DOCKET NO. 41185[1]

ARIZONA PUBLIC SERVICE CO. & PACIFICORP
v.
THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY[2]

Decided May 9, 2003

The Board finds that changed circumstances justify the reopening the 1997 rate prescription in this proceeding. Pending a decision on reopening: (a) the carrier will maintain the previously prescribed rates; and (b) for movements taking place while this reopened proceeding is being heard, any difference between revenue received under the newly prescribed rates and revenue received under the previously prescribed rates must be refunded, with interest, to the party entitled to receive it.

BY THE BOARD:

The Burlington Northern and Santa Fe Railway Company (BNSF) seeks to reopen the proceeding in Docket No. 41185, in which we prescribed the maximum rate it could charge Arizona Public Service Co. (Arizona) to haul coal from the McKinley mine in New Mexico to Arizona's Cholla Station electric generating plant (Cholla) near Joseph City, AZ. The parties agree that circumstances have changed since we set the current rate, as it is now clear that McKinley will exhaust its coal reserves sooner than anticipated in our prior decisions. We conclude that this changed circumstance justifies reopening the proceeding to redetermine the maximum reasonable rate BNSF may charge Arizona for this movement.

[1] This decision embraces STB Docket No. 42077, *Arizona Public Service Co. & PacifiCorp v. The Burlington Northern and Santa Fe Railway Company*.

[2] The original defendant in this proceeding, The Atchison, Topeka and Santa Fe Railway Company (Santa Fe), has since merged with Burlington Northern Railroad Company to form the Burlington Northern and Santa Fe Railway Company (BNSF). We have recaptioned this proceeding and will refer to the defendant as BNSF.

BACKGROUND

The Original 1997 Proceeding

In 1994, Arizona challenged as unreasonable the rates charged by one of BNSF's predecessor companies for unit-train transportation of coal from McKinley to Cholla. Using the stand-alone cost (SAC) test set forth in *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985) (*Coal Rate Guidelines*), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987), Arizona designed a stand-alone railroad (SARR) to determine what a hypothetical, efficient carrier would need to charge to provide the challenged transportation service, free from any costs associated with inefficiencies or cross-subsidization of other traffic. *See Arizona Pub. Serv. Co. v. Atchison, T. & S. F. Ry. Co.*, 2 S.T.B. 367, 379 (1997) (*1997 Decision*). The SARR followed the existing BNSF line from McKinley to Cholla and also connected to an existing private spur line to serve the electrical generating plant of Salt River Project Agricultural Improvement and Power District (Salt River) at Coronado, AZ. *See id.* at 381. Arizona could have selected any reasonable subset of available BNSF traffic to identify production economies. *See id.*; *Coal Rate Guidelines*, 1 I.C.C.2d at 544. Arizona selected only coal moving from McKinley to Cholla and Salt River.

A central dispute in the proceeding was whether the McKinley mine would run out of coal before the end of the 20-year SAC analysis period in 2013. The mineable coal reserves were estimated to run out in 2007. At the time, however, the Pittsburgh & Midway Coal Mining Company (P&M), McKinley's owner, was engaged in contract negotiations to acquire new coal reserves on adjacent Navajo lands, and expected those negotiations to be successful. Based on that evidence, we concluded that "it is quite likely that coal would continue to be available from P&M at the McKinley [m]ine site through 2013 (the extent of our SAC analysis here), making it unnecessary for Arizona and Salt River to switch to other coal sources." *1997 Decision*, 2 S.T.B. at 384.

We recognized, however, that this prediction could prove inaccurate and indicated that BNSF could seek reopening in such circumstances. At the time, we could not determine with any confidence that the two shippers' traffic patterns would change, and if so how they would change, as a result of depleted reserves at McKinley. We concluded that our regulatory responsibilities were best met by assuming a continuation of the status quo, as "we can reopen this proceeding * * * and, if necessary, determine what a reasonable rate would be under the changed circumstances." *1997 Decision*, 2 S.T.B. at 385.

Based on the record, we found that the SAC rate was less than the challenged rate and that the challenged rate was therefore unreasonable. We awarded reparations (with interest) for past movements and prescribed a maximum reasonable rate for future movements.

The 1998 Reopening

A month later after the issuance of our *1997 Decision*, BNSF asked us to reopen the proceeding. BNSF argued, *inter alia*, that shipments had fallen short of those presumed in our *1997 Decision* and that the McKinley mine would not be able to fulfill the coal needs of the Cholla and Salt River plants for the full 20-year SAC period. Specifically, BNSF argued that we were overly optimistic in concluding that P&M could expand its mineable reserves from the Navajo Nation when McKinley depletes its coal reserves. *See Arizona Pub. Serv. Co. v. Atchison, T. & S. F. Ry. Co.*, 3 S.T.B. 70, 79 (1998) (*1998 Reopening*).

Although we reopened and revised the prescription to correct for certain errors, we retained our assumption that P&M would obtain an adequate source of replacement coal from the Navajo Nation. At the time, P&M had 10 years to acquire and develop more reserves before it would exhaust its existing reserves. Witnesses had testified that P&M had, or would soon have, drilling permits from the Navajo Nation to begin exploration for suitable coal reserves. We again acknowledged that it was possible that P&M ultimately might fail to acquire and mine additional coal fields. *1998 Reopening*, 3 S.T.B. at. 79. But we thought it best to respond to such changes if and when they occur. At such a time, "the parties can and should have this proceeding reopened and the SAC analysis revised appropriately." *Id.* at 79 n.42. Therefore, we again assumed a continuation of the status quo unless and until the facts proved otherwise. *Id.* at 80.

BNSF's Current Request To Reopen

On January 13, 2003, BNSF filed a petition to reopen this proceeding and vacate the rate prescription. Arizona filed its reply on January 30, 2003. BNSF offered undisputed evidence that the McKinley mine will exhaust its reserves before the end of the 20-year SAC analysis period. The parties agree that P&M will be unable to replenish its dwindling reserves using the nearby coal fields in

the Navajo Nation.[3] Tests conducted by P&M have revealed that the coal is unsuitable due to its high sulfur content. Based on this new evidence of substantially changed circumstances, BNSF asks us to reopen and vacate the rate prescription, currently $4.21 per ton.

BNSF also seeks interim relief pending a decision on its request for reopening. It asks that we issue an order, effective January 1, 2003, instructing Arizona to pay into an escrow account the difference between the $4.21 prescribed rate and the $6.91 rate that BNSF would charge in the absence of the prescribed rate. Alternatively, BNSF asks us to require Arizona to agree in writing to reimburse BNSF, with interest, for the difference between the prescribed rate and the $6.91 rate. BNSF argues that otherwise it would suffer irreparable harm should we later find that the current prescribed rate is too low.

DISCUSSION AND CONCLUSIONS

The parties agree that circumstances have changed since 1998, when we prescribed the current maximum rate BNSF can charge Arizona for hauling coal from McKinley to the Cholla plant. It is clear that McKinley will deplete its coal reserves sooner than anticipated. This development raises three issues: (1) whether this changed circumstance warrants reopening and the appropriate scope of that reopening; (2) if we reopen, whether we should remove the prescriptive effect of the current rate while we recompute, if necessary, the maximum reasonable rate; and (3) if we reopen, whether we should grant the retroactive relief requested by BNSF. In addition, Arizona asks that, if we reopen, we consolidate this proceeding with its newly filed rate complaint in STB Docket No. 42077, in which Arizona challenges the reasonableness of BNSF's rates from another mine (Lee Ranch) to its Cholla plant. We address each issue in turn.

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[3] *See* Verified Statement (V.S.) of Robert M. Burnham, ¶ 11, attached to BNSF Petition to Reopen; V.S. of Kenneth Norlander, ¶ 11, attached to Arizona Reply to Petition to Reopen ("By [2002], it had become clear that the McKinley Mine has been unable to acquire additional coal reserves and therefore large volumes of coal would eventually need to be shipped from other sources.").

Petition to Reopen and the Scope of Reopening

We will grant BNSF's request to reopen. We may reopen a proceeding at any time because of "material error, new evidence, or substantially changed circumstances." 49 U.S.C. 722(c); 49 CFR 1115.4. Here, Arizona agrees that "there is no dispute that the circumstances have changed with regard to volume levels that are expected to be transported from the McKinley [m]ine in the final years of the original 20 year DCF analysis."[4] In particular, it is now clear that P&M cannot replenish its dwindling reserves from the nearby coal deposits in the Navajo Nation.

As we have stated before, "we must approach petitions to reopen * * * cautiously, on a case-by-case basis, striving to achieve an appropriate balance between the interests of fairness to all parties and of administrative finality and repose." *1998 Reopening*, 3 S.T.B. at 75. Here, reopening is appropriate because the changed circumstance relates to a specifically identified and contested assumption in our prior decisions. In the *1997 Decision*, and again in the *1998 Reopening*, we rejected as speculative BNSF's concern regarding Arizona's ability to obtain its coal from McKinley over the full SAC analysis period. We acknowledged, however, that we could not rule out the possibility that McKinley might run out of coal before that time. What was speculative then is no longer so. We will therefore grant BNSF's request to reopen the proceeding due to this substantially changed circumstance so that we may "determine what a reasonable rate would be under the changed circumstances." *1997 Decision*, 2 S.T.B. at 385.

Our reopening should not, however, be as limited as BNSF envisions or as broad as Arizona would like to make it. BNSF argues that we should limit our reopening to consider only the impact of the depletion of the McKinley mine on our prior SAC analysis. Arizona would seek to introduce evidence of all changed circumstances since 1998, to reconfigure the SARR system, and to change the traffic group it selected in its initial case against BNSF. Neither of these extremes is warranted.

BNSF's justification for a very narrow reopening is based on its improper assumption that, once McKinley runs out of coal (sometime between 2008 and

[4] Arizona Reply to Petition to Reopen, at 12.

2010), the entire SARR would become obsolete.[5] On the other hand, Arizona argues that, when McKinley plays out, the nearby Lee Ranch mine would become the principal source of coal for Cholla.[6] Arizona contends that the SARR could receive that coal as interchange traffic at Defiance, NM, without changing the configuration of the hypothetical railroad.[7] In our *1997 Decision*, 2 S.T.B. at 385 n.51, we advised the parties that, if there were a premature shutdown of McKinley, we would address how the SAC constraint could accommodate Arizona's and Salt River's change in coal suppliers:

> Our SAC constraint may be sufficiently flexible to accommodate a change in suppliers. Because coal from other origins might move over the same routes as the [SARR] (except for the spur from the McKinley Mine to the mainline at Defiance) in order to reach new coal source(s), it is neither necessary nor appropriate, on the record before us, to assume (as [BNSF] does) that the entire [SARR] system would be rendered obsolete if the P&M coal contracts were not renewed or if reserves at the McKinley Mine were exhausted. The reasonable rates to be charged under the new circumstances could be determined by examining any additional costs to the [SARR] to serve the new movement(s).

We therefore need a more developed record on how Arizona and Salt River will re-source their coal needs once McKinley shuts down, what portion of that traffic could flow over the SARR, and what revenues the SARR could reasonably expect to earn from that coal traffic.

In all other respects, the reopening must be limited to the basic assumptions upon which Arizona based its SAC case in 1994. *Accord Bituminous Coal-Hiawatha, UT to Moapa, NV*, 10 I.C.C.2d 259, 263 (1994) (disallowing enlargement of the geographic scope of a SAC model beyond its original parameters). Arizona based its SAC case on a particular configuration and upon the assumption that the SARR would serve a traffic group limited to coal movements to only two utility plants. This reopening is not an opportunity to

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[5] V.S. of Michael R. Baranowski, ¶ 8, attached to BNSF Reply to Arizona's Petition for Consolidation (claiming the SARR would have "no salvage value" beyond the 20-year SAC period of analysis).

[6] Verified Statement of Kenneth Norlander, ¶ 8, attached to Arizona Reply to Petition to Reopen.

