

STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

Samuel M. Sipe Jr.
202.429.6486
ssipe@steptoe.com

209758

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Tel 202.429.3000
Fax 202.429.3902
steptoe.com

ENTERED
Office of Proceedings

December 31, 2003

DEC 31 2003

By Hand

Part of
Public Record

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423-0001

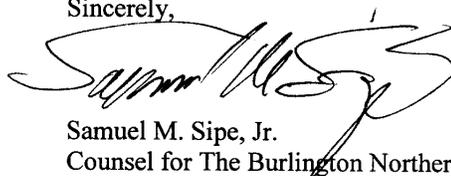
Re: **STB Docket No. 4119 (Sub-No. 1), AEP Texas North Company v. The
Burlington Northern and Santa Fe Railway Company**

Dear Secretary Williams:

Enclosed for filing in the captioned docket, please find the original and ten copies of the Reply of The Burlington Northern and Santa Fe Railway Company to Supplement to the Verified Complaint of AEP Texas North.

Please date stamp the extra copy of the referenced pleading and return it with our messenger. If you have any questions regarding this matter, please contact the undersigned.

Sincerely,



Samuel M. Sipe, Jr.
Counsel for The Burlington Northern
and Santa Fe Railway Company

cc: Chairman Roger Nober
Director David M. Konschnik
General Counsel Ellen D. Hanson
Kelvin J. Dowd, Counsel for AEP
Michael E. Roper, BNSF



-1-

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

BRUSSELS

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AEP TEXAS NORTH COMPANY,)

Complainant,)

v.)

THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY,)

Defendant.)

Docket No. 41191 (Sub-No. 1)

**REPLY OF THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY TO SUPPLEMENT TO THE VERIFIED
COMPLAINT OF AEP TEXAS NORTH**

Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby replies to the December 22, 2003 pleading styled Supplement to the Verified Complaint of AEP Texas North Company ("Supplement") in the above-referenced matter. AEP's Supplement seeks to expand the existing complaint in this proceeding to cover a new rate and service terms that BNSF recently established for the movement of coal from non-Rawhide Mine origins in the Powder River Basin to AEP's Oklaunion electric generating station.

AEP's attempt to expand the scope of the existing complaint is invalid, as was its original complaint. AEP has informed BNSF that it has no intention of paying the lawfully established rate that AEP purports to challenge in its Supplement. As BNSF explained in its pending Motion to Dismiss, AEP cannot invoke the protection of the statute's rate reasonableness provisions when it refuses to comply with its own obligations under the statute to pay BNSF's lawfully established rates for the issue traffic. *See* Motion of The Burlington Northern and Santa Fe

Railway Company to Dismiss the Complaint, filed September 2, 2003 (“Motion to Dismiss”). The Board should promptly grant BNSF’s pending Motion to Dismiss. That ruling would render AEP’s Supplement moot.

BACKGROUND STATEMENT

The background facts relevant to AEP’s Supplement and this Reply by BNSF are, for the most part, set forth in BNSF’s Motion to Dismiss at pages 4 through 9. More recent factual developments are summarized below.

By letter dated December 10, 2003, a representative of BNSF’s Coal Marketing Department advised AEP that “as of January 1, 2004, the common carrier rate for transportation of coal from non-Rawhide Mines in Wyoming to the Oklaunion power station near Vernon, TX, will increase from the current rate of \$18.04 per ton to \$18.83 per ton and shall be covered by the enclosed Common Carrier Pricing Authority BNSF 306720.”¹ This letter was accompanied by a second letter of the same date advising AEP that “as of January 1, 2004, the common carrier rate for transportation of coal from Rawhide Mine in Wyoming, covered by the STB rate prescription, to West Texas Utilities’ Oklaunion power station near Vernon, TX, will increase from the current rate of \$18.04 per ton to \$18.83 per ton.”² Both letters referenced 49 U.S.C. § 11101(c), which provides that a shipper must be given notice 20 days in advance of an increase in common carrier rates.

