

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

Complainants,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42088

228379

BNSF RAILWAY COMPANY'S REPLY TO MOTION TO STRIKE

Defendant BNSF Railway Company ("BNSF") hereby replies to the Motion to Strike filed by Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. ("WFA/Basin") on November 29, 2010. In that Motion, WFA/Basin ask the Board to strike BNSF's November 22, 2010 Comments on Remand or in the alternative to provide WFA/Basin with additional time, beyond the normal 20 days, to reply to BNSF's Comments on Remand.

WFA/Basin's Motion to Strike BNSF's Comments on Remand should be denied. The U.S. Court of Appeals for the District of Columbia Circuit instructed the Board on remand to consider BNSF's concern about the double-counting of variable costs under the Board's modified Average Total Cost ("ATC") methodology. There is no valid reason to disregard BNSF's comments on this issue of critical importance to the integrity of the Board's stand-alone cost methodology. As to WFA/Basin's alternative request for additional time to reply to BNSF's comments, BNSF does not oppose an extension of time but BNSF asks that the extension of time

be limited to 60 days from the filing of BNSF's comments rather than from the date of a Board decision extending the time period for WFA/Basin's reply.

ARGUMENT

The sole basis for WFA/Basin's Motion to Strike is that BNSF supposedly violated established Board practice by filing comments on remand before the Board formally asked for additional evidence or argument. Motion to Strike at 8. But there is no established practice or precedent governing the procedures to be followed by the Board and the parties on remand of a Board decision from an appellate court. Proceedings on remand have been handled in a variety of ways by the Board and the parties.

In some cases, the Board has requested that the parties submit comments or evidence after a remand.¹ But in several other cases, the parties to the underlying proceeding have acted without waiting for the agency to initiate remand proceedings.² The parties in those cases did not "unlawfully arrogate" to themselves a right belonging to the Board by acting before the Board indicated how it wanted to proceed. See WFA/Basin Motion to Strike at 8. The Board accepted the pleadings in those cases, as well as responsive pleadings, so that a decision could be based on a complete record. Nor did the Board require that those parties satisfy the requirements

¹ See, e.g., *Cuddo Antoine & Little Missouri R.R. Co.--Feeder Line Acquisition--Arkansas Midland R.R. Co. Line Between Gurdon & Birds Mill, AR*, STB Fin. Docket No. 32479, at 3 (STB served Nov. 15, 1996) (reopening the proceeding and "providing an opportunity for all interested parties . . . to present their views on how the Board should proceed on remand").

² See, e.g., *The Burlington N. & Santa Fe Ry. Co.—Petition for Declaration or Prescription of Crossing, Trackage, or Joint Use Rights*, STB Fin. Docket No. 33740, at 5 (STB served May 13, 2003); *GS Roofing Products Co., Inc., Beazer West, Inc.*, STB Docket No. 41230, at 1-2 (STB served Dec. 17, 2001). See also AEP Texas North Company's Petition on Remand (filed May 6, 2005), *West Texas Utils. Co. v. The Burlington N. & Santa Fe Ry. Co.*, Docket No. 41191.

of 49 C.F.R. §1115.4 before submitting comments, which is what WFA/Basin incorrectly suggest is the established practice. In fact, the Board has never indicated that a party seeking Board action after a remand must first seek to reopen the proceeding under 49 C.F.R. §1115.4.

Moreover, BNSF is not aware of any case, and none has been cited by WFA/Basin, where the Board has rejected or refused to consider comments, argument or evidence submitted by parties to a proceeding after a remand from an appellate court. The Board routinely considers evidence and argument by the parties on remand.³ WFA/Basin cite three cases where the Board declined requests by parties to undertake additional proceedings after the remand. Motion to Strike at note 9. But those cases are inapposite because the parties sought to expand the scope of the original proceeding after the remand.⁴ As far as BNSF can determine, the Board

³ In addition to the decisions in STB Fin. Docket No. 33740 and STB Docket No. 41191 discussed in footnote 2 above, see *Delaware & Hudson Ry. Co.--Lease & Trackage Rights--Springfield Terminal Ry. Co.*, 3 S.T.B. 677, 695-700 (1998) (considering "record evidence developed on remand"); *Caddo Antoine & Little Missouri R.R. Co.--Feeder Line Acquisition--Arkansas Midland R.R. Co. Line Between Gurdon & Birds Mill, AR*, STB Fin. Docket No. 32479, at 4-5 (STB served May 14, 1997) (rejecting the shippers' argument that "we should decide this case only on the current record and the supplemental information that they have already provided" and permitting the parties to "submit updated evidence and argument"); *Santa Fe S. Pac. Corp.--Control--S. Pac. Transp. Co.*, Fin. Docket No. 30400 (Sub-No. 21), at 4. 16-21 (STB served Dec. 10, 1996) (considering evidence developed on remand).

