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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB Docket No. 42088**

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**WESTERN FUELS ASSOCIATION, INC. AND  
BASIN ELECTRIC POWER COOPERATIVE, INC.**

**v.**

**BNSF RAILWAY COMPANY**

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**BNSF RAILWAY COMPANY'S MOTION TO STRIKE COMPLAINANTS'  
IMPROPER REBUTTAL EVIDENCE AND LEAVE TO RESPOND  
TO INACCURATE CITATION OF LEGAL AUTHORITY**

Pursuant to 49 C.F.R. § 1104.13 and 49 C.F.R. § 1117.1, defendant BNSF Railway Company hereby responds to certain improper rebuttal evidence and argument submitted by complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively "WFA/Basin") on August 15, 2008. This response addresses two issues.

First, BNSF requests that the Board strike certain evidence submitted by WFA/Basin for the first time on rebuttal in support of WFA/Basin's assumption that the SARR would not have to construct bridges in areas where BNSF currently has bridges. Second, BNSF seeks leave to respond to certain inaccurate statements by WFA/Basin in their rebuttal argument regarding the Board's authority to award reparations. The grounds for these requests are set out below.

**I. THE BOARD SHOULD STRIKE WFA/BASIN'S IMPROPER REBUTTAL  
EVIDENCE REGARDING BRIDGE CONSTRUCTION.**

In their Opening Evidence, WFA/Basin assumed that the new SARR would build a yard, the Orin Yard, in an area where no yard exists today. A BNSF mainline track traverses the area where the hypothetical new yard would be constructed, and that track includes three existing bridges over drainage areas. The new yard would be built over the same drainage areas, with

several yard tracks traversing the drainage areas that are now crossed by bridges. WFA/Basin assumed that the new yard would have no bridges, and that the drainage areas crossed today by bridges on the real world BNSF could all be accommodated with culverts. As BNSF noted in its reply supplemental evidence, it is not uncommon for the parties in SAC cases to convert short bridges of less than 20 feet to culverts, but the bridges at issue here were 52 feet, 82 feet and 102 feet. BNSF Third Supplemental Reply (“BNSF TS Reply”) at III-F-8. WFA/Basin submitted no evidence in their opening supplemental evidence justifying the conversion of bridges of this length to culverts.

On reply, BNSF’s engineering expert Cassie Gouger explained that one could not merely assume that bridges of this dimension could be replaced with culverts without hydrologic/hydraulic studies. BNSF TS Reply at III-F-10. Such studies would be particularly important in light of the fact that BNSF had just completed the double-tracking of those bridges, reflecting a decision not to convert to less expensive culverts. In the absence of any evidence supporting the conversion of bridges to culverts, it was appropriate for BNSF to assume that the SARR’s Orin Yard would require bridges wherever the new yard tracks crossed the drainage areas that are today crossed by BNSF bridges.

On rebuttal, WFA/Basin for the first time attempt to justify their conversion of bridges to culverts. They present a study of the acreage drained through the particular ravines that are now crossed by BNSF bridges and the water flow that would need to be accommodated, and they conclude that their use of 96” culverts is “very conservative.” WFA/Basin Third Supplemental Rebuttal (“WFA/Basin TS Reb.”) at III-F-8. Their new evidence is too little, too late. The Board has made it clear that a complainant cannot use rebuttal to support the assumptions made on opening. *See Texas Municipal Power Agency v The Burlington Northern and Santa Fe*

*Railway Company*, STB Docket No. 42056 (served Mar. 24, 2003), 2003 STB LEXIS 153, \* 136 (TMPA not allowed to introduce higher car utilization rate on rebuttal to support its lower car maintenance costs). Such a misuse of rebuttal deprives the defendant of a meaningful opportunity to respond.

In this case, if WFA/Basin had presented their evidence on opening, BNSF would have had an opportunity to explain why the volume of water flowing through the culvert is only part of the story. The photographs in BNSF's reply workpapers make it clear that factors in addition to the volume of water flow would need to be considered in converting bridges to culverts, like the effect of the restricted entry into the culvert opening, the backwater effect behind the pipe entrance, and the possibility of erosion of the existing railroad track support, among other issues. For example, the picture in BNSF's reply workpaper "Br 124.43 Looking US.JPG" shows that the natural drainage course leading to the bridge at MP 124 43 is extremely wide; it is not channeled like the drainage leading to smaller culverts. The picture of the bridge itself in BNSF reply workpaper "Br 124.43 North (New).JPG" shows that there is a very wide area – much wider than the entrance area of a 96" culvert – through which draining water flows. By waiting until rebuttal to submit any evidence purporting to justify the conversion of existing bridges to culverts, WFA/Basin deprived BNSF of an opportunity adequately to address WFA/Basin's water flow assertions.

