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**SURFACE
TRANSPORTATION BOARD**

Expedited Action Requested

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



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

Complainants,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42088

ENTERED
Office of Proceedings
NOV 14 2006
Part of
Public Record

**PETITION FOR RECONSIDERATION
OF THE BOARD'S NOVEMBER 8, 2006 ORDER**

FILED

NOV 14 2006

**SURFACE
TRANSPORTATION BOARD**

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

OF COUNSEL:

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Dated: November 14, 2006

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Attorneys for Complainants

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Defendant.

Pursuant to 49 C.F.R. §1115.3(b)(2), Western Fuels Association, Inc. (“WFA”) and Basin Electric Power Cooperative Inc. (“Basin Electric”) (collectively “WFA/Basin”) request that the Board reconsider and modify the procedural schedule it served in this proceeding on November 8, 2006 (“November 8 Order”) to correct two procedural errors: the failure to allow WFA/Basin to file opening and closing supplemental Stand-Alone Cost (“SAC”) evidence and the failure to accord WFA/Basin access to relevant SAC source data. WFA/Basin’s proposed alternative schedule is appended in Attachment 1 hereto. In support hereof, WFA/Basin state as follows:

BACKGROUND

The November 8 Order directs the parties in the instant case to present specified “supplemental evidence” related to the Board’s decision served on October 30, 2006 in Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1) (“Major Issues”). The Board’s November 8 Order also encompasses the filing of supplemental evidence in a second case, AEP Texas North Co. v. BNSF Railway Co., STB Docket No. 41191 (Sub-No. 1) (“AEP Texas North”). Specifically, the November 8 Order calls for the parties in both cases to submit supplemental evidence relating to (1) the calculation of variable costs for jurisdictional threshold purposes; (2) the calculation of revenue divisions on cross-over traffic movements; and (3) the calculation of movement-specific Stand-Alone Railroad (“SARR”) rates.

The Board’s November 8 Order also establishes identical procedural schedules in the instant case, and in the AEP Texas North case, for the filing of supplemental evidence. The Board’s schedules call for BNSF Railway Company (“BNSF”) (the defendant carrier in both cases) to file opening evidence in each case on December 8, 2006; the shipper complainants (WFA/Basin and AEP Texas) to file reply evidence in each case on January 8, 2007; and BNSF to file rebuttal evidence in each case on January 22, 2007.

ARGUMENT

The Board's November 8 Order contains two new material errors. See 49 C.F.R. §1115.3(b)(2) (Board to set aside final decisions which contain material errors).¹ The Board's first new error is to unlawfully strip WFA/Basin of their right to submit opening and closing supplemental SAC evidence. The Board's second new error, related to the first, is the Board's failure to direct BNSF to provide needed SAC source data.

A. WFA/Basin are Entitled to Open and Close on SAC Issues

Due process requires that the party with the burden of proof submit opening and closing evidence. See e.g., Bituminous Coal – Hiawatha, Utah to Moapa, Nevada, ICC Docket No. 37038 (ICC decided March 16, 1991) 1991 WL 47120 at *3 (“[i]n any proceeding before us, the party with the burden of proof opens, and closes if rebuttal evidence is allowed”); Duke Energy Corp. v. Norfolk Southern Ry., STB Docket No. 42069 (STB served Jan. 6, 2005) at (“as the shippers have the burden of proof ... it is appropriate they have the opportunity to open and close”).

The party with the overall burden of proof in a SAC case is the complainant – here WFA/Basin.² The Board has decided to interject into WFA/Basin's rate case

¹ The Board's Decision in Major Issues, as applied via the November 8 Order in the instant case, contains numerous other material errors. These errors are identified in the extensive comments and petitions WFA/Basin have previously submitted in this proceeding, and in Major Issues, and will not be repeated in this Petition.

² See Coal Rate Guidelines – Nationwide, 1 I.C.C. 2d 520, 547 (1985) (“the complainant must demonstrate that the challenged rate is unreasonable”); Duke Energy Corp. v. Norfolk Southern Ry., STB Docket No. 42069 (STB served Nov. 6, 2003) at 13

substantially new and different methods for calculating SAC rate relief. Fundamental fairness dictates that WFA/Basin – the parties with the overall burden of proof on SAC issues – be permitted to file opening and closing supplemental SAC evidence. However, the Board’s schedule does exactly the opposite – it permits the defendant carrier (BNSF) to open and close.

