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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. 41191

WEST TEXAS UTILITIES COMPANY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: September 7, 2007

This decision reopens this proceeding and vacates, as of the effective date of this decision, the rate prescription for coal shipments transported by BNSF Railway Company<sup>1</sup> from the Rawhide mine in the Powder River Basin of Wyoming to the Oklaunion electric generating station of West Texas Utilities Company (WTU).<sup>2</sup>

BACKGROUND

In 1996, the Board determined that the challenged rate charged by BNSF Railway Company exceeded the maximum reasonable rate as determined under the stand-alone-cost (SAC) test. West Texas Utilities Company v. Burlington Northern R.R. Co., 1 S.T.B. 638 (1996) (West Texas I). However, the Board did not set the maximum reasonable rate at the level of the SAC rate because at the outset of the 20-year SAC analysis period the revenues that would be produced by the SAC rate would have been less than 180% of BNSF's variable cost of providing the service—the floor under 49 U.S.C. 10707(d)(1)(A) for regulatory rate intervention. Therefore, the Board prescribed the maximum rate at the 180% revenue-to-variable cost (R/VC) level (then, \$13.68 per ton). Id. at 677-78. That rate prescription was limited to movements originating from the Rawhide mine (the mine from which WTU had been obtaining its coal) because of deficiencies in the record with respect to any other Powder River Basin (PRB) mine origins. The Board noted that it would address the maximum reasonable rate from other mine origins if appropriate supplemental evidence were submitted. Id. at 644.

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<sup>1</sup> Originally, the defendant railroad was the Burlington Northern Railroad Company (BN). It subsequently merged with The Atchison, Topeka and Santa Fe Railway Company (ATSF) to become the Burlington Northern and Santa Fe Railway Company, which has since changed its name to BNSF Railway Company (BNSF). For purposes of this decision, we will refer to the defendant as BNSF throughout the entire time period.

<sup>2</sup> WTU has since been succeeded in interest by AEP Texas North Company. For purposes of this decision, we will continue to refer to the complainant as WTU.

The Rawhide mine closed in 1997, and WTU began to procure its coal from other PRB mines. Initially, BNSF voluntarily applied the same rate as prescribed for Rawhide to movements from other PRB mines. In 2000, however, BNSF notified the Board that it intended to increase its rate for movements from non-Rawhide mines, and it asked the Board to confirm that the West Texas I rate prescription applied only to movements from the Rawhide mine. In a decision served November 7, 2000, the Board ruled that BNSF did not need Board approval to raise its rate from other PRB mine origins. When BNSF subsequently raised its rate to the Oklaunion generating station plant from other PRB mines (to \$18.04 per ton), WTU filed a separate complaint challenging the reasonableness of the rates applicable to the non-Rawhide mines.<sup>3</sup>

In the meantime, the Rawhide mine had reopened in 2002 and WTU had begun shipping coal from Rawhide again. In April 2003, BNSF asked the Board to modify the Rawhide prescription so that it could charge the higher of the 180% R/VC rate floor or the previously determined SAC rate. It argued that the Board had erred in West Texas I by not providing for it to be able to charge the SAC rate when that rate exceeds the 180% R/VC rate floor. The Board agreed and, in a decision reported at 6 S.T.B. 919 (2003) (West Texas II), reopened the proceeding to correct that error and revised the prescription to allow BNSF to charge the higher of the SAC rate level or the 180% R/VC rate level.

The Board, however, declined in West Texas II to consider WTU's assertion that the original SAC analysis was outdated. The Board explained that WTU would need to file a petition demonstrating changed circumstances sufficient to warrant reopening the case. In a further decision served July 23, 2003 (West Texas III), the Board clarified that, upon a reopening, WTU could not change the fundamental assumptions upon which the original SAC analysis had been based. Rather, to alter the basic assumptions underlying the prescription and relitigate the reasonableness of the rate, the shipper would first have to have the rate prescription vacated and then bring a new rate complaint challenging whatever new rate the carrier chose to establish.

