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SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42056

TEXAS MUNICIPAL POWER AGENCY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: September 24, 2004

Upon reconsideration, the Board modifies the rate prescription and reparations award in this proceeding.

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, TX. In a decision served March 24, 2003 (TMPA 2003), the Board found that BNSF has market dominance over that transportation and that the challenged rate was unreasonably high. Based upon a stand-alone cost (SAC) analysis, the Board prescribed maximum reasonable rates through the year 2011 and awarded reparations to TMPA.

TMPA and BNSF have each filed timely petitions for reconsideration of various aspects of that decision. They ask the Board to reconsider various substantive determinations made in TMPA 2003 and to correct several asserted technical errors. The issues raised, which are discussed in turn below, involve:

- ▶ whether BNSF should have been required to formally establish a rate for transportation in shipper-supplied railcars and to use those cars in place of its own railcars (Section I);
- ▶ the variable costs associated with maintenance-of-way, return on road property and depreciation, and locomotive fuel expense (Section II);

- ▶ those portions of the SAC analysis addressing rerouting of traffic, revenue forecasts, locomotive fueling expense, general and administrative expenses, bridges, utility relocation, road resurfacing, at-grade crossings, and fencing (Section III);
- ▶ the asserted technical errors (Section IV); and
- ▶ the scope of the rate prescription (Section V).

Three industry associations—Western Coal Traffic League (WCTL), National Industrial Transportation League (NITL), and North America Freight Car Association (NAFCA) (collectively, the “associations”)—have filed petitions to intervene in support of TMPA’s request for reconsideration with respect to the first set of issues listed above. The associations will be allowed to participate as amici, but not intervene as parties to this private rate dispute. As amici, they may present their views on, and support of, issues raised by TMPA in its petition for reconsideration. They will not, however, have access to confidential information; nor will they be allowed to broaden the issues in the proceeding. See Arizona Pub. Serv. Co. & Pacificorp v. The Burlington N. & S.F. Ry., STB Docket No. 41185 (STB served Oct. 14, 2003) at 4.

As discussed below, upon reconsideration we correct two technical errors in the SAC computation and we revise the SAC analysis in one respect (a modest increase in the level of executive salaries) to conform with the record in this case. We revise the rate prescription and reparations accordingly, and we clarify that the rate prescriptions extend to all mine origins in TMPA’s complaint. The remaining reconsideration requests are denied.

DISCUSSION AND CONCLUSIONS

A party may seek to have the Board reconsider a decision by submitting a timely petition that presents new evidence or changed circumstances that would materially affect the case or that demonstrates material error in the prior decision. 49 U.S.C. 722(c); 49 CFR 1115.3 (timely administrative appeals). Where, as here, a petition is timely filed within 20 days after the service date of the prior decision, the prior decision does not become administratively final for purposes of seeking judicial review until the Board has acted on the administrative appeal. See American Farm Lines v. Black Ball, 397 U.S. 532, 541 (1970); ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 284-85 (1987).

The Board encourages parties to file timely administrative appeals where they believe the Board has erred in some respect. The courts favor such administrative reconsideration, as it is a more expeditious and efficient means of achieving corrections or adjustments than resort to the federal courts in the first instance. See Commonwealth of Pennsylvania v. ICC, 590 F.2d 1187, 1194 (D.C. Cir. 1978); B. J. Alan Co. v. ICC, 897 F.2d 561, 562-63 n.1 (D.C. Cir. 1990). And even where judicial review is later sought, the reconsideration process can assist the court’s

review process by providing a further exploration of the issues in advance. See American Farm Lines, 397 U.S. at 541; McCarty Farms, Inc. v. STB, 158 F.3d 1294, 1301 n.1 (D.C. Cir. 1998) (further Board decision was “helpful to the court”).

On the other hand, the Board generally does not consider new issues raised for the first time on reconsideration where those issues could have and should have been presented in the earlier stages of the proceeding. Moreover, the term “new evidence” refers to evidence that was not reasonably available to the party when the record was developed, and not simply newly raised. See Friends of Sierra R.R., Inc. v. ICC, 881 F.2d 663, 667 (9th Cir. 1989). Nothing in the statute or the Board’s regulations obliges the agency to rethink its decisions whenever a party wishes to try out a new theory or finds new information at a late stage in the process. Connecticut Trust for Historic Preservation v. ICC, 841 F.2d 479, 484 (2d Cir. 1988). And if a party were free to reshape its case, so long as it did so within 20 days after a decision, the administrative process might never end. The agency is not expected to “behave like Penelope, unraveling each day’s work to start the web again the next day.” Western Coal Traffic League v. ICC, 735 F.2d 1408, 1411 (D.C. Cir. 1984).

I. Rate for Transportation in Shipper-Owned Cars

Historically, BNSF has served TMPA’s coal movements from the PRB to the Gibbons Creek station in three train sets of BNSF-furnished railcars. In 2000, TMPA asked BNSF to establish a separate rate for movements in shipper-supplied cars. TMPA advised BNSF that it was prepared to supply the equipment “if the rate differential justified the acquisition costs.”¹ BNSF, however, chose to establish a rate only in railroad-furnished cars, explaining that it had the equipment available and had chosen to use that equipment for this service.²

Two months later, TMPA began objecting to a perceived drop-off in BNSF’s service level. In a series of correspondence with BNSF, TMPA complained that it was becoming critically short on its coal requirements due to BNSF’s inability to provide an adequate number of train sets and crews to meet TMPA’s needs. BNSF advised TMPA that the larger volumes of coal coming out of the PRB required more trains and crew, but that congestion on its network made adding a fourth train set for TMPA inadvisable. Instead, BNSF instituted some “short-term plans” that, TMPA acknowledged, “seem to be easing our inventory shortages.”³ Nonetheless, in light of its past inventory concerns, TMPA renewed its request for a rate in TMPA-supplied

¹ TMPA Open. WP. at 4121 (TMPA letter dated Oct. 17, 2000).

² TMPA Open. WP. at 4123 (BNSF letter dated Nov. 1, 2000).

³ TMPA Open. WP. at 4126-7 (TMPA letter dated Jan. 8, 2001).

cars.⁴ BNSF again advised TMPA that it had sufficient equipment to fulfill its common carrier obligations and that, if it should become necessary to use TMPA-supplied cars, BNSF would accept them, applying the same rate it used for movements in BNSF-supplied cars.⁵

In its complaint challenging the BNSF rate for movements in railroad-supplied cars, TMPA also charged that BNSF's refusal to use TMPA-supplied equipment and to formally establish a rate for shipments in shipper-supplied cars constituted an unreasonable practice, in violation of 49 U.S.C. 10702.⁶ TMPA argued that at least one trainset of shipper-supplied cars is needed to supplement the BNSF fleet and satisfy TMPA's service requirements.⁷ TMPA further argued that using shipper-supplied cars for one or more trainsets of its traffic would not cause the railroad's cars to be idled, because they could be shifted immediately to alternative productive uses elsewhere.⁸

In TMPA 2003 at 9, the Board declined to require BNSF to accept TMPA-supplied cars. The Board explained that railroads have the right to use their own railcars so long as they can meet their common carrier obligations with those cars. See Atchison, Topeka & S.F. Ry. v. United States, 232 U.S. 199, 214-15 (1914) (Atchison); Shippers Comm., OT-5 v. Ann Arbor R.R., 5 I.C.C.2d 856, 865 (1989) (SCOT-5), aff'd, Shippers Comm. OT-5 v. ICC, 968 F.2d 75 (D.C. Cir. 1992). Examining the record in this case, the Board concluded that TMPA had not shown that BNSF cannot meet its common carrier obligations using its own railcars.

TMPA and the three amici have sought reconsideration, raising two distinct issues: (A) whether the carrier can lawfully decline to accept TMPA-supplied cars; and (B) even if the carrier is not required to accept shipper-supplied railcars at this time, whether the railroad nonetheless should be required to establish a rate for such movements. Although the parties often merge these two issues, they present distinct concerns and will be discussed separately.

⁴ TMPA Open. WP. at 4131 (TMPA letter dated Feb. 27, 2001).

⁵ TMPA Open. WP. at 4132 (BNSF letter dated Mar. 12, 2001).

⁶ Section 10702 provides that “[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall establish reasonable (1) rates . . . and (2) rules and practices on matters related to that transportation or service.”

⁷ TMPA Open. Narr. at 34.

⁸ Id.

A. Use of TMPA-Supplied Cars

In its petition for reconsideration, TMPA reiterates its complaints about the inconsistency of BNSF's service and its prediction that the railroad's cars would not be idled if TMPA cars were used. However, TMPA has failed to demonstrate that BNSF has not met and cannot continue to meet its common carrier obligations in railroad-furnished cars. Rather, the evidence demonstrates that congestion on the rail lines was the cause of TMPA's inventory problems and that adding more trainsets to the already congested network would not have alleviated that situation. The argument that BNSF might find alternative uses for its railcars, even if correct, is irrelevant to this inquiry. For absent evidence that BNSF does not have sufficient railcars available to serve TMPA, BNSF has no common carrier obligation to use shipper-supplied cars. And, given the lack of evidence that BNSF-supplied railcars were unavailable, we cannot find that BNSF engaged in an unreasonable practice, in violation of 49 U.S.C. 10702, by favoring the use of its own railcars over railcars to be provided by TMPA.