As noted above, the increased rate on movements from the Rawhide Mine is “covered by the STB rate prescription.” Specifically, the newly established rate of \$18.83 per ton

¹ This letter referring to rates from non-Rawhide Mines and the referenced Common Carrier Pricing Authority are included in Exhibit D to AEP’s Supplement.

² The letter referring to the rate for coal transported from the Rawhide Mine is also included in Exhibit D to AEP’s Supplement.

corresponds to the SAC maximum rate for movements from the Rawhide Mine for 2004, established by the Board in its May 29, 2003 decision in *West Texas Utilities Co. v. The Burlington Northern and Santa Fe Railway Co.*, Docket No. 41191. The rate of \$18.83 per ton on coal movements from non-Rawhide origins is not a Board prescribed rate. It is the rate that *would now be the Board prescribed rate* if the Board had granted the request made in 2000 by AEP TX's predecessor West Texas Utilities to extend the Rawhide rate prescription to movements from non-Rawhide origins. The Board denied that request and instead found that "BNSF has the freedom to increase these rates without precondition except for the 20-day notice. . . ." *W. Tex. Utilities Co. v. BNSF*, Docket No. 41191, at 5 (served Nov. 3, 2000).

By letter dated December 22, 2003, AEP responded to BNSF's notice of increased rates.³ The opening paragraph of this letter does not distinguish between the rate applicable to movements from non-Rawhide origins and the Board-prescribed rate applicable to movements from the Rawhide Mine. AEP's letter refers to "your letters dated December 10, 2003," and states that "AEP Texas objects to these rate increases . . . as unreasonable and unlawful. These rates and service terms are subject to the Surface Transportation Board's continuing jurisdiction in Docket No. 41191 (Sub-No. 1)." Insofar as it applies to the Board-prescribed rate on movements from the Rawhide Mine, this assertion regarding Board jurisdiction is plainly incorrect.⁴

AEP's letter goes on to explain that AEP has no intention of paying the newly established rate on movements from non-Rawhide origins:

³ Letter from Timothy P. Stanley, AEP to Larry C. Meyne, BNSF, dated December 22, 2003. This letter is attached to BNSF's Reply as "Attachment A."

⁴ The Board established its rate prescription on the Rawhide movement in Docket No. 41191. Although AEP has petitioned to vacate that rate prescription, the Board has not ruled on that petition and the rate prescription remains in effect.

Further, in accordance with the United States District Court for the Northern District of Texas' August 1, 2003 Order Granting AEP Texas' Motion to Refer to the STB and to Stay Pending Referral, *AEP Texas is not obligated to pay the increased rate level for coal transported from non-Rawhide PRB mine origins to Oklaunion Station at this time. Consistent with this decision, AEP Texas will continue to pay \$13.68 per ton for the non-Rawhide shipments pending the Board's ruling on the reasonableness of the rates BNSF otherwise seeks to collect.*

Attachment A at 1 (emphasis added).

On December 22, 2003, the same date as AEP's letter referenced above, AEP filed its Supplement with the Board, stating that it "hereby supplements its Complaint to clarify that its objections to the rates and service terms set forth in Common Carrier Pricing Authority BNSF 306720 are encompassed within AEP Texas' August 11, 2003 Verified Complaint. AEP Texas alleges that the rates, charges and service terms set forth in Common Carrier Pricing Authority 306720 are unreasonable and unlawful." Supplement at 3. AEP's Supplement does not advise the Board that AEP has no intention of paying the newly established common carrier rate that it purports to challenge.

ARGUMENT

I. **THE BOARD SHOULD DISMISS AEP'S COMPLAINT AND THE SUPPLEMENT**

With its Supplement, AEP has once again asserted a challenge to the reasonableness of a common carrier rate that it refuses to pay. The Board should not permit a litigant before it to determine unilaterally which statutory requirements it will adhere to and which ones it will disregard. If AEP is to invoke the rate reasonableness provisions of the statute, it must pay the rate that it purports to challenge.

