

DOCKET NO. 41191

WEST TEXAS UTILITIES COMPANY
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY¹

Decided May 28, 2003

The Board reopens this proceeding to correct a material error in a prior decision and to revise the rate prescription prospectively.

BY THE BOARD:

In a prior decision in this rail rate complaint case,² the Board found the challenged rate unreasonable based upon the stand-alone cost (SAC) test.³ Because the maximum reasonable rate under the SAC test initially fell below the jurisdictional threshold for regulatory action – 180% of the variable cost for the challenged movement – the agency prescribed future rates at the jurisdictional threshold. The rate for the present and possibly future years under those original SAC calculations may now exceed the jurisdictional threshold. Accordingly, the defendant, the Burlington Northern and Santa Fe Railway Company (BNSF), seeks a declaratory order that it is entitled to charge the complainant, West Texas Utilities Company (WTU), the higher of the jurisdictional threshold or the SAC rate. As discussed below, BNSF should not be precluded from charging the maximum reasonable rate as determined by the SAC test. Therefore, we will reopen this proceeding to revise the rate prescription, but will not apply the revised prescription retroactively to the beginning of 2002.

¹ The original defendant in this proceeding, Burlington Northern Railroad Company, has since merged with The Atchison, Topeka and Santa Fe Railway Company to form The Burlington Northern and Santa Fe Railway Company (BNSF). We have recaptioned this proceeding and will refer to the defendant as BNSF.

² *West Texas Utilities Co. v. Burlington N. R.R. Co.*, 1 S.T.B. 638 (1996) (*West Texas*), *aff'd sub nom. Burlington N. R.R. Co. v. STB*, 114 F.3d 206 (D.C. Cir. 1997).

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

BACKGROUND

In 1994, WTU challenged the reasonableness of the rate charged for the transportation of coal in unit-trains from the Rawhide mine in the Powder River Basin near Gillette, WY, to WTU's Oklaunion generating station in Vernon, TX. Using the SAC test, WTU designed a stand-alone railroad (SARR) to determine what a hypothetical, efficient carrier would need to charge to provide the transportation at issue free from any costs associated with inefficiencies or cross-subsidization of other traffic. In making its SAC presentation, WTU designed a SARR that was specifically tailored to serve a traffic group of 11 electric generating stations. The hypothetical SARR traversed five states, extending over 1,400 miles from Eagle Butte Junction in Wyoming to Fort Worth, TX. In a voluminous record, the parties projected traffic volumes, operating speeds, and traffic densities to determine the requirements for locomotives, cars, and operating personnel. The parties also developed a detailed operating plan that addressed, among other things, the length and frequency of sidings needed to accommodate the number of trains that were assumed and traffic control devices to assure the safe and efficient handling of the trains.

The SAC analysis demonstrated that the revenue stream generated by the traffic group would exceed the cost of constructing and operating the SARR. "Because [the defendant's] current rates produce revenues above the level needed to provide and sustain efficient service to this traffic group," the Board concluded that the defendant was collecting excessively high rates on this traffic. *West Texas*, 1 S.T.B. at 677.

The parties differed over the method for allocating the SARR's revenue requirements among the traffic group. The defendant argued for pro rata reduction methodology developed in *Coal Trading Corp. v. Baltimore & O.R.R.*, 6 I.C.C.2d 361 (1990) (*Coal Trading*). WTU advocated an equalized rate for all traffic in the traffic group by using the ton-mile methodology that had previously been rejected in *Coal Trading*, 6 I.C.C.2d at 377-80, on the ground that it would preclude differential pricing. See *West Texas*, 1 S.T.B. at 677. The Board found no need to revisit that issue because either method would have yielded a SAC rate below the jurisdictional threshold, then \$13.81 per ton. The Board therefore prescribed the maximum reasonable rate level for the WTU traffic at 180% of the defendant's variable cost of providing service to WTU.

BNSF now asserts that the Board should have prescribed rates at the higher of the SAC rate or the jurisdictional rate threshold. In a motion filed on April 17, 2003, BNSF seeks an order to correct that error. BNSF does not limit its request to prospective relief, however. It also seeks an order requiring WTU to

reimburse BNSF for the difference between the SAC rate and the prescribed rate for shipments that have moved since 2002. WTU replied to BNSF's petitions on May 7, 2003. BNSF has sought expedited handling of its petition.

