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BEFORE THE
SURFACE TRANSPORTATION BOARD

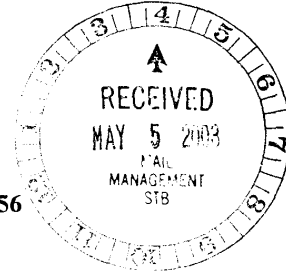
TEXAS MUNICIPAL POWER AGENCY,)
)
 Complainant,)
)
 v.)
)
 THE BURLINGTON NORTHERN AND)
 SANTA FE RAILWAY COMPANY,)
)
 Defendant.)

Docket No. 42056

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Office of Proceedings

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BNSF'S REPLY TO TMPA'S PETITION FOR RECONSIDERATION

Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby replies to the April 14, 2003 Petition for Reconsideration of Texas Municipal Power Agency ("TMPA"). TMPA's Petition for Reconsideration alleges that the Board's March 24, 2003 decision in this proceeding contains material error in the following eight areas: 1) the exclusion from the SAC analysis of certain revenue for three shippers; 2) the use of a transportation rate forecast prepared by the Department of Energy; 3) the assessment of the costs of certain public improvements; 4) the determination of fuel consumption for variable and stand-alone cost purposes; 5) the calculation of variable locomotive depreciation expenses; 6) the variable maintenance of way cost calculation; 7) the prescription of rates from two specific origins; and 8) the refusal to require establishment of private shipper car rates. As to item five, BNSF agrees that the Board's calculation was erroneous but this error did not affect the Board's findings

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relating to the reasonableness of the challenged rates. As to the remaining seven items, the Board's conclusions and calculations were not erroneous, as discussed in detail below.¹

I. The Board Did Not Err By Excluding Revenues For Three Texas and Louisiana Shippers

TMPA first takes issue with the Board's decision to exclude from the SAC analysis a portion of the revenues attributable to the movement of coal on the Gibbons Creek Railroad ("GCRR") to three Texas and Louisiana shippers.² The Board excluded revenues for these movements on grounds that TMPA assumed a different route for each movement than the route used in the real world but it failed to address "the many potential off-SARR operational implications (such as rerouting of traffic through the Houston area) nor fully addressed the variety of off-SARR costs (both capital costs and operating costs) that could be associated with rerouting this traffic." March 24 Decision at 23. The Board did not exclude all of the revenues associated with these three movements but instead assumed that the movements would be handled by the GCRR for that portion of the route used by those movements today that was replicated by the GCRR, *i.e.*, from the mines to Northport, NE. *Id.* at 24.

TMPA does not take issue with the Board's conclusion that the assumed rerouting of the three movements would impose onerous and costly burdens on the residual incumbent and that TMPA's case-in-chief included no discussion whatsoever of these burdens or costs. Rather, TMPA argues that BNSF addressed in its reply filing all of the costs that would have been

¹ The Board should treat this identification of issues as the summary required under 49 CFR § 1115.3(d). Given the large number of issues raised by TMPA in its Petition, further elaboration of the arguments and BNSF's position regarding the issues in this summary would not be helpful.

² The three shippers are LCRA/Austin's Fayette Plant at Halstead, TX, Reliant Energy's Parish Plant at Smither's Lake, TX, and Entergy's Nelson Plant at Mossville, LA.

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associated with the proposed rerouting and TMPA, on rebuttal, accepted all of those costs and included them in its rebuttal evidence.³ TMPA mischaracterizes the record. BNSF quantified certain costs that would be associated with the proposed rerouting but it never attempted or purported to address *all* of the costs and other ramifications of the substantial burdens that the rerouting assumption would impose on the residual incumbent's operations south of Iola, TX, the terminus of the GCRR.

For example, BNSF's reply evidence and workpapers make it clear that the *only* south-of-Iola operating cost that BNSF attempted to quantify was the cost to move cars for LCRA to the Smithfield car repair facility.⁴ TMPA did not even accept that cost.⁵ As the Board pointed out, there are a large number of other operating costs that would be imposed on the residual BNSF south of Iola as a result of rerouting the three movements, such as crew and equipment costs, that BNSF did not address in its reply evidence. March 24 Decision at 24, note 58. TMPA did not independently consider these costs because the thrust of TMPA's argument on rebuttal was that "BNSF's interchange preferences are irrelevant." TMPA Rebuttal at 44.

