

SURFACE TRANSPORTATION BOARD

Docket No. 41185

ARIZONA PUBLIC SERVICE CO. & PACIFICORP

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

and

STB Docket No. 42077

ARIZONA PUBLIC SERVICE CO. & PACIFICORP

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Public Comments of STB Staff in May 9, 2003 Voting Conference

by Raymond Atkins
Office of the General Counsel

Members of the Board:

The draft decision before you would grant BNSF's request to reopen Docket No. 41185. In that proceeding, Arizona Public Service had challenged the rate charged by BNSF's predecessor, The Atchison, Topeka, and Santa Fe Railway Company, to transport coal from the McKinley mine in New Mexico to the Cholla electric utility plant in Arizona. In 1997, the Board found the challenged rate unreasonable, based on a stand-alone cost methodology, and prescribed the maximum reasonable rate BNSF could charge.

A key dispute at that time was whether the McKinley mine had sufficient coal reserves to supply the traffic group for the 20-year period covered by the stand-alone cost analysis. The record showed that there was a realistic prospect that McKinley could replenish its coal reserves from neighboring coal fields. But the Board recognized that this might not be possible and the shipper might need to switch to coal from a more distant location. The Board explained that if

that were to happen, the parties could have this proceeding reopened to take into account the changed circumstances.

The parties agree that circumstances have indeed changed. Tests have shown that the nearby coal reserves contain too much sulfur for commercial use and the parties agree that McKinley mine will play out sooner than had been anticipated in our earlier decisions. Accordingly, the draft decision would reopen this proceeding to recalculate the maximum reasonable rate under the new circumstances.

In the reopened proceeding, the draft decision would allow both parties to update the record regarding any forecasts made in our prior decisions that proved inaccurate, such as inflation indexes, cost of rail equity, and revenue forecasts. But the parties may not change the basic assumptions upon which the earlier stand-alone cost analysis was based, other than how the two utilities in the original traffic group would re-source their coal needs once McKinley shuts down.

Another issue raised in this decision is what to do with the current rate prescription while the reopening is pending. The current prescribed rate is \$4.21 per ton. BNSF has stated its intention to charge \$6.91 per ton if the current rate prescription is vacated. This would constitute a 64% increase in the transportation rate. Arizona presumably has not budgeted for such a dramatic, sudden, and unexpected increase in its transportation costs. BNSF represents that during any reopening, it is willing to forgo the immediate use of the additional funds from the \$6.91 rate, so long as it is not permanently deprived of the additional funds should the Board conclude the current rate is too low. But according to longstanding Supreme Court precedent, as long as the \$4.21 rate remains the Board approved and prescribed maximum rate, neither party can receive further compensation or reparations with regard to traffic that moved under that rate,

even if upon reopening this rate is found to be too high, or too low.

To address these concerns, the draft decision would remove the prescriptive effect of the current rate, but to avoid irreparable harm would order BNSF to maintain the status quo during the pendency of the reopened proceeding. The draft decision would direct both parties to keep account of the amounts paid during the pendency of the reopening and, at its conclusion, to make the other party whole for what it would have been entitled to but for this suspension of the rate increase BNSF proposes to implement.

One final matter is addressed in the draft decision. Arizona has asked the Board to consolidate the reopened proceeding with a new complaint it has filed in Docket No. 42077, challenging BNSF's rates from the Lee Ranch mine in New Mexico to the Cholla plant. The draft decision would deny that request to consolidate, given the narrow scope of the reopening.

We would be pleased to answer any questions.