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April 14, 2003

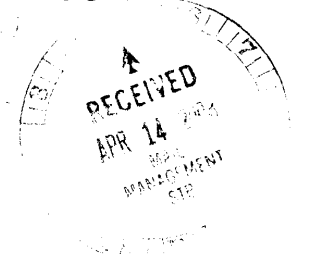
VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, D.C. 20423-0001

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Office of Proceedings

APR 15 2003

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FEE RECEIVED

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

APR 17 2003

Dear Secretary Williams:

**SURFACE
TRANSPORTATION BOARD**

Enclosed for filing in the above referenced proceeding please find an original and 10 copies of the Petition for Reconsideration of Texas Municipal Power Agency, along with a check in the amount of \$150.00 to cover the requisite filing fee. Additionally, please find 3 WordPerfect Diskettes, containing the filing in electronic form.

An extra copy of the Petition for Reconsideration also is enclosed. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

Kelvin J. Dowd
an Attorney for
Texas Municipal Power Agency

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

TEXAS MUNICIPAL POWER AGENCY,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 42056
	)	
THE BURLINGTON NORTHERN AND	)	
SANTA FE RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

PETITION FOR RECONSIDERATION

Complainant Texas Municipal Power Agency ("TMPA"), pursuant to 49 C.F.R. Part 1115.3, respectfully petitions the Board to reconsider its Decision served in this proceeding on March 24, 2003 ("Decision"), on grounds of material error. In support hereof, TMPA shows as follows:

I.

PREFACE AND SUMMARY

A lodestar principle underlying the stand-alone cost constraint of the Coal Rate Guidelines is that "railroads functioning in a noncompetitive market will be required to price as if alternatives to their services were available. That is, their rates will be judged against simulated competitive prices." Coal Rate Guidelines -- Nationwide,

1 I.C.C. 2d 520, 542 (1985). However, under the Decision, BNSF would be permitted to charge rates for coal service to TMPA's Gibbons Creek Station that exceed competitive market levels by a significant margin. TMPA respectfully submits that this result occurred because of a series of material errors in the Board's application of the Coal Rate Guidelines, in the context of the evidentiary record assembled in this case.

As explained in Part II, the Decision is deficient in at least eight (8) respects, each of which warrants reconsideration under 49 C.F.R. Part 1115.3.

Specifically:

1. The Board erred in its reduction of the revenues available to TMPA's hypothetical stand-alone railroad from three members of the Board-approved stand-alone shipper group.
2. The Board improperly rejected TMPA's shipper-specific forecast of future stand-alone revenues in favor of a non-representative, general forecast.
3. The Board departed from established precedent and inflated the costs of public improvements that would have to be borne by the hypothetical stand-alone railroad.
4. The Board erred in its calculation of variable and stand-alone fuel costs by refusing to adopt data adjustments needed to reflect actual train operations.
5. The Board mistakenly applied an incorrect unit cost value for variable locomotive depreciation expenses in its calculation of road property depreciation.
6. Without justification, the Board reversed two decades of its own precedent in rejecting use of the SFGT formula to calculate variable maintenance of way costs.

7. The Board's unexplained ruling limiting its rate prescription to only two of the 16 coal origins to which the challenged rate applies was legally erroneous.
8. The Board's endorsement of BNSF's refusal to establish rates for coal transportation in TMPA-supplied railcars was contrary to law and the weight of un rebutted evidence.

Each of these assignments of material error is addressed in detail in the balance of this Petition.

II.

ARGUMENT

1. The Board's Reduction of Stand-Alone Revenues
Available From Texas and Louisiana Shippers Was In Error

In the Decision, the Board accepted the shipper group that TMPA posited would be served by its hypothetical stand-alone carrier, the Gibbons Creek Railroad ("GCRR"), and specifically affirmed TMPA's right under the Coal Rate Guidelines to re-direct some shippers' traffic from the BNSF Front Range routing that they presently use to GCRR's higher density, alternative routing via Kansas City. See Decision at 17-19. However, finding that TMPA had not accounted for added costs to the GCRR and the "residual" BNSF resulting from the re-routing of three of these shippers,¹ the Board determined that this traffic would have to exit the GCRR at Northport, NE, "the point at

¹ The three shippers are LCRA/Austin's Fayette Plant at Halstead, TX; Reliant Energy's Parish Plant at Smithers Lake, TX; and Entergy's Nelson Plant at Mossville, LA.

which the GCRR route would diverge from the actual route of movement,” and truncated GCRR’s revenues accordingly. See Decision at 24. TMPA submits that this was in error.

In its November 29, 2001 Motion to Dismiss, BNSF argued that the re-routing of the three shippers’ traffic would cause the GCRR and the residual BNSF to incur additional costs. At that time, BNSF specified some of those costs. See Motion to Dismiss at 19-20. In its Reply Evidence, however, BNSF catalogued *all* of the capital and operating costs that it said were associated with the service issues alluded to in its Motion. See BNSF Reply Narr. at I-14; III.A-2 (summary); III.C-7 (operating expenses); III.F-131 (road property investment). BNSF’s Witness Klick’s Exhibit CK/JK-11 quantified these costs, and restated BNSF’s version of the GCRR’s stand-alone analysis to exclude the subject shippers’ traffic. Nowhere in its Reply did BNSF suggest that the added costs and improvements were not complete, nor did it have any incentive to understate those claimed costs.

On Rebuttal, TMPA accepted *all* of BNSF’s adjustments. See TMPA Reb. Narr. at 604. Since TMPA’s Rebuttal Evidence incorporated all of the on-line and off-line costs associated with re-routing that had been identified by either party, it represented the best evidence of record on this issue. Consistent with its treatment of analogous matters,² the Board should have accepted TMPA’s evidence and crafted the Decision accordingly. Instead, however, the Board revealed in the Decision for the first time that there were *other* costs that the Board believed had to be addressed, and on the basis of

² See, e.g., Decision at 46, 60 62, 68, 70 and 74 (“... we rely on BNSF’s evidence as the only other evidence of record,” even though that evidence was “undocumented”).

TMPA's failure to treat these heretofore unknown requirements, reduced the GCRR's revenues. See Decision at 24.

In an adjudicatory proceeding decided on the best evidence of record, an agency cannot go outside the record for dispositive findings without first affording the parties an opportunity to address the extra-record matters and (in TMPA's case) seek to rebut them. See City of Erie v. PAP's A.M., 529 U.S. 277, 298 (2000); Woldemeskel v. INS, 257 F.3d 1185, 1192 (10th Cir. 2001); Rivera-Cruz v. INS, 948 F.2d 962 (5th Cir. 1991). Yet that is the essence of the Board's ruling as regards the three Texas and Louisiana shippers. Rather than deciding the issue based on the record, the Board imposed new evidentiary requirements not advocated by either party without giving TMPA an opportunity to address them. This was error, and warrants reconsideration and a recalculation of stand-alone costs based on full revenue contributions from the shippers in question.³

In the alternative, assuming *arguendo* that the Board's decision to reduce the revenue contributions attributable to these shippers was rational, its determination that the traffic would have to exit the GCRR system at Northport, NE was not well-founded. While the GCRR operating plan shows the traffic departing its current BNSF routing at

³ In the Decision, the Board stated that TMPA had "argued that it need not account for added costs.... associated with handling certain movements to an off-SARR railcar repair facility that BNSF is contractually obligated to conduct..." Decision at 24. This is inaccurate. The record shows that TMPA did include the *added* costs resulting from its re-routing of the LCRA/Austin traffic, namely, the cost of installing a wye track to permit BNSF to enter the facility from the east. What TMPA objected to was absorbing BNSF's costs of operating its train to serve the facility, costs that BNSF presently bears under the existing routing. See TMPA Reb. Narr. at 387.

Northport, it also shows that the traffic could *return* to that routing much farther south, in the Fort Worth, TX area. Revising the GCRR system to have the traffic handed back to BNSF near Fort Worth⁴ would permit the traffic to move to its respective destinations without being routed through the Houston area, while minimizing the adverse revenue impact on the GCRR. At a minimum, reconsideration should be granted to make this adjustment to the Board's GCRR traffic and revenue determinations.