TMPA ignores the fact that BNSF's November 29, 2001 Motion to Dismiss discussed other ramifications of the rerouting of heavy coal trains through Houston, such as delays due to

³ Petition for Reconsideration of Texas Municipal Power Agency, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42056, at 6 (filed Apr. 14, 2003)("TMPA Petition").

⁴ Reply Evidence of the Burlington Northern and Santa Fe Railway Company, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42056, at III.C-8-9 (filed Jan. 15, 2002)("BNSF Reply"); BNSF electronic workpapers "gcerr_opexp_TMPA.xls" and "smithville_way_train.xls."

⁵ Complainant Texas Municipal Power Agency's Rebuttal Evidence, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42056, at 388 (filed Feb. 25, 2002)("TMPA Rebuttal").

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congestion, that BNSF did not attempt to quantify on reply, due to the complexity of the analysis that would be required. But BNSF did point out that the Board is already well aware of the congestion that exists in the Houston area even without the rerouting of coal unit trains through that area.⁶ TMPA ignored the issue altogether. It never considered the effect of existing congestion on the residual BNSF or the impact of increased congestion due to the rerouting of the three movements on other traffic. It defies credibility for TMPA to assert that its rebuttal evidence included all of the costs that would be associated with its assumed rerouting of the three movements through Houston.

TMPA's fallback position is that even if the Board is correct that TMPA failed to consider the ramifications of rerouting the three movements through Houston and therefore failed to justify rerouting of the movement south of Iola, TX, the Board did not have to exclude all of the revenues for the portion of the movement south of Northport, NE. According to TMPA, the Board could have assumed that the three movements were carried by the GCRR as far as Fort Worth, where they could be interchanged to the residual BNSF. This argument ignores TMPA's burden of proof and misstates the role of the Board in evaluating SAC evidence. It is not the responsibility of the Board to look for ways to fix errors in the complainant's presentation of SAC evidence, nor does the Board have the authority to do so. No party ever proposed such a routing of the three movements or presented any evidence at all that such a routing would be feasible. Indeed, such a route would require a new, fictional interchange between the GCRR and the residual BNSF at another major urban area, so the feasibility of such an assumption is highly doubtful. It would have been a clear abuse of discretion for the Board to

⁶ Defendant's Motion to Dismiss, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42056, at 19, note 39 (filed Nov. 29, 2001) ("BNSF Motion to Dismiss").

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have posited a new cross-over interchange at Fort Worth without any evidence that such an interchange would be feasible.

Given the flaws in TMPA's proposed rerouting of the three movements, the only evidence in the record that the Board could rely on was the actual route of movement of the three shippers' traffic, which was through Northport and Denver. This left the Board with two choices. The Board could have excluded the revenues from the three movements altogether on the theory that TMPA had failed to establish that the three movements could be handled by the GCRR as posited by TMPA. BNSF believes that this would have been the proper course. The second possibility, which the Board chose, was to assume that the three movements followed the existing route of movement but moved on the GCRR only to the extent the GCRR replicated the existing route. BNSF questions the Board's authority to make such a change in the traffic assumptions that were posited by TMPA. But whether or not the Board could make such a change, there is no basis for asserting that the Board committed material error by not making other changes (that were never proposed) or by not investigating other ways to ameliorate the impact of TMPA's flawed traffic assumptions. The complainant in a SAC case has the burden of proof, and it cannot expect the Board to modify the complainant's SAC assumptions to assist the complainant in meeting that burden.

II. The Board Properly Rejected TMPA's Forecast of GCRR Rates

TMPA argues that the Board improperly rejected TMPA's projection of stand-alone cost rates over the 2005-2020 time period and relied instead on a forecast prepared by the Department of Energy's Energy Information Administration ("EIA"). TMPA Petition at 8-9. TMPA claims that it submitted evidence of the likely trend in future rail rates based on actual data relating to the GCRR customers while the EIA forecast was a general one that did not focus on the GCRR

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shipper group. TMPA asserts that it was an error for the Board to use the EIA forecast since the Board has in the past estimated "future trends based on analyses of historical circumstances." *Id.* There are many problems with TMPA's argument.

