

STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

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

208295

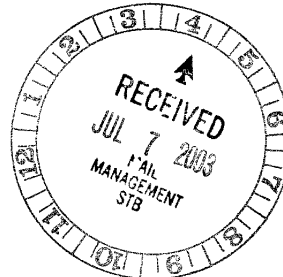
1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Telephone 202.429.3000
Facsimile 202.429.3902
www.steptoel.com

July 7, 2003

Via HAND DELIVERY

Honorable Vernon A. Williams
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001



Re: **STB Docket No. 42077, Arizona Public Service Company and PacifiCorp v. The Burlington Northern and Santa Fe Railway Company**

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding, please find original and ten copies of the Public Version and the Highly Confidential Version of BNSF's Reply to Peabody Energy Corporation's Petition to Intervene and Petition for Injunctive Relief. Also enclosed are electronic copies of this pleading in Word Perfect format.

Kindly date stamp the extra copy provided herein and return it to our messenger for our files. If you have any questions, please contact the undersigned.

Sincerely,

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

cc: Nicholas J. DiMichael (by hand)
C. Michael Loftus (by hand)

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ARIZONA PUBLIC SERVICE
COMPANY and PACIFICORP,

Complainants,

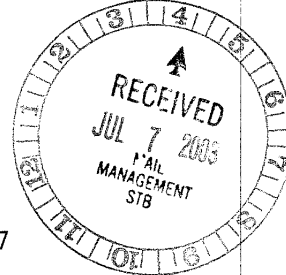
v.

THE BURLINGTON NORTHERN
SANTA FE RAILWAY COMPANY,

Defendant.

**PUBLIC
VERSION**

Docket No. 42077



**THE BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY'S
REPLY TO PEABODY ENERGY CORPORATION'S
PETITION TO INTERVENE AND PETITION FOR INJUNCTIVE RELIEF**

The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby replies in opposition to the Petition to Intervene and Petition for Injunctive Relief filed in this docket on June 16, 2003 by Peabody Energy Corporation ("Peabody"). Peabody's petitions should be summarily denied.¹ Peabody does not purport to represent the public interest in this proceeding. Peabody asserts no private interests that are protected by ICCTA and it alleges no violation of the statute on the part of BNSF.

The Board has no role in regulating coal supply markets, as distinguished from rail transportation markets, and lacks the authority to grant the relief that Peabody seeks. BNSF had the statutory right to establish the transportation rate that Peabody asks the Board to set aside.

¹ Peabody has also filed a Motion for Expedited Consideration. While BNSF does not accept the predicate of Peabody's request for expedition, it does not oppose an expeditious ruling by the Board on Peabody's petitions.

The Board could not set aside the rate absent a finding that it is unlawful, yet Peabody does not even allege that the rate is unlawful.

There is no point in allowing Peabody to intervene in this proceeding to pursue relief that is beyond the Board's authority to grant.² Permitting intervention under these circumstances would also be extremely unwise policy. One of the principle goals of national transportation policy under ICCTA is "to minimize the need for Federal regulatory control over the rail transportation system." 49 U.S.C. § 10101(2). Peabody's petitions ask the Board to proceed in precisely the opposite direction and to assume an activist regulatory role in fuel supply markets that are only tangentially related to the rail transportation system. If the Board were to act to correct the inequity that Peabody perceives in the coal supply market in which it competes, it would open the door to any number of claims by disgruntled parties who believe they could enhance their competitive situation with the Board's assistance. That is simply not what Congress intended.

Even if Peabody were granted leave to intervene, it would not be entitled to the relief it seeks. Peabody invokes the phasing constraint of the Board's *Coal Rate Guidelines* without alleging, much less establishing, any violation of ICCTA by BNSF. Moreover, the phasing constraint was intended to benefit coal shippers and not third parties like Peabody. Peabody's suggestion that it is free to seek injunctive relief from the Board independent of showing any violation of ICCTA is wrong. The Board's injunctive power is not a free floating authority to correct perceived wrongs that are not violations of ICCTA or materially connected to the Board's

² Peabody might be able to satisfy the Board's standards for intervention if it limited its participation to supporting APS' rate reasonableness claim. However, this is clearly not what Peabody contemplates.

responsibilities under ICCTA. In any event, Peabody has not made the showing needed to justify a grant of injunctive relief.

BACKGROUND

Peabody's petitions involve the amount of coal Peabody is able to sell to Arizona Public Service Company and PacifiCorp (hereafter "APS") to fuel the Cholla electric generating station near Joseph City, Arizona. That is not a matter in which BNSF has any direct involvement. Coal supply arrangements are made by APS and its coal suppliers. BNSF is not a party to them. BNSF does transport coal to Cholla from various mine origins. Two origins from which Cholla is currently receive coal are the McKinley Mine in Western New Mexico owned by the Pittsburgh and Midway Coal Company and Peabody's Lee Ranch Mine, some 65 miles east of the McKinley Mine.

Prior to January 1, 2003, BNSF for several years had transported coal to Cholla under a privately negotiated rail transportation contract between the railroad and APS. In the absence of a new contractual agreement with APS, BNSF established common carrier rates for movements of coal to Cholla. Exercising its statutory ratemaking initiative, BNSF established a rate for the Lee Ranch movement of \$8.62 per ton with a minimum carload of 116 tons.

