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October 19, 2004

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VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, DC 20423-0001



ENTERED
Office of Proceedings

OCT 19 2004

Part of
Public Record

Re: Docket No. 42088, Western Fuels Association, Inc. and
Basin Electric Power Cooperative, Inc. v. The Burlington
Northern and Santa Fe Railway Company

Dear Secretary Williams:

Enclosed for filing please find an executed original and ten (10) copies of a Verified Complaint. Also enclosed is a check in payment of the currently effective filing fee.

Please date stamp the extra copy of this cover letter and Verified Complaint and return it to our messenger.

Respectfully submitted,

John H. LeSeur
An Attorney for
Western Fuels Association, Inc. and
Basin Electric Power Cooperative, Inc.

JHL:cef
Enclosure

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CE
TRANSPORTATION BOARD

FILE RECEIVED

OCT 19 2004

SUBJECT
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD



WESTERN FUELS ASSOCIATION, INC.
1100 West 116th Avenue
Westminster, CO 80234, and

BASIN ELECTRIC POWER
COOPERATIVE, INC.
1717 East Interstate Avenue
Bismark, ND 58503

Complainants,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
2500 Lou Menk Drive
Forth Worth, Texas 76131-0039

Defendant.

Docket No. 42088

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VERIFIED COMPLAINT

FEE RECEIVED

OCT 19 2004

SURFACE
TRANSPORTATION BOARD

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

By: John H. LeSeur
Christopher A. Mills
Andrew B. Kolesar III
Peter A. Pfohl
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for Complainants

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: October 19, 2004

FILED

OCT 19 2004

SURFACE
TRANSPORTATION BOARD

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



WESTERN FUELS ASSOCIATION, INC.
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v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, Texas 76131-0039

Defendant.

Docket No. 42088

VERIFIED COMPLAINT

COME NOW Western Fuels Association, Inc. ("WFA") and Basin Electric Power Cooperative, Inc. ("Basin") to file this Verified Complaint, under 49 U.S.C. §11701, seeking the establishment of reasonable rates and other terms for unit train coal transportation service by the Burlington Northern and Santa Fe Railway Company ("BNSF") between BNSF-served Wyoming Powder River Basin origins in Campbell and Converse Counties, Wyoming ("Wyoming PRB Origins") and the Laramie River electric generating station ("Laramie River") located near Moba Junction, Wyoming. In support hereof, WFA and Basin state as follows:

1. WFA is a not-for-profit fuel supply corporation organized and incorporated under the Non-Profit Corporation Laws of the State of Wyoming. WFA's

member-owners are non-profit consumer-owned electric utilities, including cooperatives, non-profit associations, non-profit corporations and bodies politic.

2. Basin is a regional, consumer-owned wholesale power supplier that generates and transmits electricity to 120 member rural electric systems in nine states.

3. Laramie River is owned by several WFA members, including Basin. Basin operates Laramie River. Basin's contract arrangements with WFA call for WFA to obtain, and pay for, coal transportation to Laramie River.

4. BNSF is a carrier engaged in the transportation of property by rail. BNSF's common carrier rail transportation services are subject to the jurisdiction of this Board under 49 U.S.C. §10101, et seq.

5. Laramie River currently consumes approximately 8.3 million tons of coal annually. All of this coal originates at Wyoming PRB Origins. For many years, BNSF provided single-line coal transportation service from Wyoming PRB Origins to Laramie River pursuant to a rail transportation contract. That contract recently expired. WFA's efforts to negotiate terms for a new rail transportation contract with BNSF have been unsuccessful.

6. On September 3, 2004, WFA made a formal, written request to BNSF for common carrier rates for shipments from the Wyoming PRB Origins to Laramie River. A copy of WFA's September 3, 2004 letter is attached hereto and made a part hereof as Exhibit A.

7. On September 20, 2004, BNSF provided WFA with its common carrier rates, charges and other service terms. A copy of BNSF's September 20, 2004 communication (denominated "Common Carrier Pricing Authority BNSF 90077") is attached hereto and made a part hereof as Exhibit B. BNSF's Exhibit B terms became

effective on October 1, 2004.

8. BNSF exerts qualitative and quantitative market dominance over the issue traffic under 49 U.S.C. §10707. Qualitative market dominance exists because (i) the only practical means for WFA to obtain high volume coal deliveries from the Wyoming PRB Origins to Laramie River is by rail; (ii) BNSF is the only rail carrier serving Laramie River; and (iii) BNSF is the only rail carrier serving certain northern Wyoming PRB Origins. Quantitative market dominance exists because the Exhibit B rates vastly exceed the 180% rate-to-variable cost jurisdictional threshold set forth at 49 U.S.C. §10707(d).

