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SERVICE DATE – FEBRUARY 1, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. 42088

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

v.

BNSF RAILWAY COMPANY

Digest:¹ This decision denies the shippers' motion to strike the railroad's comments and provides the shippers 45 days to respond.

Decided: January 31, 2011

In this proceeding, Western Fuels Association, Inc., and Basin Electric Power Cooperative (collectively, WFA) challenged 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, Wyoming. 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) (February 2009 decision). Accordingly, the Board ordered BNSF to pay reparations to WFA (with interest) for shipments dating back to the fourth quarter of 2004. In a decision served June 5, 2009, the Board corrected technical and computational errors in the February 2009 decision. W. Fuels Ass'n v. BNSF Ry., NOR 42088 (STB served June 5, 2009). Then, on July 27, 2009, the Board resolved a dispute over how to calculate the maximum lawful rate. W. Fuels Ass'n v. BNSF Ry., NOR 42088 (Sub-No. 1) (STB served July 27, 2009).

BNSF appealed the three aforementioned Board decisions to the United States Court of Appeals for the District of Columbia Circuit. As pertinent here, BNSF argued that the Board was arbitrary and capricious in modifying its methodology for allocating revenue from cross-over traffic called average total cost (ATC). BNSF Ry. v. STB, 604 F.3d 602, 604 (D.C. Cir.

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).

2010). Explaining that the Board did not address one of BNSF's objections to the use of modified ATC, the court remanded the matter to the Board to address that concern. Id. at 613.²

On November 22, 2010, with neither a request from the Board nor an accompanying motion or petition, BNSF filed comments on remand in this proceeding. On November 29, 2010, WFA filed a motion to strike BNSF's comments, arguing that the Board has broad discretion to handle matters on remand and that it has not exercised that discretion to reopen the administrative record. WFA notes that, at the very least, BNSF should have filed a request that the Board reopen the record. In the alternative, if the Board accepts into the record BNSF's comments, WFA requests that the Board grant it 60 days from the service date of any such decision to file a reply. BNSF filed a reply to the motion to strike on December 7, 2010, arguing that the Board has no established practice or procedure governing proceedings before the Board on remand. BNSF requests that the Board grant WFA 60 days from the date that BNSF filed its comments to respond.

The Board has not adopted any specific regulation or procedure for handling cases on remand. In some instances, the agency has proceeded on remand without reopening the matter for further comment from the parties,³ while in other instances the agency has reopened the record on its own accord or at the request of one of the parties.⁴ BNSF, however, has not identified any similarly situated proceeding where a party filed comments on remand without an accompanying motion for leave to file or petition, whether pursuant to 49 C.F.R. § 1115.4 (petitions to reopen administratively final actions) or pt. 1117 (petition for relief not otherwise

² In September 2010, the court denied a petition for rehearing filed by BNSF relating to another issue. Order Denying Petition for Rehearing En Banc, BNSF Ry. v. STB, No. 09-1092 (D.C. Cir. Sept. 2, 2010).

³ See, e.g., Market Dominance Determinations—Product & Geographic Competition 5 S.T.B. 492, 496 (2001) (denying a petition to reopen the administrative record and addressing the remanded issue without further filings from the parties); Viking Starship, Inc., Common Carrier Application, 6 I.C.C.2d 228, 233 (1989) (denying a motion to reopen and seek input from various parties because the matter involved a purely legal question).

⁴ See, e.g., W. Tex. Util. Co. v. Burlington N. & Santa Fe Ry., NOR 41191 (STB served Sept. 10, 2007) (reopening the proceeding on remand after the shipper filed a petition for relief not otherwise covered, pursuant to 49 C.F.R. § 1117.1); GS Roofing Prods. Co. v. Ark. Midland R.R., NOR 41230 (STB served Dec. 17, 2001) (granting a petition to reopen on remand and setting a procedural schedule); Caddo Antoine & Little Mo. R.R.—Feeder Line Acquis.—Ark. Midland R.R. Line Between Guron & Birds Mill, Ark., FD 32479 (STB served Nov. 15, 1996) (reopening the feeder line proceeding and providing all parties an opportunity to present their views on how to proceed on remand); Del. & Hudson Ry.—Lease & Trackage Rights—Springfield Terminal Ry., FD 30965 (Sub-Nos. 1 & 2) (ICC served Apr. 21, 1993) (reopening the proceeding and directing the parties to address two remanded issues).

covered).⁵ Even so, the questions regarding modified ATC raised by this remand are important to this proceeding. In the interest of having the benefit of the parties' views on the ATC issue, coupled with the lack of a specific regulation or procedure for handling cases on remand, we will accept BNSF's comments into the record and deny the motion to strike. WFA will have 45 days from the service date of this decision to file a reply to BNSF's comments.

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.
2. WFA's motion to strike will be denied and the Board will accept for filing BNSF's comments on remand.
3. WFA has until March 18, 2011, to file a reply to BNSF's comments on remand.
4. This decision is effective on its date of service.

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

⁵ We note that BNSF cites The Burlington Northern and Santa Fe Railway—Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights, 6 S.T.B. 862 (2003) as an instance where a party “acted without waiting for the agency to initiate remand proceedings.” Reply to Mot. to Strike at 2. However, there are significant procedural differences between that matter and this one. There, the court vacated the underlying Board decision without remanding it. Keokuk Junction Ry. v. STB, 292 F.3d 884 (D.C. Cir. 2002). The railroad then submitted a filing to the Board that the court implied should have been filed with the Board in the underlying proceeding.