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May 14, 2003

EXPEDITED CONSIDERATION REQUESTED

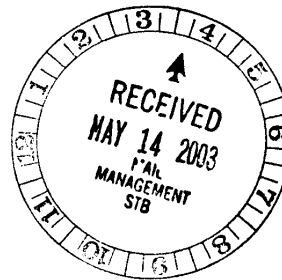
VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

MAY 14 2003

Part of
Public Record



Re: Docket No. 41191 (Reopened), West Texas Utilities Company, v.
The Burlington Northern and Santa Fe Railway Company

Dear Secretary Williams:

Enclosed for filing in the referenced proceeding, please find an original and 10 copies of a Petition to Establish Procedural Schedule. As explained in the Petition, the special circumstances that attend this matter warrant consideration on an expedited basis.

An additional copy of the Petition also is enclosed. Kindly indicate receipt and filing by time-stamping this extra copy and returning it to the bearer of this letter.

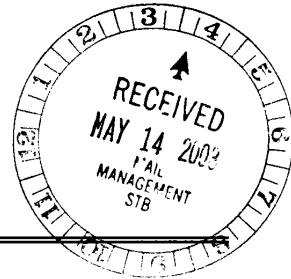
Thank you for your consideration in this matter.

Sincerely,

Kelvin J. Dowd
an Attorney for
AEP Texas North Company

Enclosure

EXPEDITED ACTION REQUESTED
BEFORE THE
SURFACE TRANSPORTATION BOARD



WEST TEXAS UTILITIES COMPANY,

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 41191
(Reopened)

PETITION TO
ESTABLISH PROCEDURAL SCHEDULE

ENTERED
Office of Proceedings

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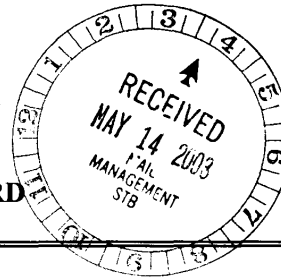
OF COUNSEL:

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1224 Seventeenth Street, N.W.
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Dated: May 14, 2003

Attorneys & Practitioners

EXPEDITED ACTION REQUESTED
BEFORE THE
SURFACE TRANSPORTATION BOARD



WEST TEXAS UTILITIES COMPANY,

Complainant,

v.

**THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,**

Defendant.

**Docket No. 41191
(Reopened)**

PETITION TO
ESTABLISH PROCEDURAL SCHEDULE

Pursuant to 49 C.F.R. Part 1111.8, and in accordance with the Decisions served in this proceeding on November 7, 2000 ("*November Decision*") and March 23, 2001 ("*March Decision*"), AEP Texas North Company ("AEP Texas"), successor in interest to Complainant, West Texas Utilities Company ("WTU"), hereby petitions for the establishment of a procedural schedule to govern the assembly, preparation and presentation of evidence in this proceeding reopened by orders of the Board. As specified in the *November Decision*, the focus of this reopened proceeding is the determination of the reasonableness of common carrier rates established by Defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF"), for coal transportation from Powder

BNSF-served Powder River Basin origins other than the Rawhide Mine¹ to the Oklaunion Generating Station near Vernon, Texas.

AEP Texas files this Petition because BNSF has refused to negotiate a schedule, despite the Board's order that "[t]he parties should confer and submit a motion to govern further proceedings, including an appropriate procedural schedule...."

November Decision at 5. AEP Texas respectfully requests that the Board act expeditiously on this Petition, and adopt the schedule appended hereto as Exhibit A.

In support thereof, AEP Texas shows as follows:

1. The Original Verified Complaint filed in this docket on January 12, 1994 sought the prescription of maximum reasonable rates for the rail transportation of coal from all BNSF-served mines in the Powder River Basin to Oklaunion. In its 1996 Decision in this proceeding, the Board stated that its prescription order applied only to movements from the Rawhide Mine. *See* 1. S.T.B. at 644. At the same time, however, the Board stated that it would evaluate the reasonableness of rates from other coal origins referenced in the Complaint when and if necessary:

"WTU may request BN to establish appropriate rates from any and all of the other mines. We can address any rate reasonableness concerns as to those other mine origins in a subsequent decision, if necessary, after obtaining

¹ Coal transportation from the Rawhide Mine to Oklaunion is governed by a rate prescription order served by the Board in 1996, in an earlier phase of this case. *West Texas Utilities Company v. Burlington Northern Railroad Company*, 1 S.T.B. 638, 679 (1996), *aff'd. sub nom, Burlington Northern Railroad Company v. Surface Transportation Board*, 114 F.3d 206 (D.C. 1997).

appropriate supplemental evidence tailored to those sites.

