

BEFORE THE
SURFACE TRANSPORTATION BOARD

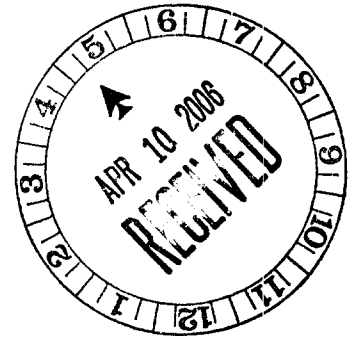
STB Ex Parte No. 657 (Sub-No. 1)

MAJOR ISSUES IN RAIL RATE CASES

BNSF RAILWAY COMPANY'S
REPLY TO PETITION FOR RECONSIDERATION

BNSF Railway Company ("BNSF") hereby replies to the Joint Petition for Reconsideration of Western Fuels Association, Inc. ("WFA"), Basin Electric Power Cooperative, Inc. ("Basin"), Kansas City Power & Light Company ("KCPL") and Western Coal Traffic League ("WCTL"), filed on March 20, 2006 in the above-captioned proceeding.

As discussed more fully below, BNSF supports the Board's efforts to address important issues of SAC methodology through a rulemaking proceeding. While BNSF is not in favor of all of the changes proposed by the Board, BNSF nevertheless urges the Board to follow through with the proposed rulemaking so that its future application of SAC methodology may better conform with the statutory objectives and economic principles underlying the *Coal Rate Guidelines*.



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ARGUMENT

I. RULEMAKING IS A FAIRER AND MORE EFFICIENT MEANS OF ADDRESSING RECURRING ISSUES OF SAC METHODOLOGY THAN CASE-BY-CASE ADJUDICATION

Petitioners request that the Board terminate the rulemaking proceeding and continue to develop rules governing the application of the SAC test on a case-by-case basis. They claim that the decision to convene a rulemaking proceeding on SAC issues is contrary to the wishes expressed by shippers participating in the April 2005 hearing in Ex Parte No. 657, *Rail Rate Challenges Under the Stand-Alone Cost Methodology*. They assert that SAC issues should be addressed only in the context of individual cases. Petition at 2-3. They further claim that the decision to convene a rulemaking proceeding “prejudices the interests of parties such as WFA/Basin and AEP Texas North Company” that have already presented evidence and argument on their rate reasonableness claims. *Id.* at 4.¹ They complain about the burden of submitting new evidence and argument in cases where significant expenditures of time and effort have already been made and they complain about the delay that will result from a stay of the cases while the rulemaking proceeding is pending. *Id.* at 6-7.

None of petitioners’ complaints constitutes an assertion of material error that would justify a reversal of the Board’s decision to institute a rulemaking proceeding to address major issues of SAC methodology. The decision to open a rulemaking proceeding on the subject of SAC methodology is within the Board’s sound discretion. It is entirely rational for the Board to conclude that recurring issues of SAC methodology that potentially affect multiple current and future litigants are best addressed through a rulemaking proceeding than through case-by-case

¹ Although Petitioners refer to the pending rate case in which AEP Texas is a complainant, AEP Texas is not a party to the petition, nor is it a member of Petitioner Western Coal Traffic League.

adjudication. As BNSF noted in the testimony it submitted in the April 2005 Ex Parte No. 657 hearing, the *Coal Rate Guidelines* have been in place for 20 years and they have not been revisited since they were adopted. The *Guidelines* are based on sophisticated economic principles. Experience has shown that the application of those principles exclusively through case-by-case litigation has produced standards that diverge from those underlying principles. The *Guidelines* themselves recognized "that the workability of the *Guidelines* is most appropriately evaluated in light of experience." *Guidelines* at 525. The Board has appropriately determined that the time has arrived to carry out that evaluation.

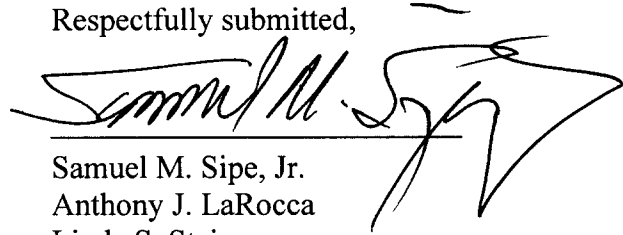
While Petitioners claim prejudice in that individual litigants will experience some delay in the resolution of their cases, they ignore the potential benefits of rulemaking for a broader class of actual and potential litigants. Rulemaking can yield greater clarity regarding the application of SAC standards going forward than case-by-case litigation and thereby foster private resolution of disputes. It is also a fairer way of formulating rules than case-by-case litigation because it allows participation by all potentially affected parties.

It is particularly appropriate that there be a focused assessment of the application of maximum rate standards for coal transportation given the current state of coal transportation markets. Demand for coal transportation is at an all-time high and is projected to increase dramatically. At the same time, rail capacity is constrained and new investments are needed to expand capacity and improve service for the entire community of shippers served by the nation's freight railroads. The Board's application of its rate reasonableness standards should be considered against these new realities of the market. The proposed rulemaking will give all persons potentially affected by the Board's rate reasonableness standards an opportunity to

present their views on how the Board's application of these standards will affect the critical real world issues of infrastructure needs and service quality.

For the foregoing reasons, BNSF urges the Board to deny the Petition for Reconsideration and to conduct the rulemaking proceeding that it initiated with its February 27, 2006 order.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Samuel M. Sipe, Jr.", is written over a horizontal line.

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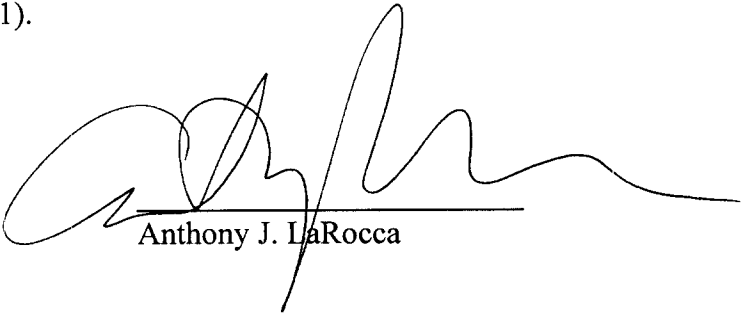
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April 10, 2006

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CERTIFICATE OF SERVICE

I, Anthony J. LaRocca, hereby certify that on this 10th day of April, 2006, I caused a copy of BNSF Railway 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).



Anthony J. LaRocca