

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ARIZONA PUBLIC SERVICE
COMPANY, and PACIFICORP

Complainants

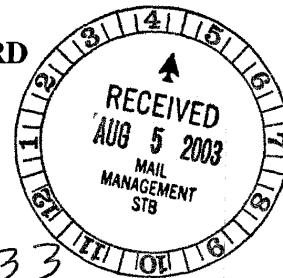
v.

THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY
COMPANY

Defendant

208633

Docket No. 42077



**BNSF'S REPLY TO PEABODY'S MOTION
FOR LEAVE TO FILE REBUTTAL**

The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby replies in opposition to the July 18, 2003 Motion of Peabody Energy Corporation ("Peabody") for Leave To File a Rebuttal in Support of Peabody Energy Corporation's Petition to Intervene and Petition for Injunctive Relief ("Motion").

The self-styled "rebuttal" that Peabody seeks permission to file is nothing more than a reply to a reply, which is prohibited under the Board's rules. 49 CFR §1104.13(c). The Board has waived this rule in the past only when there are "compelling circumstances for a waiver."¹ Moreover, the Board requires a "persuasive showing that an exception to Rule 1104.13(c) should be made."² Peabody has not made such a showing here. Its rebuttal merely seeks to have the

¹ *Potomac Electric Power Co. v. CXS Transportation, Inc.* Docket No. 41989, slip op. at 1, n.1 (served June 27, 1997).

² *Ocean Logistics Mgmt., Inc. v. NPR Inc. and Holt Cargo Sys., Inc.*, Docket No. WCC-102, slip op. at 3 (served Jan. 14, 2000).

last word on issues that have been addressed in Peabody's June 16, 2003 Petitions to Intervene and for Injunctive Relief and BNSF's July 7, 2003 Reply to those petitions. BNSF urges the Board to adhere to its rule that replies to a reply are not acceptable under the circumstances presented here.

None of the arguments Peabody presents in support of its motion for leave to file a rebuttal justifies a waiver of 49 CFR §1104.13(c). First, Peabody argues that the filing of rebuttal evidence is standard procedure in rate reasonableness challenges. Motion at 3. But the analogy to filings in a rate case is false. Peabody is not a complainant in this case and it is not in the position of a complainant challenging the reasonableness of a common carrier rate. Peabody is a coal supplier asking the Board to intervene in rail markets to address supposed "economic dislocations" in coal supply markets. *See* Petition for Injunctive Relief at 7 (June 16, 2003). Moreover, Peabody's ultimate concern is not with the absolute level of BNSF's rates (since it does not pay for any transportation) but with a supposed "artificial disparity in rail rates" created by the Board's order in a separate proceeding, Docket No. 41185. *Id.* at 3. Peabody has not identified any authority that would permit it to invoke the phasing constraint of the *Coal Rate Guidelines* under these circumstances.

Second, Peabody argues that it should be permitted to file a rebuttal to BNSF's July 7, 2003 Reply because its petitions to intervene and for injunctive relief "present novel issues and significant questions of first impression." Motion at 4. Peabody's claims are certainly novel, but that is because they are totally unprecedented and without any basis under the governing statute. Moreover, the novelty of Peabody's claims would not justify the waiver of the Board's rule prohibiting the filing of replies to a reply. To the contrary, the novelty of Peabody's claims provides a compelling reason to reject Peabody's petition to intervene without further

consideration of the merits of Peabody's legal arguments. The Board's rules provide that the Board may grant a petition to intervene only if intervention "[w]ould not unduly broaden the issues in the proceeding." 49 CFR §1112.4(a)(2). Forcing the Board and the parties to address "novel" issues of "first impression" in the existing case would clearly expand and complicate that litigation, making intervention inappropriate.

Third, Peabody argues that it should be permitted to file its supposed rebuttal because it could not have anticipated that BNSF would "challenge[] the Board's authority to grant any of Peabody's requested relief; challenge[] the scope and nature of the phasing constraint; accuse[] Peabody of asking the Board to regulate coal supply markets; and assert[] that it would be bad public policy to grant Peabody relief." Motion at 4. While Peabody may not have known the precise arguments that BNSF would make in response to Peabody's request for relief, it is implausible that Peabody's counsel did not anticipate BNSF's arguments in these areas. If, in fact, Peabody did not anticipate these concerns, then its surprise merely demonstrates the extent to which its requests for relief were ill-conceived to begin with. In any event, a moving party never knows precisely how its opponent will respond. If the Board were to waive its rule against replies to a reply any time a moving party fails to anticipate the arguments raised in reply, the Board might as well do away with the rule altogether.

For the reasons described above, the Board should reject Peabody's Motion for Leave To
File a Rebuttal in Support of Peabody Energy Corporation's Petition to Intervene and Petition for
Injunctive Relief.

Respectfully submitted,



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Dated: August 5, 2003

CERTIFICATE OF SERVICE

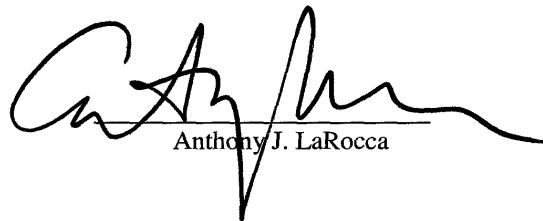
I hereby certify that on August 5, 2003, a copy of BNSF's Reply To Peabody's Motion
For Leave To File Rebuttal was served by hand upon the following:

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