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216042

March 20, 2006

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, D.C. 20423



Re: Ex Parte No. 657 (Sub-No. 1), Major Issues in Rail Rate Cases
(and embraced dockets)

Dear Secretary Williams:

Enclosed for filing in the referenced proceedings please find an original and ten copies of a Joint Petition for Reconsideration, together with our check in the amount of \$200.00 to cover the requisite filing fee.

An additional copy of the Petition also is enclosed. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

Kelvin J. Dowd
An Attorney for Petitioners

KJD:jml
Enclosure

RECEIVED
SURFACE TRANSPORTATION BOARD

FILED

MAR 20 2006

BOARD

216042

BEFORE THE
SURFACE TRANSPORTATION BOARD



MAJOR ISSUES IN RAIL RATE CASES

Ex Parte No. 657 (Sub-No. 1)
and embraced dockets

FILED
Office of Proceedings

MAR 20 2006

Office of Proceedings

JOINT PETITION FOR RECONSIDERATION
OF
WESTERN FUELS ASSOCIATION, INC.
BASIN ELECTRIC POWER COOPERATIVE, INC.
KANSAS CITY POWER & LIGHT COMPANY
AND
WESTERN COAL TRAFFIC LEAGUE

FILED

MAR 20 2006

TRANSPORTATION BOARD

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TRANSPORTATION BOARD

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Dated: March 20, 2006

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Attorneys for Petitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



MAJOR ISSUES IN RAIL RATE CASES

)
)
) Ex Parte No. 657 (Sub-No. 1)
) and embraced dockets¹
)

**PETITION FOR RECONSIDERATION
OF
WESTERN FUELS ASSOCIATION, INC.
BASIN ELECTRIC POWER COOPERATIVE, INC.
KANSAS CITY POWER & LIGHT COMPANY
AND
WESTERN COAL TRAFFIC LEAGUE**

Come now Western Fuels Association, Inc., Basin Electric Power Cooperative, Inc. (collectively "WFA/Basin"), Kansas City Power & Light Company ("KCPL") and Western Coal Traffic League ("WCTL"),² and pursuant to 49 U.S.C. §722(c) and 49 C.F.R. Part 1115.3, hereby petition for reconsideration of the Board's Decision served February 27, 2006 in the captioned proceeding ("Decision") on grounds of material error. In support hereof, Petitioners³ show as follows:

¹The Board's action in the captioned proceeding also embraced four individual dockets: Docket No. 42088, *Western Fuels Association, Inc. and Basin Electric Cooperative v. BNSF Railway Company*; Docket No. 41191, *West Texas Utilities Company v. BNSF Railway Company*; Docket No. 41191 (Sub-No. 1), *AEP Texas North Company v. BNSF Railway Company*; and Docket No. 42095, *Kansas City Power & Light Company v. Union Pacific Railroad Company*.

² As appropriate, WFA/Basin, KCPL and WCTL collectively shall be referred to as "Petitioners."

³ As noted in the text, Petitioners all were parties to the 2005 Board proceedings
(continued...)

INTRODUCTION

In the Decision, the Board announced the initiation of a rulemaking to address six (6) issues regarding the application of the Stand-Alone Cost ("SAC") constraint of the Board's *Coal Rate Guidelines*⁴ which have arisen in most recent and pending coal rate litigation. Decision at 2. Pending the outcome of this rulemaking and as-yet undefined subsequent proceedings, the Board ordered the reopening of the completed records in three⁵ cases that are before the Board awaiting decision, and purportedly "tolled" the statutory deadline⁶ for resolution of those cases. *Id.* at 39. The Board also suspended the procedural schedule in a fourth case, wherein evidence has not yet been submitted.⁷

Left unsaid in the Decision is that the rulemaking in question was the subject of public hearings held in April 2005 in Ex Parte No. 657, *Rail Rate Challenges Under the Stand-Alone Cost Methodology*. Also left unsaid is that during those hearings, Petitioners and every other participating rail shipper or shipper organization *opposed* this

³(...continued)
which were the genesis of the Decision.

⁴ *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520 (1985) *aff'd, sub nom. Consolidated Rail Corp. v. United States*, 812 F. 2d 1444 (3rd Cir. 1987).

⁵ *Docket Nos. 41191, 41191 (Sub-No. 1), and 42088, supra.*

⁶ *See* 49 U.S.C. §10704(c)(1).

⁷ Under the schedule that had been in effect in Docket No. 42095, opening evidence was set to be filed by KCPL and Union Pacific Railroad on April 25, 2006.

action, and instead jointly urged the Board to resolve the issues raised in the Decision in already-pending individual cases, where each had been addressed extensively by the parties. Significantly, no party – including the railroads – endorsed the idea of a general rulemaking with anything approaching enthusiasm.

The Decision unnecessarily compels the expenditure of significant time and resources by Petitioners and other interested parties, and improperly delays justice for active litigants such as WFA/Basin and KCPL. It is materially erroneous, and should be reconsidered.

ARGUMENT

Petitioners respectfully submit that the Decision is materially erroneous for at least four reasons, and therefore should be reconsidered. Upon reconsideration, the Decision should be vacated and this proceeding should be terminated.

First, the Decision ignores the record assembled in *Ex Parte No. 657*, which unequivocally established that no Board constituency favored the resolution of outstanding SAC issues in a general rulemaking. To the contrary, WCTL and sixteen other shipper organizations subscribed to a Joint Statement of Principles⁸ which held, *inter alia*, that “[t]he Board is urged *not* to use rulemaking or other notice-and-comment procedures to address issues of SAC implementation... .” *Id.* at 5 (emphasis in original). Specific reasons for this position were submitted in writing, and were reiterated through

⁸A copy of the Joint Statement is attached to this Petition as Exhibit I.

the oral hearing testimony sponsored by Petitioners and other parties. It is material error that the Decision does not even make mention of these parties' positions and supporting arguments, much less explain how it is proper to disregard them. *See, e.g., United Distribution Cos. v. F.E.R.C.*, 88 F3d 1105, 1187 (D.C. Cir. 1996); *KN Energy, Inc. v. F.E.R.C.*, 968 F2d 1295, 1302 (D.C. Cir. 1992).

Second, the Decision severely and unfairly prejudices the interests of parties such as WFA/Basin and AEP Texas North Company – complainants in the cases where records were “reopened” – and KCPL, by contradicting the assurance given by the Board last Spring that ongoing adjudications should not be adversely affected by any prospective rulemaking. The Board’s February 16, 2005 Notice in *Ex Parte No. 657* specifically stated that the proceeding “is not intended to offer a forum for discussion of pending cases....” *Id.* at 1-2. In reliance on that representation, Petitioners and other concerned shippers limited their commentary to the advancement of broad principles of regulatory fairness and consistency of adjudication,⁹ and deliberately demurred from any discussion of specific proposals to address issues that had arisen in pending cases. Indeed, WFA/Basin directly communicated to the Board its concurrence that the place to

⁹ *See, e.g.,* Comments of the Concerned Captive Coal Shippers, April 20, 2005 at 11-16; Statement of the Western Coal Traffic League, April 20, 2005 at 4-7.

resolve issues under the SAC constraint that were contested in its case was in the context of the actual record in that proceeding.¹⁰

The Decision effectively reneges on the Board's prior representation. Not only does the Decision invite comment on issues that are in dispute in pending cases from entities that are not parties to those cases, it specifically announces that the products of the new rulemaking (if any) will be *applied* in those cases. *See* Decision at 2-3. Moreover, WFA/Basin and AEP Texas North are admonished that if they expect to have proposals that they made in their own cases for the resolution of SAC issues arising there considered by the Board, they must *re-submit* those proposals as public comments in this proceeding. This unexplained about-face is material error.

Additionally, the timing of the Decision is unduly prejudicial to the parties to pending cases. Faced with unified shipper opposition to the initiation of a rulemaking in the Spring of 2005, the Board apparently decided not to act, and issued no rulings, proposals or other orders in the wake of the *Ex Parte No. 657* hearings. In reliance on that inaction, and with full knowledge of the Board, WFA/Basin and AEP Texas North proceeded to complete their records and conclude both the evidentiary and briefing phases of their cases.¹¹ As of February 26, 2006, all that remained was Board

¹⁰Joint Comments of WFA/Basin, April 20, 2005 at 1-2.

¹¹ In both cases, briefs were filed at the specific direction of the Board, which gave no indication that either case would be decided on the basis of any standards or guidelines other than those then in effect and addressed fully in each proceeding.

deliberations and service of a final decision, which in *Docket No. 41191 (Sub-No. 1)* was due *only eleven days later*.¹²

The Decision essentially nullifies the evidentiary presentations and legal arguments made – at considerable expense – in reliance on the Board’s inaction following the *Ex Parte No. 657* hearings. Under the Decision, these parties now must re-submit their methodological proposals in this proceeding if they wish to have them considered, and also face the prospect of having to “submit supplemental evidence that comports to whatever changes [the Board] decide[s] to adopt in the rulemaking....” Decision at 3. Should the Board adopt new rules and/or methodologies for all six of the identified issues – as it has proposed – the required “supplemental evidence” could amount to the re-submission of a major portion of each party’s entire case on both SAC and variable cost issues. It is material error to impose such a burden, especially when the Board itself induced these parties’ reliance on a case-by-case approach.

Third, the Decision undermines the congressional directive that rail rate proceedings be decided expeditiously.¹³ The need for expedition in the pending cases is graphically illustrated in WFA/Basin’s Complaint in *Docket No. 42088*:

¹² 49 U.S.C. §10704(c)(1) requires that a case adjudicated under the SAC constraint be decided within nine months after the close of the evidentiary record. In *Docket No. 41191 (Sub-No. 1)*, that occurred on June 9, 2005, when AEP Texas North and BNSF submitted their final briefs.

¹³ See, e.g., 49 U.S.C. § 10101(2) (15); H.R. Rep. No. 104-422, 104th Cong. 1st Sess. at 169-70 (1995); *Market Dominance Determination – Product and Geographic Competition*, 1998 WL 887185, *3 (STB) (1998).

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.

Docket No. 42088, Complaint filed October 19, 2004 at ¶ 12.

Finally, as WCTL explained last Spring in *Ex Parte No. 657*, the *Guidelines* themselves and every ICC and Board decision thereunder have reaffirmed that issues of SAC implementation are best left to case-by-case adjudication. *Guidelines*, 1 I.C.C. 2d at 542-43; *Bituminous Coal-Hiawatha, Utah to Moapa, Nevada*, ICC Decision served January 8, 1991 at 6; *Docket No. 42054, PPL Montana, LLC v. BNSF Railway Company*, STB Decision served November 27, 2001 at 3. Indeed, each of the six issues identified in the Decision is the product of individual adjudications, not rulemaking.

If past is prologue, the path reflected in the Decision will lead to delay and significant added expense, with no assurance that the ultimate outcome would not become

the subject of litigation.¹⁴ In a case such as this, where any “rules” that might be promulgated will be subject to interpretation and application based on individual evidentiary records, the law clearly supports a case-by-case approach. *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 291-94 (1974).

CONCLUSION

The Decision initiates a proceeding that was not sought by any legitimate Board constituency, and was firmly opposed by an unanimous rail shipper community when it was suggested a year ago. The Board should correct its error before needless expenditures of time and public resources are required to re-plow ground that already has been tilled extensively in pending cases. Petitioners request that the Board reconsider the Decision, and upon reconsideration, terminate this proceeding.

¹⁴ See, e.g., *Association of American Railroads v. STB*, 146 F.2d 942 (D.C. Cir. 1998).

Respectfully submitted,

WESTERN FUELS ASSOCIATION, INC.
BASIN ELECTRIC POWER COOPERATIVE, INC.
KANSAS CITY POWER & LIGHT COMPANY
WESTERN COAL TRAFFIC LEAGUE

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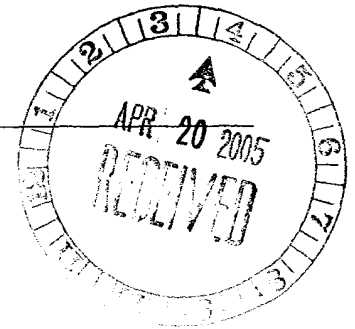
Dated: March 20, 2006

Attorneys for Petitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**RAIL RATE CHALLENGES
UNDER THE STAND-ALONE
COST METHODOLOGY**

Ex Parte No. 657



JOINT STATEMENT BY

**ALLIANCE FOR RAIL COMPETITION
AMERICAN PUBLIC POWER ASSOCIATION
COLORADO WHEAT ADMINISTRATIVE COMMITTEE
CONCERNED CAPTIVE COAL SHIPPERS
CONSUMERS UNITED FOR RAIL EQUITY
EDISON ELECTRIC INSTITUTE
IDAHO BARLEY COMMISSION
IDAHO WHEAT COMMISSION
MONTANA WHEAT & BARLEY COMMITTEE
NATIONAL ASSOCIATION OF WHEAT GROWERS
NATIONAL BARLEY GROWERS ASSOCIATION
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
OKLAHOMA WHEAT COMMISSION
SOUTH DAKOTA WHEAT COMMISSION
TEXAS WHEAT COMMISSION
WASHINGTON WHEAT COMMISSION
WESTERN COAL TRAFFIC LEAGUE**

Alliance for Rail Competition, American Public Power Association,
Colorado Wheat Administrative Committee, Concerned Captive Coal Shippers,
Consumers United for Rail Equity, Edison Electric Institute, Idaho Barley Commission,
Idaho Wheat Commission, Montana Wheat & Barley Committee, National Association of

Wheat Growers, National Barley Growers Association, National Rural Electric Cooperative Association, Oklahoma Wheat Commission, South Dakota Wheat Commission, Texas Wheat Commission, Washington Wheat Commission, and Western Coal Traffic League (collectively "Subscribing Shippers") hereby submit the appended Subscribing Shippers' Joint Statement of Principles in this proceeding. Many of the Subscribing Shippers will be separately submitting individual statements.

Respectfully submitted,

**Alliance for Rail Competition
American Public Power Association
Colorado Wheat Administrative Committee
Concerned Captive Coal Shippers
Consumers United for Rail Equity
Edison Electric Institute
Idaho Barley Commission
Idaho Wheat Commission
Montana Wheat & Barley Committee
National Association of Wheat Growers
National Barley Growers Association
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Oklahoma Wheat Commission
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Dated: April 20, 2005

