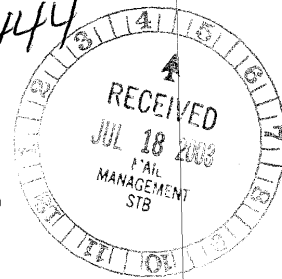


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BEFORE THE
SURFACE TRANSPORTATION BOARD



DOCKET NO. 42077

ARIZONA PUBLIC SERVICE COMPANY AND PACIFICORP

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

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REBUTTAL IN SUPPORT OF
PEABODY ENERGY CORPORATION'S

PETITION TO INTERVENE
AND
PETITION FOR INJUNCTIVE RELIEF

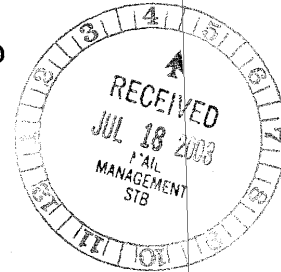
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July 18, 2003

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SURFACE TRANSPORTATION BOARD

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REBUTTAL IN SUPPORT OF
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On June 16, 2003, Peabody Energy Corporation ("Peabody") petitioned the Surface Transportation Board ("STB" or "Board") for leave to intervene in this proceeding and for an order under both 49 U.S.C. § 721(b)(4) and the "Phasing Constraint" in Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520, 546-47 (1985), to enjoin The Burlington Northern and Santa Fe Railway Company ("BNSF") from collecting the rates established in BNSF Common Carrier Pricing Authority 90040-A, Supplement No. 4 ("BNSF 90040-A"). Specifically, Peabody requested that the Board immediately (1) enter an order instructing BNSF not to collect a rate

higher than the last effective contract rate from the Lee Ranch Mine to the Cholla Electric Generating Station (“Cholla” or “Cholla Station”) during the pendency of this proceeding; and (2) order BNSF and APS to keep account of the amounts paid during the pendency of this proceeding and to make the other party whole, at the conclusion of this proceeding, with respect to the amounts paid during the interim, based on what the Board ultimately finds to be the maximum reasonable rate. BNSF filed a reply in opposition to Peabody’s Petitions on July 7, 2003.

By separate motion filed contemporaneous with this Rebuttal, Peabody has asked the Board for leave to file this Rebuttal in response to BNSF’s July 7th Reply.

I. BNSF MISCHARACTERIZES THE PURPOSE AND EFFECT OF PEABODY’S PETITIONS.

BNSF’s Reply attempts to distract the Board from the true nature of Peabody’s Petitions by mischaracterizing them as a request to intervene in the coal supply markets, and by invoking a “slippery slope” argument that has no foundation in the facts of this case. In positing these arguments, BNSF completely glosses over the fact that Peabody has asked the Board to do no more in this proceeding than it did in the May 12, 2003 decision (“May 12 Decision”) that was issued jointly in this docket (the “Lee Ranch Case”) and in Docket No. 41185, Arizona Public Service Co. and PacifiCorp v. The Atchison, Topeka and Santa Fe Ry. Co. (the “McKinley Case”).

A. Peabody Has Not Asked The Board To Regulate Coal Supply Markets.

Contrary to BNSF’s portrayal of Peabody’s Petitions, Peabody has not asked the Board to take any action in, much less to regulate, coal supply markets. Peabody’s requested relief pertains entirely to BNSF’s rail transportation rate from a single origin, the Lee Ranch Mine, to a single destination, the Cholla Station. This relief is entirely within the Board’s authority to grant.

In a transparent attempt to freeze the Board into inaction, BNSF inaccurately contends that the Board would have to evaluate factors wholly unrelated to BNSF's transportation rates. This simply is not true. Peabody's request for a phasing constraint addresses precisely those factors the Board specifically instructed parties to address in Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520, 547 (1985). Furthermore, the only factor that has changed in the competitiveness of Lee Ranch coal with McKinley coal at the Cholla Station is the rail transportation rate. All other factors, such as coal quality, remain the same. Thus, the Board need only be concerned with the substantial magnitude of the rail rate increase to determine whether to impose a phasing constraint or otherwise grant injunctive relief to prevent irreparable harm.