For movements to Cholla from the McKinley Mine, BNSF was unable to exercise its ratemaking initiative because of the Board's prior rate prescription in Docket No. 41185, which limited BNSF's common carrier rate to \$4.21 per ton when common carrier service resumed on January 1, 2003. On January 10, 2003, BNSF filed with the Board a Petition to Reopen the Proceeding and Vacate the Rate Prescription due to substantially changed circumstances and new evidence relating to the remaining coal reserves at the McKinley Mine. Specifically, BNSF presented evidence showing that the McKinley Mine would exhaust its coal reserves long before

2013 and, as a result, there was no basis for maintaining the existing rate prescription. On the same date, BNSF filed a Petition for Interim Relief requesting the Board to order APS to pay into an escrow account the difference between the prescribed rate and the higher \$6.91 common carrier rate that BNSF proposed to charge for the transportation from McKinley to Cholla in the absence of a prescribed rate. This interim relief was requested to prevent BNSF from suffering irreparable harm during the pendency of the reopened proceeding. APS opposed both petitions.

On May 12, 2003, the Board granted BNSF's petition to reopen the McKinley Mine rate proceeding and suspended the prescriptive effect of the prescribed rate during the pendency of the proceeding. However, the Board also ordered BNSF to charge the prescribed rate during the pendency of the reopened proceeding subject to a keep account order, rejecting BNSF's proposal for an escrow arrangement which would allow BNSF to assess its proposed rate of \$6.91 per ton.

In the interim between BNSF's January 10, 2003 petition to vacate the rate prescription and the Board's May 12, 2003 decision in Docket No. 41185, APS initiated this Docket No. 42077 by filing on January 30, 2003 a complaint challenging the reasonableness of BNSF's common carrier rate on movements from Lee Ranch to Cholla. APS also moved to consolidate the two dockets. The Board denied the consolidation motion in its May 12, 2003 decision.

APS/Pacificorp has petitioned the Board to reconsider its May 12, 2003 decision and BNSF has opposed reconsideration. Both Docket No. 41185 and Docket No. 42077 are temporarily on hold pending a ruling on the petition for reconsideration.

On June 16, 2003, Peabody filed its petitions in the Lee Ranch rate reasonableness docket, Docket No. 42077. Claiming that it is injured by the disparity in the rates that BNSF is currently able to charge APS for coal from the McKinley mine (the prescribed rate of \$4.21 per ton) and coal from the Lee Ranch mine (the common carrier rate of \$8.62 per ton), Peabody

seeks to enjoin BNSF from charging a rate higher than the expired contract rate for movements of Lee Ranch coal pending the Board's decision on the reasonableness of the Lee Ranch rate.

Peabody's argument is predicated on the unarticulated assumption that APS assesses the transportation cost of movements from the McKinley Mine at \$4.21, the current prescribed rate that BNSF is obligated to charge at present under the Board's keep account order. But the \$4.21 rate may well be adjusted on reopening (BNSF believes that it will be adjusted upward) so that APS will ultimately pay a rate different from \$4.21 for the current shipments. Peabody has no way of knowing what rate APS actually attributes to the McKinley Mine movement for purposes of its commercial decisions.

ARGUMENT

I. PEABODY'S PETITION TO INTERVENE SHOULD BE DENIED BECAUSE ITS PARTICIPATION WOULD UNDULY BROADEN THE ISSUES RAISED IN THIS PROCEEDING

Under the Board's rules, the Board may grant a petition to intervene if intervention "[w]ould not unduly broaden the issues raised in the proceeding." 49 C.F.R. § 1112.4(a)(2). Peabody does not even attempt to satisfy this aspect of the Board's test for intervention and, indeed, it would not be able to do so.

Peabody seeks to intervene and obtain injunctive relief in a rate reasonableness case. However, Peabody's claim of injury is fundamentally different from claims raised in rate reasonableness cases brought before the Board and its predecessor. Peabody claims injury stemming from its impaired ability to compete with McKinley Mine for sales of coal to Cholla in "the market for San Juan Basin coal." Petition to Intervene at 4. It attributes this impairment to a "spread" between rates for the transportation of McKinley Mine coal to Cholla and the rates for

the transportation of Lee Ranch Mine coal to Cholla. Peabody's focus is on the market for the sale of coal rather than the coal transportation market. Indeed, it appears that the precipitating cause of Peabody's supposed injury (and hence its filing before the Board) was not BNSF's establishment of the common carrier rate for movements from Lee Ranch to Cholla but rather the Board's May 12, 2003 decision holding the rate on the McKinley movement at \$4.21 per ton, an outcome contrary to what BNSF had sought. Peabody states that it "seeks to preserve the competitive market conditions for the sale of coal that existed between the Lee Ranch and McKinley Mines prior to January 1, 2003, but which have been distorted by the [Board's] May 12 Decision." Petition to Intervene at 4.

Peabody's claim of an impaired ability to compete with McKinley coal depends to a considerable extent on factors wholly unrelated to BNSF's transportation rates. These factors include the price at which Peabody is willing to sell its coal to the owners of the Cholla generating station, and the relationship of that price to the price of coal that the Cholla owners pay for McKinley Mine coal. These factors also include the relative quality of Lee Ranch coal versus McKinley mine coal and the available quantity of the respective coals.

A consideration of these factors involving coal supply, among others, would be necessary for the Board to assess Peabody's claim that there is truly a disparity in the delivered cost of coal to Cholla, that such an alleged disparity has resulted in injury or imminent threat of injury to Peabody, and that the level of BNSF's transportation rate has anything to do with the putative injury. These are matters far beyond the scope of an STB rate reasonableness determination. Peabody's petition to intervene should be denied because it would "unduly broaden the issues raised" in this proceeding. *See* 49 C.F.R. § 1112.4; *see also National R.R. Passenger Corp. &*

Consolidated Rail Corp. – Application under § 402(a) of the Rail Passenger Service Act, Finance
Docket No. 32467, 1995 WL 123819 at *3 (I.C.C. Mar. 24, 1995).

