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EXPEDITED CONSIDERATION REQUESTED

UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD



OFFICE OF THE
GENERAL COUNSEL
PUBLIC HEARINGS

Ex Parte No. 657 (Sub-No. 1)

MAJOR ISSUES IN RAIL RATE CASES

**PETITION OF BP AMOCO CHEMICAL COMPANY
TO CLARIFY SCOPE OF PROCEEDING, OR TO BROADEN IT**

Pursuant to 49 C.F.R. § 1117.1, BP Amoco Chemical Company ("BP Amoco"), a party herein, hereby petitions for clarification of the scope of this proceeding, or, in the alternative, to broaden it. BP Amoco seeks clarification, sufficiently in advance of the first round of comments (now due May 1) whether the Board considers to be within the scope of this proceeding (as BP Amoco does) issues concerning (a) the appropriate index for determining increases in railroad costs, and (b) certain issues concerning the propriety of adjustments to "URCS" ("Uniform Rail Costing System") with respect to use of unadjusted URCS costs in rate proceedings under its Rate Guidelines – Non-Coal Proceedings, 1 S.T.B. 1004 (1996) ("Non-Coal Guidelines" or "small-shipment" proceedings).¹ If such issues are deemed by the Board not to be within the scope of the proceeding, BP Amoco respectfully requests that the proceeding be broadened to include its issues.

Because opening comments herein are due to be filed by May 1, and obviously time is required to prepare them, BP Amoco hereby requests expedited consideration of this Petition.

¹ A petition for review of the Board's action adopting the Non-Coal Guidelines was dismissed as unripe. Association of American Railroads v. STB, 146 F.3d 342 (D.C. Cir. 1998).

Background

As the Board knows, the only formal rate complaint under the Non-Coal Guidelines was filed by BP Amoco against Norfolk Southern Railway Company ("NS") in STB Docket No. 42093 (filed May 23, 2005) (BP Amoco). Although that complaint was resolved through STB-provided mediation, certain issues arose as result of NS's responses in its pleadings submitted in response to the Board's decision served June 6, 2005 that may prevent future "small-shipment" rate complaints from being filed by BP Amoco or other appropriate parties.² Accordingly, on its behalf and for the benefit of other, potentially similarly situated shippers, BP Amoco seeks clarification that it may raise certain issues in this proceeding, or, in the alternative, to broaden the proceeding to include them.

It is not BP Amoco's desire to have the merits of its position on these issues resolved now, in response to this Petition. Rather, BP Amoco merely explains its position and (as it understands it) that of NS on the issues discussed herein, and seeks clarification that the issues it does seek to raise are being raised appropriately in this proceeding so that they can be decided after all interested parties have the opportunity to comment on them on May 1 and thereafter.

Certain of the issues that arose in BP Amoco's complaint proceeding (BP Amoco), and that may arise in future such proceedings, involved attempts by NS to make adjustments to

² For these purposes, BP Amoco asserts, as it did in Docket No. 42093, that it was eligible to file its complaint, because the movement of individual or even multiple-car shipments of chemical cars under contracts that have terms of no more than a few years could not possibly generate enough revenue to justify either the filing of a "stand-alone cost" ("SAC") case or generate sufficient revenue to pay for the costs of the "stand-alone railroad" under the Board's SAC methodology. Under such circumstances, BP Amoco could not bring a case under the Board's SAC methodology, and thus perforce it is eligible to bring a case under the Board's Non-Coal Guidelines. 49 U.S.C. 10701(d)(3) NS stipulated that BP Amoco was eligible to bring the case that it did bring in Docket No. 42093, although to be fair, NS did so without prejudice to its position in other proceedings. In any event, the Board proceeded as though BP Amoco was eligible to bring a case under the Non-Coal Guidelines, and for present purposes it must proceed in the same way, for otherwise it would be making a ruling, in advance of the facts of a particular complaint, that BP Amoco cannot be eligible to bring a case under the Non-Coal Guidelines.

URCS costs, notwithstanding the fact that the Board proposed in its decision served June 6, 2005 in BP Amoco that it would use unadjusted URCS costs. (As BP Amoco understood the Board's proposal in BP Amoco, the use of "unadjusted costs" meant to use URCS costs **without any change**, based on than the input information required in URCS to calculate URCS costs for the movement, such as the origin and destination, the STCC Code for the commodity being shipped, the type of car, and the like.) Yet, NS proposed adjustments to URCS costs in at least two respects, and asserted that, under Board precedent, it had a right to make those adjustments.

