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August 22, 2003

VIA HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, DC 20423



ENTERED
Office of Proceedings
AUG 22 2003
Part of
Public Record

Re: Docket No. 41191 (Sub-No. 1), AEP Texas North 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 ten copies of AEP Texas North Company' Report Pursuant to 49 C.F.R. Part 1111.10 (b) and Request for Procedural Schedule. A WordPerfect Diskette containing the filing also is enclosed.

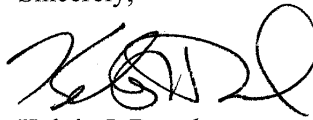
As explained in the Report, this pleading was made necessary by the Defendant's refusal to participate in a conference of parties, as required by 49 C.F.R. Part 1111.10 (b). In light of this default, and to avoid any improper or undue delay, AEP Texas requests that **EXPEDITED CONSIDERATION** be given to this filing.

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

Honorable Vernon A. Williams
August 22, 2003

Thank you for your consideration in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'KJD', with a large, stylized loop at the end.

Kelvin J. Dowd
An Attorney for
AEP Texas North Company

KJD:dmb

Enclosure

cc: Office of Chairman Roger Nober
Director, Office of Proceedings
Office of General Counsel

EXPEDITED CONSIDERATION REQUESTED

**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)

**REPORT PURSUANT TO
49 C.F.R. PART 1111.10 (b)
AND
REQUEST FOR PROCEDURAL SCHEDULE**

**ENTERED
Office of Proceedings
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Complainant, AEP Texas North Company ("AEP Texas") hereby submits this Report pursuant to the requirements of 49 C.F.R. Part 1111.10 (b). AEP Texas is filing this Report solely in its own name because Defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF"), refused to participate in the mandatory conference of parties called for by the Board's regulations.

Because BNSF would not attend the conference, AEP Texas was deprived of the opportunity to pursue an agreement on the procedural schedule to govern this case. Therefore, in light of BNSF's default and pursuant to 49 C.F.R. Part 1111.8, AEP Texas

respectfully requests that the Board expeditiously adopt the schedule attached hereto as Exhibit A.

In support hereof, AEP Texas shows as follows:

1. AEP Texas filed its Verified Complaint in this proceeding on August 11, 2003. The Complaint recited that the reasonableness of the BNSF common carrier rates challenged therein would be determined based on the stand-alone cost constraint of the Board's Constrained Market Pricing methodology. *See* Complaint ¶ 12. Under 49 C.F.R. Part 1111.10 (b), therefore, the parties were required to "meet, or discuss by telephone, discovery and procedural matters within 7 days"; *i.e.*, by August 18, 2003.

2. Shortly after the Complaint was filed, counsel for AEP Texas contacted counsel for BNSF to arrange the mandatory conference. At BNSF counsel's request, to accommodate vacation schedules, AEP Texas agreed to set the conference for 3:00 p.m. EDT on August 20, 2003. Early on the afternoon of August 20, however, counsel for BNSF requested another delay, until 10:00 a.m. EDT on August 21, 2003. The reason given for this rescheduling was that an in-house BNSF lawyer who was to participate in the conference was experiencing travel delays. Based on this representation, AEP Texas again agreed to BNSF's scheduling request.

3. At approximately 9:30 a.m. EDT on August 21, counsel for AEP Texas received a letter from BNSF's counsel, a copy of which is attached hereto as Exhibit B. Therein, BNSF purported to "inform" AEP Texas "that BNSF has decided not

to participate in the conference...that had been set for this morning.” Needless to say, the conference did not take place.

4. The stated reason for BNSF’s unilateral action is a dispute between the parties over the charges payable by AEP Texas for coal transportation service from Wyoming Mines to the Oklaunion Generating Station, pending the Board’s adjudication of the reasonableness of the BNSF rates now at issue in this docket.¹ In an effort to increase the charges it was collecting during this period and force AEP Texas to make additional payments for past shipments, BNSF initiated a civil suit in the Fort Worth Division of the U.S. District Court for the Northern District of Texas. *The Burlington Northern and Santa Fe Railway Company v. American Electric Power Company, Inc., Et Al.*, Civil Action No. 4:03-CV-213-Y (hereinafter the “Texas Action”).

