

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

WESTERN FUELS ASSOCIATION, INC.)	
and BASIN ELECTRIC POWER)	
COOPERATIVE, INC.)	
)	
Complainants,)	
)	Docket No. 42088
v.)	
)	
BNSF RAILWAY COMPANY)	
)	
Defendant.)	
)	

MOTION TO STRIKE

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

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Dated: November 29, 2010

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Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (“WFA/Basin”) respectfully request that the Board strike from the administrative record the document Defendant BNSF Railway Company (“BNSF”) styled as “Comments of BNSF Railway Company on Remand” (“Comments”) and filed with Board on November 22, 2010.

As demonstrated below, BNSF’s Comments should be stricken because BNSF had no legal authority to file them. The record in this case remains closed unless and until the Board decides to reopen it – a decision that the Board has not made – and BNSF’s attempt to arrogate this decision to itself is clearly unlawful. The proper remedy is to strike BNSF’s filing.¹

¹ See 49 C.F.R. § 1104.8 (Board may order objectionable matter stricken); 49 C.F.R. § 1104.10 (Board may reject deficient document).

Alternatively, if the Board does decide to reopen the record, and to accept BNSF's Comments for filing, WFA/Basin request that the Board adopt a procedural schedule that affords WFA/Basin at least sixty (60) days from the date of the Board's order reopening these proceedings to submit a reply to BNSF's Comments.²

BACKGROUND

In a series of three decisions served in 2009 ("Relief Orders"),³ the Board found that the rates BNSF charged on WFA/Basin's coal traffic moving from the Wyoming Powder River Basin to the Laramie River Generating Station exceeded a reasonable maximum. The Board prescribed maximum reasonable rates and directed that BNSF pay WFA/Basin reparations.

BNSF filed multiple petitions for review of the Board's Relief Orders in the United States Court of Appeals for the District of Columbia Circuit ("Court" or "D.C. Circuit"). In the ensuing appellate proceedings, BNSF argued that the Board's Relief

² 49 C.F.R. § 1104.13 provides that a party must file a "reply or motion" responding to a pleading within twenty days after the pleading is filed. The instant Motion is timely under § 1104.13. WFA/Basin do not construe § 1104.13 under these circumstances as requiring that they also file a merits reply within the twenty-day period (which expires on December 13, 2010), but, out of an abundance of caution, WFA/Basin also tender their alternative relief request as a request for an extension of time under § 1104.7(b) (governing time periods "may be extended by the Board in its discretion, upon request and for good cause").

³ See decisions served in this proceeding on February 18, 2009, June 5, 2009, and July 27, 2009.

Orders should be vacated, citing a host of asserted errors as grounds for this requested relief. The Board, and WFA/Basin, defended the Orders.

On May 11, 2010, the Court issued a decision (“Decision”)⁴ that rejected BNSF’s request that the Board’s Rate Relief orders be vacated and affirmed these Orders in all respects, except one – the Court found that the Board had failed to address BNSF’s claim that the Board’s Average Total Cost (“ATC”) methodology contained an impermissible “double-counting” of variable costs. *Id.* at 612-13.⁵ The Court remanded the case to the Board “so that the Board on remand can address BNSF’s double-counting objection.” *Id.* at 613.

In explaining its remand order, the Court noted that both the Board and WFA/Basin had presented detailed explanations in their briefs demonstrating why the Board’s ATC methodology contained no impermissible double-counting of variable costs. *Id.* at 612-13. However, the Court concluded that since the Board had not expressly adopted these explanations in its Relief Orders, the Court could not defer to them on review. *Id.* at 613 (“WFA has offered a response in its brief at 35-36, explaining that BNSF’s concern with double-counting is not problematic However, the Board never relied on this rationale [in its Relief Orders] and cannot do so on appeal.”)

⁴ *BNSF Railway Co. v. STB*, 604 F.3d 602 (D.C. Cir. 2010).

⁵ The Board’s ATC methodology is used in the Board’s stand-alone cost analysis to calculate revenues on cross-over traffic.

On June 25, 2010, BNSF petitioned for rehearing and rehearing en banc of the Court's Decision. The Court denied these requests in orders filed on September 2, 2010 and the Court's mandate issued on September 14, 2010. As of the date of this Motion, the Board has not reopened the administrative record, nor requested that the parties make any post-remand submissions to the Board.

On November 22, 2010, BNSF filed its self-styled Comments with the Board. In this lengthy and convoluted filing,⁶ BNSF argues that the Board should reject the ATC methodology used in the Relief Orders, a methodology BNSF refers to as "Modified ATC," because, according to BNSF, Modified ATC arbitrarily "double-counts variable costs." Comments at 2. BNSF also requests that the Board "recalculate" its prior stand-alone cost analysis using what it refers to as "Original ATC" to set divisions on cross-over traffic or, alternatively, to make the recalculations using other purported ATC variants created by its experts. *See id.* at 2, 30-31.

