

STB DOCKET NO. 42038

MINNESOTA POWER, INC.

v.

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

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*Decided May 10, 1999*

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The Board denies railroad's request to use evidence of geographic competition to defend against a rate complaint. The Board also denies shipper's request for access to carrier's internal costing system.

**BY THE BOARD:**

In a verified complaint filed and served on defendant, Duluth, Missabe and Iron Range Railway Company (DMIR), on December 30, 1998, Minnesota Power, Inc. (MPI or complainant), alleges that DMIR's rates for movements of unit trains of coal from a connection with The Burlington Northern and Santa Fe Railway Company (BNSF) at Keenan, MN, to MPI's Laskin Energy Center (Laskin), a coal-fired electric generating facility near Colby, MN, exceed a maximum reasonable level.<sup>1</sup> Complainant alleges that DMIR possesses market dominance over the traffic and requests that maximum reasonable rates be prescribed, along with related rules and service terms for the movement. Complainant also requests an award of reparations. In this decision, we are resolving all remaining discovery disputes and establishing a procedural schedule for presentation of evidence on the merits.

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<sup>1</sup> This service was formerly provided by DMIR under a rail transportation contract that expired on December 31, 1998. Because the BNSF portion of the through service is provided under contract, over which we have no jurisdiction, 49 U.S.C. 10709(c), the rate applicable to the DMIR segment of the movement can be separately reviewed. *Central Power & Light Co. v. Southern Pacific et al.*, 1 S.T.B. 1059 (1996), *clarified*, 2 S.T.B. 235 (1997).

## BACKGROUND

On February 16, 1999, MPI filed a motion to compel discovery. DMIR replied on February 22, 1999, and simultaneously filed its own motion to compel discovery. MPI replied to DMIR's motion on March 1, 1999. In a decision served March 10, 1999, MPI's motion to compel was granted in part, and the discovery schedule was suspended because insufficient time was available to complete meaningful discovery.<sup>2</sup> Resolution of DMIR's motion to compel was deferred, and the parties were directed to submit a joint proposal for a new discovery schedule on or before March 22, 1999. MPI was further directed to request any needed additional relief by the same date.

On March 22, 1999, the parties submitted their joint proposal for a new discovery schedule, and MPI filed a second motion to compel discovery. DMIR filed a reply on March 31, 1999, one day after the due date under the parties' joint schedule. Accordingly, on April 5, 1999, MPI filed a motion to reject as untimely or, in the alternative, for leave to file a tendered reply to the reply. In the April 5 reply, MPI complains that DMIR's March 31 reply raises, for the first time, specific arguments regarding the discovery sought by MPI,<sup>3</sup> and identifies, for the first time, many of the documents DMIR was withholding.

In a further reply filed on April 8, 1999, DMIR points out that its March 31 reply, although late-filed under the parties' agreement, was timely under the Board's rules.<sup>4</sup> DMIR also objects to MPI's alternative tendered reply to DMIR's March 31 reply. DMIR contends that its March 31 reply contains no assertions that should not have been anticipated, that MPI identifies no new arguments and had to have known what documents had been produced or withheld, and that DMIR is entitled to the last word under our procedural rules.<sup>5</sup> DMIR also contends that MPI's tendered reply is only a rehash of arguments made in its opening statement and contains inaccurate and incomplete assertions.

We will accept DMIR's March 31 reply even though it was filed one day late under the parties' proposed schedule. That proposal was never formally adopted by the Board and, therefore, the March 31 reply was timely filed under

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<sup>2</sup> Under the general procedural schedule established in *Expedited Procedures for Processing Rail Rate*, 1 S.T.B. 754 (1996) and 1 S.T.B. 859 (1996), *aff'd sub nom. United Transp. Union — Ill. Legis. Bd. v. STB*, 132 F.3d 71 (D.C. Cir. 1998), discovery was to have been completed on or before March 15, 1999.