After West Texas II, BNSF raised the Rawhide rate to the SAC rate level (\$18.04 per ton in 2003).<sup>4</sup> WTU sought reconsideration of West Texas II. It argued that, had current circumstances existed when the record was developed, its SAC presentation and the resulting rate prescription would have been different. For example, it argued that its SAC presentation would have embraced the traffic that now moves to six additional power plants that BNSF has

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<sup>3</sup> AEP Texas North Co. v. BNSF Ry., STB Docket No. 41191 (Sub-No. 1) (filed Aug. 11, 2003) (AEP Texas). WTU refused to pay the increase above \$13.68 per ton on the non-Rawhide movements. See AEP Texas Open Narr. at I-6. BNSF sought to collect the underpayment in the United States District Court of the Northern District for Texas, Fort Worth Division. The District Court has stayed BNSF's collection action pending the Board's determination of the reasonableness of the increased rate for non-Rawhide movements.

<sup>4</sup> On December 22, 2003, AEP Texas sought to supplement its 2003 complaint to include the December 2003 BNSF rate increases, including the rate increase for Rawhide movements.

since begun serving, and it would have reflected efficiencies when serving two of the eleven power plants in the initial traffic group resulting from the intervening merger of BN and ATSF.

As suggested by the Board in West Texas III, WTU also filed a petition to vacate the Rawhide prescription. In that petition, WTU argued that a request by the shipper, as the beneficiary of the rate prescription, provided a sufficient basis upon which to vacate an outstanding rate prescription. Alternatively, it argued that reopening and vacatur was justified by changes in factual circumstances, legal standards and regulatory policies since the 1996 West Texas I decision. Specifically, WTU pointed to long-term shifts in coal traffic patterns, impacts of railroad mergers, unanticipated changes in inflation rates and the cost of capital in the railroad industry, and refinements in the Board's SAC methodology.

In a decision served March 19, 2004 (West Texas IV), the Board vacated the Rawhide prescription based solely on the fact that the shipper had requested that action. The Board acknowledged that, when it is the railroad seeking to have a rate case reopened, the railroad must demonstrate that the statutory standard in 49 U.S.C. 722(c) for reopening a prior Board action (i.e., material error, new evidence or substantially changed circumstance) has been met. And to justify vacating—rather than simply recalculating—an outstanding rate prescription, the railroad must demonstrate that the factual and legal underpinnings of that original prescription no longer continue to have validity, citing San Antonio, Tx. v. Burlington N., Inc., 364 I.C.C. 887, 896 (1981) (San Antonio). But the Board held that the shipper did not need to make the same showings.

The Board reasoned that, as “the proponent and beneficiary of the rate prescription, the complaining shipper should be entitled to have that prescription vacated upon request, without having to show that the prescription is now defective.” West Texas IV, slip op. at 3. The Board explained that this policy would ensure that a captive shipper who prevails on its rate complaint in the first instance does not later end up in a worse position—by having to bear a higher rate than would be justified under a new SAC analysis. Accordingly, the Board did not reach the issue of whether sufficient changed legal and factual circumstances had been shown to justify vacatur.

BNSF did not increase its rate for shipments from Rawhide in response to the Board's action.<sup>5</sup> Instead, BNSF sought judicial review of the West Texas IV decision on the ground that the rate prescription could not be vacated without the Board first making the findings required to reopen the case under section 722(c). BNSF argued that there could not be different standards for vacating a prescription depending upon which party requests the action, as the carrier also benefits from a rate prescription (by obtaining certainty as to the lawfulness of that rate).

In Burlington N. & S.F. Ry. v. STB, 403 F.3d 771 (D.C. Cir. 2005) (West Texas Remand), the reviewing court held that the Board had not justified applying different standards

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<sup>5</sup> On April 19, 2004, WTU sought to further amend its complaint in AEP Texas, to challenge the reasonableness of the previously-prescribed rate level as the rate level selected by BNSF.

depending upon which party requested the vacatur. Accordingly, the court vacated the West Texas IV decision and remanded the case to the Board.

