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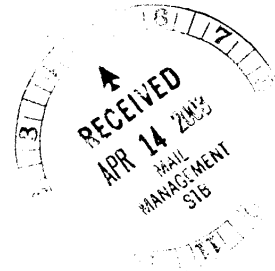
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April 14, 2003

VIA HAND-DELIVERY

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



Re: Docket No. 42056, Texas Municipal Power Agency v.
The Burlington Northern and Santa Fe Railway

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding please find an original and ten copies of (1) Petition of the Western Coal Traffic League for Leave to Intervene and (2) Petition For Reconsideration of the Western Coal Traffic League. Enclosed is a check in the amount of \$150.00 to cover the applicable filing fee for the Petition for Reconsideration.

We have enclosed an additional hard copy of each of these filings to be date-stamped and returned to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

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APR 15 2003

Part of
Public Record

C. Michael Loftus

C. Michael Loftus

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Enclosures

cc: Counsel for Complainant and Defendant

APR 17

SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

TEXAS MUNICIPAL POWER AGENCY,

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 42056

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SURFACE
TRANSPORTATION BOARD

**PETITION FOR RECONSIDERATION OF
THE WESTERN COAL TRAFFIC LEAGUE**

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Public Record

WESTERN COAL TRAFFIC LEAGUE

OF COUNSEL:

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1224 Seventeenth Street, N.W.
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Dated: April 14, 2003

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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APR 14 2003

MANAGEMENT

TEXAS MUNICIPAL POWER AGENCY,

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 42056

**PETITION FOR RECONSIDERATION OF
THE WESTERN COAL TRAFFIC LEAGUE**

Pursuant to 49 C.F.R. § 1115.3, the Western Coal Traffic League

("WCTL")¹ hereby petitions the Board to reconsider two aspects of its decision in this proceeding served March 24, 2003 ("TMPA") that have widespread potential consequences for western coal shippers generally and shippers of Powder River Basin ("PRB") coal in particular. These are (1) the Board's refusal to prescribe rates commensurate with Defendant The Burlington Northern and Santa Fe Railway Company's ("BNSF") holding out of the same rates from all Wyoming PRB origin mines

¹ WCTL's members are electric utilities and cooperatives who collectively arrange and pay for the transportation of over 100 million tons of coal annually. The bulk of this coal is produced at and transported by rail from mines in the Powder River Basin, and moves in private railcars.

it serves, and (2) its refusal to order BNSF to provide Complainant Texas Municipal Power Agency ("TMPA") with rates applicable to service in private cars.

INTRODUCTION

For nearly 20 years, the commercial practice of the two rail carriers that serve the PRB (BNSF and Union Pacific ("UP")) has been to offer one rate applicable for movements to a particular destination from all of the Wyoming PRB mines each carrier serves. This concept is typically embodied in contracts for rail transportation of PRB coal, and in the common carrier rate publications of which WCTL is aware including those involved in every PRB coal rate case since WTU.² Given the high volumes of coal moving by rail from the PRB, and the congestion that periodically occurs due to surges in demand, equipment breakdowns at individual mines, etc., the availability of a single rate from all of the mines helps to keep coal from this important producing region moving smoothly. In addition, competition among the PRB coal producers is enhanced, the mines' production capabilities are maximized, and problems related to surges in demand are minimized by the established commercial practice under which utilities purchase coal from various PRB mines under contracts of varying duration including spot contracts that last for as little as a few months or that cover only a few

² West Texas Utilities Co. v. Burlington Northern R. R., 1 S.T.B. 638 (1996). The WTU case involved a rate applicable from a single BNSF-served PRB mine and, as the Board is aware, a dispute is presently pending in the proceeding (Docket No. 41191) due to BNSF's establishment of a higher rate applicable from a different (but nearby) mine from which WTU presently receives most of its coal.

trainloads. This enables a utility to shift mines on short notice when a problem develops at a particular mine from which it purchases coal.

The Board's recent practice – first manifested in its WPL decision and further crystallized in the TMPA decision involved here – is to refuse to prescribe rates on the basis under which they are established, but rather to prescribe rates only from those specific PRB origins from which coal movements have actually occurred and for which variable cost evidence has been presented. This practice is contrary to the Board's precedents, disruptive of established commercial dealings between producers and utilities, and inimical to the public interest in assuring the smooth and uninterrupted flow of coal from the nation's largest and most important reserve of low-sulfur, environmentally-benign coal.

The Board's refusal to order BNSF to provide a rate applicable to movements in private cars has potentially far-reaching consequences and, carried to its logical conclusion, could idle thousands of private railcars acquired and used by electric utilities for western coal transportation service. In the west, over 90 percent of all coal moving by rail moves in private equipment furnished by the shipper. The use of private equipment was initially encouraged by BNSF's predecessor starting in the 1970s, when the PRB reserves first began to be developed, by offering substantially lower rates applicable in private cars as an inducement to utilities to acquire their own car fleets.

The use of such private equipment became even more widespread following the Interstate Commerce Commission's 1977 PEPCO decision in which the agency held

that rail carriers need not furnish railcars for unit train coal movements.³ The practice of using private cars for western coal movements has evolved to the point where WCTL's members, alone, provide more than 17,000 railcars for use in transporting western coal. The potential disruption to car-supply arrangements under the ruling in TMPA would be inimical to the public interest.

I. PRESCRIPTION OF RATES FROM MULTIPLE PRB ORIGINS

The BNSF common carrier pricing authority provided to TMPA at the latter's request contained a single rate applicable to movements in railroad-supplied cars from 16 BNSF served PRB origins in Wyoming to TMPA's Gibbons Creek power plant in Texas. See Common Carrier Pricing Authority BNSF 90042 attached to the complaint in this proceeding as Exhibit A. As noted above, the multiple origins were consistent with the practice of the two PRB origin rail carriers over the past 20 years, and with the commercial realities of the PRB coal supply and transportation markets.

The Board's refusal to prescribe rates for the movements covered by BNSF's pricing authority and TMPA's complaint violates 49 U.S.C. § 10701(d)(1) which requires that:

If the Board determines, under section 10707 of this title, that a rail carrier has market dominance over the transportation to

³ See Potomac Electric Power Co. v. Penn Central Transp. Co., 356 I.C.C. 815 (1977) ("PEPCO"), aff'd, Potomac Electric Power Co. v. United States, 584 F.2d 1058 (D.C. Cir. 1978).

which a particular rate applies, the rate established by such carrier for such transportation must be reasonable.

In this case, as with all other common carrier PRB rates of which WCTL is aware, the rate applies to coal transportation from a group of PRB mines to the destination involved. One of the tests for market dominance is quantitative, i.e., whether the revenue/variable cost ratio for the transportation to which the rate applies is 180% or greater. 49 U.S.C. § 10707(d)(1). Thus, the Board has a statutory obligation to determine whether the rate exceeds the jurisdictional threshold level from all of the origins to which it applies.

WCTL notes that the statute does not require that traffic actually move from each of the origins from which the rate applies before the Board can make a market dominance or rate reasonableness determination. Moreover, in the past the agency has not hesitated to prescribe maximum reasonable rates in situations where the shipper has not moved any traffic under the challenged rates. See, e.g., San Antonio, TX v. Burlington N. Inc., 355 I.C.C. 405 (1976), aff'd sub nom. Burlington N. Inc. v. United States, 555 F.2d 637 (8th Cir. 1977); Incentive Rate on Coal - Cordero, Wyo. to Smithers Lake, Tex., 258 I.C.C. 537 (1977), both of which involved PRB coal movements. While these were pre-Staggers Act cases, there is nothing in the Staggers Act or ICC Termination Act that precludes the Board from prescribing rates for origin/destination pairs over which traffic is not moving so long as it is able to develop reasonably reliable surrogate costs for such movements. Given the relatively close proximity of all of the PRB mines, the similarity in loading characteristics (all of these mines have loop tracks

that permit continuous loading of an entire train in four hours or less), and the fact that the PRB carriers move large volumes of coal traffic from each of these mines, there is no reason why variable costs cannot be developed for movements from each mine regardless of whether traffic has actually moved from the mine under the common carrier rates that are in issue. The Board sees no similar obstacles when it comes to SAC findings where everything is hypothetical yet the Board easily makes cost computations. WCTL urges the Board to reconsider the origin limitations on its prescription in TMPA.

