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September 24, 2008

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: Docket No. 42088, *Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Co*

Dear Ms. Quinlan:

Enclosed for filing, please find an original and twenty (22) copies of the Reply to BNSF's Motion to Strike Complainants' Improper Rebuttal Evidence and Leave to Respond to Inaccurate Citation of Legal Authority of Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc.

Please date stamp the extra copy of this cover letter and the enclosed pleading and return it to our messenger. Thank you for your attention to this matter.

Respectfully submitted,

John H. LeSeur
An Attorney for Complainants

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Enclosures

cc: Counsel for Defendant BNSF Railway Co.

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BEFORE THE
SURFACE TRANSPORTATION BOARD



WESTERN FUELS ASSOCIATION, INC.
and BASIN ELECTRIC POWER
COOPERATIVE, INC.

Complainants,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42088

WFA/BASIN'S REPLY TO BNSF'S
MOTION TO STRIKE COMPLAINANTS' IMPROPER
REBUTTAL EVIDENCE AND LEAVE TO RESPOND TO
INACCURATE CITATION OF LEGAL AUTHORITY

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WESTERN FUELS ASSOCIATION,
INC. and BASIN ELECTRIC POWER
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Dated: September 24, 2008

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BEFORE THE
SURFACE TRANSPORTATION BOARD



WESTERN FUELS ASSOCIATION, INC.)
and BASIN ELECTRIC POWER)
COOPERATIVE, INC.)

Complainants.)

v.)

BNSF RAILWAY COMPANY)

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**WFA/BASIN'S REPLY TO BNSF'S
MOTION TO STRIKE COMPLAINANTS' IMPROPER
REBUTTAL EVIDENCE AND LEAVE TO RESPONSE TO
INACCURATE CITATION OF LEGAL AUTHORITY**

Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively "WFA/Basin") file this reply to Defendant BNSF Railway Company's ("BNSF") filing entitled "Motion to Strike Complainants' Improper Rebuttal Evidence and Leave to Respond to Inaccurate Citation of Legal Authority" ("Motion"). As demonstrated below, the Board should deny BNSF's Motion.

SUMMARY

In its Motion, BNSF asks the Board to strike WFA/Basin's Third Supplemental Rebuttal ("TS Rebuttal") testimony concerning the inclusion of three specified culverts in the revised Laramie River Railroad's ("LRR") Orin Yard. WFA/Basin included these culverts in their Third Supplemental Opening ("TSO") evidence. In its Third Supplemental Reply ("TS Reply"), BNSF challenged the feasibility

of these culverts and proposed that they be replaced with 70 bridges, at a cost fifteen times higher than the culverts. WFA/Basin responded to these contentions in their TS Rebuttal. The Board should deny BNSF's motion to strike WFA/Basin's TS Rebuttal evidence because that evidence directly responds to feasibility issues BNSF raised in its TS Reply. Also, in their TS Rebuttal, WFA/Basin did not make any changes to their TSO evidence concerning the design or cost of the three culverts.

BNSF also asks the Board for permission to file surrebuttal legal argument concerning the granting of reparations relief in this case. WFA/Basin asked for reparations relief in their TSO, and are entitled to reparations. In its TS Reply, BNSF argued, inter alia, that the Board had discretion to deny reparations relief on shipments moving prior to September 10, 2007, and it asked the Board to exercise this discretion to deny WFA/Basin reparations during this time period. TS Reply Narr. at I-42-50. WFA/Basin refuted BNSF's reparations contentions in their TS Rebuttal. TS Rebuttal Narr. at I-61-70. BNSF claims its supplemental argument is warranted because WFA/Basin made "inaccurate statements" concerning the Board's authority to grant reparations in this case. Motion at 1.

The Board should deny BNSF's request to file surrebuttal argument because the reparations issue has been fully argued in accordance with the governing procedural schedule. The Board is fully equipped to address the parties' legal contentions without further input from the parties. Moreover, BNSF's contentions that WFA/Basin made "inaccurate statements" is wrong. Governing law clearly requires the Board to award reparations to WFA/Basin for all time periods covered by their complaint, starting on

October 1, 2004. See, e.g., Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1) (STB served Oct. 30, 2006) at 6 (“[i]f, after a full hearing, the Board finds the challenged rate unreasonable, it will order the railroad to pay reparations to the complainant for past movements”) (“Major Issues”).

