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April 3, 2006

## **BY HAND**

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

ENTERED  
Office of Proceedings

APR 3 2006

Part of  
Public Record



Re: Ex Parte No. 657 (Sub-No. 1) – Major Issues in Rail Rate Cases

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter please find the original and ten copies of Union Pacific Railroad Company's Reply to Petition for Reconsideration.

I have also enclosed an extra copy to be date-stamped and returned to our messenger.

Thank you for your assistance.

Sincerely,

Michael L. Rosenthal

Enclosures

BEFORE THE  
SURFACE TRANSPORTATION BOARD

\_\_\_\_\_  
Ex Parte No. 657 (Sub-No. 1)  
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MAJOR ISSUES IN RAIL RATE CASES  
\_\_\_\_\_

UNION PACIFIC RAILROAD COMPANY'S  
REPLY TO PETITION FOR RECONSIDERATION

Union Pacific Railroad Company ("UP") hereby replies to the joint petition of Western Coal Traffic League ("WCTL"), Western Fuels Association, Inc., and Basin Electric Power Cooperative (collectively, "WFA/Basin"), and Kansas City Power & Light Company ("KCPL"), who ask the Board to reconsider its decision to institute a rulemaking "to address major issues regarding the proper application of the stand-alone cost (SAC) test in rail rate cases." STB Decision served February 27, 2006 ("Decision") at 2.

UP supports the Board's decision to institute a rulemaking. Petitioners are wrong when they claim that "no Board constituency favor[s] the resolution of outstanding SAC issues in a general rulemaking." (Petition at 3.) Both UP and BNSF Railway ("BNSF") urged the Board to institute such a rulemaking at the public hearing in Ex Parte No. 657 last April. In written comments submitted for the public hearing, UP stated:

The Board's review of the SAC methodology . . . should not begin and end with this one public hearing. The Board should step back from its case-by-case approach to rate complaints and formally reopen the *Coal Rate Guidelines* in a rulemaking that allows interested parties a full opportunity to submit evidence and offer concrete proposals for bringing rate reasonableness cases into line

with the rail transportation policies set forth by Congress. (UP Comments at 4.)

Similarly, BNSF submitted a statement in which it “urge[d] the Board promptly to convene a formal rulemaking proceeding to address its current application of the stand-alone cost methodology.” (Statement of Samuel M. Sipe, Jr., on behalf of BNSF at 1.)

Petitioners are also wrong when they claim that the Decision is “materially erroneous.” (Petition at 3.) None of their four arguments has any merit:

First, Petitioners are wrong when they claim that the Board committed material error by failing to address the comments of parties that had opposed a rulemaking during the Board’s April 2005 hearing in Ex Parte No. 657. (Petition at 4.) The Decision addresses the concerns raised by those parties. It explains that the Board decided to institute a rulemaking so that “all interested parties will have an opportunity to comment” on issues that “have industry-wide significance.” Decision at 2. It specifically addresses concerns about delay and retroactive application of any new rules by establishing an expedited schedule for the rulemaking and asking parties to comment on the application of new rules to pending cases. *Id.* at 2-3. The Board thus properly explained the reasons for its action and considered the most important objections. *See Public Citizen v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993).

Second, Petitioners are wrong when they claim that the Board committed material error by upsetting the reliance interests of WFA/Basin, KCPL, and AEP Texas North Company (“AEP Texas”). (Petition at 4-6.) Their fundamental concern appears to be that certain parties have already incurred substantial costs to submit evidence in their pending cases and that they might be required to incur additional costs to submit supplemental evidence as a result of the rulemaking. (Petition at 6.) However, the appropriate response is not to forego a rulemaking with industry-wide significance, but rather to recognize that issues involving the retroactive

application of new rules will potentially arise in a few individual cases, which the Board has done by inviting parties to comment “on whether or to what extent it would be inequitable to apply the changes proposed herein, or parts thereof, to their pending cases.” Decision at 2.

Third, Petitioners are wrong when they claim that the Board committed material error because the Decision “undermines the congressional directive that rail rate proceedings be decided expeditiously.” (Petition at 6.) The D.C. Circuit Court of Appeals rejected a similar claim when it upheld the Board’s authority to impose a moratorium on the filing of merger applications while the agency was engaged in a rulemaking to develop new merger rules. *See Western Coal Traffic League v. STB*, 216 F.3d 1168 (D.C. Cir. 2000). As the court explained in that case, there are “numerous cases upholding agency decisions to defer actions mandated by statute . . . where doing so is administratively necessary in order to realize the broader goals of the same statute.” *Id.* at 1173. This rulemaking meets that standard: it involves proposals “designed to ensure that both the SAC test and the jurisdictional floor for rate relief are applied fairly and in conformity with [the Board’s] statutory responsibilities.” Decision at 2.

Fourth, Petitioners are wrong when they claim that the Board committed material error when it instituted a rulemaking because “issues of SAC implementation are best left to case-by-case adjudication.” (Petition at 7.) Petitioners assert that the *Coal Rate Guidelines* favor case-by-case adjudication. (*Id.* at 7.) However, the agency recognized that a rulemaking might be appropriate after the agency and parties gained some experience under the *Guidelines*: “[T]he workability of the guidelines is most appropriately evaluated in light of experience,” which might show “that modifications are needed to make this approach . . . fully workable.” *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 525 (1985). Moreover, “the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the

informed discretion of the administrative agency.” *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). As discussed above, the Board appropriately explained that it chose to institute a rulemaking so that “all interested parties will have an opportunity to comment” on issues that “go to the heart of the SAC test and have industry-wide significance.” Decision at 2.

\* \* \*

UP believes that the time is ripe for a rulemaking that addresses major issues in SAC cases. Petitioners have concerns about the rulemaking’s potential impact on pending cases, but the Board can address such concerns in the rulemaking or in the individual cases. Petitioners have not offered any valid reason why the Board should forego a rulemaking.

Respectfully submitted,



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*Attorneys for Union Pacific Railroad  
Company*

April 3, 2006

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, hereby certify that on this 3rd day of April, 2006, I caused a copy of Union Pacific Railroad Company's Reply to Petition for Reconsideration to be served by first-class mail or a more expeditious method of delivery upon all persons who have filed a notice of intent to participate in STB Ex Parte No. 657 (Sub-No. 1).

A handwritten signature in black ink, appearing to read "Michael L. Rosenthal", written over a horizontal line.

Michael L. Rosenthal