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SERVICE DATE - OCTOBER 14, 2003

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. 41185

ARIZONA PUBLIC SERVICE CO. & PACIFICORP

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: October 10, 2003

In a decision served May 12, 2003 (2003 Reopening), the Board reopened Docket No. 41185, based on materially changed circumstances, to redetermine the maximum reasonable rate that may be charged for the traffic at issue in that case; established the scope of the reopened proceeding; provided for interim rate relief for movements occurring while the maximum reasonable rate is being redetermined; and denied a request to consolidate that proceeding with the rail rate complaint filed in STB Docket No. 42077. Arizona Public Service Company and PacifiCorp (Arizona) have sought reconsideration of that decision. That request will be denied, and the parties directed to submit a proposed procedural schedule in Docket No. 41185.

BACKGROUND

In a decision issued in 1997 and revised in 1998,¹ the Board prescribed maximum reasonable rates for the movement of coal by The Burlington Northern and Santa Fe Railway Company (BNSF)² from the McKinley mine (owned by the Pittsburgh & Midway Coal Mining Company (P&M)) to Arizona's Cholla electric generating plant near Joseph City, AZ (Cholla). The rate prescription was based on an application of the Board's stand-alone cost (SAC) methodology.³

¹ See Arizona Pub. Serv. Co. v. Atchison, T. & S.F. Ry., 2 S.T.B. 367 (1997) (1997 Decision), revised, 3 S.T.B. 70 (1998) (1998 Decision).

² The original defendant in this proceeding, The Atchison, Topeka and Santa Fe Railway Company, has since merged with the Burlington Northern Railroad Company to form BNSF. The defendant is referred to as BNSF.

³ See Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987).

In January 2003, BNSF filed a petition asking the Board to reopen this proceeding to vacate the rate prescription. BNSF submitted evidence that the McKinley mine will exhaust its reserves before the end of the 20-year SAC analysis period, and that P&M will be unable to replace McKinley mine coal with coal from adjacent Navajo Nation land, as the Board had previously contemplated, due to its high sulfur content. BNSF argued that the Board should reopen the case for the limited purpose of considering the impact on the prior SAC analysis of depletion of the McKinley mine.

BNSF also asked the Board to provide interim relief from the rate prescription. Specifically, BNSF requested that the Board order Arizona to pay into an escrow account the difference between the \$4.21 prescribed rate and the \$6.91 rate that BNSF said it would charge without a prescription. Alternatively, BNSF asked the Board to order Arizona to agree in writing to reimburse BNSF, with interest, for the difference between the prescribed rate and a \$6.91 rate.

In its reply, Arizona did not dispute that the McKinley mine will exhaust its reserves before the end of the 20-year SAC analysis period and that P&M will be unable to replace McKinley mine coal with coal from adjacent Navajo Nation land. Arizona argued, however, that the SAC analysis upon which the rate prescription had been based would not be affected because tonnages moving over the stand-alone railroad (SARR) would not decline. Rather, Arizona argued, coal from the McKinley mine could be replaced with coal from the nearby Lee Ranch mine. According to Arizona, that replacement traffic could be interchanged onto the original SARR at Defiance, NM. Arizona also argued that, if the proceeding were reopened, the reopening should have a broad scope, allowing Arizona to (a) address other changed circumstances, (b) expand the traffic group upon which it had originally based its SAC presentation, and (c) reconfigure the SARR to accommodate the expanded traffic group.

Arizona also filed a complaint, in STB Docket No. 42077, Arizona Public Service Company and PacifiCorp v. The Burlington Northern and Santa Fe Railway, challenging the reasonableness of BNSF's rates for transporting coal from the Lee Ranch mine to Cholla. Arizona asked that the two cases be consolidated so that it may present a single, combined SAC analysis based upon a SARR that would serve both the McKinley mine and the Lee Ranch mine. BNSF opposed consolidation.