**I.
THE BOARD SHOULD DENY BNSF’S
REQUEST TO STRIKE WFA/BASIN’S YARD
CULVERT REBUTTAL EVIDENCE**

A. Background

In their TSO evidence, WFA/Basin designed a new LRR yard near Orin, WY (“Orin Yard”). The real-world BNSF does not have a yard at Orin, but does have a single-track rail line in the area encompassed by the LRR’s Orin Yard. This BNSF line traverses three bridges that cross drainage ditches. These bridges are located at BNSF mileposts (“MP”) 125.39, 124.75 and 124.43. In designing the Orin Yard, WFA/Basin’s engineers converted each bridge to a culvert with a 96-inch diameter.¹

On TS Reply, BNSF challenged WFA/Basin’s inclusion of the three culverts. BNSF maintained that a least-cost, efficient stand-alone railroad (“SARR”) would not design a yard using culverts to cross the three ditches, but instead would construct a total of 70 new yard bridges to cross the three ditches.² According to BNSF,

¹ See TSO Narr. at III-F-24.

² See TS Reply Narr. at III.F-5-10, 21-23; TS Reply e-workpapers “LRR Bridge Costs BNSF 3rd Rep.xls,” rows 29-31 and “LRR Overpasses Costs BNSF 3rd Rep.xls,” rows 21-23.

construction of 70 bridges, rather than three culverts, was necessary, because (1) the 96-inch culverts did not have sufficient capacity to handle the water flow from the involved drainage areas; (2) BNSF was currently adding an additional line of railroad track in the area. and, for this track, BNSF was constructing new bridges, not culverts, to cross the three ditches; (3) WFA/Basin did not properly apply a formula used in prior SAC cases for converting bridges to culverts; and (4) WFA/Basin did not prepare any detailed hydrologic/hydraulic studies.³

In their TS Rebuttal, WFA/Basin responded to each of BNSF's four contentions. WFA/Basin's rebuttal evidence demonstrated, *inter alia*, that:

(1) BNSF had misidentified the involved drainage areas and, once these areas were correctly identified, it was clear that the 96-inch culverts could handle the involved water flow since in the real-world larger drainage areas adjacent to the bridges being replaced were flowing into smaller culverts than the 96-inch culverts WFA/Basin included in the Orin Yard design.

(2) BNSF's construction of bridges for a second track in the area was not relevant here because WFA/Basin were constructing a multi-track yard, not just a second track. Also, BNSF's adding second bridges made sense in the real-world since substitution of new culverts would have required BNSF to dismantle the existing bridges and to place new culverts to accommodate both tracks.

³ See TS Reply Narr. at III.F-5-10.

(3) The formula cited by BNSF was a formula WFA/Basin utilized when replacing small bridges with box culverts. The formula was not intended to apply in a situation where a party was replacing large bridges with pipe culverts in a rail yard.

(4) WFA/Basin did not need to prepare any detailed hydrological studies since it was clear from the involved topography, and the use of actual culverts in the Orin Yard area, that 96-inch culverts could be substituted for the three bridges.

See TS Rebuttal Narr. at III-F-7-10.

In its Motion, BNSF asks the Board to “strike” WFA/Basin’s rebuttal evidence concerning the substitution of culverts for the three bridges. Motion at 1. According to BNSF, “a complainant cannot use rebuttal to support the assumptions made on opening.” See id. at 2-3 (citing the TMPA decision⁴). BNSF argues that WFA/Basin violated this standard by presenting a new study in their TS Rebuttal demonstrating that the involved culverts have the capacity to handle the water flow, without flooding. BNSF further opines that had WFA/Basin introduced this evidence in their TSO, BNSF would have submitted evidence on TS Reply that, for one of the involved culverts, the culvert entry was too narrow to prevent flooding “behind the pipe entrance.” Motion at 2-3.

