

BEFORE THE
SURFACE TRANSPORTATION BOARD

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WEST TEXAS UTILITIES COMPANY,

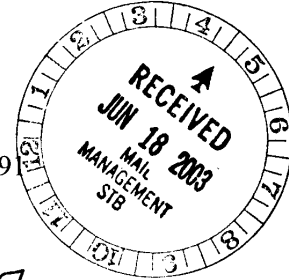
Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 4119



208117

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

Office of Proceeding

FILED

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SURFACE
TRANSPORTATION BOARD

WESTERN COAL TRAFFIC LEAGUE

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Dated: June 18, 2003

Its Attorneys

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SURFACE TRANSPORTATION BOARD**

WEST TEXAS UTILITIES COMPANY,

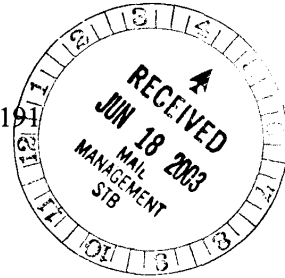
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Defendant.

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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 its Decision in this proceeding served May 29, 2003 ("Decision").

SUMMARY

Labeling its action as the mere "technical correction" of an "obvious mistake," the Board has circumvented the hearing requirement applicable to the modification of a rate prescription. In so doing, the Board has dramatically increased the

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.

existing rate seven years after the Board's 1996 Decision, and has fundamentally undercut the finality and value of STB rate prescriptions.

As such, the Decision raises the unsettling possibility for shippers in need of maximum rate relief that even many years after the completion of the arduous rate complaint process, the Board may – if so inclined – determine retrospectively that relief should not have been granted, and substantively revoke its decision under the guise of a technical correction. WCTL respectfully requests that the Board reconsider and reverse its decision to modify the West Texas Utilities rate prescription.

BACKGROUND

In its 1996 Decision in this proceeding, the Board determined that The Burlington Northern and Santa Fe Railway Company's ("BNSF") common carrier rate for service from the Rawhide mine to West Texas Utilities Company's ("WTU") Oklahoma Station exceeded a reasonable maximum. See West Texas Utilities Co. v. Burlington Northern R.R., 1 S.T.B. 638, 679 (1996), aff'd sub nom. Burlington Northern R.R. v. STB, 114 F.3d 206 (D.C. Cir. 1997) ("1996 Decision"). The Board determined that it would prescribe a reasonable rate for such service on the basis of the jurisdictional threshold for the subject movement because the SAC rate for the Fourth Quarter of 1995 was lower than the jurisdictional threshold. Id. at 677, 679, 716. The Board specifically "decline[d] to prescribe a rate for the future at a set dollar amount." Id. at 679.

Although the Board found that “under [its] calculations, in each of the 20 years of the SAC period, [the stand-alone railroad’s] projected annual revenues would exceed the costs allocated to that year,” the Board did not find it necessary to explicitly address the question of whether the SAC rate for the WTU traffic would fall below the jurisdictional threshold in any future year. See 1996 Decision, 1 S.T.B. at 677.

More than one full year later, in its July 21, 1997 Decision in the Arizona Public Service maximum rate proceeding, the Board engaged in its first explicit analysis of the relationship between SAC rate levels and the jurisdictional threshold for each of the years included with the DCF model. See Arizona Pub. Serv. Co. v. The Atchison, Topeka and Santa Fe Ry., 2 S.T.B. 367, 442-52 (1997) (“Arizona Public Service”).

Three years after the Board’s Arizona Public Service decision, BNSF made its first effort to seek a revision of the 1996 WTU Decision. Specifically, on June 16, 2000, BNSF filed a “Notice and Justification for Increased Rates on Coal Movements from Non-Rawhide Origins, or, in the Alternative, Petition for Modification of Rate Prescription” in Docket No. 41191 (“BNSF Notice”). Therein, BNSF stated, inter alia, that “in ordering BNSF not only to establish an initial rate at 180 percent of variable costs but to *maintain* the rate at that level, the Board [in its 1996 WTU Decision] did not explicitly take into account that the SAC maximum rate might not always be lower than the jurisdictional threshold.” Id. at 11 (emphasis in original). BNSF added that the

approach subsequently employed by the Board in the Arizona Public Service case would have yielded higher revenues for BNSF in the WTU case:

Indeed, in the rate prescription case next following *WTU*, the Board recognized the interplay between the SAC maximum and the jurisdictional threshold and specifically provided that the SAC maximum would be the maximum reasonable rate where it exceeded the jurisdictional threshold.