WFA/Basin request that the Board correct its November 8 Order to permit WFA/Basin to open and close on SAC issues. This result is consistent with both the Board’s procedures governing the initial submission of SAC evidence³ as well as the general practice followed by the Board when it has received supplemental SAC evidence.⁴

(complainant shipper has the burden of proof “on SAC Issues”).

³ See 49 C.F.R. §1111.8 (complainant shipper files opening and rebuttal evidence on “stand-alone cost issues”); General Procedures For Presenting Evidence in Stand-Alone Cost Cases, STB Ex Parte No. 347 (Sub-No. 3) (STB served March 12, 2001) at 5 (party with burden of proof opens and closes).

⁴ See e.g., Western Fuels Association, Inc. v. BNSF Ry., STB Docket No. 42088 (Decision served March 17, 2006) (shipper files opening and closing supplemental SAC evidence); AEP Texas North Co. v. BNSF Railway Co., STB Docket No. 41191 (Sub-No. 1) (STB served March 17, 2006) (same), Arizona Public Service Co. v. Burlington Northern and Santa Fe Ry., STB Docket No. 41185 (STB served July 2, 2004) (same); Otter Tail Power Co. v. Burlington Northern and Santa Fe Ry., STB Docket No. 42071 (STB served Nov. 21, 2003) (same). In some other SAC cases, the Board has called for two rounds of simultaneous supplemental filings. See e.g., Duke Energy Corp. v. CSX Transportation Inc., STB Docket No. 42070 (STB served Oct. 14, 2003). These cases generally involved Board requests for supplemental evidence to address technical evidentiary disputes. These procedures should not apply where, as here, the Board has made wholesale changes to the SAC standards that were in effect when the complainant prepared and presented its case to the Board.

The Board attempts to justify its decision to permit BNSF to open and close because “the [SAC] information being requested is in the possession of the railroad.” November 8 Order at 4 (footnote omitted). This reasoning is in correct. In all SAC cases, much of the information needed for a complainant shipper to present its SAC evidence is in the possession of the defendant carrier. See Coal Rate Guidelines, 1 I.C.C. 2d at 548 (“[w]e recognize that shippers may require substantial discovery to litigate a [SAC] case ... and we are prepared to make that discovery available to them”). The fact that BNSF possesses needed SAC data provides no rational basis whatsoever to strip WFA/Basin of their basic right to file opening and closing supplemental SAC evidence.

**B. WFA/Basin Should Be Accorded
Equal Access to BNSF SAC Data**

Due process also requires that both BNSF and WFA/Basin have access to the same set of source data to make SAC calculations. Under the Board’s November 8 Order, WFA/Basin would not have access to the BNSF source data. Instead, the Board directs BNSF to make various “calculations” for which BNSF supplies “narrative” explanations, and supporting “workpapers.” See November 8 Order at 4. This is not enough. Narrative explanations, and workpapers, are no substitute for production of the source data.⁵

⁵ See, e.g., Texas Municipal Power Agency v. Burlington Northern and Santa Fe Ry., STB Docket No. 42056 (STB served March 24, 2003) at 68 (STB rejects study results where, inter alia, source data was not provided).

The record in this and other SAC cases demonstrates the problems inherent in the Board's approach. For example, in the instant case, WFA/Basin presented workpaper requests to BNSF asking for access to source documents, and data bases, that BNSF used and manipulated in its presentation of its evidence.⁶ BNSF routinely refused to provide the source of data on grounds that WFA/Basin's requests constituted "improper discovery."⁷

Based upon WFA/Basin's review to date of the Board's November 8 Order, the SAC source data identified in Attachment 2 is relevant. Permitting only BNSF access to this material is fundamentally unfair. The Board can correct this error by directing BNSF to supply the Attachment 2 material to WFA/Basin in advance of the parties' evidentiary filings.

**C. WFA/Basin Are also Entitled to Open and
Close on Jurisdictional Threshold Issues**

In SAC cases, complainant shippers and defendant carriers share the burden of proof on quantitative jurisdictional threshold issues.⁸ As a result, the Board's maximum rate case procedures call for both complainant shippers and defendant carriers

⁶ See e.g., WFA/Basin's July 20, 2005 Reply Exhibit II-A-1 at 3; WFA/Basin Reply electronic workpaper file "Op.Workpaper Correspondence.pdf."