WCTL argues that this analysis does not hold up for unit-train service. WCTL cites Potomac Electric Power Co. v. Penn Central Transp. Co., 356 I.C.C. 815 (1977) (PEPCO), aff'd in relevant part, Potomac Electric Power Co. v. United States, 584 F.2d 1058 (D.C. Cir. 1978) for the proposition that railroads do not have a common carrier obligation to provide unit-train service in railroad-supplied cars. And because a carrier's right to favor the use of its own railcars derives from its obligation to provide cars for that service, WCTL concludes that railroads may not refuse to accept shipper-supplied cars for unit-train service.

In PEPCO, the shipper had asked the defendant railroad (Penn Central Transportation Company) to establish a rate for "unit-train" service in railroad-supplied cars. Instead, Penn Central established one tariff rate for "train-load" service in railroad-supplied cars and another rate for unit-train service in shipper-supplied cars. The train-load service Penn Central offered in its own railcars was nearly identical to the unit-train service PEPCO sought: both called for shipments of over 7,000 tons of coal per train from eastern mines to PEPCO's three electric generating plants in railroad-supplied cars. But in unit-train service railcars and locomotives are joined for uninterrupted, round trip, shuttle-type service, and Penn Central did not want to commit its own railcars to the repeated movement of a single unit-train. Penn Central preferred the greater operating flexibility of train-load service, whereby it could use those railcars to serve other shippers if needed.

PEPCO challenged Penn Central's refusal to dedicate the railroad's cars to unit-train service as an unreasonable practice. The Board's predecessor, the Interstate Commerce Commission (ICC), found no merit to PEPCO's claims, as the record clearly established that Penn Central was providing comparable train-load service to PEPCO in railroad-supplied cars. PEPCO, 356 I.C.C. at 827. The court of appeals agreed. Potomac Elec. Power Co., 584 F.2d at 1063 ("In these circumstances, the railroad's refusal to hold out a complete unit-train service did not violate the Interstate Commerce Act.").

Thus, PEPCO does not stand for the broad proposition that a carrier is never required to provide service in unit trains. In PEPCO, the ICC made a case-specific determination that it was reasonable for the carrier to offer trainload service, instead of unit-train service, where that service applied from the same origin at the same minimum weight as the unit-train service. See PEPCO, 365 I.C.C. at 827. To the extent that PEPCO stands for a general proposition, it is that how a railroad satisfies its common carrier obligation is left to the railroad to decide in the first instance. So long as the railroad offers service that satisfies its common carrier obligations (the critical inquiry), it need not provide the particular service that the shipper would prefer.

In this case, the issue of whose equipment is to be used appears to be more about rate levels than service. TMPA complains that, in insisting on using the railroad's cars, BNSF is "leveraging its monopoly over TMPA's coal transportation service to collect a guaranteed, 80% mark-up on its variable railcar costs."⁹ Under 49 U.S.C. 10707(c)(1)(A), a railroad may charge a captive shipper up to 180% of its variable cost of serving that shipper without regulatory intervention, and the Board cannot prescribe a rate that would yield revenues below that level. See West Texas Util. Co. v. Burlington N.R.R., 1 S.T.B. 638, 677 (1996) (West Texas), aff'd sub nom. Burlington N.R.R. v. STB, 114 F.3d 206 (D.C. Cir. 1997). Therefore, it may indeed be more profitable for a railroad to use its own railcars to provide service to a captive shipper, at least when a rate prescription is set at the regulatory floor.

But when Congress established the 180% revenue-to-variable (R/VC) floor, it was well settled that railroads may use their own railcars in preference to shipper-supplied cars. As far back as 1914, the law has been clear that railroads have the right to use their own cars so long as they can meet their common carrier obligations with those cars. Atchison, 232 U.S. at 214-15. Because Congress legislates against the backdrop of then-existing law, one must presume that, in enacting 49 U.S.C. 10707(d)(1)(A), Congress intended to permit railroads to charge captive shippers 180% of the variable cost of supplying the railcars. See, e.g., United States v. Baxter Int'l, Inc., 345 F.3d 866, 900 (11th Cir. 2003) ("We presume that Congress legislates against the backdrop of established principles of state and federal common law, and that when it wishes to deviate from deeply rooted principles, it will say so.").

Although TMPA may want a lower rate for transportation using its own cars, the Supreme Court has held that a railroad is under no obligation to provide a lower rate for service in shipper-supplied cars. As the Court has explained, because railroads must stand ready as common carriers to provide service in railroad-supplied cars (see 49 U.S.C. 11101, 11121) they "cannot be compelled to accept [railcars] tendered by the shipper on condition that a lower freight rate be charged." Atchison, 232 U.S. at 214-15.

⁹ TMPA Open. Narr. at 34; see also id. at 117; TMPA Reply Narr. at 78; TMPA Br. at 29.

B. Rate for TMPA-Supplied Cars

NITL/NAFCA argue that the railroad should nonetheless be obliged to provide a rate for transportation in shipper-supplied cars (TMPA 2003 at 9) in light of the balance struck in SCOT-5. In that case, a shipper group filed a complaint challenging the practices of most of the nation's railroads regarding the use and control of privately owned covered hopper cars in grain transportation. The complainants alleged, among other things, that the railroads had defaulted on their common carrier obligation by not supplying a sufficient number of railcars when requested by shippers. They also objected to the industry practice of sometimes denying "OT-5 approval" for assigning reporting marks to privately owned railcars—which is required before private cars can be put onto the rail system—solely for economic reasons.¹⁰

The ICC concluded that it was an unreasonable practice for carriers to deny such approvals for reasons other than safety, mechanical factors, or inadequate track storage space. SCOT-5, 5 I.C.C.2d at 864. The ICC explained that there should be no artificial impediment to the use of private cars when carrier cars are unavailable. But the ICC also made clear that "[a]llowing shippers freely to register private cars under the OT-5 process does not, in itself, require the railroads to use private cars when the railroads have cars of their own available." Id. at 870.

Here, NITL/NAFCA argue that, just as the ICC found it unlawful for carriers to routinely refuse OT-5 approval for cars that the owners were ready to put into the rail system, the Board should find that a carrier must establish a common carrier rate for transportation using those cars. Otherwise, the 10-day period that railroads have for establishing a common carrier rate (see 49 CFR 1300.3) would create another artificial barrier to the use of privately supplied railcars.

While there may be merit to that argument, we need not and do not resolve that issue here, because the delay concerns expressed by NITL/NAFCA do not apply in this case. The record indicates that BNSF has already informed TMPA of the common carrier rate it would charge, at least initially, for shipments in TMPA-supplied railcars should movements in shipper-supplied cars become necessary¹¹—a fact that the amici would not have known, as the evidence in this case was filed prior to the Board's clarification of the requirement that parties file public

¹⁰ The term "OT-5" refers to procedures published at the time in the Official Railway Equipment Register, OT-5, Circular E, for assigning reporting marks and handling private cars. Under those procedures, a noncarrier would file an application with the Association of American Railroads, which would forward it to the carrier on whose lines the cars were to be placed in service. The originating carrier had the discretion to grant or deny OT-5 approval.

¹¹ TMPA Open. WP. at 4132 (BNSF letter dated Mar. 12, 2001).

versions of their evidence in rate cases,¹² and a fact that was not reported in TMPA 2003. The rate the carrier has quoted for movements in shipper-supplied cars is the same as the rate for movements in railroad-supplied cars, but, as previously discussed, BNSF cannot be compelled to accept shipper-supplied railcars on the condition that a lower freight rate be charged. Atchison, 232 U.S. at 214-15.

II. Variable Cost Issues

The Board may consider the reasonableness of a challenged rate only if the carrier has market dominance over the traffic involved. 49 U.S.C. 10701(d)(1), 10707(b). Market dominance is “an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies.” 49 U.S.C. 10707(a). The statute precludes a finding of market dominance, however, where the carrier shows that the revenues produced by the movements at issue are less than 180% of the carrier’s variable costs for providing that service. 49 U.S.C. 10707(d)(1)(A).

The variable costs associated with the traffic at issue also determine the floor for regulatory rate relief, because the Board cannot prescribe a rate that is below the 180% R/VC jurisdictional floor. See West Texas, 1 S.T.B. at 677. Therefore, the rate prescribed in this case was the higher of the rate level produced by the SAC analysis or the regulatory floor (the 180% R/VC rate level). See TMPA 2003 at 33-35.

Under 49 U.S.C. 10707(d)(1)(B), a carrier’s variable costs are to be determined using the Board’s Uniform Railroad Costing System (URCS), with adjustment where appropriate. URCS is a general purpose costing model used to determine the variable cost of a movement. The model determines, for each Class I railroad, what portion of each category of costs shown in its Annual Report to the Board (STB Form R-1) represents its system-average variable unit cost for that cost category for that year. In considering whether to allow adjustments to the system-average variable costs produced by URCS, the Board evaluates whether the party proposing to use a different figure has shown that its proposed figure would better reflect the variable costs of serving the particular traffic at issue than the URCS system-average figure. These adjustments are known as “movement-specific” adjustments.