9. The Exhibit B common carrier rates and charges include items denominated as “Rates,” “Rate Adjustment” and “Fuel Surcharge.” These rates and charges exceed the maximum reasonable levels permitted under 49 U.S.C. §10701(d)(1) and 49 U.S.C. §10702. The common carrier rates and charges named in Exhibit B, and the manner of their collection, also violate the Board’s constrained market pricing guidelines set forth in Coal Rate Guidelines – Nationwide, 1 I.C.C.2d 520 (1985). The guidelines are applicable because the Laramie River movement involves high-volume, repetitious unit train coal traffic. See 49 C.F.R. §1111.1(a).

10. Exhibit B also contains service terms that differ from those previously in effect under the BNSF/WFA contract. These changed service terms include changed terms for rail car supply and train cycling. WFA and Basin reserve the right to present evidence challenging the lawfulness of these service terms, if, as applied to the Laramie River service, they result in unreasonable rates, charges or practices in violation of 49 U.S.C. §§10701(d)(1), 10702 and 10746.

11. This Verified Complaint covers any changes to, or modification of, any of the Exhibit B terms that BNSF may establish during the course of this proceeding (including new or replacement rates, charges, or service terms).

12. WFA and Basin respectfully request that the Board do all it can to expedite this rate case. BNSF's common carrier rates impose draconian rate increases over the contract rate levels previously in effect. On information and belief, Complainants are aware of no shipper that has been forced to incur such immediate, massive rate increases. For example, the percentage increases vastly exceed those that the Board considered in its recent eastern coal rate case decisions. Not only are the increases unprecedented, but the resulting rates, when measured on a cost-of-service basis, or on a mills per ton-mile basis, are vastly in excess of the maximums the Board has prescribed in its recent western coal case decisions. Expedition is particularly important since, under the present regulatory scheme, Complainants have no choice but to pay the exorbitant rates during the pendency of this case.

13. BNSF's pricing actions constitute a clear abuse of its statutory authority to initiate rates (49 U.S.C. §§10701(c), 10702) and the Board's constrained market pricing guidelines.

14. Pursuant to 49 C.F.R. §1111.1, Complainants state that arbitration was considered, but rejected, as a means of resolving this dispute. Complainants will participate in the mandatory mediation process set forth at 49 C.F.R. §1109.4.

15. Neither this proceeding, nor the granting of the relief requested here, will constitute a major federal action significantly affecting the quality of the human environment or the conservation of energy resources.

WHEREFORE, Complainants WFA and Basin request that Defendant BNSF be required to answer the charges herein; that after a hearing and investigation conducted pursuant to 49 U.S.C. §10704(a)(1) and the Board's implementing regulations, the Board find the assailed rates, rules, charges and practices are unreasonable in violation of 49 U.S.C. §§10701(d)(1) and 10702; that the Board prescribe maximum lawful rates, rules, charges and practices as requested by Complainants; that the Board award Complainants damages pursuant to 49 U.S.C. §11704(b) for all unlawful payments made to BNSF; and that the Board grant to Complainants such other and further relief as the Board may deem proper on the record presented.

Respectfully submitted,

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

By: John H. LeSeur 
Christopher A. Mills
Andrew B. Kolesar III
Peter A. Pfohl
1224 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 347-7170

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: October 19, 2004

Attorneys for Complainants

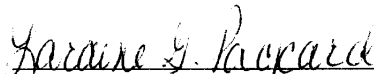
VERIFICATION

STATE OF COLORADO)
) ss:
COUNTY OF ADAMS)

Duane L. Richards, being duly sworn, deposes and says that he is the Chief Executive Officer of Western Fuels Association, Inc.; that has read the foregoing Verified Complaint and knows the contents thereof; and that the same are true as stated, except as to those statements made on information and belief, and as to those, that he believes them to be true.


Duane L. Richards

Subscribed and sworn to before me
this 1 day of October, 2004.


Notary Public for the State of Colorado

My Commission expires 1/23/06



CERTIFICATE OF SERVICE

Pursuant to 49 C.F.R. § 1111.3, I hereby certify, that I have this 19th day of October, 2004 caused to be served copies of this Verified Complaint by overnight express courier on the senior legal officers of Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") as follows:

Jeffrey R. Moreland, Esq.
Richard E. Weicher, Esq.
2500 Lou Menk Drive
Fort Worth, TX 76131-0039

and by hand delivery on outside counsel for BNSF, as follows:

Samuel M. Sipe, Jr., Esq.
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, DC 20036



Andrew B. Kolesar III
An Attorney for Complainants



September 3, 2004

Duane L. Richards
Chief Executive Officer
VIA FAX AND
FIRST-CLASS MAIL

Mr. Robert A. Brautovich
Assistant Vice President – Coal Marketing
The Burlington Northern and Santa Fe
Railway Company
2650 Lou Menk Drive
Fort Worth, Texas 76131-2830

