

March 16, 2010

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Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

ENTERED
Office of Proceedings

MAR 16 2010

Part of
Public Record

RE: STB Finance Docket No. 35305; *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*

Dear Ms. Brown:

Attached for filing in the above referenced matter is Texas Municipal Power Agency's ("TMPA") Opening Evidence. Please note, this is the only version of TMPA's Opening Evidence.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



Sandra L. Brown

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35305

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

**OPENING EVIDENCE AND ARGUMENT OF THE
TEXAS MUNICIPAL POWER AGENCY**

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The Texas Municipal Power Agency (“TMPA”), pursuant to the decision (“Decision”) of the Surface Transportation Board (“Board” or “STB”) served on December 1, 2009 in the above-captioned docket, hereby files its Opening Evidence and Argument.

I. BACKGROUND

The BNSF Railway Company (“BNSF”) issued tariff BNSF-6041-B on May 27, 2009. Items 100 and 101 of BNSF-6041-B mandated that BNSF coal trains operating over the Powder River Basin Joint Line and the Black Hills Subdivision should not exceed “Integrated Dust Value” (“IDV”) levels as measured by BNSF-installed Trackside Monitors. Additionally, BNSF-6041-B stated that shippers were responsible for ensuring that BNSF trains meet this IDV standard. The tariff is silent as to what would happen if a BNSF train exceeded the mandated IDV maximum.

On October 2, 2009, the Arkansas Electric Cooperative Corporation (“AECC”) filed a petition with the Board, claiming that BNSF-6041-B (Items 100 and 101) constitutes an unreasonable practice in violation of 49 USC § 10702 and/or a refusal to provide service in

violation of 49 USC § 11101. Citing the “vital role transportation of coal by rail plays in the nation’s energy supply and the economy in general,” the Board instituted a declaratory order proceeding and invited comments from the public. Decision at page 1.

II. IDENTITY AND INTEREST OF TMPA

TMPA functions as a non-profit municipality and operates the Gibbons Creek Steam Electric Station (“Gibbons Creek”) in Iola, Texas. TMPA was created by the Texas legislature in 1975 for the purpose providing an economical power supply to the four member cities of Bryan, Denton, Garland, and Greenville for resale to their customers. These four member cities own the Gibbons Creek station and benefit from the advantages of its generation that would not be possible if the cities had operated independently.

Gibbons Creek has a capacity of approximately 460 MW and burns coal from the Powder River Basin (“PRB”) in Wyoming. Coal consumed at Gibbons Creek is transported by BNSF from the PRB, and TMPA is captive to BNSF at Gibbons Creek.

As the Board is aware, TMPA's rail transportation of coal is currently subject to a 20-year prescribed rate as a result of decisions in TMPA's rate case finding the BNSF rates unreasonable in *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42056 (decisions served March 24, 2003, Sept. 27, 2004, and Oct. 29, 2004) (“*TMPA v. BNSF*”).

III. SUMMARY OF OPENING EVIDENCE AND ARGUMENT

TMPA expects that it will share many of the same general concerns raised by other shippers and shipper organizations participating in this proceeding, but TMPA will not use its Opening Evidence to similarly address the broad implications and issues created by Items 100 and 101 of BNSF-6041-B. Instead, the possible implementation of BNSF-6041-B has raised a

narrow issue concerning the transportation of coal by BNSF for TMPA to Gibbons Creek because TMPA is currently paying BNSF under a transportation rate prescribed by the Board in *TMPA v. BNSF*. As the Board is aware, shippers like TMPA expend considerable amounts of money to bring a rate case and prove that the sole railroad serving a plant is charging unreasonable rates. TMPA hired lawyers, rail experts, and economic consultants to put together and defend the voluminous amount of evidence needed to meet the Board's "stand-alone cost" ("SAC") test and develop a hypothetical, efficient, "stand-alone railroad" ("SARR"). Likewise, BNSF had its opportunity in the rate case to put forth its evidence and establish what the reasonable rate should be for rail transportation of coal from the PRB to Gibbons Creek.

Review of the information from the Board's decisions in the *TMPA v. BNSF* case shows that costs for ballast fouling remediation are already covered by the rate prescribed by the Board. Therefore, in the event the Board finds, whether through BNSF-6041-B or another similar provision, that shippers can be made to pay for coal dust mitigation, then the Board should also state that these costs cannot be applied to TMPA's prescribed rate.

IV. THE TMPA PRESCRIBED RATE ALREADY INCLUDES COAL DUST MITIGATION COSTS

A. BNSF Devised The Coal Dust Tariff To Address Maintenance Needs

In support of its plan to implement the IDV standards, as measured by the Trackside Monitors, BNSF asserts that the tariff is needed to prevent "compromised rail infrastructure", to address ballast becoming "contaminated by the accumulating coal dust", and to deal with "fouling [of] the rail ballast." See pages 1, 4, and 8 of the BNSF Declaratory Order Reply (filed Oct. 21, 2009). According to BNSF, roadbed repairs, rehabilitation, and maintenance are necessitated by coal dust accumulation. See pages 4-5 of the BNSF Declaratory Order Reply

(filed Oct. 21, 2009). TMPA is not aware of any additional reasons alleged by BNSF in support of the coal dust tariff.

