

STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

208829

1330 Connecticut Avenue, NW
Washington, DC 20036-1795

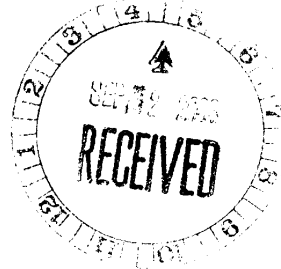
Telephone 202.429.3000
Facsimile 202.429.3902
www.steptoel.com

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

September 2, 2003

By Hand Delivery

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



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 captioned proceeding, please find the original and ten copies of the Motion of The Burlington Northern and Santa Fe Railway Company to Dismiss the Complaint in the captioned proceeding.

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

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Office of Product Safety
SEP 8 2003
Part of
Public Record

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

**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)

ENTERED
Office of Proceedings

AUG 11 2003

Part of
Public Record

**MOTION OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY TO DISMISS THE COMPLAINT**

Pursuant to 49 C.F.R. § 1111.5, The Burlington Northern and Santa Fe Railway Company ("BNSF") moves to dismiss the complaint filed by AEP Texas North ("AEP") in this proceeding on August 11, 2003. In its complaint, AEP purports to challenge the reasonableness of the common carrier rate (currently \$18.04 per ton) established by BNSF for the movement of coal from mines other than the Rawhide mine in the Powder River Basin to AEP's Oklaunion generating station in Texas. What AEP does not disclose to the Board in its complaint is that AEP is not currently paying the challenged rate and apparently has no intention of paying it. Instead, AEP has unilaterally determined that it will pay BNSF at the rate of \$13.68 per ton until the Board determines what is the maximum reasonable rate for the service in question.

AEP's refusal to pay the lawfully established rate is directly at odds with the governing statutory scheme that provides that carriers are free to establish any rate they choose in the first instance and that the shipper must pay the rate established by the carrier unless and until the Board finds it to be unreasonable. AEP's conduct in this case is particularly egregious in light of

the Board's November 7, 2000 decision in Docket No. 41191 which expressly recognized that "BNSF has the rate freedom to increase these rates [on non-Rawhide movements] without precondition except for the 20-day notice. . . ."¹ The Board did not say that BNSF was free to raise its rates and that AEP was free to ignore them. The statutory scheme plainly provides that the rates assessed by rail carriers are the rates to be paid by shippers, and when the Board said BNSF was free to raise its rates, all concerned knew that AEP should pay the higher rates.

Despite the Board's November 2000 order, AEP has consistently refused to pay BNSF's lawfully established common carrier rates for non-Rawhide movements since the increased rates went into effect on July 7, 2000. Faced with AEP's continued refusal to pay the rates it had established, BNSF filed suit in federal court in the Northern District of Texas on March 26, 2003, well within the applicable three-year limitations period, to collect unpaid amounts due and owing. AEP contended that BNSF's claims were barred, in whole or in part, by the doctrine of preemption and requested the Court to refer the issues of the reasonableness and lawfulness of the rates to the Board. In an order dated August 1, 2003, the Court granted AEP's referral motion and stayed BNSF's collection action indefinitely, pending the Board's determination of the reasonableness of non-Rawhide rates.

Having thwarted BNSF's efforts to collect its lawfully established rates, AEP seeks to challenge the reasonableness of the non-Rawhide rates without ever paying them. The Board must not permit the rate reasonableness provisions of the statute to be misused in this manner. It is improper for AEP to seek to invoke the protection of the statute's rate reasonableness provisions when it has refused to fulfill its own obligations to pay BNSF's lawfully established

¹ *W. Tex. Utilities Co. v. BNSF*, Docket No. 41191 (decided Nov. 3, 2000) ("2000 Order") at 5.

charges. Indeed, if AEP were to succeed with its stratagem in this case, it would seriously undermine the ability of rail carriers to exercise their statutory ratemaking initiative.

The Board has ample authority to prevent a litigant before it from misusing its processes and has not hesitated to exercise this authority in appropriate circumstances. Here, the appropriate course for the Board to follow is to dismiss AEP's complaint, without prejudice to refiling in the event that AEP pays the charges due and owing under the rates that it purports to challenge. Dismissal of the complaint without prejudice to refiling will not prejudice AEP or preclude its right to pursue rate relief. It will simply assure that AEP pursues its claim in accordance with well established rules that provide that the shipper must first pay the challenged rate and then pursue its rate reasonableness claim.