⁷ See, e.g., Letter from BNSF counsel to WFA/Basin counsel (dated May 31, 2005) reproduced in the WFA/Basin July 20, 2005 Reply electronic workpaper referenced in footnote 6.

⁸ See Duke Energy Corp. v. Norfolk Southern Ry., STB Docket No. 42069 (STB served Nov. 6, 2003) at 13 n.16.

to file opening and closing quantitative jurisdictional threshold evidence. See 49 C.F.R. § 1111.8(a).

WFA/Basin request that the Board adhere to these standard procedures and permit both WFA/Basin and BNSF to file opening and closing supplemental jurisdictional threshold evidence. This result accords with the parties' shared burden of proof.

D. A Corrected Schedule

The Board can correct the two new errors in its November 8 Order by issuing the modified procedural schedule set forth in Attachment 1. The proposed evidentiary filing dates in Attachment 1 are slightly different from the dates proposed by AEP Texas North. These differences are intended to permit common witnesses in both cases sufficient time to prepare supplemental evidence in each case.

The Attachment 1 schedule is longer than the Board's proposed schedule. The additional time is necessary to afford WFA/Basin the due process denied by the Board's two new scheduling errors. Also, there would not have been any need for supplemental filings if the Board had decided this case in a timely manner as WFA/Basin repeatedly requested in their prior filings in this case.

CONCLUSION

WFA/Basin request that the Board grant the relief requested herein.

Respectfully Submitted

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

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Dated: November 14, 2006

Attorneys for Complainants

PROPOSED PROCEDURAL SCHEDULE

BNSF's Production of Documents Requested in <u>Attachment 2</u>	December 8, 2006
WFA/Basin's Opening Supplemental SAC and Jurisdictional threshold Evidence; BNSF's Opening Supplemental Jurisdictional Threshold Evidence	January 16, 2007
Reply Evidence to Opponent's Opening Evidence	February 16, 2007
Rebuttal Evidence to Opponent's Reply Evidence	March 9, 2007

WFA/Basin Discovery Requests

1. Please provide BNSF density information for each route traversed by each movement in the traffic group during base year 2004 in a machine readable database or electronic spreadsheet, including all field descriptions, data definitions and data dictionaries required to utilize the data. The density database or spreadsheet should include, at a minimum, the following data:
 - a. Identification of the unique railroad divisions, subdivisions, and individual line segments for each unique density segment;
 - b. Station name at the beginning of a unique density segment and at the end of a unique density segment;
 - c. Beginning and ending milepost for each unique density segment;
 - d. Rail mileage for each unique density segment;
 - e. (i) Total density (both directions including empty and loaded trains) by segment expressed in net ton-miles; or, in the alternate, (ii) BNSF should provide total density (both directions including empty and loaded trains) by segment expressed in gross ton-miles plus appropriate factors that can be used to convert gross ton-miles to net ton-miles on each unique density segment.

2. Please provide BNSF train event data for each movement included in the traffic group from origin to destination for base year 2004 in a machine readable database or spreadsheet, including all field descriptions, data definitions and data dictionaries.

3. Please provide the actual BNSF train event data and traffic revenue data from Powder River Basin ("PRB") mine origins for the unit train movements to the following destinations that were first included in the stand-alone traffic group in 2005:
 - a. { };
 - b. { };
 - c. { };
 - d. { };
 - e. { };
 - f. { };
 - g. { }; and
 - h. { }.

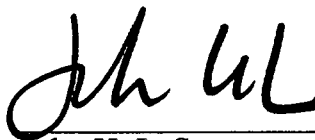
4. Please provide actual BNSF train event data and traffic revenue data from the mine origins for the unit train movement to { } included in the traffic group in 2006.

5. Please provide the proposed routing and estimated train and operating characteristics from the mine origins for the unit train movement to { }.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 2006, I caused a copy of the foregoing Petition for Reconsideration of the Board's November 8, 2006 Order to be served by hand delivery on counsel for BNSF, as follows:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Linda S. Stein
Steptoe & Johnson, L.L.P.
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A handwritten signature in black ink, appearing to read 'JH 4L', is written over a horizontal line.

John H. LeSeur