In 2003 Reopening, the Board concluded that reopening of Docket No. 41185 was justified by the changed circumstance that the McKinley mine will deplete its coal reserves sooner than assumed in the Board's prior decisions. The Board also provided interim relief designed to compensate either party, should it prevail on reopening, for sums forgone or overpaid while the maximum reasonable rate

for movements from McKinley mine is being redetermined.⁴ Finally, the decision denied Arizona's petition to consolidate this proceeding with the proceeding in STB Docket No. 42077.

The Board concluded that the reopening should be neither as limited as BNSF had envisioned nor as broad as Arizona would prefer. Specifically, the Board provided that Arizona may submit evidence on how the two shippers in the original traffic group will re-source their coal needs once McKinley shuts down, what portion of that traffic could move over the SARR, and the revenues that the SARR could reasonably expect from that re-sourced traffic. Both parties may also update the record regarding any forecasts used in the original SAC analysis that have since proved to have been inaccurate, but they may not reargue or recalculate the base figures to which forecasts were applied. Finally, Arizona may not change the configuration of the SARR or include any new traffic (other than the re-sourced coal destined to the two shippers in the original traffic group).

By petition filed on June 2, 2003, Arizona requests reconsideration of 2003 Reopening. Arizona argues that the Board: (1) should not restrict the scope of the reopened proceeding; (2) should not vacate the prescriptive effect of the prior rate order without adequate hearing; and (3) should consolidate the two proceedings.

On June 2, 2003, the Western Coal Traffic League (WCTL) sought leave to intervene and tendered a separate petition for reconsideration of 2003 Reopening. On June 23, 2003, the American Public Power Association and the National Rural Electric Power Cooperative (APPA/NRECA) also sought leave to intervene and tendered comments in support of the argument of Arizona and WCTL.⁵ On June 23, 2003, BNSF filed a reply in opposition to all of the arguments raised by Arizona. On July 17, 2003, Edison Electric Institute (EEI) also filed a "Motion for Leave to File Out-of-Time The Reply Amicus Curiae of Edison Electric Institute."

⁴ Specifically, the Board removed the prescriptive effect of the prior rate order, but directed the carrier to maintain the previously prescribed rate of \$4.21 per ton during the proceeding on reopening, and ordered each party to maintain records that would allow it to compensate the other party for sums forgone or overpaid due to any difference between any new rate to be prescribed and the \$4.21 per ton rate to be maintained during the interim while the maximum reasonable rate is being recalculated. The amount of any such compensation will depend on the outcome of the reopening.

⁵ BNSF does not object to participation by WCTL.

PRELIMINARY MATTERS

WCTL and APPA/NRECA will be allowed to participate as amici, but they may not intervene as parties to this private rate dispute. As amici, they will not have access to confidential information; nor will they be allowed to broaden the issues in the proceeding.

EEL's petition comes almost a month after the other petitions in this matter, by which time BNSF had already filed its reply to Arizona's request for reconsideration. Nevertheless, the Board will accept EEL's filing, which puts it in essentially the same status as WCTL and APPA/NRECA and does not broaden the issues.

DISCUSSION AND CONCLUSIONS

As discussed below, the requests to reconsider the 2003 Reopening decision are not persuasive. That decision did not unduly restrict the scope of the reopened proceeding, because neither reconfiguration of the SARR nor expansion of its traffic group has been shown to be necessary to reflect the changed circumstance for which the proceeding was reopened. Moreover, because the evidence and analysis in the reopened proceeding will be substantially different from the evidence and analysis in STB Docket No. 42077, it would not be appropriate to consolidate the two proceedings. Finally, Arizona's argument that the prior decision subjected it to a rate increase without proper hearing is without merit; there will be no rate change or recovery of sums forgone or overpaid without a full evidentiary hearing.