WFA/Basin's rebuttal evidence on this issue should be struck. Since WFA/Basin failed to support their conversion of bridges to culverts in their case-in-chief, the Board should assume, consistent with BNSF's reply supplemental evidence, that where the new Orin Yard traverses drainages now crossed by bridges, the SARR should construct bridges.

**II. THE BOARD SHOULD ACCEPT BNSF'S REPOSE TO WFA/BASIN'S INACCURATE DESCRIPTION OF CASE LAW REGARDING THE BOARD'S REPARATIONS AUTHORITY.**

BNSF noted in its reply supplemental evidence that the Board has the authority to consider equitable factors in deciding whether to award reparations in rate reasonableness cases. BNSF TS Reply at I-50. BNSF explained that the Board does not have legal authority to award damages for the period covered by the Board's September 10, 2007 decision finding that WFA/Basin had failed to show that the challenged rates were unreasonable BNSF TS Reply at I-42-50. However, even if the Board concluded that there was no legal prohibition on the award of damages prior to the September-10,-2007 decision, the equities in this case would justify -- limiting reparations to the period after the September 2007 decision. *Id.* at I-50-53 Among other things, WFA/Basin's decision to abandon the fundamental assumptions underlying their original SAC presentation and present the equivalent of a new SAC case would justify a limit on any reparations that might be awarded. *Id.*

In response, WFA/Basin argued that the Board has no discretion to consider equitable factors in determining whether to award reparations. They challenge the ICC's ruling in *Potomac Elec Power Co. v Penn Central Transportation Co* , 359 I.C.C. 222, 241 (1977) ("*PEPCO*"), that "[t]he issue of reparations is addressed to our discretion," claiming that the *PEPCO* decision was "an aberration at the time it was decided." WFA/Basin TS Reb. at I-69 This statement is demonstrably inaccurate BNSF requests that the Board accept the following response to WFA/Basin's inaccurate description of the case law regarding the Board's authority in this area.

The *PEPCO* decision is one of a long line of cases following the principle that the agency's reparations authority is discretionary. It is clear from the *PEPCO* decision itself that *PEPCO* was not an "aberration " The *PEPCO* case cited *William Volker & Co v Atchison, T &*

*S F Ry* , 318 I.C.C. 249 (1962), in which the Commission held, consistent with the later *PEPCO* decision, that “[t]he Commission’s power with regard to reparation is discretionary, and it may in certain instances deny reparation even though a rate is unreasonable when there is good and sufficient reason for doing so.” *Id* at 271. The Commission in *Volker* cited a line of cases similarly holding that the award of reparations is discretionary. *See id* at 254-56 (“In such circumstances, the Commission was persuaded that reparation should not be rewarded . . .”)

WFA/Basin’s claim that *PEPCO* was an “aberration at the time it was decided” also ignores the Supreme Court’s ruling in *Atchison, Topeka & Santa Fe Railway Co v Wichita Board of Trade*, 412 U.S 800 (1973) (“*ATSF*”), just a few years before *PEPCO* was decided. There, the Court discussed case law regarding the ability of grain shippers to challenge the reasonableness of line-haul rates that included a charge for grain inspections. The plurality noted that while shippers could challenge such rates, the ICC’s reparations authority was discretionary: “A shipper can challenge any such rate as unreasonable and, if he succeeds, *may* recover reparations. In addition, the Commission *may* prescribe a rate to be charged in the future. 49 U.S.C §§ 8, 9, 13(1), 15(1)” 412 U.S at 812 (emphases added).<sup>1</sup> The *ATSF* case is particularly important here because sections 8 and 15(1) of the statute as it existed at the time of the decision, cited by the Court as the basis for its conclusion that the ICC’s authority was discretionary, are predecessors to the two statutory provisions that currently govern the Board’s authority to grant relief. Section 8 became the first sentence of Section 11704(b) and Section 15(1) became Section 10704(a)(1). As it relates to the agency’s reparations authority, therefore, the statutory regime has not changed substantively

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<sup>1</sup> None of the other opinions concurring in part and dissenting in part questioned the discretionary nature of relief in a rate reasonableness case.