These anomalies occurred because: (1) although the URCS miles for BP Amoco's shipments from Decatur, AL to Kingsport, TN are approximately 336, NS claimed that the actual miles traveled by BP Amoco's tank cars in that transportation were approximately 409, because, for operational convenience, NS takes the cars 37 miles west of Decatur, then 37 miles back east, virtually traveling right by the Decatur facility, before they move on to Kingsport; and (2) NS published a "full mileage" tariff, only applicable to BP Amoco's shipment at issue, that set the rate at \$2400/car, but with a \$300 mileage/car allowance credited to BP Amoco. To BP Amoco, this meant the rate was in reality \$2100/car (\$2400/car-\$300/car), but to NS it meant that the rate was \$2400/car, with **additional** variable costs of \$300/car, thus artificially reducing the R/VC ratio for the shipments quite substantially (by over 100 percentage points, to approximately 267 percent). A third issue raised by BP Amoco was whether, in light of the Board's proposal to use unadjusted URCS costs, which NS proposed by updated to 2005, and despite the Board in SAC cases used the RCAF(U) for cost and rate escalation of the "stand-alone railroad," it should use a RCAF adjusted for productivity (whether RCAF(A) or RCAF-5, either of which the Board considers appropriate), to adjust costs and any prescribed rates in proceedings under Non-Coal Guidelines to reflect productivity being incurred in the real world by actual railroads such as NS.

None of these issues was resolved by the STB in BP Amoco, because BP Amoco and NS amicably settled their dispute. Nevertheless, these are recurring issues for BP Amoco and many other shippers. Specifically, BP Amoco may bring another case before the STB raising these issues, but whether it does so may depend on the resolution of the issues addressed herein **before** a decision is made to file the complaint.

Issues in This Proceeding

Among the issues on which the Board called for comment is one involving the "percent reduction methodology," which the Board introduced as follows:

"First, we present two alternatives to the "percent reduction" method to determine maximum reasonable rates to address concerns that the existing method can be unfairly manipulated by the railroads."

Of course, BP Amoco has similar concerns about the issues that it raises here, in that a railroad, simply by choosing to call its rate a "full mileage rate," rather than a "zero mileage rate" (which is common in the chemical industry, because shipments are almost universally made in shipper-owned or -leased tank cars), can claim that the variable costs of a movement have risen substantially, and that therefore the R/VC ratio for the shipment is much lower than that claimed by the shipper (using truly unadjusted URCS costs), simply by including a mileage allowance of whatever size. Under either scenario (i.e., a zero-mileage rate, or a full-mileage rate), the contribution of the traffic by definition is the same, yet the railroads would argue (as NS was argued in BP Amoco) that the full-mileage rate it was charging BP Amoco was reasonable because the R/VC ratio was "only" 267 percent, rather than the higher amount (well over 300 percent) calculated by BP Amoco for the same URCS costs.³

In the text of its Notice, the Board proposed a "Maximum Contribution Methodology"

³ Interestingly, in the Decision (at 26 n.29) served February 27, 2006 in this proceeding, the Board cited its Decision served June 6, 2005 in BP Amoco, strongly suggesting that issues concerning unadjusted URCS costs are appropriately raised in this proceeding.

("MCM"), and stated:

"We, therefore, also seek public comment on a variant of the MCM approach that could be applied to either a homogeneous or diverse traffic group. We call this alternative the Maximum Markup Method (MMM). This alternative would use URCS to estimate the variable cost of every movement in the traffic group, and then express the maximum contribution towards SAC costs as a markup over variable cost. Under this alternative approach, the maximum contribution might be expressed as 225% of the variable cost of the movement, instead of just a flat amount per ton-mile. Under MMM, a movement with a higher variable cost per ton would have a higher maximum contribution toward total SAC costs, and vice-versa."

As BP Amoco sees it, the issue raised by the Board is essentially the same as the issue raised in the BP Amoco case, *i.e.*, whether the Board's rate methodologies should recognize the **contribution** made by certain traffic, rather than base its decision on R/VC ratios that can be manipulated as a result of arbitrary designations of a credit (*i.e.*, "mileage allowances") as a "variable cost" that, according to NS, artificially reduced the R/VC ratios applicable to the movement.⁴

The Board's Notice also raised issues concerning productivity. In its introduction, that Board stated:

"Third, we propose a method for forecasting future operating expenses of a stand-alone railroad (SARR) that would reflect anticipated future productivity gains."