<sup>3</sup> Assertedly, DMIR had previously limited its responses to boilerplate objections.

<sup>4</sup> A reply to any pleading is due 20 days after the pleading is filed, unless otherwise provided by the Board. 49 CFR 1104.13(a).

<sup>5</sup> To that end, DMIR requests that it be allowed to respond to any MPI reply.

49 CFR 1104.13(a). We need not address the contents of MPI's tendered April 5 reply because we have sufficient information to resolve all of the disputed discovery issues and MPI has not provided sufficient cause for us to deviate from our general policy not to accept a reply to a reply. See, 49 CFR 1104.13(c). Accordingly, the pleading will be rejected.

#### DISCUSSION AND CONCLUSIONS

##### DMIR's Motion to Compel

DMIR contends that the principal alternative to the use of DMIR for the traffic at issue would be a rail-truck transload at Boswell, another BNSF-served MPI power plant in northern Minnesota. Accordingly, DMIR seeks documents and information regarding the potential to use transload options to bypass the DMIR service. MPI points out, however, that the rate at issue concerns only transportation between Keenan and Laskin, that the transload alternative posited by DMIR thus constitutes geographic competition, and that evidence of geographic competition is barred under *Market Dominance Determinations*, 3 S.T.B. 937 (1998), *pets. for reconsideration and clarification pending (Ex Parte No. 627)*.

As MPI correctly observes, in *Ex Parte No. 627* we limited the market dominance inquiry to an examination of the intra- and intermodal transportation alternatives between the points to which the rate applies. In this case, which was filed after the market dominance rules were changed, the transportation to which the rate applies is the Keenan-to-Laskin movement. Thus, under the revised procedures adopted in *Ex Parte No. 627*, any evidence of truck deliveries to Laskin would be relevant only if they originated at Keenan.<sup>6</sup> As both parties recognize, there are no such movements. In any event, MPI states that it has searched its files and found no documents, during the relevant time period, discussing or otherwise addressing transloading rail-originated western coal for truck delivery to Laskin. DMIR's motion to compel with respect to the Boswell transload potential will be denied.

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<sup>6</sup> While under the revised market dominance procedures information related to geographic competition is not relevant, petitions for reconsideration of our *Ex Parte No. 627* decision are pending. If those petitions persuade us that consideration of geographic competition is appropriate, we will afford DMIR the opportunity to pursue discovery and present evidence on transloading coal at Boswell for shipment to Laskin.

DMIR also requested, in its first set of discovery requests, copies of all contracts between MPI and any carrier (including DMIR) for the movement of coal to Laskin. MPI, in response, produced copies of its contracts for Keenan-to-Laskin service, all of which were with DMIR. It noted that the remaining contracts (one active contract and various predecessor contracts) were with BNSF for service to Keenan. MPI noted that BNSF initially objected to disclosure on relevance and confidentiality grounds but subsequently agreed to the release of portions of the contract including the table of contents, the definitions, and provisions concerning origins, destinations, and routings. DMIR has now limited its request to the information that BNSF has agreed to release. As above, however, we fail to see how the requested information is relevant to the Keenan-to-Laskin movement. Accordingly DMIR's motion to compel will be denied.

DMIR, in various requests, seeks all documents and information describing any calculations or otherwise supporting the allegations in the complaint that: (1) DMIR's rate for the complaint traffic exceeds 180% of its variable costs; (2) DMIR is market dominant; (3) DMIR's rates exceed maximum reasonable levels; and (4) DMIR's tariff lacks sufficient specificity to comply with 49 U.S.C. 11101, 10702, and 10742.<sup>7</sup> DMIR contends that MPI is concealing its evidence and theories with respect to these issues. MPI responds that the allegations in its complaint turn on the variable costs for the issue traffic,<sup>8</sup> matters largely within the exclusive knowledge of the defendant carrier and for which it will rely upon discovery from the defendant carrier.

