

# Surface Transportation Board Update



By Thomas W. Wilcox, Principal, GKG Law, P.C.

The Surface Transportation Board 2012 started slow in 2012 but ended with a flurry of activity that will carry over into 2013. This year will also mark a change in the make-up of the Board, as the term of Board Member Frances P. Mulvey expired at the end of 2012. Under the applicable law, Mr. Mulvey may stay on as long as one additional year while his replacement is designated and confirmed, and he has indicated his interest in staying on until then. In the meantime, Board Member Ann D. Bege-man was named Vice Chairman of the STB on January 4, 2013.

Several key STB proceedings affecting the coal industry and the rail transportation of coal are summarized below:

## BNSF Tariff Coal Dust Emission Standards

Most of 2012 was taken to develop the administrative record in Docket FD No. 35557, where the Board is considering the reasonableness of BNSF Railway's re-

vised coal dust emission control standard included in Item 100 of BNSF's "Price List 6041-B" and appendices thereto. In March, 2011, the Board ruled that BNSF's first iteration of this standard was an unreasonable practice under 49 USC 10702. BNSF unilaterally adopted a revised version of the prior standard on July 20, 2011, which eventually resulted in the Board instituting a proceeding on its own motion on November 22, 2011 to take comments and evidence from the public on the reasonableness of a "safe harbor" provision added to the new version. However, the Board also said it would consider other topics it did not address in the prior proceeding, such as the absence of penalties for non-compliance, how the costs associated with meeting the standard should be allocated, and liability and indemnification issues. The last of several rounds of submittals on the revised tariff and related issues was on December 17, 2012. The Board has given no indication that it intends to hold a public hearing before issuing a decision.

## Coal Transportation Reasonable Rate Rules

On July 25, 2012, the Board issued a Notice of Proposed Rulemaking in EP 715, *Rate Regulation Reforms*, containing six potential modifications to its rate reasonableness rules. Of particular relevance to captive coal shippers, the Board proposed to change the rules concerning the use of "cross-over traffic" in its Stand-Alone Cost rate rules. The use of "cross-over traffic" in such cases has been a valuable simplifying mechanism utilized by coal shipper complainants for decades. The Board also proposed to modify its Simplified Stand Alone Cost and Three Benchmark Methodology rules – primarily by eliminating and raising, respectively, the current relief limits associated with those rules – but the "cross-over traffic" issue has by far received the most attention in the proceeding from railroad and shipper interests. The final round of comments on the NOPR were submitted to the Board on January 7, 2013, and although the Board could issue a final

rule without holding a public hearing, it would be consistent with past practices for it to do so.

Several coal rate cases continue to work their way through the STB and the courts. These include Docket NOR 42136, *Intermountain Power Agency v. Union Pacific Railroad Company*, where IPA has challenged the rates UP charges for its part of the transportation of coal to IPA's electric generating facilities at Lynndyl, Utah. In a December 14, 2012 decision, the STB declined a request by UP to hold the case in abeyance pending the Board's completion of EP 715.

In Docket NOR 42133, *Arizona Electric Power Cooperative, Inc. v. BNSF Railway Company and Union Pacific Railroad Company* – a case where the coal shipper was awarded rate relief and reparations in late 2011 – the STB allowed the two defendant railroads to change the form of the prescribed rates from the challenged joint rates to new proportional rates. The Board allowed this after concluding that the change would have no impact on the relief granted, and that the railroads' rationale for the switch – “disentangling” UP from the issues sur-

rounding the acquisition of BNSF by Berkshire Hathaway – was reasonable.

Finally, on November 19, 2012, the AAR filed a petition asking the Board to institute a rulemaking proceeding to reintroduce “indirect competition” (i.e., competition from alternative fuels and other non-railroad sources) into the determination of market dominance in coal rate reasonableness cases. Replies in opposition to the petition were filed on January 14, 2013.

## Railroad Practices

Coal transportation stakeholders are also awaiting the Board's decision in Docket NOR 42120, *Cargill v. BNSF Railway Company*. In that case, Cargill challenged the reasonableness of BNSF's mileage-based fuel surcharge program under 49 USC 10702, claiming that it is unlawful because the surcharge program is designed to over recover BNSF's actual fuel costs. The evidentiary record in the case closed in April, 2012, and the Board will either issue a decision or schedule oral argument prior to issuing its final decision.

On October 9, 2012, the North America Freight Car Association filed a complaint with the STB alleging that the Association of American Railroads' processes for adopting and modifying the AAR Interchange Rules, and in particular a 2011 change to a rule addressing “truck hunting” of rail cars, both constitute unlawful practices under 49 USC 10702 and other statutory provisions. That proceeding, Docket NOR 42137, *North America Freight Car Association v. BNSF Railway, et al*, alleges that the AAR's processes for modifying the Interchange Rules unlawfully produce rules that require private car owners to pay 100% of the costs of compliance while the operating railroads reap the vast majority of the benefits. ▲

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