

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42088

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

v.

BNSF RAILWAY COMPANY

Digest:¹ The Board finds that changed circumstances justify reopening this proceeding. Pending a final decision, the parties have agreed to maintain the current rate prescriptions.

Decided: January 18, 2012

The Board concludes that changed circumstances relating to the 2010 purchase of BNSF Railway Company (BNSF) by Berkshire Hathaway Inc. (Berkshire) justify reopening this proceeding. On March 31, 2011, pursuant to 49 C.F.R § 1241.11(a), BNSF submitted to the Board its Class I Railroad Annual Report for the year ending December 31, 2010, which reflects an increase in BNSF's net investment base attributable to Berkshire's purchase of BNSF. This increase in BNSF's net investment base is likewise reflected in the recently released Uniform Railroad Costing System (URCS) data for calendar year 2010. Whether we should exclude the increase in BNSF's investment base from BNSF's URCS data is an issue that is currently under review in a separate docket. See W. Coal Traffic League—Petition for Declaratory Order, FD 35506 (STB served Sept. 28, 2011). Because the outcome of that issue could affect the rates charged under the rate prescriptions in this case, we are reopening this proceeding and holding it in abeyance, on a limited basis, until the issue in FD 35506 is resolved.

BACKGROUND

In 2004, Western Fuels Association, Inc., and Basin Electric Power Cooperative, Inc. (collectively, WFA) challenged the reasonableness of the rates charged by BNSF for movements of coal from origins in the Powder River Basin in Wyoming to WFA's Laramie River Station coal-fired electric utility plant at Moba Junction, Wyo. In a decision served on February 18, 2009, the Board found that WFA had shown that BNSF has market dominance over those movements, and that its rates exceeded the level BNSF needed to charge to earn a reasonable

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

return on the full replacement cost of the facilities used to serve WFA. W. Fuels Ass'n v. BNSF Ry., NOR 42088 (STB served Feb. 18, 2009) (February 2009 Decision). Accordingly, the Board ordered BNSF to pay reparations (with interest) to WFA for shipments dating back to the fourth quarter of 2004. Id. at 2. In a decision served June 5, 2009, the Board modified the rate prescriptions to correct technical and computational errors contained in the February 2009 Decision. W. Fuels Ass'n v. BNSF Ry., NOR 42088 (STB served June 5, 2009) (June 2009 Decision). Subsequently, on July 27, 2009, the Board addressed a dispute over the method for calculating the maximum lawful rate. W. Fuels Ass'n v. BNSF Ry., NOR 42088 (Sub-No. 1) (STB served July 27, 2009).²

BNSF appealed the three aforementioned Board decisions to the United States Court of Appeals for the District of Columbia Circuit. Among other things, BNSF argued that the Board was arbitrary and capricious in modifying its average total cost (ATC) methodology for allocating revenue from cross-over traffic. BNSF Ry. v. STB, 604 F.3d 602, 604 (D.C. Cir. 2010). Explaining that the Board did not address one of BNSF's objections to the use of modified ATC, the court remanded the matter to the Board to address that concern. Id. The parties have submitted comments on the remanded issue. The matter remains pending before us and will be addressed in a future decision.

On May 2, 2011, the Western Coal Traffic League (WCTL) filed a petition pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721 asking the Board to adjust BNSF's URCS costs for 2010 and subsequent years so as to exclude the write-up in BNSF's net investment base attributable to the difference between the book value and the price that Berkshire paid to acquire BNSF in 2010, and to make corresponding changes in BNSF's annual URCS depreciation calculations. On September 28, 2011, the Board instituted a proceeding to consider the issues raised in WCTL's petition. W. Coal Traffic League—Petition for Declaratory Order, FD 35506, slip op. at 1 (STB served Sept. 28, 2011). On December 9, 2011, the Board advised parties with BNSF rate prescriptions in effect in January 2012 that, if they believed the Board should temporarily lift the prescriptive effect of their 2012 rate prescriptions pending final resolution of the issues in Western Coal Traffic League, Docket No. FD 35506, they should petition the Board to reconsider or reopen relevant Board decisions. W. Coal Traffic League—Petition for Declaratory Order, FD 35506, slip op. at 2 (STB served Dec. 9, 2011). In response, WFA filed a petition on December 14, 2011, in which it requested, among other potential forms of relief, that the Board reopen this proceeding. BNSF agreed with this request in its December 19, 2011 reply.