[7] Verified Statement of Thomas D. Crowley, ¶ 11, attached to Arizona Reply to Petition to Reopen.

expand the configuration of the SARR, or to include new traffic, other than the re-sourced coal traffic destined to Arizona and Salt River.[8]

Both parties may, however, update the record regarding any forecasts made in our prior decisions, such as inflation indexes, cost of rail equity, and revenue forecasts for the Salt River traffic, that proved to be inaccurate. *See, e.g.*, *Wisconsin Power & Light v. Union Pacific Railroad Company*, 5 STB 955 (2001) at 984. But the parties may not seek to reargue or recalculate the costs upon which the projections were based.

Within 10 days after the effective date of this decision, the parties are instructed to submit a procedural schedule to govern whatever limited discovery may be necessary and for the subsequent submission of evidence in the reopened proceeding. Because Arizona may have better access to information on how it may re-source its coal needs once McKinley shuts down, what portion of that traffic could flow over the SARR, and the revenues available from that coal traffic, the procedural schedule should provide for opening evidence by Arizona, then reply evidence by BNSF, followed by an opportunity for rebuttal evidence by Arizona.

Petition to Vacate

In deciding whether to vacate a prescription while a reopening is pending, and thus to temporarily restore ratemaking initiative to the carrier, we look at whether "the factual and legal underpinnings of the original prescription continue to have current validity." *San Antonio, Tex. v. Burlington Northern, Inc.*, 364 I.C.C. 887, 896 (1981). In this case, we must obtain additional evidence before determining what the SAC rate, and hence a maximum reasonable rate (if any), would be under the changed circumstances. Here, Arizona maintains that the evidence it intends to produce upon reopening would mandate a lower

[8] If Arizona wishes to challenge the rate that it must pay using a SAC analysis that is based on different assumptions, its recourse would be to have this proceeding dismissed, allow BNSF to establish a new rate, and then file a complaint challenging the carrier's new rate.

prescription,[9] whereas BNSF presumes that the reopening will show that no prescription is needed.

Ordinarily, where there is a dispute about the appropriate rate, the equities favor allowing the carrier's rate to control pending our resolution of the dispute. Under the statute, the shipper may receive reparations for overpayments, but a carrier is not generally entitled to further compensation if we find that there has been an underpayment. *See Burlington Northern, Inc. v. United States*, 459 U.S. 131, 141-42 (1982). Here, however, we are concerned that allowing BNSF to charge its proposed $6.91 per ton rate, even if only temporarily, could needlessly expose Arizona to significant financial hardship. Arizona presumably has not budgeted for such a dramatic, sudden, and unexpected increase in its transportation costs. Morever, BNSF represents to the Board that it is willing to forgo the use of the additional funds from the higher rate that it seeks to charge, while we reopen and redetermine the appropriate rate level, so long as it is not permanently deprived of the additional funds (plus interest) for this period should we later find the current rate to be too low.

Under the circumstances, we no longer have the same level of confidence in the current rate prescription as we did when we prescribed that rate. At the same time, we will not know what would be an appropriate rate to prescribe (assuming a prescription remains necessary) until the completion of our reexamination. In view of this uncertainty, we believe it would be inappropriate to continue the prescriptive effect of the current rate. We also do not, however, believe that it would be appropriate to allow BNSF to impose a sudden 64 percent rate increase on this traffic, simply because we might ultimately conclude that a rate prescription at a higher level is appropriate or that a rate prescription is no longer warranted.[10]

Accordingly, we will remove the prescriptive effect of our prior rate order and exercise our broad authority under 49 U.S.C. 721(b)(4) to prevent irreparable harm. Specifically, we instruct BNSF to collect no more than $4.21 per ton

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[9] Arizona believes that, once the Board considers all changed circumstances, the "rates for BNSF transportation service from McKinley Mine to Cholla will need to be adjusted *downward* from the prescribed levels called for in the Board's 1997 and 1998 Decisions." Arizona Reply to Petition to Reopen, at 13.