The same logic and approach to the rate prescription used in the *APS* case applies here. . . . The Board should affirm that the intent of the prescription established in the May 1996 Decision was to maintain a rate at the jurisdictional level *only* when the SAC maximum rate was below the Board's jurisdictional threshold, consistent with the rule that the Board followed in *APS*.

Id. at 11-13 (emphasis in original).²

In its Decision served November 7, 2000 addressing the BNSF Notice ("2000 Decision"), however, the Board recounted but declined to grant BNSF's request that the Arizona Public Service analysis should have been applied in the 1996 Decision regarding service from Rawhide. Id. at 2 ("If the SAC rate level exceeds 180% r/vc, as it allegedly now does, then BNSF submits that the maximum rate should be the SAC rate rather than the 180% r/vc floor.").

On April 17, 2003, in a second effort to undermine the 1996 Decision, BNSF filed a Petition for a "Declaration Regarding the Rate Prescription on Coal

² BNSF based its argument, in part, upon an electronic workpaper ostensibly used by the Board's Staff in its work leading to the 1996 Decision. See BNSF Notice at 8.

Movements from Rawhide, Wyoming to Oklaunion, Texas” (“BNSF Petition”). Therein, BNSF once again asked the Board to declare that, under the 1996 Decision, BNSF should be entitled to charge WTU the higher of the current jurisdictional threshold or the “current” SAC rate, as determined by BNSF based solely on the same electronic workpaper that it identified in support of its June 2000 Notice. BNSF also commented that the declaration which it sought from the Board would be “consistent with the legal standard that the Board already has adopted in the [1997 Arizona Public Service] decision.” See BNSF Petition at 4 (emphasis added) (i.e., a legal standard that was “adopted” by the Board one year after the 1996 WTU decision).³ Finally, BNSF commented that “since the Board already has calculated the SAC maximum rate level for this Rawhide movement for each year of the DCF period,[] no evidentiary hearing is required to establish the SAC maximum rate level.” Id.

On May 29, 2003, over WTU’s opposition, the Board served the subject Decision, finding initially that BNSF’s request for declaratory relief mischaracterized the 1996 Decision:

³ As such, BNSF’s use of the term “already” is somewhat misleading. As of the date of the 1996 Decision, the Board had not “already” adopted its year-by-year Arizona Public Service analysis, and similarly, the Board had not “already” determined that it would use the percentage reduction (i.e., pro rata) method to allocate savings associated with a stand-alone railroad. Cf. Reply of the Burlington Northern and Santa Fe Railway Company to AEP Texas North’s Petition to Stay, filed June 16, 2003, at 6-7 (“Although this issue was not resolved in the 1996 decision, it had been resolved by the time the Board issued its *May 2003 Decision*.”).

BNSF seeks a declaration that the prior decision prescribed the maximum reasonable rate at the higher of the SAC rate of the jurisdictional threshold. The prior decision was unambiguous, however, so it is inappropriate to declare that it said something different from what it clearly said.

Id. at 2. In other words, the Board explicitly acknowledged that by its terms, the 1996 Decision did not include the year-by-year comparison adopted in the Arizona Public Service case.

Nevertheless, the Board found that it would grant the substantive, prospective relief sought by BNSF in the form of reopening to correct “material” or “technical” error:

We will instead treat BNSF’s petition as a request for comparable relief that we may grant at any time – a petition to reopen a proceeding because of material error. . . .

Here, reopening is appropriate to correct a material error in the prior decision. The SAC constraint is designed to determine the maximum reasonable rate a carrier may charge annually over the 20-year period of the SAC analysis. If the SAC rate rises above the jurisdictional threshold in any year, the railroad should have the right to charge a rate up to that maximum reasonable rate. See 49 U.S.C. 10701(a)(c). While the analysis in West Texas showed that the SAC rate initially fell below the jurisdictional threshold . . . , it should also have been clear that the SAC rate might in some future years exceed the jurisdictional threshold.[] It was therefore error not to prescribe a maximum reasonable rate at the higher of the SAC rate or the statutory jurisdictional rate threshold, as the Board has done in subsequent proceedings.