In this case, each party proposed various movement-specific adjustments to the URCS system-average figures. In TMPA 2003, the Board accepted some of the adjustments proposed by the parties but not others. The Board then concluded that the challenged rate produces revenues that exceed 180% of the variable costs of providing service from the two mine origins for which traffic data had been submitted. In their petitions for reconsideration, each party

¹² See Procedures To Expedite Resolution of Rail Rate Challenges To Be Considered Under the Stand-Alone Cost Methodology, STB Ex Parte No. 638 (STB served Apr. 3, 2003).

objects to certain component parts of our variable cost analysis. Their objections are discussed individually below.

A. Maintenance-of-Way Costs

To calculate the variable costs associated with maintenance-of-way (MOW), the Board used system-average URCS rather than the “speed factored gross ton” (SFGT) formula accepted in prior cases. The original SFGT formula was developed in 1973 to allocate MOW costs between passenger and freight traffic. It was based on research on track degradation and MOW activities from 1950 to 1970, and the precise parameters of the formula were estimated using those data and standard regression analysis. See generally Nat’l R.R. Passenger Corp. & Consolidated Rail Corp., 10 I.C.C.2d 863, 872-74 (1995) (Amtrak). The Board had accepted adjustments based on the SFGT formula in prior SAC cases. But in this case, the Board concluded that the SFGT formula is so outdated as to no longer be reliable. TMPA 2003 at 56.

TMPA objects to the departure from precedent. It argues that use of the SFGT formula was well-settled and that the Board has previously rejected arguments that the formula was out-of-date. TMPA also contends that the record contained evidence demonstrating that the SFGT formula accurately calculates average MOW costs because of adjustments that have been made to the formula to reflect changes in maintenance practices, heavier wheel loads, and traffic densities. To justify some movement-specific adjustments for these high-density lines, TMPA pointed to evidence that BNSF’s system-average MOW expense has fallen over time, allegedly showing that there remain economies of density in the maintenance of rail lines.

It is undisputed that much has changed since the original SFGT formula was derived. As BNSF had pointed out, in 1983 the ICC changed the accounting system that is used by railroads from a retirement, replacement, and betterment system to a depreciation accounting system, which treats a significantly greater portion of maintenance as capital cost (as opposed to an operating expense) than the prior accounting system had. Track materials have become more durable. In 1978 the average rail line had 111-lb. rail, only 6% of which was continuous welded rail (CWR); by 1999, the average weight of rail was 125-lb., and 62% of that was CWR. And industry maintenance practices have changed over the years, so that more of the maintenance that is being performed is planned maintenance, which is capitalized under depreciation accounting. TMPA 2003 at 55 n.92.

Furthermore, the average densities of the railroads of the 1970’s bear no relation to the average densities of the railroad today. The SFGT formula reflected railroad lines with an average density of 10-15 million gross tons (MGT), and densities of 25 MGT were relatively rare when that formula was developed. See Amtrak, 10 I.C.C.2d at 877. In contrast, in 2000 the average density along the route BNSF uses for TMPA’s traffic was approximately 60 MGT. In short, present-day railroad maintenance expenses and practices bear little resemblance to those of 30 to 50 years ago.

The SFGT formula, however, has not been re-benchmarked to address these changes. And scholars have long cautioned of the dangers of using a regression analysis to extrapolate beyond the range of existing data. See, e.g., Rudolf Freud & William Wilson, *Regression Analysis: Statistical Modeling of a Response Variable* (1998), at 65 n.53. See also *Amtrak*, 10 I.C.C.2d at 877 (“Applying [the SFGT] regression results to circumstances outside the relevant range of data upon which the regression equations are based may not produce valid results.”).

The fact that the formula has been modified by consultants does not correct the problem. To the contrary, such changes could render the new formula less reliable than the original formula. For example, the formula was changed to add an “R-Factor”—an index purportedly designed to reflect current maintenance practices, price levels, and departmental overheads.¹³ The R-Factor was derived by comparing the SFGT formula with the system-average MOW expenses of the carrier. For example, if the original SFGT formula would yield a system-average MOW figure of \$100 million for a carrier, when in fact its MOW expense was \$150 million, the R-Factor would be 1.5. The formula would then be indexed by this percent markup (or markdown as the case may be). In this case, TMPA applied an R-Factor of 0.86, indicating that the original SFGT formula overstates BNSF MOW expenses by 14%. But the extent to which the adjustment yields reliable results or simply masks the unreliability of the old formula is impossible to determine. In its circular fashion, the R-Factor does ensure that the SFGT formula produces accurate system-average MOW expenses, but there is no evidence that this adjustment ensures that the formula accurately models the relationship between MOW expenses and density with respect to individual lines.

In sum, there is no evidence that the SFGT formula produces MOW expenses that are comparable to current actual MOW costs for any rail line. Compare *San Antonio v. Burlington N. R.R.*, Docket No. 36180 (ICC served Apr. 11, 1986) (*San Antonio*) (SFGT-calculated MOW costs were shown to be within 8% of BNSF’s actual 1978 MOW expenditures). Thus, although the SFGT formula originally fit the data well, the passage of time and profound changes in this industry have plainly rendered unreliable the continued use of the SFGT formula. We need not use an outdated formula forever simply because it was accepted in prior cases. See *Atchison, T. & S.F. Ry. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973); *JSG Trading Corp. v. USDA*, 176 F.3d 536, 544 (D.C. Cir. 1999) (an agency is not strictly bound to follow the test applied in prior cases, so long as it articulates a principled rationale for departing from that test).

B. Return on Road Property and Depreciation Expense

In *TMPA 2003* at 57, the Board accepted, with one correction, the movement-specific adjustments that TMPA had proposed for calculating variable road property return-on-investment and depreciation expense. The Board found that TMPA’s adjustments were reasonable and

¹³ See *TMPA Open Narr.* at 73.

supported, and that BNSF had failed to discredit them. On reconsideration, BNSF argues that the Board should have followed the precedent in Wisconsin Power & Light Co. v. Union Pacific R.R., STB Docket No. 42051 (STB served May 14, 2002) (WPL Recons.) at 4-6, where, to calculate the MOW component of variable cost, the Board rejected a similar aggregate approach in favor of a segment-by-segment approach. Although the determination in WPL Recons. dealt with a different variable cost expense, BNSF contends that the same type of analysis should be applied to road property expenses.

However, BNSF never proposed that the Board use a segment-by-segment procedure when making movement-specific adjustments to the road property expense item. Rather, it argued (unsuccessfully) that the Board should not make any movement-specific adjustment to this expense item. (In contrast, in the WPL case, the Union Pacific Railroad Company's initial case had included movement-specific adjustments to the MOW expense item using a segment-by-segment weighted allocation procedure.) It is inappropriate for BNSF to raise an issue in a petition for reconsideration that it chose not to raise initially. Furthermore, the issue in WPL is not identical to the issue sought to be presented here, as it related to a different expense item. The Board did not have the benefit of a full record and debate on whether a segment-by-segment approach would be appropriate for road property expenses. As BNSF failed to challenge the particular manner in which TMPA performed its movement-specific adjustment below, its request for reconsideration of the calculation of variable road property expenses is denied.

C. Locomotive Fuel Expense

TMPA seeks reconsideration of the Board's determination with respect to locomotive fueling expense, in TMPA 2003 at 58. Before the filing of evidence, the Board had ordered BNSF to let TMPA conduct a special study of locomotive fuel consumption.¹⁴ The parties had negotiated and agreed upon a study methodology, which was tested and validated by TMPA's witness. The special study examined a three-locomotive consist (the number of locomotives used to move trains transporting TMPA's traffic) using an event recorder. This device documented the amount of time that a locomotive consist operated at a particular throttle setting. Based on manufacturer-specified fuel consumption levels at different throttle settings, an estimate of the gallons of fuel consumed to serve TMPA was developed.

TMPA, however, was not satisfied with the results of this study, which showed fuel consumption rates higher than BNSF's system-average rates. TMPA argued that the study results were too high because certain operating characteristics of the study trains (number of locomotives in consist and cycle time) did not accurately portray the characteristics of its traffic

¹⁴ Texas Mun. Power Agency v. Burlington N. & S.F. Ry., STB Docket No. 42056 (STB served Feb. 9, 2001) at 8.

when compared to train movements conducted in the ordinary course of business.¹⁵ TMPA therefore proposed adjustments to the fuel consumption data based on a three-locomotive consist and 2001 train cycle times.¹⁶ Specifically, TMPA increased the running time and decreased the idle time of the study locomotives, and decreased the number of locomotives consuming fuel, based on a presumption that fuel consumption varies directly with the number of locomotives and cycle time.¹⁷

The Board was not persuaded that TMPA's adjustments produced a more accurate picture of the variable locomotive fuel cost than did the unadjusted study results (with exclusion of a few anomalous study observations). Accordingly, the Board rejected TMPA's adjustments and instead used the results of the jointly conducted fuel study to determine the variable locomotive fuel expense.

On reconsideration, TMPA again argues that discrepancies between the operating characteristics of TMPA trains moving during the fuel study period and those moving in the ordinary course of business required adjustments to produce accurate variable cost results. TMPA contends that its proposed adjustments were consistent with BNSF's service in the period from April to November 2001, relying on a chart comparing average running and idle times extrapolated from train movement records during this post-contract period with the running and cycle times of the shorter, encapsulated study period (July to September 2001).

