

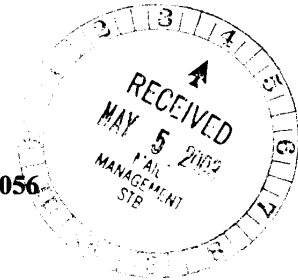
207739

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

TEXAS MUNICIPAL POWER AGENCY,)
)
 Complainant.)
)
 v.)
)
 THE BURLINGTON NORTHERN AND)
 SANTA FE RAILWAY COMPANY,)
)
 Defendant.)
 _____)

Docket No. 42056



ENTERED
Office of Proceedings
MAY 06 2003
Part of
Public Record

BNSF'S REPLY TO THE PETITIONS OF WCTL AND
NITL/NAFCA FOR LEAVE TO INTERVENE

Defendant The Burlington Northern & Santa Fe Railway Company ("BNSF") hereby replies in opposition to the April 14, 2003 Petitions of the Western Coal Traffic League ("WCTL") and the National Industrial Transportation League and North America Freight Car Association ("NITL/NAFCA") for leave to intervene in this proceeding. Intervention by WCTL and NITL/NAFCA is not appropriate here. Those associations improperly seek to broaden the scope of issues that have already been adjudicated in this proceeding. In essence, WCTL and NITL/NAFCA request that the Board provide an advisory opinion on the applicability of certain legal standards addressed in the stand-alone cost proceeding involving Texas Municipal Power Agency ("TMPA") to factual scenarios other than those at issue in this case. The Board should disallow intervention under these circumstances.

BACKGROUND

WCTL requests leave to intervene in order to urge the Board to reconsider two aspects of the Board's March 24 Decision in this proceeding: (1) the Board's refusal to prescribe rates for service from all of the Powder River Basin ("PRB") mines referenced in Common Carrier

PUBLIC VERSION

Authority 90024; and (2) the Board's refusal to require BNSF to offer rates for service in shipper-provided railcars. WCTL Intervention Petition at 1-2. WCTL claims to have an interest in this proceeding because it is a voluntary association representing shippers and coal recipients whose members (one of which is TMPA) solicit coal from a number of different sources and have invested considerable sums in a private car fleet. On the first issue, WCTL urges the Board to consider the entire PRB as a single coal origin and therefore to prescribe rates that would be applicable to all PRB mines. On the second issue, WCTL asks the Board to address what it claims is a conflicting line of cases relating to a common carrier's rail car obligations that might affect the interests of a WCTL member that, unlike TMPA, has acquired a fleet of rail cars and seeks service in those cars.

NITL/NACFA seek to intervene to challenge only the private shipper car portion of the March 24 Decision. NITL/NACFA Intervention Petition at 2-3. NITL/NACFA contend that their members, who are manufacturers, lessors, owners, and operators of private rail freight cars, have an interest in the conditions under which that equipment can be operated. NITL/NACFA present a complex and convoluted review of case law relating to the regulation of rail cars and specifically request that the Board clarify the relationship between the private car findings in its March 24 Decision and the Interstate Commerce Commission's ("ICC") decision in *Shippers Committee, OT-5 v. Ann Arbor R.R.*, 5 I.C.C.2d 856 (1989) ("*SCOT-5*"). NITL/NACFA specifically urge the Board to establish a rule providing that "once a shipper has acquired private cars and obtained OT-5 authority for such cars, a request for rates in those private cars is a reasonable request and the railroad must provide such rates." *Id.* at 7; *see also id.* at 10.

**WCTL AND NITL/NAFCA'S PETITIONS TO INTERVENE
SHOULD BE DENIED**

1. Intervention Of A Non-Party Should Be Granted Under Extremely Limited
Circumstances In An Adjudicatory Proceeding After A Decision Is Reached

The Board issued its decision in this SAC proceeding on March 24, 2003. Accordingly, this proceeding is now under review by the Board under the Board's appellate rules. The Board should not interpret its appellate rules as permitting the intervention of persons that did not participate in the proceeding below and that does not have a direct interest in the subject matter of the proceeding. If intervention in an appeal brought under Part 1115 of the Board's rules were regularly permitted whenever a person had a concern about the impact of a decision on other cases, the scope of appellate proceedings under Part 1115 would be substantially expanded. The consequences would be particularly significant in SAC cases such as this, where the Board's decision by definition involves issues that may affect litigants in pending or future cases.

WCTL and NITL/NACFA specifically seek permission to intervene under 49 C.F.R. §1112.4, but on its face that provision applies only to intervention in proceedings prior to the issuance of a final decision. It provides for intervention in a proceeding "set for modified procedure" and requires that the requested intervention "not unduly disrupt the schedule for filing verified statements." 49 C.F.R. §1112.4(a)(1) (2002). The language of the rule suggests that it applies to intervention in proceedings while evidence and argument are still being formulated and before a decision has been reached. In the past, the Board and the ICC have

repeatedly rejected attempts by non-parties to intervene in proceedings after the record has been closed.¹

In *PPL Montana, LLC v. The Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42054, slip op. at 1 n.1 (served Mar. 24, 2003), the Board permitted intervention of a non-party after a decision was issued, but only to the extent intervention did “not broaden the issues...in [this] proceeding.” *Id.*; 49 C.F.R. §1112.4(a)(2). BNSF agrees that this express limitation on intervention after a final decision is appropriate if any intervention is permitted, but urges the Board to acknowledge that it means there will be few circumstances when intervention is justified at that stage of proceedings. To the extent an intervenor seeks to raise new issues, requests the Board to consider new facts or urges the Board to apply the case law to new circumstances, it is clear that intervention should not be permitted. To the extent an intervenor raises arguments already made in the underlying case, intervention does not serve any useful purpose and imposes additional litigation burdens on the Board and the parties.