Id. at 2-3 (citing Texas Municipal Power Agency v. Burlington N. & S.F. Ry., Docket No. 42056, at 34-35 (Decision served March 24, 2003) (“TMPA”), FMC Wyoming Corp. v.

Union Pacific R.R., Docket No. 42022, at 185-99 (Decision served May 12, 2000), and Arizona Public Service v. Atchison, T. & S.F. Ry., 2 S.T.B. 367, 393 (1997)).⁴ The Board's explicit reference to a policy adopted in "subsequent" proceedings confirms the impropriety of characterizing the May 2003 Decision as a "technical" correction that could justify modifying the existing rate prescription without a hearing.

ARGUMENT

The Board's Decision improperly modifies the 1996 rate prescription under the guise of a technical correction. In so doing, the Decision deals a significant blow to the finality of STB rate prescriptions. The Board's supposedly "technical" correction retroactively applies a form of multi-year rate/cost analysis first undertaken by the Board in the Arizona Public Service case in 1997. Cf. BNSF Petition at 4 (commenting that the relief sought through BNSF's Petition was consistent with the legal standard that the Board "adopted" in the 1997 Arizona Public Service case).

The essence of BNSF's Petition, and of the Board's Decision, is that application of the 1997 Arizona Public Service analysis to the facts of the WTU case would yield a different result than had been set forth in the Board's actual 1996 WTU Decision. This type of retroactive policy application is improper, and the courts

⁴ See Decision at 4 ("Accordingly, the SAC rate that BNSF should now be allowed to charge will be calculated, on the record upon which the prior decision was based, using the percentage reduction methodology applied in recent decisions.") (emphasis added).

previously have invalidated agency efforts to apply new policies to past decisions while characterizing the actions as technical corrections. For example, in Consolidated Rail Corp. v. STB, 93 F.3d 793, 801 (D.C. Cir. 1996), the D.C. Circuit criticized the STB for attempting to broaden its ability to correct technical errors:

[W]e remind the STB that “the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful.”

Id. at 801 (citing American Trucking Ass’n, Inc. v. Frisco Transp. Co., 358 U.S. 133, 146 (1958)); see also Watson Bros. Transp. Co. v. United States, 132 F. Supp. 905 (D. Neb. 1955), aff’d, 350 U.S. 927 (1956) (holding that the Interstate Commerce Commission’s 1953 sua sponte “correction” of a 1949 order actually constituted a substantive change in its prior decision).⁵

With perhaps the greatest relevance to the instant case, in United States v. Seatrain Lines, Inc., the United States Supreme Court ruled that the Interstate Commerce Commission had improperly attempted to impose a policy adopted in a subsequent case to the facts of an earlier decision:

⁵ Id. at 909 (“Counsel for the Commission argues that the order of August 25, 1953, merely corrects a clerical error in the certificate of July 19, 1949. Even if the court were to assume that the Commission has authority to correct clerical errors without notice and hearing, the result in this case would not be different, because it is the holding of the court that the order of August 25, 1953, is more than the mere correction of a clerical error; and is an attempt made contrary to Section 212 to revoke and change a certificate duly issued.”).

We need not determine the Commission's statutory power to correct clerical mistakes, since we are persuaded . . . that the issuance of the original certificate was not an "inadvertent" error which the Commission's subsequent action was intended to correct. . . . Moreover, the Seatrain application was not reopened for consideration by the Commission until its decision in Foss Launch & Tug Co., 260 I.C.C. 103, decided December 18, 1943. There the Commission pointedly ruled for the first time that a certificate to carry "commodities generally" did not authorize water carriage of loaded or unloaded freight cars – so-called "car-ferry service." Thus it seems apparent that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute the new policy announced in the Foss case.

See United States v. Seatrain Lines, Inc., 329 U.S. 424, 428-29 (1947) ("Seatrain") (emphasis added).

Much like the Commission's improper effort to impose the 1943 Foss policy on the previously decided 1942 Seatrain case, the Board in the instant case has attempted to impose the 1997 Arizona Public Service policy on the 1996 WTU case. Moreover, the facts of the instant case confirm that – as in Seatrain – the supposed "error" of the initial decision was not "inadvertent." On the contrary, it is evident that upon determining that the jurisdictional threshold for the Fourth Quarter of 1995 exceeded the would-be SAC rate under either party's approach to SAC costing, the Board found that it would prescribe the subject rate for all future periods on the basis of the jurisdictional threshold. See 1 S.T.B. at 677-79. The Board's language in the May 2003 Decision confirms this understanding. In denying BNSF's request for declaratory relief, the

Board's May 2003 Decision itself acknowledges that in 1996, the Board did not intend to engage in a year-by-year comparison of SAC and jurisdictional threshold levels. Id. at 2. The Board's refusal to impose the Arizona Public Service analysis in this case following BNSF's June 2000 Notice further confirms that, at least as of November of 2000, the Board did not view the issue as an "inadvertent" or "obvious mistake" in need of "technical correction."

