

January 18, 2011

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

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**RE: Docket No. NOR 42056, Texas Municipal Power Agency v. The BNSF
Railway Company**

Dear Ms. Brown:

In a Reply filed January 6, 2011 in the above-captioned docket, the BNSF Railway Company ("BNSF") made a number of misleading statements regarding the request of Texas Municipal Power Agency ("TMPA") that the Board enforce the maximum reasonable rate in this case. TMPA respectfully requests that the Board accept this letter, despite 49 CFR § 1104.13(c), because it "provide[s] a more complete record, clarif[ies] the arguments, will not prejudice any party, and do[es] not unduly prolong the proceeding." BNSF Railway Company – Discontinuance of Trackage Rights Exemption – In Peoria and Tazewell Counties, Ill., STB Docket No. AB-6 (Sub-No. 470X), slip op. at 1 (served June 4, 2010).

As an initial matter, TMPA wants to reiterate that it seeks an expeditious ruling from the Board. In its Reply, BNSF includes numerous statistics and a variety of statements about the case possibly being reopened. However, this case is not reopened and neither TMPA nor BNSF have sought reopening. Instead, TMPA is seeking enforcement of the existing decision. Nine trains have been loaded and seven BNSF trains have already arrived at TMPA's Gibbons Creek station in 2011, and an expeditious decision is warranted.

An expeditious decision is also warranted because BNSF is also attempting to impose additional costs to TMPA's service beyond the new higher tariff rate. These additional costs are above and beyond those itemized in the STB's rate case decisions for TMPA and include:

1. A minimum car loading that has increased from 118 to 120 tons per car. This makes loading BNSF cars extremely difficult when their maximum net capacity is 121 tons or less. The weight target range is too small and TMPA must pay overloading charges if more than 121 tons is placed into the car or minimum loading charges if less than 120 tons is loaded. A weight tolerance range of less than 1% of a car's capacity is nonsense.

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2. A minimum annual volume has been added at 1.8 million tons with a 30% liquidated damages penalty for any shortage.
3. Demurrage charges of \$600 per hour for train unloading times in excess of 6 hours.¹
4. This tariff is subject to BNSF's coal dust tariff and the costs associated with dust suppression treatments of trains.

Strewn throughout the flotsam of the Reply, BNSF repeatedly claims that circumstances have changed since the Board's 2003 and 2004 decisions in this case. See, e.g., BNSF Reply at 2 (claiming "substantial changes in economic conditions"). The major change in economic conditions, according to BNSF, is an increase in fuel costs since the original SAC analysis. BNSF Reply at 15. BNSF conveniently ignores other changes that would show the original SAC analysis overestimated the reasonable rate level; for example, railroad rates have risen dramatically since 2003, especially for coal transportation. See, e.g., Study of Railroad Rates: 1985-2007, Surface Transportation Board, Office of Economics, Environmental Analysis & Administration (January 16, 2009); A Study of Competition in the U.S. Freight Railroad Industry and Analysis of Proposals that Might Enhance Competition, Christensen Associates, Inc., Volume I, page 2-11 (November 2009); An Update to the Study of Competition in the U.S. Freight Railroad Industry, Christensen Associates, Inc., page 2-5 to 2-6 (January 2010) (graph shows significant increase in two coal transportation rate indices, and notes that "[b]oth rate indexes show that coal transportation rates increased more rapidly than overall industry rates").

In any event, BNSF's assertions are irrelevant because this proceeding is not reopened. BNSF has not actually requested reopening, or made any effort to meet the reopening standard carefully described in Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1), slip op. at 67-75 (served Oct. 30, 2006). Because BNSF has not met the standard of 49 USC § 722(c), the Board should disregard BNSF's unsupported assertions and simply enforce the existing decision.

BNSF now claims that the current maximum reasonable rate of \$25.33 per ton is less than 180% of BNSF's variable costs. If BNSF wants to assert the 180% R/VC level, it must follow the movement-specific adjustments as directed in the Board's original decision. "The parties should calculate this rate floor, in a manner consistent with the procedures and findings contained in

¹ In the March 24, 2003 Decision, the STB accepted BNSF's evidence for utility unloading time wherein BNSF asserted that the average time its trains spend at the destinations (including Gibbons Creek) ranges from 10 to 19 hours. Decision, slip op at 76. In addition, the STB found that TMPA failed to show that trains could be expected to be unloaded within the free time provided in the BNSF tariffs.

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Appendix A, as the necessary information for each time period becomes available.” TPMA v. BNSF, 6 STB 573, 608 (2003). BNSF now appears to claim that it has not kept track of the “necessary information” regarding its variable costs as that information has become available during this case. BNSF Reply at 19-21. BNSF’s failure to maintain its variable cost data as directed by the Board should not be used to BNSF’s benefit, as an excuse to switch to system average variable costs.

BNSF also suggests that the switch to unadjusted variable costs in Major Issues means that the Board-determined movement-specific adjustments in the TPMA v. BNSF proceeding must be ignored. BNSF Reply at 17-18. This is incorrect. In Major Issues, the Board only stated that the new rules would apply to “future cases.” Ex Parte No. 657 (Sub-No. 1), slip op. at 76-77. The Board cannot apply the Major Issues rule changes to the pre-existing decision in Docket 42056 because retroactive rulemaking is unlawful under the Administrative Procedure Act. Bowen v. Georgetown University Hospital, 488 U.S. 204, 223-224 (1988); Sierra Club v. Whitman, 285 F.3d 63, 68 (D.C. Cir. 2002) (internal citation omitted) (“We have held that the APA prohibits retroactive rulemaking.”).