DMIR's requests appear to be an attempt to preview the evidence that MPI will submit in its case-in-chief. Apart from the fact that MPI will not know exactly what its case will look like until it obtains discovery from defendant, we see no need to grant such a request. Under the modified procedure applicable to this case, DMIR will have substantial time to examine MPI's opening evidence before being required to respond.

DMIR also previously sought all documents in MPI's possession that refer or relate to DMIR and its affiliates. MPI objected on the ground that such a broad request was burdensome. In its motion to compel, DMIR scales back its request to documents (other than routine transactional documents) discussing or referring to DMIR's service to the Laskin facility. MPI does not object to this revised request in its reply, and the motion to compel a response will be granted.

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<sup>7</sup> MPI asserts that it has responded fully with respect to the tariff issue.

<sup>8</sup> DMIR has stipulated that this rate should not exceed 180% of the variable cost for this traffic.

Finally, DMIR asks MPI whether it contends that DMIR has waived any claims to demurrage. Contending that MPI refused to answer, DMIR seeks to compel a response. MPI states that it has already answered the question and points out that its complaint does not address demurrage. Because the complaint does not involve demurrage, DMIR's motion to compel a response will be denied.

#### MPI's Second Motion to Compel<sup>9</sup>

As noted above, DMIR has stipulated that it will accept the 180% jurisdictional threshold in 49 U.S.C. 10707(d)(1)(A) as the measure of rate reasonableness for this case. Thus, no stand-alone cost (SAC) analysis will be required, and MPI's motion to compel is primarily aimed at the dispositive issue of variable costs. MPI asserts that the information it seeks to discover consists of data needed to calculate movement-specific costs and carrier-specific Uniform Rail Costing System (URCS) inputs<sup>10</sup> not publicly available.

1. *Calculating a DMIR — Specific URCS.* DMIR objects to the notion that a carrier-specific URCS needs to be developed for this case. It contends that the use of the regional URCS is appropriate and customary for determining the variable costs of a Class II carrier, that Western Regional URCS data can be adjusted with DMIR-specific costs provided in discovery to develop an adequate costing tool for this proceeding, and that development of a DMIR-specific URCS would be too costly.

MPI contends that the use of Western Regional data is unsatisfactory given the cost structure of DMIR. MPI argues that, because DMIR is a small railroad transporting mostly bulk, trainload traffic, DMIR's cost structure is different from the cost structures of the larger Class I railroads supplying the data for the Western Region. MPI also points out that, in *Bituminous Coal — Hiawatha, UT to Moapa, NV*, 6 I.C.C.2d 1 (1989), the Interstate Commerce Commission applied variable costs developed from a Class II carrier's data.

We will permit MPI to pursue discovery of information pertinent to the development of a DMIR-specific URCS. Use of the Western Regional URCS

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<sup>9</sup> MPI's motion addresses two sets of discovery requests. Request Nos. 1-59 are contained in MPI's first request for production, dated January 8, 1999. Request Nos. 60-73 are contained in MPI's second request, dated February 26, 1999.

<sup>10</sup> Unlike Class I carriers, DMIR, as a Class II rail carrier, is not required to routinely file financial or operating data with the Board — data needed to develop carrier-specific variable costs.

alternative posited by DMIR is not mandatory, and MPI is entitled to control the presentation of its own case. Moreover, any undue cost of developing a DMIR-specific URCS will fall mainly on MPI.

We turn now to MPI's URCS-related specific discovery requests. Request No. 20 asks DMIR to produce basic accounting documents created by DMIR, its parent Transtar, or one of its parent's other subsidiaries.<sup>11</sup> This request seeks information on working capital, depreciation, investment in properties, and the like. Request No. 21 asks DMIR to describe the accounts used to generate the Request No. 20 documents. Request Nos. 22 and 23 seek traffic and revenue information on carloads originating and terminating on, or bridging, DMIR's lines, and Request No. 24 asks for annual accounting reports. In each instance, MPI seeks 5 years of data. Notwithstanding DMIR's objection, 5 years of data are needed for parts of the URCS formula. Thus, to the extent DMIR has provided discovery, we will require supplementation for the full 5-year period, if DMIR maintains records for that period.<sup>12</sup>

