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SERVICE DATE - NOVEMBER 7, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 41191

WEST TEXAS UTILITIES COMPANY
v.
BURLINGTON NORTHERN RAILROAD COMPANY

Decided: November 3, 2000

On June 16, 2000, The Burlington Northern and Santa Fe Railway Company (BNSF), successor in interest to the Burlington Northern Railroad Company (BN), notified the Board of its intention to increase to \$15.78 per ton, effective July 7, 2000, its common carrier rate on unit train movements of coal from Powder River Basin (PRB) origins in Wyoming to the electric generating station of the West Texas Utilities Company (WTU) at Oklaunion, TX. This rate would replace the \$13.68 per ton rate that the Board determined to be the maximum reasonable rate for coal movements from the Rawhide mine in the PRB to Oklaunion, West Texas Utilities Company v. Burlington Northern RR Co., 1 S.T.B. 638 (1996) (West Texas), aff'd sub nom. Burlington N.R. v. STB, 114 F.3d 206 (D.C. Cir. 1997), and that BNSF also applied to non-Rawhide PRB origins.

BNSF argues that the Board's West Texas rate prescription only applied to coal movements from the Rawhide mine. Now that the Rawhide mine has closed, and all of WTU's coal moves from different PRB origins, BNSF claims that it has a right to take the rate increase without obtaining prior Board approval. In the alternative, BNSF asks that, if we consider that the rate prescription also applied to non-Rawhide origins, we treat its filing as a request to modify the rate prescription in West Texas.

On June 29, 2000, WTU filed a reply requesting that BNSF's filing be dismissed. WTU argues that the notification of the rate increase was null and void because it involved a rate prescription that could be modified only by the Board. Alternatively, it contends that, if we find that the rate prescription applies only to the Rawhide mine, we should modify the prescription to include the other PRB mines. Finally, WTU submits that, if BNSF wishes to raise its rates to Oklaunion, it must demonstrate, in an evidentiary presentation, that the rate increase is warranted.

BACKGROUND

In making our rate reasonableness determination in West Texas, we found that the stand-alone cost (SAC) of providing the service at issue would produce a rate that was below the 180% revenue-to-variable cost (r/vc) jurisdictional threshold. Because we do not have jurisdiction over rates below this threshold, we prescribed the maximum reasonable rate level at the point that

would produce revenues equal to 180% of BN's variable cost of providing the service. 1 S.T.B. at 677-78. In so doing, we stated, id. at 644 (footnote omitted):

We will limit our analysis and relief in this decision to the reasonableness of the rate from the Rawhide origin. The original complaint referred only to Rawhide, as does Tariff 4232. Rawhide is the main focus of the complaint because, as discussed more fully below, it supplies WTU's base-load coal tonnage requirements. Moreover, only the Rawhide origin is consistently identified throughout the evidence.

WTU may request BN to establish appropriate rates from any or all of the other mines. We can address any rate reasonableness concerns as to those other mine origins in a subsequent decision, if necessary, after obtaining appropriate supplemental evidence tailored to those sites.

In accordance with our decision, BN established the \$13.68 rate for Rawhide. At the request of WTU's parent company, Central and South West Services (CSW), BN applied the rate of \$13.68 per ton to other PRB origins.¹ The Rawhide mine closed in 1997, and since then WTU's primary source of coal has been the Buckskin mine. BNSF states that, at least until July 7 of this year, it has continued to apply the \$13.68 rate to all PRB origins.

POSITIONS OF THE PARTIES

BNSF, as noted, maintains that the West Texas prescription does not apply to non-Rawhide movements. BNSF also contends that, even if the rate prescription applied to the other origins, it would still be entitled to increase the rate. It argues that setting a rate at the 180% r/vc level is only appropriate if the SAC rate level is lower than that jurisdictional threshold. If the SAC rate level exceeds 180% r/vc, as it allegedly now does, then BNSF submits that the maximum rate should be the SAC rate rather than the 180% r/vc floor.

WTU argues that, once a maximum rate has been prescribed, the carrier is deprived of pricing freedom and cannot charge a different rate unless the Board modifies or ends the prescription. Here, BNSF's notice of rate increase is allegedly invalid because, according to WTU, the \$13.68 rate "was established in compliance with a rate prescription order of the Board issued pursuant to 49 U.S.C.

¹ Specifically, BN informed CSW that the \$13.68 rate "applies to service from all coal mines in Campbell and Converse Counties, WY that are directly accessible to BN and are located on the rail line between Buckskin Junction and Converse Junction, WY, inclusive." Letter dated December 9, 1996, from Sami M. Shalah, BNSF Assistant Vice President – Coal Marketing Business Unit to Marguerite Mills, Director of Solid Fuels for CSW.

10704(a)(1).”² WTU claims that the rate prescription applied to multiple PRB origins. It asserts that in West Texas it presented evidence of its intent to use the different PRB origins and sought a rate prescription for all of them, and that it followed the instructions in our decision at 644³ and 681⁴ by contacting BN to request that the \$13.68 rate be established for all PRB origins.

WTU argues that, under the terms of our West Texas decision at 644, WTU made a “request,” and BN and it agreed that the \$13.68 rate was “appropriate” for all PRB origins. Thus, WTU claims that BN “establish[ed]” the prescription rate for all origins. According to WTU, in West Texas we left to the parties the issue of what origins were part of the prescription order, and we would only intervene if “rate reasonableness” issues about the other origins arose. Because the parties agreed that the \$13.68 rate applied to all origins, WTU contends that those rates were within the scope of the prescription and no further Board action was needed.

