

STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

Brooke L. Gaede
202.429.6467
bgaede@step toe.com

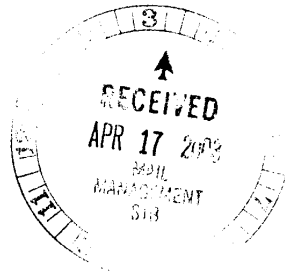
1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Telephone 202.429.3000
Facsimile 202.429.3902
www.step toe.com

April 17, 2003

via Hand Delivery

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423



207650

STB Proceedings
APR 17 2003
STB

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

Dear Secretary Williams:

Attached for filing in the above-captioned case on behalf of defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") are the original and 10 copies of the public version of BNSF's Petition for Reconsideration. A confidential version of this Petition was filed under seal on April 14, 2003. Also attached is a diskette containing a copy of the public version of BNSF's Petition in Microsoft Word.

Sincerely,

A handwritten signature in black ink, appearing to read "B. L. Gaede".

Brooke L. Gaede

Enclosures

cc: Counsel for Complainant

- 1 -

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

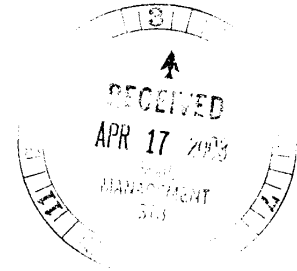
BRUSSELS

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



Office of Proceedings

APR 1 2003

Office of Public Utility Management

BNSF'S PETITION FOR RECONSIDERATION

Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby requests pursuant to 49 C.F.R. §1115.3 that the Board reconsider its March 24, 2003 finding in this proceeding that the challenged rate exceeds a reasonable maximum rate.

This petition for reconsideration focuses on the Board's conclusions in three important areas of SAC methodology, namely the principles governing traffic selection, the complainant's burden of proof in establishing the reasonableness of its SAC assumptions, and the exclusion of costs deemed to be entry barriers. These are recurring issues in SAC cases and they have a significant effect on the outcome of a SAC analysis in this case. BNSF also requests that the Board correct certain calculation errors in the Board's application of the SAC test and in its determination of the variable costs of the issue traffic movement.

First, on the question of traffic selection, the Board erred in concluding that "the determination of what traffic may be included in a SAC analysis should not be controlled by the specific language of a contract. . . ." March 24 Decision at 19. In prior SAC cases, the Board has correctly found that the hypothetical stand-alone railroad steps into the shoes of the

incumbent with respect to the terms of the incumbent's transportation contracts and is, like the incumbent, bound by the terms of existing contracts. *West Texas Util. Co. v. Burlington Northern R.R.*, 1 S.T.B. 638, 657 (1996) ("*WTU*"). It would be contrary to SAC principles for the stand-alone railroad to assume a rerouting of traffic that would be inconsistent with specific contractual provisions that are binding on the incumbent. In particular, the Board erred in not giving effect to the routing provision in BNSF's contract with Texas Utilities covering the Big Brown movement. Exclusion of the Big Brown movement from TMPA's SARR would result in a finding that revenues on the Madill, OK to Iola, TX segment of the SARR fail to cover the collective attributable costs of handling traffic over that segment.

Second, TMPA presented no verifiable evidence supporting its assumption that the stand-alone railroad could operate with low G&A staffing levels, low staff salaries and high employee productivity rates that are totally unprecedented in real world experience. If a complainant seeks to reduce SAC costs by positing a hypothetical railroad that achieves unprecedented efficiencies, it must present specific evidence showing how the efficiencies would be achieved. TMPA did not present such proof. Instead, the Board put the burden on BNSF to demonstrate that specific G&A staffing assumptions were infeasible, thereby improperly reversing the burden of proof in SAC proceedings.

Third, the Board misapplied the concept of entry barriers in assessing the cost of constructing certain bridges over highways and the cost of resurfacing roads and relocating utilities affected by the line construction. The Board's entry barrier rule is that the stand-alone railroad should not have to incur investment costs for investments that the incumbent did not make. In each of the three cases identified above, the incumbent did incur capital investment

costs. It would therefore be improper under the Board's own entry barrier rule to exclude the comparable costs that the hypothetical railroad would incur today.

Finally, BNSF identifies two technical errors in the Board's SAC calculations and one error in the Board's determination of the variable costs of the issue traffic movement. Those calculation errors, as well as the more significant errors in the application of SAC principles, are described below.

I. The Board Erred in Permitting TMPA to Reroute the TXU Big Brown Movement to the Stand-Alone Railroad Contrary to the Terms of the Governing Rail Transportation Contract

In its reply evidence, BNSF showed that certain non-issue traffic movements selected by TMPA for inclusion in its traffic group are governed by contracts that contain provisions precluding the rerouting of these movements.¹ The Board rejected BNSF's argument. It stated:

[T]he determination of what traffic may be included in a SAC analysis should not be controlled by the specific language of a contract that has been drafted (or its terms set) at least in part by the defendant railroad. Rather, our determination is based on (1) a factual assessment of whether the transportation needs of the shipper would be met by the SARR and (2) a more fundamental consideration of whether the underlying purpose and objectives of the SAC test would be met.

March 24 Decision at 19. In accordance with the foregoing, the Board declined to give any effect to the routing provisions of contracts governing several movements that BN contended had been included improperly in TMPA's traffic group.²

¹ For purposes of this appeal, BNSF focuses solely on the issue of rerouted traffic and does not challenge the Board's ruling regarding single-line movements that were converted to interline movements by including them in the SARR as cross-over traffic. March 24 Decision at 18.

² The Board declined to give effect to the specific routing provisions in the contracts for TXU's Big Brown plant, Reliant Energy's Parish plant, and Entergy's Nelson plant.

The Board's ruling that it would disregard the routing provisions of contracts constituted material error, particularly as that ruling applied to the movement of coal to TXU's Big Brown electric generating station. [REDACTED]

A. The Board's Precedents and the Logic of the SAC Test Require the Board to Give Effect to the Contractual Routing Provision

There is no dispute that the routing provision of the TXU/BNSF contract for movement to the Big Brown plant unambiguously provides for the traffic to move on a different route from that chosen by TMPA for its SARR. [REDACTED]

[REDACTED] This provision should preclude TMPA's inclusion of the Big Brown movement in the SARR traffic group, at least for movement beyond Northport.⁴

³ Confidential Rail Transportation Agreement [REDACTED] at 5 (emphasis added). This contract is in the record as Exhibit 5 to BNSF's November 29, 2001 Motion to Dismiss.

[REDACTED] *Id.*

⁴ In its *TMPA* decision, the Board rejected TMPA's attempt to reroute certain other movements because of the adverse effect of that rerouting on the residual incumbent's operations, but the Board permitted inclusion of those movements as cross-over movements that would operate on the SARR between the origin and the fictional interchange at Northport, Nebraska.

The Board has stated that where the complaining shipper selects contract movements for inclusion in the stand-alone traffic group, the “the SAC analysis assumes that [the SARR] would replace [the defendant carrier], that is, step into the shoes of [the defendant carrier] under existing transportation contracts.”⁵ The Board’s attempt in its *TMPA* decision to limit the applicability of this broad statement does not alter the fact that it is a recurring and well established feature of the Board’s SAC analysis to assume that contract provisions will apply to the SARR in the same way they apply to the real world defendant. Indeed, one of the most important evidentiary features of the Board’s SAC analysis is the assumption that contract provisions governing rates and contract rate adjustment mechanisms are used to determine the revenues available to the stand-alone railroad.⁶

In its *TMPA* decision, the Board ignored precedent cited by BNSF to support the proposition that where there is an explicit contract provision that applies to the routing of non-issue traffic, the contractual routing provision must be adhered to.⁷ In the *WTU* case, the complainant sought to route all of the traffic destined for Southwestern Public Service Company’s Tolk plant on the SARR to Amarillo, in contravention of a contract provision stating that 75% of the traffic would be interchanged at Denver. The Board rejected the complainant’s effort to benefit the SARR by routing all the traffic to Amarillo:

WTU’s SAC presentation assumes that WTRR would interchange all of the Tolk traffic at Amarillo. The existing transportation contract, however, specifies that 75% of this traffic is interchanged by BN at Denver, and only 25% at Amarillo. Our

⁵ *WTU*, 1 S.T.B. at 638, 657 (1996).