B. BNSF Mistates the Governing Legal Standard

The Board’s standard governing permissible shipper rebuttal in SAC cases is clear. On rebuttal, a shipper can respond to “issues raised” in a carrier’s reply

⁴ Texas Mun. Power Agency v. Burlington N. and Santa Fe Ry., 6 S.T.B. 573, 664 (2003).

evidence. As stated by the Board in its September '07 Decision⁵ in this case:

Our general rules of practice limit the permissible scope of rebuttal statements “to issues raised in the reply statements to which they are directed.” 49 CFR 1112.6. Thus, as the Board explained in Duke/NS, in rail rate cases the shipper may use its rebuttal presentation either to demonstrate that its opening evidence was feasible and supported, to adopt the railroad’s evidence, or in certain circumstances to refine its opening evidence. Where the railroad has identified flaws in the shipper’s evidence but has not provided evidence that can be used in the Board’s SAC analysis, or where the shipper shows that the railroad’s reply evidence is itself unsupported, infeasible or unrealistic, the shipper may supply corrective evidence in its rebuttal. See General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, 5 S.T.B. 441, 445-46 (2001).

Id. at 6 (footnote omitted).

Similarly, the Board held in PEPCO⁶ that a complainant shipper, on rebuttal, “may respond to the defenses and criticisms raised [in the carrier’s reply] by introducing evidence to bolster its initial assumptions”:

The proponent of a SAC model sets the general parameters by which the reasonableness of a rate will be judged in its opening submission. The opponent, on reply, has an opportunity to attack the fundamental premises underlying the

⁵ Western Fuels Ass’n, Inc. and Basin Elec. Power Coop., Inc. v. BNSF Ry., STB Docket No. 42088 (STB served Sept. 10, 2007).

⁶ Potomac Elec. Power Co. v. CSX Transp., Inc., STB Docket No. 41989 (STB served Nov. 24, 1997).

SAC model. On rebuttal, the proponent of the model may not alter the basic configuration of the stand-alone system developed in its opening evidence. However, this restriction does not require the proponent to anticipate in its opening evidence every possible defense or criticism of the SAC model. Rather, on rebuttal, the proponent may respond to the defenses and criticisms raised by introducing evidence to bolster its initial assumptions.

Id. at 3 (footnote omitted).

BNSF claims that the Board's decision in TMPA supports a different standard. Motion at 2-3. BNSF misreads TMPA. The portion of the TMPA decision cited by BNSF involves the development of rail car costs.⁷ In TMPA, the Board rejected the complainant shipper's development of car costs, on rebuttal, using a new "utilization adjustment" because "a utilization adjustment was not in TMPA's opening evidence and BNSF did not raise the utilization issue in its [reply] evidence." Id. TMPA holds that a shipper cannot address, on rebuttal, issues not raised by the parties in their prior evidentiary submissions. This is the same standard the Board articulated in PEPCO, this case, and many others.

C. WFA/Basin's Rebuttal Evidence on Culverts Was Clearly Permissible

WFA/Basin's TS Rebuttal evidence on the use of culverts instead of bridges in the Orin Yard was clearly permissible rebuttal because it responded to an issue raised in the parties' prior filings. Specifically, WFA/Basin explained in its TSO evidence that

⁷ Id., 6 S.T.B. at 664.

they had substituted culverts for bridges at three locations in order to accommodate the building of the Orin Yard. On TS Reply, BNSF cited four reasons why the Board should reject WFA/Basin's use of these culverts. WFA/Basin responded to BNSF's contentions in their TS Rebuttal evidence. This is perfectly permissible rebuttal.

What BNSF is really trying to do through its request to strike is to cooperate its flawed reply testimony on the culvert/bridge issue by seeking to strike WFA/Basin's dispositive TS Rebuttal evidence. BNSF's TS Reply starts from a ridiculous premise – an efficient carrier would build a rail yard with 70 bridges traversing three ditches instead of constructing three culverts.⁸ The cost of constructing the 70 bridges is 15 times higher than the cost of constructing the three culverts.⁹ BNSF goes on to submit flawed evidence in support of this nonsensical contention, including its flawed water flow contentions illustrated in Table 1 below:

⁸ See TS Reply Narr. at III.F-5-10, 21-23; TS Reply e-workpapers "LRR Bridge Costs BNSF 3rd Rep.xls," rows 29-31 and "LRR Overpasses Costs BNSF 3rd Rep.xls," rows 21-23.

⁹ Compare WFA/Basin TSO e-workpaper "Culvert Quantities and Costs.XLS," rows 657-658, 662 with BNSF's TS Reply e-workpapers "LRR Bridge Costs BNSF 3rd Rep.xls," rows 29-31 and "LRR Overpasses Costs BNSF 3rd Rep.xls," rows 21-23.

