpoena directed to the Southwest Power Pool (SPP), a non-party to the proceeding, requiring the production of certain documents. As discussed in more detail below, the Board will not issue the requested subpoena at this time.

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 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 tariff.

¹ On May 17, 2024, BNSF filed a partial motion to dismiss seeking dismissal of Complainants’ request for a declaratory order. Complainants replied to that motion on June 5, 2024. The Board will address BNSF’s motion to dismiss in a separate decision.

(Id. ¶¶ 14-15.)² 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.”³ (Id. ¶ 14.) 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 are members of 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, Evergy can be required to implement coal conservation measures. (Id.) Complainants state that 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.) According to Complainants, as a result of the reduced coal inventories caused by BNSF’s actions, Evergy needed to implement coal conservation measures and incurred lost profits and opportunity costs in 2022 that exceed \$20 million (before interest). (Id. at 3.)

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 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.) In Count IV, Complainants seek declaratory relief, asking the Board to clarify that “so long as coal shipments to Iatan and Lawrence are transported in common carrier service, BNSF’s obligations under 49 U.S.C. §§ 10702(2), 11101(a), and 11121(a)(1) require it 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.)

² 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.

³ The tariffs were renewed annually and, until June 2023, continued to include the service limitation notice. (Compl. ¶¶ 14-15.)

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. (Id. ¶ 20.)

BNSF filed its answer to the complaint on May 20, 2024. On June 4, 2024, the Board adopted a procedural schedule, as proposed jointly by Complainants and BNSF. The schedule provides for discovery, closing November 1, 2024. On August 5, 2024, BNSF filed a petition asking the Board to issue a third-party subpoena directed to SPP. (BNSF Pet. for Subpoena 1.) BNSF states that its information requests relate to Complainants' claims regarding the impact of BNSF's service on Complainants' profits and opportunity cost. (*Id.* at 1, 6.) Specifically, BNSF requests information about SPP's policies and procedures relating to coal management, resource adequacy, operation of coal generating facilities, and dispatch data. (*Id.* at 6-7.) BNSF does not believe that the information it seeks from SPP is in Complainants' possession, and as a result, BNSF is now seeking certain documents and information from SPP directly. (*Id.* at 5.) According to BNSF, it has tailored its requests to SPP to be as unobtrusive and non-duplicative as possible. (*Id.* at 2.)

Complainants replied to BNSF's petition for subpoena on August 26, 2024. Complainants take no position on the merits of BNSF's petition but request that the Board direct BNSF to produce to Complainants copies of any documents or written responses that BNSF receives from SPP in connection with the requested subpoena. (Complainants Reply to Pet. for Subpoena 1.)

DISCUSSION AND CONCLUSIONS

The Board has authority under 49 U.S.C. § 1321(c) to subpoena witnesses and records related to a proceeding from any place in the United States. If a witness “*fails* to be deposed or to produce records” as requested by a party to a proceeding before the Board, then the Board may subpoena that witness. 49 U.S.C. § 1321(d)(1)-(2) (emphasis added). A non-party to a proceeding can be compelled to respond only to a subpoena issued pursuant to 49 U.S.C. § 1321(c). See E. W. Resort Transp., LLC—Pet. for Declaratory Ord.—Motor Carrier Transp. of Passengers in Colo., MCF 21008, slip op. at 2 (STB served June 1, 2005.)

Here, there is no indication in the record that SPP has failed to produce the records sought by BNSF. In fact, it is not clear that BNSF has ever asked SPP to produce the records that BNSF now seeks to subpoena. Accordingly, a subpoena directed to SPP will not be issued at this time. See id. (issuing subpoena for witness's deposition “[i]nasmuch as Vail Resorts and Aspen Ski Tours have stated that they will not allow their representatives to be deposed absent a subpoena by the Board”). BNSF will be directed to serve a copy of its petition and this decision on SPP by September 27, 2024. BNSF is encouraged to work together with SPP to voluntarily come to an agreement regarding the requested information.⁵ BNSF may inform the Board if SPP

⁵ Any commercially sensitive materials can be protected through the protective order previously issued by the Board in this proceeding.

objects to its discovery requests. The Board will address the merits of BNSF's petition for subpoena, if necessary, in a subsequent decision.⁶

It is ordered:

1. BNSF is directed to serve a copy of its petition for subpoena and this decision on SPP by September 27, 2024.
2. BNSF may inform the Board if SPP objects to its discovery requests, and BNSF's petition for subpoena will be addressed, if necessary, in a subsequent decision.
3. This decision is effective on the date of service.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

⁶ In determining whether to issue a subpoena, the Board will examine whether the subpoena could cause undue burden on third parties, and in doing so will consider the extent of the third party's connection to the matter before the Board. See Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions, FD 35557, slip op. at 3-4 (STB served June 25, 2012).