Apart from the issue of the relevant time period, DMIR contends that it has already responded adequately to each of MPI's requests. Because its accounting is done on a consolidated basis with Transtar's other operations, DMIR has produced the Securities and Exchange Commission filings of Transtar's controlling shareholder, in response to Request No. 20. DMIR also prepared and produced for MPI an account-by-account report of rail operating expenses. Although MPI assails this response as deficient, it describes no specific shortcomings. With regard to Request No. 21, DMIR submits that its accounts are self-explanatory, but agrees to furnish MPI with the meaning of any specific account on request. Because DMIR has agreed to turn over all information it maintains relative to its accounting procedures, MPI's motion to compel responses to Request Nos. 20 and 21 will be denied.

In response to Request No. 22, DMIR provided annual information showing cars, car-miles, short and long tons, and ton-miles, along with the origin and destination of major traffic movements. DMIR contends that it does not maintain carload commodity data or operating data by car type responsive to Request Nos. 22 and 23, respectively. DMIR also objects on relevancy grounds to the production of revenue data. Because systemwide revenue data are necessary for the calculation of working capital, an element of the URCS investment base,

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<sup>11</sup> Transtar, Inc., a noncarrier holding company, controls DMIR and other rail and nonrail entities.

<sup>12</sup> DMIR's General Objection No. 6, relating to documents generated before 1996, is accordingly overruled.

MPI's motion to compel responses to Request Nos. 22 and 23 will be granted with respect to systemwide revenue data, but it will be denied as to the data that DMIR does not maintain.

Finally, in Request No. 24, MPI seeks DMIR-specific annual reports prepared for Transtar's use. DMIR responds that these reports are not usable or relevant because they do not separate out DMIR's nonrail operating expenses. Nevertheless, under our discovery rules, material that is not relevant in itself but that may lead to the discovery of relevant material is discoverable. Therefore, MPI's motion to compel a response to Request No. 24 will be granted.

2. *Calculating Movement-Specific Costs.* MPI's other variable-cost requests seek information needed to make movement-specific cost calculations. Request No. 2 seeks, for the years 1997 and 1998, documents that identify, with respect to MPI trains moving over the DMIR route:

- j. The trailing weight of each train (cars and contents) by the unit measure of rail line for the loaded route(s);
- k. The trailing weight of each train (cars and contents) by the unit measure of rail line for the empty route(s); [and]
- m. The tare weight of each car.

DMIR responds that it calculates trailing train tonnage for each movement in order to provide adequate power for the train, but does not record or maintain these records. It further states that it does not have tare weights for the BNSF cars used in the Laskin service but that this information is publicly available. Because DMIR does not have the requested information or the information is publicly available to MPI, the motion to compel a response to Request No. 2 will be denied.

Request Nos. 4, 5, 6, 7, 64, and 65 seek information for calendar years 1997 and 1998 assertedly needed to calculate line-specific maintenance-of-way costs for the MPI routes. Specifically, Request Nos. 4, 5, 6, and 64 ask for track miles of welded rail, rail statistics by type of traffic, and system density charts; Request Nos. 7 and 65 seek actual line-specific roadway maintenance expenditures.

DMIR states that it will produce the welded rail data, but that it does not record or maintain actual gross ton-mile data or density charts on a systemwide or movement-specific basis. Likewise, it does not record line-specific maintenance-of-way expenditures, but has produced systemwide data. Because DMIR represents that it will produce welded rail data and that it does not have

the other requested information, MPI's motion to compel responses to Request Nos. 4, 5, 6, 7, 64, and 65 will be denied.