Table 1 BNSF Reply Culvert Evidence			
<u>Item</u>	<u>Milepost</u>	<u>Drainage Area</u>	<u>Currently Leads To</u>
(1)	125 28	254 Acres	84" Culvert
(2)	124 95	196 Acres	72" Double Culvert
(3)	125 39	158 Acres	Bridge
(4)	124 75	136 Acres	Bridge
(5)	124.43	288 Acres	Bridge
(6)	126 13	326 Acres	4' x 5' Box Culvert

In their TSO evidence, WFA/Basin proposed to replace the bridges at MP 125.39, 124.75, and 124.43 with culverts. On TS Reply, BNSF mistakenly identified the drainage areas flowing to the bridges at MP 125.39 and 124.75 as those larger drainage areas shown in lines (1) and (2) of Table 1.¹⁰ Even more significantly, the larger drainage areas referenced in lines (1) and (2) flow through existing 84-inch and 72-inch BNSF double culverts in the Orin Yard area¹¹ – a fact BNSF does not dispute in its Motion.

When BNSF's error is corrected, which WFA/Basin did on TS Rebuttal, it is clear that BNSF's water flow demonstration supports WFA/Basin's conversion of the bridges at MP 125.39 and MP 124.75 to culverts since the involved drainage areas currently flow through the culverts in the Orin Yard area that are smaller in diameter than the 96-inch culverts used by WFA/Basin. WFA/Basin also refuted BNSF's evidence concerning the drainage flow issues with the conversion of the bridge at MP 124.43 to a

¹⁰ See TS Reply e-workpaper "USGS Orin WY Waterways.pdf."

¹¹ See TS Reb. e-workpaper "Drainage Area Map.pdf."

culvert. The drainage area flowing into this culvert encompasses 288 acres. WFA/Basin showed that a substantially larger drainage area encompassing 326 acres now flows into a nearby box culvert at MP 126.13, which has a substantially smaller water flow capacity than the 96-inch culvert used by WFA/Basin.¹² WFA/Basin's water flow evidence, like their other TS Rebuttal evidence on the disputed culvert issue, is permissible rebuttal. BNSF raised the water flow issue on reply, and WFA/Basin refuted it on rebuttal.

BNSF now tries to bolster its fatally flawed water flow arguments by claiming that the acreage of the drainage area is not the only water flow issue. BNSF claims a second issue, as applied to the bridge at MP 124.43, is the width of the drainage ditch as it approaches the culvert. Motion at 3. BNSF implies, but makes no effort to demonstrate, that flooding could occur using a 96-inch culvert at MP 124.43 because the width of the ditch is greater than 96 inches. Id. BNSF did not make this argument in its TS Reply filing and should not be permitted to do so here under the guise of a motion to strike. See Duke Energy Corp. v. Norfolk Southern Ry., STB Docket No. 42069 (STB served Mar. 25, 2003) at 2 ("The record must close at some point. Absent a clearly defined cut-off point that is observed by all, one party or the other could always point to some new piece of evidence or data to bolster its arguments.") ("Duke/NS").

Moreover, even if the Board were to consider BNSF's belated culvert width contentions, which it should not, the Board would need to reject them for two principal reasons. First, the width of the drainage channel leading into a culvert is not indicative of

¹² See TS Reb. e-workpaper "AREMA Culvert Nomographs.pdf."

the size of culvert required nor is it dispositive as to whether or not a culvert can be used. Indeed, culvert locations are designed to channel and control the water through the use of rip-rap out-falls (rip-rap is included at the ends of each of the LRR's culverts), and American Railway Engineering and Maintenance-of-Way Association ("AREMA") standard culverts are also designed to allow water to build-up behind the culvert.¹³ In other words, a properly designed culvert acts much like a storm water management system. In addition, AREMA standard culverts protect the track subgrade and structures above it by requiring that the culvert placement be deep enough that 100-year storm event water levels will remain two feet below the base of the rail – much like a bridge might be designed to allow water levels to only reach the bottom chord of the bridge.¹⁴

Second, BNSF's width contentions are not supported by the record.

WFA/Basin notes, for example, that the culvert pictures BNSF references¹⁵ are not scaled or otherwise quantified in such a way that WFA/Basin can determine the width of the drainage channel, even if it were relevant. In addition, BNSF assumes that the drainage channel width at the bridge is relevant here but it is not.¹⁶ The culverts proposed by WFA/Basin would actually begin well to the west of the location of the bridge (i.e., the water would already be in the culvert by the time it passed the current location of the

¹³ See IS Reb. e-workpapers "AREMA Culvert Design Standards.pdf."

