

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

WESTERN FUELS ASSOCIATION, INC.,)	
and BASIN ELECTRIC POWER)	
COOPERATIVE)	
)	Docket No. 42088
Complainants,)	
)	236918
v.)	ENTERED
)	Office of Proceedings
BNSF RAILWAY COMPANY)	October 28, 2014
)	Part of
Defendant.)	Public Record

**BNSF RAILWAY COMPANY’S OPPOSITION TO
COMPLAINANTS’ REQUEST FOR LEAVE TO RESPOND
TO BNSF’S REPLY COMMENTS ON REMAND**

On October 9, 2014, Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (“WFA/Basin”) requested leave to file a reply to BNSF’s September 19, 2014 Reply Comments on Remand. *See* Complainants’ Response to BNSF Railway Company’s (“BNSF”) Reply Comments and Request for Leave to Respond, STB Docket No. 42088 (filed Oct. 9, 2014) (“Request for Leave to Respond”). For the reasons set out below, the Board should deny WFA/Basin’s Request for Leave to Respond.

The Board’s rules do not permit a reply to a reply. 49 C.F.R. § 1104.13(c). While the Board may waive the rule prohibiting a reply to a reply upon good cause, WFA/Basin have provided no valid reason to waive the Board’s rule here.¹ WFA/Basin’s sole purported

¹ The Board often rejects replies to a reply when the replying party has “not presented any justification for allowing this extra pleading.” *Union Pac. R.R. Co.—Abandonment Exemption—In Rio Grande & Mineral Counties, CO*, STB Docket No. AB-33 (Sub-No. 132X), at 3 (STB served May 3, 2005). *See also Capitol Materials Inc.—Petition for Declaratory Order—Certain Rates & Practices of Norfolk S. Ry. Co.*, STB Docket No. 42068, at 3 n.7 (STB

justification for seeking to file a reply to a reply is that its reply would “create a more complete record.” Request for Leave to Respond at 1, note 1. In fact, WFA/Basin just want to have the last word.² Their reply merely rehashes the same arguments they had already made and does not create a more complete record.

On the question whether the application of Alternative ATC³ would be impermissibly retroactive, WFA/Basin repeat their implausible and erroneous argument that WFA/Basin had a “settled expectation” that the Board would apply Modified ATC, notwithstanding that Modified ATC had never been applied previously, that Modified ATC was inconsistent with a notice-and-comment rule that the Board had just issued, and that the flaws in Modified ATC, which the Board has now acknowledged, were a central focus of BNSF’s challenge to WFA/Basin’s new SAC evidence. As the Board stated when it rejected WFA/Basin’s nearly identical retroactivity argument in *Major Issues In Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1), at 75 (STB

served Apr. 19, 2002) (rejecting a reply to a reply because the party “has not presented any argument or shown good cause why rule 1104.13(c) should be waived”).

² The Board frequently rejects replies to a reply that amount to no more than an attempt to have the last word on issues that have already been addressed. *See FMC Wyoming Corp. & FMC Corp. v. Union Pac. R.R. Co.*, STB Docket No. 42022, at 1 n.2 (STB served Jan. 8, 1999) (rejecting a reply to a reply because it “simply appear[s] to be an effort to have the last word); *Potomac Elec. Power Co. v. CSX Transp., Inc.*, STB Docket No. 41989, at 1 n.1 (STB served June 27, 1997) (same); *Union Pac. R.R. Co.—Abandonment—In Lancaster & Gage Counties, NE, and Marshall County, KS*, STB Docket No. AB-33 (Sub-No. 140), at 2 (STB served Dec. 22, 1999) (same); *WTL Rail Corp. Petition for Declaratory Order & Interim Relief*, STB Docket No. 42092, at 2 (STB served June 23, 2005) (“The reply essentially repeats arguments previously made and, because replies to replies are prohibited under 49 C.F.R. 1104.13(c), it will not be considered.”); *Waterloo Ry. Co.—Adverse Abandonment—Lines of Bangor & Aroostook R.R. Co. & Van Buren Bridge Co. in Aroostook County, Maine*, STB Docket No. AB-124 (Sub-No. 2), at 3 (STB served May 6, 2003) (rejecting a reply to a reply where the reply was “merely an argument that CN’s interpretation of case law and view of its compliance burden is incorrect.”)

³ BNSF’s September 19, 2014 Reply Comments on Remand set out a full discussion of the relevant background and terminology, which is not repeated here.

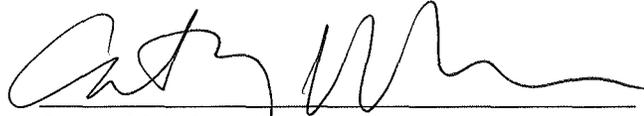
served Oct. 30, 2006), “the parties were well aware when they litigated the pending cases that these issues were in dispute. . . .”

On the question whether WFA/Basin should be entitled to file new SAC evidence if the Board applies Alternative ATC, WFA/Basin simply rehash their original argument that the Board *always* allows a complainant to file new SAC evidence when there is a change in a SAC methodology, ignoring the Board’s own language stating that the Board looks at whether the complainant’s traffic selection incentives have changed. Rather than supplying any concrete evidence at all to show that traffic selection incentives have changed (which, in any event, they could not do because the change from Modified ATC to Alternative ATC *does not* affect traffic selection incentives), WFA/Basin just repeat their vague claim that SAC assumptions are based on “extensive computer modeling” and “numerous inputs.” Request for Leave to Respond at 7. If the Board were to give WFA/Basin another bite at the apple here, it would be the first time that a complainant was allowed to refile SAC evidence where *there is no evidence at all* indicating that the complainant’s traffic selection incentives had changed.

Finally, WFA/Basin repeat their argument that they have a due process right to update the record with new data obtained through new discovery, although they do not cite a single case supporting such a due process right to “update.” They also repeat their dismissive argument that the Board need not worry about the complexity of assessing an updated SAC record, ignoring the unprecedented complexities that would arise from attempting to marry old data and old Board decisions on the evidence with a completely new set of data.

Because WFA/Basin have not shown good cause for accepting their reply to a reply but merely seek to rehash their prior arguments, the Board should reject WFA/Basin’s Request for Leave to Respond.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Samuel M. Sipe, Jr.', written over a horizontal line.

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Linda S. Stein
Kathryn J. Gainey
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-8119

Richard E. Weicher
Jill K. Mulligan
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

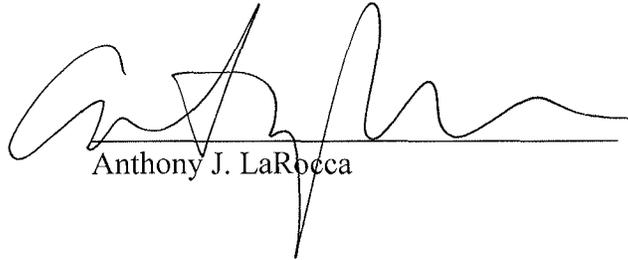
Attorneys for BNSF Railway Company

October 28, 2014

CERTIFICATE OF SERVICE

I hereby certify that this 28th day of October, 2014, I served a copy of BNSF Railway Company's Reply to Opposition to Complainants' Request for Leave to Respond to BNSF's Reply Comments On Remand on the following by e-mail:

John H. LeSeur
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036



Anthony J. LaRocca