While there may have been differences in cycle times and the number of locomotives in the consists during the study period as compared to other time periods, TMPA's proposed adjustments would not properly correct for any such discrepancies. TMPA's adjustments were based on the assumption that fuel consumption is directly variable with cycle time. That is not the case, however. It is the locomotive's throttle position that determines the amount of fuel consumed, not simply the aggregate time spent running as opposed to idling.¹⁸ The throttle position, in turn, is dependent on such factors as the weight and makeup of the train, the grade and curvature over which the train is moving, train spacing over the line, and weather and track

¹⁵ TMPA Open. Narr. at 96-98; TMPA Reply Narr. at 71-72; TMPA Reb. Narr. at 96, 186.

¹⁶ TMPA Reply Narr. at 72 n.66; TMPA Reply e-WP. "Fuel Summary Reply.123"; TMPA Reb. Narr. at 193.

¹⁷ TMPA Open. Narr. at 96-97.

¹⁸ TMPA Reply Narr. at 77 (acknowledging that the fuel study measured fuel consumption as the product of the rate of fuel consumption at a given throttle setting multiplied by the amount of time the locomotive runs at that throttle setting).

conditions. Indeed, BNSF submitted a scatter diagram showing the absence of a linear relationship between locomotive running time and fuel consumption for the fuel study trains.¹⁹

TMPA alleges that its proposed adjustments were necessary because the original study suggested the anomalous result of fuel consumption at levels above system-average using BNSF's most efficient locomotives. But in light of the fact that TMPA's trains are heavier than BNSF's average trains, thus requiring greater tractive effort for movement, it is not unreasonable for the joint fuel study to have shown that fuel consumption was slightly above system-average. Accordingly, TMPA has failed to show that it was improper for the Board to use the results of the locomotive fuel expense study.

III. Stand-Alone Cost Issues

The Board's finding that the challenged rate was unreasonable and its determination of the maximum reasonable rate were based on a SAC analysis. To make a SAC presentation, a shipper designs a stand-alone railroad ("SARR") specifically tailored to serve an identified traffic group, using the optimum physical plant or rail system needed for that traffic. Based on the traffic group, services to be provided, and terrain traversed, a detailed operating plan must be developed to define further the physical plant that would be needed for the SARR. It is assumed that investments normally would be made prior to the start of service and that recovery of the investments would occur over the economic life of the assets. A computerized discounted cash flow (DCF) model simulates how the SARR would likely recover its capital investments, taking into account inflation, Federal and state tax liabilities, and a reasonable rate of return. The annual capital costs are combined with the annual operating costs to calculate the total annual revenue requirements of the SARR.

The defendant carrier's rates are then judged against the revenue requirements of the SARR. Traffic and rate level trends for the traffic group are forecast into the future to determine the future revenue contributions from that traffic. By comparing the total revenues generated by the traffic group against the revenue requirements of the SARR, the Board determines whether there would be over- or under-recovery of costs. Because the analysis period is lengthy, a present value analysis is used that takes into account the time value of money, netting annual over-recovery and under-recovery as of a common point in time. If the revenues from the traffic group are determined to be less than the revenue requirements of the SARR, then the challenged rates are considered reasonable.

The parties seek reconsideration of several components of the SAC analysis conducted in this case. Their objections are discussed below.

¹⁹ BNSF Reb. V.S. Fisher at 50.

A. Rerouting of Traffic

To increase the amount of traffic that would flow over the hypothetical SARR in this case, referred to as the Gibbons Creek Railroad (GCCR), TMPA proposed an operating plan for the GCRR that would transport certain non-issue traffic using a different route than the route BNSF uses for that traffic. The rerouted traffic consisted of PRB coal destined to the Parrish, Nelson, Fayette, and Big Brown utility plants. For these movements, BNSF uses its Front Range route, which proceeds southwest along the Rocky Mountains through Denver, CO, then southeast into Texas and Louisiana. However, to achieve maximum traffic densities for its SARR, TMPA hypothesized that the GCRR would haul that traffic over the somewhat longer, but higher-density, Central Corridor route, which proceeds east from Northport through Kansas City, and then south into Oklahoma and Texas. The map below, reproduced from TMPA 2003 at 20, illustrates the proposed rerouting.

Proposed Rerouting



This rerouting proposal presented an issue of first impression. The Board, guided by the underlying purpose and objectives of the SAC test, see Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985) (Guidelines), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987), first set forth general principles relating to the rerouting of traffic.

TMPA 2003 at 21-24. The Board concluded that a SAC analysis may reroute traffic that the SARR would handle entirely from origin to destination, so long as the proposed route is reasonable and would meet the shipper's transportation needs. But to reroute cross-over traffic (i.e., traffic for which the SARR would not replicate the full length of the defendant carrier's current move), the SAC analysis must fully account for the ramifications of assuming that the residual carrier (i.e., the portion of the defendant carrier's system that would not be replaced by the SARR) would alter its handling of the traffic.

Applying these principles, the Board permitted the proposed rerouting of the Big Brown traffic, which the GCRR would carry entirely from the origin mines to the plant, because the evidence demonstrated that the GCRR would provide the same or superior service as the shipper receives from BNSF. However, because that traffic moves in shipper-supplied cars, the Board reduced the revenues from the Big Brown movement to account for the additional (per-mile) car maintenance costs that the utility would incur due to the longer route.

The Board disallowed the proposed rerouting of the Fayette, Parish, and Nelson traffic because TMPA's evidence had failed to address and account for the variety of off-SARR costs (both capital and operating costs) that could be associated with rerouting this cross-over traffic. This deficiency was highlighted by TMPA's failure to address the concerns raised by BNSF regarding the potentially serious operational problems associated with rerouting this traffic through the Houston area. TMPA 2003 at 23. Moreover, TMPA had not demonstrated that the revenues from the rerouted traffic would be sufficient to cover all costs for the entire movement over the longer new route, including all off-SARR costs.

Although the Board did not permit this rerouting, it did not exclude the traffic to these three utilities from the SAC analysis entirely, as BNSF had proposed. Instead, the Board assumed that the GCRR would carry this traffic up to the point at which the historical routing diverged from the BNSF lines replicated by the GCRR (i.e., Northport), where it would be interchanged with the residual BNSF. TMPA 2003 at 24.

Both parties seek reconsideration of the Board's treatment of rerouted traffic. TMPA objects to the disallowance of the proposed rerouting of the Fayette, Parish, and Nelson traffic, while BNSF objects to the acceptance of the rerouting of the Big Brown traffic.

1. Overview

In evaluating TMPA's arguments here on reconsideration, it is important to consider them in light of the underlying principles of the SAC test, which is to determine whether the carrier is being charged more for its service than a hypothetical, efficient carrier would charge.

Here, TMPA has sought to reroute traffic onto its SARR that in actuality travels out of the PRB south on another route on the BNSF system. And the Board has allowed such so-called

“rerouting” in circumstances where it is demonstrated that such rerouting would not affect the service those shippers expect or currently receive. However, in this instance TMPA has sought to take that concept one step farther, and reroute traffic that traverses another route onto its system for a long length, and then arbitrarily hand that traffic back to the BNSF at a point of its choosing, without regard to whether such a handoff is practical or feasible. In this instance, the handoff point happens to be near Houston, TX, one of the nation’s most crowded rail terminals. TMPA contends that BNSF could then carry unit trains of coal through Houston to their destination at the power plants in question.

BNSF has contended that its existing lines through Houston do not have the necessary infrastructure to handle this demanding type of traffic. For its part, TMPA has not submitted evidence that either demonstrates that BNSF’s Houston lines could handle such additional traffic, or how much it would cost to upgrade those lines to handle this traffic. The Board has properly disallowed these movements in this instance, because it found that TMPA had neither determined nor included the additional infrastructure and operating costs of moving this coal traffic through Houston.

Allowing re-routing of movements in the way proposed by TMPA would distort the SAC test by permitting the complainant to artificially increase traffic on, and revenue allocated to, its SARR, all while passing on the ramifications of such a rerouting (in this case, funneling 8,000-foot unit trains of coal through the city of Houston) to BNSF. The Board properly disallowed such a reroute unless the complainant shows that it has identified what these additional infrastructure and operational costs would be and ensured that these costs are fully accounted for.

2. Fayette, Parish, and Nelson

TMPA presents three arguments as to why the rerouting the Fayette, Parish, and Nelson traffic should have been allowed. First, it maintains that its rebuttal testimony incorporated all of the on-line and off-line costs that BNSF had identified and that this should have been sufficient and accepted as the best evidence of record. Second, TMPA argues that the Board should not have applied new evidentiary requirements that had not been advocated by either party without first giving TMPA an opportunity to address them. Third, it argues that the Board should not have made findings about Houston congestion without first affording parties an opportunity to address such extra-record matters.

A cursory summary of the record in this case will put TMPA’s evidentiary arguments into context. Notwithstanding the novelty of its rerouting proposal, TMPA offered no evidence to support that proposal as reasonable and consistent with the Guidelines; TMPA simply asserted that its proposal should be accepted.²⁰

²⁰ See TMPA Open. Narr. at 125-26.