Id. Neither party challenged this ruling in the appeal which ensued, and the Board's Decision thereafter was affirmed in all respects. *Burlington Northern Railroad Company v. Surface Transportation Board, supra.*

2. Following the 1996 Decision, BNSF established a rate from Rawhide to Oklahoma that complied with the prescription order. By mutual agreement with AEP Texas, BNSF later applied the prescribed Rawhide rate to movements from other BNSF-served Powder River Basin mines. *November Decision* at 3. In June of 2000, however, BNSF petitioned the Board for permission to increase its rates from the non-Rawhide origins, on grounds that the 1996 prescription only constrained BNSF's pricing on movements from Rawhide. *Id.*

3. Upon protest by AEP Texas, the Board issued the *November Decision*. Therein, the Board first agreed with BNSF that the 1996 prescription only applied to Rawhide, and allowed the carrier to establish a higher rate (\$15.78 per ton, since increased further) for shipments from other origins. *Id.* at 4. It then turned to the question of the reasonableness of the new, higher rate:

"We will, however, reopen this proceeding to address WTU's opposition to the \$15.78 rate. As noted, our *West Texas* decision provided that we would consider reasonableness disputes over rates for other mine origins based on supplemental evidence. The parties should confer and submit a motion to govern further proceedings, including an appropriate procedural schedule and a discussion of the

issues that must be addressed on reopening. We will then issue a schedule under which the parties can submit supplemental evidence concerning the non-Rawhide origins. We will then make a determination on the reasonableness of the rates for non-Rawhide origins.”

Id. The Board’s Ordering Paragraph No. 1 stated: “This proceeding is reopened to determine the reasonableness of the \$15.78 per ton rate from other PRB origins. The parties shall jointly file a motion to govern further proceedings.” *Id.*

4. While AEP Texas sought reconsideration of the *November Decision*, BNSF took no appellate action. Instead, BNSF supported and defended the *November Decision*. In a Reply to WTU’s Petition for Reconsideration, BNSF noted that the parties had “deferred submitting the motion” to set a new schedule pending resolution of WTU’s Petition.² It went on to argue that the Board’s decision to reopen the docket and consider the reasonableness of the non-Rawhide rates fully protected all of WTU’s rights regarding the non-Rawhide rates:

“There will be no prejudice to WTU if the Board adheres to its decision not to prescribe rates for non-Rawhide origins in advance of a determination of the reasonableness of those rates. BNSF is confident that the rates it has established for non-Rawhide origins are reasonable. However, in the event that the Board should subsequently determine otherwise, WTU could be made whole through an award of reparations. 49 U.S.C. §10704.”

² *Reply of BNSF to West Texas Utilities’ Petition for Reconsideration*, December 18, 2000 at 6 n.1.

Id. In its *March Decision*, the Board denied the Petition for Reconsideration, and reiterated its order reopening the docket for further proceedings respecting the non-Rawhide rates:

“We also note that, pursuant to our holding out [sic] in *West Texas*, if the parties could not voluntarily agree to a rate from non-Rawhide origins, we would make a rate reasonableness determination after taking further evidence. Accordingly, in our *November decision*, we reopened the proceeding to address the reasonableness of the \$15.78 rate, and asked the parties to file a joint motion to direct further proceedings.

March Decision at 2.

5. Neither party challenged the *March Decision*. Instead, BNSF and AEP Texas’ began negotiations over a possible commercial resolution of their rate dispute. During the negotiations, the parties by mutual agreement deferred consideration of a procedural schedule for the reopened proceeding to consider the reasonableness of the non-Rawhide rates.

6. When negotiations between the parties ended unsuccessfully, AEP Texas arranged to meet with BNSF to discuss the joint establishment of the procedural schedule and other matters described by the Board in the *November Decision* and the *March Decision*. Counsel for the parties met on May 8, 2003. At that meeting, however, counsel for BNSF stated that it was now the carrier’s position that the Board had no authority to reopen this proceeding to consider the reasonableness of non-Rawhide rates

to Oklahoma in the *November Decision*, and for that reason BNSF would not discuss or consider a procedural schedule. BNSF suggested that AEP Texas file a new complaint challenging the non-Rawhide rates under 49 U.S.C. §§10701(d) and 11701(b).

7. BNSF's present position is contradicted by the carrier's prior, consistent actions in defense and support of the *November Decision*, and by its written representations as quoted above. BNSF's new position is also wrong as a matter of law. The Board possesses broad authority to reopen rail rate proceedings under 49 U.S.C. §722(c)(1), and its authority includes the power to reopen a docket initially opened to consider the reasonableness of rates between a particular origin and destination, for the purpose of adjudging the reasonableness of alternate rates from other origins to the same destination. This principle applies with particular force in this case, where WTU's Original Complaint specifically sought the prescription of reasonable rates on shipments from all BNSF-served origin mines in the Powder River Basin. *See Verified Complaint*, January 12, 1994 at 7.