BACKGROUND

As the Board is aware, the dispute between AEP and BNSF regarding the rates on non-Rawhide movements has a long and somewhat complicated history. The dispute is related to a rate reasonableness challenge originally brought by AEP's predecessor, West Texas Utilities ("WTU"), to common carrier rates applicable to the movement of coal from the Rawhide mine in the Powder River Basin to Oklaunion. In its 1996 rate reasonableness decision, the Board concluded that the challenged rate exceeded a reasonable maximum. Finding that the SAC maximum rate fell below the statutory jurisdictional threshold, the Board ordered BNSF to establish a maximum rate at \$13.68 per ton, which represented 180 percent of BNSF's variable costs on the Rawhide movement as of the fourth quarter 1995.² The Board's rate prescription was limited to movements to Oklaunion from the Rawhide mine.

² *W. Tex. Utilities Co. v. BNSF*, 1 STB 638, 679 (decided Apr. 25, 1996) ("1996 Decision").

In accordance with the Board's decision, BNSF established the \$13.68 rate for Rawhide movements. At the request of WTU's parent company, Central and South West Services, BN voluntarily applied the rate of \$13.68 per ton to other PRB origins subject to a minimum volume requirement. BNSF continued to apply the \$13.68 rate to the non-Rawhide movements until July 7, 2000.

On June 16, 2000, BNSF notified the Board that it intended to increase its common carrier rate on movements to Oklaunion from non-Rawhide origins to \$15.78 per ton, effective July 7, 2000. BNSF asked that the Board either confirm that the rate prescription in the *1996 Decision* applied only to coal movements from the Rawhide mine or, in the alternative, to modify the prescription to allow BNSF to charge the higher of 180 percent of variable costs or the SAC maximum for movements from other PRB mines.

In response, WTU argued that the 1996 prescription did apply to PRB origins other than the Rawhide mine and, in the alternative, that the prescription should be modified, without any supplemental evidence, to apply to non-Rawhide movements. WTU did not seek leave to reopen Docket 41191 to submit additional evidence.

In a decision served on November 7, 2000, the Board ruled that BNSF could lawfully raise its common carrier rate for non-Rawhide movements without a modification of the rate prescription because the prescription applied only to movements from the Rawhide mine.³ In addition to authorizing the increase in the common carrier rate to \$15.78 per ton, the Board noted that "BNSF has the rate freedom to increase these rates without precondition except for the 20-day notice."⁴ The Board stated that it would reopen the proceeding "to address WTU's

³ *W. Tex. Utilities Co. v. BNSF*, Docket No. 41191 (decided Nov. 3, 2000) ("2000 Order") at 4.

⁴ *Id.* at 5.

opposition to the \$15.78 rate.”⁵ WTU sought reconsideration of the *2000 Order*, and the Board denied the reconsideration petition.⁶

By the summer of 2000, WTU’s parent company, Central and South West, had merged into American Electric Power Company. The merged company owned numerous subsidiaries that operated coal fired generating stations served by BNSF. In late summer/early fall 2000, shortly after the increased rate for movements from non-Rawhide origins to Oklaunion became effective, BNSF and American Electric Power (the parent company) entered into protracted negotiations regarding a possible rail transportation contract that would apply to transportation to multiple generating facilities owned by the American Electric Power family of companies, one of which was the Oklaunion generating station. By the time these negotiations got underway, it was apparent to BNSF that AEP was not paying the increased rate of \$15.78 for movements of coal from non-Rawhide mines to Oklaunion. Instead, although it was being invoiced at the rate of \$15.78 per ton, AEP was continuing to pay at the previously effective rate of \$13.68 per ton.

In the context of its negotiations with American Electric Power, BNSF repeatedly referenced its awareness that AEP was short paying freight bills for trains moving to Oklaunion after July 7, 2000.⁷ The matter of the short payments was subsumed in the broader negotiations between the parties. One point of discussion between BNSF and American Electric Power was that BNSF might retroactively forgive the short payments on movements to Oklaunion as part of a comprehensive commercial arrangement. However, BNSF never represented that AEP was

⁵ *Id.*

⁶ *W. Tex. Utilities Co. v. BNSF*, Docket No. 41191 (decided March 21, 2001) (“*2001 Reconsideration Order*”).

⁷ V. S. of Sami M. Shalah at 2. Mr. Shalah’s Verified Statement is attached to this motion as Attachment A.

free to pay a lower rate than that being charged or that BNSF would forego pursuing its right to those payments in the event that the negotiations were unsuccessful.