A. Peabody Does Not Assert an Interest within the Zone of Interests Protected by ICCTA

The extent to which Peabody proposes to broaden the scope of this proceeding can be assessed by examining Peabody's request for relief in light of the policy goals and statutory provisions that delineate the Board's responsibilities under ICCTA. That examination reveals that Peabody's asserted interests are not within the zone of interests protected by the Act.

Peabody asks the Board to intervene in the coal supply market to restore a competitive balance between its Lee Ranch Mine and the McKinley Mine for sales of coal to Cholla. Peabody's interest has nothing to do with the interests the Board is supposed to protect under ICCTA. The starting point for identifying those interests is the rail transportation policy set out at 49 U.S.C. § 10101. *See Simmons v. ICC*, 909 F.2d 186, 190 (7th Cir. 1990) (in holding that interest of rail employees in retaining their jobs did not fall within zone of interests contemplated by the statute, the court looked to the policies now enumerated in 49 U.S.C. § 10101, which set forth "the overall interests which the [act] seeks to protect through its rail transportation policy").

Under ICCTA, the Board is to exercise its regulatory authority sparingly. A principal policy goal is "to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required." 49 U.S.C. § 10101(2). The foregoing policy also indicates where the Board is supposed to focus its attention when the need for regulation does arise – i.e., on the "rail transportation system." Indeed, section 10101 is replete with references to "the rail transportation system" (sub-sections (2), (3), (4)), "the rail system" (sub-section (6)), and the "railroad industry" or "the industry" (sub-sections (7), (11)). It is also clear from the rail transportation policy that the interests the

Board is supposed to protect, in addition to those of the railroad industry, are the interests of railroad ratepayers (sub-sections (1), (6), (12)).

Nothing in the rail transportation policy suggests that Congress intended the Board to address the interests of coal producers who do not pay freight rates or to regulate coal supply markets. Nor is there any grant of substantive authority in ICCTA that would authorize the Board to address such interests. The Board may not expand the scope of its authority beyond what ICCTA allows.³

Not only did Congress not give the Board the responsibility or authority to protect the interest asserted by Peabody in this case, but a grant of the relief sought by Peabody would be contrary to the substantive provisions of ICCTA in several ways. Peabody seeks a Board order requiring BNSF to charge rates on the movement of Lee Ranch Mine coal to Cholla that are substantially lower than the rates BNSF chose to establish. Peabody seeks this relief without offering any proof or even any contention that BNSF has violated a provision of ICCTA. The statute does not permit this approach. Section 10701(c) states

Except as provided in subsection (d) of this section and unless a rate is prohibited by a provision on this part, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may establish any rate for transportation or other service provided by the rail carrier.

³ See *La. Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (stating that “an agency may not confer power on itself” and recognizing that “an agency literally has no power to act . . . unless and until Congress confers power upon it”); *Mich. v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001) (stating that “[a]gency authority may not be lightly presumed. Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.” (quotations omitted)); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) (refusing “once again to presume a delegation of power merely because Congress has not expressly withheld such power”).

In other words, rail carriers are free to charge any rate they choose unless and until the rate is found to be unreasonable. Peabody would have the Board deny BNSF's ratemaking initiative on the Lee Ranch Mine movement without the requisite showing that the rate is unreasonable and without the "full hearing" required under 49 U.S.C. § 10704(a)(1). There is no basis in the statute to grant Peabody this relief.

B. Peabody's Intervention Would Unduly Broaden the Scope of this Proceeding by Requiring the Board to Resolve Disputed Factual Issues Beyond the Scope of Rate Reasonableness Cases

Peabody's request for relief is predicated on the notion that the Board should give credence to Peabody's highly speculative, selective and self-serving version of the facts relating to the ability of Peabody's Lee Ranch Mine to compete with McKinley Mine for the sale of coal to Cholla. For example, Peabody speculates that the disparity in rail rates "will give the McKinley Mine a substantial and potentially decisive competitive advantage over the Lee Ranch Mine for the sale of coal to Cholla. {

}” Petition for Injunctive Relief

at 7. These assertions are fraught with conjecture. {

}

Peabody also asks the Board to accept at face value the proposition that “it is essential that Lee Ranch coal have a delivered price { } to remain competitive in the southwest.” Petition for Injunctive Relief at 12. This assertion seems

inherently implausible and is not supported with specific evidence in Peabody's Petition for Injunction. For all the Board knows, Peabody's request for relief could simply be a device to obtain an unwarranted competitive advantage for the Lee Ranch Mine over the McKinley Mine.

In fact there is reason to believe that the reality of the coal supply market situation is very different from what Peabody describes. As explained in the attached verified statement of BNSF's Director of Coal Marketing, Randy Reyff, BNSF's analysis of Peabody's competitive position for sales of coal to Cholla is fundamentally different from that asserted by Peabody here. McKinley Mine has historically been the primary supplier of coal to Cholla, with Lee Ranch Mine competing in recent years for incremental or "spot" coal sales. Reyff V.S. at 4. In BNSF's view, any competitive analysis of coal sales to Cholla requires an identification of which segments of McKinley Mine sales to Cholla the Lee Ranch Mine actually competes with. Mr. Reyff explains that "Lee Ranch coal competes with McKinley Mine's Spot coal offerings as suggested by the 2002 'Spot-1' and/or 'Spot-2' data. Compared against either 2002 McKinley 'Spot' example, Lee Ranch Mine Coal, notwithstanding the change to BNSF's 2002-2003 freight rate, maintains a significant 2003 cost advantage even assuming that the FOB Mine price of all the alternative coal takes a 2% inflation adjustment." *Id.* at 7. Mr. Reyff concludes that "when viewed in the context of the relevant market segments, Peabody's Lee Ranch Mine still enjoys a comparative economic advantage that, while somewhat less than was the case in 2002, is still material in 2003 and, by any reasonably projection, would continue in 2004." *Id.* at 8.