⁶ See, e.g., *Wisconsin Power and Light Co. v. Union Pacific R.R.*, Docket No. 42051, slip op. at 26 (served September 13, 2001). Other provisions adhered to are volume provisions and termination dates. See, e.g., *WTU*, 1 S.T.B. at 657-61.

⁷ See BNSF’s Motion to Dismiss, Nov. 29, 2001 at 111-12.

SAC analysis assumes that WTRR would replace BN in these movements, but it does not assume that the contract would be displaced or its terms changed, as WTU suggests.⁸

The Board's consistent approach in its SAC analyses is to assume that contract terms will be adhered to and not displaced. This assumption has become an essential element of the SAC construct and backing away from it, as the Board appears to have done in its *TMPA* decision, would be arbitrary and capricious.

B. Rerouting the Big Brown Movement Would Disregard the Shipper's Needs and Preferences

The Board's decision to permit inclusion of the rerouted Big Brown movement in TMPA's traffic group is not only inconsistent with the Board's precedent of adhering to contract terms, it is also improper under the first prong of the traffic selection test that the Board itself announced in *TMPA*, that test being "a factual assessment of whether the transportation needs of the shipper would be met by the SARR."⁹

⁸ *WTU*, 1 S.T.B. at 658 n.41.

⁹ March 24 Decision at 19. BNSF does not address here the second prong of the traffic selection test announced by the Board in its *TMPA* decision, *i.e.*, "whether the underlying purpose and objectives of the SAC test would be met" by including the non-issue traffic in question. *Id.* Arguably the Board could and should exclude the rerouted Big Brown traffic on the basis of the fundamental SAC principle that "[a] shipper should not seek to have its rate reduced by shifting any part of the costs of the lines or facilities that it needs onto traffic that does not use those lines or facilities." *PPL Montana v. The Burlington Northern and Santa Fe Railway Co.*, Docket No. 42054 slip op. at 6 (served March 24, 2003); *see also Arizona Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company*, STB Docket No. 42058, slip op. at 2 (served Aug. 20, 2002) ("revenues from non-issue traffic should not be relied upon to contribute to the costs of line segments or facilities that the non-issue traffic would not use.")

This fundamental SAC principle regarding cost sharing could apply here to exclude the rerouting of the Big Brown traffic. However, BNSF acknowledges that it did not present evidence related to this point in its Reply evidence, which was filed before the Board's statements quoted above. Because BNSF did not raise this issue on reply, it does not allege it as a point of error for purposes of this Petition.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁰ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹¹

The Board's decision to disregard the specific language of the contract was based on its view that the "contract has been drafted (or its terms set) at least in part by the defendant railroad." March 24 Decision at 19. The import of this statement is unclear, but the Board apparently reasoned that if a particular contract provision was included to benefit the incumbent railroad, then the stand-alone railroad could choose to ignore it. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁰ Brautovich V.S.at 1.

¹¹ *Id.*

██████████ The Board suggests that it can compensate for one of these factors, car maintenance expense, by calculating the additional car maintenance costs that TXU would incur and including them in the SAC analysis as an offset against revenues. Circumventing existing contractual provisions in this manner would place the Board on a very slippery slope by inviting increasingly fanciful traffic selections by complaining shippers.

For the foregoing reasons, the Board should disallow the rerouting of the Big Brown movement and conduct its threshold cross-subsidy analysis of the Madill/Iola line segment anew, excluding the Big Brown revenues from that analysis. As BNSF explained in its Motion to Dismiss, the result of that analysis should be a finding that the revenues from remaining traffic on the Madill/Iola line segment do not cover the collective attributable costs of handling that traffic over the line segment and therefore TMPA's complaint should be dismissed.

II. The Board Should Have Rejected TMPA's G&A Cost Assumptions Because TMPA Failed To Prove They Were Reasonable

The two primary components of G&A costs are the number of non-operating employees required to support SARR operations and the salaries paid to those employees. TMPA did not carry its burden of demonstrating that its assumptions in either area were reasonable.¹² The Board should have accepted BNSF's cost assumptions in these areas because they were supported by extensive reference to real world experience.

TMPA's staffing assumptions were based entirely on a general description of G&A functions provided by TMPA's witness, Mr. Yokum. See TMPA Opening Nar. at 214-225. TMPA presented no comparative evidence or other data showing that the SARR could function

¹² TMPA sponsored G&A costs that were 3.68% of total operating costs while the Board's restated G&A costs were only 3.25%. TMPA's G&A percentage was far less than the 16-22% the Board found was reasonable for the proposed DM&E. *Dakota, Minnesota & Eastern R.R. Corp., Construction Into The Powder River Basin*, STB Finance Docket No. 33407 (served January 30, 2002).

with the staff posited by Mr. Yokum. In reply, BNSF presented evidence comparing the hypothetical SARR with several real world railroads, including large and small Class I railroads and short-line railroads, and showed that TMPA's assumed staffing levels and employee productivity were unprecedented and unachievable. BNSF Reply Nar. at III.D-36-44. The Board improperly disregarded BNSF's data on real world railroads.

The *Guidelines* clearly contemplate that real world evidence should be the starting point for SAC calculations. The *Guidelines* specifically require that the complainant posit a hypothetical railroad that would be "feasible" and further require that the complainant's evidence supporting SAC assumptions be "verifiable."¹³ While a complainant is not required to posit a SARR that is a replica of existing railroads, the complainant does have the burden of justifying SAC assumptions that are inconsistent with real world conditions. If the defendant shows that the stand-alone railroad is assumed to operate more efficiently than any real world railroad has ever operated, then the complainant must be required to present specific and verifiable evidence showing how the stand-alone railroad would achieve those efficiencies. It is inconsistent with the *Guidelines* to accept a complainant's mere assertion that the stand-alone railroad would achieve unprecedented efficiencies.

Real world comparisons are in fact highly relevant to any assessment of TMPA's G&A assumptions. To take an example, TMPA assumed that the SARR would serve a subset of BNSF's existing PRB coal shippers. BNSF presented evidence relating to the actual marketing efforts that BNSF undertakes to maintain those same customers. BNSF Reply Nar. at III.D-58. The Board has previously found that the incumbent's experience is relevant to determining SAC

¹³ *Coal Rate Guidelines*, 1 I.C.C.2d 520, 543 (1985).

costs when the SARR is assumed to replicate the incumbent's traffic base.¹⁴ TMPA offered no evidence at all supporting its assumption that the SARR could maintain those same customers with less marketing effort. Indeed, BNSF's experience most likely understated the necessary level of marketing activity for the SARR since the SARR would be required to deal not only with the shippers but also with the residual incumbent. BNSF Reply Nar. at III.D-57. Under these circumstances, it was clearly inappropriate to assume that the SARR would be feasible with fewer marketing resources than the BNSF has today to serve the same shippers included in the SARR shipper group.

The Board's rejection of BNSF's G&A staffing evidence was based on its conclusion that BNSF had not demonstrated that TMPA's assumptions were infeasible. *See* March 24 Decision at 97, 100. But this turns the burden of proof on its head. The defendant in a SAC case does not have the burden of demonstrating that the complainant's assumptions are infeasible. Instead, the complainant has the burden of demonstrating the feasibility of its assumed operations. The Board's approach is tantamount to a presumption of feasibility in favor of the complainant. There is no precedent and no basis for such a presumption, which would be inconsistent with the complainant's burden of proof.¹⁵

¹⁴ *Bituminous Coal -- Hiawatha, Utah to Moapa, Nevada*, 10 I.C.C.2d 259, 272-3, 301 (1994); *FMC Wyoming Corporation et al v. Union Pacific Railroad Company* at 166 (served May 12, 2002).

¹⁵ In the ICC's February 13, 1995 ruling in the *McCarty Farms* case, the ICC stated that a complainant's operating assumptions were presumed to be feasible but only for purposes of evaluating a defendant's motion to dismiss filed before reply evidence was submitted. If the feasibility of the complainant's assumptions are challenged, the complainant must present evidence showing that its assumptions are feasible. *McCarty Farms, et al. v. Burlington Northern Inc.*, slip op. at 8 (served February 13, 1995). TMPA failed to present such evidence here.

On the issue of salaries paid to SARR managers, BNSF presented evidence of salaries paid to several regional and short-line railroads and used those verifiable data as the basis for establishing salaries for the SARR management.¹⁶ After three rounds of evidence, it remains unclear what TMPA used to produce its salary assumptions for the SARR.¹⁷ What is clear, however, is that TMPA assumes that its SARR -- which earns nearly 1 billion dollars of annual revenue -- would pay salaries to its upper management that are completely out of line with salaries paid to comparable managers in their real world counterparts. It is irrational to assume that unparalleled efficiencies could be achieved by an underpaid staff.

TMPA did not carry its burden of demonstrating that its G&A costs were reasonable. It did not submit any verifiable evidence showing that the SARR's undersized and underpaid G&A staff would support feasible operations. BNSF's G&A cost assumptions were based on data from real world railroads and should have been used in the Board's SAC calculations.¹⁸

III. The Board Misapplied Its Own Entry Barrier Standards

While it is clear that that costs associated with "entry barriers" should be excluded from the SAC analysis, the proper definition of an entry barrier has been the subject of much debate

¹⁶ BNSF also presented real world evidence on Board of Director fees and outsourcing costs (such as legal and audit fees), which the Board disregarded in favor of TMPA's unsupported assumptions in these areas. *See, e.g.*, BNSF Reply Nar. at Table III-D-15 at III.D-15, III.D-65, and Table III-D-14 at III.D-49.

¹⁷ No where does TMPA's witness describe the bases for these assumptions. As to the president's salary, TMPA's workpapers include salary information for the Wisconsin Central and FEC, neither of which appears to support TMPA's assumption. Considering bonuses and stock options paid to executives in those companies, it is clear that the salary assumed by TMPA for the SARR president is far too low. *See* TMPA Opening Workpapers, Vol. 11 at 5955, 5959. As to some vice presidents, it is possible that TMPA used Wage Form A&B, but if it did it must have used data for employees below the rank of vice president. *See id.* at 5940, 5960.

¹⁸ BNSF's G&A cost assumptions are set out in BNSF Reply Workpapers, Vol. 9 at 5201, 5220-25; electronic workpaper "gcorrpgpayroll_Final.xls", tab "gcorr", cells C6 through J160.

among economists and parties in SAC litigation. *WTU*, 1 S.T.B. at 669. The Board currently treats as an entry barrier the cost of investments that the stand-alone railroad must make to enter the market but that the incumbent did not make. The Board's rationale for this approach is that the incumbent has an unfair advantage over any new entrant (which confers "monopoly" power) to the extent the incumbent owns assets on which it does not need to earn a return due to the fact that it does not have capital invested in those assets. *Id.* at 670. Even if this entry barrier standard is correct, the Board misapplied it in assessing the cost of constructing bridges and the cost of resurfacing roads and relocating utilities disrupted by the construction process.

Bridges: The Board excluded as an entry barrier the cost to construct 62 railroad bridges on grounds that the incumbent did not pay for the original cost to construct those bridges.¹⁹ The Board accepted TMPA's argument for the exclusion of these costs based on the following logic: (1) Absent other evidence, it is reasonable to assume that these bridges are over highways. (2) When the railroad predated a highway, the railroad was not responsible for the cost of constructing a railroad bridge over the new highway. (3) The incumbent generally predated highways in the area where the SARR would be built, so it could reasonably be assumed that the incumbent had not incurred the cost to construct bridges over highways.

TMPA's logic is flawed. BNSF's bridges generally have construction dates in BNSF's inventory lists within the last 20 to 30 years. BNSF Reply Nar. at III.F-80. This meant either that the bridges had been constructed recently (after the highways became prevalent) or, because the original construction was long ago, had been replaced recently. But in either case, the railroad has invested capital in these bridges that is the equivalent of the cost to construct a bridge. A dollar of capital invested in replacing an old bridge is no different from a dollar of

¹⁹ See STB Workpaper "Restated Bridges and Overpasses.xls". The excluded bridges are highlighted in green.

capital invested in the construction of a new bridge. Under the Board's own entry barrier standard, the SARR should therefore be required to invest the capital necessary to construct the bridges.

The Board's exclusion of the bridge costs was erroneous for another reason. Even if the SARR does not have to bear the cost of the original construction of these bridges, it clearly must bear the future costs of maintaining them. But by excluding from the discounted cash flow model any capital for the original construction of these bridges, the Board also excluded any capital recovery in the future for the replacement of the bridges as they age. This is because the Board's DCF model automatically calculates the amounts needed in future years to replace SARR assets using the amounts included in the DCF for the original construction cost. If no cost is included in the original cost, the DCF model does not calculate a replacement cost, thus understating the capital recovery needed in future years.

The Board also erred by excluding all operating costs associated with maintaining the bridges. There is no dispute that BNSF is responsible for maintaining these bridges regardless of who paid to construct them originally. Table C-16 of the Board's March 24 Decision makes it clear, however, that the Board eliminated all "Bridge Contract Work" from the operating portion of the maintenance of way budget for the SARR thereby understating the SARR MOW operating budget as well as its capital recovery requirements.

Road Resurfacing and Utility Relocation: The Board also excluded as entry barriers the costs that the SARR would incur to resurface roads damaged by the construction of the rail lines and to protect or relocate utilities disrupted by the construction activity. On the question of road resurfacing, TMPA argued that the SARR should not incur a road resurfacing cost on most line segments because the incumbent railroad predated roads and therefore did not incur a similar

cost. But the Engineering Reports on which TMPA relies for earthwork costs belies this assertion. As the Board acknowledged with respect to at-grade crossings, there is evidence in the Reports that at-grade crossings were built by the incumbent. March 24 Decision at 153. This is conclusive evidence that roads predated the railroad in the geographic areas covered by the Engineering Reports and that the incumbent therefore incurred road resurfacing costs even on the older sections of the line. The SAC analysis should therefore include the comparable costs that the SARR would incur today.²⁰

On the question of utility relocation costs, TMPA does not dispute the fact that the incumbent incurred substantial costs to install utility poles and telegraph lines when the original line was constructed. Instead, TMPA argues that these costs were not incurred to *relocate* utilities because there were no utilities in the construction area at the time to relocate. *See* TMPA Rebuttal Nar. at 529. TMPA's argument misses the point of the Board's entry barrier rule. Whether the capital was invested to relocate utilities or to bring them to the construction site in the first place is irrelevant. In both cases, the existence of a utility to provide power to the railroad is a requirement, and in both cases a capital cost must be incurred to satisfy this requirement.²¹ The Board should have included in its SAC analysis the cost today for utility relocation.

IV. The Board's SAC and Variable Cost Calculations Contain Technical Errors That Should Be Corrected

BNSF also identified three technical errors in the Board's SAC and variable cost calculations. These errors are described below. BNSF is also submitting an electronic

²⁰ Road resurfacing costs are set out at BNSF's Reply electronic workpapers at "III F 2 Grading.xls", tab IIIF Summary, cell G25.

²¹ The SARR's utility relocation costs are set out at BNSF's Reply electronic workpapers at "III F 2 Grading.xls", tab IIIF Summary, cell G26.

workpaper showing how these errors can be corrected. The workpaper is intended only as a convenience for the Board and does not contain any new evidence or methodological assumptions other than those used by the Board in its original calculations.

1. Incorrect Construction Cost Inputs To DCF Accounts: The Board's DCF combines into a single cost category the construction costs for Rails and Other Track Materials ("OTM"). However, when the Board filled in the DCF accounts with the relevant construction costs, it mistakenly kept Rails and OTM costs separate. This caused several costs to be included in the wrong DCF account, resulting in the application of the wrong asset life assumptions to these costs. The error can be seen by comparing the spreadsheet "STB-Comparisons1.xls" at tab "STB Comparison" cells X14 - X15 and the DCF file "STB DCF Final.wk4" at tab "Construction" cells A19 - D20. (Note, for example, that OTM investment -- cell D20 -- appears in the DCF ballast account.) The correct treatment of these construction accounts is set out in the attached electronic workpaper.

2. Incorrect MOW Total: Table C-16 at page 109 of the TMPA decision states that the operating portion of stand-alone maintenance of way expenditures is \$83,296,545 and the Board included this amount in the DCF model. However, the Board's worksheet "STB Restated MOW1.xls" shows total maintenance of way expense of \$[REDACTED] or approximately \$[REDACTED] more than what is in the DCF. The value in the worksheet appears to be calculated in a manner consistent with the Board's explanation at page 108 the March 24 Decision of its methodology for calculating MOW expenditures, namely that "... because certain of BNSF's MOW cost estimates are based on the number of track miles the GCRR would have, we use our restated track-mile estimate (rather than BNSF's estimate) to develop those expenses."

Accordingly, it appears that the Board used an incorrect value for MOW expenditures in the DCF model and should have used the \$ [REDACTED] figure.

3. Incorrect Weighting of Road Property Expenses:

In calculating a line-specific road property return and depreciation, the Board did not apply the correct weighting factor for traffic moving over the line segments at issue. The Board accepted TMPA's adjustment to system-average costs in which TMPA calculated the average net investment per gross ton-mile and the average depreciation per gross ton-mile by weighting on total gross ton-miles for the route. After TMPA's rebuttal filing, however, the STB found that this approach to weighting across segments was inappropriate. *See Wisconsin Power and Light Co. v. Union Pacific R.R.*, Docket No. 42051, slip op. at 4-6 (served May 14, 2002). Because it adopted TMPA's calculations, the Board apparently inadvertently failed to follow its own precedent.

As a result of its disproportionately weighting the investments and depreciation, TMPA's rebuttal adjustments to road property ownership costs are understated. *See* TMPA Rebuttal Exhibit II-A-68 and electronic work paper "RD INV TMPA00.123". The correctly weighted adjustment factors require two modifications to TMPA's rebuttal work paper. First, as explained by the STB in footnote 100, the URCS annual depreciation total for road accounts (located in tab "URCSAvg" of TMPA's rebuttal spreadsheet) must be changed to include only the running portion. Second, the calculation of the average investment and depreciation across segments (located in tab "Route" of TMPA's rebuttal spreadsheet) must be changed to use only the TMPA traffic, and not all the gross ton-miles on the route. The correct adjustment ratios can then be substituted for the road property ownership unit costs located in Column "D" of the "Work_data" tabs of the STB's electronic work papers "Caballo Rojo VC March 6 2003.123" and "Cordero

VC March 6 2003.123". These adjustments have been made in the attached electronic workpapers.

V. Conclusion

The Board should reconsider its March 24 Decision in this proceeding to correct the errors described above.

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

Respectfully submitted,



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

Attorneys for
The Burlington Northern and Santa Fe
Railway Company

Dated: April 14, 2003

VERIFIED STATEMENT OF ROBERT A BRAUTOVICH

My name is Robert A. Brautovich. I am Assistant Vice President of Coal Marketing for The Burlington Northern and Santa Fe Railway Company.

[illegible]

I declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this testimony.

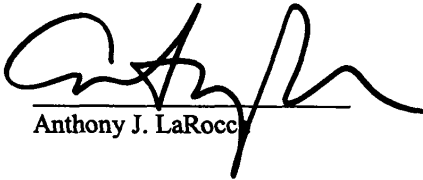
Executed on April 11, 2003


Robert A. Brautovich

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2003, a true and correct copy of the Petition for
Reconsideration was served by hand on:

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



Anthony J. LaRocca