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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TEXAS MUNICIPAL POWER AGENCY,

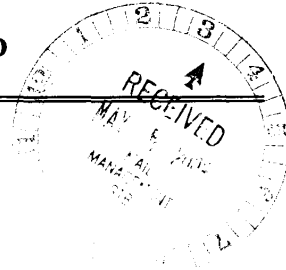
Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 42056



**REPLY IN OPPOSITION TO
BNSF'S PETITION FOR RECONSIDERATION**

Complainant Texas Municipal Power Agency ("TMPA"), pursuant to 49 C.F.R. Part 1104.13 (a), hereby replies in opposition to the Petition For Reconsideration of the Board's March 24, 2003 Decision in this proceeding filed by Defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF") on April 14, 2003 ("BNSF Pet."). BNSF's Petition should be denied.

I.

SUMMARY

BNSF first challenges the Board's decision to include the coal traffic moving to TXU's Big Brown Station in TMPA's stand-alone railroad (SARR) shipper group. BNSF claims that re-routing that traffic

and that Board precedent requires

See BNSF Pet. at 4-9. However, BNSF is wrong on both counts.

The TXU contract and agency precedent since the *Coal Rate Guidelines*¹ consistently has held that so long as the rights of third party carriers are respected, contract terms do not restrict the traffic grouping options otherwise available to complainants in coal rate cases. Since TMPA's evidence included all additional costs associated with handling the TXU traffic via an alternate route, inclusion of that traffic in the SARR shipper group was proper.

BNSF likewise is wrong in its assertions that TMPA did not present evidence supporting its costs for General & Administrative personnel on the SARR, and that the Board shifted the burden of proof on this issue to BNSF. *See* BNSF Pet. at 9-12. The record shows that in each instance cited by BNSF, the Board considered the evidence submitted by TMPA and found it reasonable *before* turning to BNSF's failure to support its own contrary position. Such an approach to weighing conflicting evidence is fully

¹ *Coal Rate Guidelines -- Nationwide*, 1 I.C.C. 2d 520 (1985), *aff'd. sub nom.*, *Consolidated Rail Corporation v. United States*, 812 F.2d 1444 (3rd Cir. 1987).

consistent with applicable principles of administrative law, and respects the allocation of burdens of proof under the *Coal Rate Guidelines*.

Third, BNSF seeks reconsideration of the Board's exclusion of the costs of certain bridges, road resurfacing and utilities relocation from the stand-alone calculation, on grounds that they constituted barriers to entry. *See* BNSF Pet. at 12-15. Here, too, BNSF's argument is without merit. There was no reliable evidence to support the claim that BNSF or its predecessor incurred the cost when the facilities in question originally were installed. Consistent with the *Coal Rate Guidelines*, it was proper to find that the SARR should not have to bear the costs either.

Finally, BNSF claims to have identified certain "technical errors" in the Board's calculations of variable and stand-alone costs. *See* BNSF Pet. at 15-18. However, the adjustments proposed by BNSF are neither necessary nor appropriate.

II.

ARGUMENT

A. The Board Properly Allowed Inclusion of the TXU Big Brown Traffic in the SARR Customer Group

BNSF's argument challenging the SARR's re-routing of traffic destined for TXU's Big Brown Plant rests upon a false premise:

See BNSF Pet. at 5. In fact,

and as TMPA explained in its December 18, 2001

Reply to BNSF's Motion to Dismiss,² the re-routing by TXU of its coal trains is permitted under a range of circumstances that could be satisfied by the SARR. For purposes of determinations under the *Coal Rate Guidelines*,
is sufficient to permit inclusion of
TXU's traffic in the SARR shipper group.

Assuming *arguendo* that it was necessary to disregard a contract routing provision to permit inclusion of the Big Brown traffic, such a ruling is justified under contestability theory and the *Coal Rate Guidelines*. As the Board's predecessor held there, "[t]he ability to group traffic of different shippers is essential to [the] theory of contestability....[W]e see no need for any restrictions on the traffic that may potentially be included in a stand-alone group." 1 I.C.C. 2d at 544. The *Coal Rate Guidelines* decision specifically rejected the argument that stand-alone cost presentations should be limited to the construction of a hypothetical competing railroad, and could not include other modes of carriage; *i.e.*, coal slurry pipelines. 1 I.C.C. 2d at 543 n. 60. Coupled with the agency's acknowledgment that contract traffic could be included in an SARR customer group (1 I.C.C. 2d at 544 n. 62), it is clear that the court-approved *Guidelines* always have contemplated that the terms of a contract between an incumbent defendant and its customer would not be an impediment to that customer's inclusion in an SARR traffic group.

² Reply In Opposition to Defendant's Motion to Dismiss, December 18, 2001 at 10-11.

Though the Board looks to the terms of existing contracts as evidentiary indicators of SARR traffic volumes and revenues, BNSF's implication (BNSF Pet. at 6) that the SARR must assume all the terms of each contract is wrong. Ever since its initial finding in *Coal Rate Guidelines* that contracts would be used as data sources "for ease of administration" (1 I.C.C. 2d at 544), the Board's decisions have made it clear that its reliance on contract rates and rate adjustment mechanisms is a matter of selecting the "best evidence" of record, not a rigid rule of contract enforcement. *See, e.g., Bituminous Coal -- Hiawatha, Utah to Moapa, Nevada*, 10 I.C.C. 2d 259, 268 n. 19 (1994) ("*Nevada Power II*").

BNSF misapplies a footnote from the Board's *West Texas Utilities*³ decision (1 S.T.B. at 658 n. 41) to claim that "[t]he Board's consistent approach in its SAC analysis is to assume that contract terms will be adhered to and not displaced." BNSF Pet. at 7. The traffic at issue in the *West Texas Utilities* footnote was to be tendered by the SARR to a *third party carrier* for ultimate delivery. Consistent with precedent,⁴ the Board ruled that the third party carrier's contract rights had to be respected by the SARR. Nothing in that observation speaks to

To the

³ *West Texas Utilities Company v. Burlington Northern Railroad Company*, 1 S.T.B. 678 (1996), *aff'd. sub nom., Burlington Northern Railroad Company v. Surface Transportation Board*, 114 F.3d 206 (D.C. Cir. 1997).

⁴ *E.g., Nevada Power II*, 10 I.C.C. 2d at 267.

contrary, the Board's consistent endorsement of the inclusion of cross-over traffic amounts to a *de facto* release of SARRs from the effects of contract terms covering minimum volume commitments, single-line service, and other typical features of utility coal transportation agreements. *See, Nevada Power II, supra*; Docket No. 42051, *Wisconsin Power & Light Company v. Union Pacific Railroad Company*, Decision served September 13, 2001 at 24.

BNSF's alternative claim

is equally specious. BNSF Pet. at 8.

Regardless of how

5

The Board already

has found (and BNSF does not challenge) that any additional costs occasioned by re-routing would be covered by the SARR, and that TXU would receive "the same or superior level of service" as it receives under its contract. *See* Decision at 22-23. The first prong of the Board's re-routing test clearly is met. *Cf. McCarty Farms, Et Al. v. Burlington Northern, Inc.*, 2 S.T.B. 460, 468 (1997).

⁵ BNSF offers a self-serving declaration by one of its marketing officers to attempt to introduce new evidence that could have been submitted (and rebutted) earlier in the case violates the Board's rules (49 C.F.R. Part 1115.3 (c)), and is impermissible as a matter of law given that BNSF's Petition is based on claims of material error. *See* F.D. No. 33388, *CSX Corporation, Et Al. -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corp.*, Decision served May 20, 1999 at 5.

This

Finally, BNSF derides the Board's handling of the Big Brown traffic re-routing issue as placing the agency "on a very slippery slope" toward undesired consequences in future cases. BNSF Pet. at 9. In actuality, however, it is BNSF's re-routing arguments that pose such a threat. As TMPA noted on Rebuttal, acceptance of BNSF's claim here quickly would lead to a significant erosion of the "essential" right⁶ of complainants to group traffic. *See* TMPA Reb. Narr. at 234. The Board correctly decided that TXU's Big Brown traffic could be included in the TMPA traffic group in its entirety. BNSF's request for reconsideration of that ruling should be denied.

**B. BNSF's Challenges to the Board's Determination
Of G&A Costs for the SARR Are Without Merit**

TMPA's estimates of staffing levels and costs for general and administrative employees of the SARR principally were sponsored by its witness Frederick Yocum, an individual with decades of experience managing Class I and regional railroads, including the Iowa Interstate Railroad, the Bangor & Aroostook System, the Chessie System (now CSXT) and the U.S. Railway Association. *See* TMPA Reb. Narr. at 418-19. These estimates were supported extensively in TMPA's Opening Workpapers. *See, e.g.*, Vol. 11 pp. 5938-5967.

When BNSF argued on Reply that more than twice as many G&A employees than Mr. Yocum found necessary would be required on the SARR, TMPA

⁶ *Coal Rate Guidelines*, 1 I.C.C. 2d at 544.

explained how and why its estimates were reasonable in light of the single-commodity/single-service nature of the SARR, as compared to the multi-commodity, multi-service, unionized Class I and large regional railroads that BNSF had used as templates for its inflated estimates. *See* TMPA Reb. Narr. at 417-439 and Workpaper references cited therein. For the most part, the Board in its Decision agreed that TMPA's staffing levels and cost estimates were reasonable, and rejected BNSF's criticisms as unsupported. *See* Decision at 95, 97-98, 102-04.

BNSF argues that the Board mis-assigned the burden of proof, and accepted TMPA evidence "based on its conclusion that BNSF had not demonstrated that TMPA's assumptions were infeasible." BNSF Pet. at 11. No such thing occurred. In each instance, the Board's rejection of BNSF's inflated staffing and expense estimates was *preceded* by a consideration of TMPA's evidence and a finding that it was reasonable and credible. Typical is the Board's discussion of human resources staffing:

With respect to human resources, TMPA provides for a Director of Human Resources and a Manager of Training, plus a secretarial pool of four. BNSF proposes a larger human resources staff of nine, including directors of Recruitment, Personnel, and Training, managers of Benefits and Personnel, and two personnel analysts. TMPA maintains that BNSF's proposed human resources staffing does not take into account the outsourcing and computerized human resources management systems that TMPA has included. We agree, and we conclude that the human resources staffing proposed by TMPA would be adequate.

Decision at 102. *See also*, Decision at 96 (Operations Department); at 97 (marketing staff); at 98 (engineering staff); at 100 (Law and Administration Department); at 104 (salaries).

Reconsideration is not warranted when a petitioner simply rehashes claims previously made or merely argues that the agency was wrong the first time in its evaluation of the record. *See*, F.D. No. 33726, *Western Coal Traffic League v. Union Pacific Railroad Company*, Decision served November 30, 2000 at 2; F.D. No. 32645, *Big Stone-Grant Industrial Development and Transportation, LLC -- Construction Exemption -- Ortonville, MN and Big Stone City, SD*, Decision served May 30, 2000 at 2-3. However, that is the essence of BNSF's claims as regards the Board's findings on G&A costs.⁷ The Board did not reverse the burden of proof as BNSF alleges; it simply accepted TMPA's G&A evidence as superior to that offered by BNSF. Consistent with its obligations under governing principles of administrative law, it also explained the reasons why. No basis exists for reconsideration of these findings.

⁷ BNSF seeks to compare the G&A expenses found by the Board as a percentage of total SARR operating expenses to a corresponding percentage reflected in a revised pro forma for the Dakota, Minnesota & Eastern Railroad. *See* F.D. No. 33407, *Dakota, Minnesota & Eastern Railroad Corporation Construction Into the Powder River Basin*, Decision served January 30, 2002 at 38. BNSF Pet. at 9 n. 12. The comparison, however, is meaningless. The SARR posited by TMPA is more than five times the length of the prospective DM&E, with correspondingly higher overall operating expenses. Given that many G&A functions and expenses do not vary directly with the length of a railroad (*e.g.*, a 200-mile road and a 1000-mile road each only need one CEO), it is hardly surprising that a smaller system would show G&A as a higher percentage of total operating expenses.

C. The Board Properly Applied Its Entry Barrier Principles to Bridges, Road Resurfacing and Utilities Relocation

BNSF makes two erroneous arguments with respect to barriers to entry.

First, BNSF claims that because it probably replaced its bridges over the years, the SARR should pay to construct the bridges even if that cost was not originally borne by BNSF. BNSF Pet. at 13-14. Second, BNSF argues that because it allegedly paid for at-grade crossings, the roads must predate the railroad and road surfacing and utility relocation now must be paid by the SARR. *Id.* at 15. BNSF's arguments are without merit.

With respect to bridges, it is established that replacement costs have no bearing on whether or not a particular cost is a barrier to *entry*. As the Board noted, "repairing or replacing bridges is more properly considered a maintenance expense." Decision at 140. The important consideration for construction cost purposes is whether BNSF or its predecessor had to build a particular bridge when it entered the railroad market. *See, West Texas Utilities*, 1 S.T.B. at 669 n.68. In this case, bridges crossing non-natural barriers properly were excluded because it was shown that the railroad predates the roads in the area (*see* TMPA Reb. Narr. at 536-539 and Op. Workpapers, Vol. 14, pp. 7272-7274), and BNSF did not demonstrate that it paid for the bridges when they originally were installed. BNSF is attempting once again to reargue a point well-settled by the Board. *West Texas Utilities*, 1 S.T.B. at 669-670; *Wisconsin*, Decision served September 13, 2001 at 85.

As for road surfacing, the Board held that the SARR was responsible for the costs of at-grade crossings because the ICC Engineering Reports assigned a value to the crossings in place at the time the Reports were prepared. As explained in detail in TMPA's Petition for Reconsideration, the Board's conclusion in this regard is erroneous. *See* TMPA Petition for Reconsideration, April 14, 2003 at 10-12. The Reports never have purported to determine whether a railroad *originally* paid for a crossing. *Texas Midland Railroad*, 75 I.C.C. 1, 115 (1918). Given that the Engineering Reports make no determination as to who bore the original cost of public improvements and BNSF provided no evidence that it paid for them, the Board should have adhered to its well-established position that the later entrant pays for the improvement. *See* Decision at 134. *See also, Wisconsin* at 92; *West Texas Utilities*, 1 S.T.B. at 672, 709.⁸

In its Petition, BNSF asks the Board to burden the SARR with more unproven costs for surfacing roads and utility relocation, based entirely on the Board's erroneous decision with respect to crossings. BNSF's logic appears to be that if the railroad paid for the crossing, the roads must predate the railroad, and the SARR also

⁸ It is not inconsistent to use the ICC Engineering Reports to determine grading quantities while disputing their usefulness for crossings payments. The ICC Engineering Reports are based on a detailed analysis of the terrain and how much earth, etc. would have to have been moved in order to create the existing right-of-way. Those quantities are then adjusted for the modern sized road bed, number of tracks, etc. The assumption that the parties make is that the railroad would pay to grade its own property, so there is no barriers to entry question. But for road crossings, it is well-established that the railroad preceded the roads, and so it reasonable to assume that the crossings were added some years later. Since, the ICC Engineering Reports were prepared in the late 1910s and 1920s, they show data for crossings, but they do not treat the question here of who paid for them.

must pay for road surfacing. However, on the record TMPA showed that the railroad predates the roads in the area. Up until now, BNSF has never disputed TMPA's evidence on this point. Indeed, BNSF studiously avoids any mention of when its lines actually were built. BNSF's previous silence on this point makes its sudden claim that the ICC Engineering Reports prove that its lines are newer than the roads spurious at best. The burden is on BNSF to show that it incurred such costs, and it has not met that burden.⁹

A similar flaw affects BNSF's arguments that the SARR should pay for electric utility relocations. *See* BNSF Pet. at 14-15. Again, BNSF never demonstrated on the record that it paid for any such relocation; it merely clouds the issue by arguing that the SARR should pay for utility service of some kind. *Id.* TMPA discussed this issue extensively in its Rebuttal Narrative (at 529-530), and noted the many flaws in BNSF's claims. Moreover, in *McCarty Farms* the Board determined that a stand-alone railroad could take advantage of encoded track circuitry, and that a fully wire-based solution was unnecessary. *McCarty Farms*, 2 S.T.B. at 518 n.115. The Board similarly accepted TMPA's evidence in this case. *See* Decision at 121.

⁹ BNSF also offered no evidence to show that it paid for road surfacing.

**D. The “Technical Corrections” Requested By
BNSF Are Neither Necessary Nor Appropriate**

BNSF closes its Petition with a request for “technical” corrections to the Board’s variable and stand-alone cost calculations. *See* BNSF Pet. at 15-18. TMPA takes no position with respect to the first point raised by BNSF, though it does not appear that a material change in the output of the DCF calculation is warranted. As for the other two “corrections,” neither is necessary or appropriate.

1. The MOW Total is Correct

Contrary to BNSF’s supposition, the Board did not use an incorrect value for MOW expenditures in its DCF model. As shown on the Board’s electronic workpaper “STB Restated MOW 1.xls,” the Board adjusted BNSF’s proposed calculation of track geometry testing costs for main lines and sidings to reflect two tests per year, as TMPA’s evidence showed, rather than the four tests assumed by BNSF. The result is annual MOW expenses of \$83,296,545, the figure properly used in the DCF model.

**2. The Weighting of Road
Property Expenses Was Proper**

Finally, BNSF argues that TMPA’s weighting procedure for the line-specific calculation of variable road property return and depreciation costs is inconsistent with the Board’s ruling in *Wisconsin* (Decision served May 14, 2002 at 4-6). BNSF’s citation, however, is to a discussion of MOW expenses, not road property costs. In fact,

the aggregated segment weighting approach used by TMPA and accepted by the Board is superior to the method advocated by BNSF.

TMPA's weighting approach reflects the actual use and traffic density for each discrete line segment. It is the actual traffic moving across a line segment that justifies the property investment and determines when the subject asset(s) must be replaced. The more traffic that traverses a rail line, the faster the assets are consumed and must be replaced. Likewise, additional expenditures are only justified by the density of traffic over the line. TMPA's weighting approach captures these effects and related economies, and the Board's acceptance of that approach was proper.

III.

CONCLUSION

For all the reasons set forth herein, BNSF's Petition For Reconsideration should be denied.

Respectfully submitted,

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Dated: May 5, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2003, I caused three (3) copy of the foregoing Reply In Opposition to BNSF's Petition for Reconsideration to be served by hand upon:

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