

SERVICE DATE – JULY 27, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42056

TEXAS MUNICIPAL POWER AGENCY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Digest:<sup>1</sup> The Board will not “enforce” an expired rate prescription against the defendant railroad as requested by the complaining shipper. The Board’s prior decisions in this proceeding provide that the maximum rate prescription ended in 2010.

Decided: July 22, 2011

Ten years ago in this proceeding, Texas Municipal Power Agency (TMPA) challenged the reasonableness of the rate charged by The Burlington Northern and Santa Fe Railway Company (BNSF) for transportation of coal in unit trains from certain mine origins in the Powder River Basin (PRB) of Wyoming to TMPA’s Gibbons Creek Steam Electric Station at Iola, Tex. In a decision served March 24, 2003 (TMPA 2003),<sup>2</sup> the Board found that BNSF had market dominance over that transportation and that the challenged rate was unreasonably high. Based on a stand-alone cost (SAC) analysis, the Board awarded reparations to TMPA and prescribed maximum reasonable rates through the year 2011. In a decision served September 27, 2004 (TMPA 2004),<sup>3</sup> the Board reconsidered various aspects of TMPA 2003 and corrected several technical errors.<sup>4</sup> As a result of its reconsideration, the Board revised its rate prescription, prescribing maximum reasonable rates through the year 2010. Neither party appealed the Board’s decisions, nor has either party sought reopening.

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<sup>1</sup> 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).

<sup>2</sup> Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 6 S.T.B. 573 (2003).

<sup>3</sup> Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 7 S.T.B. 803 (2004).

<sup>4</sup> The Board subsequently served a decision correcting TMPA 2004’s Table 2 – Revised Rate Prescription. Texas Mun. Power Agency v. Burlington N. & Santa Fe Ry., NOR 42056 (STB served Oct. 29, 2004) (TMPA Correction). The remainder of TMPA 2004 was unchanged.

On December 17, 2010, TMPA filed what it called a “Petition for Enforcement of Decision,” seeking a Board order directing that BNSF charge TMPA no higher than what it called the “SAC rate” or “Tariff rate”<sup>5</sup> through March 31, 2021 (the last quarter of the 20-year Discounted Cash Flow (DCF) analysis period in this case).<sup>6</sup> TMPA argues that TMPA 2003 and TMPA 2004 established maximum reasonable rates through the 1st quarter of 2021. It asserts that, on an overall net present value basis over the entire 20-year DCF period, the Board found that the revenues of the stand-alone railroad (SARR) exceeded its costs, requiring rate relief. TMPA claims that the Board lowered TMPA’s rate relief in the first 10 years of the DCF period so that annual overpayments and underpayments would offset each other by the end of the 20-year DCF “prescription” period, using a “netting” procedure.<sup>7</sup> TMPA argues that under this netting procedure—although rates were not ordered to be reduced during the years 2011 through the 1st quarter of 2021—the maximum reasonable rate for this time period is the “Tariff rate” or “SAC rate” shown in TMPA 2004.<sup>8</sup> TMPA argues that it only received half of the appropriate rate reductions and that allowing BNSF to charge anything other than the tariff rate or SAC rate through the 1st quarter of 2021 would “subvert the offset,”<sup>9</sup> thereby permitting BNSF to “over-recover” during the SAC analysis period and undermining 49 U.S.C. § 10701, the rate reasonableness process, and the DCF analysis in this case. TMPA claims that, by charging more than the tariff rate or SAC rate, BNSF is improperly attempting to alter the rate prescription (which TMPA asserts is legislative in nature) without having sought reopening of the Board’s decisions.

TMPA also contests certain new charges that BNSF has added to its base rates including a fuel surcharge, a reduced car-loading weight tolerance range with minimum loading charges and penalties for overweight loadings, a minimum annual volume commitment with penalty for shortages, new demurrage charges, and coal dust mitigation costs.<sup>10</sup> TMPA claims that the new

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<sup>5</sup> TMPA (Pet. at 5, 16) refers to Table 2 of TMPA 2004, 7 S.T.B. at 832, corrected, TMPA Correction, slip op. at 2.

<sup>6</sup> In 2006, the Board reduced the standard DCF period to 10 years for future large rate cases. Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 61-66 (STB served Oct. 30, 2006) (Major Issues). The Board noted that most rate prescriptions in large rail rate cases ended after 10 years. Id. at 65-66.

<sup>7</sup> Pet. at 8-10.