Dear Bob:

Pursuant to 49 U.S.C. § 11101 and 49 C.F.R. Part 1300, Western Fuels Association, Inc. ("WFA") formally requests that The Burlington Northern and Santa Fe Railway Company ("BNSF") to either (a) disclose the existing common carrier rates, charges, and service terms for application from and after October 1, 2004 to the transportation of coal between the Wyoming Powder River Basin ("PRB") and the Laramie River Station at Moba Junction, Wyoming as described in the appended sheet or (b) establish and disclose appropriate and reasonable common carrier rates, charges, and service terms for application from and after October 1, 2004 for the transportation of coal between the Wyoming PRB and the Laramie River Station as described in the appended sheet. We also request that WFA be notified of any future increases in the rates involved or changes in the pertinent service terms. BNSF's response to our requests should be provided in writing to the undersigned no later than September 20, 2004 and otherwise comply with the statutory and regulatory provisions referenced above.

WFA is prepared to assist BNSF in any way we can to facilitate your timely response to this request.

Sincerely,


Duane L. Richards

**REQUESTED
TRANSPORTATION SERVICES**

Origins:	All Powder River Basin ("PRB") Mines in Campbell and Converse Counties, WY served by BNSF.
Destination:	Laramie River Station (Moba Junction, WY).
Route:	BNSF Direct.
Equipment:	WFA will provide its current fleet of WFA-owned or leased aluminum rotary coal cars. In addition, at WFA's request and consistent with current operating procedures, BNSF will supply the number of additional aluminum rotary coal cars WFA needs to make up three separate train sets in compliance with the Train Size provisions.
Commodity:	PRB coal.
Average Lading Weight per car:	119 net tons per car on a trainload average basis.
Train Size:	136 cars per train.
Annual Shipments:	Approximately 8.3 million tons annually.
Loading and Unloading:	Consistent with current operating procedures, including four hours loading free time at Origins and eight hours unloading free time at Destination.
Train Fueling and Inspections:	Third-party train inspection and locomotive fueling on LRS property consistent with current arrangements.
Weighing:	WFA will make arrangements with Origin mine operators to weigh trains in accordance with current operating procedures and to permit BNSF, or its agent, to make periodic scale inspections in accordance with current inspection procedures.

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
COMMON CARRIER PRICING AUTHORITY BNSF 90077**

Effective Date: October 1, 2004

Expiration Date: Effective until changed, superceded or cancelled.

Commodity: Raw sub-bituminous Coal, STCC 11-21-Series (excluding artificially dried or processed coal).

Origins: Wyoming Powder River Basin Mines listed in Attachment A, subject to diversion restrictions identified below.

Destination: Laramie River Generating Station located near Moba, WY.

Route: BNSF Direct.

Fuel Surcharge: All freight rates cited herein are subject to the coal fuel cost recovery surcharge as set forth in BNSF Rules Book 6100-series, Item 3380.

Rates: All rates are expressed in U.S. Dollars per net ton (2000 pounds).

Mine Group	Year	Rates
South PRB Mines	October 1, 2004 through December 31, 2005	\$5.69
	2006	\$6.54
	2007	\$7.52
Central PRB Mines	October 1, 2004 through December 31, 2005	\$5.97
	2006	\$6.87
	2007	\$7.90
North PRB Mines	October 1, 2004 through December 31, 2005	\$6.15
	2006	\$7.07
	2007	\$8.13

Freight charges will be assessed on the basis of the applicable minimum weight per trainload (see below) or the actual weight of coal per trainload whichever is greater. The aforementioned rates are subject to a minimum annual volume of 7,000,000 tons per year.

Trainload and Railcar Weights:

The minimum weight per trainload is 16,184 net tons (that is, 119.0 tons per car times 136 cars per train) and the minimum per car load is 119 tons. Weights shall be ascertained at origin by shipper, its agent, or the coal mine operator, at no charge to BNSF, and will be provided to BNSF via either electronic data interchange or facsimile upon release of a loaded train. BNSF shall have the right to inspect and certify the origin scales.

Rate Adjustment:

On January 1, 2008 and on the first day of each quarter thereafter the transportation rates set forth herein (initially the 2007 rates and the resultant adjusted rates thereafter) shall be adjusted quarterly, upward or downward, by an amount equal to one hundred percent (100%) of the change in the Rail Cost Adjustment Factor (Less Fuel) unadjusted for Railroad Productivity. In addition, the Fuel Surcharge shall continue to be applied to the adjusted rates.