BNSF's suggestion that the Board also must consider the price at which Peabody is willing to sell its coal is a red herring. Peabody already has testified that it cannot absorb the rail rate increase in the price of its coal to Cholla. But, even if arguendo Peabody had the ability to absorb the rail rate increase, the increase still would amount to an unjustified windfall to either BNSF or APS, depending on whether or not the Board subsequently determines that BNSF's rate increase is reasonable. This windfall would accrue for however long it takes the Board to decide this case. This is because, although the Board's determination of a reasonable rate will be retroactive, the Board has no reparations authority to return money to Peabody. Peabody should not be required to absorb (even if it could do so) what ultimately may be determined to be an unreasonably high rail rate under the stand-alone cost constraint, without any reparations remedy. The only way to prevent irreparable harm to Peabody is for the Board to enjoin collection of the higher rail rate now, subject to an accounting order that would make BNSF whole if it successfully defends the reasonableness of its rate increase.

B. Peabody's Intervention Will Not Lead To A Slippery Slope Of Additional Interventions By Disgruntled Third Parties.

BNSF contends that Peabody's intervention would lead to a "slippery slope" that "would open the door to any number of claims by disgruntled parties who believe they could enhance their competitive situation with the Board's assistance." BNSF Reply at 3, 13-14. This is a gross exaggeration that ignores the very narrow facts presented by Peabody's Petitions and is not based upon any realistic scenario of future events.

Peabody's injury arises within a very narrow and unusual set of circumstances. It is the result of two simultaneously pending rate cases involving the transportation of coal by the same railroad, BNSF, over essentially the same route from two competing mines, Lee Ranch and McKinley, to the same power plant, the Cholla Station. BNSF attempted to increase its rates from both mines simultaneously. However, BNSF was enjoined by the May 12 Decision from exercising its rate-making initiative in the McKinley Case, while it has been allowed to exercise that initiative in the Lee Ranch Case. This fact, in combination with the sheer magnitude of the rate increase itself, has caused competitive harm that threatens to cost Peabody millions of dollars in lost sales. These facts alone clearly distinguish Peabody's Petition from the vast majority of other entities that might want to enhance their competitive situation with Board assistance.

BNSF has not posited any realistic scenario in which other entities could assert injury similar to Peabody's irreparable harm. BNSF only loosely asserts that the consequences of granting Peabody relief "could be felt by other participants in the San Juan Basin coal supply market who also receive coal transportation services from BNSF such as the Salt River Project [SRP] and Tucson Electric Power Company [TEPCO], and by other coal suppliers." BNSF Reply at 13. BNSF does not explain what these consequences might be or how they could affect

any of these entities. Peabody's requested relief affects only the transportation of coal to the Cholla Station and certainly has nothing to do with other electric generators. Furthermore, SRP and TEPCO have no direct interest in the Cholla rail rate. They have their own rail rates and, to the extent that they believe their rail rates are unreasonable, they can initiate their own rate complaints and, unlike Peabody, receive reparations if they prevail. The harm to them, thus, is not irreparable. The only other coal suppliers who conceivably could be affected are those who sell coal to the Cholla Station, whose coal competes with Lee Ranch coal, and whose coal is transported by BNSF under a rate that has been challenged as unreasonable. There are no such coal suppliers and, even if there were, the universe would be extremely small. BNSF's slippery slope argument, therefore, is completely contrived.

BNSF inappropriately compares Peabody's Petitions to requests by parties in rail merger proceedings to preserve the pre-merger competitive balance among industries served by the merging railroads. Peabody's request clearly is distinguishable. In rail merger proceedings, the Board must make a final determination, with permanent effect, that a merger is in the general public interest. In contrast to the final nature of a merger decision and the permanent impact of the merger itself, BNSF's rate increase is only temporary unless and until the Board determines the increased rate to be reasonable. If the Board determines the rate to be unreasonable, its impact is undone through reparations to the shipper. But the impact of the unreasonable rate cannot be reversed as to Peabody because the statute does not provide a remedy for Peabody's lost sales. Therefore, in order to protect Peabody from the irreparable harm of a potentially unreasonable rate, the Board must act now to enjoin collection of the rate increase, subject to an accounting order that will protect BNSF in the event its rate is determined to be reasonable under the stand-alone cost constraint.