I.

THE BOARD SHOULD REJECT BNSF'S UNLAWFUL FILING

The Board should reject BNSF's filing because BNSF had no legal authority to make it. In fact, it appears clear that BNSF made its filing for the sole purpose of evading governing legal standards.

⁶ BNSF's Comments consist of seventy-four (74) pages of written evidence, arguments, and exhibits tendered by its Counsel and two expert witnesses, along with twenty-one (21) megabytes of supporting electronic workpapers.

The Court's remand in this case was directed to the Board, not the parties.

In responding to remands, the Board has "broad discretion" concerning the procedures to be applied on remand.⁷ One of the most consequential issues the Board must address in any remanded proceeding is whether to reopen the administrative record.

If the Board concludes that that the receipt of additional evidence and/or argument from the parties would assist it in addressing the remanded issue, the Board may exercise its discretion to reopen the record. When the Board adopts this approach, the Board typically issues an order informing the parties of its decision to reopen the record; directs the parties to submit whatever additional evidence and/or argument the Board believes is pertinent; and establishes a procedural schedule governing the order and timing of these submissions.⁸ Alternatively, the Board may decide that it can best respond to a remanded issue without reopening the record.⁹

⁷ *Cross-Sound Ferry Servs., Inc. v. ICC*, 934 F.2d 327, 332 (D.C. Cir. 1991), *accord Nat'l Grain & Feed Ass'n, Inc. v. OSHA*, 903 F.2d 308, 310-11 (5th Cir. 1990) (agency is "free on remand" to exercise its "discretionary authority" to select procedures to be followed); *Global Van Lines, Inc. v. ICC*, 804 F.2d 1293, 1305 n.95 (D.C. Cir. 1986) (on remand, agency "has discretion to determine in the first instance how [to proceed]").

⁸ *See, e.g., Waybill Data Released in Three-Benchmark Rail Rate Proceedings*, STB Docket No. EP 646 (Sub-No. 3) (STB served Apr. 2, 2010 and Oct. 22, 2010); *GS Roofing Prods. Co., Inc. v. Ark. Midland R.R. Co.*, STB Docket No. 41230 (STB served Dec. 17, 2001); *Caddo Antoine and Little Mo. R.R. Co. – Feeder Line Acquisition – Ark. Midland R.R. Co. Line between Gurdon and Birds Mill, AR*, STB Finance Docket No. 32479 (STB served Nov. 15, 1996 and May 14, 1997).

⁹ *See, e.g., Market Dominance Determinations – Product and Geographic Competition*, 5 S.T.B. 492 (2001), *aff'd sub nom. Ass'n of Am. R.Rs. v. STB*, 301 F.3d 1108 (D.C. Cir. 2002); *Rail Gen. Exemption Auth. – Miscellaneous Agric. Commodities –*

Following a final court remand, a party's role is far more limited. A party has two basic responsive options in cases like the present one: it can wait to see how the Board decides to proceed, or, if a party wants to the Board to reopen the record on remand, it can make such a request to the Board. *See* 49 C.F.R. § 1115.4 (party may request Board to reopen administratively final decision). BNSF's counsel is familiar with the governing procedures.

In the *Market Dominance Case*,¹⁰ the Association of American Railroads ("AAR"), represented by BNSF's current counsel, petitioned the D.C. Circuit to vacate the Board's decision adopting new market dominance standards.¹¹ The Court rejected all of the AAR's arguments except one where the Court found that the Board had failed to address a contention made by the AAR in the proceedings before the Board.¹² The Court remanded (but did not vacate) the Board's decision for the Board to address the AAR's contention.¹³

Petition of G&T Terminal Packaging Co., Inc. to Revoke Conrail Exemption, 1 S.T.B. 869 (1996); *aff'd sub nom. G&T Terminal Packaging Co., Inc. v. STB*, 159 F.3d 1349 (D.C. Cir. 1998); *Viking Starship, Inc., Common Carrier Application*, 6 I.C.C. 2d 228 (1989), *aff'd sub nom. Cross-Sound Ferry Servs., Inc. v. ICC*, 934 F.2d 327 (D.C. Cir. 1991).

¹⁰ *Market Dominance Determinations – Product and Geographic Competition*, STB Ex Parte No. 627.

¹¹ *Ass'n of Am. R.Rs. v. STB*, 237 F.3d 676 (D.C. Cir. 2001).

¹² *Id.* at 680-81.

¹³ *Id.* at 681.

