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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35305

**ARKANSAS ELECTRIC COOPERATIVE CORPORATION –
PETITION FOR DECLARATORY ORDER**

**ENTERED
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Public Record**

**REPLY COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

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Dated: April 30, 2010

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Norfolk Southern Railway Company (“NS”) respectfully submits these Reply Comments, which address two issues. First, NS’s Opening Comments argued that the Board’s resolution of this case should adhere to its established practice of considering the reasonableness of individual railroad practices on a case-by-case basis.¹ NS notes that several other parties similarly endorsed a case-by-case approach, including Arkansas Electric Cooperative Corporation (“AECC”) and BNSF – the parties most affected by the BNSF tariff at issue. Second, the American Public Power Association’s (“APPA”)² argument that the Board must refer the question of whether BNSF’s coal dust tariff is reasonable to the Federal Railroad Administration (“FRA”) should be rejected. While the Board is free to solicit FRA’s input if the Board believes it would be helpful, the Board is not required to refer unreasonable practice claims to FRA simply because they touch upon safety issues.

¹ As explained in NS’s Opening Comments, NS does not take any position on whether the specific BNSF tariff provisions at issue are reasonable.

² APPA’s Comments were joined by the Edison Electric Institute and the National Rural Cooperative Association.

I. Other Parties Agree That The Board Should Continue Its Case-By-Case Approach.

Every party to address the issue in its Opening Evidence has agreed with the position advocated by NS that the Board should maintain its fact-specific, case-by-case approach to determining whether a practice is unreasonable. For example, AECC acknowledged that “[w]hether a particular practice is unreasonable depends upon the facts and circumstances of each case,” and AECC cited several Board cases holding that the reasonableness of a particular practice is a “fact-specific inquiry” requiring “case-by-case analysis.” AECC Opening Evidence at 4 (quoting *WTL Rail Corp.—Pet. for Declaratory Order*, STB Docket No. 42092, slip op. at 6 (served Feb. 17, 2006)). The Western Coal Traffic League and Concerned Captive Coal Shippers similarly recognized that “[t]he Board has developed no single test for judging whether a particular practice is unreasonable. Instead, the Board conducts a case-by-case analysis and tailor[s] its analysis to the evidence proffered and arguments asserted under a particular set of facts.” Western Coal Traffic League Opening Evidence at 11 (internal citations and quotation marks omitted). BNSF likewise argued that the Board should conduct a “case-by-case fact-specific inquir[y]” into the reasonableness of the tariff provision at issue. BNSF Opening Comments at 20.

In sum, both shipper commenters and railroad commenters agree that the Board should adhere to its fact-specific, case-by-case approach. No party has suggested that the Board abandon that practice. Indeed, the voluminous documentary evidence, multiple expert reports, and factually intensive questions presented in the parties’ Opening Evidence demonstrate the wisdom of the Board’s policy of considering each case on its facts and not allowing fact-specific determinations in one case to unduly affect later assessments of cases that present different facts. However the Board may choose to resolve the fact-specific question of whether BNSF’s tariff

provisions are reasonable in light of the specific factual circumstances at issue here, the Board should note in its decision in this case that its ruling is limited to those facts so as not to unduly limit carriers' discretion to adopt appropriate tariff provisions in different factual circumstances.

II. Pre-Approval by the Board Is Not Required for Tariffs to Become Effective, Nor Is the Board Required to Refer This Matter to the FRA.

The fact-specific inquiry in this case in part touches upon rail safety issues, specifically questions about the effect of coal dust accumulation on track integrity. In BNSF's words, its tariff is appropriate because "the accumulation of coal dust on BNSF's coal lines poses a risk to safe and efficient operations on the Joint Line and BNSF's other PRB coal lines." BNSF Opening Evidence at 21. APPA claims that, because BNSF has cited safety concerns as a justification for its tariff provision, the Board should defer ruling on the tariff's reasonableness until the FRA has opined on whether the emission limits in BNSF's tariff are appropriate. APPA is wrong to suggest that the Board must consult FRA. The Board may consult FRA if the Board believes FRA's input would be helpful, but the Board need not refer this or any other unreasonable practice case to FRA merely because it touches upon safety issues. And the Board certainly should not establish a rule that any unreasonable practice case that involves rail safety requires formal FRA involvement. Instead, the Board's assessment of whether FRA input is appropriate should be a case-by-case decision depending on the specific circumstances at issue.

APPA's comments argue that BNSF's tariff should not be "permit[ted] . . . to go into effect until the STB is convinced that the Tariff is reasonable" and that the STB should "withhold its determination [of the tariff's reasonableness] until the FRA determines whether BNSF's 'emission limits' are appropriate and would accomplish the objective of preventing railroad derailments." APPA Comments at 6, 7. APPA argues that this approach is necessary

“because the FRA, rather than the STB, is the agency empowered to establish railroad safety standards.” *Id.* at 8.