<sup>8</sup> See TMPA 2004, 7 S.T.B. at 832 (Table 2), corrected, TMPA Correction, slip op. at 2.

<sup>9</sup> Pet. at 10.

<sup>10</sup> Pet. at 14; Letter from TMPA counsel to Board, at 1-2 (Jan. 18, 2011). TMPA also requested expedited consideration for its Petition in light of “BNSF’s stated plan to deviate from the maximum reasonable rate starting January 1, 2011,” and to “prevent BNSF from charging a significantly higher rate than the maximum reasonable rate determined under the Board’s 20-year analysis.” Pet. at 1. In letters filed on December 21, 2010, and January 19, 2011, BNSF opposed TMPA’s request for expedited treatment and asked the Board not to accept TMPA’s January 18 Letter into the record. In the interest of compiling a complete record, we will accept

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fuel, demurrage, and coal dust mitigation charges are similarly proscribed by the rate prescription because they were already accounted for by the SARR and in the DCF analysis.

BNSF opposes TMPA's requests in its Reply filed January 6, 2011, arguing that the Board restored its pricing discretion upon the end of the rate prescription in 2010. BNSF points out that TMPA cites no language in TMPA 2003 and TMPA 2004 that supports its position, but instead TMPA claims that the logic of the SAC analysis requires a constraint on rates even though the Board did not specify a maximum rate after 2010. BNSF contends that the Board's rate prescription was unambiguous and was required only through 2010. Further, BNSF claims that the scope of a rate prescription is governed by the language of the Board's decision, rather than the SAC assumptions underlying the rate prescription. BNSF argues that prescribed rates are an exercise of the Board's discretion under 49 U.S.C. § 10704(a)(1) and that the Board only had the discretion to prescribe rates through 2010, because after 2010, the SAC analysis showed that the SARR would not generate sufficient revenues to cover its costs. Thus, BNSF argues, the Board did not have a legal basis on which to prescribe rates for 2011-2021.<sup>11</sup>

In addition, BNSF argues that TMPA has not shown grounds for either reopening TMPA 2003/TMPA 2004 or extending the rate prescription. To extend the rate prescription, BNSF argues that the Board would need to consider fuel cost evidence and an array of other changed circumstances since the 2001 base year forecasts.<sup>12</sup> Finally, BNSF claims that the revenue it receives from its current rate is less than 180% of the variable cost of the movements, and therefore the Board may not prescribe rates below the current level.<sup>13</sup>

Both parties oppose reopening our prior decisions, but BNSF submits evidence of changed circumstances in its Reply, should the Board reopen.<sup>14</sup>

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the parties' letter filings. See, e.g., Reporting Requirements for Positive Train Control Expenses & Investments, EP 706, slip op. at 1 n.2 (STB served Feb. 10, 2011).

<sup>11</sup> Reply at 7-11.

<sup>12</sup> For example, the parties and the Board used 2001 fuel costs in the SAC analysis, TMPA 2003, 6 S.T.B. at 635-36, but BNSF points out there has been a dramatic increase in fuel costs over the past decade. Thus, BNSF concludes that had the original DCF analysis accurately projected fuel cost increases since 2001, no rate prescription would have been ordered, even for the period before 2010. Reply at 16.

<sup>13</sup> Reply at 16-21.

<sup>14</sup> Reply at 15-16 & Joint V.S. of Michael R. Baranowski and Benton V. Fisher, at 3, 5-6.

## DISCUSSION AND CONCLUSIONS

The Board will deny TMPA's petition. The Board will not clarify, or "enforce," its TMPA 2003 and TMPA 2004 decisions in the manner TMPA seeks, because those decisions clearly provide that TMPA is entitled to a rate prescription only through 2010.

The plain language of the Board's decisions in this case is contrary to TMPA's position. In TMPA 2003, the Board stated that "[i]n our SAC analysis, we find that the SAC rate would be lower than the challenged rate until the year 2012. Accordingly, we find the challenged rate to be unreasonable and we prescribe a maximum reasonable rate through the year 2011."<sup>15</sup> In TMPA 2004, the Board stated that "[b]ased upon a stand-alone cost (SAC) analysis, the Board prescribed maximum reasonable rates through the year 2011."<sup>16</sup> The Board then modified this year to 2010.<sup>17</sup> Table 2 – Revised Rate Prescription shows that the "STB Prescribed Rate" – the Higher of the SAC rate or a 180% R/VC rate – ends after 2010.<sup>18</sup> Finally, the Board served a correction to TMPA 2004 in which it stated that "[a] decision by the Board, in [this] proceeding . . . did not properly calculate the rate prescription for 2002 through 2010."<sup>19</sup> Although TMPA argues that the 20-year SAC and DCF analyses support its position that BNSF's rate must be capped through the 1st quarter of 2021, the Board's language makes clear that the agency ordered rate relief only through 2010.

