

DOCKET NO. 37809¹

McCARTY FARMS, ET AL.
v.
BURLINGTON NORTHERN, INC.

Decided March 20, 1991

The Commission quantifies the amount of reparations that are owed by Burlington Northern and specifies the level of future rates.

BY THE COMMISSION:

We have previously found that Burlington Northern Railroad Company ("BN") has market dominance over the movement of wheat and barley from Montana to Pacific Northwest ports, 3 I.C.C.2d 822 (1987), and that certain of its rates for this traffic are unreasonable, 4 I.C.C.2d 262 (1988). We applied a revenue-to-variable cost ("R/VC") comparison test,² under which BN's returns (the degree of differential pricing, as measured by the ratio of revenue to variable costs) on this traffic should not exceed the average returns paid by shippers of other traffic with similar market characteristics.³ In this decision, we calculate the amount of reparations and determine the future rate prescription procedure.

¹ This proceeding embraces No. 37809 (Sub-No. 1), *McCarty Farms, Inc. v. Burlington Northern Railroad Company*, and No. 37815S, *Montana Dept. of Agriculture, et al. v. Burlington Northern Inc.*

² See Ex Parte No. 347 (Sub-No. 2), *Rate Guidelines - Non-Coal Proceedings* (not printed), served April 8, 1987.

³ The comparison traffic that we used in this case is wheat and barley originating in the West and moving by rail at least 500, and no more than 1400, miles at an R/VC level above 180%.

The parties have had basic disagreements on how reparations should be calculated. Accordingly, we issued a decision in February 1989 that made some corrections to our computation of the comparison group ratios; expanded the comparison period (previously 1978-1985) by providing an additional year of data (1986) for the comparison group; recomputed the resulting average R/VC benchmarks (to which the maximum reasonable rates for the issue traffic are keyed);⁴ and provided specific instructions for computing reparations.⁵

Based on those instructions, BN has recomputed the amount of reparations for the period 1978-1988. It now calculates the reparations at \$8,967,576.⁶ BN asserts that future rates need not be prescribed because the R/VC ratios on this traffic for 1988 were below the benchmark level and BN will voluntarily observe the benchmark R/VC levels for the future.

Complainants (collectively referred to as "McCarty") dispute two aspects of BN's computations. McCarty calculates the amount of reparations at either \$16,696,229 or \$20,344,797 (see n.8, *infra*). McCarty also maintains that BN's 1988 rates exceeded the R/VC standard and that the Commission should prescribe rates for the future.

DISCUSSION

A. Calculation of Reparations.

1. Private Car Mileage Rates.

To determine the (mileage) rates for use of private cars for traffic in the comparison group, we relied on the railroad industry's "UMLER" files, a computerized list of railroad cars showing the actual mileage rate for

⁴ The revised R/VC benchmarks for single car, multiple car and trainload shipments are 22A, 22A and 226%, respectively.

⁵ We directed the parties to: (1) use BN's system-average costs; (2) base equipment costs on box car costs where traffic moved in box cars, rather than covered hopper car costs; (3) exclude domestic movements; (4) include all export movements of the traffic at issue, including traffic with an R/VC ratio below 180%; and (5) calculate reparations for each year separately (thus precluding use of lower revenues in one year to offset reparations in another year).

⁶ These reparations are all for trainload traffic. Under its calculations, BN owes no reparations on either single or multiple car movements.

each individual car. BN claims that it could not locate historical UMLER files for the years covered by the complaint. Therefore, in computing reparations it estimated private car mileage rates for the issue traffic using the annual weighted average car mileage rates for all BN wheat and barley shipments moving from Montana to Pacific Northwest port areas reflected in the Commission's Costed Waybill File.

McCarty objects that this is not consistent with the treatment of the comparison group traffic. McCarty offers two alternatives: BN's system average car mileage rates for private cars ("Method 1")⁷ or the weighted average car mileage rates we used for the privately-owned hopper cars included in the comparison group ("Method 2").⁸ BN responds that both of McCarty's suggested approaches violate the principle of comparable costing.

Both parties rely on sources other than the UMLER file, from which we derived the private car mileage rates for the comparison group. Moreover, both parties assign a single average mileage rate to all private cars in a particular year, whereas our methodology recognized differences in the ages and costs of various cars for the comparison group. For consistency, the methodology used for the comparison group should also be used for the issue traffic.⁹ To eliminate further disputes between the parties, we have obtained the necessary car data from BN and computed the private car mileage costs for the issue traffic using the UMLER file.¹⁰

⁷ McCarty claims that these rates are the best evidence of record and comport with the Commission's preference for system costs over movement specific costs in applying the R/VC methodology.

⁸ McCarty estimates the reparations at \$20,344,797 under Method 1 and \$16,696,229 under Method 2.

⁹ The program we used to develop the comparison group ratios matched the specific car initial and number for the movement being costed with the UMLER file data. Where an exact match was not found, the average mileage rates for private cars with the same initial was used. If there was no matching initial, then the average mileage rate for cars of the same type was used.

¹⁰ The 1983 UMLER file was used for 1979-1985, while the 1986 UMLER file was used for that year. This is the identical process used for the comparison group. With the exception of 1982, for which BN was unable to identify each issue private car by AAR initial and number, almost 93% of the issue private cars were specifically matched with their corresponding UMLER file rate.

The resulting reparations on trainload traffic total \$9,685,918 through 1986. See Appendix.

2. Updating From 1986.

To apply our findings to years since 1986, BN first computed its 1987-1988 costs for the issue traffic by indexing forward its 1986 unit costs. It then determined the resulting permissible revenues from the issue traffic in those years, based on the benchmark R/VC levels (the average R/VC ratios for the comparison group for the period 1978-1986).

McCarty, on the other hand, recomputed the average R/VC ratio against which the issue traffic should be measured by including in the comparison group average its own estimate of the 1987 R/VC. It then computed BN's variable costs for 1987, using BN's 1987 Rail Form A unit costs. Using its revised comparison group R/VC ratio, McCarty computes BN's permissible 1987 revenues. For 1988, McCarty indexed BN's 1987 cost figures forward, adjusting for inflation and improved productivity.

BN objects to McCarty's use of 1987 unit cost figures and the recomputation of the benchmark R/VC levels.¹¹

Rather than indexing costs, we can index the maximum 1986 rate levels forward by applying the rail cost adjustment factor ("RCAF")¹² to them to establish maximum rate levels for succeeding years. This avoids the need to reexamine the revenues and costs of the issue traffic each year and annually reapply the R/VC methodology. That, in turn, furthers the objective of the R/VC test -- to simplify rate reasonableness proceedings. It limits the railroad's ability to alter the relative position of these individual

¹¹ BN motions filed June 15, 1989 and January 8, 1990.

¹² The RCAF, a measure of the impacts of inflation, is published by the Commission pursuant to 49 U.S.C. § 10707a(a). Applying the RCAF, BN's 1986 year-end rates would be allowed to increase by 4.7% in 1987 (4th Qtr. 1987 index of 1.093 ÷ 4th Qtr. 1986 index of 1.044); 4.0% more in 1988 (4th Qtr. 1988 index, restated to negate the impact of "re-basing" the RCAF in 1988, of 1.137 ÷ 4th Qtr. 1987 index of 1.093); and 1.9% more in 1989 (4th Qtr. 1989 *adjusted* index of 1.060 ÷ 4th Qtr. 1988 index of 1.040). Because the RCAF was first adjusted for changes in productivity effective the second quarter of 1989, the 1989 increase of 1.9% reflects the impacts of inflation net of productivity changes for three quarters of that year. In subsequent years the productivity adjusted RCAF should be used as the measure of inflation.

rates, but the parties can petition for modification of a prescription when and if a revision is warranted. This is preferable to yearly proceedings.

B. *Prescription.*

We have the discretion to decide whether or not to prescribe rates for the future, and have already decided to prescribe future rates levels for this case. BN nonetheless argues that a prescription is unnecessary because the R/VC ratios on the issue traffic for 1988 (the last year that has been computed) were below the R/VC benchmark level and that, in any event, BN will voluntarily observe the benchmark R/VC levels for the future. McCarty maintains that BN's 1988 rates exceeded the R/VC standard and that the Commission should prescribe rates for the future.

By our calculation BN's 1986 rate structure on trainload traffic was 5.37% higher than the level permitted by the (226%) R/VC standard. The rate indexing procedure provides a convenient rate prescription mechanism. It limits future rate levels to the (reduced) 1986 trainload rate level, plus any applicable RCAF increases.¹³ This ensures that the rates charged for this traffic continue to be limited to a reasonable level and that the carrier is protected from the effects of inflation, while minimizing future Commission involvement in these rates.

C. *Interest on Reparations.*

Under our rules, at 49 C.F.R. § 1141.1, a shipper is entitled to interest on the reparations, computed by applying the simple 13-week Treasury rate in effect on the date that the first unlawful charge was made. BN argues that the R/VC comparison test used in this proceeding -- which was applied on an annual basis and under which reparations are assessed only when the R/VC ratio for the entire year exceeds the benchmark -- does not permit identification of the date on which the first unlawful charge was made. Thus, BN assumed that all reparations in a given year were incurred at mid-year; developed a different interest rate for each year in which reparations are owed (based upon a weighted average of the yields on the 13-week Treasury Bill issues sold in each reparations year); and applied the

¹³ When the RCAF declines, rates would be rolled back to reflect the decrease in costs.

interest rate developed for that year to the amount of reparations attributable to that year, for six months of that year and all remaining years until the reparations are actually paid. McCarty argues that interest should be based on our standard interest procedures, applying the 13-week interest rate in effect on December 11, 1980, the date of the first trainload movement, to all reparations.

The conventional methodology for computing interest is not appropriate. It assumes readily identifiable shippers and an accurate record of the amount of overcharges attributable to each shipper. This class action suit involves multiple shippers and relies upon data that does not specify the shipper for each movement. Reparations are being computed on an aggregate basis and the district court in Montana will decide how to disperse them among the class members. Furthermore, by not permitting the railroads to net over- and underpayments for the entire complaint period,¹⁴ we essentially have treated each year as a separate complaint.

BN's proposal is tailored to these circumstances. Because a changing mix of shippers are affected by the unlawful rates each year, each year should be treated independently for computing interest charges. Since overcharges are computed annually on an aggregate basis, assumptions must be made as to the specific pattern of accumulation in order to assess interest. The most reasonable assumption is that they were accumulated on a uniform basis, with zero overcharges at the beginning of the year and the full aggregate overcharge at the end of the year. Applying a simple interest charge to such a distribution is equivalent to computing interest at mid-year (as BN proposes). Consistent with that approach, it is appropriate to use the average 13-week Treasury Bill rate for each year.

D. *Other Issues.*

The parties have attempted to reargue a number of issues which have already been addressed in earlier decisions. We will not consider these issues further. This decision is merely to quantify the amount of reparations that are owed by BN and to specify the level of future rates.

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

¹⁴ See decision served February 21, 1989.

It is ordered:

1. In accordance with this decision, defendant shall calculate the total amount of reparations due including reparations for the imposition of unreasonably high rates in the amount of \$9,685,918, additional amounts from 1986 forward, and interest.

2. Consistent with this decision, rendered upon referral of rate reasonableness issues by the United States District Court in *McCarty Farms, Inc. et al. v. Burlington Northern Railroad Inc.*, No CV-80-103-GF (D. Mont., Great Falls Div.), and by June 25, 1991, defendant shall notify the Court and this Commission of the total amount of reparations and interest due and that defendant has made funds available for payment of this amount, consistent with the order of the Court.

3. Future rates shall be no higher than those prescribed by this decision.

By the Commission, Chairman Philbin, Vice Chairman Emmett, Commissioners Simmons, Phillips and McDonald.

APPENDIX
RESTATED REPARATIONS SUMMARY

YEAR	SINGLE CAR REVENUE	VAR COST	R/V/C RATIO	MULTI CAR REVENUE	VAR COST	R/V/C RATIO	TRAINLOAD REVENUE	VAR COST	R/V/C RATIO
ICCS BENCHMARKS			2.240			2.240			2.240
1978 QTR 4 BENCHMARK X VC REPARATIONS	\$11,003,709	\$3,339,206	2.084	\$0			\$0		
1979 BENCHMARK X VC REPARATIONS	\$0			\$0			\$0		
1980 BENCHMARK X VC REPARATIONS	\$32,034,932	\$25,126,599	2.071	\$0			\$0		
1981 BENCHMARK X VC REPARATIONS	\$45,334,081	\$21,469,589	2.112	\$0			\$0		
1982 BENCHMARK X VC REPARATIONS	\$48,091,879	\$0		\$0			\$0		
1983 BENCHMARK X VC REPARATIONS	\$22,712,605	\$12,297,142	1.849	\$35,535,688	\$20,716,740	1.716	\$2,572,668	\$1,000,274	2.572
1984 BENCHMARK X VC REPARATIONS	\$27,545,598	\$0		\$46,405,498	\$0		\$2,260,610	\$0	
1985 BENCHMARK X VC REPARATIONS	\$0			\$0			\$312,049		
1986 BENCHMARK X VC REPARATIONS	\$4,274,723	\$2,541,065	1.682	\$15,529,414	\$9,546,179	1.732	\$54,702,097	\$24,770,216	2.289
1987 BENCHMARK X VC REPARATIONS	\$3,691,986	\$0		\$21,283,441	\$0		\$35,980,914	\$0	
1988 BENCHMARK X VC REPARATIONS	\$1,173,703	\$678,228	1.731	\$3,980,557	\$3,407,716	1.725	\$70,447,341	\$29,587,863	2.383
1989 BENCHMARK X VC REPARATIONS	\$1,519,211	\$0		\$7,767,684	\$0		\$66,799,640	\$0	
1990 BENCHMARK X VC REPARATIONS	\$0			\$0			\$3,647,701		
1991 BENCHMARK X VC REPARATIONS	\$34,612	\$39,472	1.772	\$2,036,334	\$1,507,977	1.734	\$11,294,334	\$21,099,612	2.435
1992 BENCHMARK X VC REPARATIONS	\$435,617	\$0		\$3,366,666	\$0		\$47,617,323	\$0	
1993 BENCHMARK X VC REPARATIONS	\$0			\$0			\$3,677,201		

DOCKET NO. AB-335 (SUB-NO. 2X)

KCT RAILWAY CORPORATION-ABANDONMENT EXEMPTION--
IN FRANKLIN, ANDERSON, AND ALLEN COUNTIES, KS

Decided June 6, 1991

Reopened Proceedings, revoking the exemption necessary to implement interim trail use and rail banking

BY THE COMMISSION:

In a decision served November 1, 1990, we exempted KCT Railway Corporation (KCT) from the prior approval requirements of 49 U.S.C. § 10903, *et seq.*, to abandon its 50.2-mile line of railroad between milepost 58-1368 feet at Ottawa and milepost 108-2185 feet near Iola, in Franklin, Anderson, and Allen Counties, KS, subject to certain environmental conditions. Notice was published at 55 Fed. Reg. 46,109, (1990), and the exemption became effective on December 1, 1990.

Subsequently, by decision served February 26, 1991, we imposed a 180-day public use condition at the request of the Kansas Department of Wildlife and Parks (KDWP). The condition permitted salvage to the extent consistent with alternative public use.

Thereafter, on March 19, 1991, KDWP late-filed a request for issuance of a Notice of Interim Trail Use/Rail Banking (NITU) under § 8(d) of the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29. It asserts that the previously imposed public use condition is insufficient for it to acquire the entire rail corridor for trail use. Having discovered that no more than 43% of the land underlying the corridor was obtained from Federal land grants, it concluded that upon abandonment the bulk of the corridor could revert to adjacent property owners and would not be available for acquisition and trail use.

RESTATED REPARATIONS SUMMARY (continued)

1985						
BENCHMARK X VC	\$174,595	\$100,090	\$218,259	\$128,674	\$17,772,033	\$7,581,990
REPARATIONS	\$0		\$0		\$534,758	
1986						
BENCHMARK X VC	\$272,579	\$127,972	\$1,625,804	\$903,829	\$13,568,987	\$5,698,213
REPARATIONS	\$0		\$2,024,577		\$12,877,261	
TOTAL REPARATIONS	\$0		\$0		\$9,685,918	
						2,344
						2,381