BNSF raised several objections to the proposal, including whether it was proper to propose an operating plan that would impose additional costs on the residual BNSF by changing the off-SARR routing of the cross-over traffic. BNSF pointed out that TMPA's proposal to route the three cross-over movements through Iola, TX, would require BNSF to handle the traffic in a new manner. To illustrate the problems such a rerouting might present, BNSF noted that the ability to meet the cycle time commitments in the governing contracts would be called into serious question, as the new routing of traffic would be through Houston, a congested terminal area.²¹ BNSF reminded the Board of the traffic problems that have arisen after the "UP/SP" merger,²² and of the emergency service order issued to address those problems.²³ BNSF asserted that, while those emergency conditions had abated, the effect of rerouting coal trains through Houston would be "uncertain, at best."²⁴

Despite TMPA's statement that it would "respond with appropriate rebuttal evidence further demonstrating the propriety of including these movements in its stand-alone traffic group,"²⁵ TMPA's rebuttal testimony contained no such evidence. Instead, TMPA simply repeated its assertion that, because a shipper may include cross-over traffic in its traffic group, it can dictate where the cross-over interchange would occur—even if that would impose off-SARR costs on the defendant carrier's operations.²⁶ The only concession TMPA made was to include some (but not all) of the off-SARR road property investment that BNSF had claimed would need to be incurred as a result of such a rerouting.²⁷

Given the record that was presented in this case, TMPA's arguments for reconsideration of this issue ring hollow. With respect to TMPA's first argument, it is true that TMPA's rebuttal

²¹ BNSF Mot. to Dismiss at 18-19; see also BNSF Reply Narr. at I-13-17; BNSF Reply V.S. Mueller at 30-32.

²² See Union Pac. Corp.--Control & Merger--Southern Pac. Rail Corp., 1 S.T.B. 233 (1996), aff'd sub nom. Western Coal Traffic League v. STB, 169 F.3d 775 (D.C. Cir. 1999).

²³ Joint Pet. for Service Order, 2 S.T.B. 725 (1997), modified and extended, 2 S.T.B. 744 (1997), further modified and extended, 3 S.T.B. 44 (1998), terminated, Joint Pet. for a Further Service Order, 3 S.T.B. 612 (1998).

²⁴ BNSF Mot. to Dismiss at 19.

²⁵ TMPA Reply to Mot. to Dismiss at 5.

²⁶ See TMPA Reb. Narr. at 44-45 (asserting that BNSF's interchange preferences were "irrelevant").

²⁷ See TMPA Reb. Narr. at 604.

testimony accepted (for the most part) the additional off-SARR investment costs that BNSF had quantified. See TMPA 2003 at 24. But BNSF had not purported to address all of the costs associated with the off-SARR rerouting—it had not, for example, sought to quantify the cost of rerouting these movements through the congested Houston area—and BNSF had vigorously objected to the rerouting even if the costs it did quantify were included in the SAC analysis. The first issue with respect to rerouting was not whose evidence was the best evidence of record, but whether TMPA’s rerouting assumptions were consistent with the purpose and goal of the SAC test. Thus, TMPA’s concession that some additional road property investment would be needed for the residual BNSF to handle that traffic south of Iola, TX, was not by itself sufficient to justify its rerouting proposal in light of the spectrum of concerns that BNSF had raised.

As for TMPA’s second argument, the Board did not impose a qualitatively different or undue burden on TMPA; the Board simply required TMPA to support its case. See Guidelines, 1 I.C.C.2d at 544 (“A proponent of a particular stand-alone model must identify, and be prepared to defend, the assumptions and selections it has made.”). Here, TMPA had offered no evidence of the off-SARR ramifications of its rerouting proposal. Accordingly, it had failed to defend its traffic selection in the face of serious objections raised by BNSF. As the Board stated in TMPA 2003 at 24, TMPA cannot avoid the potential impact that might result from its rerouting proposal by choosing to terminate the SARR before the point at which those impacts would occur (e.g., Houston).

Turning to TMPA’s third argument, concerning the discussion of potential congestion in Houston (which TMPA characterizes as extra-record), BNSF had specifically raised the concern of rerouting heavy coal trains through the congested Houston area as an illustrative example of the problems associated with the proposed rerouting.²⁸ It was, therefore, entirely appropriate for the Board to address those operational considerations. Moreover, an expert agency may draw on its general expertise and the Board properly did so here with respect to rail service in Houston—an issue that had been the subject of numerous Board decisions. See TMPA 2003 at 23 & n.52.

TMPA’s final argument is that, even if it was proper to disallow the particular rerouting that it had proposed, the Board should not have reverted to using the historical routing of that traffic, under which the SARR would need to interchange the traffic with the residual BNSF at Northport, NE. Instead, TMPA now argues, the Board should have maximized the SARR’s participation in the movement by assuming that this traffic would be rerouted as far as Fort Worth, TX, where the GCRR could interchange the traffic with BNSF, which in turn could transport the rerouted traffic to its respective destinations without going through Houston. However, this was not how TMPA had structured its SAC presentation and TMPA had not

²⁸ See BNSF Reply Narr. at I-14-17; BNSF Reply V.S. Mueller at 30-32; BNSF Mot. to Dismiss at 4, 16-19.

suggested any alternative scenarios. Thus, no record had been presented as to whether such an alternative rerouting would itself pose operational concerns or place additional costs on the residual BNSF.

In sum, as the proponent of the novel rerouting proposal, it was TMPA's responsibility to support its proposal. It failed to do so here. Therefore the Board properly disallowed the proposed rerouting of the Fayette, Parish, and Nelson traffic through the Iola interchange.

3. Big Brown

BNSF argues that, because its rail transportation contract for the Big Brown movement specifies the Front Range route, the Board was required to give effect to that routing provision. BNSF relies on the Board's statement in West Texas, 1 S.T.B. at 658 n.41, that a SAC analysis assumes that a SARR would replace the defendant railroad but does not assume that a governing contract would be displaced or its terms changed.

The issue in West Texas was whether the SAC analysis could ignore the contractual rights of a connecting railroad. In that case, the complainant had proposed an operating plan that would have routed all of the traffic destined for a particular utility plant via the SARR to Amarillo, TX, where it would have been interchanged with a third-party carrier. This assumption contravened a contract provision stating that 75% of the traffic would be interchanged with a third-party carrier at Denver. The Board therefore rejected the complainant's effort to route all of the traffic through Amarillo. The Board explained that the contract terms could not be ignored simply to garner a greater proportion of the revenue from that traffic.

The ruling in West Texas reflects the broader principle that a complainant may not assume an operating plan that would divert traffic away from other railroads—see Arizona Elec. Power Coop., Inc. v. Burlington N. & S.F. Ry. et al., STB Docket No. 42058 (STB served Aug. 20, 2002) at 6—as the analysis of the reasonableness of a defendant carrier's rate should be based on the extent of the defendant carrier's participation in the movement. And the West Texas ruling reflects the general SAC principle that the proponent of a SARR may not assume a changed level of service to suit its proposed configuration unless it also presents evidence showing that the affected shippers, connecting carriers, and receivers would not object. See, e.g., McCarty Farms, Inc. v. Burlington N., Inc., 2 S.T.B. 460, 467 (1997).

Here, in contrast, it is BNSF itself that has the contract for the Big Brown movement and handles that movement from origin to destination. With the proposed rerouting, the SARR would merely step into the shoes of the BNSF. The traffic would not be diverted from a third-party connecting carrier, as there is no connecting carrier involved in that movement. Furthermore, TMPA presented evidence showing why the affected shipper presumably would not have any reason to object to the change in service. Thus, there is no inconsistency with the objectives of the SAC test. See TMPA 2003 at 19.

BNSF argues that the rerouting of the Big Brown traffic would not meet the needs of the shipper because it would deny the shipper several enumerated benefits of the routing provision that were placed in the contract at the shipper's request. BNSF seeks to support this claim with a newly presented verified statement from its Vice President of Coal Marketing. But because that evidence could have, and should have, been presented when the record was developed on this issue, it is not timely now.

B. Revenue Forecasts

To forecast the revenues that would be generated after 2004 for traffic not under contract, the Board used the most recent rate forecast from the Department of Energy's Energy Information Administration (EIA) as the best evidence of record. This forecast—one of several forecasts advanced by BNSF—was found to be preferable to the forecast proposed by TMPA for two reasons. First, it was a recent forecast from an official and impartial source. (The EIA, an independent statistical arm of the Department of Energy, was created by Congress for the express purpose of providing policy-neutral data and forecasts.) Second, use of EIA's rate forecast was consistent with the parties' reliance on EIA's tonnage forecast. TMPA 2003 at 29.

TMPA argues that the Board should have accepted its rate forecasts, which were based on specific contract information, rather than rely on a more general, regional forecast. TMPA's forecasts had differentiated between traffic based on whether it would be captive or competitive traffic for the GCR. For captive traffic, TMPA's forecasts escalated the rate at the end of the contract period by the weighted average rate adjustment for captive shippers remaining under contract. For competitive shippers, TMPA's forecasts estimated a new competitive market rate and, for subsequent years, escalated that rate by the weighted average rate adjustment for competitive shippers remaining under contract. Overall, TMPA forecast a 1.7% average annual increase in rail coal transportation rates, in contrast with EIA's forecast of 1.4%.