WTU asks that on remand the Board further explain and reaffirm the West Texas IV principle that a rate prescription can be vacated based solely on the shipper's request. Alternatively, WTU argues that the record that it presented to the Board prior to the West Texas IV decision contains a sufficient demonstration of changed circumstances to warrant reopening and a finding under San Antonio that the factual and legal underpinnings of the Rawhide prescription are no longer valid. Finally, WTU argues that, notwithstanding the court's remand, the Board's order vacating the Rawhide prescription continues in effect until superseded by another Board order.

BNSF argues that the Board cannot reaffirm its prior holding, as WTU's arguments in support of that approach have been rejected by the court in West Texas Remand. BNSF further argues that WTU has not justified reopening the case and vacating the prescription, as WTU has not shown that any material assumptions used in the SAC analysis were incorrect. Finally, BNSF argues that the effect of the court's decision vacating and remanding the Board's West Texas IV order was to revive the Rawhide prescription. Thus, according to BNSF, any attempt to affect the prescription before the effective date of this decision would constitute prohibited retroactive ratemaking.

#### DISCUSSION AND CONCLUSIONS

The Board responded in part to the court's remand in Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1) (STB served Oct. 30, 2006) (Major Issues), by revising the standards for requests to reopen a rate case and/or vacate a rate prescription. Under the revised standards, when either party to a rate prescription seeks to reopen the proceeding in order to alter or vacate the rate prescription, it must first make the showing required under 49 U.S.C. 722(c) of material error, new evidence,<sup>6</sup> or substantially changed circumstances. Once a party has justified reopening a rate proceeding, the Board will consider whether the changes sought can be reasonably addressed in a reopened proceeding, or if the further step of vacatur is required. The Board will first decide whether there continue to be reasonable grounds for investigation of the rate under 49 U.S.C. 11701(b).<sup>7</sup> If there continue to be reasonable grounds for a rate investigation, the Board will examine the factual underpinnings of the prior SAC analysis (and any resulting rate prescription) to determine if the Board can suitably conduct the investigation within the framework of the old SAC analysis (in a reopened proceeding), or whether a new SAC analysis (after vacatur) is needed because the underlying assumptions have changed drastically.

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<sup>6</sup> The term "new evidence" refers to evidence that was not reasonably available to the party when the record was developed, and not simply newly raised. Toledo, Peoria & Western Ry. v. STB, 462 F.3d 734, 753 (7th Cir. 2006).

<sup>7</sup> For example, if the carrier no longer has market dominance, reasonable grounds to investigate would no longer exist because the Board would no longer have regulatory jurisdiction over the level of the rate charged by the carrier. See Major Issues at 69-70.

No party has challenged these revised standards.<sup>8</sup> In this decision, we apply these standards to this case, based on the record before us.

### Grounds for Reopening

WTU points to four areas of significant unanticipated change. The first is that there is now substantially more coal traffic moving along BNSF's Front Range route than what had been forecast. The West Texas I decision presumed that the group of BNSF-served unit-train coal shippers using the Front Range route (then 11) would remain unchanged and that additional generating capacity would be added by only three of those shippers.<sup>9</sup> However, there are now six additional coal shippers using that route, and the additional generating capacity that is now expected to be served by 2014 is beyond what was previously forecast. Based on publicly available data, WTU now estimates that the volume of coal traffic that the stand-alone railroad (SARR) could serve over that route would likely have been 21% higher than what was assumed in West Texas I for 2003<sup>10</sup> and 13% higher than what was assumed for 2014. WTU argues that this additional traffic volume should now be reflected in the SAC analysis.

As the Board has explained,<sup>11</sup> short-term, year-to-year fluctuations that do not undermine the long-term projections do not warrant reopening. Rather, there must be a long-term shift in traffic patterns. Here, it appears that the additional traffic volumes and associated revenues are significant and are expected to continue for the remainder of the SAC analysis period that was used in West Texas I.

BNSF argues that reopening the proceeding to add shippers to the SARR's traffic group would represent a "fundamental change in the nature of the SARR" and should not be allowed, especially here because the traffic from the additional shippers would be cross-over traffic<sup>12</sup> and the 1996 analysis did not include any cross-over traffic.<sup>13</sup> But had this additional traffic been

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<sup>8</sup> Although there are various pending petitions for judicial review of our Major Issues decision, see Norfolk S. Ry. v. STB, No. 06-1373 et al. (D.C. Cir. filed Nov. 14, 2006), no party has indicated that it will challenge this part of that decision.