SUBSCRIBING SHIPPERS' JOINT STATEMENT OF PRINCIPLES

- The decisions in recent SAC cases have been uniformly unfavorable to captive shippers. These decisions have resulted in the transfer of hundreds of millions of dollars in rate increases from railroad customers and the public to four (4) dominant coal-carrying railroads.
- As a direct result of the Board's recent decisions, many captive shippers are paying considerably higher rates and charges than had been in place as little as three years ago. The burdens associated with these rate increases have been compounded by poor service, thus exacerbating the harm experienced by captive shippers and their customers.
- Railroad managements have interpreted these recent STB decisions as a "green light" for even greater increases in rail rates and charges, with the net effect that the bargaining power between railroads and their customers has become significantly biased towards the railroads. The railroads have been so emboldened that many captive shippers have now been forced into a new era of "take-it-or-leave-it" negotiations, in which carriers even have refused to enter into contracts.
- Although the Board properly has stated that it is not the "umpire, blandly calling balls and strikes" when adjudicating rate cases, and that "the right of the public must receive active and affirmative protection at the hands of the [Board]," these principles have been applied inconsistently in recent decisions and there is little evidence of meaningful protection.
- The Board has recognized that major case-specific problems exist in its current approach to SAC and these problems are leading to skewed results. The failure to resolve such problems in individual cases -- the context in which they arose -- threatens to deprive captive shippers for which a SAC case is even theoretically possible of any meaningful regulatory review.
- In a related context, small and non-coal captive shippers currently are experiencing particular harm. STB Chairman Nober testified before Congress that "[I]f no small cases are brought, this means that in practice, only about 75 coal shippers have a meaningful opportunity to challenge rail rates. This is unacceptable." Yet the Board has not offered any meaningful solution to the particularly acute difficulties faced by the 99%+ of captive shippers in the nation that cannot bring cases under the SAC constraint.
- The statutory requirement that captive shippers' rail rates must be "reasonable" needs to be implemented in a manner that ensures that captive rail shippers of all sizes and in all locations are protected by effective remedies to limit monopoly pricing by market dominant railroads. This includes non-coal shippers who have no tested or approved methodology for rate relief.

- If private-sector solutions are to be preferred, there must be more effective rail-to-rail competition. Private-sector solutions equate to a free hand for monopoly railroads where there is neither effective competition nor effective regulation.
- Using notice-and-comment proceedings to consider issues of SAC implementation which arose in individual SAC cases serves the railroads' interests in making rate cases even more difficult and expensive. The SAC problems which have arisen by Board action or inaction in individual cases should be resolved by Board remedial actions in individual cases.
- The Board is urged not to use rulemaking or other notice-and-comment procedures to address issues of SAC implementation, for four interrelated reasons:
 - First, the Coal Rate Guidelines clearly provide that complex SAC issues are best left to case-by-case resolution.¹ See Guidelines at 542-43 (SAC computations are "left to the parties to make in each case"). See also PPL Montana, et al. at 5 (Board denied request by BNSF and UP to institute separate proceedings, citing the policy of addressing SAC issues "as they arise in individual adjudications.")²
 - Second, the SAC standards themselves are not hard-and-fast "rules." See OPPD at 142 (the Guidelines "are styled guidelines precisely because they do not contain rules").³ The STB does not need to initiate rulemakings to change guidelines that are not rules. All SAC implementation issues can – and should – be addressed in individual cases.
 - Third, side-bar proceedings will divert the Board's attention from correcting case-specific SAC implementation issues where they should be corrected – in pending coal rate cases. Many coal rate cases were left in limbo for years as the ICC struggled to develop the Guidelines. Reopening the Guidelines for rulemaking proceedings raises the specter of similar delays and added expense, as coal shipper-complainants get caught in the cross-fire between their cases and the generic rulemaking proceedings.
 - Fourth, any SAC-related rulemaking proceedings paralleling pending complaint cases are likely to be complex, time-consuming and expensive. If past is prologue, any STB decisions are likely to be appealed, resulting in further delays and uncertainty.⁴ It took the Board's predecessor, the ICC, almost a decade to promulgate the Coal Rate Guidelines, and the appeals took another two years. Shippers have no assurance that any new "rulemaking" proceedings concerning the Guidelines will be on a faster track or produce meaningful results.

¹ See Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520 (1985) ("Coal Rate Guidelines" or "Guidelines"), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3rd Cir. 1987).

² PPL Montana, LLC v. Burlington Northern and Santa Fe Ry., STB Docket No. 42054, et al. (STB served Nov. 27, 2001).

³ Omaha Public Power District v. Burlington Northern R.R., 3 I.C.C. 2d 123 (1986).

⁴ See, e.g., Ass'n of Am. R.Rs. v. STB, 146 F.3d 942 (D.C. Cir. 1998) (denying as unripe the AAR's challenge to the STB's small rate case standards).