[10] As the ICC observed in the *Coal Rate Guidelines*, 1 I.C.C.2d. at 546, "in some instances, otherwise justified rate increases could cause significant economic dislocations which must be mitigated for the greater public good."

while the reopening is pending, but we direct both parties to keep account of the amounts paid during the pendency of the proceeding on reopening and, at the conclusion, to make the other party whole for what it would be entitled to but for this direction to maintain the status quo while we recalculate the maximum reasonable rate. If we conclude that the maximum reasonable rate is below $4.21, we will order BNSF to reimburse Arizona for all overpayments (plus interest) as of the effective date of this decision. Similarly, if we find that the maximum reasonable rate is now above $4.21, we will instruct Arizona to remit to BNSF the underpayments (plus interest) as of the effective date of this decision. In this manner, neither party will suffer irreparable harm while we recalculate the maximum reasonable rate.

We believe our action here is fully consistent with *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370 (1932). There, our predecessor, the Interstate Commerce Commission (ICC), set the maximum reasonable rate for shipping sugar from California to Arizona. Four years later, at the request of the shippers, the ICC reassessed the maximum reasonable rate, concluded it had erred, and prescribed a lower maximum rate. It then attempted to apply that decision retroactively by ordering the railroad to reimburse the shipper for charges collected in the prior 4 years that were above the newly prescribed rate. The Supreme Court held that the ICC could not award reparations with respect to past shipments that had moved under previously approved and prescribed rates. The Court reasoned that the ICC's rate prescription was an action that was legislative in nature and thus had the force of a statute in establishing the lawful rate. *Id.* at 386-87. The ICC was bound to recognize the validity of the rule of conduct approved by it and could not repeal its own enactment with retroactive effect. *Id.* at 389. In other words, "the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate." *Id.*

Here, the lawfulness of the rates approved and prescribed pursuant to 49 U.S.C. 10704(a)(1) in our *1998 Reopening* cannot be challenged with respect to traffic that moved from 1997 until now. But, with this decision, we remove the legislative force of our *1998 Reopening* with respect to the lawful rate for future movements. We do not know what the outcome of this reopening will be; the maximum reasonable rate may be higher or lower, by a modest or significant amount. But the evidence that justified reopening also raises genuine questions about the maximum reasonable rate for the future in light of the substantially changed circumstances.

To avoid irreparable harm to Arizona from a massive and unexpected increase in its transportation rate, we exercise our authority under 49 U.S.C. 721(b)(4) to order BNSF not to increase its current rate while we conduct our

reexamination. But neither party should rely on this order as approving the current rate as the maximum reasonable rate.

Petition for Retroactive Relief

In its request for interim relief, BNSF seeks to be able to collect a higher rate retroactive to January 1, 2003, which is prior to the time that BNSF filed its petition to reopen and vacate the current prescription. As discussed above, under *Arizona Grocery*, we cannot grant such relief.

Petition for Consolidation

Finally, Arizona seeks to have this reopened proceeding consolidated with the proceeding in Docket No. 42077. The complaint in that case, filed shortly after BNSF filed its petition to reopen this case, challenges BNSF's rates for the transportation of coal from the Lee Ranch mine to Cholla. Arizona argues that consolidation of the two cases would avoid unnecessary costs or delays, as both proceedings involve rates for transportation of coal from mines in New Mexico to Cholla, and Arizona anticipates presenting SAC evidence in both cases using a single SARR. While we encourage parties to suggest ways to avoid unnecessary costs and delays in large rate cases, consolidation is not appropriate here, given the limited scope of the reopening (as discussed above) and the different time periods that would be used in the SAC analysis in the two cases.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The motion to reopen STB Docket No. 41185 is granted. Within 10 days from the effective date of this decision, the parties shall submit a procedural schedule to govern the reopening.

2. The motion for retroactive relief is denied.

3. The prescriptive effect of the prior rate order is removed. BNSF is instructed not to increase the current rate during the pendency of this reopening. Each party is, however, instructed to keep account of the amounts paid during the pendency of the reopening and to make the other party whole, at the conclusion of this reopening, with respect to the amounts paid during the interim, based on what we ultimately find to be the maximum reasonable rate.

4. The motion to consolidate this proceeding with Docket No. 42077 is denied.

5. This decision is effective May 22, 2003.

By the Board, Chairman Nober and Commissioner Morgan.