<sup>9</sup> See West Texas I at 657, 661 n.48, 664.

<sup>10</sup> WTU calculates that, for 2003, the additional traffic would yield an additional \$32 million dollars of gross revenue in that year alone. The net additional revenues would be somewhat less, as the SARR's operating and capital costs would increase with the increase in traffic levels, although there presumably would be additional economies of density as well.

<sup>11</sup> Arizona Public Service Co. v. Atchison T. & S.F. Ry., 3 S.T.B. 70, 75 (1998).

<sup>12</sup> Cross-over traffic is traffic that would be routed over the SARR for only a part of the movement and would be interchanged with what would remain of the defendant carrier's system. See PPL Montana, LLC v. STB, 437 F.3d 1240, 1243 (D.C. Cir. 2006).

foreseen, WTU likely would have included it.<sup>14</sup> As we determined in Major Issues, at 72-73, reopening and vacatur is an appropriate avenue to address unforeseen significant changes to the available traffic.<sup>15</sup>

The second area of change upon which WTU relies is the major mergers of western railroads that have occurred since the record was developed West Texas I. BN has merged with ATSF, and Southern Pacific Transportation Company (SP) has merged into Union Pacific Railroad Company (UP). WTU contends that its SARR should now be able to replace the merged BN/ATSF and handle the entire movement for shipments destined for the Tolk and Harrington plants in Amarillo, TX.<sup>16</sup> (Of course, any revised SAC analysis would also need to take into account traffic that BNSF has lost due to the merger of SP and UP.)

The third change presented by WTU is that the forecasts used by the Board in West Texas I for rates of inflation and the cost of capital in the rail industry, see West Texas I at 712-16, have proven inaccurate. The West Texas I analysis used 5-year historical averages, rather than industry forecasts. WTU observes that inflation has moderated from the historic levels that it was assumed would continue, and the rail industry's cost of capital has also declined. Thus, while West Texas I forecast prices for materials and supplies to rise by 8.52% per year, WTU asserts that those prices have actually risen by only 0.25% per year.<sup>17</sup> And the railroad industry's cost of capital declined from 12.21% in 1994 to 9.75% in 2003.

BNSF argues that WTU has not shown that the 1996 economic forecasts were so far off the mark—and so central to the rate prescription—as to invalidate the Board's prior rate reasonableness analysis.<sup>18</sup> However, given the long-term nature of a SAC analysis, overstating inflation and the annual cost of capital can have a substantial impact on the analysis and the resulting level of the maximum reasonable rate.

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<sup>13</sup> See BNSF's Reply to AEP Texas' Petition on Remand at 16. WTU points out that the 1996 analysis included traffic that would be local to the SARR, citing West Texas I at 658 (listing Coletto Creek and Jeffrey Energy Center as shippers with non-local moves). See Petition on Remand at 12.

<sup>14</sup> See West Texas I at 657 ("The SAC analysis assumes that [the SARR] would replace BN, that is, step into the shoes of BN under [its] existing transportation contracts.")

<sup>15</sup> In its Reply to the Petition on Remand, BNSF relied upon the Board's decision in Arizona Public Serv. Co. & Pacificorp v. The Burlington N. and S.F. Ry., STB Docket No. 42077 (STB served May 12, 2003) (APS). As we observed in Major Issues at 73 n.257, had APS been decided under our current standard, the outcome in that case would likely have been different.

<sup>16</sup> This assumes that the SARR would construct a 1.5 mile spur to the Harrington plant.

<sup>17</sup> Crowley V.S. at 16.

<sup>18</sup> See BNSF's Reply to AEP Texas' Petition on Remand at 15 (May 26, 2005).