Mr. Reyff's understanding of the Lee Ranch Mine competitive position regarding coal sales to Cholla is based on publicly available data, his dealings with APS and Peabody, and his experience in the Southwestern United States coal transportation market. Mr. Reyff does not purport to have undertaken a complete analysis of this complex situation. But it is clear from his

statement that Peabody's own analysis is neither complete nor objective. Indeed, the Board would likely need to have considerable additional information beyond that provided thus far before it could determine whether there is any factual basis for Peabody's claim of competitive harm in its coal supply market. That inquiry would take the Board far afield from the types of factual determinations that it typically makes in rate reasonableness cases and, by doing so, would unduly broaden the scope of this proceeding.

In connection with the broadening of the factual inquiry discussed above, it is instructive to note that the Board's decision to foreclose consideration of product and geographic competition in rate reasonableness cases was based in part on the rationale that consideration of complex factual matters not directly related to transportation markets represented an undue burden. According to the Board,

Consideration of product and geographic competition also imposes substantial burdens on us that extend the processing of rate cases. For example, in several recent cases challenging the rates charged for transporting coal to a utility, the railroads asserted that a utility's ability to substitute power from different plants, either within or outside its immediate system, effectively disciplined the railroads' rates because a utility could in theory idle or reduce power production at the plant at issue. The argument was also made that a utility could switch coal types (e.g. from low sulfur coal to mid-sulfur coal, coupled with the purchase of emission allowances to comply with the Clean Air Act). These arguments required us to examine in depth the economics associated with producing and distributing electric power. It has also been suggested that, because utilities are interconnected via the power grid, the ability to burn fuel and produce power at various plants gives rise to effective geographic competition. Again, these arguments have required us to address complex non-transportation issues, such as the function of the power transmission grid, thus significantly complicating and prolonging an analysis of the record.

STB Ex Parte No. 627, *Market Dominance Determinations – Product and Geographic Competition*, served December 21, 1998 (footnote omitted).

The Board's belief that "address[ing] complex non-transportation issues" can complicate and prolong a rate reasonableness case is relevant here. It underscores the point that permitting Peabody to intervene and undertaking the complex factual determinations regarding coal supply markets that consideration of Peabody's petition would require would unduly broaden the scope of this proceeding.

C. Permitting Peabody to Intervene Would Be an Unwise Precedent that Could Embroil the Board in Numerous Disputes Outside the Scope of its Jurisdiction

Allowing Peabody to intervene here would have potentially far reaching pernicious consequences. Intervention would not only unduly burden this particular docket, it would be an invitation to other parties to impose further burdens on the Board by seeking relief that the Board is not empowered to grant.

Peabody asks the Board to assume a regulatory role in a market that is not a transportation market. If the Board were to intervene in the coal supply market as Peabody requests, there would be no reason to draw the line with Peabody or with the particular market of interest to it. Suppose the Board acted to protect Peabody's competitive position as it requests. The consequences of such Board action could be felt by other participants in the San Juan Basin coal supply market who also receive coal transportation services from BNSF such as the Salt River Project and Tucson Electric Power Company, and by other coal suppliers. If the Board's intervention on behalf of Peabody were to affect adversely one of these entities, there would be no principled reason to stop them from intervening and seeking relief on their own behalf.

This scenario of multiple interventions for the purpose of having the Board fine tune the effects of prior regulatory actions illustrates the danger of regulatory intrusions into markets. Regulatory intrusions disrupt markets and impede their efficient functioning. Indeed, it is worth

noting that the market problem that is the subject of Peabody's petitions began with a regulatory intrusion, the Board's ruling that BNSF must continue to charge the prescribed rate (currently \$4.21 per ton) on movements from McKinley Mine to Cholla pending the determination of a different rate on reopening. Peabody views this continuing prescription as the source of an "artificial disparity in rail rates." Petition for Injunctive Relief at 3 (emphasis added). Although BNSF disagrees with the rate prescription, it acknowledges the Board's authority to impose it. But the answer is not to "fix" the distortions or dislocations caused by this initial regulatory intrusion with more intrusions. The answer is to limit regulatory intervention only to those situations where it is required, as Congress explicitly directed.

The Board and its predecessor have recognized the danger of extending the regulator's reach beyond well defined boundaries and have declined to take steps to create a level playing field for parties that might experience some secondary impact from authorized Board actions. *See, e.g., Burlington Northern Inc. and Burlington Northern Railroad Company – Control and Merger – Santa Fe Pacific Corp. and The Atchison, Topeka and Santa Fe Railway Co.*, 10 I.C.C.2d 661, 782 (1995) (declining to grant conditions to a shipper that would be disadvantaged by a settlement agreement benefiting its competitors on the grounds that "[w]e typically do not use our conditioning power to preserve the competitive balance among the industries served by rail carriers"); *Burlington Northern Railroad Co. – Abandonment – In Daniels and Valley Counties, MT*, 7 I.C.C.2d 308, 318 (1990) (rejecting ALJ's analysis of how railroad should price its service so as to preserve competition between grain elevators and maintain branch line profitability, stating that "regulatory agencies should not attempt such analysis").

