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BEFORE THE
SURFACE TRANSPORTATION BOARD

WESTERN FUELS ASSOCIATION, INC., and BASIN ELECTRIC POWER COOPERATIVE	)	231511 231512
Complainants,	)	**Docket No. 42088 and 42088 (Sub-No. 1)**
v.	)	
BNSF RAILWAY COMPANY	)	
Defendant.	)	

BNSF RAILWAY COMPANY'S REPLY TO COMPLAINANTS' PETITION RESPONDING TO THE BOARD'S ORDER SERVED ON DECEMBER 9, 2011 IN F.D. NO. 35506

On December 9, 2011, the Surface Transportation Board ("Board") served a decision in *Western Coal Traffic League – Petition for Declaratory Order*, STB Finance Docket No. 35506 ("FD 35506"), in which it stated that it was issuing the 2010 URCS data for BNSF Railway Company ("BNSF") prior to reaching a decision in FD 35506 concerning the appropriate treatment in URCS of the acquisition premium paid by Berkshire Hathaway, Inc., when it acquired BNSF. The Board noted that the 2010 URCS data it was releasing for BNSF "reflect the increase in BNSF's net investment base following its acquisition by Berkshire." *Id.*, slip op. at 2. The Board also noted that two rate prescriptions would be affected by the increase in the net investment base as reflected in BNSF's 2010 URCS. The Board stated that "any party that believes the prescriptive effect of its 2012 rate prescription should be temporarily lifted pending the outcome of this proceeding should petition the Board to reconsider or reopen any relevant decisions." *Id.* Western Fuels Association, Inc., and Basin Electric Power Cooperative

("WFA/Basin") filed a petition in response to the Board's invitation in Docket Nos. 42088 and 42088 (Sub-No. 1) on December 14, 2011. ("WFA/Basin's Petition"). BNSF hereby responds to that petition.

In their petition, WFA/Basin seek to protect what they call their "refund rights" in the event the Board decides in FD 35506 that any acquisition "premium" associated with the Berkshire Hathaway acquisition should be removed from BNSF's 2010 URCS. WFA/Basin's Petition at 9-10. BNSF's position in FD 35506 is that the Board must reject the petition of Western Coal Traffic League, which asks the Board to depart from years of precedent and principles of sound economic regulation requiring the recognition of current asset values according to principles of GAAP purchase accounting and the adoption of those purchase accounting values for regulatory purposes. However, BNSF has repeatedly acknowledged in FD 35506 that the unique circumstances involved in the WFA/Basin rate prescription, which was imposed prior to the Berkshire transaction, could warrant a special review of the use of current asset values and URCS costs reflecting the Berkshire transaction in the specific context of the WFA/Basin rate prescription. WFA/Basin are the only BNSF shippers for whom a rate was prescribed as an R/VC ratio before the Berkshire transaction.

The possibility of such a review would necessarily have to be pursued in this docket, following the issuance of a decision in FD 35506 denying WCTL's petition.[1] BNSF continues to believe that if it prevails in FD 35506, the Board could nonetheless conclude that WFA/Basin should have the opportunity to demonstrate in the context of this docket that they are entitled to a rate prescription that is predicated on pre-Berkshire Hathaway asset values notwithstanding a

[1] BNSF takes no position on which docket related to the Board's rate prescription would be the proper docket to consider the issue.

decision in FD 35506 that rejects Western Coal Traffic League's request to disallow GAAP purchase accounting treatment for other regulatory purposes.[2]

WFA/Basin's Petition ignores the possibility that BNSF will prevail in FD 35506, and therefore does not address the scenario whereby the Board concludes that separate consideration of WFA/Basin's rate prescription in the context of this docket could be appropriate. Apart from this oversight, it appears that BNSF and WFA/Basin agree on the key rights of each of the parties that need to be protected while the Board addresses the purchase accounting issue, whether it is in the context of FD 35506 or in a subsequent proceeding relating specifically to WFA/Basin's rate prescription. Specifically:

- BNSF agrees that rates charged to WFA/Basin beginning with the increase from current levels that becomes effective in January 2012 should be based on the 2010 BNSF URCS released by the Board on December 9, 2011, until and unless those costs are modified by the Board in FD 35506 or in subsequent proceedings in this docket, or until BNSF URCS for subsequent years are released.

- BNSF agrees that if the Board subsequently modifies BNSF's 2010 URCS as a result of a decision in FD 35506 or in a subsequent proceeding initiated by WFA/Basin related to its specific rate prescription in the context of this docket, WFA/Basin should be entitled to a refund of any overpayments that result from the difference between the rates actually paid by WFA/Basin and the rates that WFA/Basin should have paid under the modified URCS.

- BNSF agrees that WFA/Basin's petition does not relate to and should not affect the Board's deliberations concerning the issues raised by the remand decision in *BNSF Railway Co. v. STB*, 604 F.3d 602 (D.C. Cir. 2010). As WFA/Basin notes, those issues have already been fully briefed.