Finally, WTU argues that a change in how the Board applies the discounted cash flow (DCF) model in SAC cases constitutes a changed circumstance. In West Texas I, the Board allocated capital recovery charges based on changes in forecasted traffic volumes over the 20-year DCF period. The Board has since found that procedure to be inappropriate in cases where traffic is projected to increase dramatically, because a volume-based model would assign a disproportionately large share of capital carrying charges to the later part of the 20-year period.<sup>19</sup> However, it remains unclear whether a prospective change regarding this issue could be made without creating an inappropriate windfall for the shipper by not properly accounting for all costs over the DCF period.

We do not need to determine whether each, or even any one, of the changed circumstances, standing alone, would necessarily merit reopening. When the cumulative impact of all of the changes identified by WTU is considered, it is clear that the effect of the changes is substantial<sup>20</sup> and warrants reopening under section 722(c). Indeed, it is because many unanticipated changes can occur over 10 years that we now limit future rate prescriptions in SAC cases to 10 years.<sup>21</sup>

#### Reasonable Grounds for Investigation

Because WTU has satisfied the threshold standard for reopening this proceeding, we turn to whether there continue to be reasonable grounds for investigation of the rate under 49 U.S.C. 11701(b). Here, there is no suggestion that BNSF no longer has market dominance over this traffic. Therefore, we will now consider how to proceed given the nature and extent of the changes that led us to reopen this proceeding

#### Reopening vs. Vacatur

We must decide whether we can continue to examine the reasonableness of the challenged rate within the framework of the prior SAC analysis (i.e., in a reopened proceeding), or whether we should instead vacate the rate prescription and dismiss this proceeding so that a new and different SAC analysis can be presented in a new proceeding. As we explained in Major Issues, this determination must be made on a case-by-case basis. Some types of changes can be integrated into an old SAC analysis without undue complications and without compromising the integrity of the SAC analysis. Others may be ill-suited to working within the

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<sup>19</sup> FMC Wyoming Corp. & FMC Corp. v. Union Pac. R.R., 4 S.T.B. 699, 740 (2000).

<sup>20</sup> BNSF argues that, even if all of WTU's changes are accepted and taken into account, the cumulative effect would be too modest to justify reopening under the capital recovery pattern used by the Board in 1996. However, the \$83 million figure cited by BNSF, which is expressed in 1994 dollars, does not fully capture the current dollar value of those changes. Moreover, using the Board's more recent capital recovery policy, WTU estimates that the maximum reasonable rate for 2007 would be \$17.47 per ton—a decrease of over \$3 per ton from the \$21.70 per ton SAC rate for 2007 computed in West Texas II. See Crowley V.S. at 22.

<sup>21</sup> Major Issues at 64. This aspect of Major Issues has not been challenged in court.

framework of an old SAC analysis. And at some point, attempting to interweave old and new SAC presentations could become so complicated and convoluted that it is better to vacate an existing prescription and start afresh, allowing the complainant to design a new SARR that would yield a more reliable result. Accordingly, we look to see whether extensive changes to the traffic group or the configuration of the SARR are necessary to take into account the changes warranting the reopening.

Some of the changes involved here are the sort that generally could be accommodated within the framework of the prior SAC analysis. These would include changes to the inflation forecasts that were used, as such recalculations would not alter any fundamental assumptions of the original SAC analysis. See Major Issues at 70.

However, there are other changes that would more fundamentally alter the SAC analysis and do not lend themselves to being readily integrated into the prior SAC analysis. These include the additional traffic that has been identified by WTU for inclusion in the traffic group. To take this additional traffic into account, we would need to consider not only the additional revenues available from that traffic but also the increased costs of handling that traffic, including any needed capacity upgrades. BNSF is likely correct that a SARR with such a substantially higher volume of traffic, much of which would be cross-over traffic, would have been designed differently at the outset. Thus, it is difficult to see how a major design change could be grafted onto the SARR that was designed in 1996, when the prospect of that traffic was not foreseen.

Similarly, the changes to the operating plan made possible by the BN/ATSF merger directly impact how some of the SARR's traffic would be handled, possibly reducing switching and other costs, or possibly resulting in configuration changes. These are also changes that would appear to be difficult to accommodate in the original SAC framework. Moreover, the results of a patchwork analysis would be unreliable.