¹⁴ Id.

¹⁵ See Motion at 3 (citing TS Reply e-workpapers "BR 124.43 Looking US.JPG" and "BR.124.43 North (New).JPG").

¹⁶ Id. at 3.

bridge that WFA/Basin intend to replace)¹⁷ and BNSF has not offered any evidence of the drainage channel sizes at those locations.

**II.
THE BOARD SHOULD DENY BNSF'S REQUEST
TO SUBMIT SURREBUTTAL ARGUMENT ON REPARATION ISSUES**

BNSF's tariff rates on the issue traffic became effective on October 1, 2004. WFA/Basin's TSO evidence demonstrated that for all time periods starting on October 1, 2004, these tariff rates exceeded a reasonable maximum. WFA/Basin requested that the Board award reparations, measured as the difference between the rates paid and the maximum reasonable rates (plus applicable interest) on all shipments moving on and after October 1, 2004.¹⁸

In its TS Reply, BNSF argued, *inter alia*, that the Board's authority to order reparations in this case was "discretion[ary]."¹⁹ BNSF also argued that the Board should exercise its discretion and deny WFA/Basin reparations on shipments moving prior to September 10, 2007 because, BNSF maintained, WFA/Basin had impermissibly modified the LRR in response to the Board's September '07 Decision, served on September 10, 2007.²⁰

¹⁷ See TSO Exhibit III-B-1, p. 5.

¹⁸ See TSO Narr. at I-25, III-H-3-6.

¹⁹ TS Reply Narr. at I-50.

²⁰ *Id.* at III.A-1-14.

WFA/Basin responded to BNSF's reparations contentions in their TS Rebuttal argument.²¹ WFA/Basin demonstrated that the Board was required as a matter of law to award WFA/Basin reparations on all shipments moving on and after October 1, 2004.²² WFA/Basin also demonstrated that even if the STB had discretion to deny WFA/Basin reparations for past shipments, which it did not, the Board could not exercise that discretion to deny WFA/Basin reparations because, contrary to BNSF's contentions, the Board's September '07 Decision permitted WFA/Basin to modify the LRR in the manner set forth in WFA/Basin's third supplemental evidence.²³

On the issue of whether the Board could exercise "discretion" to deny reparations in cases where the Board found the rates on the involved shipments exceeded a reasonable maximum, WFA/Basin's TS Rebuttal pointed out that the governing statute, 49 U.S.C. 11704(b), provides that a rail carrier is liable for damages when it engages in unlawful conduct.²⁴ In a maximum rate case, a carrier engages in unlawful conduct if it charges a rate on a shipment that the Board finds exceeds a reasonable maximum. See 49 U.S.C. §§10701(d)(1) and 10704(a)(1). The shipper's damage remedy in these situations is measured by the difference between the rates paid and the maximum lawful rates found

²¹ See TS Rebuttal Narr. at I-61-70.

²² Id. at I-67-70.

²³ Id. at I-61-64.

²⁴ Id. at I-67.

by the Board.²⁵ The Board has no “discretion” here to deny reparations, assuming other statutory prerequisites are met (e.g., the shipments are moving within the limitations period and the shipper has demonstrated it paid the assailed rates), because, as Justice Holmes summarized nearly a century ago, “[t]he carrier ought not to be allowed to retain his illegal profit.”²⁶

In its TS Reply filing, BNSF cited two cases in support of its claim that the STB had discretion to deny WFA/Basin reparations on shipments where the Board found WFA/Basin had paid rates that exceeded a reasonable maximum – Genstar²⁷ and PEPCO II.²⁸ WFA/Basin demonstrated in their IS Rebuttal that these cases did not support BNSF’s arguments.²⁹ Genstar is inapposite because it was not a maximum rate case, and in that case, the ICC did award compensatory damages for rate overcharges. WFA/Basin also demonstrated that PEPCO II was an incorrectly decided, aberrant decision, that had no precedential value.

²⁵ See id. (citing Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 235 (1925) (Brandeis, J.)).

²⁶ S. Pac. Co. v. Darnell Taenzer Lumber Co., 245 U.S. 531, 534 (1918) (Holmes, J.) (“Darnell Taenzer”); accord Major Issues at 6 (when the Board finds a rate is unreasonable, “it will order the [defendant] railroad to pay reparations to the complainant for past movements, 49 U.S.C. 11704(b)”).