⁴ *Market Dominance Determinations--Product & Geographic Competition*, 5 S.T.B. 492, 495-96 (2001) (denying request to initiate additional proceedings to consider specific proposals for the development and presentation of evidence on product and geographic competition and to direct shippers and railroads to negotiate rules regarding the development of such evidence); *Rail General Exemption Authority--Miscellaneous Agricultural Commodities--Petition of G&T Terminal Packaging Co., Inc. to Revoke Conrail Exemption*, 1 S.T.B. 869, 870-71 (1996) (after calling for additional argument on remand, the Board denied G&T's request to assign the matter on remand to an ALJ for further proceedings); *Viking Starship, Inc., Common Carrier Application*, 6 I.C.C.2d 228, 232 (1989) (denying request to "seek further input from a variety of public and private parties; . . . order discovery, . . . hold oral, evidentiary hearings in the field," consolidate the proceeding with another case and follow notice and comment procedures).

has never refused to consider evidence or argument submitted by a party in an adjudicatory proceeding that was directed to the issue that was remanded to the Board by an appellate court.

The Board clearly has authority to control its docket. But it would be an abuse of discretion for the Board to fail to consider BNSF's Comments on Remand in this case. The issue that is the subject of the court's remand – the allocation of revenue on cross-over traffic – is an issue that has already been the subject of three separate decisions by the D.C. Circuit. It is an issue of critical importance in stand-alone cost cases, which is why the Board addressed the issue in a broad rulemaking proceeding where it adopted its original ATC methodology. *See Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No.1) (STB served Oct. 30 2006). The D.C. Circuit instructed the Board to consider BNSF's objection to the use of a revenue allocation methodology that double-counts variable costs. Moreover, as BNSF explains in its Comments on Remand, the decision to abandon the Board's original ATC methodology resulted in an increase of reparations owed by BNSF in this case of \$63 million through 2009. Given the importance of this issue and the high stakes involved, it is critical that the Board consider BNSF's comments on remand.

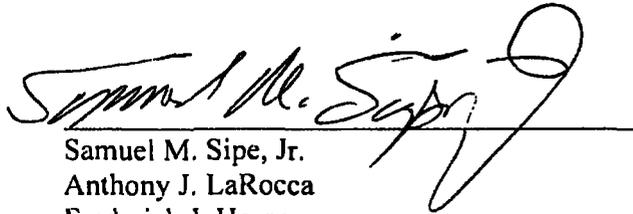
As to WFA/Basin's request for an extension of time to reply to BNSF's Comments on Remand, BNSF does not oppose an extension of the normal 20-day reply period. It is important that the Board's decision on remand be based on a complete record and WFA/Basin should have an adequate opportunity to prepare responsive comments. However, it is also important that the Board resolve the current uncertainty over the revenue allocation on cross-over traffic as soon as possible. The issue of cross-over traffic revenue allocation affects other pending rate reasonableness cases, and it may also be important to parties assessing rates and rate proposals

outside of the context of litigation. BNSF believes that a 60-day reply period from the date that BNSF filed its comments should be more than adequate for WFA/Basin to respond.

CONCLUSION

For the reasons set forth above, the Board should deny WFA/Basin's Motion to Strike and provide WFA/Basin with 60 days from the date that BNSF filed its Comments on Remand to submit responsive comments.

Respectfully submitted,



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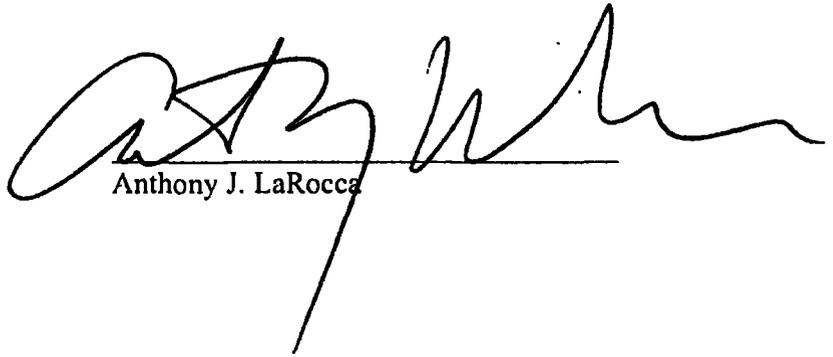
Attorneys for BNSF Railway Company

December 7, 2010

CERTIFICATE OF SERVICE

I hereby certify that this 7th day of December, 2010, I served a copy of BNSF's Reply to Motion to Strike on the following by electronic mail:

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