Here too the Board should refrain from intervening in non-transportation markets.

II. **PEABODY’S PETITION FOR INJUNCTION DOES NOT STATE A CLAIM ON WHICH RELIEF COULD BE GRANTED**

If the Board denies Peabody’s Petition to Intervene, as it should, there will be no need to address the merits of its Petition for Injunctive Relief. If the Board does address the merits of the Petition for Injunctive Relief, it should deny it.

A. **Peabody Is Not Entitled to Relief under the Phasing Constraint of the *Coal Rate Guidelines***

Peabody states that “a phasing constraint in the form of temporary injunctive relief during the pendency of this proceeding[] is appropriate regardless of whether BNSF ultimately justifies the rate levels in BNSF 90040-A or whether APS ultimately justifies a rate lower than the rate that BNSF is seeking.” Petition for Injunctive Relief at 8. This claim fails for multiple reasons.⁴

First, Peabody itself has indicated in its various pleadings that it is not an increase in the level of the common carrier rate that BNSF established as of January 1, 2003 that is the source of Peabody’s concerns. It is the “spread” or “disparity” between that common carrier rate and the Board’s prescribed rate of \$4.21 per ton on the McKinley Mine movement that is the supposed source of Peabody’s injury. This point is underscored by the timing of Peabody’s action. Peabody did not file its petitions at the beginning of the year when BNSF established its rate. It filed its petitions in June, after the Board’s May 12 decision addressing the level of the McKinley mine rate. Where the carrier’s rate action is not the source of the alleged harm, the phasing constraint is inapplicable.

⁴ Peabody’s Petition for Injunctive Relief includes conclusory assertions regarding BNSF’s alleged market dominance. *See* Petition for Injunctive Relief at 9-10. BNSF does not concede market dominance, but neither does it believe there is any need to expend the resources to develop evidence on this point or further burden the record on a matter that the Board does not need to address.

A second reason why the phasing constraint does not apply to this situation is that the rate that became effective of January 1, 2003 does not represent an increase in the level of BNSF's common carrier rates. The rate in question is properly viewed as a *new* common carrier rate. The prior rate was a contract rate and, as such, was not within the Board's jurisdiction. The relief that Peabody seeks here is an order requiring BNSF to continue to charge a rate no higher than the prior contract rate. Board precedent suggests that the Board could not consider the level of a prior contract rate for purposes of applying the phasing constraint and could not order BNSF to set its common carrier rate at the level of a previously effective contract rate. In its 1996 *Bottleneck* decision, the Board ruled that it could not assess the reasonableness of a joint through rate in its entirety "when one of the components of service over the through route is embodied in a transportation contract." *Central Power & Light Co. v. Southern Pacific Transportation Co.*, Docket No. 41242, served Dec. 31, 1996 ("*Bottleneck I*") at 13. The Board explained:

Plainly, we are without rate reasonableness jurisdiction over the rates of any rail transportation provided by contract. Regulation of the entire through rate – even if the contract rate were simply treated as a given that cannot be changed – would indirectly result in review of the contract rate, and Congress has declared that rates for that portion of the through-route service to be beyond our reasonableness jurisdiction.

Id. Issuance of the order Peabody requests requiring BNSF to reduce its common carrier rate to the level of its prior contract rate would likewise seem to be barred on jurisdictional grounds, as well as constituting an unjustified infringement on BNSF's ratemaking initiative.

In any event, the Board need not reach the question of whether it would have the authority to require BNSF to collect no more than its prior contract rate because there is yet another, dispositive problem with Peabody's reliance on the phasing constraint. The problem is that the phasing constraint, like the other constraints set out in the *Coal Rate Guidelines*, was

intended to protect the interests of captive shippers.⁵ Peabody is not a captive shipper. It does not pay the freight rates for the transportation of coal from the Lee Ranch Mine to Cholla. There is no basis in the statute or the *Coal Rate Guidelines* for the Board to apply the phasing constraint on behalf of Peabody.

B. Section 721(b)(4) Does Not Authorize the Relief Sought by Peabody

Peabody appears to take the position that 49 U.S.C. § 721(b)(4), which gives the Board authority to issue orders to prevent irreparable harm, constitutes an independent substantive ground for granting the relief it seeks. *See* Petition for Injunctive Relief at 15 (“The Board *also* may grant Peabody relief pursuant to its broad authority under 49 U.S.C. § 721(b)(4) to prevent irreparable harm.”) (emphasis added). If this is in fact Peabody’s position, Peabody is wrong. Section 721(b)(4) does not provide the basis for an independent cause of action. It is remedial and must be exercised in furtherance of some other substantive power granted to the Board under the act.⁶ As already explained, there is no such substantive provision of ICCTA that forms the basis of Peabody’s claim here.

Apart from the lack of substance to Peabody’s claim, Peabody has failed to establish an entitlement to the remedy of injunctive relief under the conventional four part test applied by the Board. Peabody is unable to make *any* showing regarding the likelihood of success on the merits

⁵ *See Consolidated Rail Corp. v. United States*, 812 F.2d 1444, 1451 (3rd Cir. 1987) (phasing constraint “postpon[es] in individual cases the immediate imposition of an otherwise justified rate increase if such an immediate increase would create economic disruption for the shipper”) (affirming *Coal Rate Guidelines*).