Contrary to TMPA's assertions, its forecast was not the best evidence of record as to post-contract rate changes beyond 2004. As the Board explained, TMPA 2003 at 28, TMPA's rate projections were more reflective of past rate changes and were not the best evidence of what changes in rates would reasonably be expected in the future. Moreover, the Board regards the forecasts developed by EIA, a neutral governmental source, as more reliable than forecasts developed by private parties for litigation, which are inherently subject to manipulation. Indeed, TMPA itself acknowledged the reasonableness of EIA forecasts when it used the EIA forecast for traffic volumes to demonstrate the reasonableness of its own traffic volume projection. Finally, having used the EIA forecast for tons, it was appropriate to use EIA's rate forecast as well. As explained in Duke Energy Corp v. CSX Transp., Inc., STB Docket No. 42070 (STB served Feb. 4, 2004) at 47-48, the forecasts of future transportation rates cannot be divorced from the forecasts of future demand for coal transportation (tonnages), as the two matters are interrelated. EIA's coal demand forecasts reflect EIA's rate forecasts, and tonnage and rate forecasts should be internally consistent where possible. Thus, where EIA tonnage forecasts are used, it is

preferable to use the matching EIA rate forecasts as well. This provides a single, consistent, and independent source for both components of the revenue forecast.

C. Locomotive Fueling

As previously discussed, the parties conducted a joint fuel study that was used in the variable cost analysis to determine the fuel expenses associated with handling the TMPA traffic alone. For the GCRR's operating costs, the Board again relied on this special study to estimate the fuel expense associated with serving all of the traffic in the traffic group, an approach advocated by BNSF. TMPA 2003 at 82. TMPA seeks reconsideration of this determination.

TMPA again asserts that adjustments to the results from the fuel study are required to address differences between the trains studied and the traffic group. In the variable cost analysis, it was the differences in cycle times that TMPA sought to address. In the SAC analysis, it was differences in the route that TMPA argued necessitated an adjustment, as the joint fuel study examined movements that traveled over the Front Range route, while the traffic group would travel over the Central Corridor route. TMPA contends that coal shipments over the Central Corridor route should have a lower fuel consumption rate because that route has less severe grades and curves than the Front Range route.

TMPA's proposed adjustment, however, bore no relationship to the perceived problem, as TMPA sought to use the same adjustment it advocated for the variable cost analysis. That adjustment addressed alleged discrepancies in cycle times and locomotive consists, not route characteristics.²⁹ Nowhere in TMPA's variable cost evidence on the proposed fuel study adjustments did TMPA describe any adjustment based on differences in route characteristics. And the Board could find no explanation in TMPA's SAC evidence of any proposed adjustment to fuel study results to account for differing route characteristics. Rather, TMPA simply stated that it was submitting fuel costs for the GCRR based on the consumption rate from the locomotive fuel study results.³⁰ Accordingly, the fuel consumption estimates drawn from the joint fuel study were the best evidence of record and were therefore properly used in the SAC analysis.

D. General and Administrative Expenses

To determine the general and administrative (G&A) expenses that the SARR would incur, the Board reviewed the record in detail to assess what a least-cost, most efficient railroad would need to manage the company. That inquiry ran the gambit, from the number of outside

²⁹ TMPA Open. Narr. at 96-98; TMPA Reply Narr. at 72; TMPA Reb. Narr. at 186-87.

³⁰ TMPA Open. Narr. at 196; TMPA Reb. Narr. at 379-80.

directors to the number of purchasing agents. With a few exceptions, the Board accepted as feasible TMPA's evidence of the number of employees; the Board also accepted TMPA's proposed salary levels. Accordingly, the Board assumed that the GCRR would be staffed by 63 G&A employees, at an annual expense of \$13.38 million. TMPA 2003 at 94.

BNSF seeks reconsideration, arguing that the total G&A costs accepted in this case are exceedingly low when compared with those of real-world railroads. But BNSF's cost-comparison data does not show what it would cost to run a specialized, optimally efficient railroad. As explained in TMPA 2003 at 79-80, the structure of the GCRR would be substantially simpler than that of the BNSF or any other large-scale, general commodity rail carrier. Under these circumstances, the costs incurred by BNSF or other large carriers are not necessarily a reliable indicator of the costs that would need to be incurred by the GCRR.

BNSF argues that the Board's analysis on this issue erroneously shifted the burden of proof to BNSF to show that TMPA's evidence was infeasible. This is incorrect. The Board found that TMPA's evidence was feasible and supported. See TMPA 2003 at 95 (finding that TMPA's operating department proposal would be reasonable and that BNSF's proposed additional layer of management would be unnecessary), 97 (agreeing with TMPA's proposal to outsource marketing functions and finding that TMPA's customer service staffing were reasonable), 100 (finding TMPA's proposed law and administration department reasonable), 102 (finding TMPA's arguments on legal staffing persuasive, its proposed staffing level for safety and claims reasonable, and its human resources staffing adequate), 103 (finding TMPA's indexation of wages realistic and verifiable), 104 (finding TMPA's proposals on non-operating personnel salaries supported). Thus, under SAC principles, it does not matter whether BNSF's higher-cost evidence may also have been feasible and supported, so long as TMPA's evidence—which represented the least cost for these expenses—was feasible and supported. See Guidelines, 1 I.C.C.2d at 542.

Finally, BNSF asserts that TMPA's executive salary assumptions were unsupported. TMPA estimated the salary for the president, vice-president of law and administration, and controller from public filings by Florida East Coast Industries. The salary estimate for Vice President-Finance was drawn from public filings by Wisconsin Central Transportation Corporation. TMPA drew its remaining G&A salary estimates from BNSF's 2000 Annual Wage Forms A & B.³¹

Upon reconsideration, BNSF is correct that TMPA's workpapers do not support TMPA's salary estimates for the senior executives. For example, the public filing by Florida East Coast Industries shows that in 2000, the President of the Florida East Coast Railway (FEC) received

³¹ See TMPA Reb. e-WP "Salaries" & BNSF Reply WP. 05194-051200.

total compensation of \$506,400, in the form of a salary of \$300,000 and a bonus of \$206,400.³² TMPA, however, used only the salary to develop its estimate. Similarly, TMPA ignored non-salary compensation of \$173,000, \$86,000, and \$31,580 paid to the VP-Law and Administration, Controller, and VP-Finance respectively. Accordingly, we will modify the SAC analysis with respect to executive compensation.

BNSF maintains that the Board should use BNSF's evidence of salaries paid to executives of several regional and short-line railroads to calculate salaries for the GCRR's executives. However, with the exception of the VP-Law position, including the non-salary compensation components paid by the FEC produces lower total compensation figures than proposed by BNSF. Therefore, our revised SAC analysis uses BNSF's evidence only with respect to the salary for VP-Law, where it is the least-cost evidence on record. For the other executive positions, we will continue to rely on TMPA's evidence, but revised to include the total annual compensation paid to the FEC executives (excluding stock options that we cannot value), and not just the salary component. This will increase the total G&A operating expense by \$550,221 (from \$13,380,139 to \$13,930,360).

E. Road Property Investment

1. Barriers to Entry

The ultimate objective of the SAC constraint is to simulate a competitive rate standard for non-competitive rail movements by determining the rate that would be available to the shipper in a contestable market environment. As explained in Guidelines, 1 I.C.C.2d at 529, the railroad industry is not considered contestable due to its significant barriers to entry and exit. It is only by excluding from the SAC analysis the costs and other limitations associated with entry and exit barriers that the Board can approximate the cost structure of firms operating in a contestable market.

The SAC analysis treats as a barrier to entry any type of cost that a new entrant would have to incur that was not actually incurred by the defendant carrier. West Texas, 1 S.T.B. at 670. Thus, a defendant railroad is not entitled to earn a return on investments it did not incur, but it can earn a reasonable return on the current replacement costs of investments it made. However, costs associated with modern construction practices are not treated as barriers to entry, as such practices are merely a present-day substitute for the procedures used when the original rail line was constructed. See FMC Wyoming Corp. and FMC et al. v. Union Pac. R.R., STB Docket No. 42022 (STB served May 12, 2000) at 118.

³² See TMPA Open WP. at 5959.

It is often difficult to determine if a defendant railroad or its predecessor(s) incurred a particular construction cost, given the passage of time. We therefore rely on the Engineering Reports (“Engrg Rpts”), which are a compendia of data collected by the ICC in the early part of the 20th Century. They detail the material quantities required to build most rail lines in place in the United States at the time. These reports included only those items for which the ICC concluded a carrier had paid all or some part of the cost. See Texas Midland R.R., 75 I.C.C. 1, 115-86 (1918). Therefore, if an item appears in the Engrg Rpts, the Board includes in the SAC analysis some cost to replicate that facility, albeit only a percentage of that cost if there is reason to conclude that the defendant carrier (or its predecessor) did not bear the full cost of that item.

Both parties object to how these barrier-to-entry principles were applied in this case to four particular expenses: rail bridges, utility relocation, at-grade crossings, and road resurfacing.

i. Bridges

South of Bridger Junction, TMPA had included the costs for only those rail bridges needed to cross over natural barriers and other rail lines that predated BNSF’s line. TMPA asserted that BNSF’s predecessors had not incurred the cost to build the remaining 62 rail bridges now on the BNSF lines that would be replicated by the GCRR.³³ BNSF responded by noting that the excluded bridges all had construction dates within the last 20-30 years – inferring that they had either paid to construct that bridge (after highways became prevalent) or paid to replace bridges that had become obsolete. The Board excluded any cost for constructing those rail bridges, explaining that, if BNSF had replaced bridges as they became obsolete, those costs should be considered a maintenance expense, rather than a capital investment expense.

