

SERVICE DATE – JULY 25, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42088

WESTERN FUELS ASSOCIATION, INC., AND
BASIN ELECTRIC POWER COOPERATIVE

v.

BNSF RAILWAY COMPANY

Digest:¹ In light of a decision issued concurrently by the Board in another proceeding regarding the markup of the defendant rail carrier's railroad assets, the parties are directed to confer and propose a suitable mechanism to adjust the current rate prescription to hold the plaintiffs harmless from the revaluation of the defendant's railroad assets.

Decided: July 24, 2013

In 2004, Western Fuels Association, Inc., and Basin Electric Power Cooperative, Inc. (collectively, WFA) filed a complaint challenging the reasonableness of the rates charged by BNSF Railway Company (BNSF) for movements of coal from origins in the Powder River Basin in Wyoming to WFA's Laramie River Station coal-fired electric utility plant at Moba Junction, Wyo. In a decision served on February 18, 2009, the Board found that WFA had shown that BNSF has market dominance over those movements, and that its rates exceeded the level BNSF needed to charge to earn a reasonable return on the full replacement cost of the facilities used to serve WFA. W. Fuels Ass'n v. BNSF Ry., NOR 42088 (STB served Feb. 18, 2009). Accordingly, the Board ordered BNSF to pay reparations (with interest) to WFA for shipments dating back to the fourth quarter of 2004. Id. at 2. In a decision served June 5, 2009, the Board modified the rate prescription to correct technical and computational errors contained in its earlier decision. W. Fuels Ass'n v. BNSF Ry., NOR 42088 (STB served June 5, 2009).

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).

Subsequently, on July 27, 2009, the Board addressed a dispute over the method for calculating the maximum lawful rate. W. Fuels Ass'n v. BNSF Ry., NOR 42088 (Sub-No. 1) (STB served July 27, 2009).²

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, WFA filed a petition to reopen this proceeding, to which BNSF agreed. 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

² BNSF appealed the three aforementioned Board decisions to the United States Court of Appeals for the District of Columbia Circuit. BNSF Ry. v. STB, 604 F.3d 602 (D.C. Cir. 2010). Explaining that the Board did not address one of BNSF's objections to the use of modified average total cost (ATC), the court remanded the matter to the Board to address that concern. Id. at 604. After considering the parties' submissions on remand, the Board reaffirmed its use of the modified ATC methodology in a decision served June 15, 2012. W. Fuels Ass'n v. BNSF Ry., NOR 42088 (STB served June 15, 2012), pet. for review docketed, No. 12-1327 (D.C. Cir. July 23, 2012).

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, Docket No. 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. With respect to this proceeding, 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. Id. at 14-15. We stated that, "[i]f we do not adjust the rate prescription, BNSF would be able to charge higher rates to WFA based on a revaluation of fixed costs that we already recognized in our rate prescription." Id. at 15.

Accordingly, we are now directing WFA and BNSF to confer regarding a suitable mechanism to adjust the current rate prescription to hold WFA harmless from the markup of BNSF's rail assets. We have identified two potential approaches. The existing rate prescription could be revised to fixed rates per ton for the 20-year stand-alone cost analysis period. This would lose the flexibility of our current approach, but seems to be the simplest way to hold WFA harmless. Alternatively, the rate prescription could be restated using updated URCS data that reflect the gradual markup of rail assets beginning in 2013. The parties shall confer in order to settle upon a mutually agreeable solution, which may be one of these approaches or another of their choosing, and advise the Board of how to adjust the prescribed rates by September 23, 2013. If the parties cannot agree on an approach, the parties shall so advise the Board by September 23, 2013, and the Board will decide on an appropriate approach.

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

It is ordered:

1. WFA and BNSF shall advise the Board of how to adjust the prescribed rates by September 23, 2013. If the parties cannot agree on an approach, the parties shall so advise the Board by September 23, 2013, and the Board will decide on an appropriate approach.

2. This decision is effective on its service date.

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