

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42088

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

v.

BNSF RAILWAY COMPANY

Decided: March 12, 2008

In this proceeding, Western Fuels Association, Inc. and Basin Electric Power Cooperative (collectively, WFA) challenge the reasonableness of the rates charged by BNSF Railway Company (BNSF) for movements of coal from origins in the Powder River Basin (PRB) in Wyoming to WFA's Laramie River Station coal-fired electric utility plant at Moba Junction, WY. In a decision served on September 10, 2007 (September '07 Decision), the Board found that WFA had failed to establish that the challenged rates were unreasonably high but offered WFA an opportunity to submit supplemental evidence. Today's decision clarifies the scope of the evidence that the parties may submit in their supplemental pleadings.

BACKGROUND

WFA challenged the reasonableness of BNSF's rates using the stand-alone cost (SAC) test. Under the SAC test, a "stand-alone railroad" (SARR) is hypothesized that could serve WFA's coal traffic and other traffic. The SAC constraint limits the rates that the BNSF may charge WFA to what the SARR would need to charge to serve WFA while fully covering all of its costs, including a reasonable return on investment.

WFA designed a SARR, the Laramie River Railroad (LRR) that would serve unit-train coal traffic from the PRB. The LRR's investment requirements and operating expense requirements were projected for a 20-year period, reflecting anticipated changes in traffic, rate levels, and expenses over that time period. The resulting revenue needs were compared to the revenues that BNSF receives from this traffic for the portion of the movements that would be replicated by the LRR. For all but the WFA traffic in the group, the LRR would replicate only a portion of the move, and it would interchange the non-WFA traffic with the residual BNSF system at various locations. The traffic that would be interchanged with the residual BNSF system is referred to as cross-over traffic.

After reviewing the record, the Board compared the best estimate of the costs associated with building and operating the LRR against the best estimate of the revenues to be generated by the traffic that would use the LRR. The Board used a present value analysis that takes into

account the time value of money over the 20-year analysis period, netting the annual over-recovery or under-recovery of the revenue requirements of the LRR as of a common point in time. This analysis showed that the projected revenues from the transportation that the LRR would provide would not be sufficient over the 20-year period to allow the LRR to profitably serve the selected traffic. Therefore, the record did not show that the challenged rate levels were unreasonably high.

However, after WFA had designed the LRR, we conducted a rulemaking in which we changed our policy as to how certain recurring SAC issues would be addressed. One of those changes involves how the SARR's share of the total revenues from cross-over traffic should be estimated. In past SAC cases, while there was no one prescribed approach, revenues were generally apportioned based on the relative distance of each carrier's participation in the move. In Major Issues in Rail Rate Cases, STB Ex Parte 657 (Sub-No. 1) (STB served Oct. 30, 2006) pet. for review docketed, No. 06-1374, et al. (D.C. Cir. Nov. 13, 2006) ("Major Issues"), a revenue allocation method that takes into account the density of each segment of the move—the so-called Average Total Cost (ATC) procedure—was prescribed instead.¹

WFA designed the LRR based on prior precedent, including the mileage-based revenue allocation known as the Modified Straight-Mileage Prorate (MSP). In the September '07 Decision, we recognized that the revenue allocation procedure could affect the optimal size and configuration of a SARR that a complainant would postulate, and that WFA could have been unfairly prejudiced by not knowing when it designed the LRR that the ATC revenue allocation procedure would be applied to its case. We therefore offered WFA the opportunity to redesign the LRR for the limited purpose of addressing the new revenue allocation procedure and to submit supplemental evidence based on that redesign.

With regard to this supplemental evidence, the Board stated:

WFA may increase or decrease the traffic group, change the configuration of the LRR, and submit evidence on all related issues (such as the revenue from new traffic or construction costs avoided or added due to a new configuration). However, neither party will be allowed to use this reopening of the record to relitigate unrelated issues (such as how to account for non-SARR traffic at the PRB mines). September '07 Decision at 20.

WFA and BNSF both filed timely petitions for reconsideration of the September '07 Decision. The Board denied the petitions for reconsideration and set the procedural schedule and evidentiary boundaries for the filing of additional evidence in a decision on February 29, 2008

¹ The ATC method develops the average total cost per segment of a move based on the defendant carrier's variable and fixed costs and the density and miles of each segment of the move. Revenues from cross-over traffic are allocated in proportion to the average total cost of the segments that are on- and off-SARR.