²⁷ Genstar Chem. Ltd. v. ICC, 665 F.2d 1304 (D.C. Cir. 1981).

²⁸ Potomac Elec. Power Co. v. Penn. C. Transp. Co., 359 I.C.C. 222 (1977).

²⁹ See TS Rebuttal Narr. at I-67-70.

In PEPCO II, the ICC found that coal rates paid by a utility coal shipper, PEPCO, exceeded a reasonable maximum, but the ICC did not order the defendant carrier to pay PEPCO reparations on these shipments because PEPCO had not demonstrated that the reparations would be passed through to its utility customers. Id. at 241. PEPCO II was an aberration at the time it was decided because other contemporaneous agency and court decisions were applying the correct legal standard calling for the “automatic” award of reparations in cases where the ICC found that rates on past shipments exceeded a reasonable maximum.³⁰ PEPCO II also has no precedential value. In every maximum coal rate case decided after PEPCO II, the agency has automatically awarded reparations where the complainant shipper has demonstrated that the rates it paid during the pendency of its case exceeded a reasonable maximum.³¹ Finally, even if the Board applied the ICC’s PEPCO II decisional standards, WFA/Basin would obtain reparations because all reparations in this case will flow through to utility coal consumers.³²

In its Motion, BNSF does not dispute that the ICC and the Board have not followed PEPCO II. Nor does BNSF dispute that WFA/Basin will flow through reparations relief to consumers. Instead, BNSF seeks leave to file surrebuttal argument on grounds that WFA/Basin have made “inaccurate statements” concerning the

³⁰ See TS Rcbuttal Narr. at I-69-70.

³¹ Id. at I-70.

³² Id.

precedential value of PEPCO II. Motion at 1. Even if that was true, which it is not, the Board is fully equipped to review PEPCO II, and the other authorities WFA/Basin cited, and to reach its own conclusions without any belated assistance from BNSF. In fact, what BNSF really wants to do is to try to rehabilitate its TS Reply argument by citing new cases and making new arguments. The Board should summarily deny BNSF's request for leave to file surrebuttal arguments. If BNSF had additional authorities or arguments it wanted to present, it could have submitted them in its TS Reply. It is clearly impermissible for BNSF to do so now. See Duke/NS at 2.

Moreover, if the Board does consider BNSF's surrebuttal argument, which it should not, the Board will find the new cases BNSF cites, and the new arguments it makes, do not advance BNSF's flawed position. BNSF cites three new cases, Wichita,³³ Campbell,³⁴ and Volker,³⁵ which it claims support its position that the STB has discretion to deny reparations for shipments moving at rates that the Board finds exceed a reasonable maximum.

In Wichita, the Supreme Court did not address, much less resolve, whether the ICC had the authority to deny reparations on shipments where the agency found the challenged rates exceeded a reasonable maximum. The two issues considered by the Court in Wichita were the applicable standards courts should apply in determining

³³ Atchison, Topcka & Santa Fe Ry. v. Wichita Bd. of Trade, 412 U.S. 800 (1973).

³⁴ ICC v. U.S. ex rel. Campbell, 289 U.S. 385 (1933).

³⁵ William Volker & Co. v. Atchison, Topcka & Santa Fe Ry., 318 I.C.C. 249 (1962).

whether the ICC had adequately explained its departure from settled Commission precedents and the standards courts should apply when asked to enjoin proposed rail rate increases. Id. at 802.

BNSF points to a passage in Wichita where the Court described the ICC's maximum rate jurisdiction. This passage stated that in cases where a shipper demonstrates a rail rate is unreasonable, the shipper "may" obtain reparations. Id. at 812. BNSF concludes that the Court was endorsing BNSF's view that reparations are discretionary because the Court used the term "may." In light of the Court's many contrary precedents, WFA/Basin submits the Court most likely used the term "may" to address other legal requirements that apply before a shipper can collect reparations – e.g., the shipper's need to show that it paid the challenged rates³⁶ and the shipper's need to show the shipments moved during the statutory limitations period.³⁷

In Campbell, the Supreme Court addressed the reparation standards that applied in rate reasonableness and rate preference/discrimination cases. In a case where a shipper demonstrates the issue rates exceed a reasonable maximum, the Court ruled that reparations must be recovered, citing Justice Holmes admonition in Darnell Taenzer that "[t]he carrier ought not to be allowed to retain his illegal profit." Campbell, 289 U.S. at 390. The Court ruled that a different reparations standard applied in rate preference/

³⁶ See 49 C.F.R. Pt. 1133.