BNSF seeks reconsideration of that decision. BNSF contends that, if it had paid to replace those bridges, the SAC analysis should include the replacement cost of those bridges. BNSF argues that, even if the SAC analysis did not need to include the cost of initially constructing the bridges, the SARR would need funds to replace the bridges as they age and that, by excluding the capital for the construction, the Board wrongly omitted any provision for the capital recovery needed for replacement of the bridges. This is because the DCF model used by the Board automatically calculates the amounts needed in future years to replace SARR assets, based on the amounts included in the original construction costs, but does not calculate a replacement cost for items excluded from the original investment base. Finally, BNSF argues that the Board also erred by excluding all operating costs associated with maintenance of the bridges.

³³ The statement in TMPA 2003 at 140, that TMPA only included 62 rail bridges south of Bridger Junction was incorrect, as that was the number of bridges TMPA excluded.

Upon reconsideration, we agree that, where BNSF has paid to replace an obsolete bridge, even if it did not pay for the original bridge, it should be entitled to earn a return on that investment just as it would if it had paid for the original bridge. Treating that capital outlay as a maintenance expense is insufficient, as the result would be to include in the SAC analysis only enough cost to cover future operating expenses to maintain that bridge. The SAC analysis would not provide for a return on that investment.

Here, however, BNSF has failed to prove that it paid to construct or replace the contested bridges. It simply asserted that it had, based on nothing more than a bridge inventory list. If BNSF had paid to replace or construct those bridges in the last 20-30 years, we would expect BNSF to have much stronger evidence showing that financial outlay. Thus, on this record, it was proper to exclude the cost to construct or replace the contested bridges. And, as discussed in Section IV below, because the Board accepted BNSF's evidence regarding MOW expenses, which presumably included the annual operating cost to maintain all of the bridges along the right-of-way (ROW), no change to that expense is necessary.

ii. Utility Relocation

Where there was no evidence that BNSF or its predecessor paid to relocate utility lines when it constructed its rail lines, the Board excluded that cost as a barrier to entry. TMPA 2003 at 121. BNSF seeks reconsideration of that treatment. It argues that the costs of siting or relocating utilities should be included regardless of whether the rail line predated or postdated the utilities, as utilities are necessary to provide power to a railroad and BNSF invested capital in the utilities' poles and lines.

BNSF's argument rests on the unsupported assertion that the GCRR would benefit from the utility lines. But in this case, the inclusion of recent technology (encoded track circuitry) would make pole lines unnecessary. Therefore, it was appropriate to exclude those costs.

iii. Road Surfacing and At-Grade Crossings

In this case, the Board included the costs of at-grade crossings south of Bridger Junction because the Engrg Rpts demonstrated that BNSF's predecessor had incurred crossing costs south of Bridger Junction. TMPA 2003 at 154. But the Board excluded the cost to surface new roads or resurface existing roads damaged during construction of that line, because the lines predated the adjacent roads and there was no evidence that BNSF had incurred the costs for surfacing (or resurfacing) such roads. Id. at 123.

Both parties seek reconsideration of the Board's treatment of these two costs. BNSF argues that, because the Engrg Rpts show that the railroad paid for at-grade crossings, that means the road predated the railroad and that the railroad therefore would have incurred costs for road resurfacing. TMPA responds that BNSF's position rests on the incorrect presumption that Engrg

Rpts provide evidence of who paid for an item, instead of just the existence of an item. TMPA argues that Engrg Rpts, which were the basis for the Board's decision on this issue, catalog the existence of at-grade crossings, but do not specify whether the incumbent, or some other party, paid for the crossings, and that BNSF has provided no other evidence that it or its predecessor paid for the crossings.

As explained above, we do not accept TMPA's limiting characterization of the Engrg Rpts. Rather, inclusion of an item in those reports generally means that the railroad paid at least some portion of the expense for that item and that expense is therefore properly included in the SAC analysis. Here, because the Engrg Rpts included these assets, it is reasonable to assume that BNSF paid at least part of the expense associated with at-grade crossings south of Bridger Junction. The evidence in this record and past cases suggests that when railroads did pay for at-grade crossings, they generally paid 10% of those expenses. Thus, the Board properly included only 10% of the replacement cost in the SAC analysis. TMPA 2003 at 154.

There is no comparable evidence to indicate that BNSF paid any cost to surface or resurface roads damaged by such construction, or to accommodate traffic during construction. Absent such evidence, the Board's longstanding presumption is that other parties (such as the state) bore those expenses. Even where the railroad paid some portion of the costs to construct at-grade crossings and crossing protections, there is no basis for assuming, without supporting evidence, that the railroad, rather than the state, paid for resurfacing or relocation of public roads.

In sum, contrary to the suggestion of the parties, it is not inconsistent to conclude, based on the evidence in this case, that BNSF or its predecessor paid a small portion of the cost of at-grade crossings, but that the state paid the entire cost to surface or resurface public roads damaged or diverted as a result of that construction.

2. Fences

Relying on BNSF's evidence that the Engrg Rpts showed fencing of 75% of the ROW, and on BNSF's citation to state laws and deeds from adjacent landowners demonstrating the railroad's obligation to fence the ROW, the Board included fencing costs for 75% of the ROW south of Bridger Junction. TMPA 2003 at 152. TMPA seeks reconsideration of the Board's rejection of its evidence that only 20% of the ROW required fencing. TMPA's witnesses had spent 5 days traveling along the BNSF route that would be replicated by the GCRR's route from the PRB through Texas, and from their visual observations they concluded that only 20% of the line was fenced. TMPA also submitted photographs to show the lack of fencing. TMPA notes that the Board relied on similar evidence in PPL Montana, LLC v. Burlington N.&S.F. Ry., STB Docket No. 42054 (STB served Aug. 20, 2002) (PPL) at 28.

Here, BNSF's evidence was the better evidence of record. TMPA's evidence consisted of two pages of workpapers purporting to summarize its witnesses' inspection of unspecified

portions of the ROW, along with miscellaneous photographs (some of which note that there are no fences shown) in an unlabeled section of its rebuttal workpapers. The photographs appear to have been taken at four locations on the ROW (all on the same subdivision within 80 miles of each other), but with no organized sampling procedure for the remainder of the ROW. Given that both parties agree that at least 25% of the ROW is unfenced, a handful of photographs showing sections with no fencing was not sufficient support for TMPA's claim that fully 80% is unfenced. Thus, TMPA's evidence was simply not on par with the evidence in PPL, where the shipper supported its fencing contentions with detailed, organized observations in 20 pages of workpapers.

IV. Technical Errors

Several technical errors in the numbers used by the Board in TMPA 2003 have been brought to our attention by the parties. First, the parties agree that the wrong value was used for system-average locomotive depreciation. The Board used a figure of \$0.00000105, instead of the correct value of \$0.00006377. The parties should correct this mistake when they calculate the variable costs in future years.

Second, as BNSF has noted, the Board mistakenly separated construction costs for Rails and for Other Track Materials (OTM), when it should have combined them for input into DCF accounts. This error resulted in the application of the wrong asset-life assumptions to OTM costs, as well as the costs for Ballast, Track Labor & Equipment, and Fences and Roadway Signs. This error is corrected herein.

Finally, BNSF notes that the MOW figure reported in the decision and used in the DCF analysis (\$83.3 million) conflicted with the MOW figure provided to the parties in the Board's electronic workpapers (\$87.8 million). The Board inadvertently inserted the wrong table into the decision's appendix (one that did not reflect the final determination of the Board) and provided the parties with some electronic workpapers showing the wrong numbers as well. The DCF analysis then incorrectly used the \$83.3 million figure to calculate the maximum reasonable rate and reparations.

For the reasons discussed in the decision, see TMPA 2003 at 112, the Board generally relied on the evidence submitted by BNSF to develop MOW expenses. However, BNSF's MOW cost estimates were based, in part, on the number of track miles the GCRR would have, and the Board had restated the total track miles from BNSF's estimate of 2,546 down to 2,401. The Board therefore accepted BNSF's total MOW expense (of \$93,025,753), but reduced that expense by roughly 5.6% due to the smaller SARR network. This error is corrected here. The correct figure of \$87,800,819 is shown in our new electronic workpapers at "STB Restated MOW1" spreadsheet "STB Restatement."

V. Scope of Rate Prescription

The challenged BNSF rate applied to coal movements to TMPA's Gibbons Creek plant from 16 named PRB mines: Antelope, Buckskin, Belle Ayr, Black Thunder, Caballo, Caballo Rojo, Coal Creek, Cordero, Dry Fork, Eagle Butte, Glovis Point, Jacobs Ranch, North Antelope, North Rochelle, Rawhide, and Rochelle. TMPA's complaint was not limited to specific mines,³⁴ and its SAC evidence covered all 16 mines. Moreover, it is undisputed that there are no other feasible means of transporting coal from the PRB to the Gibbons Creek plant. Thus, the rate prescription in this case—the higher of the SAC rate or the 180% R/VC regulatory floor—should apply to movements from any of the 16 mines. However, the findings and ordering paragraph in TMPA 2003 (at 33, 36) only mentioned the two mines from which TMPA's traffic had moved during the 9-month time period covered by the evidentiary record (Caballo Rojo and Cordero).