(February '08 Decision). The February'08 Decision stated that the supplemental evidence should be limited to what is already in the administrative record, including the discovery record, except information the parties need to develop cost-of-capital calculations under the newly adopted Capital Asset Pricing Model (CAPM). February '08 Decision at 8.

On March 3, 2008, WFA filed a petition for clarification and, in the alternative, reconsideration of the February'08 Decision. WFA asks the Board to clarify that it can use publicly or commercially available data not currently in the administrative record in its supplemental evidence in support of its reconfigured SARR. WFA maintains that it will need to use publicly or commercially available data, not currently in the record, to reconfigure the LRR to maximize revenues and minimize costs under ATC. WFA states that it will need to introduce information not currently in the record, including: land value data; ICC Engineering Report data; geodetic map data; mileage data; R.S. Means Manual data; and new field observation evidence. To that end, WFA asks us to modify the language in the February'08 Decision to read “that the supplemental evidence should be limited to what is already in the administrative record, except publicly or commercially available information the parties need to develop cost-of-capital calculations under CAPM and to develop modified SAC presentations to address the new revenue methodology.” WFA also asked the Board to compel BNSF to reply by March 7, 2008, and schedule a staff supervised technical conference.

In a decision served on March 5, 2008, the Board ordered BNSF to reply to WFA's petition by March 7, 2008, and set a staff supervised technical conference for March 14, 2008.

In its reply filed on March 7, 2008, BNSF does not oppose WFA's request to use publicly or commercially available engineering and construction data in presenting supplemental evidence, provided that data is limited to land value data; ICC Engineering Report data; geodetic map data; mileage data; R.S. Means Manual data; and new field observation evidence not currently in the record.² BNSF speculates that WFA will use its supplemental evidence to alter the configuration of its SARR by increasing its geographic footprint. BNSF questions the propriety of such a presentation and reserves the right to challenge the rationale and assumptions regarding any reconfiguration of WFA's SARR in its reply evidence.

In a letter filed on March 10, 2008, WFA states that it provided the list of data sources as examples and, because it has not yet modeled its revised SARR, it would be impossible to make a complete list of the sources of data needed for its supplemental pleadings.

DISCUSSION AND CONCLUSION

It would not make sense to offer WFA the opportunity to increase or decrease the traffic group, change the configuration of the LRR, and submit evidence on all related issues and then

² BNSF contends that the term “field observations” is vague and reserves the right to contest the reliability and reasonableness of any field observations used in WFA's supplemental evidence. BNSF Reply at 2 fn 1.

to not allow WFA to use publicly and commercially available data to develop its supplemental evidence on those issues. Accordingly, we will clarify that WFA may use publicly and commercially available data needed to develop a modified SAC presentation to address the ATC methodology by increasing or decreasing the traffic group and/or changing the configuration of the LRR. Specifically, the parties may use: land value data; ICC Engineering Report data; geodetic map data; mileage data; R.S. Means Manual data; and new field observation evidence not currently in the record. If, during the course of preparing its opening or rebuttal testimony, either party concludes that other publicly or commercially available information is needed, it should include that information in its presentation with a full explanation for why the additional information is necessary. We will consider and address the propriety of that information in the final decision.

As to issues related to the cost of capital and CAPM, the February'08 Decision does not limit the parties to the data already in the administrative record. The parties may use publicly and commercially available data to develop cost-of-capital calculations under CAPM.

In light of the clarification provided here, WFA's petition for reconsideration, including its request for an additional discovery period before supplemental evidence is filed, is moot. Additionally, because we have clarified the type of publicly and commercially available data that the parties can use in their supplemental filings, there is no need for a technical conference at this time. However, because of the need for clarification, we will extend the procedural schedule by two weeks.

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

It is ordered:

1. WFA's petition for clarification is granted.
2. WFA's petition for reconsideration is denied as moot.
3. The technical conference scheduled for March 14, 2008, is canceled.
4. The following procedural schedule, as amended, is set forth for this proceeding:

WFA's opening supplemental SAC evidence is due May 13, 2008.

BNSF's reply supplemental SAC evidence is due July 14, 2008.

WFA's rebuttal supplemental SAC evidence is due August 11, 2008.

5. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner
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Anne K. Quinlan
Acting Secretary