Railcar Supply and Tender Requirements:

Shipper shall supply enough railcars to fill three (3) unit trains with 136 cars per train plus an appropriate number of spare railcars. Shipper provided railcars shall have the capacity of loading not less than 121 net tons of coal per carload. The minimum tender for a train of shipper railcars is 133 such railcars and a

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
COMMON CARRIER PRICING AUTHORITY BNSF 90077**

maximum tender of 136 railcars. At the request of shipper and if available, BNSF will furnish up to 75 BNSF coal cars to supplement the shipper car fleet at a charge of \$40.00 per car per round trip through December 31, 2007. Shipper shall be granted relief from the minimum train weight to the extent BNSF is unable to furnish these cars by subtracting from the minimum train weight requirement an amount equal to the number of cars that BNSF is unable to furnish or fill multiplied by 119 tons.

Claims for damage to or destruction of shipper railcars shall be handled in accordance with the procedures set forth in the field manual and office manual of the Association of American Railroads Interchange Rules, as amended from time-to-time. Notwithstanding the foregoing BNSF shall not be liable for loss or damage caused by defects in design, materials, or workmanship of Shipper-supplied equipment or otherwise due to events of Force Majeure or improper loading or unloading performed by Shipper, its agent, contractor or consignee.

Loading:

Shipper or its agent shall be responsible for the provision of appropriate loading facilities. All cars in each shipment shall be tendered to BNSF (or its agent or contractor) for loaded movement within four (4) hours of actual or constructive placement for loading at origin ("Loading Free Time"). Shipper shall pay a charge per hour or fraction thereof that a train is held in excess of loading free time as published in Tariff BNSF 6041-series on the date such charge is incurred.

Unloading:

Shipper or its agent shall be responsible for the provision of appropriate unloading facilities. All cars in each shipment shall be tendered to BNSF (or its agent or contractor) for empty movement within six (6) hours of actual or constructive placement for unloading at destination ("Unloading Free Time"). Shipper shall pay a charge per hour or fraction thereof that a train is held in excess of loading free time as published in Tariff BNSF 6041-series on the date such charge is incurred.

Accessorial Services:

Coal unit train accessorial services and charges therefor, other than specified in this common carrier authority, shall be as set forth in BNSF Authority 6041-Series or successors thereto in effect on the date the accessorial services are provided, except that no change in destination shall be permitted.

Billing and Payment:

BNSF will bill each shipment under the terms of the Uniform Straight Bill of Lading. All railcars for each shipment are to be billed on one (1) Bill of Lading. This Common Carrier Authority BNSF 90077, correct address and patron code must be shown on the bill of lading to insure accurate billing. Freight charges will be billed by BNSF and paid by shipper within fifteen (15) days of receipt of invoice by wire transfer. In the event that shipper does not make timely payment, or if adverse credit conditions occur, which in BNSF's judgement could affect shipper's ability to meet payment terms, BNSF may require shipper to pay cash in advance of service for all amounts for which shipper is liable under this Common Carrier Authority.

Other Provisions:

Shipments made under the provisions of this Common Carrier Authority are subject to the Uniform Freight Classification 6000-Series or its successor, BNSF Rules Tariff 6100-series, other applicable tariffs, statutes, federal regulatory rules and regulations, AAR rules, and other accepted practices within the railroad industry as may be amended from time-to-time.

Shipments shall be deemed to be in service to the Origin served by the immediately preceding shipment; provided, however, diversion to any other qualified Origin as set forth in Attachment A, is authorized without additional charge to Shipper, in the event reasonable notice (by telephone or otherwise) is given to BNSF operating personnel prior to departure of empty trains from Shipper's facility of intention to divert the empty train to a specifically identified alternate Origin.

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
COMMON CARRIER PRICING AUTHORITY BNSF 90077**

**ATTACHMENT A
(BNSF 90077)**

Wyoming Powder River Basin (PRB) Coal Origins

South PRB Mines:	<u>Mine</u>	<u>BNSF Origin</u>
	Jacobs Ranch	Jacobs Jct.
	Black Thunder	Thunder Jct.
	Black Thunder South	Thunder, Jct. South
	Antelope	Converse, Jct.
	North Antelope	Nacco, Jct.
Central PRB Mines:	<u>Mine</u>	<u>BNSF Origin</u>
	Caballo	Caballo Jct.
	Belle Ayr	Belle Ayr Jct.
	Caballo Rojo	Rojo Jct.
	Cordero	Cordero Jct.
	Coal Creek	Coal Creek Jct.
North PRB Mines:	<u>Coal Mine</u>	<u>BNSF Origin</u>
	Buckskin	Buckskin Jct.
	Rawhide	Rawhide Jct.
	Eagle Butte	Eagle Jct.
	Dry Fork	Dry Fork Jct.
	Fort Union	Union Jct.
	Clovis Point	East Gillette Jct.