First, BNSF showed in its reply evidence that TMPA's future rate estimates were not, in fact, based on historical trends but instead represented a dramatic change from historical trends. For example, BNSF showed that by simply extrapolating historic coal transportation rates from 1988 through 2001 forward to 2020, rates would be expected to *fall* 35-45% below 2001 levels. BNSF Reply at III.A-33, Figure III.A-3. By contrast, TMPA's forecast showed a 45% *increase* in rates by 2020 over 2001 levels. *Id.*; *see also id.* at III.A-28, 46. [REDACTED]

[REDACTED]

[REDACTED] *Id.* at III.A-49. [REDACTED]

[REDACTED] *Id.* at III.A-50.

If TMPA's premise were correct -- that the Board should have based its future rate estimate on an analysis of historical rates -- then the Board should have adopted BNSF's evidence on this issue. BNSF submitted a detailed study sponsored by the head of its coal marketing organization of actual contract rate renegotiations that have taken place since 1998. That study considered the initial contract rate levels, escalation provisions and terms of renegotiated rate contracts during that period. *Id.* at III.A-61-62. [REDACTED]

[REDACTED]

[REDACTED] *Id.* at III.A-59. [REDACTED]

[REDACTED]

[REDACTED] *Id.*

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Moreover, TMPA itself acknowledged the reasonableness of the EIA forecast. TMPA used the EIA forecast to project changes in traffic volume, so it was reasonable to use the same forecast as the basis for assumed changes in rate levels. BNSF Reply at III.A-71. TMPA acknowledged that EIA's forecast was representative of expected future GCRR traffic rates, TMPA Rebuttal at 288, and used the EIA forecast to demonstrate the reasonableness of its own forecast. *See, e.g.*, TMPA Rebuttal at 254 ("TMPA's forecast is quite consistent with EIA's"). TMPA referred to the EIA rate forecast as "the only truly independent forecast invoked by either party."⁷ TMPA has no basis to argue now that the Board erred in using the EIA forecast.

III. The Board Properly Ruled on the Public Improvement Costs for GCRR

A. GCRR's Road Crossing Costs Were Accurately Calculated

TMPA asserts that the Board erred by including in its SAC analysis the costs for any at-grade crossings south of Bridger Junction. TMPA Petition at 10. The Board accepted BNSF's evidence that the ICC Engineering Reports for the pertinent valuation sections showed that BNSF's predecessors incurred substantial investment costs for at-grade crossings that should also be incurred by the GCRR. BNSF Reply at III.F-107; BNSF.RP.WP.05864-95. TMPA argues that these costs should not be included in the SAC analysis because the ICC Engineering Reports only show the replacement cost of these assets, but do not indicate who *originally* paid for the crossings. TMPA Petition at 10. In fact, the case that TMPA cites makes it clear that the starting point for the Reports were the costs actually incurred by the railroads. *Texas Midland Railroad*, 75 I.C.C. 1, 116 (1918)("there is shown in our reproduction estimate [for crossings] the amount paid by the carrier"). This is consistent with the ratemaking purpose of those

⁷ Brief of Texas Municipal Power Agency, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42056, at 25-26 (filed June 27, 2002)("TMPA Final Brief").

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Reports, which was to establish the basis for determining a return on investments made by the railroads.

TMPA also erroneously claims that it presented evidence showing that the railroad lines at issue preceded vehicular traffic. In fact, the workpapers TMPA relies on to support its position relate to crossings by other railroads, not vehicular traffic as TMPA suggests. *See* TMPA Petition at 10, *citing* Opening Workpapers, Vol. 14, pp. 7272-74. The Engineering Reports are the best evidence of the facilities that the incumbent constructed and therefore the best evidence of the facilities that the stand-alone railroad must construct.

B. The Board Correctly Calculated Fencing Costs

In its Petition for Reconsideration, TMPA similarly claims that the Board should have accepted its assertion that only 20% of the line south of Bridger Junction is fenced and the Board should have rejected BNSF's evidence of fencing costs from the ICC Engineering Reports. TMPA Petition at 11-12. In opening, TMPA asserted that its witnesses inspected "portions" of the GCRR route and concluded that only 20% was fenced.⁸ However, TMPA did not provide any report, analysis, or other workpapers relating to its supposed inspection trip to support that conclusion. *See* BNSF Reply at III.F-101. On rebuttal, TMPA presented for the first time some photographs showing areas where there is no fencing. TMPA Rebuttal at 591; Workpapers Vol. III. Because these photographs were offered for the first time on rebuttal, the Board cannot rely on them as BNSF had no opportunity to respond. March 24 Decision at 107. In any event, photographs showing areas where there is no fencing do not support a claim that only 20% of the right-of-way is fenced, since there is no dispute that portions (25% according to BNSF) are not

⁸ Complainant Texas Municipal Power Agency's Opening Evidence, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42056, at 310-11; Workpapers Vol. 14 at 7263 (filed Oct. 15, 2001)("TMPA Opening").

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fenced. In addition, in its Reply Narrative, BNSF provided not only evidence from the ICC Engineering Reports that its predecessors had incurred costs for substantially more fencing than TMPA claimed, but also included copies of state laws and deeds with adjacent landowners showing BNSF's obligations to provide fencing. BNSF Reply at III.F-101-02; BNSF.RP.WP.05806-49. Thus, BNSF's evidence was the best evidence of record on GCRR's actual fencing needs.

IV. The Board's Variable and Stand-Alone Cost Fuel Consumption Determination Was Correct

TMPA asserts that the Board erred in its variable cost fuel consumption determination by failing to accept certain adjustments proposed by TMPA that would have reduced fuel consumption on TMPA trains by more than 30% from the consumption measured in a fuel consumption study carried out jointly by BNSF and TMPA. TMPA's expert participated directly in the study and confirmed that the results were reasonable. TMPA Opening at 93-94. However, beginning in its opening evidence, TMPA proposed a series of result-oriented and unjustified adjustments to these fuel consumption calculations to get around the inescapable conclusion of the fuel study that heavy unit coal trains have fuel consumption rates that are greater than system average fuel consumption on BNSF trains.

TMPA complains that the Board erred in concluding that the adjustments TMPA proposed were inconsistent with service during the period of common carriage. TMPA Petition at 13. But the Board had ample justification to reject TMPA's adjustments. BNSF demonstrated that the operations of the trains analyzed in the fuel study were representative of the trains

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moving during the common carriage period, so no adjustment was required.⁹ Moreover, as BNSF explained, TMPA's own evidence did not support the supposed relationship asserted by TMPA between the operating characteristics of a train and the amount of fuel consumed by it, which was the basis for TMPA's proposed adjustment. *Id.* at 49-50. The Board was clearly justified in accepting BNSF's evidence of fuel consumption. BNSF's calculations were based directly on the results of the jointly conducted fuel study, while TMPA's evidence was based on convoluted and unsupported manipulation of the fuel study data.

TMPA also complains about the Board's use of the same fuel consumption results for its stand-alone cost analysis and its variable cost analysis. However, in both its opening and rebuttal evidence, TMPA urged the Board to use its variable cost fuel consumption results in its stand-alone cost analysis. TMPA Opening at 195; TMPA Rebuttal at 380.¹⁰ BNSF agreed with that approach. BNSF Reply at III.D-3. The Board was correct in pursuing an approach that both parties requested.

V. TMPA Correctly States That The Board Erred In Inputs To Its Road Property Depreciation Spreadsheet

BNSF agrees with TMPA that the correct URCS value for the locomotive depreciation account should be [REDACTED] TMPA Petition at 14. That correction will decrease the variable costs by approximately one percent, which in turn will increase the Board's revenue/variable cost ratio. However, the Board did not rely on its variable cost calculation for any purpose other than

⁹ Rebuttal Verified Statement of Benton V. Fisher, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42056, at 51-52 (filed Feb. 25, 2002) ("BNSF Fisher Rebuttal V.S.").

¹⁰ It is misleading for TMPA to suggest that it made further adjustments to its variable cost fuel consumption data to adapt it for use in the SAC calculations over a route with different characteristics. TMPA proposed using the same consumption estimate for both variable cost and SAC purposes.

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to establish that it had jurisdiction to review the challenged rates; therefore, the proposed correction has no impact on that determination.

VI. The Board Properly Rejected TMPA's Maintenance-of-Way Cost Calculation Using the SFGT Formula

TMPA contends that the Board erred in rejecting its use of the speed factored gross ton ("SFGT") formula to calculate maintenance-of-way ("MOW") variable costs. TMPA Petition at 14. TMPA's basic argument is that the Board's use of the SFGT formula has become established precedent to which the Board is required to adhere. TMPA's argument is premised on a misunderstanding of the law. An agency may depart from its own prior decisions so long as it gives a principled rationale for doing so. *JSG Trading Corp. v. USDA*, 176 F.3d 536, 544 (D.C. Cir. 1999). The Board had abundant reasons to reject the SFGT model based on the evidence presented in this case and it fully explained the basis for its conclusion that the SFGT model does not produce an accurate adjustment to system average MOW costs.

On opening, BNSF pointed out numerous problems with the SFGT formula and why the ICC's prior validation in *San Antonio v. Burlington Northern R.R. Co.*, 1 I.C.C.2d 561, 572 (1986), did not justify the continued use of SFGT today.¹¹ Rather than attempting to show that the SFGT formula does produce accurate cost adjustments, TMPA chose to rely on precedent, asserting that "criticisms of the SFGT formula are at odds with the Board's precedents."¹²

¹¹ Opening Evidence of the Burlington Northern and Santa Fe Railway Company Opening Statement, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42056, at 11 (filed Oct. 15, 2001)("BNSF Opening"); Opening Evidence of the Burlington Northern and Santa Fe Railway Company Verified Statement of Benton V. Fisher, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42056, at 27-36 (filed Oct. 15, 2001)("Fisher Opening V.S.").

¹² Complainant Texas Municipal Power Agency's Reply Evidence, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co.*, Docket No. 42056, at 43 (filed Jan. 15, 2002)("TMPA Reply"); TMPA Rebuttal at 124.

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TMPA Reply at 43; TMPA Rebuttal at 124. Its only justification for the continued use of SFGT was that in the *San Antonio* case the ICC found a close correlation between the results produced by the formula and MOW expenses. TMPA Reply at 44. TMPA made no showing of whether SFGT results correlate with MOW variable costs today.

The Board's rejection of the SFGT model in light of the changes in railroad accounting and operating practices since the SFGT model was created was fully justified. As the Board explained in *West Texas Utilities Co. v. Burlington Northern R.R. Co.*, 1 S.T.B. 638, 678 (1996), "we use the system-average costs in our calculations except where a special study is clearly shown to be more representative of the service being provided." Adjustments to URCS are considered only "in specific cases where their superiority is proven." *Adoption of the Uniform Railroad Costing System As A General Purpose Costing System for All Regulatory Costing Purposes*, 5 I.C.C.2d 894 (1989). BNSF demonstrated that the SFGT model does not produce accurate or reliable results and TMPA made no showing that SFGT was more representative of MOW costs for the movement at issue than system average costs.

TMPA also argues that the Board's rejection of the SFGT model in this case is at odds with its use in some recent cases where the accuracy of the model's results were also challenged. But the prior cases involved different issues. There, the defendants urged the Board to adopt an alternative model for adjusting MOW costs, the Weighted System Average Cost ("WSAC") model, and further argued that the WSAC model was superior to SFGT. The Board rejected these arguments, citing the fact that the SFGT model had been validated in the past while the WSAC model had never been validated. *Wisconsin Power and Light Co. v. Union Pacific R.R. Co.*, Docket No. 42051, slip op. at 50-52 (served Sept. 13, 2001) ("WPL"). In this case, BNSF did not urge the Board to accept an alternative model, but rather urged the Board to apply system

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average MOW costs because no line segment adjustment could be justified. BNSF's argument here, in contrast to arguments before the Board in prior cases, was that the SFGT model did not produce segment-specific MOW costs that were superior to system-average costs. Since TMPA did not produce any evidence to the contrary, the Board correctly applied system-average MOW costs.

VII. The Board Correctly Limited Its Rate Prescription To The Two Origins From Which Coal Was Shipped Under The Challenged Rates

TMPA argues that the Board erred by refusing to extend its rate prescription to all 16 mine origins identified in an Appendix to Common Carrier Pricing Authority BNSF 90042. TMPA Petition at 17. TMPA asserts that "[t]he Board gave no explanation for its ruling limiting the rate prescription to Cordero and Caballo Rojo." *Id.* at 18. But the Board clearly explained its rationale for limiting the rate prescription. As the Board noted, the only mines from which traffic originated under the challenged rates were Cordero and Caballo Rojo. March 24 Decision at 10. Accordingly, the only data on the costs to provide transportation under the challenged rates were for movements from those two mines and the Board was able to calculate variable costs only for those two movements. The Board has no jurisdiction to assess the reasonableness of challenged rates until it has determined that the revenues for the movement exceed the revenue/variable cost threshold set out in the statute. Without variable cost evidence corresponding to movements under the challenged rates from other origins, it was not possible to carry out this threshold analysis and the Board simply had no authority to assess the reasonableness of rates from the other origins or prescribe rates for those movements. *Id.* This rationale is fully consistent with the Board's practice in prior cases. *WPL*, slip op. at 7.

TMPA also argues that the Board should have prescribed rates for all 16 mine origins covered by the challenged rate authority because, as a matter of policy, the Board should treat

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“[p]roducing regions like the Powder River Basin . . . as single origins, to accommodate the business realities under which all market participants operate.” TMPA Petition at 19. This argument ignores the Board’s jurisdictional constraint, discussed above, which requires a finding of the variable costs for particular movements before it has the authority to address the reasonableness of the rate for that movement. Moreover, TMPA’s reference to “business realities” has no factual predicate in the record. The only business reality to which TMPA alludes is the supposed desire of shippers to be able to shift transportation among mine origins, which would have no relevance to the Board’s rate prescription authority. In addition, the Board has already rejected the claims of coal shippers that the PRB should be considered a single origin for purposes of the Board’s rate prescriptions. *See West Texas Utilities Co. v. Burlington Northern R. R. Co.*, Docket No. 41191, slip op. at 3 (served Mar. 23, 2001).

VIII. The Board Correctly Held That BNSF Is Not Required To Establish Rates for Private Shipper Cars

TMPA asserts that the Board erred by refusing to require BNSF to establish rates for transportation of coal in TMPA-supplied railcars. However, it raises no arguments in the Petition in support of its claims that were not already presented to the Board in the proceedings below. As it argued below, TMPA claims again that it is entitled to rates in shipper-owned cars because “TMPA demonstrated BNSF’s service failures and the absence of any risk that BNSF’s cars would be idled.” TMPA Petition at 21. The Board correctly rejected TMPA’s claims.

On the question of service failure, BNSF demonstrated that there was no evidence that BNSF had insufficient cars to provide TMPA’s transportation. BNSF showed that TMPA’s purported service concerns either related to service provided under a prior contract, which is irrelevant here, BNSF Reply at I-36-37, or that it was due to congestion in the PRB and not to the unavailability of BNSF cars, *id.* at I-38. As to TMPA’s claim that BNSF should be required

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to provide a rate for service in shipper-owned cars because there was no risk that BNSF-owned cars would be idled, BNSF showed that this assertion, whether or not it was true, was irrelevant under the governing law. As the Board found, the Supreme Court in *Atchison, Topeka & Santa Fe Ry. v. United States*, 232 U.S. 199, 214 (1914) (“*Santa Fe*”) made it clear that:

Whatever transportation service or facility the law requires the carrier to supply they have the right to furnish. They can therefore use their own cars, and cannot be compelled to accept those tendered by the shipper on condition that a lower freight rate be charged.

Shippers Comm., OT-5 v. The Ann Arbor R.R. Co., 5 I.C.C.2d 856 (1989) (“*SCOT-5*”), stands for the same proposition:

As a corollary to their common carrier obligation, the railroads have always had the right to use their own cars in preference to privately owned cars . . . to strip the railroads of this prerogative, . . . would be contrary to the Interstate Commerce Act.

Id. at 857. The legal standard is clear: If the carrier can provide the common carrier service in its own cars, it is not required to provide service in shipper-owned cars.

TMPA has made it clear that its real concern is simply with the level of rates associated with service provided in the carrier’s cars. TMPA Final Brief at 29. The Supreme Court anticipated this argument in *Santa Fe* and found a carrier “cannot be compelled to accept those [cars] tendered by the shipper on condition that a lower freight rate be charged.” 232 U.S. at 214-15. The Board was correct in finding that it had no basis in this case to require BNSF to establish a rate for service in shipper-supplied cars.

IX. Conclusion

For the reasons set out above, the Board should reject TMPA’s Petition for Reconsideration. As to seven of the eight alleged errors, the Board’s decision was proper. The

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eighth error, relating to the calculation of locomotive depreciation, had no effect on the Board's decision.

Respectfully submitted,

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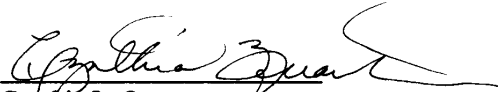
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Dated: May 5, 2003

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2003, a true and correct copy of the Reply to
TMPA's Petition for Reconsideration was served by hand on:

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