In its petition for reconsideration, TMPA asks that the rate prescription not be limited to the traffic from those two mines. In fact, it was the Board's intention that the rate prescription extend to any mines from which traffic might move, so long as those mines were covered by both the complaint and the SAC analysis. In TMPA 2003 at 10, the Board expressly stated that, if Gibbons Creek traffic were to move in the future from other mines, the prescription would apply so long as the 180% R/VC jurisdictional threshold was met, and that the parties should themselves make the determination whether the threshold was met using the variable costing procedures and findings contained in Appendix A of that decision. In other words, the order was intended to be self-effectuating: only if the parties could not agree on the computation of the variable cost of a movement would there be any need to return to the Board.

BNSF argues that the Board has no authority to assess the reasonableness of a challenged rate until we have determined that the revenues for the movement exceed the R/VC threshold contained in the statute. That, however, is not our reading of the relevant statutory provisions. Under the statute, we must make an affirmative finding that the rail carrier has "market dominance," 49 U.S.C. 10707(b), which is defined as "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies," 49 U.S.C. 10707(a). Once the Board makes that qualitative finding, we may then proceed to examine the reasonableness of the rate. 49 U.S.C. 10707(c). There is no requirement that the Board make an independent quantitative determination of the R/VC ratio for a movement; rather, we are precluded from finding market dominance only if the defendant carrier proves that the rate charged results in an R/VC below 180%. 49 U.S.C. 10707(d)(1)(A). Thus, absent a railroad showing that the R/VC level for a movement is below 180%, the Board may proceed to examine the reasonableness of a rate for a movement for which there is no competitive alternative.

³⁴ The prior decision erroneously stated that the complaint named only 4 mines. TMPA 2003 at 8 n.3.

The railroad is not disadvantaged by the rate prescription extending to all of the mines that were embraced in the complaint and the SAC analysis. The railroad is protected by the terms of the prescription itself, which assures that the prescribed rate cannot fall below the 180% R/VC floor for any movement in any year. Indeed, by their nature rate prescriptions apply to future movements, before the information necessary to calculate the variable costs of those future movements is known. Thus, even as to the two mines from which traffic had already moved, the parties were directed to make the appropriate variable cost calculations for future years based on the guidance provided in the Board's TMPA 2003 decision regarding how those costs are to be determined. If the parties cannot agree on the proper R/VC calculation from another mine even with that guidance, either party may return to the Board to have the dispute resolved.

BNSF argues that this approach represents a departure from precedent. In Wisconsin Power & Light Co. v. Union Pac. R.R., STB Docket No. 42051 (STB served Sept. 13, 2001) (WPL)—where, as here, the Board's decision addressed only two of the multiple mine origins covered by the complaint, as traffic had only moved from two mines during the period covered by the evidentiary record—the Board stated that, for shipments from the other mines, the parties should return to the Board only if they could not agree on what the 180% R/VC rate floor should be. See WPL at 7. In any event, to the extent that there has been a change in Board policy, we are persuaded that the better policy is for a rate prescription to be self-effectuating where a mine is embraced in both the original complaint and the SAC evidence. There is no sound legal or public policy reason why TMPA should be required to re-litigate its rate complaint, in whole or in part, to obtain the benefit of the rate prescription when it shifts traffic from one of the mines covered by its rate complaint to another mine covered by that same complaint.

VI. Recalculated DCF

The DCF analysis compares the stream of revenues that would be generated by the traffic group to the stream of costs that the GCRR would incur, discounted to a common point in time. To do that, the DCF model computes and distributes the total cost of the GCRR over the 20-year analysis period, thus determining the amount of revenues that would be needed by the GCRR to cover its operating expenses, meet its tax obligations, recover its investment, and obtain an adequate return on that investment.

The results of our revised DCF calculations are shown in **Table 1** below. As that table shows, in the first 10 years of the 20-year SAC analysis period, the traffic group would generate greater revenues than the GCRR's revenue requirements; but thereafter the annual revenues are forecast to fall below the GCRR's revenue requirements. The sum of the present values of over-recoveries exceeds the under-recoveries, thus demonstrating that the existing rate level is too high. The last column of **Table 1** shows the percentage amount by which the revenues from the traffic group would need to be reduced so that over the entire 20-year SAC analysis period this traffic group would generate just enough revenue to cover the GCRR's revenue requirements. The rate prescription for TMPA's Gibbons Creek traffic reflects that percentage reduction.

Table 1
Revised DCF Analysis
(millions of dollars)

Year	GCRR Revenue Requirements	BNSF Forecast Revenues	Difference	Present Value	Cumulative	Percent Rate Reduction
2001	661.0	694.5	33.5	33.6	33.6	2.36%
2002	866.4	926.9	60.6	53.3	86.9	3.19%
2003	886.0	916.9	30.9	24.5	111.4	1.64%
2004	905.8	931.0	25.2	18.1	129.5	1.32%
2005	929.1	970.8	41.7	27.0	156.5	2.10%
2006	947.8	978.6	30.8	18.0	174.6	1.54%
2007	972.7	1,006.4	33.7	17.8	192.3	1.63%
2008	997.2	1,027.7	30.5	14.5	206.9	1.45%
2009	1,021.6	1,043.9	22.4	9.6	216.5	1.05%
2010	1,047.0	1,059.8	12.8	5.0	221.5	0.59%
2011	1,073.1	1,072.6	(0.5)	(0.2)	221.3	0.00%
2012	1,099.8	1,084.9	(14.9)	(4.7)	216.5	0.00%
2013	1,127.5	1,099.0	(28.5)	(8.2)	208.4	0.00%
2014	1,155.5	1,110.2	(45.3)	(11.7)	196.7	0.00%
2015	1,183.9	1,126.6	(57.3)	(13.4)	183.3	0.00%
2016	1,215.8	1,149.7	(66.1)	(13.9)	169.4	0.00%
2017	1,246.9	1,170.8	(76.1)	(14.5)	155.0	0.00%
2018	1,278.0	1,192.0	(85.9)	(14.7)	140.2	0.00%
2019	1,310.4	1,217.4	(93.1)	(14.4)	125.8	0.00%
2020	1,344.3	1,246.8	(97.5)	(13.6)	112.2	0.00%
2021	341.2	311.7	(29.5)	(4.0)	108.2	0.00%

* 2001 data is for the 2nd, 3rd, and 4th quarters of the year.

** 2021 data is for only the 1st quarter of the year.

NOTE: The DCF model limits the revenue reductions in 2001 through 2010 to 49% of the overpayments, in order to offset the underpayments that would occur in 2011 through 2021.

Under the revised SAC analysis, the prescribed rate is the higher of the SAC rate, as shown in **Table 2**, or the regulatory rate floor (the 180% R/VC rate level), which the parties should compute in a manner consistent with the procedures and findings in TMPA 2003 at 38-66. (As discussed above, the Board cannot calculate the regulatory rate floor for movements from 14 of the challenged mine origins, or for any of the mines beyond 2001, as we do not have the necessary variable cost information.)

Table 2
Revised Rate Prescription

Year	Tariff Rate	SAC Rate Reduction	SAC Rate	STB Prescribed Rate
2001 Q2	\$19.09	2.54%	\$18.61	Higher of SAC rate or 180% R/VC rate
2001 Q3	19.28	2.36%	18.83	
2001 Q4	19.39	2.18%	18.97	
2002	19.55	2.36%	19.09	Higher of SAC rate or 180% R/VC rate
2003	20.06	3.19%	19.42	
2004	20.64	1.64%	20.30	
2005	21.26	1.32%	20.98	
2006	21.89	2.10%	21.43	
2007	22.53	1.54%	22.18	
2008	23.18	1.63%	22.80	
2009	23.88	1.45%	23.53	
2010	24.60	1.05%	24.34	
2011	25.33	0.00%	25.33	
2012	26.09	0.00%	26.09	
2013	26.88	0.00%	26.88	
2014	27.68	0.00%	27.68	
2015	28.51	0.00%	28.51	
2016	29.37	0.00%	29.37	
2017	30.25	0.00%	30.25	
2018	31.16	0.00%	31.16	
2019	32.09	0.00%	32.09	
2020	33.05	0.00%	33.05	
2021 Q1	33.05	0.00%	33.05	

Finally, based on the revised SAC analysis, we restate the reparations awarded to TMPA for the unreasonable portion of the rate that it has paid prior to this revised rate prescription taking effect. The amount of reparations for movements in the 2nd, 3rd and 4th quarters of 2001 are shown in **Table 3**.

Table 3
Revised Reparations

	Tons	Tariff Rate	Amount Paid	Prescribed Rate	Reparations
2Q2001	454,852	\$19.09	\$8,683,119	\$18.61	\$218,329
3Q2001	524,538	19.28	7,319,128	18.83	\$236,042
4Q2001	455,980	19.39	8,841,450	18.97	\$191,512
Totals	1,291,370		\$24,843,697		\$645,883

The parties should now re-calculate what reparations, if any, are due after the 4th Quarter 2001 until this revised rate prescription takes effect. Interest is also awarded in accordance with 49 CFR 1141.

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

It is ordered:

1. The rate prescription and reparations award for movements of the issue traffic are revised as discussed above and set forth in Tables 2 and 3 of this decision.
2. This decision is effective October 27, 2004.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary