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BEFORE THE
SURFACE TRANSPORTATION BOARD

ARIZONA PUBLIC SERVICE COMPANY
and PACIFICORP

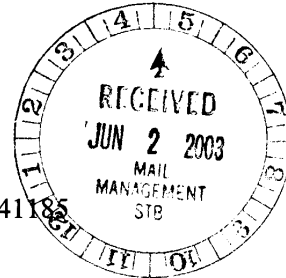
Complainants,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 41185



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**SURFACE
TRANSPORTATION BOARD**

**PETITION FOR RECONSIDERATION OF
THE WESTERN COAL TRAFFIC LEAGUE**

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**SURFACE
TRANSPORTATION BOARD**

WESTERN COAL TRAFFIC LEAGUE

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Dated: June 2, 2003

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SURFACE TRANSPORTATION BOARD**

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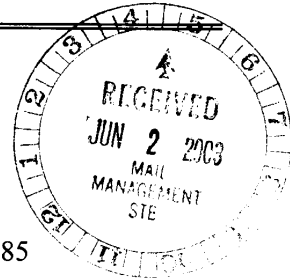
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**PETITION FOR RECONSIDERATION OF
THE WESTERN COAL TRAFFIC LEAGUE**

Pursuant to 49 C.F.R. § 1115.3, the Western Coal Traffic League (“WCTL”)¹ hereby petitions the Board to reconsider two aspects of its Decision in this proceeding served May 12, 2003 (“Decision”) that have widespread potential consequences for western coal shippers. These are: (1) the Board’s decision to unduly restrict the scope of its reopening; and (2) the Board’s decision to lift the existing rate prescription absent a hearing on the merits of the carrier’s request to vacate the prescription order.

¹ WCTL’s members are consumers of coal transportation who collectively arrange and pay for the transportation of over 100 million tons of coal annually.

INTRODUCTION

In its May 12, 2003 Decision, the Board reopened this proceeding at the request of the defendant railroad, The Burlington Northern and Santa Fe Railway Company ("BNSF"), as a result of its finding that the McKinley mine would terminate production prior to the end of the 20-year analysis period on which the Board based its initial rate prescription in this case. In ordering a reopening of the evidentiary record, the Board imposed severe restrictions on the scope of the new evidence it would accept:

. . . the reopening must be limited to the basic assumptions upon which Arizona based its SAC case in 1994. . . . 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 expand the configuration of the SARR, or to include new traffic, other than the re-sourced coal traffic destined to Arizona and Salt River.[]

Id. at 5-6 (emphasis added).

The Decision also took the unprecedented step of lifting complainant Arizona Public Service Company/PacifiCorp's ("APS") rate prescription previously in effect on the basis of the Board's changed "level of confidence":

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.

Id. at 7. This action is incompatible with established precedent requiring an evidentiary hearing prior to the removal or modification of a rate prescription order.

ARGUMENT

I. The Decision Improperly Limits the Scope of Reopening to Evidence Regarding the Two Existing SARR Shippers

The underlying premise of the Board's Decision regarding the scope of reopening is evident in the Board's comment that "Arizona could have selected any reasonable subset of available BNSF traffic to identify production economies [but] Arizona selected only coal moving from McKinley to Cholla and Salt River." Id. at 2. From this premise, the Board reasons that on reopening, APS should not be permitted to submit evidence regarding traffic moving to other shippers via the same line used by the issue traffic. The Board's reasoning, however, ignores the very basis of the reopening Decision; namely, that circumstances can change over time in ways that are not always evident at the outset of a case, and that those changes can impact the results of a stand-alone cost determination. In the challenged Decision, the Board attempts to limit new evidence to only one, arbitrarily selected change – i.e., the depletion of the McKinley mine and the impact of that depletion on the two shippers served by APS's original SARR.

When developing their evidence in SAC cases, complaining shippers must create a stand-alone railroad system that carefully balances a number of different interests

with the goal of maximizing the available economies of scale, scope, and density. To that end, a complainant must weigh the impact of increased construction and maintenance expense (and/or increased operational complexity) that would be associated with the introduction of revenues drawn from additional coal or non-coal traffic. As such, it is necessarily the case that the selection of each aspect of a stand-alone railroad system will be driven by – and relate to – each other aspect of that system.

In its holding regarding the scope of reopening, the Decision ignores that close degree of interrelationship and instead permits reopening to occur only on an artificially limited basis. Under the Board's rationale, BNSF will be permitted to introduce evidence regarding the early termination of operations at the McKinley mine, but APS will be precluded from introducing evidence regarding traffic moving over the SARR to shippers other than APS or Salt River Project. See Decision at 5.²

The fact that APS designed a stand-alone system in 1994 that served only two coal shippers should not constrain APS nearly ten years later from changing the traffic flows on the stand-alone railroad ("SARR") to reflect changed circumstances in the region. While APS undoubtedly could have included all available overhead traffic in its original SARR traffic group evidence (regardless of origin, destination, or type of

² The Board's prohibition on the introduction of new evidence regarding costs is perplexing – and in need of elimination – in light of the fact that traffic moving from different coal sources to APS and Salt River will necessarily generate different costs for the SARR.

traffic), that manner of presentation likely would have been subject to strident railroad criticisms that APS had unduly complicated the case. For example, if APS had elected to include a large amount of “cross-over” intermodal traffic in its original SARR system, it would have triggered the same fusillade of legal machinations and objections that BNSF has raised regarding the identical BNSF rail line in the maximum rate proceedings currently pending before the Board in Docket No. 42058, Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Ry. and Union Pacific R.R., Public version of BNSF’s May 27, 2003 Reply Evidence, at I-5 & Exhibit III.A-1 (contending that “the Board should not permit any use of cross-over traffic in SAC cases because it invites distortion into the SAC analysis . . .”). The effect of the assailed Decision is to allow defendant railroads like BNSF to argue both sides of the issue.

By preventing APS from including additional shippers in its evidence on reopening, the Board requires coal shippers not only to present a least-cost, most efficient stand-alone railroad system in their opening evidence, but also to anticipate circumstances – ten or more years into the future – that were sufficiently remote as to have not been credited by the Board itself in its initial decision. In other words, the Decision threatens to significantly compound the burdens faced by captive shippers when designing a stand-alone railroad system.

This additional burden – i.e., the need to “over-design” a stand-alone railroad – will require additional discovery in future stand-alone cases, additional time,

and additional expense. A far more logical result would be to permit each side in the case to submit its evidence regarding the changes that have occurred since the date of the Board's rate prescription.³ Absent an equitable scope of this nature, the Board's Decision will preclude captive shippers from adequately responding to defendants' efforts to undermine the stability of STB rate prescriptions.

II. The Board Erred in Ordering the Removal of its 1997 Rate Order

As the record in this proceeding discloses, APS persevered through a lengthy (i.e., four-year), arduous, and costly process to secure successfully a maximum rate order for its coal transportation service pursuant to the Coal Rate Guidelines.⁴ While the Board's rate case processes under the Guidelines are notoriously daunting, those coal consumers who elect to run the rate case gauntlet do so because of the permanency of the protections against excessive rail rates which are afforded by a rate order. Those

³ See ICC Docket No. 37038, Bituminous Coal – Hiawatha, UT to Moapa, NV, Decision served January 8, 1991, at 3 (allowing parties to make reasonable changes to their SARR models, and precluding only those modifications which constitute a “wholesale departure from the previous configuration.”).

⁴ According to the Board's Chairman, the staff of the agency also spent “thousands” of hours on APS's rate case. See Testimony of Honorable Roger Nober, Chairman of the Surface Transportation Board, Before the House Committee on Transportation and Infrastructure, Subcommittee on Railroads, “Hearing on Surface Transportation Board: Agency Resources and Requirements,” May 20, 2003, at 7.

attributes were articulated by the Supreme Court in Arizona Grocery⁵ where the Court pronounced that agency rate orders have the force of law and a railroad whose price is governed by an agency rate order cannot change its rate without a “new hearing” before the agency. Id. at 387.

In the assailed Decision, the Board summarily eviscerates the mandate of Arizona Grocery and wipes away the rate order which APS secured for its electric customers through its prodigious efforts. It does this on the basis of what can only be fairly described as a whim; namely, its sense of reduced confidence in APS’s rate prescription. The grounds for the reduction in the Board’s confidence relied upon in the Decision are purely ethereal. Some time five or more years from today,⁶ the SARR in this case may or may not encounter diminished traffic which might impact SAC. Because there has been no hearing and the Board has no probative evidence before it on SAC, it can only speculate on the future economics of the SARR and rightfully acknowledges that it has no notion as to whether, after consideration of evidence addressing the impact of the changed circumstances on the SAC analysis, its current prescription will be too high, too low, or just right. Notwithstanding the tenuousness of the aforescribed findings, the Board relies upon them to order the removal of APS’s rate prescription order.

⁵ See Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370 (1932) (“Arizona Grocery”).

⁶ See Decision at 4 (suggesting that McKinley may run out of coal “sometime between 2008 and 2010”).

It is WCTL's position that the removal of a prescription under the facts and circumstances recounted cannot be reconciled with the Supreme Court's ruling that there must be a new hearing before a rate order can be changed. See Arizona Grocery at 387. The only authority cited by the Decision for its unprecedented act of removing a rate prescription without first holding a hearing is San Antonio, TX v. Burlington Northern, Inc., 364 I.C.C. 887 (1981) ("San Antonio"). San Antonio merely stands for the proposition that in some instances a prescription can be lifted without the "same kind of full evidentiary hearing" whereunder it was imposed. Neither San Antonio nor Conrail⁷ upon which San Antonio relies states anywhere that a prescription can be removed with no hearing as took place here.

Moreover, in both San Antonio and Conrail, the agency provided public notice of its intended action, received and reviewed extensive evidentiary submissions, and based its actions on a written evidentiary record. In San Antonio, for example, the agency was careful to stress that it had heard cost evidence and counter-evidence and that evidence had been considered in "three separate forums." Id. at 896. If the Board believes that San Antonio is valid authority for the removal of a prescription with no hearing, it is misinformed. Nothing that has transpired in this proceeding since the

⁷ See Consolidated Rail Corp. – Eliminate Dk. No. 28300, 364 I.C.C. 615 (1981) ("Conrail").

imposition of the rate order in 1997 constitutes the requisite "hearing" as defined by the Supreme Court in United States v. Florida East Coast Ry., 410 U.S. 224 (1973).

Any doubt as to the error inherent in the Board's challenged order is dispelled by its own prior position, articulated in Burlington Northern R.R. v. I.C.C., 679 F.2d 934 (D.C. Cir. 1982) and endorsed by the court. In Burlington Northern, the Board asserted vigorously that Arizona Grocery stands for the principle that an "outstanding order must remain in place until [the carrier] establishes at a hearing its need for more revenue." Id. at 940 n.13. Here, there has been no hearing and a fortiori nothing has been established about the prescribed rate – a fact confirmed by the Board's own admission of uncertainty. Upon reconsideration, the Board must follow the clear and long-accepted directive of the Supreme Court and restore the APS rate prescription until it has held the hearing requisite for its change.

CONCLUSION

If, by the assailed Decision, the Board is seeking to signal to captive shippers that their rights to relief from excessive rail rates are being narrowed, then the message is clear. If the Board's intention is not to take away one of the few remaining

rights of captive rail shippers, it must then reconsider and reverse its decisions to restrict the scope of the reopened proceeding and to remove APS's rate prescription order.

Respectfully Submitted,

WESTERN COAL TRAFFIC LEAGUE

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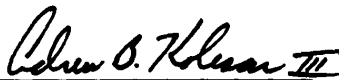
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Certificate of Service

I hereby certify that on June 2, 2003, I caused copies of the foregoing
Petition for Reconsideration to be served by hand upon all parties of record in this
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