⁶ *See, e.g., Canadian Pac. Ry. Co. v. STB*, 197 F.3d 1165, 1168 (D.C. Cir. 1999) (rejecting argument that § 721(b)(4) allows Board to broaden the scope of reviewable issues in a labor arbitration award); *Western Coal Traffic League v. STB*, 216 F.3d 1168, 1172 (D.C. Cir. 2000) (“[E]ven assuming *arguendo* that the moratorium properly may be considered an injunctive-type order . . . § 721(b)(4) does not relieve the Board of any of its statutory duties except adherence to the APA.”).

because the party with a rate reasonableness claim in this case is APS and not Peabody. Peabody admits that it “is not in a position to assess APS’s ultimate likelihood of success on the merits.” Petition for Injunctive Relief at 17.

Peabody suggests that “[a]n alternative, and perhaps more appropriate, view of the likely success on the merits is whether Peabody is likely to succeed on the merits of its phasing constraint argument . . . for an injunction during the pendency of this proceeding.” *Id.* This argument is hopelessly circular. It amounts to the proposition that the Board *should grant* Peabody injunctive relief because it is *likely to grant* Peabody injunctive relief. The reality is that Peabody cannot succeed on the merits precisely because it has no claim on the merits.

Peabody’s contention that it will suffer irreparable harm unless the Board grants the requested relief likewise rings hollow. As explained above, Peabody has not asserted an interest in this proceeding that is a protected interest under ICCTA. The Board cannot act to prevent perceived harms that are not within its power to address. Moreover, for the reasons set forth in Mr. Reyff’s verified statement, the factual basis of Peabody’s claim of irreparable harm is, at best, highly suspect. Even if Peabody had asserted an interest that is legitimately protected under ICCTA, the Board could not justify injunctive relief based on the unsubstantiated, self-serving assertions of harm that Peabody has presented here.

Peabody asserts that because it “has requested an accounting order as part of its requested rate relief, no other party will be substantially harmed.” Petition for Injunctive Relief at 19. BNSF disagrees. What Peabody proposes here is an unprecedented denial of BNSF’s ratemaking initiative. There is no dispute that BNSF was authorized to establish the common carrier rate at issue here. No violation of ICCTA on BNSF’s part has even been alleged. Under these circumstances, exercise of regulatory authority to set aside the rate, even temporarily,

would undermine the scheme of carrier initiated rates upon which BNSF and other rail carriers are entitled to rely.

Finally, Peabody is plainly incorrect in asserting that the relief it request here is in the public interest. Congress has specifically stated that the public interest is served by minimizing federal regulatory intervention in the rail industry. The relief requested by Peabody would represent an unwarranted and unprecedented extension of regulatory authority over rail rates, allowing the Board to second guess and adjust the rates on the basis of their alleged effects in markets that are beyond the Board's jurisdiction. It is hard to imagine an action that would be more disruptive to the efficient working of markets or more directly antithetical to Congress policy goals for the rail transportation sector.

There is no basis for granting the injunctive relief that Peabody seeks.

CONCLUSION

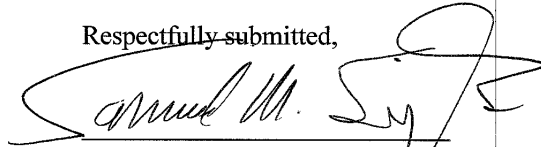
For the foregoing reasons, BNSF requests that the Board deny Peabody's Petition to Intervene and Petition for Injunctive Relief.

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) 352-2353
Facsimile (817) 352-2397

Dated: July 7, 2003

Respectfully submitted,



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

ARIZONA PUBLIC SERVICE
COMPANY and PACIFICORP,

Complainants,

v.
THE BURLINGTON NORTHERN
SANTA FE RAILWAY COMPANY,

Defendant.

My name is Randall R. Reyff. I am currently employed by The Burlington Northern and Santa Fe Railway Company ("BNSF"), the successor to the Atchison Topeka & Santa Fe Railway Company ("Santa Fe"), in the position of Director Coal Marketing. I have been employed by BNSF or its predecessor, the Santa Fe, for the last 31 years. Since late 1990, in my previous position with Santa Fe as well as in my current position with BNSF, I have been responsible for the negotiation and administration of the railroad's coal transportation arrangements, including contractual arrangements, with certain customers, including coal shippers located in the state of Arizona.

Since late 1990, my responsibilities have included the marketing of BNSF coal transportation service to electric utility generating stations located in the Southwestern United States. This includes coal transported to the Cholla generating station that is located near Joseph City, Arizona and operated by Arizona Public Service Company (“APS”). Other large coal-fired generating units in this service territory that are served by BNSF include Salt River Project’s

Coronado generating station, Tucson Electric Power's Springerville generating station, and Arizona Electric Power Cooperative's Apache generating station. All of these generating stations currently burn at least some San Juan Basin coal, including coal produced at the Pittsburg and Midway Coal Mining Company's McKinley Mine ("McKinley") and or Peabody Energy Company's Lee Ranch Mine ("Lee Ranch"). In the course of dealing with the BNSF coal shippers that operate the aforementioned generating plants, I have become familiar with characteristics of the coal produced at both McKinley and Lee Ranch and with the market conditions affecting the sale of San Juan Basin coal.

The purpose of this statement is to respond to certain of the factual assertions made by Peabody Energy Company ("Peabody") in its Petition for Injunctive relief in Surface Transportation Board Docket No. 42077.

A. Misunderstandings Regarding BNSF Charges

Peabody claims to compare the transportation rate formerly paid by APS for movements from Lee Ranch to Cholla under a rail transportation contract with the rate under BNSF's current common carrier authority applicable to movements from Lee Ranch to Cholla. I will not comment on the contract terms, as APS and BNSF agreed that they would be treated as confidential. I would point out with respect to the common carrier authority that Peabody appears not to understand the role of either fuel surcharges or destination detention charges.