2. The Board Improperly Rejected TMPA's
Forecast of Rates for the GCRR Traffic Group

Board precedents confirm the superiority of evidence that is specific to the traffic at issue over national or regional averages. See F.D. No. 33407, Dakota, Minnesota & Eastern Railroad Corporation Construction Into the Powder River Basin, Decision served December 10, 1998 at 15. See also Docket No. 42038, Minnesota Power Inc. v DM & IR Railway Company, Decision served March 6, 2000 at 1. In its projection of stand-alone revenues over the 2005-2020 time period, TMPA drew from an analysis of actual changes in rates under contracts applicable to coal shipments by members of the GCRR traffic group. See TMPA Reb. Narr. Vol. I at 278-83. In the Decision, however, the Board rejected this evidence in favor of a general, regional forecast published by the Energy Information Administration (EIA). See Decision at 28. TMPA respectfully submits that this was error.

⁴ To the extent that an additional siding or other facility is needed to handle the interchange, ample evidence of the associated costs exists in the record. Indeed, the Decision is rife with examples of the Board revising the parties' calculations or adjusting components of the GCRR system.

The Board's stated rationale for not accepting TMPA's evidence was that "past rate changes[] are not the best evidence of what changes in rates would reasonably be expected in the future." Id. Elsewhere, however, the Board – or the parties with the Board's approval – employed the very same practice, and relied on estimates of future trends based on analyses of historic circumstances. See, e.g., Decision at 27 (2001-2004 contract revenues); at 75 (expected mine loading times); at 162 (capital cost recovery). This approach likewise finds support in Board precedent. See, e.g., Docket No. 42051, Wisconsin Power & Light Company v. Union Pacific Railroad Company, Decision served September 13, 2001 at 17; West Texas Utilities Company v. Burlington Northern Railroad Company, 1 S.T.B. 638, 661-62 (1996).

In this case, TMPA submitted a documented forecast of future rate changes for members of the GCRR traffic group (all of whom are current BNSF customers) based on actual changes in contract rates experienced by the same or similarly-situated BNSF customers. The Decision eschews this evidence in favor of a general EIA forecast that is not specific to the members of the GCRR group, and is not limited to rates set by BNSF. The Board's determination to rely on this less reliable and non-representative forecast should be reconsidered.

3. The Board's Stand-Alone Rulings on
Public Improvements Were In Error

a. The Costs of Road Crossings
Should Not Be Borne by the GCRR

The Board's conclusion that the GCRR should pay for all public improvements, such as at-grade crossings, south of Bridger Junction (Decision at 153-155) should be revisited. The conclusion is based entirely on the ICC Engineering Reports, which record values associated with those crossings, but do not establish that BNSF actually incurred the cost of installation.

The purpose of the ICC Engineering Reports was to develop the replacement costs of the railroad structures at the time of the survey. Texas Midland Railroad, 75 I.C.C. 1, 115 (1918) Significantly, they have never purported to determine whether a railroad *originally* paid for a crossing. Given that the Engineering Reports make no determination as to who bore the original cost of public improvements and BNSF provided no other evidence that it paid for them, the Board should have adhered to its well-established position that the later entrant pays for the improvement. Decision at 134. See also Wisconsin at 92; West Texas Utilities, 1 S.T.B. at 672, 709.

TMPA's analysis of the age of the replicated BNSF lines showed that those lines preceded vehicular traffic in the area. See TMPA Opening Workpapers, Vol. 14, pp. 7272-7274. BNSF did not raise any arguments to the contrary. Since the test for whether the GCRR must build a facility is whether the incumbent railroad had to pay for that facility when it was built, and there is no reliable record evidence that BNSF bore the

cost of the crossings, the Board's ruling that the GCRR should pay those costs should be reconsidered.

b. TMPA's Fencing Evidence
Was Properly Supported

The Decision rejected TMPA's evidence with respect to fencing south of Bridger Junction on the ground that it was "not supported." Decision at 152. This finding was materially erroneous. TMPA documented that its experts spent five days traveling the route from the PRB through Texas, viewing BNSF's lines in every state traversed by the GCRR. See TMPA Op. Narr. at 310, 379-380, 395; TMPA Reb. Narr. at 590. From that visual observation, TMPA's witnesses determined that at most, 20 percent of the line south of Bridger Junction was fenced Id. In addition, TMPA submitted photographs showing the lack of fencing at various points along these lines. See Rebuttal Workpapers Vol. 3, pp. 10630-10655.

BNSF's claims relied entirely on the ICC Engineering Reports; BNSF offered no other rebuttal to TMPA's onsite inspections. The inspection and photographs taken by TMPA's witnesses contradict the fencing quantities from the Engineering Reports, which is hardly surprising given the Reports' vintage.⁵ As the Board recently held:

While the ICC Engineering Reports show more
fencing of the ROW than PPL's evidence,

⁵ Contrary to the Board's suggestion (Decision at 152), there is nothing inconsistent about relying on the Engineering Reports for grading quantities, which have changed little if at all since the Reports were prepared, but not for fencing, which has changed significantly with the passage of time.

PPL's line inspection provides a more up-to-date assessment of the fencing needs today. Therefore, we use PPL's fencing figures as the better evidence of record.

Docket No. 42054, PPL Montana LLC v. The Burlington Northern & Santa Fe Railway Company, Decision served August 20, 2002 at 28. The Board should reconsider its ruling and follow the same course here.

4. The Board Should Reconsider
Its Fuel Cost Calculations

In its Rebuttal Evidence, TMPA explained how significant discrepancies between the operating profiles of the TMPA trains moving during the ordinary course of business and the trains that moved during the conduct of the fuel study required adjustments to the study data to produce accurate variable cost results. See TMPA Reb. Narr. at 194-197; Table II-A-42. The Board declined to accept these adjustments, alleging that they were based on data taken from a time when the TMPA traffic moved under contract. See Decision at 58. Without any further explanation, the Board then went on to use the same fuel cost figures in the calculation of stand-alone costs. Id. at 82. Both rulings were erroneous, and should be reconsidered.

Assuming *arguendo* that there was any evidence of meaningful differences between BNSF's operation of the TMPA trains while the movement was under contract and its operation under Common Carrier Pricing Authority 90042, the fact is that TMPA's fuel study adjustments *were* consistent with common carrier service experience. As TMPA's Rebuttal Table II-A-42 showed, a discrepancy existed between the way that

BNSF operated the trains during the study period, and the way that they were operated over the entire period from April to November, 2001, *after* expiration of TMPA's contract with BNSF. Given that the raw study data suggested an anomalous phenomenon – fuel consumption by the most efficient locomotives in the BNSF system at levels *above* system averages – there is ample reason to doubt the veracity of the raw data. TMPA corrected the anomaly through its adjustments, which were supported by train operating statistics from time periods when the traffic moved in common carriage. The Board should reconsider its failure to recognize the need for the adjustments for variable cost purposes.

Separately, reconsideration of the determination to impute variable fuel cost findings to fuel costs for the GCRR also is required. As the record shows,⁶ the fuel study trains moved over a very different route than that traversed by the GCRR. The study route is characterized by more severe grades and curves that would be expected to lead to relatively higher fuel consumption rates. TMPA conservatively accounted for these route differences through its fuel study data adjustments.⁷ The Board, however, applied unadjusted costs taken from a study of trains moving over the BNSF Front Range to the GCRR's Kansas City routing without any explanation. On reconsideration, the Board should reject this unsupported assumption and adopt TMPA's adjusted stand-alone fuel costs.

⁶ See, e.g., TMPA Op. Narr. at 178.

⁷ Id. at 195.

5. The Road Property Depreciation Error Should Be Corrected

In the Decision, the Board properly accepted TMPA's movement-specific calculation of variable return on road property costs. Decision at 56-57. However, the Board inadvertently overstated the gross ton-mile depreciation costs by using the wrong value for the deduction of system average locomotive depreciation. The Board's spreadsheets⁸ shows an URCS unit cost for D3L209C10 (cell D110 on level "Work__data"), the locomotive depreciation account, equal to \$0.00000105. However, the correct URCS value for this cell as reflected in both TMPA and BNSF's workpapers is \$0.00006377.⁹ By mistakenly deducting a smaller value for locomotive depreciation, the Decision overstates the remaining gross ton-mile variable costs. Upon reconsideration, the Board should correct this error and restate its variable cost conclusions accordingly.

6. The Board Improperly Rejected TMPA's Calculation of Maintenance-of-Way Costs Using the SFGT Formula

In every western railroad rate case beginning with the 1986 San Antonio decision and ending with the 2001 Wisconsin decision, the Board has calculated variable maintenance-of-way ("MOW") costs using the Speed Factored Gross Ton formula. In several mid-1990's cases, both parties agreed that the SFGT formula should be used.

⁸ See "Caballo Rojo VC March 6 2003.123" and "CORDERO VC March 6 2003.123."

⁹ The Board's unit cost for D3L209C10 is the same as TMPA and BNSF's. Upon observation, it appears that the value shown in the Board's spreadsheet for this account is the same as that for line D3L203C10, which suggests an inadvertent error.

More recently, railroad defendants have claimed that the SFGT formula is outdated and no longer produces reliable estimates of MOW costs. See Wisconsin at 50-53. The Board rejected these criticisms, however, and continued to use the SFGT formula. Id. The Board then stated that this issue was settled. Ex Parte No. 347 (Sub-No. 3), General Procedures for Presenting Evidence in Stand-Alone Coal Rate Cases, Decision served March 12, 2001 at 6.

In this case, the Board ignored both its precedents and its Ex Parte No. 347 (Sub-No. 3) admonition by rejecting the SFGT formula in favor of system average MOW costs. Its expressed reasons for doing so do not pass muster, and the Board should reconsider its ruling.

In the Decision, the Board accepted BNSF's argument that the SFGT formula was based on line densities and MOW practices dating from the 1970's, whereas conditions have since changed. However, BNSF's argument was identical in substance to the arguments made by Union Pacific in Wisconsin, which were rejected by the Board barely 18 months ago. Moreover, railroad defendants accepted use of the SFGT formula in other rate cases through the mid-1990's, notwithstanding changes such as the switch to depreciation accounting. The Decision does not identify a single reason for abandoning SFGT that had not already been raised before and rejected by the Board.¹⁰

¹⁰ The Board's adoption of a new rule and giving it retroactive application to TMPA's detriment in this case, also was improper under holdings such as Williams Natural Gas Company v. FERC, 3 F.3d 1544 (D.C. Cir. 1993).

The Decision purports to distinguish the precedential support for SFGT by offering that here, for the first time, a railroad was arguing for the use of URCS system-average MOW costs, rather than an alternative formula. But this is a distinction without a difference; the obsolescence argument has been the same in all cases. The Board recognized in this very proceeding that movement-specific costs for unit coal trains traveling over heavy density lines are likely to be lower than system-average costs.¹¹ Virtually all of the western rate cases where the SFGT formula has been accepted by the Board involved coal movements over the high-density rail lines emanating from the Powder River Basin, where economies of scale and density are acknowledged to produce unit costs lower than system averages. It was incumbent upon BNSF, as the party arguing for a departure from precedent, to demonstrate that reliance on system-average costs produces results comparable to actual MOW costs for unit-train coal traffic. It did not even attempt such a demonstration.

Finally, the Board stated that the record does not contain evidence “showing that the SFGT model produces MOW expenses that are comparable to current actual MOW costs for any line,” though it acknowledges that such a showing was made in San Antonio, which involved most of the same lines at issue here. Decision at 55-56.

However, the record does contain evidence that the formula has been revised and updated to reflect changes in maintenance practices, heavier wheel loads and traffic densities. See

¹¹ See Decision served February 9, 2001 at 3 (“TMPA correctly notes that adjustments to a defendant carrier’s system-average costs are appropriate to reflect the economies and efficiencies that are associated with high-volume, repetitive movements such as the unit-train service at issue here.”)

TMPA Op. Narr. at 69-71; TMPA Reply Narr. at 44-45. Moreover, TMPA submitted evidence demonstrating that BNSF's MOW cost per gross ton-mile has decreased since 1983, despite an increase in average density per mile. TMPA Reply Narr. at 45-48. Elsewhere, the Board has pointed to similar evidence as a basis for continued acceptance of the SFGT formula. Wisconsin at 51 n.98. The same result should have been reached here.

7. The Board Improperly Limited the Scope
 Of Its Rate Prescription to Two Origins

TMPA's Complaint challenged the reasonableness of BNSF's common carrier rates from the 16 mine origins collectively established by BNSF in Common Carrier Pricing Authority BNSF 90042. See Complaint, Exhibit A at 3. However, the Board limited its rate prescription to only two of those origins: Caballo Rojo and Cordero.¹² Decision at 33. This was error, and should be corrected on reconsideration.

The scope of the Board's regulatory authority and responsibility extends to all the terms and conditions of a carrier's rate publication:

If the Board determines...that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable.

¹² The Board inaccurately stated that only 4 mine origins were named in TMPA's Complaint. In fact, the Complaint challenges the rates and seeks prescriptions for all the origins named by BNSF in its pricing publication. See TMPA Complaint, 7, Exhibit A.

49 U.S.C. § 10701 (d) (1) (emphasis supplied). That a shipper has moved traffic from all origins named in a tariff or other publication has never been a precondition to that shipper's entitlement to a rate prescription that governs all of the origins to which the challenged rate applies.¹³ Indeed, rate reasonableness determinations routinely have been made in instances where the shipper has not moved *any* traffic under the challenged rate(s). See 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., 358 I.C.C. 537 (1977); Incentive Rate on Coal - Gallup N.M. to Cochise, Ariz., 357 I.C.C. 683 (1977).¹⁴ The Board's decision is contrary to this controlling precedent.

The Board gave no explanation for its ruling limiting the rate prescription to Cordero and Caballo Rojo,¹⁵ and its failure to explain its departure from applicable precedent is reversible error. See Burlington N. Inc. v. ICC, 661 F.2d 964, 972-73 (D.C. Cir. 1981). Accord Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962).

¹³ Compare West Texas Utilities, 1 S.T.B. at 644 (rate relief limited to a single origin because "[t]he original complaint referred only to Rawhide, as does Tariff 4232.")

¹⁴ See also N. E. Kentucky Coal Bureau v. Chesapeake & Ohio Ry., 201 I.C.C. 165 (1934); S. Agric. Chem. Corp. v. Cleveland, Cincinnati, Chicago & St. Louis Ry., 109 I.C.C. 227 (1926).

¹⁵ The Board offered only the most summary justification for refusing to consider TMPA's variable cost evidence respecting other origins. Decision at 10. Even so, the fact that the Board felt it could not determine the variable costs associated with service from other, adjacent mines is irrelevant to its failure to extend the stand-alone cost prescription to all the origins covered by BNSF's pricing publication; by definition, rates based on stand-alone costs are not predicated on actual traffic movements.

The fact that the Decision left open the possibility of future relief in another proceeding once TMPA moves traffic from other origins is a wholly inadequate substitute for a reasoned explanation for the Board's determination to ignore current law and turn its back on 20+ years of jurisprudence. An agency cannot hide behind the possibility of a future remedy in declining to make findings that support its decision. See Nat'l Elec. Mfg. Ass'n v. United States, 407 F.Supp. 598, 604 (W.D. Penn. 1976) ("to require plaintiffs to repeat this evidence in a separate 'more comprehensive' proceeding, while dismissing the present evidence as insufficiently probative, is an abuse of discretion").¹⁶

The Board's ruling on the scope of its prescription also is severely questionable as a matter of policy, as it contradicts the interests of fair, expedient and complete resolutions, of rail rate disputes. Coal shippers routinely shift origins from year to year, or even within the same year. Producing regions like the Powder River Basin are marketed as single origins, to accommodate the business realities under which all market participants operate. The Board's ruling disrupts this market structure, as it effectively requires TMPA and other shippers to challenge the same rate over and over each time a coal source changes, even if it simply moves to an adjacent mine.¹⁷ A regulatory system

¹⁶ BNSF refused to submit cost evidence on traffic that had not actually moved since the establishment of BNSF 90042, citing Wisconsin. See BNSF Reply V.S. Fisher at 5-6. Wisconsin is inapplicable, however. There, the complainant limited its evidence to mines from which it was receiving coal when it filed its case, and the Board limited its review to the specific origin-destination pairs for which the complainant presented cost evidence. In Wisconsin it was the complainant's evidentiary focus that dictated the Board's conclusions concerning the scope of its prescription. Id. at 7.

¹⁷ Future challenges to individual rates necessarily would involve new procedural schedules; renewed discovery; motions and further decisions addressing the proper format of
(continued...)

characterized by such burdensome and piecemeal litigation is unduly prejudicial to all parties, and clearly undermines the National Rail Transportation Policy. See 49 U.S.C. §10101(2) and (15).

8. The Board's Endorsement of BNSF's
Refusal to Establish Private Car
Rates Cars Was Materially Erroneous

In rejecting TMPA's complaint against BNSF's refusal to establish rates for movements in TMPA-supplied railcars, the Board relied on Atchison, Topeka & Santa Fe Ry. v. United States, 232 U.S. 199, 214 (1914). However, while that decision *generally* supports a carrier's right to use its own equipment, it also clearly holds that when the service provided by the carrier is not of equal value, the carrier has no right to prevent the shipper from adequately accommodating its own needs. Id. at 296. TMPA presented ample evidence that BNSF had not consistently met TMPA's equipment needs on a timely basis, and threatened the adequacy of the coal inventory at Gibbons Creek as a result. See, e.g., TMPA Reb. Narr. at 118; Reb. Workpapers Vol. 8, pp. 4126-4131.

Likewise, the Decision over-simplifies the ICC's ruling in Shippers Committee, OT-5 v. Ann Arbor R.R., 5 I.C.C.2d 856 (1989). There, the right of a carrier to utilize its own cars was tied to the carrier's interest in not having its cars idled while traffic moves in private equipment. See 5 I.C.C.2d at 866. TMPA's undisputed evidence

¹⁷(...continued)
evidentiary presentations, scope of evidence, etc.; and additional evidentiary pleadings -- all causing unnecessary burdens on the parties, enormous administrative pressures on the Board, and undermining the goals of Ex Parte No. 638.

established that BNSF's cars would not be idled; to the contrary, TMPA Rebuttal Exhibits III-I-1 through 5 and Workpapers Vol. 8 pp. 4311-4312 showed that BNSF would be able to shift any railcars displaced by TMPA cars directly to revenue service for new business, other existing business, or make-up service under shipper contracts.

Consistent with governing law, TMPA demonstrated BNSF's service failures and the absence of any risk that BNSF's cars would be idled. Therefore, the Board should reconsider its ruling and prescribe maximum reasonable rates for movements in TMPA-supplied railcars.

III.

CONCLUSION

For all of the foregoing reasons, the Board should reconsider its March 24, 2003 Decision in this proceeding, and upon reconsideration serve a new decision and rate prescription consistent with the showings made in this Petition.

Respectfully submitted,

TEXAS MUNICIPAL POWER AGENCY

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OF COUNSEL:

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Washington, DC 20036

Dated: April 14, 2003

Attorneys for Complainant

Certificate of Service

I hereby certify that on April 14, 2003, I caused three (3) copies of the foregoing Petition for Reconsideration to be served by hand upon:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Steptoe & Johnson
1330 Connecticut Ave., N.W.
Washington, D.C. 20036


Kelvin J. Dowd