BNSF tries to make an issue of the fact that TMPA did not seek reconsideration of the Board’s initial decision in this case on the issue of when the rate-setting freedom would be returned to BNSF. BNSF Reply at 5. This is true, but only because TMPA believed then, and continues to believe now, that the decision clearly used a 20-year analysis period and mandates maximum reasonable rates for all 20 years. It may also be worth noting that BNSF did not seek reconsideration on this issue either.

BNSF also claims that, despite the 20-year netting process used by the Board in this case, no maximum rate is appropriate for years 11-20 because rate relief is entirely “discretionary.” BNSF Reply at 13. See also BNSF Reply at 8 (BNSF claims that TMPA’s argument is based upon the “supposed logic” of the SAC analysis). BNSF seems to be saying that, after a multi-year and multi-million dollar SAC proceeding that shows TMPA is entitled to relief, the Board should simply decide to refrain from enforcing a maximum reasonable rate.

This assertion is based on the “may prescribe” language from 49 USC § 10704(a)(1) and a recent decision in the AEP Texas case, but BNSF omits several key points in citing these two sources. First, BNSF ignores the Board’s reliance on the peculiar “circumstances” in the AEP Texas case. In that case (which did not use the percent reduction method), a maximum reasonable rate was only warranted in the 21st year of an 83-quarter DCF period for a few origin mines. The Board decided not to prescribe that maximum reasonable rate because it was so far in the future and due to the unique “combination of circumstances” that existed in the case. AEP Texas North Company v. BNSF Railway Company, STB Docket No. 41191 (Sub-No. 1), slip op. at 19 (served May 15, 2009). The Board also noted that its determination of what a reasonable rate

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would be in the 21st year should be used by the parties as a “transparent guide.” *Id.* In contrast, the TMPA rate dispute concerns the rate to be charged right now, not at a point years in the future; moreover, the “circumstances” and equities favor enforcing the Board’s decision because the netting process (in conjunction with the percent reduction method) used by the Board reduced TMPA’s recovery in years 1-10 to offset the existence of a maximum reasonable rate through year 20.

One of BNSF’s most disturbing assertions is that TMPA’s only relief now is that it can challenge the new tariff in a new rate case, despite the fact that the original 20-year DCF period continues through the first quarter of 2021. BNSF Reply at 11. BNSF’s viewpoint is a recipe for chaos and would create a second, overlapping SAC analysis period for the same shipper and same origin to destination pairs. The irrationality of this situation highlights the fallacy of BNSF’s position.

Under BNSF’s interpretation of the Board’s netting process, a defendant railroad is able to manipulate the result to its own favor. Use of netting in conjunction with the percent reduction method means that SARR under-recoveries in later years of the SAC analysis work to offset SARR over-recoveries in early years. Thus, as in TMPA’s case, a maximum reasonable rate is “pulled” upward in the early (over-recovery) years in order to “push” down the maximum rate to the tariff level in later (under-recovery) years. In BNSF’s view, the defendant has complete rate-setting freedom in the later years that were part of the analysis period.

BNSF asserts that the Board does not have authority to set maximum reasonable rates for 2011-2021. BNSF Reply at 13. This assertion is contradicted by Board precedent. Contrary to BNSF’s unsupported assertion, the Board does and has set a maximum reasonable rate equal to the challenged tariff level. APS, 2 STB at 390-393. See maximum rate on page 452, where the “Arizona ultimate reduced rate” is equal to the putative tariff rate “Greater of revised reduced rate or R/VC floor” in years 2003-2004 and 2008-2013. 2 STB at 452. As later stated by the Board in the same proceeding, “the SAC analysis assumes that the defendant railroad would adhere to the rate that it has selected.” APS, slip op. at 7 (served Dec. 13, 2004).

BNSF claims that TMPA’s position represents “the same argument” made by Western Fuels in STB Docket No. 42088 (Sub-No. 1). BNSF Reply at 9. There is a world of difference between the position advocated by Western Fuels and that explained by TMPA in the Petition for Enforcement. Western Fuels was arguing about how to calculate variable costs for the determination of the maximum reasonable rate (which was set at an R/VC ratio). Western Fuels asserted that the original variable costs should be used, and simply indexed for the next 20 years. The Board disagreed, finding that the variable costs should be calculated each year based on BNSF’s reported results. Western Fuels Association, Inc. and Basin Electric Power Cooperative

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v. BNSF Railway Company, STB Docket No. 42088 (Sub-No. 1), slip op. at 6-9 (served July 27, 2009).

The Western Fuels dispute about how to calculate variable costs has no relationship to TMPA's position regarding the netting process used by the Board in calculating the maximum reasonable rate using the percent reduction method in a 20-year DCF. The Board did not even use the percent reduction method in Western Fuels. In short, TMPA is not making "the same argument" as Western Fuels.

Finally, BNSF makes the unusual assertion that a "legal flaw" must be shown to justify reopening a case based on material error. Reply at 12-13. Despite repeatedly claiming a "legal flaw" is necessary for material error to exist, BNSF does not cite to any Board or ICC precedent. Indeed, the "legal flaw" concept is nowhere found in the governing statute, 49 USC § 722(c), or the Board's reopening rules, 49 CFR § 1115.4. The Board has previously reopened a case based on material error with no mention of a "legal flaw" or statute violation. See Railroad Ventures, Inc. – Abandonment Exemption – Between Youngstown, OH and Darlington, PA, In Mahoning and Columbiana Counties, OH and Beaver County, PA, STB Docket No. AB-556 (Sub-No. 2X), slip op. at 6-8 (served Feb. 15, 2007). While neither TMPA nor BNSF have argued for reopening here, the Board should reject BNSF's attempt to create a new standard for reopening based on material error.

Please do not hesitate to contact me if you have any questions.

Very truly yours,



Sandra Brown

cc: Samuel M. Sipe, Jr., Counsel for BNSF Railway Company
Parties of Record