Request No. 9 seeks data to calculate DMIR's investment in the road property between Keenan and Laskin. DMIR has provided the requested investment data but has not provided the associated gross ton-mile information sought in 9(i) and 9(j). However, because DMIR states that it does not keep track of gross ton-miles either for line segments or for valuation sections, MPI's motion to compel responses to Request Nos. 9(i) and (j) will be denied.

Request Nos. 11 and 12 seek information necessary to make movement-specific locomotive capital investments. DMIR has provided some locomotive leases, but has not provided the requested billings or payments associated with these leases. DMIR assails the usefulness of that information and contends that its production would be burdensome. However, DMIR has not substantiated the alleged burden, and MPI has presented a verified statement of its economic consultant demonstrating a need for the data. *Crowley V.S.* at 8-9. Accordingly, MPI's motion to compel responses to Request Nos. 11 and 12 will be granted.

MPI's Request Nos. 13 and 66 seek information to calculate movement-specific locomotive maintenance costs. Rather than producing individual locomotive maintenance data, DMIR has produced annual locomotive statistics for the entire DMIR system, along with a list of locomotives. DMIR denies the existence of any additional relevant documents. Therefore, MPI's motion to compel responses to Request Nos. 13 and 66 will be denied.

In Request Nos. 15, 16, and 71, MPI seeks information for calendar years 1997 and 1998 to calculate movement-specific crew wages and fringe rates. DMIR produced crew payment and time records for trains consisting of BNSF cars, but has refused to produce similar data for trains consisting of private cars. DMIR states that all movements under the tariff used BNSF cars, and, accordingly, crew data for traffic moving to Laskin in private cars is irrelevant. We disagree. Because service under the tariff did not begin until year-end 1998, and because historical data are necessary for the calculation of variable costs, DMIR should provide information on crew wages and fringe rates for trains that moved under contract. Accordingly, because contract movements may have used some private cars, MPI's motion to compel will be granted.

DMIR makes the same private car argument with respect to MPI's Request Nos. 25, 26, 53, 54, 67, and 68 pertaining to car capital and maintenance information. MPI's motion to compel will be granted in this regard as well. DMIR's concern that the inclusion of non-per-diem-paying private cars will

distort the variable cost calculation can be addressed in its evidence and arguments to be presented in this case.

In Request No. 17, MPI asks DMIR (i) to identify whether it has prepared any switching studies (or has any documents related to switching) that involve the movement of MPI trains, and (ii) if the answer is yes, to produce these documents. DMIR states that it has not performed switching studies relating to the traffic at issue. Accordingly, MPI's motion to compel responses to Request No. 17 will be denied.

MPI's Request No. 18 seeks information necessary to make line-specific joint facility cost calculations. In response, DMIR provided a portion of one trackage rights agreement. The exhibits to that agreement were not provided, but DMIR now indicates that it has located the exhibits and will provide them to MPI. DMIR also failed to provide, as requested, documents identifying joint facility billings, maintenance-of-way and structure expenses, and documents identifying service units (*i.e.*, gross ton-miles) over the joint facility line segments. DMIR contends that such documents are not relevant because they rely on derived, not actual, gross tons or mileages. Nevertheless, MPI avers that it cannot calculate line-specific joint facility costs without the missing items. Accordingly, MPI's motion to compel a response to Request No. 18 will be granted. DMIR is free to challenge the probative value of the derived data in the evidentiary phase of this proceeding.

MPI's Request Nos. 29 and 59 seek, *inter alia*, line-specific interchange agreements between DMIR and BNSF. DMIR contends that no written interchange agreement applicable to the issue traffic exists and that its operating arrangement with BNSF for movement of the issue traffic is informal, involving no compensation. Even so, MPI is entitled to an accurate and complete description of the terms of the operating arrangement. Accordingly, DMIR is directed to produce a written summary of any oral agreement relating to the interchange of MPI's Laskin traffic, but need not produce copies of other interchange agreements with BNSF.