² In these decisions, the Board ordered BNSF to establish and maintain rates for movements of the issue traffic that do not exceed specified maximum reasonable revenue-to-variable cost (R/VC) ratios. The variable cost of the issue movements was to be calculated for this purpose using unadjusted URCS cost data, with indexing as appropriate. See, e.g., February 2009 Decision, slip op. at 31.

DISCUSSION AND CONCLUSIONS

We will reopen this proceeding and temporarily lift the prescriptive effect of the rate prescriptions in this case. Pursuant to 49 U.S.C. § 722(c), the Board may reopen a case upon a showing of “material error, new evidence, or substantially changed circumstances.” We conclude that the increase in BNSF’s net investment base resulting from the Berkshire purchase, as well as our consideration of whether that increase should be excluded from BNSF’s 2010 URCS data, constitutes “substantially changed circumstances” that could materially affect the rates charged under the rate prescriptions set forth in the June 2009 Decision.

While we find that reopening this proceeding is warranted, the further step of vacatur is unnecessary. In a stand-alone cost (SAC) case, if the Board concludes that reopening is justified, it must then consider whether the rate prescription should be vacated because either: (a) reasonable grounds for investigation of the rate under 49 U.S.C. § 11701(b) no longer exist, or (b) the factual underpinnings of the prior SAC analysis and the resulting rate prescription have been undermined to such a degree as to render the existing SAC analysis inadequate. Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 69-70 (STB served Oct. 30, 2006). Here, we still have reasonable grounds for investigation and the factual underpinnings of the prior SAC analysis have not been undermined.

Our ordinary practice established in Major Issues regarding reopened SAC cases would be: (a) to direct the railroad to maintain its current rates for shipments involving the issue traffic; and (b) for movements taking place during this reopening period, to order that any difference between the revenue received under the rates charged and revenue that would have been generated during the reopening period under the rates prescribed in our final decision must be refunded, with interest calculated pursuant to 49 C.F.R. § 1141.1, to the party entitled to receive it. Major Issues, slip op. at 70. The first step is unnecessary in this case, however, as the parties have agreed that BNSF will continue to charge WFA rates set at the R/VC ratios prescribed previously by the Board pending a final decision in this reopened proceeding.³ Specifically, BNSF states it “will continue to charge [WFA] rates set at the R/VC levels previously prescribed by the Board In other words, BNSF will calculate [WFA]’s quarterly rate based on the most recent BNSF URCS published by the Board—presently the 2010 BNSF URCS released by the Board on December 9, 2011—indexed in accordance with Oklahoma Gas & Electric v. Union Pacific Railroad Co., STB Docket 42111 (decisions served July 24, 2009 and Oct. 26, 2009).”⁴ As such, here we need only follow the second step of our normal process. Each party will be instructed to keep account of the amounts paid during the pendency of the reopening, and to make the other party whole with respect to the amounts paid during the interim, including if the Board ultimately determines that the increase in BNSF’s net investment base should be excluded from BNSF’s URCS, in Western Coal Traffic League, Docket No. FD 35506.

Furthermore, we will hold this proceeding in abeyance, except as to the issue before the Board on remand, pending final resolution of the issues in Western Coal Traffic League, Docket

³ See WFA Petition 13 & 18; BNSF Reply 4-5.

⁴ BNSF Reply 4-5.

No. FD 35506. Our decision in that case regarding whether the increase in BNSF's net investment base resulting from the Berkshire purchase should be excluded from BNSF's URCS data will impact the question of whether the rate prescriptions in this proceeding should be reevaluated.

It is ordered:

1. This proceeding is reopened.
2. The prescriptive effect of the prior rate order is temporarily lifted. Each party is instructed to keep account of the amounts paid during the pendency of the reopening—in accordance with the parties' agreement—and to make the other party whole, at the conclusion of this reopening, with respect to the amounts paid during the interim.
3. This proceeding is held in abeyance, except as to the issue before the Board on remand, pending final resolution of the issues in Western Coal Traffic League, Docket No. FD 35506.
4. This decision is effective on its service date.

By the Board, Chariman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.