8. Having accepted and defended the *November Decision* and led AEP Texas into lengthy negotiations on the premise that its full remedial rights with respect to the non-Rawhide rates were protected in the interim, BNSF cannot now be permitted to challenge the validity of the very Board action upon which the parties relied.

9. BNSF's new objective is transparent. In addition to causing further delay, a requirement that AEP Texas file a new complaint would deprive AEP Texas of

the ability to fully recover for overcharges since the inception of the challenged rates in July, 2000. Under 49 U.S.C. §11705(c), a complaint against a violation of 49 U.S.C. §10701(d) can only claim retrospective reparations for the two-year period prior to the filing of the complaint. If applied here, such a rule would insulate BNSF from liability for unreasonable charges assessed prior to May, 2001 *i.e.*, nearly a full year's worth of overcharges could not be recovered. The law and the relevant facts of this case do not support BNSF's new position.

10. In the *November Decision*, the Board lawfully exercised its authority to reopen this proceeding, and directed the parties to negotiate a schedule. Those rulings were supported by BNSF on the record, and reiterated by the Board in the *March Decision*. Since BNSF now refuses to negotiate over a schedule as required by the Board, the Board forthwith should adopt and impose the schedule proposed by AEP Texas in Exhibit A.

11. AEP Texas' proposed schedule incorporates procedural rules changes adopted by the Board in *Ex Parte No. 638* to expedite the resolution of coal rate disputes, and in accordance with the Board's recent ruling in *APS*,³ calls for AEP Texas to file Opening Evidence, followed by a BNSF Reply and AEP Texas Rebuttal. Consistent with the *March Decision*, it allows sufficient time for the preparation and

³ Docket No. 41185, *Arizona Public Service Co. & PacifiCorp v. The Burlington Northern and Santa Fe Railway Company*, Decision served May 12, 2003 at 6.

presentation of evidence, including evidence of the many “significant changed circumstances that ... affect the rate analysis” which have occurred since the 1996 Decision was served, such as changes in capital costs and rates of inflation; changes in the traffic and operating characteristics of BNSF service from non-Rawhide origins to Oklaunion; changes in coal volumes and revenues for BNSF traffic that moves over the route of the stand-alone railroad; and modifications in the methodology applied by the Board to determine variable and stand-alone costs under the *Coal Rate Guidelines*. Because it is anticipated that the record on reopening will supplement the evidentiary data base already assembled in connection with the 1996 Decision, the proposed time periods for discovery and the presentation of evidence are shorter than those that normally apply in the case of entirely new rate complaints.

12. With respect to changes in coal volumes and revenues, AEP Texas is mindful of the Board’s ruling in *APS* that an expansion or reconfiguration of the complainant’s initial stand-alone rail system would not be permitted in that reopened proceeding. While this case differs significantly in that, *inter alia*, no record has been developed concerning the reasonableness of BNSF’s rates from non-Rawhide origins, AEP Texas does not anticipate expanding the configuration or geographic scope of the stand-alone system described in the 1996 Decision. However, AEP Texas does intend to submit evidence of changes in stand-alone traffic volumes and revenues attributable both to coal movements included in the original traffic group, and coal movements that

presently use the route of the original stand-alone system but were not available to BNSF when the original record was being developed. These changes are fully consistent with *APS*.

WHEREFORE, for the reasons set forth herein, the Board should adopt and impose the procedural schedule in Exhibit A for application to this reopened docket. Further, because this Petition is occasioned solely by BNSF's refusal to obey the Board's previous orders to negotiate a schedule and there is no legitimate basis for additional delay, this Petition should be considered and the relief requested herein should be granted on an expedited basis.

Respectfully submitted,

AEP TEXAS NORTH COMPANY
1 Riverside Plaza
Columbus, Ohio 43215

By: Tim Stanley, Manager of Transportation
David Cohen, Senior Attorney
American Electric Power Company
1 Riverside Plaza
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OF COUNSEL:

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Dated: May 14, 2003

Attorneys & Practitioners

Exhibit A

STB Docket No. 41191 (Reopened)

WEST TEXAS UTILITIES COMPANY

v.

**THE BURLINGTON NORTHERN & SANTA FE
RAILWAY COMPANY**

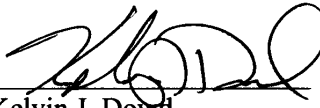
PROPOSED PROCEDURAL SCHEDULE

Entry of Scheduling Order	Day 1
Discovery Conference with STB Staff	Day 21
Discovery Period Closes	Day 40
Technical Conference with STB Staff	Day 65
AEP Opening Evidence Due	Day 80
BNSF Reply Evidence Due	Day 130
AEP Rebuttal Evidence Due	Day 165
Base Period for Cost Determinations	3 Q 2000

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2003, I caused three (3) copies of the foregoing Petition to Establish Procedural Schedule to be served by hand upon:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036


Kelvin J. Dowd