In the alternative, WTU argues that, if we find that the rate prescription is limited to the Rawhide mine, we should modify the order to include the other PRB mines. According to WTU, this modification can be made on the present record because the Buckskin mine is adjacent to the Rawhide mine; because pricing transportation services from PRB mines the same is consistent with industry practice and regulatory precedent (citing Ayrshire Collieries Corp. v. United States, 335 U.S. 573 (1949) (Ayrshire)); and because BNSF has acknowledged that we would likely apply the rate prescription to all PRB mines.

Finally, WTU argues that the BNSF notice is deficient because it does not present substantial evidence to justify an increase in the prescribed rate. The evidence BNSF submitted is flawed, according to WTU, because it is based on workpapers of Board staff, the Board made no specific

² That section reads in relevant part:

When the Board, after a full hearing, decides that a rate charged or collected by a rail carrier . . . does or will violate this part, the Board may prescribe the maximum rate . . . to be followed. . . .

When a rate . . . is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate

³ “WTU may request BN to establish appropriate rates from any or all of the other mines. We can address any rate reasonableness concerns as to those other mine origins in a subsequent decision, if necessary, after obtaining appropriate supplemental evidence tailored to those sites.”

⁴ In the first ordering paragraph we directed that “[d]efendant shall, within 60 days, establish and maintain rates for the issue traffic that do not exceed the reasonable rate limitation determined in this decision.”

findings on SAC rate levels in West Texas, and the SAC rate levels in the workpapers were based on projections instead of actual data.

Accordingly, WTU asks that BNSF’s filing be dismissed. Alternatively, WTU requests that the filing be treated as a petition to reopen, and that we reopen this proceeding and set an appropriate evidentiary schedule.

DISCUSSION AND CONCLUSIONS

A carrier cannot change a prescribed rate without receiving permission from the Board. A rate prescription bars a carrier from “publish[ing], charg[ing], or collect[ing] a different rate.” See 49 U.S.C. 10704(a)(1). See also Pet.–Review of WV PSC Decision Pursuant–49 U.S.C. 11501, 2 I.C.C.2d 48 (1986) and Arizona Grocery Co. v. Atchison Topeka & Santa Fe Ry., 284 U.S. 370 (1932). We find, however, that the rate prescription in West Texas only applied to the Rawhide mine, and, thus, under 49 U.S.C. 11101(c),⁵ BNSF may raise its rates from non-Rawhide PRB origins to \$15.78 per ton, effective July 7, 2000. BNSF does not need a Board order to modify the rate. Nevertheless, under the terms of our West Texas decision at 644, we will reopen this proceeding to receive supplemental evidence on whether the \$15.78 rate is reasonable.

Our decision in West Texas made clear, 1 S.T.B. at 644, that the rate prescription applied only to Rawhide: “We will limit our analysis and relief in this decision to the reasonableness of the rate from the Rawhide origin. The original complaint referred only to Rawhide, as does Tariff 4232. Rawhide is the main focus of the complaint. . . . Moreover, only the Rawhide origin is consistently identified throughout the evidence.” We added that “WTU presented evidence, albeit inconsistently, with regard to movements from some (but not all) of the origin mines it had identified, as well as from other mines not identified in the February 1995 letter.” Id. at n.5.

WTU points to other language on 644 (supra note 3) which, it asserts, justifies its claim that the \$13.68 rate for all other PRB origins was deemed appropriate and was “established” in the BN letter to WTU dated December 9, 1996. We disagree. Our language indicated that, while only a rate from the Rawhide mine was prescribed, the parties could voluntarily agree on rates from the other origins. We would, if a rate agreement was not reached, make a rate reasonableness determination after getting “supplemental evidence tailored to those sites.” Any agreement between the parties did not transform the agreed-upon rates into prescribed rates. Indeed, in its December 9, 1996 letter at 1, BN indicated that the rates were not immutable: “This letter reflects the modified terms of service without prejudice to our prerogative to modify those terms in the future.”

⁵ Section 11101(c) states in relevant part: “A rail carrier may not increase any common carrier rate or change any common carrier service terms unless 20 days have expired after written or electronic notice is provided”

We will also deny WTU's alternative requests. We cannot extend the prescription to the other PRB origins on the present record. As noted, BNSF has the rate freedom to increase these rates without precondition except for the 20-day notice (also making moot WTU's request to have a full hearing to justify the \$15.78 rate).⁶ Moreover, we would not make such a prescription without receiving "supplemental evidence tailored to those sites."

We will, however, reopen this proceeding to address WTU's opposition to the \$15.78 rate. As noted, our West Texas decision provided that we would consider reasonableness disputes over rates for other mine origins based on supplemental evidence. The parties should confer and submit a motion to govern further proceedings, including an appropriate procedural schedule and a discussion of the issues that must be addressed on reopening. We will then issue a schedule under which the parties can submit supplemental evidence concerning the non-Rawhide origins. We will then make a determination on the reasonableness of the rates for non-Rawhide origins.

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

It is ordered:

1. This proceeding is reopened to determine the reasonableness of the \$15.78 per ton rate from other PRB origins. The parties shall jointly file a motion to govern further proceedings.
2. WTU's alternative requests are denied.
3. This decision is effective December 7, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary

⁶ Thus, Ayrshire, which WTU cites, is not on point. There, the Interstate Commerce Commission investigated and ruled on group rates. Here, the Board reviewed and prescribed only the Rawhide rate.