Similarly, in BP Amoco, BP Amoco advocated the use of the RCAF(A) or RCAF-5, *i.e.*, the RCAF adjusted for productivity, rather than the RCAF(U); the railroads can be expected herein and in "small-shipment" rate proceedings to argue for the RCAF(U). The Board's proposal in this proceeding thus raises either the same or a related issue to that which arose in BP Amoco,

⁴ In this respect, the issue that arose in BP Amoco, whether to use the URCS miles (336) or the actual miles NS claims the cars in that movement travel (409) as "unadjusted URCS costs" is similar; may arbitrary routings by railroads be used to alter the miles that the URCS methodology provides as applicable to the shipment at issue? Alternatively, what are proper miles to use in "unadjusted URCS costs" in such a situation – the miles the URCS program produces, or the miles claimed by the railroad?

and which it will have to grapple with in any future Non-Coal Guidelines complaint case – what method of cost adjustment and rate adjustment should it use? However, it is not clear if the Board considers comments about productivity in "small-shipment" cases to be within the scope of this proceeding.

Argument

BP Amoco respectfully asserts that the issues it raises here, whether "unadjusted URCS costs" mean no adjustments to URCS, regardless of the party that benefits from the adjustments, is the standard to be followed in proceedings under Non-Coal Guidelines, or whether the Board will allow certain adjustments to URCS costs in "small-shipment" proceedings, are big impediments to the filing of "small-shipment" rate complaints with the Board. All BP Amoco (and presumably other parties following the pleadings in the BP Amoco proceeding) had to do was observe the way that a supposedly simple process could be made complicated by NS's proposal to make adjustments to URCS costs, to realize that the objective of Congress (see 49 U.S.C. 10701(d)(3)) and the shipping community, to have a simple, low-cost, streamlined rate methodology to use in "small-shipment" cases, was unlikely to be realized unless the Board actively policed the process.

The Board surely has observed the great concern in many quarters about the utility of its Non-Coal Guidelines. This proceeding offers the opportunity to address two overriding issues: whether the Board's desire to use "unadjusted URCS costs" (see decision served June 6, 2005 in BP Amoco) means just what it says – **no** adjustments, and whether the RCAF adjusted for

productivity, rather than the RCAF(U), is the correct adjustment mechanism for use in adjusting costs and rates.⁵

It is important to allow these issues to be heard **now** in this proceeding, because there is no other proceeding in which the Board appears to be inclined to address such issues, and neither BP Amoco nor any other shipper has filed a complaint under Non-Coal Guidelines to allow these issues to be raised and resolved. Moreover, because whatever it says in this proceeding will likely be dispositive of the productivity issue in "small-shipment" cases, it should hear from such shippers on that issue in this proceeding, because of the impact that the productivity issue may have on whether parties file "small-shipment" rate complaints. Accordingly, it is important that these issues be heard in this proceeding.

Prayer for Relief

Accordingly, BP Amoco hereby requests clarification that the issues it seeks to raise herein are properly within the scope of this proceeding, whether by clarification or in the alternative by broadening the scope of the proceeding, sufficiently in advance of May 1 to permit BP Amoco and other parties who may have an interest in commenting on issues that may arise in "small-shipment" cases, to do so in their initial Comments in this proceeding.⁶

⁵ Superficially, it may appear that BP Amoco is being inconsistent, advocating unadjusted URCS costs but also advocating updated URCS costs. There is no inconsistency, because there is no doubt that URCS costs are updated annually to be kept current, and no doubt, therefore, that some adjustment mechanism to keep costs current and have rates track costs is essential, as NS itself advocated in BP Amoco. BP Amoco believes that "small-shipment" rate cases cannot be brought for a reasonable sum if adjusted URCS costs are used, especially for rate-comparison purposes, but agrees that adjustments by some form of index to costs and rates is essential for fairness to both sides in such cases. Accordingly, the position BP Amoco takes on the merits is entirely consistent with the Board's approach to these matters. BP Amoco seeks to participate on these issues to address litigation positions that NS took in BP Amoco that are inconsistent with the Board's general approach.

⁶ BP Amoco is aware of the Petition for Reconsideration filed by the Western Coal Traffic League ("WCTL") on March 20, 2006. Because BP Amoco does not expect ever to file a case under the Board's SAC methodology, it takes no position on the WCTL Petition. However, should the WCTL Petition be granted, BP Amoco urges the Board to promptly convene a separate proceeding involving "small-shipment" cases to address the issues BP Amoco has raised herein.

Respectfully submitted,

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Dated: March 27, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served, this 27th day of March, 2006, a copy of the foregoing pleading by First Class mail, postage prepaid, or by more expeditious means, to each of the persons on the service list for this proceeding.

Michael F. McBride

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