While the bulk of WFA/Basin's petition addresses complicated procedural alternatives for protecting its interests, WFA/Basin focus on two basic concerns: (1) how to ensure that

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[2] In support of WCTL's opening evidence in FD 35506, Messrs. Crowley and Fapp advanced an argument that WFA/Basin might pursue in a proceeding in this docket for an adjustment to the WFA/Basin rate prescription. *See* Verified Statement of Thomas D. Crowley and Daniel L. Fapp in support of WCTL Opening Evidence and Argument, at 41-43 (submitted October 28, 2011).

WFA/Basin do not pay excessive rates while awaiting a decision on the purchase accounting issue, and (2) how to ensure that WFA/Basin can obtain a refund of rates already paid, if necessary, if BNSF's 2010 URCS costs are modified to exclude the effects of the purchase accounting adjustment. To address these concerns, WFA/Basin propose several different convoluted procedures involving different potential dockets and discuss legal theories relating to the case law that has evolved under *Arizona Grocery Co v Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932) ("*Arizona Grocery*"). WFA/Basin have complicated the issues unnecessarily. Given the broad agreement between the parties concerning rights that should be protected by a Board order, it is possible for the Board to take action without becoming ensnared in unnecessary legal and procedural disputes.

As to WFA/Basin's first concern about the rates it will be charged pending a decision by the Board on the purchase accounting issues as applied to WFA/Basin, those concerns can be addressed by a commitment from BNSF regarding the rates it will charge while the purchase accounting issue is pending in FD 35506 and, potentially, in a subsequent proceeding in this rate reasonableness docket. BNSF hereby commits that if the Board temporarily lifts the prescriptive effect of its rate prescription, BNSF will continue to charge WFA/Basin rates set at the R/VC levels previously prescribed by the Board, calculated in the manner approved by the Board, until the Board either reimposes the prior rate prescription or modifies the prior rate prescription, or until the prescription otherwise terminates. In other words, BNSF will calculate WFA/Basin's quarterly rate based on the most recent BNSF URCS published by the Board – presently the 2010 BNSF URCS released by the Board on December 9, 2011 – indexed in accordance with *Oklahoma Gas & Electric v. Union Pacific Railroad Co.*, STB Docket No. 42111 (decisions

served July 24, 2009 and Oct. 26, 2009).[3] BNSF's commitment concerning rates makes it unnecessary for the Board to order BNSF to establish specific rates during the pendency of a reopening.[4] The Board has relied on a party's commitment to take specific actions in the past. *See, e.g., C.F. Industries, Inc. v. Koch Pipeline Company*, STB Docket No. 41685, at 3 (served June 7, 2000).

Given this commitment by BNSF, WFA/Basin's second concern – securing its ability to obtain a refund – can be addressed in a straight-forward manner by applying the procedures that the Board has already established in *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) (served Oct. 30, 2006), to (1) reopen the decision in Docket No. 42088, (2) temporarily lift the prescriptive effect of the rate prescription and (3) order a reinstitution of the prescription and any appropriate refund after the purchase accounting issue has been resolved in FD 35506 or in a subsequent proceeding in this docket. If the Board follows its existing procedure by reopening the original docket, it can avoid the legal complexities that would arise if it attempted to develop new procedures along the lines suggested as alternatives by WFA/Basin. Indeed, the Board need not and should not address the complications suggested by WFA/Basin as to the application of *Arizona Grocery*. The *Major Issues* procedures were designed to ensure that a shipper could obtain a refund without running afoul of the *Arizona Grocery* prohibition against retroactive ratemaking.[5] If the Board follows those procedures, to which WFA/Basin do

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[3] Should the Board issue a decision on the remand issues that would change the level of the prescribed rate prior to reaching a decision in FD 35506, BNSF would calculate WFA/Basin's rates based on the R/VC level established by the Board's remand decision.

[4] The commitment also makes it unnecessary for the Board to confront questions concerning its legal ability to order some form of "interim prescription" and the entitlement of a shipper to obtain a refund when the railroad is charging a legally approved rate.

[5] *See Major Issues*, slip op. at 73-74.

not object, there is no reason to consider the complicated alternatives raised by WFA/Basin in their petition.

In light of the above, BNSF believes that the Board should take the following steps to protect the interests of all parties:

- Reopen Docket No. 42088;
- Temporarily lift the prescriptive effect of the rate prescription in Docket No. 42088;
- Complete its evaluation in FD 35506 of how the acquisition premium should be treated for regulatory purposes, including the impact on BNSF's URCS;
- If, as BNSF believes is appropriate, the Board denies the Western Coal Traffic League petition in FD 35506, the Board could nonetheless permit WFA/Basin to raise the purchase accounting issue in the context of the WFA/Basin rate prescription in this docket;
- Order appropriate relief, including reimposition of the prescription and payment of necessary refunds once the proceedings in FD 35506 and any follow-on proceeding in this docket have been completed.

Respectfully submitted,

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December 19, 2011

CERTIFICATE OF SERVICE

I hereby certify that this 19th day of December, 2011, I served a copy of BNSF's Reply to Complainants' Petition Responding to the Board's Order Served on December 9, 2011 in F.D. No. 35506 on the following by hand delivery:

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