There can be no doubt as to AEP's obligation to pay the common carrier rate of \$18.83 per ton that will go into effect as of January 1, 2004. The Board itself ruled in November 2000 regarding BNSF's right to establish the rate on the non-Rawhide movement. The Board expressly found that "BNSF has the freedom to increase these rates without precondition except for the 20-day notice. . . ." *W. Tex. Utilities Co. v. BNSF*, Docket No. 41191, at 5 (served Nov. 3, 2000). Under the governing statute, a shipper must pay the lawfully established rate pending a determination of its reasonableness. AEP itself acknowledged as much in its September 2, 2004 petition to vacate the Board's rate prescription on the Rawhide movement: "To be sure, removal of the prescription means that the carrier is free to set – *and the shipper must pay* – any new rate it chooses, subject to the Board's jurisdiction to review it on reasonableness grounds." AEP Texas North Company's Petition to Vacate Rate Prescription, Docket No. 41191, Sept. 2, 2003 at 11 (emphasis added).

As AEP itself asserted, "the shipper must pay" the rate it intends to challenge. To insure the integrity of the statutory scheme, the Board must make adherence to this rule a precondition to bringing a rate reasonableness complaint. Accordingly, the Board should dismiss AEP's complaint, without prejudice to refiling if and when AEP pays the lawfully established common carrier rate that it purports to challenge.

II. THE U.S. DISTRICT COURT'S REFERRAL ORDER DOES NOT PRECLUDE THE BOARD FROM EXERCISING ITS AUTHORITY IN COMPLAINT PROCEEDINGS BROUGHT BEFORE IT

In its December 22, 2003 letter to BNSF, AEP cites the August 1, 2003 referral order of the United States District Court for the Northern District of Texas as the basis for its refusal to pay the lawfully established common carrier rate on non-Rawhide movements. The suggestion

that a referral order in a collection action can somehow trump the statutory scheme that the Board is entrusted to administer is entirely unfounded.

Indeed, nothing in the referral order provides a shred of support for the proposition that AEP is not obligated to pay BNSF's lawfully established rate. The order states that "[t]he issue of the reasonableness of BNSF's rates for transportation service from mines in the Powder River Basin ('PRB') of Wyoming (excluding the Rawhide mine) to Oklahoma, Texas is referred to the STB."⁵ This referral does not even purport to alter the rule, acknowledged by AEP itself, that the shipper must pay the challenged rate while its rate reasonableness claim is pending.

The District Court also ruled that it would defer consideration of BNSF's claims for the collection of amounts due until the Board had ruled on the reasonableness of the underlying rates. BNSF believes that the District Court's decision is based on an incorrect understanding of the role of federal courts in enforcing the obligation of a shipper to pay a lawfully established common carrier rate. Regardless of the validity of the District Court's decision, however, that Court clearly did not, and could not, restrict the Board's own exercise of jurisdiction over AEP's rate reasonableness claims.⁶ The District Court's referral order is no impediment to a Board decision dismissing AEP's complaint and requiring AEP to pay the challenged rate as a condition of refiling its complaint.

⁵ *BNSF v. American Elec. Power Co., et al.*, Complaint, Civil Action No. 4-03CV-213-Y (filed March 26, 2003), Aug. 1, 2003 slip op. at 2. (The referral order is attached to BNSF's Motion to Dismiss as "Attachment B".)

⁶ The practical effect of the District Court decision was to defer AEP's obligation to pay for past charges that were the subject of BNSF's collection action. Even if the Board were to defer to this aspect of the District Court's decision by declining to require AEP to pay past due amounts as a condition of maintaining its complaint, the District Court decision provides no conceivable basis for relieving AEP of the obligation to pay the challenged rate going forward as a predicate to maintaining a rate reasonableness challenge to that rate.

III. THE BOARD SHOULD PROMPTLY GRANT BNSF'S MOTION TO DISMISS THE COMPLAINT AND SHOULD DISMISS THE SUPPLEMENT AS MOOT

BNSF's Motion to Dismiss AEP's complaint was filed on September 2, 2003, and AEP replied in opposition 20 days later. The Motion to Dismiss has been ripe for decision for over three months. It should be granted promptly.