5. On August 1, 2003, U.S. District Judge Terry R. Means issued an Order (copy attached as Exhibit C) in which he ruled that the court would not consider BNSF’s collection suit “without waiting for the STB to rule on the reasonableness of BNSF’s rates for transportation.” Judge Means then granted AEP Texas request for a stay of all proceedings in the Texas Action, adding that “the case may be reopened, without prejudice, upon the motion of either party, once the STB has issued a ruling on the

¹The rate reasonableness issue first was joined in the Board’s November 7, 2000 reopening order in Docket No. 41191, *West Texas Utilities Company v. The Burlington Northern and Santa Fe Railway Company*. This proceeding is a continuation of AEP Texas’ claim that the subject rates are unreasonably high and, therefore, unlawful. See Docket No. 41191, *Notification In Compliance With Decision Served July 23, 2003*, filed August 11, 2003.

reasonableness of BNSF's rates for transportation service from mines in the PRB to Oklaunion Station."

6. In the Texas Action, BNSF claimed that AEP Texas should be required to pay higher rates while the issue of the reasonableness of those rates under 49 U.S.C. § 10701 was resolved by the Board. The District Court disagreed, and effectively preserved the *status quo* pending the Board's final ruling in this case, formally referring the rate reasonableness issue to the exclusive jurisdiction of the Board. As shown by Exhibit B, BNSF now is taking the position that it should not have to participate in this proceeding unless AEP Texas first agrees to give BNSF the very relief that the District Court denied. BNSF's refusal to participate in the mandatory procedural conference is in open defiance both of the Board's regulations and Judge Means' Order.

7. Plainly, BNSF is disappointed with its lack of success in the Texas Action. However, no agency rule or principle of law confers on a rail carrier the power to stonewall an ongoing STB maximum rate proceeding based on its disapproval of a validly-entered order in another forum. Under the circumstances here presented, BNSF has defaulted on its obligations under 49 C.F.R. Part 1111.10 (b) to meet and confer over a procedural schedule and related matters. Therefore, the Board now should move on and establish the schedule to govern further proceedings in this case.²

²In its letter of August 21 (Exhibit B), BNSF includes a threat to file a motion to dismiss this case, though no grounds for such a motion are alleged to exist. However, 49 C.F. R. Parts 1111.8 and 1111.10 (b) contain no exceptions for intended motions to dismiss, and the Board
(continued...)

8. The Board's regulations (49 C.F.R. Part 1111.8) establish the standard schedule that is to apply in cases brought under the stand-alone cost test, absent some other, specific order of the Board. The schedule attached as Exhibit A closely tracks the regulation, with minor modifications³ to avoid due dates falling on weekends or holidays. AEP Texas respectfully requests that the Board enter an order adopting this schedule.

9. Had BNSF complied with the requirements of 49 C.F.R. Part 1111.10 (b), it is very likely that an agreed-upon schedule now would be before the Board, and the parties would be proceeding with discovery and other case presentation preparations. However, BNSF's position as reflected in Exhibit B plainly implies that the carrier will resist all progress until the Board publishes a schedule and demonstrates an intent to enforce its regulations and permit this case to proceed without delay. In light of BNSF's refusal to comply with the Board's rules and in consideration of the Board's own commitment to a more efficient administrative process,⁴ AEP Texas respectfully urges the Board to consider and grant this scheduling request on an expedited basis.

²(...continued)

elsewhere has made clear that even the pendency of such a motion does not operate to stay or delay proceedings. *See* Ex Parte No. 527, *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings*, Decision served October 1, 1996 at 9.

³The proposed schedule also includes requested dates for the Staff-supervised discovery and technical conferences adopted by the Board in Ex Parte No. 638, *Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology*, Decision served April 3, 2003 at 14.

⁴*See* Ex Parte No. 638, *supra* at 11-12 (Commissioner Morgan, commenting).

WHEREFORE, for good cause shown, the Board should issue an order
forthwith, adopting the procedural schedule set out in Exhibit A.

Respectfully submitted,

AEP TEXAS NORTH COMPANY
1 Riverside Plaza
Columbus, OH 43215

By: Timothy P. Stanley, Director
Transportation and Marketing
David M. Cohen, Senior Counsel
155 West Nationwide Boulevard
Suite 500
Columbus, OH 43215

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

William L. Slover
Kelvin J. Dowd
Christopher A. Mills
Daniel M. Jaffe
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Washington, D.C. 20036



Dated: August 22, 2003

Attorneys & Practitioners

Docket No. 41191 (Sub-No. 1), *AEP Texas North Company v. The Burlington Northern and Santa Fe Railway Company*

Procedural Schedule (Pursuant to 49 C.F.R. Part 1111.8)

August 11, 2003	Complaint filed.
September 2, 2003	Answer to Complaint due.
September 24, 2003	Requested date for Staff-supervised discovery conference.
October 27, 2003	Discovery completed.
December 22, 2003	Complainant files opening evidence on absence of intermodal and intramodal competition, variable costs, and stand-alone costs. Defendant files opening evidence on revenue-variable cost percentage generated by Complainant's traffic.
January 23, 2004	Requested date for Staff-supervised technical conference.
February 23, 2004	Complainant and Defendant file reply evidence to opponent's opening evidence.
March 26, 2004	Complainant and Defendant file rebuttal evidence to opponent's reply evidence.

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

August 21, 2003

Via Fax and Hand Delivery

Kelvin J. Dowd
Slover & Loftus
1224 Seventeenth St., N.W.
Washington, D.C. 20036

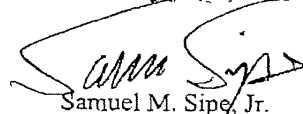
Re: **Docket No. 41191 (Sub-No.1), AEP Texas North Company v.
The Burlington Northern and Santa Fe Railway Company**

Dear Kelvin:

This is to inform you that BNSF has decided not to participate in the conference regarding scheduling and discovery matters that had been set for this morning. As you know, AEP Texas North is not currently paying and in fact has never paid the rates that it purports to challenge in its complaint, despite the issuance of the Board's 2000 order authorizing BNSF to establish those rates. We believe that it is improper for AEP Texas North to seek to invoke the protection of the statute's rate reasonableness provisions when it has refused to fulfill its obligations under the Act. Accordingly, we will be filing a motion to dismiss AEP Texas North's complaint unless your client should change its position and pay the common carrier charges on non-Rawhide movements that are due and owing by August 29, 2003.

Under these circumstances, we do not believe that the proposed meeting would be productive.

Sincerely yours,



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

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

BRUSSELS

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED

AUG - 1 2003

CLERK, U.S. DISTRICT COURT
BY _____
DEPUTY

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

§
§
§
§
§
§

VS.

CIVIL ACTION NO. 4:03-CV-213-Y

AMERICAN ELECTRIC POWER
COMPANY, INC., ET AL.

ORDER GRANTING DEFENDANT'S MOTION TO REFER TO THE SURFACE
TRANSPORTATION BOARD AND MOTION
TO STAY PENDING REFERRAL AND ADMINISTRATIVELY STAYING CASE

Pending before the Court is defendant AEP Texas North Company ("AEP")'s Motion to Refer to The Surface Transportation Board and Motion ("STB") [doc. # 20-1] and Motion to Stay Pending Referral [doc. # 20-2], filed June 12, 2003. Having carefully considered the motion, response, and the reply, and the supplemental response, and in light of the decisions of the United States Court of Appeals for the Fifth Circuit in *Advance United Expressways, Inc. v. Eastman Kodak Co.*, 965 F.2d 1347 (5th Cir. 1992) and the United States Supreme Court in *Reiter v. Cooper*, 507 U.S. 258 (1993), the Court concludes that the equities¹ in this case indicate that the Court should not proceed immediately to judgment on plaintiff Burlington Northern and Santa Fe Railway Company ("BNSF")'s complaint without waiting for the STB to rule on the reasonableness of BNSF's rates for transportation.

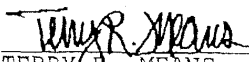
¹The following factors tip the equities in favor of referring the reasonableness issue to the STP: (1) that BNSF first sought guidance from the STB whether it could raise its rates for transportation service to Oklahoma Station; (2) the various attempts by the parties, over a period of several years, to negotiate a settlement; and (3) the on-going pendency of the rate dispute before the STB.

Consequently, it is ORDERED that AEP's Motion to Refer to the STB [doc. # 20-1] is GRANTED. The 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 Oklaunion, Texas is referred to the STB.

It is further ORDERED that AEP's Motion to Stay Pending Referral [doc. # 20-2] is GRANTED. All proceedings in the above-styled and numbered cause are STAYED until further order of the of Court.

In an effort to manage this Court's docket more efficiently, the above-styled and numbered cause should be and is hereby ADMINISTRATIVELY CLOSED. The case may be reopened, without prejudice, upon the motion of either party, once the STB has issued a ruling on the reasonableness of BNSF's rates for transportation service from mines in the PRB to Oklaunion Station.

SIGNED ^{August} ~~2003~~ 1, 2003.

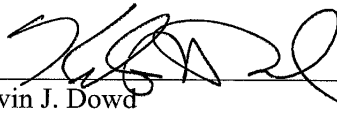

TERRY B. MEANS
UNITED STATES DISTRICT JUDGE

TRM/kny

CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of August, 2003, I served a copy of the foregoing Complainant AEP Texas North Company's Report Pursuant to 49 C.F.R. Part 1111.10 (b) and Request for Procedural Schedule by hand delivery on designated outside counsel for BNSF, as follows:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Steptoe & Johnson, L.L.P.
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795



Kelvin J. Dowd