DISCUSSION AND CONCLUSIONS

Petition for Prospective Relief

BNSF seeks a declaration that the prior decision prescribed the maximum reasonable rate at the higher of the SAC rate or the jurisdictional threshold. The prior decision was unambiguous, however, so it is inappropriate to declare that it said something different from what it clearly said. We will instead treat BNSF's petition as a request for comparable relief that we may grant at any time – a petition to reopen a proceeding because of material error. 49 U.S.C. 722(c); 49 CFR 1115.4. As the Board stated previously, however, “we must approach petitions to reopen * * * cautiously, on a case-by-case basis, striving to achieve an appropriate balance between the interests of fairness to all parties and of administrative finality and repose.” *Arizona Pub. Serv. Co. v. Atchison, T. & S.F. Ry. Co.*, 3 S.T.B. 70, 75 (1998) (*Arizona II*); see also *Arizona Public Service Co., et al. v. The BNSF Ry. Co.*, 6 S.T.B. 851, 855-57 (2003) (reopening a rate reasonableness proceeding on a limited basis to address substantially changed circumstances).

Here, reopening is appropriate to correct a material error in the prior decision. The SAC constraint is designed to determine the maximum reasonable rate a carrier may charge annually over the 20-year period of the SAC analysis. If the SAC rate rises above the jurisdictional threshold in any year, the railroad should have the right to charge a rate up to that maximum reasonable rate. See 49 U.S.C. 10701(a)(c). While the analysis in *West Texas* showed that the SAC rate initially fell below the jurisdictional threshold (by 4.5% or \$0.62 per ton), it should also have been clear that the SAC rate might in some future years exceed the jurisdictional threshold.⁴ It was therefore error not to prescribe a

⁴ In this regard, *West Texas* is different from the situation in *Wisconsin Power & Light v. Union Pacific Railroad Company*, 5 S.T.B. 955 (2001) (*WPL*). In *WPL*, the Board found that, even if it were to uncritically accept many of the railroad's higher-cost assumptions regarding operating costs, the SAC rate would fall well below the jurisdictional rate threshold and would be likely to remain well below that threshold over the entire 20-year period of analysis. The Board therefore set the prescribed rate at 180% of the variable cost for the complaint movements. Nonetheless, if circumstances were to change so as to raise the SAC rate calculated in the decision above the jurisdictional threshold, the railroad could request to have the proceeding reopened and we could

(continued...)

maximum reasonable rate at the higher of the SAC rate or the statutory jurisdictional rate threshold, as the Board has done in subsequent proceedings.⁵ With this decision, we correct that error.

The determination to make what is in effect a technical correction does not provide support for WTU's argument that it should first have the opportunity to relitigate what the appropriate SAC rate ought to be. WTU contends that if afforded the opportunity, it would show that the projections upon which the SAC analysis was based – projections regarding coal volumes, revenues, inflation forecasts, capital costs, and other factors – are now inaccurate and outdated as compared to actual or current data.⁶ WTU also argues that it should be allowed to change certain of the basic assumptions upon which the SAC analysis was predicated, such as the traffic group originally selected by WTU.⁷ Those type of changes, however, are in no way related to the material error identified by BNSF, which can be corrected without changing any of the findings in the original decision. In contrast, WTU's proposed adjustments would involve relitigating almost the entire SAC case.

If WTU wishes to have this proceeding reopened based on new evidence or substantially changed circumstances, it may file an appropriate petition to reopen on that basis.⁸ But it is not necessary or appropriate to withhold immediate correction of an obvious mistake in the prior decision that substantially prejudices one of the parties, pending the resolution of matters that would undoubtably prove far more complex and far-reaching in nature. To the contrary, upon determining that there was a material error, we believe we have a responsibility to promptly set right the mistake by revising the rate prescription. The party who benefitted from the mistake is not entitled to prolong the effects of that mistake while it relitigates the original case.

⁴(...continued)

address the unresolved SAC issues.

⁵ Cf. *Texas Municipal Power v. The BNSF Ry. Co.*, 6 S.T.B.573, 609-610 (2003) (*TMPA*); *FMC Wyoming Corp. & FMC Corp. v. Union Pacific RR Co.*, 4 S.T.B. 699, 851-865 (2000) (*FMC*); *Arizona Public Service Co. v. Atchison, T. & SF. Ry. Co.*, 2 S.T.B. 367, 393 (1997) (*Arizona I*).

⁶ WTU Reply, at 16-17.

⁷ See Verified Statement of Thomas D. Crowley at 4 attached to WTU Reply.

⁸ Projections will inevitably prove inaccurate to some degree. But the Board previously rejected "the notion that any discrepancy between forecasted and actual traffic volumes warrants reopening and recalculation of the SAC analysis." *Arizona II*, 3 S.T.B. at 75. Rather, changes must be significant; they should involve "important long-term shifts in traffic patterns, not short-term, year-to-year fluctuations that do not undermine our long-term projections." *Id.* at 75 n.16.

Accordingly, the SAC rate that BNSF should now be allowed to charge will be calculated, on the record upon which the prior decision was based, using the percentage rate reduction methodology applied in recent decisions.⁹ The results of the discounted cash flow calculations are shown in the Appendix to this decision, Table 2.

As of the effective date of this decision, the maximum reasonable rate is the higher of the SAC rate or the regulatory rate floor, as shown below in Table 1. The parties should calculate the regulatory rate floor for each time period, as the necessary information becomes available, in a manner consistent with the procedures and findings contained in Appendix F of the original decision. *See West Texas*, 1 S.T.B. at 717-30.

⁹ *See TMPA*, 6 S.T.B. at 608-611; *WPL*, 5 S.T.B. at 986-87; *FMC*, 4 S.T.B. 851-865; *Arizona I*, 2 S.T.B. at 392.

6 S.T.B.

Table 1
Rawhide to Oklaunion

Year	Tariff Rate	SAC Rate Reduction	SAC Rate	180% of Variable Costs	STB Prescribed Rate
1995	\$19.36	32.54%	\$13.06	\$13.68	\$13.68
1996	19.90	33.30%	13.28	To be determined by the parties once variable costs for each year are known	180% of variable cost
1997	20.46	32.29%	13.85		
1998	21.04	31.31%	14.45		
1999	21.63	30.19%	15.10		
2000	22.24	29.03%	15.78		
2001	22.86	19.55%	18.39		
2002	23.50	26.63%	17.25		
2003	24.17	25.34%	18.04		Higher of SAC rate or 180% of variable cost*
2004	24.84	24.19%	18.83		
2005	25.54	22.75%	19.73		
2006	26.26	21.22%	20.69		
2007	27.00	19.62%	21.70		
2008	27.76	8.66%	25.35		
2009	28.54	16.16%	23.92		
2010	29.34	14.44%	25.10		
2011	30.16	12.50%	26.39		
2012	31.01	12.82%	27.03		
2013	31.88	10.74%	28.46		
2014	32.78	8.57%	29.97		

*The 180% of variable cost prescription applies for the portion of 2003 prior to the effective date of this decision.

Petition for Retroactive Relief

BNSF also seeks retroactive relief for amounts it would have been entitled to collect under the SAC rate for movements since 2002. BNSF states that, since 2002, WTU has shipped over 2.4 million tons from the Rawhide mine to Oklaunion under the prescribed rate of \$13.68 per ton, whereas the SAC rate per ton was \$17.25 and \$18.04 in 2002 and 2003, respectively. BNSF seeks to collect the difference between the prescribed rate and the SAC rate (an amount totaling more than \$8 million for that time period). BNSF relies on *Iowa Power & Light Co. v. United States*, 712 F.2d 1292 (8th Cir. 1983), for the proposition that we can retroactively correct a “legal error” and allow it to collect additional revenues for past shipments.

Our ability to retroactively alter a prescribed rate is sharply curtailed by *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932). There, the Interstate Commerce Commission (ICC), prescribed the maximum reasonable rate for shipping sugar from California to Arizona. Four years later, at the request of the shippers, the ICC reassessed the maximum reasonable rate, concluded it had erred, and prescribed a lower maximum rate. It then attempted to apply that decision retroactively by ordering the railroad to reimburse the shipper for charges collected in the prior 4 years that were above the newly prescribed rate. The Supreme Court held that the ICC could not award reparations with respect to past shipments that had moved under previously approved and prescribed rates. The Court reasoned that the ICC's rate prescription was an action that was legislative in nature and thus had the force of a statute in establishing the lawful rate. *Id.* at 386-87. The ICC was bound to recognize the validity of the rule of conduct approved by it and thus it could not repeal its own enactment with retroactive effect. *Id.* at 389. In other words, parties are "entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate." *Id.*

The authority cited by BNSF, *Iowa Power*, falls within a narrow exception to the general prohibition against retroactive rate adjustments: when an agency's order is reversed by a reviewing court, "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order," even where the enabling statutes provides "no power to make reparation orders." *United Gas Improvements Co. v. Callery Properties*, 382 U.S. 223, 229 (1965) (*Callery*). That is because "judicial review at times results in the return of benefits received under the upset administrative order." *Id.* The federal courts have applied the *Callery* principal in a variety of contexts. *See, e.g., Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1076-75 (D.C. Cir. 1992) (affirming the authority of FERC to order retroactive rate adjustments when its earlier order, reversed on appeal, improperly disallowed a higher rate). Such was the case in *Iowa Power*, in which a prior ICC decision rejecting a proposed tariff had been reversed by the reviewing court and the ICC simply retroactively reinstated the carrier's wrongfully rejected tariff. Here, there is no intervening reversal by a reviewing court to justify a retroactive rate adjustment. *Arizona Grocery* is therefore controlling.

In sum, the law does not permit retroactive application of the revised rate prescription contained in this decision.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The rate prescription for movements of the issue traffic from the Rawhide mine is revised as set forth in Table 1 of this decision.
2. The motion for retroactive relief is denied.
3. This decision is effective June 28, 2003.

By the Board, Chairman Nober.

APPENDIX – DISCOUNTED CASH FLOW COMPUTATION

The results of the discounted cash flow calculation are shown in Table 2 below. Column 8 shows that the SARR's total revenue over the 20-year SAC period would be \$1.132 billion more than the SARR would need to recover all its costs, including a reasonable rate of return on its investment. As stated in this decision, we follow our established practice of using the "percentage rate reduction" methodology to calculate the SAC rate. Column 10 shows the amounts by which the SARR's total revenues would have to be reduced in the period 1995 through 2014. We compute the SAC rate using that percentage reduction.

Table 2
CASH FLOW
(millions of dollars)

Year	Capital Costs & Taxes	Annual Opera- ting Costs	Total Annual Costs	Annual Revenues	Annual Over/ Under Payment (current)	Annual Over/ Under Payment (present value) (7)	Cumula- tive Over/ Under Payment (present val.) (8)	Required Revenue Reduction (present val.)	Required Revenue Reduction (current)	Percent Rate Reduction
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
1995	\$149.5	\$142.8	\$292.3	\$433.4	\$141.0	\$133.3	\$133.3	\$133.3	\$141.0	32.54%
1996	163.0	149.4	312.4	468.4	156.0	131.8	265.1	131.8	156.0	33.30%
1997	173.6	153.9	327.5	483.6	156.2	117.9	383.0	117.9	156.2	32.29%
1998	186.1	159.2	345.3	502.7	157.4	106.2	489.2	106.2	157.4	31.31%
1999	200.3	164.8	365.1	523.0	157.9	95.2	584.4	95.2	157.9	30.19%
2000	214.6	170.6	385.2	542.7	157.5	84.9	669.3	84.9	157.6	29.03%
2001	230.1	223.2	453.3	563.4	110.1	53.1	722.4	53.1	110.1	19.55%
2002	246.8	182.4	429.1	584.9	155.7	67.1	789.5	67.1	155.7	26.63%
2003	264.5	188.4	452.9	606.6	153.7	59.2	848.7	59.2	153.7	25.34%
2004	291.4	197.2	488.6	644.5	155.9	53.6	902.3	53.6	155.9	24.19%
2005	310.3	203.2	513.4	664.7	151.2	46.5	948.8	46.5	151.2	22.75%
2006	330.2	209.1	539.2	684.5	145.3	39.9	988.7	39.9	145.3	21.22%
2007	351.5	215.1	566.7	705.0	138.3	34.0	1,022.7	34.0	138.3	19.62%
2008	374.1	288.6	662.7	725.6	62.8	13.8	1,036.5	13.8	62.8	8.66%
2009	398.0	227.4	625.4	746.0	120.6	23.7	1,060.2	23.7	120.6	16.16%
2010	432.8	238.7	671.5	784.9	113.4	19.9	1,080.1	19.9	113.4	14.44%
2011	460.8	245.3	706.1	807.0	100.8	15.8	1,095.9	15.8	100.8	12.50%
2012	504.4	260.9	765.3	877.8	112.5	15.8	1,111.7	15.8	112.5	12.82%
2013	537.4	268.2	805.5	902.5	96.9	12.1	1,123.8	12.1	96.9	10.74%
2014	572.7	275.6	848.3	927.8	79.5	8.9	1,132.7	8.9	79.5	8.57%