1. Fuel Surcharges

Fuel Surcharges by their causation and nature are a short term Railway pricing management expedient and are not expected or understood by BNSF customers to be a permanent additive onto BNSF freight charges (otherwise they wouldn't be "surcharges"). During the past year, BNSF Fuel Surcharges have ranged from 0% to 4.5% and by next year are

as likely as not to be back to zero. Peabody's use of 2003 Fuel Surcharge to differentiate 2003 McKinley- and Lee Ranch-Cholla freight rates is merely self-serving.

2. BNSF Train Detention Provisions

Peabody also apparently does not understand BNSF Coal Unit Train Detention provisions, practice and facts. Actual billing for Cholla Destination Detention has only rarely occurred in spite of the fact that Destination "Spot-to-Release" time is rarely less than the pricing authorities' provided "Free Time for Unloading." In 2003 through June 16, average Spot-Release for Lee Ranch -- Cholla shipments has been about 39.2 hours ("Free Time" = 24 hours) while Spot-Release of McKinley shipments has averaged about 22 hours ("Free Time" = 12 hours). In connection with Cholla coal traffic, BNSF only assesses Destination Detention in the (rare) case of an egregious delay by the Plant in "Releasing" a train. In such a chargeable case, the delay also occasions materially excessive BNSF crews and locomotive power costs and/or a missed (and planned) loading opportunity at an Origin Mine. The fact that Destination Detention is rarely assessed bespeaks the fact that that Cholla plant operating personnel and BNSF personnel routinely coordinate their respective work in a manner that acceptably meets the Plant's coal transportation and handling plan on the one hand while providing BNSF appropriate operating management flexibility on the other.

Destination Detention assessment has nothing to do with the purchased Coal's Origin and everything to do with the Destination facility's behavior.

B. APS/PacifiCorp Cholla Coal Purchasing

Both Peabody and BNSF essentially have "informed opinions," rather than perfect knowledge, about Cholla coal purchasing decisions. However, BNSF's Cholla business history in fact predates Peabody's and BNSF's views are supported to no less degree than Peabody's by

ongoing customer discussions and reasonable inferences from publicly available coal supply data (Platt's / RDI "CoalDat").

The Cholla generating station has historically purchased the preponderance of its coal supply from the McKinley Mine due largely to the fact that projected Cholla coal demand was the single largest element underwriting the capitalization of the early 1970's development of McKinley "North Mine." It is generally well known however that McKinley is currently in the last few years of its economic life, and, as is not uncommon in mature coal mining operations, McKinley's ability to provide Cholla with 100% of the plant's coal price, quality and quantity requirements is becoming somewhat constrained. However, during the next 3 to 4 years, BNSF expects McKinley to continue as Cholla's predominant coal supplier.

1. Delivered Cost of Alternative Coals

As evidenced by "CoalDat" 2002 data, McKinley's Cholla coal sales appear to be comprised of several distinct supply agreements:

Base Contract Sales:	2.536 million tons
	Avg. Delivered Price = \$22.93 per ton
	Avg. Delivered Price = \$ 1.17 per mmbtu
Spot Contract Sales -1:	408,000
	Avg. Delivered Price = \$30.33 per ton
	Avg. Delivered Price = \$ 1.55 per mmbtu
Spot Contract Sales -2:	301,000 tons
	Avg. Delivered Price = \$32.93 per ton
	Avg. Delivered Price = \$ 1.67 per mmbtu

For the same period, Cholla's Lee Ranch Coal purchases were reported to be:

637,000 tons

Avg. Delivered Price = \$19.78 per ton

Avg. Delivered Price = \$ 1.07 per mmbtu

Consequently, Lee Ranch coal's nominal Delivered Price advantage in 2002 was:

	<u>vs MCM Contract</u>	<u>vs MCM "Spot-1"</u>	<u>vs MCM "Spot-2"</u>
Per Ton	(\$3.15)	(\$10.55)	(\$13.15)
Per mmbtu	(\$.097)	(\$.483)	(\$.597)

2. Coal Cost Determination

"Delivered Price" comparison per se is not the whole story. Certain "Quality" aspects of alternative coal sources have significant economic implications as well and are important to understanding relative coal source comparative advantage. Most relevant to the competition between McKinley and Lee Ranch, coal quality is measured by several physical and chemical characteristics including but not limited to Ash and Sulfur Content.

Coal Ash must be captured, handled and disposed. To the degree that a given coal's Ash Content (as a % of weight) exceeds that of an alternative, it can be reasonably inferred that Ash-related handling costs might be higher as well. In 2002 however, the reported Ash Content by weight of McKinley and Lee Ranch coal respectively is not extraordinarily differentiated:

MCM "Contract"	14.5%
MCM "Spot - 1"	15.1%
MCM "Spot - 2"	14.1%
LRM	14.6%

Consequently, I would not expect Cholla Plant to incur a significant difference in associated handling costs as between McKinley and Lee Ranch coal.