In 2004, the Board reviewed the SAC evidence and the results of the DCF analysis showing that the SARR's revenues would exceed its costs during the first 10 years of the SAC analysis period, but that its costs would exceed revenues during the second 10 years.<sup>20</sup> Further, the DCF analysis showed that "[t]he sum of the present values of over-recoveries exceeds the under-recoveries, thus demonstrating that the existing rate level is too high."<sup>21</sup> That is, the agency concluded (in 2004) that TMPA was eligible for relief from BNSF's unreasonable rates from 2001 to 2010, but not from 2011 to 2021, because BNSF's forecasted rates were not shown to be unreasonable in the latter years.

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<sup>15</sup> TMPA 2003, 6 S.T.B. at 608. See also Table E-1, GCRR Cash Flow, which shows zeroes in columns 9 through 11 for the years 2012 through 2021. Column 9 shows "Required Revenue Reduction (present val[ue])"; Column 10 shows "Required Revenue Reduction (current)"; and Column 11 shows "Percent Rate Reduction." TMPA 2003, 6 S.T.B. at 749.

<sup>16</sup> TMPA 2004, 7 S.T.B. at 803.

<sup>17</sup> TMPA 2004, 7 S.T.B. at 830-33.

<sup>18</sup> TMPA 2004, 7 S.T.B. at 832, corrected, TMPA Correction, slip op. at 2. The Board's first ordering paragraph states that "[t]he rate prescription . . . for movements of the issue traffic [is] revised as discussed above [in the decision] and set forth in Table[] 2 . . . of this decision." TMPA 2004, 7 S.T.B. at 833.

<sup>19</sup> TMPA Correction, slip op. at 1.

<sup>20</sup> TMPA 2004, 7 S.T.B. at 830-31.

<sup>21</sup> Id. at 831.

TMPA has raised additional issues stemming from TMPA 2003 and TMPA 2004, such as its concern about “netting,” but it did not timely raise questions about those long-final decisions. TMPA also complains about BNSF’s alleged alteration of the rate prescription, while BNSF has raised issues regarding changed circumstances since we decided TMPA 2003 and TMPA 2004, such as rising fuel costs. But we cannot properly analyze and make findings on those issues without reopening this proceeding, which both TMPA and BNSF expressly oppose.<sup>22</sup>

Although we could reopen our decisions on our own initiative, we will not do so here for three reasons. First, the parties have affirmatively asked us not to reopen. Second, if we were to reopen on our own initiative, we would look at changed circumstances such as rising fuel costs and other economic conditions that were unforeseen when the original 20-year projections were made. We would also look at revisions to our SAC policies in the past 8 years, such as our shortening our analysis period to 10 years,<sup>23</sup> changing the method by which we calculate maximum lawful rates for a complainant shipper,<sup>24</sup> and using our unadjusted Uniform Rail Costing System to determine if rail rate levels are below the jurisdictional floor.<sup>25</sup> Finally, more than 8 years have passed since the Board first stated, in TMPA 2003, that the rate prescription would apply only to approximately the first half of the DCF period, and 7 years since we indicated, in TMPA 2004, that it would end in 2010. For these reasons and in the interest of administrative repose,<sup>26</sup> we decline to reopen on our own initiative.

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

It is ordered:

1. TMPA’s Petition for Enforcement is denied.
2. This decision is effective on its service date.

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

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<sup>22</sup> Reply at 16, 21; TMPA Jan. 18 Letter at 1, 2, 5; BNSF Jan. 19 Letter at 1.

<sup>23</sup> Major Issues, slip op. at 64, aff’d sub nom. BNSF Ry. v. STB, 526 F.3d 770 (D.C. Cir. 2008).

<sup>24</sup> Id. at 14.

<sup>25</sup> Id. at 59-60.

<sup>26</sup> See, e.g., Union Pac. R.R.—Aban. Exemption—In Rio Grande & Mineral Cntys., Colo., AB-33 (Sub-No. 132X), slip op. at 6 (STB served May 3, 2005) (need for repose weighed against granting petition to reopen more than 5 years after line sale).