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SERVICE DATE – JULY 25, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42113

ARIZONA ELECTRIC POWER COOPERATIVE, INC.

v.

BNSF RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY

Digest:¹ In light of a decision issued concurrently by the Board in another proceeding regarding the markup of BNSF Railway Company's railroad assets, the parties are directed to confer and comment on approaches to reinstating the rate prescription in this proceeding.

Decided: July 24, 2013

In 2008, Arizona Electric Power Cooperative, Inc. (AEPCO) filed a complaint challenging the reasonableness of the joint rates established by BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP) for unit train coal transportation service from New Mexico and the northern portion of the Powder River Basin in Wyoming and Montana to AEPCO's Apache Generating Station located near Cochise, Ariz. In a decision served on November 22, 2011, the Board found that AEPCO had shown that BNSF and UP have market dominance over those movements, and that their rates exceeded the level defendants needed to charge to earn a reasonable return on the full replacement cost of the facilities used to serve AEPCO. Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113 (STB served Nov. 22, 2011). In that decision, the Board prescribed the maximum lawful rate that BNSF could charge, 180% of variable cost.

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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

In 2010, BNSF was acquired by Berkshire Hathaway Inc. (Berkshire). Subsequently, BNSF submitted to the Board its Class I Annual Report (STB Form R-1) for the year ending December 31, 2010, in which it revalued its railroad assets to reflect their fair market values in light of the acquisition as required by Generally Accepted Accounting Principles and the Board's regulations. Some of the increases in the value of BNSF's railroad assets are also reflected in the Uniform Railroad Costing System (URCS) data for 2010 and 2011. On May 2, 2011, the Western Coal Traffic League (WCTL) filed a petition asking the Board to adjust BNSF's URCS data for 2010 and subsequent years to exclude the revaluation of BNSF's railroad assets attributable to Berkshire's acquisition of BNSF, and to make corresponding changes in BNSF's annual URCS depreciation calculations. The Board subsequently instituted a proceeding, Western Coal Traffic League—Petition for Declaratory Order (Western Coal), Docket No. FD 35506, to consider the issues raised in WCTL's petition. W. Coal Traffic League—Pet. for Declaratory Order, FD 35506 (STB served Sept. 28, 2011).

On December 9, 2011, the Board issued a decision in the Western Coal proceeding advising parties with BNSF rate prescriptions in effect in January 2012 that, if they believed the Board should temporarily lift the prescriptive effect of their 2012 rate prescription pending final resolution of the issues in Western Coal, they should petition the Board to reconsider or reopen relevant Board decisions. W. Coal Traffic League—Pet. for Declaratory Order, FD 35506, slip op. at 2 (STB served Dec. 9, 2011). In response, AEPCO filed a petition to reopen this proceeding. On January 20, 2012, we concluded that changed circumstances relating to the purchase of BNSF by Berkshire justified the reopening of this proceeding. We temporarily lifted the prescriptive effect of the prior rate order, and instructed the parties to keep account of the amounts paid during the pendency of the reopening and to make the other party whole, at the conclusion of the reopening, with respect to the amounts paid during the interim. We then held the proceeding in abeyance pending final resolution of Western Coal.

In a decision served today in Western Coal, the Board concluded that BNSF may not revalue its railroad assets to reflect a markup during the years 2010, 2011, and 2012. The Board also held that, for 2013 and beyond, BNSF is required to mark up its rail assets in accordance with Generally Accepted Accounting Principles, but subject to a four-year transition period. W. Coal Traffic League—Pet. for Declaratory Order, FD 35506, slip op. at 2 (STB served July 25, 2013) (Commissioner Mulvey dissenting in part regarding four-year transition process). In that decision, we discuss the two current BNSF rate prescriptions. In Western Fuels Association, Inc. v. BNSF Railway Co., Docket No. NOR 42088, the plaintiffs have a rate

prescription that ranges from 229% to 267%.² With respect to that prescriptive rate, the Board noted that the maximum lawful rate was calculated using projections of variable costs that did not include any markup attributable to the recognition on BNSF's books of the 2010 fair market value of BNSF's road investment. W. Coal Traffic League—Pet. for Declaratory Order, FD 35506, slip op. at 14-15. We stated that, “[i]f we do not adjust the rate prescription, BNSF would be able to charge higher rates to [the plaintiffs] based on a revaluation of fixed costs that we already recognized in our rate prescription.” Id. at 15.

Although the same rationale typically would apply to AEPCO's prescribed rate, the prescription in this proceeding is already set at the jurisdictional floor of 180%. See Ariz. Elec. Power Coop. v. BNSF Ry., NOR 42113, slip op. at 37 (STB served Nov. 22, 2011). Therefore, unlike in Western Fuels Association, Inc. v. BNSF Railway Co., Docket No. NOR 42088, we are prohibited from adjusting the rate prescription downward in this proceeding. Accordingly, we have identified two options for reinstating the rate prescription. Specifically, the Board could reinstate the rate prescription at this time, or the Board could defer reinstating the prescription until after the Board issues revised URCS data for 2010 and 2011. We ask the parties to confer and comment on these approaches, or an alternate approach within the Board's jurisdiction, by September 23, 2013.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. AEPCO and defendants shall advise the Board on approaches to reinstating the rate prescription in this proceeding by September 23, 2013.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.

² The maximum lawful rate, which varies from year to year, was established in a February 18, 2009 decision, and modified slightly by a decision served on June 5, 2009. See W. Fuels Ass'n v. BNSF Ry., NOR 42088 (STB served June 5, 2009).