In the first place, APPA’s suggestion that BNSF’s tariff not be permitted to become effective “until the STB is convinced that the Tariff is reasonable” violates the language and policy of the Interstate Commerce Act. Railroads have the authority to establish reasonable rules and practices governing their transportation services and are not required to obtain regulatory preapproval for new tariff provisions. *See* 49 U.S.C. §§ 10702(2); NS Opening Comments at 1-2. APPA’s contention that BNSF should not be allowed to impose its tariff until the Board rules on the tariff’s reasonableness would effect a dramatic and unwarranted change in the law. Congress recognized that railroads need the flexibility to adopt reasonable rules and practices to respond to changing situations. *See id.* Requiring that the Board preapprove any new tariff would substantially reduce that flexibility, and the Board should reject APPA’s argument.³

Moreover, APPA is incorrect to claim that FRA referral is mandatory because the questions in this proceeding touch upon safety issues. *See* APPA Comments at 8. FRA is not the only federal agency with jurisdiction over rail safety issues. The Board also has authority over rail safety under the Rail Transportation Policy, including responsibility “to promote a safe and efficient rail transportation system,” to permit “operat[ion of] transportation facilities and equipment without detriment to the public health and safety” and “to encourage . . . safe and

³ APPA does not argue that the Board should enjoin the BNSF tariff provisions at issue, which in any event will not become effective until August 1, 2010. And APPA certainly does not present evidence that could satisfy the high standards necessary for such an injunction. *See, e.g., Seminole Electric Cooperative, Inc. v. CSX Transp., Inc.*, STB Docket No. 42110, slip op. at 2 (served Dec. 22, 2008) (“To obtain an injunction, the requesting party must show: (1) it is likely to succeed on the merits; (2) it will be irreparably harmed in the absence of the requested relief; (3) issuance of the injunction will not substantially harm other parties; and (4) granting the injunction is in the public interest.”).

suitable working conditions in the railroad industry.” 49 U.S.C. § 10101(3), (8), (11). For this reason, the Board has recognized that “Congress established railroad safety as an important policy for the Board to consider in exercising its regulatory responsibilities over the interstate railroad network.” *See, e.g., Railroad Ventures, Inc.—Abandonment Exemption—Between Youngstown, OH, and Darlington, PA*, STB AB-556 (Sub.-2X), slip op. at 8 (Apr. 28, 2008) While it is true that FRA has particular expertise in the realm of rail safety, “both FRA and STB are vested with authority to ensure safety in the rail industry.” *Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, and Acquisitions of Control; and Procedures for Consideration of Safety Integration Plans in Cases Involving Railroad Consolidations, Mergers, and Acquisitions of Control*, STB Ex Parte No. 574, slip op. at 10 (served Mar. 8, 2002), also available at 67 Fed. Reg. 11582, 11586 (published Mar. 15, 2002) (emphasis added). As a result, if “the Board is not faced with technical questions regarding railroad safety,” it has indicated that the mere fact that an issue “implicates” safety does not make it necessary to refer it to FRA. *Railroad Ventures*, at 9.

APPA cites two cases to support its claim that FRA review of the tariff is necessary, but neither is relevant here. Both are three-decade-old circuit court decisions affirming ICC determinations relating to the transportation of spent nuclear fuels. In one, the Sixth Circuit held that the ICC reasonably relied on the fact that other agencies had issued safety regulations governing the transportation of radioactive materials as a reason to reject railroads’ arguments that safety concerns justified their failure to publish tariffs for such transportation. *See Akron, Canton & Youngstown R.R. Co. v. ICC*, 611 F.2d 1162, 1168-69 (6th Cir. 1979). Similarly, *Consolidated Rail Corp. v. ICC*, 646 F.2d 642, 649 (D.C. Cir. 1981), held that the ICC reasonably relied on other agency regulations to reject carrier claims that radioactive materials

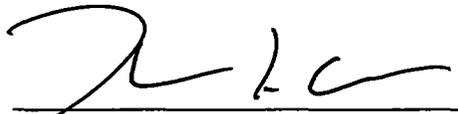
must be transported in special train service. These affirmances of ICC decisions to consider other agencies' safety regulations are a far cry from holdings that any safety questions must be referred to FRA. Indeed, in both cases the courts of appeals explicitly recognized that the ICC had jurisdiction over safety issues. *See Conrail*, 646 F.2d at 648 (“[P]romoting safe rail transportation is one of the Commission’s statutory responsibilities”); *Akron, Canton*, 611 F.2d at 1170 (“[T]he Commission has more than a small residue of authority over safety matters” (internal quotation marks omitted)).

It is certainly true that in some cases FRA’s technical expertise on safety issues is valuable, and the Board has benefited from consultation with FRA in such cases. For example, in *National R.R. Passenger Corp.—Pet. for Declaratory Order—Weight of Rail*, STB Fin. Docket No. 33697 (served Oct. 21, 1999), the Board was asked to decide whether 115-pound continuous welded rail could safely accommodate Amtrak trains operating at 89 miles per hour. Because of the technical issues involved, the Board “requested that [FRA] participate in this proceeding and assist us” because of its “expertise on safety issues such as this one.” *Id.* at 1. Significantly, the Board did not ask FRA for a “ruling” on the relevant question, as APPA would have the Board do here. APPA Comments at 8. Instead, after consulting with FRA, the Board asked FRA to submit an analysis, which the Board considered in reaching its own determination of the issues. *See National R.R. Passenger Corp.—Pet. for Declaratory Order—Weight of Rail*, STB Fin. Docket No. 33697, slip op. at 2 n.3 (served Feb. 12, 1999) (indicating that Board requested FRA to submit analysis after “discuss[ions] . . . with FRA staff”).

In short, the Board has authority to decide issues that impact safety and to determine unreasonable practice complaints that touch upon safety issues without the involvement of other agencies. At the same time, the Board has the discretion to seek FRA’s

input if the Board deems it helpful. NS takes no position on whether FRA referral would be appropriate here. Whether or not the Board chooses to ask FRA for comments on one or more of the issues presented by this litigation, the Board should make clear that such consultation is a case-specific decision based on the specific factual circumstances presented here and not a decision that FRA consultation is required simply because BNSF cited rail safety issues as a justification for the tariff.

Respectfully submitted,



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Dated: April 30, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2010, I caused copies of the Opening Comments of Norfolk Southern Railway Company to be served by first-class mail or more expeditious means on all Parties of Record in STB Finance Docket No. 35305.



Matthew J. Warren