In the remanded proceedings, the AAR filed a petition with the Board asking the Board to reopen the record to obtain additional evidence and argument on the remanded issue.¹⁴ The Board denied the AAR's request because "AAR has presented no compelling reason to further delay this proceeding by reopening the record."¹⁵ The Board proceeded to address the remanded issue without obtaining any additional filings from the parties and reaffirmed its new standards.¹⁶ The Board's decision on remand was affirmed on appeal.¹⁷

In the instant case, the Board has not reopened the record, nor has BNSF filed a request that the Board do so. Instead, BNSF simply filed its Comments without first obtaining permission from the Board to do so, thus unlawfully arrogating to itself the decision of whether the record should be reopened, when it should be reopened, and the scope of the submissions on reopening. Under governing Board precedent, these decisions are for the Board to make in the first instance, not BNSF.

The Board should not permit BNSF to engage in such a blatant end-run around its procedural rules, nor should the Board allow BNSF to usurp the Board's

¹⁴ See *Petition of the AAR to Reopen on Remand, Market Dominance Determinations – Product and Geographic Competition*, STB Ex Parte No. 627 (filed Feb. 23, 2001).

¹⁵ *Market Dominance Determinations – Product and Geographic Competition*, 5 S.T.B. at 496.

¹⁶ See *id.* at 499.

¹⁷ See *Ass'n of Am. R.Rs. v. STB*, 306 F.3d 1108 (D.C. Cir. 2002).

authority to determine, in the first instance, whether to reopen the record on remand and if so, when and how the record should be reopened. For these reasons, the Board should strike summarily BNSF's "Comments" from the administrative record.¹⁸

II.

ALTERNATIVE RELIEF REQUEST

It is clear that the Board's ATC methodology contains no impermissible double-counting of variable costs for the reasons set forth in the pre-remand record, as well as in the Board's and WFA/Basin's briefs in the ensuing appellate proceedings in the D.C. Circuit. The Board can address and reject BNSF's double-count contentions in a remand decision without first reopening the record and further delaying this case – a case that is now over six years old.¹⁹

Moreover, the fact that the Court remanded BNSF's double-count contentions without vacating the Board's ATC methodology provides compelling corroborating support for not reopening the record. The Court remands agency decisions without vacating them in cases where "the agency's error was one of form and not of

¹⁸ *Cf. US Magnesium, L.L.C. v. Union Pac. R.R. Co.*, STB Docket No. 42114 (STB served July 7, 2009) (striking impermissibly filed evidence from the record).

¹⁹ *See Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24, 29-30 (D.C. Cir. 2005) ("the usual rule is that, with or without vacatur, an agency that cures a problem identified by a court is free to reinstate the original result on remand").

substance”²⁰ and where the error is “a technical one”²¹ which the agency can cure on remand “when it gets down to trying.”²² As summarized by the Court:

Remand is generally appropriate when there is at least a serious possibility that the [agency] will be able to substantiate its decision given an opportunity to do so, and when vacating would be disruptive.²³

Nevertheless, if the Board does decide to reopen the record, and then decides to accept BNSF’s Comments for filing in the reopened proceedings, WFA/Basin respectfully request that the Board establish a procedural schedule that provides them at least sixty (60) days from the entry of the Board’s scheduling order to file a reply responding to BNSF’s Comments. BNSF had one hundred and ninety-five (195) days following the issuance of the Court’s Decision to prepare its bloated Comments and WFA/Basin should be accorded a reasonable period of time to respond to them.

CONCLUSION

For the reasons set forth above, WFA/Basin respectfully request that the Board grant this Motion.

²⁰ *Engine Mfrs. Ass’n v. EPA*, 20 F.3d 1177, 1184 (D.C. Cir. 1994).

²¹ *Am. Water Works Ass’n v. EPA*, 40 F.3d 1266, 1273 (D.C. Cir. 1994).

²² *Id.*

²³ *Radio-Television News Dirs. Ass’n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999) (internal quotation marks omitted); *accord Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008) (remand appropriate where “there seems to be a significant possibility that the Commission may find an adequate explanation for its actions”).

Respectfully submitted,

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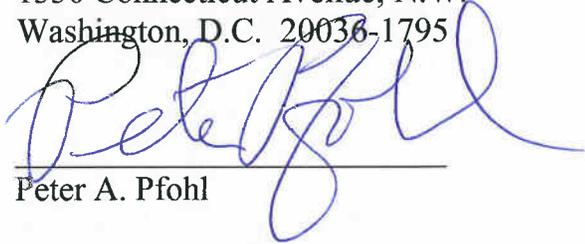
Dated: November 29, 2010

Attorneys for Complainants

CERTIFICATE OF SERVICE

I hereby certify that this 29th day of November, 2010, I served copies of the foregoing Motion to Strike by electronic mail on designated outside counsel for BNSF, as follows:

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