Scope of Proceeding on Reopening

Arizona (and the amici supporting it) argue that, because the Board already indicated in the 1997 Decision and the 1998 Decision that it would allow parties to make appropriate changes to their presentations, it is bound to allow the reconfiguration of the SARR and expansion of the traffic group that Arizona seeks. They reason that it is necessary to reconfigure the design of the SARR to add 52 miles of track between Defiance (an end point of the SARR) and the Lee Ranch Mine, in order to substitute Lee Ranch mine coal for the declining volumes of coal from the McKinley mine. They further argue that, to enable Arizona to take full advantage of production economies, Arizona should be allowed to expand the traffic group to include other traffic that could move in part over the SARR.

In this case, the changed circumstance that warranted reopening is that the McKinley mine will deplete its coal reserves sooner than expected and that coal reserves on adjacent property are not a suitable replacement. Enlargement of the SARR is not necessary to determine what the maximum

reasonable rate should now be for coal that will continue to move from the McKinley mine before that mine source is exhausted. The decline in the tonnage of traffic moving over the SARR from the McKinley mine can be made up for by including in the SARR replacement coal from the Lee Ranch mine, or even origins farther away, as crossover traffic that the SARR would interchange at Defiance. Because rates for movements from Lee Ranch or other origins are not at issue in this proceeding, there is no need to examine the capital and operating costs of movements beyond the currently configured SARR. Thus, enlargement of the SARR to include coal from other origins is not necessary. Nor has Arizona shown any other changed circumstances that would justify the inclusion of other commodities in the SARR's traffic base or its redesign to include other origins or destinations.

Contrary to what Arizona maintains, the Board's 1997 Decision and 1998 Decision do not bind the agency to allow Arizona to reconfigure and expand the traffic group. The Board recognized that reopening might be necessary if assumptions regarding the McKinley mine reserves proved inaccurate.⁶ But it had no reason or ability to define the scope of a reopened proceeding at that time. Rather, the language indicates that the scope of future reopening would be defined by the nature of the changed circumstances that arise to justify reopening, which is the approach taken in 2003 Reopening. See 1997 Decision, 2 S.T.B. at 385 n.51:

Our SAC constraint may be sufficiently flexible to accommodate a change in suppliers. Because coal from other origins might move over the same routes as the [SARR] (except for the spur from the McKinley Mine to the mainline at Defiance) in order to reach new coal sources(s), it is neither necessary nor appropriate, on the record before us, to assume (as [BNSF] does) that the entire [SARR] system would be rendered obsolete if the P&M coal contracts were not renewed or if reserves at the McKinley Mine were exhausted. The reasonable rates to be charged under the new circumstances could be determined by examining any additional costs to the [SARR] to serve the new movement(s). It would be better to make any necessary adjustments to the SAC analysis when we know how the shippers' traffic patterns will be changed, than attempt to do so now, when any [alterations] in the design of the [SARR] would be based on pure speculation.

Thus, the Board clearly anticipated that the extent of any future adjustments to the design of the SARR would depend on the extent of the future changes in traffic patterns. Because it is not necessary to alter the configuration of the SARR or its traffic mix (other than to reflect the resourced coal traffic) to respond to the changes that justified reopening, such alterations will not be allowed.

⁶ See, e.g., 1998 Decision, 3 S.T.B. at 79 n.42.

The Board's approach does not force parties to make initial SARR configurations and traffic decisions that will bind them for unreasonable lengths of time. As noted in 2003 Reopening, if Arizona wishes to change the SARR's configuration or traffic mix upon which the McKinley rate prescription was based, it should ask the Board to close this proceeding and remove the interim relief. If granted, Arizona could then file a new complaint against whatever new rate BNSF established for the McKinley traffic, and it would then have the opportunity to make whatever new SAC presentation it may wish to make. But Arizona is not free to launch what would be essentially a new and considerably more complex SAC case without taking these steps.⁷

In conclusion, disallowing a broader reopening than justified by the substantially changed circumstances is good public policy. It promotes stability in rate prescriptions and reduces the administrative burden of continued reopenings. It also gives parties an incentive to make their best case initially, rather than to make a lesser case and attempt to improve it later on reopening. Arizona's petition for reconsideration of this issue will therefore be denied.