II. PRIVATE CAR RATES

The Board's treatment of TMPA's request for the prescription of rates for service in shipper-owned cars perpetuates the errors and confusion which have arisen in this area in recent years and which now require redress. It has long been the law that railroads are obligated to supply the freight cars needed to accomplish the transportation services which they hold to perform. In the context of this well-established obligation, the agency has ruled in the past that a railroad need not accept shipper cars if it has its own cars available for the service. See TMPA at 9.

What the Board neglects to discuss in the TMPA decision is a group of collateral and conflicting rulings in the early cases dealing with carrier car obligations for coal service in unit trains. In these cases, the agency established an exception to the rule relied upon by the Board in TMPA. In PEPCO, an early unit train case, the agency appeared to hold, contrary to the established law cited in TMPA, that a railroad is not

obligated to furnish cars for unit coal train service.⁴ On appeal, the agency vigorously asserted that the carrier did not have to furnish cars and the reviewing court upheld the agency.⁵ Thereafter, western rail carriers generally refused to offer unit train service in carrier equipment and coal consumers generally and WCTL members, in particular, acquired huge fleets of freight cars. Today, WCTL members own more than 17,000 cars.

As the foregoing discussion discloses, the agency has, perhaps unwittingly, created two lines of car law. One holds that carriers have the duty and right to furnish equipment. This is the line relied upon in TMPA. The second line of law, as articulated in PEPCO and elsewhere, holds that for unit coal train service, the railroads do not have to furnish cars. These two lines of law are conflicting and WCTL members find themselves in the center of the conflict. On the one hand, the Board has permitted the western railroads to ignore their car service obligations – for unit coal trains – but on the other it states that BNSF has no obligation to establish rates for service “in privately owned cars.” See TMPA at 9. Under the Board’s ruling in TMPA, a WCTL member with a fleet of coal cars could easily find itself faced with a circumstance where the railroad insists upon using its own cars instead. BNSF, for example, owns circa 17,000 cars itself. There is little to prevent BNSF from arbitrarily insisting upon supplying cars

⁴ PEPCO at 828.

⁵ Potomac Electric Power Co. v. United States, 584 F.2d 1058, 1063 (D.C. Cir. 1978).

when it chooses. Indeed, it has every motivation to supply cars on captive movements where the Guidelines award it a minimum of 180% of its costs in the rate determination.

Between TMPA and PEPCO, the railroads seem to have been accorded the right to supply unit train cars, at their discretion. The Board needs to reconsider its conclusions in TMPA and to conclude that for unit coal train service, rail carriers must offer rates for service in private cars.

CONCLUSION

For all of the foregoing reasons, WCTL urges the Board to reconsider and reverse its TMPA decision insofar as it fails to (1) prescribe rates applicable from all BNSF-served Wyoming PRB origins to TMPA's Gibbons Creek power plant, and (2) require BNSF to provide rates applicable in railcars provided by TMPA.

Respectfully Submitted,

WESTERN COAL TRAFFIC LEAGUE

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Dated: April 14, 2003

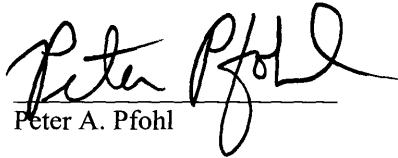
Its Attorneys

Certificate of Service

I hereby certify that on April 14, 2003, I caused copies of the foregoing
Petition for Reconsideration to be served by hand upon all parties of record in this
proceeding, as follows:

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