Litigation of a maximum reasonable rate is a time-consuming and expensive process. When a shipper has successfully completed that process and obtained a rate prescription, that shipper should be entitled to rely upon the prescription, subject only to a new hearing before the Board. See Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370, 387 (1932) ("Arizona Grocery") (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); accord Burlington Northern R.R. v. I.C.C., 679 F.2d 934, 940 n.13 (D.C. Cir. 1982) (an "outstanding order must remain in place until [the carrier] establishes at a hearing its need for more revenue.").

In the May 2003 Decision, the Board seeks to evade the requirements of Arizona Grocery by contending that it was engaged merely in the technical correction of its 1996 Decision and was able to make that correction "without changing any of the findings in the original decision." Id. at 4. It is WCTL's position that the modification of the WTU prescription under the circumstances of this case 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, 284 U.S. at 387.

The Board theorized that it could avoid the hearing requirement and summarily grant the relief sought by BNSF because of the supposed "substantial prejudice" experienced by BNSF:

[I]t is not necessary or appropriate to withhold immediate correction of an obvious mistake in the prior decision that substantially prejudices one of the parties, pending the resolution of matters that would undoubtedly prove far more complex and far-reaching in nature. To the contrary, upon determining that there was a material error, we believe we have a responsibility to promptly set right the mistake by revising the rate prescription. The party who benefitted from the mistake is not entitled to prolong the effects of that mistake while it relitigates the original case.

See May 2003 Decision at 4 (emphasis added).

Notably, however, the Board seized upon this supposed prejudice to BNSF – and therefore undermined the validity and certainty of the rate prescription process for the shipping public – because BNSF's costs have not increased. BNSF's April 17, 2003 Petition sought a significant increase in the prescribed rate in this case precisely because BNSF's costs (and thus the cost-based rate prescription) had not increased by a wide enough margin to satisfy BNSF's rate ambitions. See BNSF Petition at 8 ("Rail costs have not increased by 38 percent since 1995. The RCAF-U, an index of railroad costs, has shown only a 12.9 percent increase since Fourth Quarter 1995. . . ." Id. at 8; see also id. at 9-10 ("WTU contended in 2000 that variable costs for the WTU movement had

declined, not increased, since 1995.”). It is entirely improper for the Board to invoke the extreme measure of “correcting” a seven-year old rate prescription to relieve the “substantial prejudice” experienced by a defendant railroad who – by its own admission – has not experienced significant cost increases over that seven year period. That impropriety is particularly acute where the defendant railroad waited four years after the 1996 Decision before first raising the supposed “error,” and where the Board itself previously declined an explicit invitation to correct the “obvious mistake.”

CONCLUSION

In less than three months, the Board has significantly undercut the ability of coal shippers to obtain – and to preserve – STB rate prescriptions. The Board has: (1) prevented coal shippers from obtaining rates in shipper-provided cars (TMPA at 9); (2) limited the right of shippers to litigate the reasonableness of a rate that they plan to use but have not yet utilized (TMPA at 38); (3) abandoned its use of movement-specific maintenance-of-way costing techniques previously held to be so entrenched under STB precedent as to warrant a rebuke of defendant railroads who had advocated a departure from that method (TMPA at 54-56); and (4) vacated a six-year old rate prescription on the basis of changed circumstances while limiting the right of the complainant to introduce significant new evidence regarding those changed circumstances (Arizona Public Service, Docket No. 41185, Decision served May 12, 2003).

In the instant proceeding, under the guise of a "technical correction," the Board has imposed a major rate increase on the successful complaining shipper seven years after the issuance of the rate prescription. WCTL respectfully requests that the Board reconsider and reverse that Decision.

Respectfully submitted,

WESTERN COAL TRAFFIC LEAGUE

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Dated: June 18, 2003

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Certificate of Service

I hereby certify that on June 18, 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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