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SERVICE DATE – JANUARY 20, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42056

TEXAS MUNICIPAL POWER AGENCY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Digest:¹ The Board upholds its decision denying “enforcement” of an expired rate prescription against the defendant railroad as requested by the complaining shipper.

Decided: January 18, 2012

In 2001, 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),² 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),³ the Board reconsidered various aspects of TMPA 2003 and corrected several technical errors.⁴ In TMPA 2004, the Board revised its rate prescription, prescribing maximum reasonable rates through the year 2010. Neither party sought reconsideration of TMPA 2004 or judicial review of either TMPA 2003 or TMPA 2004, nor has either party sought reopening of those decisions.

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

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).

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

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

⁴ The Board subsequently served a decision correcting TMPA 2004’s Table 2 – Revised Rate Prescription. Tex. 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.

called the “SAC rate” or “Tariff rate”⁵ through March 31, 2021 (the last quarter of the 20-year Discounted Cash Flow (DCF) analysis period in this case). BNSF opposed TMPA’s request in its Reply filed January 6, 2011, arguing that the Board restored BNSF’s pricing discretion upon the end of the rate prescription in 2010. Both parties opposed reopening our prior decisions.

By a decision served July 27, 2011 (TMPA 2011), the Board denied the relief TMPA requested, finding that the decisions in 2003 and 2004 clearly provided that TMPA was entitled to a rate prescription only through 2010. TMPA filed a petition for reconsideration of TMPA 2011 on August 16, 2011, and BNSF filed an opposition on September 6, 2011.

On reconsideration, TMPA claims the Board committed material error in denying the petition for enforcement. TMPA challenges TMPA 2003, TMPA 2004 and TMPA 2011 on the merits, making 2 arguments we could only address if we were to reopen our earlier decisions. TMPA argues the Board erred in ruling that: (1) TMPA 2003 and TMPA 2004 limit TMPA’s relief to 10 years of the 20-year DCF analysis period; and (2) TMPA’s concern about the Board’s “netting” process was untimely. Although TMPA sought timely reconsideration of TMPA 2003 back in 2003, it did not present these 2 arguments at that time. Now, some 8 years later, TMPA has expressly said it does not want the Board to reopen TMPA 2003 and TMPA 2004, and it does not oppose our decision not to reopen on our own initiative.

TMPA’s first argument—that the Board materially erred in TMPA 2011 in denying “enforcement” of a rate prescription for the full 20-year DCF period—is contrary to the plain language of TMPA 2003 and TMPA 2004: “Accordingly, we find the challenged rate to be unreasonable and *we prescribe a maximum reasonable rate through the year 2011*,” TMPA 2003, 6 S.T.B. at 608 (emphasis added). In TMPA 2003, the Board “prescribed maximum reasonable rates *through the year 2011* and awarded reparations to TMPA.” TMPA 2004, 7 S.T.B. at 803 (emphasis added).⁶ We cannot “enforce” a rate prescription for later years that we did not order, and thus our refusal to do so in TMPA 2011 is not material error.

Second, to the extent TMPA believes that those plain statements about the extent of its rate relief are inconsistent with the “netting” procedure discussed in those same decisions, any alleged inconsistencies should have been just as evident to TMPA when TMPA 2003 and TMPA 2004 were issued as they are today. TMPA could have raised that argument years ago on reconsideration or judicial review of TMPA 2003 and TMPA 2004, but it did not. Thus, our observation in TMPA 2011 (at 5) that TMPA “did not timely raise questions about those long-final decisions” with regard to netting is not material error.

Finally, in addition to the 2 arguments already discussed, TMPA adds 1 additional point: it argues that the Board materially erred in TMPA 2011 because that decision “retroactively

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

⁶ In TMPA 2004, the Board adjusted the rate prescriptive period to run through the end of 2010, rather than 2011. Compare TMPA 2003, 6 S.T.B. at 609-610 (Tables 3 and 4) with TMPA 2004, 7 S.T.B. at 832, corrected, TMPA Correction, slip op. at 2 (Table 2).

applies the 10-year DCF rule.” The decision, however, does not retroactively apply the 10-year DCF rule; it merely notes, in dicta, that if we were to reopen TMPA 2003 and TMPA 2004—which we did not do on our own initiative and which TMPA itself expressly asked us not to do—we would consider a range of circumstances that have changed since then, including the reduction of the standard DCF analysis period from 20 years to 10. Nowhere does TMPA 2011 state or imply that the Board is declining to enforce a 20-year rate prescription because the DCF analysis period is now only 10 years. To the contrary, we are declining to enforce a 20-year rate prescription because our decisions in 2003 and 2004 did not provide for one.

For these reasons, TMPA’s petition for reconsideration is denied.

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 Reconsideration is denied.
2. This decision is effective on its service date.

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