2. WCTL Provides No Valid Basis For Permitting It To Intervene On The Question Of The Scope Of The Board’s Rate Prescription

WCTL claims that the Board should have prescribed rates for all movements covered by the BNSF pricing authority that was at issue in TMPA’s complaint. WCTL Petition at 4. This is the same position taken by WCTL’s member, TMPA, in its petition for reconsideration of the Board’s decision. WCTL presents no reasons for reconsidering the Board’s decision limiting its rate prescription to the two origins from which coal originated that its member, TMPA, has not already urged. It would therefore serve no purpose to allow WCTL to intervene on this issue.

¹ See, e.g., *B.J. Alan Co., Inc., et al v. United Parcel Serv., Inc.*, No. MC-C-30093, 1989 MCC LEXIS 398 (ICC decided Sept. 8, 1989); *Knauf Fibre Glass GmbH v. the Alton & Southern Ry. Co., et al*, No. 39739, 1986 ICC LEXIS 326 (ICC decided Apr. 23, 1986).

PUBLIC VERSION

The Board should also deny WCTL's Petition on grounds that it is based on factual contentions that have no support in the evidentiary record. WCTL claims that the prescription of a single rate for all PRB origins would comport 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." WCTL Petition at 4. No record has been created in this case relating to the "commercial realities" of PRB coal supply and transportation markets. Apart from the fact that this argument ignores the jurisdictional limitations on the Board's rate prescription authority, it relies on factual assertions that are not supported by evidence in the record. The Board should reject WCTL's request to intervene because the Board would not even have a basis to consider WCTL's assertions without first expanding this proceeding to obtain relevant evidence and argument on the "commercial realities" of marketing PRB coal transportation and the impact of those realities on the Board's rate prescription authority.

3. The Requests By WCTL And NITL/NAFCA To Intervene On The Issue Of Shipper Cars Should Be Denied Because Both Entities Request The Board To Address Factual Circumstances That Were Not At Issue In This Proceeding

Both WCTL and NITL/NAFCA urge the Board to consider the effect of the Board's ruling that BNSF is not required to establish rates for TMPA for transportation in shipper cars [REDACTED] [REDACTED] WCTL expresses a concern that 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." WCTL Petition at 7. NITL/NAFCA urges the Board to clarify the relationship between several cases that address car ownership and common carriage obligations and establish a rule providing that "once a shipper has acquired private cars and obtained OT-5 authority for such cars, a request for rates in those private cars is a reasonable request and the railroad must provide such rates." NITL/NAFCA Intervention Petition at 7; *see also id.* at 10.

PUBLIC VERSION

The facts of this case do not present the issues that WCTL and NITL/NAFCA ask the Board to address. It would be inappropriate to address those issues here. [REDACTED]

[REDACTED] Whether Board precedent regarding the relative rights and responsibilities of car ownership would produce different results in different factual circumstances is not an issue that the Board needs to or should address in this case.

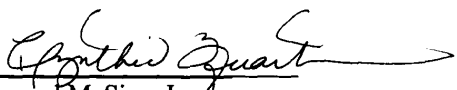
In effect, these associations seek an advisory opinion on how the legal principles relied on by the Board in this proceeding would be applied in different factual circumstances. The ICC has previously stated that it “see[s] no compelling reason to issue non-binding advisory type decisions.” *Liberty Liquors Co. v. Ryder/P-I-E Nationwide, Inc.*, No. MC-C-10951, 1987 WL 99631, at *1 (ICC decided Oct. 8, 1987). Indeed, the Board has repeatedly expressed a preference for resolving issues in the context of specific factual disputes. *McCarty Farms, et al. v. Burlington Northern Inc.*, No. 37809, 1995 WL 55449, at *6 (ICC served Feb. 13, 1995). The Board should not accept the invitation of WCTL and NITL/NAFCA in this case to issue advisory opinions on the legal issues relating to ownership and use of rail cars.

CONCLUSION

For the reasons set out above, the Board should deny the petitions of WCTL and NITL/NACFA for leave to intervene.

Respectfully submitted,

Richard E. Weicher
Michael Roper
The Burlington Northern and Santa Fe
Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353


Samuel M. Sipe, Jr.
Anthony J. LaRocca
Cynthia L. Quarterman
Stephoe & Johnson, LLP
1330 Connecticut Ave., N.W.
Washington, DC 20036
(202) 429-3000

Attorneys for The Burlington Northern and
Santa Fe Railway Company

Dated: May 5, 2003

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2003, a true and correct copy of Defendant's Reply To
The Petition Of Western Coal Traffic League And The National Industrial Transportation
League And North America Freight Car Association For Leave To Intervene was served by hand
on:

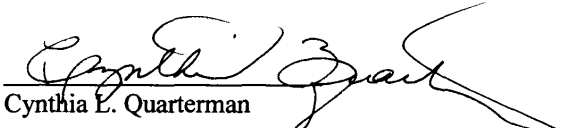
Kelvin J. Dowd
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036

A copy of the public version was served by hand on:

Andrew P. Goldstein
McCarthy, Sweeney & Harkaway, P.C.
2175 K Street, N.W., Suite 600
Washington, DC 20037

Nicholas J. DiMichael
Jeffrey O. Moreno
Thompson, Hine LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036

C. Michael Loftus
Andrew B. Kolesar III
Peter A. Pfohl
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036


Cynthia L. Quarterman