II. THE BOARD HAS THE STATUTORY AUTHORITY TO GRANT PEABODY'S REQUEST FOR RELIEF

BNSF repeatedly asserts that the Board has no statutory authority to grant the relief that Peabody requests. First, it claims that the "phasing constraint" is not available to Peabody. Second, it contends that the Board lacks authority to grant Peabody relief under its Section 721 injunctive powers. Neither assertion is supported by Board precedent.

A. Peabody Has a Claim for Relief Under the Phasing Constraint.

At page 15 of its Reply, BNSF asserts that Peabody cannot request relief under the phasing constraint because the source of Peabody's injury "is the 'spread' or 'disparity' between the common carrier rate and the Board's prescribed rate of \$4.21 per ton on the McKinley Mine movement," rather than the increase in BNSF's common carrier rate from the Lee Ranch Mine to Cholla. BNSF is playing a game of semantics. The rate disparity exists as a direct result of the rate increase caused by BNSF's common carrier rate. Thus, the rate increase is the source of Peabody's concern.

BNSF plays a similar word game on page 16 of its Reply with its second objection to Peabody's use of the phasing constraint. Although convoluted and confusing, BNSF's argument appears to be that, because BNSF established a new common carrier rate from the Lee Ranch Mine rather than increasing an existing rate and because the prior rate was a contract rate, the Board has no jurisdiction to grant the requested relief. The phasing constraint applies to all rate complaints and, contrary to BNSF's suggestion, Central Power & Light Co. v. Southern Pac. Transp. Co., Docket No. 41242, served Dec. 31, 1996, does not require the Board to hold otherwise. There is no basis to distinguish between new common carrier rates and increases to existing common carrier rates. The harm to Peabody is caused by a common carrier rate, over

which the Board clearly has jurisdiction, not a contract rate, and the Board thus should reject BNSF's argument.

At pages 16-17 of its Reply, BNSF's third objection to the phasing constraint cites Consolidated Rail Corp. v. U.S., 812 F. 2d 1444, 1451 (3rd Cir. 1987) for the proposition that the phasing constraint was intended solely to protect the interests of captive shippers. First of all, the quoted language does not indicate that shippers are the only or the exclusive beneficiary of the phasing constraint. Second, that decision affirmed Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520 (1985), in which the Board adopted the phasing constraint. No where in Coal Rate Guidelines did the Board restrict the phasing constraint to the benefit of shippers. In fact, the premise of the phasing constraint is that "otherwise justified rate increases could cause significant economic dislocations which must be mitigated for the greater public good." Id. at 546 [emphasis added]. The Board also stated that it will "require phasing of a rate increase where the party seeking such relief demonstrates the need for it with specificity." Id. at 547. "Party" is a broader term than "shipper" and, since the railroad-defendant is highly unlikely to request a phasing constraint, this term clearly contemplates that non-shippers could seek such relief. Final confirmation of this fact is found in the factors that Board considers in evaluating phasing constraint requests. These factors specifically include "the economic conditions in the coal supply area (and the impact of the rate increase on that region), and any supply contracts involved." Id. [emphasis added] Both of these factors focus on the coal supply markets and the suppliers within them, and are directly implicated in Peabody's request for relief.

Finally, BNSF wrongly asserts that Peabody seeks relief without any contention that BNSF has violated a provision of ICCTA. But, the phasing constraint is itself a standard of reasonableness on a par with the stand-alone cost constraint. It recognizes that even "otherwise

justified rate increases” may be unreasonable if they “cause significant economic dislocations.” Coal Rate Guidelines, 1 I.C.C. 2d at 546. Thus, there is a direct nexus between Peabody’s Petition and violations of ICCTA. Furthermore, BNSF conveniently ignores the fact that Peabody’s Petition is filed in a proceeding, and pursuant to STB procedures, that are predicated on alleged violations of ICCTA. But for actions associated with these proceedings, there would be no injury to Peabody.