In Request Nos. 60-63, MPI notes that Transtar had formulated a plan to consolidate the accounting and clerical functions of all of its carrier subsidiaries at its Monroeville, PA facility. MPI seeks to discover information necessary to calculate carrier-specific station clerical cost items. Specifically, Request No. 60 seeks a copy of the 1997 accounting consolidation plan, and Request No. 63 seeks documents regarding any economic benefits of the consolidation. Although we agree with DMIR that these materials are not relevant in themselves, we believe the requests were designed to lead to the discovery of relevant information. Accordingly, MPI's motion to compel responses to

Request Nos. 60 and 63 will be granted. Request Nos. 61 and 62 pertain to the delegated accounting and clerical functions themselves. DMIR has stated that it has no responsive documents. In light of the nature of the consolidated accounting function, however, DMIR is responsible for obtaining from Transtar or its subsidiaries any such documents. Accordingly, MPI's motion to compel responses to Request Nos. 61 and 62 will be granted to the extent that responsive materials are in the possession of Transtar or its subsidiaries.<sup>13</sup>

Finally, in Request Nos. 27 and 72, MPI seeks traffic tapes (other than revenue tapes) from which it can obtain such data as tare weights, gross ton-mile data, and traffic density data. DMIR replies that it has no traffic tapes of the sort MPI is seeking. Accordingly, MPI's motion to compel responses to Request Nos. 27 and 72 will be denied.

3. *Management Costs.* MPI's Request No. 19 seeks all documents prepared by or for DMIR relating to DMIR's costs for performing coal transportation services for MPI, including any profitability analyses or internal management cost studies. DMIR has objected to producing any documents responsive to Request No. 19 but acknowledges that it has an internal costing system.

As in *Potomac Electric Power Co. v. CSX Transportation, Inc.*, 2 S.T.B. 290 (1997), the output produced by the defendant carrier's proprietary costing system is not likely to produce URCS-compatible variable costs.<sup>14</sup> Therefore, DMIR's costing system and studies produced by that system are not relevant to this proceeding. However, the data inputs to that costing system may well be relevant. Thus, while we will deny access to DMIR's proprietary costing system and all cost estimates produced by that system, we will require DMIR, to the

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<sup>13</sup> To this extent, DMIR's General Objection No. 8, pertaining to inclusion of DMIR's parent and sister companies, is overruled. See, e.g., *Grand Rapids Eastern Railroad, Inc. — Purchase, Lease, and Operation Exemption — Rail Lines of Central Michigan Railroad Company*, Finance Docket No. 32297 (ICC served February 16, 1994); *Union Pacific Corporation, Union Pacific Railroad Company, and Missouri Pacific Railroad Company — Control and Merger — Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company*, Finance Docket No. 32760 (ICC served November 22, 1995).

<sup>14</sup> The statute requires the use of URCS to determine variable costs in rate proceedings. 49 U.S.C. 10707(d).

extent that it has not already done so in response to other of the requests, to produce the operating and financial data used in its costing system.<sup>15</sup>

4. *General Objections.* MPI requests that we overrule DMIR's General Objections Nos. 1, 2, 6, 7, 8, 13, and 15, as well as "boilerplate" objections. We have overruled two General Objections (Nos. 6 and 8 [in part]) and, for the most part, the boilerplate objections of vagueness, relevance, or burden. We have sustained General Objection No. 15. Otherwise, the objections have not been invoked in opposition to the motion to compel, and no further action on our part is required.

*It is ordered:*

1. MPI's motion to reject DMIR's March 31, 1999, reply, or for leave to file a reply to the reply is denied. The tendered reply to DMIR's reply is rejected.

2. The motions to compel are granted to the extent discussed above.

3. The substitute procedural schedule proposed by the parties is adopted. Discovery must be completed by June 10, 1999. Opening evidence is due July 15, 1999, reply evidence is due August 30, 1999, and rebuttal is due September 28, 1999.

4. This decision is effective on May 11, 1999.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

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<sup>15</sup> DMIR's General Objection No. 15 is thus sustained.