Coal Sulfur Content, manifested after combustion as Sulfur Dioxide per mmbtu of coal heat value (“SO₂ / mmbtu”), is important at Cholla because (a) the State of Arizona enforces a 0.8 lb. per mmbtu maximum at the Plant, (b) the Plant’s generating unit No. 3 is not equipped with a Flue Gas Desulfurization (“FGD”) system. and (c) the Sulfur content and associated SO₂ per mmbtu realization of Lee Ranch coal is significantly higher than that of McKinley coal. For 2002:

McKinley “Contract”	.99 lb. SO ₂ per mmbtu
McKinley “Spot – 1”	.93 lb. “ “ “
McKinley “Spot – 2”	.99 lb. “ “ “
Lee Ranch	1.53 lbs. “ “ “

To meet the 0.8 lb. per mmbtu limit, McKinley Mine coal on average needs about a 20% reduction of SO₂ while Lee Ranch Mine coal on average requires a reduction of about 52% of its associated SO₂. Moreover, about 46% of Lee Ranch Mine coal supplied to Cholla in 2002 generated SO₂ per mmbtu of 1.9 lbs. or higher suggesting a nearly 60% required SO₂ reduction.

Based on Platt’s/ RDI 1999-2000 data, Cholla’s FGD system costs are material both in terms of original investment (about \$234 million) and annual operating expense (about \$6-8 million). These FGD O&M costs approximate \$1.00 per Megawatthour (“Mwh”) when merely prorated over Plant output. However, on an incremental operating expense basis I believe the SO₂ “scrubbing” costs for alternative coals is likely to be less than \$1.00 per Mwh. In any case, I believe it is reasonable to assume that Lee Ranch coal’s significantly higher required SO₂ removal suggests that Cholla would in fact incur incrementally higher FGD system expenses using Lee Ranch coal than would be the case using McKinley coal. However, even if the SO₂ removal cost associated with Lee Ranch coal were \$1.00 per Mwh greater than that associated

with McKinley coal, Lee Ranch coal's cost would be essentially in parity with McKinley Mine "Contract" supply but would be significantly more economical than the cost of either McKinley Mine "Spot – 1" or "Spot – 2":

McKinley "Contract"	\$12.08 per Mwh
McKinley "Spot – 1"	\$16.08 “ “
McKinley "Spot – 2"	\$17.26 “ “
Lee Ranch (not incl. FGD O&M)	\$11.08 “ “
Lee Ranch (incl. FGD O&M)	\$12.08 “ “

The question then is "With which McKinley Mine coal supply segment does Lee Ranch Mine coal compete?" BNSF believes that neither McKinley longer term "Contract" business, nor the average cost of all of Cholla's McKinley Mine coal, nor the issues of "Fuel Surcharges" or "Destination Detention" is relevant. BNSF believes that Lee Ranch coal competes with McKinley Mine's Spot coal offerings as suggested by the 2002 "Spot – 1" and/or "Spot – 2" data. Compared against either 2002 McKinley "Spot" example, Lee Ranch Mine Coal, notwithstanding the change to BNSF's 2002-2003 freight rate, maintains a significant 2003 cost advantage even assuming that the FOB Mine price of all the alternative coal takes a 2% inflation adjustment. :

Delivered Cost:

	<u>Per Ton</u>	<u>Per Mwh(a)</u>	<u>Per Mwh(b)</u>
2002 Lee Ranch	\$19.78	\$11.08	\$12.08
2003 “ “	\$23.17	\$12.98	\$13.98
2002 McKinley "Spot – 1"	\$30.33	\$16.08	\$16.08
2003 McKinley "Spot – 1"	\$30.95	\$16.41	\$16.41
2002 McKinley "Spot – 2"	\$32.93	\$17.26	\$17.26
2003 McKinley "Spot – 2"	\$33.61	\$17.61	\$17.61

2002: Lee Ranch vs McKinley “Spot – 1”	(\$10.55)	(\$5.00)	(\$4.00)
“ “ “ “ “Spot – 2”	(\$13.15)	(\$6.18)	(\$5.18)
2003: Lee Ranch vs McKinley “Spot – 1”	(\$ 7.78)	(\$3.43)	(\$2.43)
“ “ “ “ “Spot – 2”	(\$10.44)	(\$4.63)	(\$3.63)

(a) Not including any SO2 removal cost differential.

(b) Including Lee Ranch coal SO2 removal cost penalty = \$1.00 per Mwh.

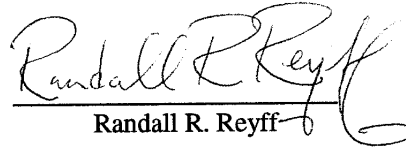
Accordingly, from a business perspective, BNSF believes that when viewed in the context of the relevant market segments, Peabody’s Lee Ranch Mine enjoys a comparative economic advantage that, while somewhat less than was the case in 2002, is still material in 2003 and, by any reasonable projection, would continue in 2004. The change in the Lee Ranch – Cholla freight rate may have affected Peabody’s desired and perhaps anticipated profit margin on Cholla coal sales, but it does not seem to me that it has put Lee Ranch Mine at a competitive disadvantage versus P&M’s McKinley Mine.

VERIFICATION

I declare under penalty of perjury that the foregoing statements are true and correct.

Further, I certify that I am qualified and authorized to sponsor this testimony.

Executed on July 3, 2003


Randall R. Reyff

CERTIFICATE OF SERVICE

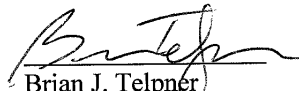
I hereby certify that on July 7, 2003, a copy of the Public Version and the Highly Confidential Version of the foregoing Reply to Peabody Energy Corporation's Petition to Intervene and Petition for Injunctive Relief was served by hand on the following:

Nicholas J. DiMichael
Jeffrey O. Moreno
THOMPSON HINE LLP
1920 N St., N.W.
Washington, DC 20036

Counsel for Peabody Energy Corporation

C. Michael Loftus
SLOVER & LOFTUS
1224 Seventeenth St., N.W.
Washington, DC 20036

Counsel for Arizona Public Service Company


Brian J. Telpner