Accordingly, we will vacate the Rawhide prescription.

#### Effective Date of Vacatur

Having determined that the West Texas I rate prescription, as modified in West Texas II, should be vacated, we must decide whether this vacatur applies only prospectively (from the effective date of this decision) or can relate back to the date of the Board's earlier vacatur order. The parties differ as to the effect of the court's West Texas Remand decision. BNSF argues that the effect was to cancel the Board's earlier order, thus reviving the Rawhide prescription, and that any attempt by the Board to affect the prescription before today's decision would be retroactive ratemaking prohibited by Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370 (1932) (Arizona Grocery). WTU takes a contrary position. It argues that, because federal courts lack the power to dictate railroad rates, the Board's earlier vacatur of the Rawhide prescription stands pending further order of the Board, and that the rate that BNSF has been charging since 2004 can be challenged and reparations awarded if that rate is now shown to be unreasonably high back to the effective date of the earlier vacatur.

An appellate court may choose to remand an agency action for further consideration or explanation, or it may go a step further and vacate the agency's action. In West Texas Remand, 403 F.3d at 778, the court expressly vacated the Board's West Texas IV decision. The consequence of an appellate decision vacating an administrative order is to render the vacated order without force or effect, *see, e.g., Action on Smoking and Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir. 1983), and to restore the pre-existing status quo. Busboom Grain Co., Inc. v. ICC, 830 F.2d 74, 76 (7th Cir. 1987); Milk Train, Inc. v. Veneman, 310 F.3d 747, 756 (D.C. Cir. 2002). In other words, the vacatur of an agency action usually acts to "reinstate the last valid administrative determination." Greene v. United States, 376 U.S. 149 (1964). *See also* Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217 (1925). Thus, the logical effect of West Texas Remand was to restore the rate prescription that the court found had been improperly vacated.

WTU argues that this interpretation of the effect of the court's decision is incompatible with the limited role of the federal courts with regard to rate setting. WTU cites Burlington Northern Inc. v. United States, 459 U.S. 131 (1982) (Burlington Northern), and its predecessor cases,<sup>22</sup> for the proposition that the court lacked the power to reinstate a prescription that the Board had vacated. In Burlington Northern, the Supreme Court reversed a court of appeals order that had reinstated a temporary stop-gap rate prescription (referred to as the San Antonio rate) imposed by the Board's predecessor, the Interstate Commerce Commission (ICC), after finding subsequent ICC rate prescriptions (referred to as the San Antonio II and San Antonio III rates) to be "arbitrary and capricious."

In Burlington Northern, the Court itself addressed the three operative principles involved in that case (459 U.S. at 141-42 (citations omitted)):

[O]ur cases stand for three propositions: (1) under the Interstate Commerce Act, primary jurisdiction to determine the reasonableness of rates lies with the Commission; (2) federal-court authority to reject Commission rate orders for whatever reason extends to the orders alone, and not to the rates themselves; (3) where there is a dispute about the appropriate rate, the equities favor allowing the carrier's rate to control pending decision by the Commission, since under the Act, the shipper may receive reparations for overpayment while the carrier can never be made whole after underpayment.

Applying those principles to that case, the Court concluded that, by attempting to revive the San Antonio I rate order, the court of appeals had impermissibly frozen the rate that the railroad could charge prior to a decision by the ICC as to what a reasonable rate was. *Id.* at 142. The

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<sup>22</sup> *E.g., Atchison, T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 819 (1973) (holding that a district court injunction precluding carriers from imposing certain charges that had been found reasonable by the ICC was improper where "suspension of the ICC's order [did] not in itself preclude carriers from implementing new rate").