³⁷ See 49 U.S.C. §11705(c).

discrimination cases. In such cases, the measure of damage is the injury suffered by the complainant as a result of the preferential/discriminatory rates. Id. at 390-91.

In Volker, the ICC stated in passing that the agency's authority to award reparations in maximum rate cases involving certain class rates "is discretionary"³⁸ but it never explained the basis for this conclusion. nor did the agency cite, much less discuss, the governing statute and long line of cases holding that a carrier "ought not to be allowed to retain his illegal profit." Darnell Taenzer, 245 U.S. at 534. Moreover, in Volker, the ICC found that most of the challenged rates exceeded a reasonable maximum and, without further discussion, ordered that reparations be paid.³⁹

BNSF also claims that WFA/Basin misstated the holding in ASG Industries,⁴⁰ a case WFA/Basin cited in their TS Rebuttal argument. This case involved the Sixth Circuit's review of an ICC decision addressing a complaint that the challenged rail rates were both unreasonable and unlawfully preferential. Consistent with the Supreme Court's rulings in Campbell and Darnell Taenzer, the Sixth Circuit held that in cases where a rate is found unreasonable, "amounts charged in excess of the reasonable rates are awarded automatically to the shipper as overcharges." Id. at 152. The Court concluded that the ICC's review of the involved rate complaint was arbitrary and capricious and remanded the case to the ICC. Id. at 155.

³⁸ Id., 318 I.C.C. at 271.

³⁹ Id.

⁴⁰ ASG Indus., Inc. v. United States, 548 F.2d 147 (6th Cir. 1977).

BNSF argues that the Sixth Circuit merely held in ASG Industries that a shipper does not need to show market harm in proving damages in a rate reasonableness case.⁴¹ Under BNSF's reading, ASG Industries does not mandate an award of reparations in cases where the agency finds the involved rates exceed a reasonable maximum, and other statutory prerequisites (e.g., statute of limitations) are satisfied. That is not what the decision says, nor how the ICC interpreted the decision on remand. In its July 1977 decision on remand, the ICC read the Sixth Circuit's ASG Industries ruling as holding that reparations "automatically flow" when the agency finds qualifying rates exceed a reasonable maximum.⁴² The ICC went on to find the challenged rates exceeded a reasonable maximum and "having made this finding . . . reparations are automatically awarded." Id. at 4.

Justice Holmes got it right nearly a century ago. The law does not permit rail carriers to retain their illegal profits in cases where the agency finds that a challenged rate exceeds a reasonable maximum. The Board most recently reaffirmed this bedrock legal principle in Major Issues.⁴³ Application of this basic damages rule is particularly necessary in the instant case because the illegal profits at issue have been collected from, and will be returned to, the rural and municipal electric consumers that have borne BNSF's unlawful charges. BNSF has offered no credible legal or equitable reason for

⁴¹ Motion at 6.

⁴² ASG Indus., Inc. v. Aberdeen and Rockfish R.R., 355 I.C.C. 1, 3 (1977).

⁴³ Id. at 6.

denying these consumers the relief the law accords to them and which the ICC, and the STB, have accorded similarly situated complainant shippers in every coal rate case decided under the Coal Rate Guidelines.⁴⁴

CONCLUSION

For the reasons set forth above, WFA/Basin request that the Board deny BNSF's Motion.

Respectfully submitted,

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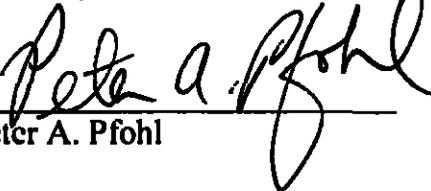
Attorneys for Complainants

⁴⁴ Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3rd Cir. 1987).

CERTIFICATE OF SERVICE

I hereby certify that this 24th day of September, 2008, I served copies of the foregoing Reply to BNSF's Motion to Strike Complainants' Improper Rebuttal Evidence and Leave to Response to Inaccurate Citation of Legal Authority by hand delivery on designated outside counsel for BNSF, as follows:

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