Mechanism for Relief Covering the Interim Period

Arizona argues that the Board violated Arizona Grocery v. Atchison, Topeka & Santa Fe Ry., 284 U.S. 370 (1932) (Arizona Grocery) by removing the prescriptive or legislative effect of the prior rate order pending a redetermination of the maximum reasonable rate that may henceforth be changed for movements from the McKinley mine to Cholla. Arizona argues that a full hearing and determination of a new rate prescription is required by law before the Board may alter a rate prescription in any way and that the Board thus has no authority to order interim relief in this case.

However, the Board's decision neither allowed nor approved any change in the previously prescribed rate; to the contrary, it required the carrier to keep the previously prescribed rate in effect pending completion of a full evidentiary hearing.⁸ It simply removed the prescriptive effect so that either

⁷ Changes in the configuration of a SARR and its traffic group are not minor changes. The changes in the SARR configuration sought by Arizona here would require analysis of substantial additional investment and new track construction costs. The changes to traffic selection would have an even larger ripple effect through the SAC analysis. They would require a new operating plan; new calculation of capacity requirements; new estimates of the requirements for crews, locomotives, cars, and helper trains; new assessment of the general and administrative costs to run this larger SARR; analysis of crossover traffic and the permissible revenue contribution of such traffic; new calculations of the revenues and tonnage; and so forth. Extensive discovery would be required.

⁸ Because there will be a full evidentiary hearing before a new maximum reasonable rate is set, Arizona's reliance on San Antonio, Tex. v. Burlington Northern, Inc., 364 I.C.C. 887, 896 (1981), is
(continued...)

party could obtain relief for the interim period (to be compensated for revenues forgone or overpaid during the interim period) without violating a prior prescription with legislative force.

Moreover, the decision to remove the prescriptive effect of the prior rate order so as to provide an interim relief mechanism, without holding a full evidentiary hearing, was a lawful exercise of the Board's statutory authority. Under 49 U.S.C. 721(b)(4), the Board is authorized, "when necessary to prevent irreparable harm, [to] issue an appropriate order without regard to [the procedural requirements of the Administrative Procedure Act]." And, under 49 U.S.C. 722(b), the Board is authorized to modify any order, including a rate prescription, upon notice to the parties:

(b) Terminating and changing actions. – An action of the Board remains in effect under its own terms or until superseded. The Board may change, suspend, or set aside any such action on notice. Notice may be given in a manner determined by the Board.

The Board gave Arizona ample notice that it might act to change, to suspend, or to vacate the rate prescription contained in the prior order. Both parties were afforded an opportunity to submit legal briefs and verified statements from expert witnesses, who discussed in detail what they believe has changed since the original prescription. After weighing that evidence and the equities of the situation presented here, the Board exercised its discretion to maintain the rate status quo while preserving its ability to later order refunds or reparations for the interim period based upon the outcome of the evidentiary hearing.

In sum, Arizona Grocery simply provides that this agency may not apply a rate prescription retroactively and that a railroad may not change a prescribed rate without agency approval. Here, the Board is not prescribing any rate at this time. It simply found, after reviewing all of the relevant circumstances, that the old prescription should not be held in force, as the Board could not determine if that rate is prescribed at an appropriate level in light of the anticipated depletion of coal reserves at McKinley. Pursuant to its authority to do equity, the Board thus took action to ensure that all parties can be made whole when the new prescription is ultimately set. That approach is not in any way contrary to Arizona Grocery.

Consolidation

Because the scope of reopening here will not be broadened, this proceeding will not be consolidated with Docket No. 42077.

⁸(...continued)
unavailing.

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

It is ordered:

1. The requests filed by WCTL and APPA/NRECA to participate in this proceeding are granted in part. Those groups are allowed to participate in this proceeding as amici.
2. EEI's motion for leave to file an amicus brief in support of Arizona is accepted.
3. Arizona's petition for reconsideration is denied.
4. The parties are again directed to submit, within 10 days of the effective date of this decision, the proposed procedural schedule that they were directed to submit in 2003 Reopening.
5. This decision is effective on its date of service.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary