

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. 41191 (Sub-No. 1)

AEP TEXAS NORTH COMPANY

v.

BNSF RAILWAY COMPANY

Decided: January 21, 2011

This matter is before the Board on remand from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). AEP Tex. N. Co. v. STB, 609 F.3d 432 (D.C. Cir. 2010). The underlying proceeding involved a rate dispute between AEP Texas North Company (AEP Texas) and BNSF Railway Company (BNSF). AEP Texas challenged the reasonableness of rates charged by BNSF to transport coal from mine origins in the Powder River Basin of Wyoming to the Oklaunion Generating Station near Vernon, Tex. By decision served September 10, 2007, the Board found that AEP Texas failed to show that the challenged rates were unreasonable under the Board's stand-alone cost (SAC) test. AEP Tex. N. Co. v. BNSF Ry., NOR 41191 (Sub-No. 1) (STB served Sept. 10, 2007) (September 2007 Decision).

AEP Texas and BNSF both filed timely petitions for reconsideration of the September 2007 Decision. In a decision served on May 29, 2008, the Board denied both petitions for reconsideration except as to one issue on which the Board requested additional evidence and argument: whether the Board's evolving cost-of-capital methodology necessitates restating the stand-alone railroad's (SARR) cost of equity for previous years. In a decision served May 15, 2009, while the Board acknowledged that its methodology to determine cost of equity was evolving, the Board found that it was not necessary to restate the SARR's cost of equity for previous years because, among other things, AEP Texas had still not shown the challenged rates to be unreasonable. AEP Tex. N. Co. v. BNSF Ry., NOR 41191 (Sub-No. 1) (STB served May 15, 2009) (May 2009 Decision).

AEP Texas appealed the Board's decision to the D.C. Circuit. AEP Texas challenged, inter alia, the Board's use of its previously published 2005 cost of equity estimate in determining the reasonableness of BNSF's rates. The D.C. Circuit vacated the Board's May 2009 Decision and remanded it to the Board with directions to reassess the "decisionmaking for the 2005 cost of equity estimate." AEP Tex. N. Co., 609 F.3d at 444.

On November 22, 2010, with neither prompting by the Board nor an accompanying motion or petition, BNSF filed comments in this proceeding. On November 29, 2010, AEP Texas filed a letter stating that BNSF's comments should be struck because the Board had not requested submissions from the parties. In the alternative, AEP Texas requests that if the Board

accepts BNSF's comments into the record, AEP Texas should be given until January 28, 2011, to file its reply. On December 7, 2010, BNSF filed a letter in response to AEP Texas, asserting that BNSF's comments should not be struck because it is not improper to submit comments to the Board to assist the Board in addressing an issue on remand. BNSF, however, does not oppose granting AEP Texas until January 28, 2011, to file reply comments.

The Board will grant AEP Texas until February 18, 2011, to file a reply to BNSF's comments. Any further filings will be by order of the Board.

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

It is ordered:

1. AEP Texas has until February 18, 2011, to file a reply to BNSF's comments on remand.
2. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director of the Office of Proceedings.