WFA/Basin's claim that the *PEPCO* decision was an "aberration" appears to rely heavily on the Sixth Circuit's decision in *ASG Industries, Inc v United States*, 548 F.2d 147 (6th Cir 1977), but WFA/Basin also mischaracterize that case. The *ASG* case involved the differences between the statutory requirements for relief available under (1) a claim that a rate exceeds a reasonable maximum rate and (2) a claim that a rate is unduly preferential. As to the latter, a complainant seeking relief from unduly preferential rates was required to show market harm before the ICC could even consider the possibility of reparations. As to claims for relief from rates that exceed a reasonable maximum, the court concluded that no showing of market harm was required. 548 F.2d at 152. The *ASG* case did not address the question whether the agency had discretion whether to award damages. Rather, the case dealt only with the question whether market harm had to be shown to obtain relief. When the court stated that "amounts charged in excess of the reasonable rates are awarded automatically to the shipper as overcharges," the court was simply pointing out that a showing of market harm, which was required in a undue preference case, was not required in a rate reasonableness case.

The Sixth Circuit did not purport to establish new law regarding the discretion of the ICC to award reparations. That issue was not raised in the case. Instead, the court was merely relying on and paraphrasing a prior Supreme Court decision in *Interstate Commerce Commission v U S ex rel Campbell*, 289 U.S 385 (1933), that contrasted the requirements for relief under the two different types of claims. In that Supreme Court case, on which the Sixth Circuit expressly relied, the Court acknowledged that the award of reparations is discretionary. There, the Court held that "[w]hen the rate exacted of a shipper is excessive or unreasonable in and of itself, irrespective of the rate exacted of competitors, there *may be* recovery of the overcharge without other evidence of loss." *Id* at 390 (emphasis added)

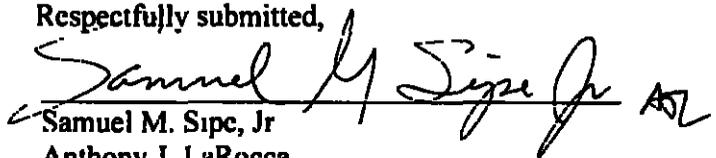
The PEPCO decision that the agency's power to award reparations is discretionary is consistent with a long line of cases, including Supreme Court cases. To call *PEPCO* an "aberration" is clearly wrong

### III. CONCLUSION

For the reasons set out above, the Board should strike WFA/Basin's improper rebuttal evidence on the issue of the SARR's construction of culverts rather than bridges in the new Orin Yard. In addition, the Board should accept BNSF's response to WFA/Basin's inaccurate description of the case law governing the Board's discretion to award reparations in rate reasonableness cases

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Respectfully submitted,



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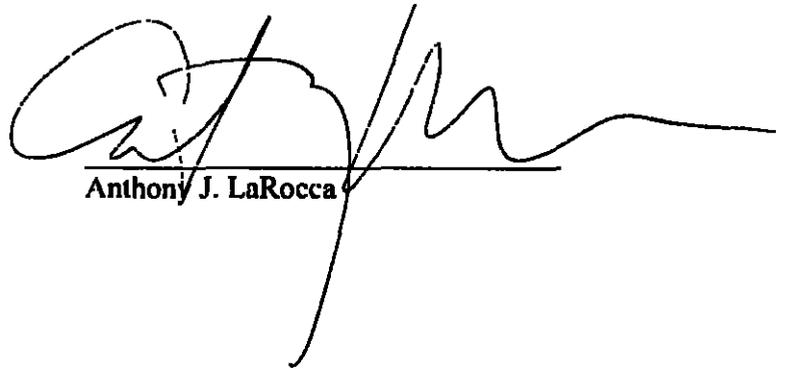
ATTORNEYS FOR  
BNSF RAILWAY COMPANY

September 4, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of September, 2008, I have served three copies of the foregoing Motion to Strike Complainants' Improper Rebuttal Evidence and Leave to Respond to Inaccurate Citation of Legal Authority on the following by hand delivery:

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