B. Peabody Is Entitled To Injunctive Relief Pursuant to 49 U.S.C. § 721(b)(4).

BNSF wrongly asserts that Peabody is not entitled to injunctive relief under 49 U.S.C. § 721(b)(4). Peabody has asked the Board to do no more than what the Board already found it had the authority to do in the McKinley Case. BNSF, however, seems to be under the mistaken impression that the Lee Ranch Case is different because the Board has continued to “prescribe” a rate of \$4.21 per ton in the McKinley Case. For example, on page 14 of its Reply, BNSF states “Although BNSF disagrees with the rate prescription [in the McKinley Case], it acknowledges the Board’s authority to impose it.” Yet, the Board’s May 12 Decision, slip op. at 7, unequivocally states “we will remove the prescriptive effect of our prior rate order” and then invokes Section 721(b)(4) to order BNSF to collect no more than \$4.21 per ton subject to an accounting order. BNSF acknowledges the Board’s authority under Section 721(b)(4) to restrict BNSF’s rate-making initiative in the McKinley Case, but attempts to distinguish the relief granted in that case from the relief requested by Peabody by inaccurately describing the McKinley rate as a “prescribed” rate. Clearly, the same authority that BNSF acknowledges the Board possessed to grant injunctive relief in the McKinley Case also provides authority to grant Peabody’s requested relief in this case.

BNSF also wrongly claims that the Board cannot grant Peabody's requested relief because that would violate BNSF's rate-making initiative. But, this is precisely what the Board did in the May 12 Decision when it enjoined BNSF from collecting a rate higher than \$4.21. BNSF's attempt to distinguish that decision on the basis of the Board's prior rate prescription in the McKinley Case is to no avail because the Board explicitly lifted that prescription. In fact, the act of lifting the prescription restored BNSF's rate-making initiative and created the irreparable harm that required the Board to use its injunctive powers in the McKinley Case. Thus, there is no basis to distinguish BNSF's rate-making initiative in the McKinley Case from the Lee Ranch Case. Furthermore, Peabody's request for relief includes an accounting order that is identical to the one issued in the McKinley Case, which will preserve BNSF's ratemaking initiative because BNSF will be entitled to collect the full rate retroactively if the rate ultimately is determined to be reasonable.

Finally, BNSF ignores the fact that Peabody's injunction request does have a nexus to the phasing constraint. At page 16 of its Petition for Injunctive Relief, Peabody asserts that "Section 721(b)(4), by itself, provides adequate authority for the Board to grant Peabody's request for relief, and it also provides a mechanism for the Board to impose the phasing constraint" [emphasis added] Thus, Peabody has invoked Section 721(b)(4) in furtherance of the Board's substantive power to ensure reasonable rates through the phasing constraint, which satisfies BNSF's contention that the Board may only exercise its injunctive powers in furtherance of other substantive powers granted by ICCTA.

III. CONCLUSION

Peabody's Petitions to intervene and for injunctive relief are based on a narrow set of facts and do not require the Board to regulate, or otherwise to intervene, in the coal supply markets. Peabody's claims are brought within the context of the Board's clearly enumerated authority under the phasing constraint of the Coal Rate Guidelines and its injunctive powers to prevent irreparable harm in 49 U.S.C. § 721(b)(4). BNSF's slippery slope arguments are strained and are not based upon any realistic scenario. Thus, the Board has the authority to grant Peabody's request and it should do so in order to prevent irreparable harm to Peabody.

Respectfully submitted,



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July 18, 2003

Certificate of Service

I hereby certify that I have on this 18th day of July 2003 served a copy of the foregoing
"Rebuttal in Support of Peabody Energy Corporation's Petition to Intervene and Petition for
Injunctive Relief," by hand delivery, on all parties of record in this proceeding.



Jeffrey O. Moreno