

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. 42119

NORTH AMERICA FREIGHT CAR ASSOCIATION

v.

UNION PACIFIC RAILROAD COMPANY

REPLY OF NORTH AMERICA FREIGHT CAR ASSOCIATION TO UNION PACIFIC
RAILROAD COMPANY'S PETITION FOR AN ORDER DIRECTING
SIMULTANEOUS FINAL BRIEFS

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I.

North America Freight Car Association (“NAFCA”) vigorously opposes the Petition of Union Pacific Railroad Company (“UP” or “Union Pacific”) for an order directing simultaneous final briefs. The fundamental reason for NAFCA’s opposition is that UP’s petition reneges on a procedural agreement reached with NAFCA and approved by the Board as “reasonable.”¹ In addition, none of the cases cited by UP in support of its position involve a fact pattern where, as here, the parties, each for their own good reasons, and presumably in good faith, agreed on a procedural schedule but one party then went back on its word and asked the Board to allow additional briefs, which were granted over the objections of the other party.

The Board has never set a procedural schedule of its own in this case. When the proceeding began, the parties requested the Board to refrain from doing so while they explored the possibility of resolving or narrowing the issues through mutual discussions. The Board agreed and stayed its hand, advising the parties that, if their negotiations did not work, they should either seek Board-run mediation or file a proposed procedural schedule. On September 14, 2011, the parties did file a mutually agreed, proposed procedural schedule, which the Board approved in its Decision of September 26, 2011. That schedule called for opening statement by NAFCA, a reply by UP, and a rebuttal statement by NAFCA, all of which have been filed. In its Decision of September 26, 2011, the Board called that schedule “reasonable.”

The reason why it is customary in a complaint proceeding for the complainant to file an opening statement, followed by the defendant’s reply, and then by complainant’s rebuttal is because complainants have the burden of proof. *NAFCA v. BNSF Railway Co.*, Docket No. 42060, Decision served January 26, 2007, *Pet. for Review Denied*, *NAFCA v. STB*, 529 F.3d 466

¹See, e.g., Decision of the Board dated September 26, 2011.

(D.C. Cir. 2008). Union Pacific has not relinquished the position that NAFCA bears the burden of proof and UP therefore should not be heard to demand nullification of the procedural process historically recognized where the complainant does bear the burden of proof.

II.

UP argues that closing briefs “assist the Board in evaluating the record and making a decision that is fair.” UP Petition at 3. UP, however, neglects to address the question of what is fair about a party entering into an agreed procedural schedule, inducing reliance by the other party, and then abandoning that agreement to advocate for a different approach. NAFCA agrees that fairness is an appropriate concept in this case, but submits that it is anything but fair for UP to agree to one set of filings, and, after briefing has been completed under that format, ask the Board to permit additional filings. Allowing UP to have an additional opportunity to contest the issues, and an opportunity to try to rehabilitate contentions it may feel were not adequately made in its Reply Statement, increases litigation costs and decreases litigation fairness.

III.

Union Pacific cites several cases for the proposition that final, simultaneous briefs are “efficient,” “focus the evidence,” and allow “each party to identify the issues that are in dispute, to explain the issues that are relevant, and to set forth its positions on those key issues.” All of that has been done, however, in NAFCA’s opening statement, UP’s reply, and NAFCA’s rebuttal. Each party has set forth its positions on what it regards as key issues in its statements filed under the procedural schedule approved by the Board. UP’s Petition certainly offers no record-based reasons why there is a further need to identify issues in dispute or explain issues, or for the parties to set forth their positions on issues.

This is not a rate case where issues may not always be identifiable except after looking at the record in retrospect. In this case, the issues have been announced by each party from the beginning and addressed accordingly. There may well have been cases in which the Board was convinced by the argument of the party petitioning for closing briefs that the prior record was, indeed, unfocused; but UP makes no effort to make that argument with respect to this specific record.

IV.

Although Union Pacific's Petition makes it appear as if final, closing briefs are to be taken for granted, that is far from true. In a number of cases, including those of some significance, opening and closing statements were filed by the complainant, without simultaneous closing briefs. See *Groome & Associates, Inc. v. Greenville County Economic Dev. Corp.*, Docket No. 42087 (served July 27, 2005); *Granite State Concrete Co. v. Boston & Maine Corp.*, Docket No. 42083 (served September 24, 2004), *aff'd. sub nom., Granite State Concrete Co. v. STB*, 417 F.3d 85 (1st Cir. 2005); *NAFCA v. BNSF Ry. Co.*, Docket No. 42060 (served January 26, 2007), *Pet. for Review Denied, NAFCA v. STB*, 529 F.3d 1166 (D.C. Cir. 2008); and *Entergy Arkansas, Inc. v. Union Pac. R.R. Co.*, Docket No. 42104 (served March 15, 2011).²

V.