B. Ballast Cleaning Costs And Other Railbed Maintenance Costs Were Evaluated And Included In The TMPA Prescribed Rate

As mentioned above, TMPA is currently paying a transportation rate to BNSF based on the Board's decision in STB Docket No. 42056. Decisions in that docket reveal that the parties and the Board considered all costs of ongoing maintenance of the railbed, including costs addressing drainage and the condition of ballast. In particular, the Board included nearly \$700,000 annually for "shoulder ballast cleaning" in its prescription decision. *TMPA v. BNSF*, STB Docket No. 42056, slip op. at 109 (served March 24, 2003). CSXT has recently indicated that shoulder ballast cleaning is sufficient for dealing with the fouled ballast of a railbed. CSXT Reply, filed in *Seminole Electric Cooperative, Inc. v. CSX Transportation, Inc.*, STB Docket No. 42110 at page III-D-168 (filed Jan. 19, 2010).

Furthermore, in the ultimate decision in *TMPA v. BNSF*, the Board generally followed all of BNSF's cost evidence on railbed maintenance and repairs in developing the prescribed rate, including areas such as:

- track workers
- maintenance of way equipment
- ditching
- derailment allowance
- storm water prevention
- ballast

TMPA v. BNSF, STB Docket No. 42056, slip op. at 109 (served March 24, 2003). In short, the *TMPA v. BNSF* decision shows that the parties considered the costs associated with the coal dust problem as described in the BNSF Declaratory Order Reply and that such costs were included as

part of each party's detailed SARR evidence. Furthermore, the Board imposed these costs when determining the level of the TMPA prescribed rate based upon the SAC test.¹

V. BNSF SHOULD NOT BE PERMITTED TO “DOUBLE-DIP” AT TMPA’S EXPENSE

The situation created by the TMPA prescribed rate and the attempted application of BNSF-6041-B to TMPA is akin to the Board’s recent decision addressing fuel surcharges. *Rail Fuel Surcharges*, Ex Parte No. 661 (served Jan. 26, 2007). In that decision, the Board found that application of a fuel surcharge to a transportation rate was impermissible “double-dipping” where the cost of fuel was already included in the transportation rate through use of an index that includes fuel costs. *Rail Fuel Surcharges*, slip op. at 10-11. For example, TMPA does not pay a fuel surcharge in addition to its prescribed rate because this would constitute double-dipping of fuel costs, which were already addressed and included when the Board prescribed the TMPA rate. *TMPA v. BNSF*, STB Docket No. 42056, slip op. at 82 (served March 24, 2003). Therefore, there is no justification for TMPA paying a separate fuel surcharge in addition to its prescribed rate.

There is no material difference between the fuel surcharge issue and the BNSF coal dust tariff as applied to TMPA. Both the fuel surcharge and BNSF-6041-B would impose costs on TMPA despite the fact that the prescribed rate already includes all necessary costs, and especially all the costs and reasons alleged by BNSF to date to justify the coal dust tariff, as components of the prescribed rate. In other words, application of Items 100 and 101 of BNSF-6041-B to TMPA’s traffic would force TMPA pay these costs twice and result in BNSF being compensated twice for its maintenance costs to remedy fouled ballast which were already

¹ TMPA recognizes that the Board has changed certain aspects of its current rate case methodology but these changes do not implicate TMPA's rate which was set based upon the higher of a specified SAC rate or the jurisdictional threshold.

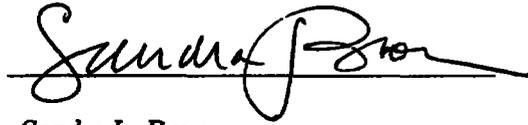
included in the stand-alone costs forming the basis of TMPA's current rate. Therefore, as applied to TMPA, it would be impermissible double-dipping for BNSF to receive both the TMPA prescribed rate (which already includes all necessary maintenance costs) and apply a tariff provision to TMPA that would essentially require TMPA to pay for these costs again.

TMPA acknowledges that the coal dust tariff portion of BNSF-6041-B was issued many years after the time BNSF and TMPA submitted their evidence in the rate case, and at the time the Board issued its decision in *TMPA v. BNSF*. Nevertheless, BNSF already offered, or should have offered, all railbed maintenance costs to the Board in its evidence in the rate case, and the Board considered and included those costs in its decision. Consequently, to the extent that the Board finds, whether through BNSF-6041-B or another similar provision, that shippers can be made to pay for coal dust mitigation, the Board should also find that costs of compliance with the coal dust tariff may not be assessed against TMPA's traffic during the 20-year prescribed period. At the absolute minimum, the burden of proof should be on BNSF to show that the BNSF coal dust tariff applies to TMPA by carrying its burden of proving that BNSF did not include and the Board did not consider the necessary maintenance costs for dealing with fouled ballast and other drainage related issues during the SAC calculation for the TMPA prescribed rate.

VI. CONCLUSION

TMPA believes and has shown that the costs resulting from coal dust have already been included in the TMPA prescribed rate. TMPA respectfully requests that the Board's ultimate decision in this case should include a statement that any costs associated with the provisions of a "coal dust tariff" such as Items 100 and 101 of BNSF-6041-B cannot be forced onto TMPA because such costs were already included in the prescribed rate in STB Docket No. 42056.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sandra L. Brown", written over a horizontal line.

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Attorneys for Texas Municipal Power Agency

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March 2010, a copy of the foregoing was served via first-class mail, postage prepaid, on all parties of record.



David E. Benz