Court ruled that the proper effect of striking the orders in San Antonio II and San Antonio III was to leave in effect the rates filed under ICC authority pending the ICC's redetermination of a reasonable rate. Id. at 144. Thus, under Burlington Northern, where the agency's order establishing a rate prescription is found by a court to be invalid, that prescription is vacated.<sup>23</sup>

This case presents a different situation. The West Texas Remand did not overturn a Board rate prescription, but rather a Board decision vacating a presumptively valid rate prescription.<sup>24</sup> In contrast to the situation in Burlington Northern, the West Texas I prescription, as modified by West Texas II, had not been a temporary stop-gap order meant to expire quickly. Rather, it was a 20-year rate prescription set to remain in effect until 2013 absent superseding Board action. Moreover, unlike the San Antonio I order, which had been extinguished by its own terms by San Antonio II, there is no doubt that, up until the Board's West Texas IV decision, the West Texas I prescription (as modified by West Texas II)<sup>25</sup> was in full effect.

Significantly, in the overturned West Texas IV decision vacating that prescription, the Board did not find the prescribed rate to be wrong or its prior SAC analysis to have become unreliable, but rather only that the *shipper* had come to believe that the 1996 prescription was no longer in its interest. Thus, when the court rejected the Board's basis for terminating what was still a presumptively valid prescription, it was within the court's authority to vacate the Board's 2004 decision, thereby limiting rates in the meantime to the maximum levels the Board itself had previously determined to be reasonable for the remaining years of the prescription.

In short, the concerns expressed by the Supreme Court in Burlington Northern regarding the dangers of a court superseding the agency's rate reasonableness authority are not present

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<sup>23</sup> See also Union Pac. R.R. v. United States, 637 F.2d 764, 767-68 (10th Cir. 1981) (setting aside ICC rate prescription); Union Pac. R.R. v. Nevada Power Co., 950 F.2d 1429, 1432 (9th Cir. 1991) (holding that the effect of the 10th Circuit's decision was to leave the carrier's previously filed rates in effect). In the Union Pacific cases, but for the vacated rate prescription, the only legal rate would have been the tariff rates filed by the railroad with the ICC. Here, in contrast, but for the vacated decision, the legal rate would have been that prescribed by West Texas I, as modified by West Texas II. But for the Board's West Texas IV decision, BNSF would have had no ability to charge a rate higher than that already prescribed by the Board.

<sup>24</sup> Because it was a vacatur order issued solely on the request of the shipper, it is not even clear that the Board's West Texas IV decision was a "rate order" (i.e., a decision establishing the lawful rate) within the scope of what the Supreme Court was addressing in Burlington Northern. However, even if it could be viewed as a rate order, in the sense that it restored the railroad's ability to set its own rates, it was not the equivalent of an order prescribing the maximum reasonable rate.

<sup>25</sup> The West Texas II modification corrected "what [was] in effect a technical error" that foreclosed BNSF's ability to charge the higher of the SAC rate or the 180% R/VC level. West Texas II at 922. This revision did not extinguish West Texas I, but modified it.

here.<sup>26</sup> Where there is a valid rate prescription that would otherwise be in place but for the Board's vacatur of the prescription for the convenience of the shipper, there is no bar to construing a court decision vacating the Board's order as a revival of the valid rate prescription. Accordingly, we reject WTU's assertion that notwithstanding the express vacating language in the court's decision the Board's West Texas IV decision continued in force pending further Board action.

Under Arizona Grocery, a rate prescription is a legislative action in nature and has the force of a statute in establishing the lawful rate. Because we construe the court's West Texas Remand decision as having the effect in this case of reinstating the West Texas I prescription (as modified in West Texas II), we conclude that the Board lacks the power to retroactively change that rate prescription. Accordingly, we vacate the Rawhide prescription as of the effective date of this decision.

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

It is ordered:

1. This proceeding is reopened and the prior rate prescription is vacated.
2. This proceeding is dismissed.
3. This decision is effective on September 10, 2007.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary

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<sup>26</sup> The Court's equitable concern in Burlington Northern that the railroad could not be made whole also is not present here. In that case, reviving the San Antonio I prescription rate would have required "the railroads to accept a return that was considered temporary when it was approved in 1976 and 'below a minimum reasonable rate' when it was modified in 1978." Burlington Northern, 459 U.S. at 142. Here, by reviving the Rawhide prescription rate, BNSF will collect a rate that is identical to the rate it chose to charge in response to the Board's West Texas IV decision.