The cases cited by UP turn out, upon examination, to be distinguishable if not outright contrary to UP's position. The first of these is Docket No. 42120, *Cargill, Inc. v. BNSF Ry.*, Slip Op. at 1 (March 1, 2012), a case involving the sensitive question of fuel surcharges. In that case, the parties had not agreed on a procedural schedule, and the Board adopted its own schedule. The parties then jointly filed a motion to revise the Board's procedural schedule to allow additional time for discovery. When a petition for filing closing briefs was entered, the opposing side

² Petition for Reconsideration pending.

agreed to closing briefs provided the Board identified issues that needed input if closing briefs were deemed necessary. The Board responded by listing specific questions to be addressed by the parties in its decision requiring closing briefs. Here, UP has identified no specific questions that it regards as requiring further briefing, and neither has NAFCA. The purposes supporting further briefing allowed in the *Cargill* case are not present here.

VI.

In Docket No. 42057, *Pub. Serv. Co. of Colo. d/b/a XCEL Energy v. Burlington Northern & Santa Fe Ry. Co.*, (Aug. 8, 2003), a rate reasonableness case, the parties had agreed on a procedural schedule. When one of the parties later petitioned for final briefs, the other concurred that final briefs would be appropriate, in contrast to this case, where there is no such agreement. Moreover, in ordering final briefs, the Board listed specific questions concerning evidence and requested the parties to point out where in the record certain evidence could be found. Nowhere in its petition does Union Pacific indicate the need for the source of any evidence to be identified in the record beyond the extent to which the evidence already is identified.

In Docket No. 02456, *Tex. Mun. Power Agency v. Burlington Northern & Santa Fe Ry. Co.*, another rate reasonableness case subject to all the complexities of the Board's rate reasonableness rules, the Board granted final briefs for the purpose of eliciting answers to questions concerning evidence. In that case, unlike this one, both parties agreed that final briefs would be helpful.

VII.

In *PPL Montana, LLC*, Docket No. 42054, a rate reasonableness case under the Board's complex rules that seem to be constantly subject to reinterpretation, the parties had agreed on a

procedural schedule, and, when final briefs were requested by one party, the other filed no pleading in opposition.

VIII.

In Finance Docket No. 35081, *Canadian Pacific Ry. Co. – Control – Dakota, Minn. & Eastern R. R. Corp.* (Jan. 12, 2008), there was no agreement between the parties on a procedural schedule, and the Board’s decision adopting a procedural schedule stated that “final briefs, if any, will be due by”. There has been no such mandate by the Board in this case.

IX.

Finally, in Docket No. 41191, *W. Tex. Util. Co. v. Burlington R.R.*, the Board noted that final briefs are not meant to “give either side a tactical advantage by allowing it the ‘last word’” but will “assist the [Board] in evaluating the record compiled in the proceeding so that it can make a fair and informed decision”). This was a coal rate case in which the Board stated that final briefs were customary, and indeed, they often are called for in coal rate cases, where the record and workpapers may consist of thousands of pages. As noted above, if the controlling concept is to be “fairness,” then a party should not be permitted to renege on its agreements with other parties, particularly where, as here, there is no specific reason advanced for allowing final briefing.

X.

As indicated above, no case cited by UP, and none found by NAFCA, mandates final briefs where the parties initially agree in good faith on a briefing protocol and then one of those parties demands closing briefs beyond the scope of the agreed filing protocol, in the name of “fairness,” but without any showing of how the existing agreement was unfair to that party.

Union Pacific was not forced to enter into a procedural protocol with NAFCA. UP did so voluntarily, for reasons of its own. NAFCA did so voluntarily, likewise for reasons of its own, including the fact that, as complainant, it has the burden of proof and therefore the recognized right to open and close. The Board should not try to second guess the reasons why the parties entered into their procedural bargain, particularly in the absence of any claim by UP that it was misled into endorsing the existing procedural schedule.

XI.

If the Board agrees to UP's request and mandates simultaneous closing briefs over the objection of NAFCA and in contravention of the agreement reached by the parties, there will be no incentive for parties to agree on procedural scheduling in future cases. UP simply demands closing briefs without reference to how specifically closing briefs would improve the ability of the Board to decide the issues already fully developed in the record before it. NAFCA respectfully requests that the Board deny UP's request.

Respectfully submitted,



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Dated: March 30, 2012

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of North America Freight Car Association to Union Pacific Railroad Company's Petition for an Order Directing Simultaneous Final Briefs, has, this 30th day of March 2012, been served on counsel for defendant.

Andrew P. Goldstein

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