BNSF is aware that the Board has on occasion been reluctant to rule on motions to dismiss before the submission of evidence in a rate reasonableness case has been completed. The Board appears to believe that in some cases it is unwise to rule on the sufficiency of the evidence supporting a rate reasonableness claim until all the evidence has been assessed. But the pending Motion to Dismiss does not require any assessment of evidence. BNSF's motion is jurisdictional in nature and raises a fundamental threshold issue that is relevant to the effective administration of the statutory rate reasonableness provisions that the Board oversees.

There are strong policy grounds for granting the Motion to Dismiss now and no countervailing factors suggesting that the Board should refrain from ruling. Granting the motion will send a straightforward message to shippers and rail carriers that the Board will continue to administer the rate reasonableness provisions of the statute in the manner that Congress intended. AEP will not be prejudiced by a grant of BNSF's motion, because it will be entitled to refile its complaint when it complies with the Board's ruling that it must pay the challenged rate as a precondition to filing a complaint. A grant of BNSF's Motion to Dismiss will render AEP's Supplement moot.

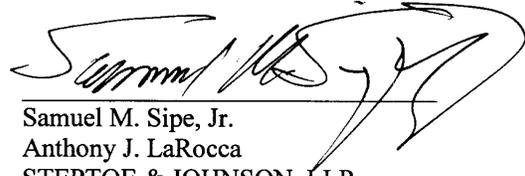
CONCLUSION

For the foregoing reasons, BNSF respectfully requests that the Board promptly grant BNSF's pending Motion to Dismiss and further dismiss AEP's Supplement as moot.

Respectfully submitted,

OF COUNSEL

Richard E. Weicher
Michael E. Roper
THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY
2500 Lou Menk Drive
P.O. Box 961039
Ft. Worth, TX 76131-0039
Phone (817) 352-2368
Facsimile (817) 352-2397



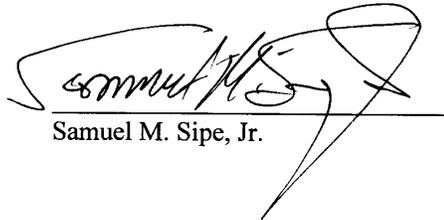
Samuel M. Sipe, Jr.
Anthony J. LaRocca
STEPTOE & JOHNSON, LLP
1330 Connecticut Ave. N.W.
Washington, D.C. 20036
Phone (202) 429-6486
Facsimile (202) 429-3902

December 31, 2003

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by messenger on
this 31st day of December, 2003 on the following:

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



Samuel M. Sipe, Jr.



ATTACHMENT A

American Electric Power
188 Nationwide Blvd.
Suite 500
Columbus, OH 43215
www.aep.com

December 22, 2003

Via Telecopier

Mr. Larry C. Meyne
Director Coal Marketing
P.O. Box 961051
2650 Lou Menk Drive
2nd Floor
Fort Worth, Texas 76131-2830

Re: Common Carrier Pricing Authority BNSF 306720

Dear Larry:

We are in receipt of your letters dated December 10, 2003 attaching Common Carrier Pricing Authority BNSF 306720 and announcing rate increases and new service terms for AEP Texas North Company's Powder River Basin movements to Oklaunion Station. Please be advised that AEP Texas objects to these rate increases and changes in service terms as unreasonable and unlawful. These rates and service terms are subject to the Surface Transportation Board's continuing jurisdiction in Docket No. 41191 (Sub-No. 1).

Further, in accordance with the United States District Court for the Northern District of Texas' August 1, 2003 Order Granting AEP Texas' Motion to Refer to the STB and to Stay Pending Referral, AEP Texas is not obligated to pay the increased rate level for coal transported from non-Rawhide PRB mine origins to Oklaunion Station at this time. Consistent with this decision, AEP Texas will continue to pay \$13.68 per ton for the non-Rawhide shipments pending the Board's ruling on the reasonableness of the rates BNSF otherwise seeks to collect.

Sincerely,

Timothy P. Stanley
Director, Coal Transportation & Marketing