The broad negotiations between BNSF and American Electric Power continued over a period of two years, eventually terminating without an agreement between the parties at the end of 2002. During the course of the negotiations, BNSF exercised its ratemaking initiative to increase the common carrier rate on the non-Rawhide movement to Oklaunion to \$17.25 per ton, effective August 21, 2002. Despite being invoiced at the higher rate, AEP continued to pay at the rate of \$13.68 per ton. BNSF continued to note the fact of these short payments in its discussions with American Electric Power and to quantify the accumulated amount of those short payments.

On March 26, 2003, several months after termination of negotiations between the parties and well within the three-year limitations period for bringing a collection action, BNSF filed an action in the United States District Court for the Northern District of Texas to collect the amounts owing under the lawfully established common carrier rates for transportation of coal from non-Rawhide mines to Oklaunion from July 7, 2000 forward.⁸ AEP answered, denying that the charges BNSF sought to collect were lawfully established common carrier rates and asserting that BNSF's claims were barred, in whole or in part, by the doctrine of preemption. On June 12, 2003, AEP filed a Motion to Refer to The Surface Transportation Board and a Motion to Stay Pending Referral. AEP contended, *inter alia*, that the Board has primary jurisdiction over the reasonableness and lawfulness of BNSF's rates for non-Rawhide movements.

BNSF opposed AEP's Motion to Refer. It explained that under the statutory scheme lawfully established rates are immediately binding on the shipper and the shipper must continue

⁸ *BNSF v. Am. Elec. Power Co., et al.*, Compl. Civil Action No. 4-03CV-213-Y (filed March 26, 2003).

to pay them unless and until the Board determines they are not reasonable. If rates are found to be unreasonable, the shipper can be made whole by the payment of reparations. BNSF pointed out that the Board had authorized BNSF to establish the rates at issue in its *November 2000* decision. BNSF explained that under these circumstances, there was no issue that needed to be referred to the STB and, consequently, no need to stay the collection action.

On August 1, 2003 the District Court entered an order granting AEP's Motion to Refer and its Motion to Stay. The Court concluded that:

The equities in this case indicate that the Court should not proceed immediately to judgment on plaintiff [BNSF's] complaint without waiting for the STB to rule on the reasonableness of BNSF's rates for transportation.

Aug. 1, 2003 slip op. at 1.⁹ In a footnote appended to the foregoing statement, the Court explained that:

The following factors tip the equities in favor of referring the reasonableness issue to the STB: (1) that BNSF first sought guidance from the STB whether it could raise its rates for transportation service to Oklaunion 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.

*Id.*¹⁰

AEP filed its complaint challenging the reasonableness of BNSF's rates for non-Rawhide movements with the Board on August 11, 2003. It did so after declining to enter into a

⁹ A copy of the Court's order is attached to this motion as Attachment B.

¹⁰ On August 29, 2003, BNSF filed with the United States Court of Appeals for the Fifth Circuit a Petition for Writ of Mandamus requesting that the Fifth Circuit (i) direct the district court to withdraw its August 1, 2003 order and (ii) order that the case be reopened for further proceedings in the district court.

stipulation that would have extended the rate prescription for the Rawhide movement, as modified in the Board's May 28, 2003 decision in Docket 41191, to non-Rawhide movements.¹¹ In its complaint, AEP refers to the events involving the establishment of the challenged rate for non-Rawhide movements in 2000:

On or about June 16, 2000, BNSF announced its intent to establish a rate higher than \$13.68 per ton for Wyoming coal shipments to Oklahoma. The rate that BNSF initially intended to establish was \$15.78 per ton, subject to subsequent increases. Over WTU's protest, the Board allowed the higher non-Rawhide rate to go into effect, subject to WTU's right to challenge the reasonableness of the rate.

AEP Tex. Compl. at 5-6. While acknowledging that "the Board allowed the higher non-Rawhide rate to go into effect," AEP does not disclose that it has consistently refused to pay that rate, is not currently paying the lawfully established rate, and has resisted efforts to collect the amounts due and owing.

ARGUMENT

I. **AEP HAS FLOUTED THE STATUTORY SCHEME AND THE BOARD'S NOVEMBER 2000 ORDER BY REFUSING TO PAY BNSF'S LAWFULLY ESTABLISHED RATE**

There is no doubt regarding a shipper's obligations under the statutory scheme established by ICCTA to pay lawfully established common carrier rates. The rail carrier is free in the first instance to establish any common carrier rate that it chooses. 49 U.S.C. § 10701(c).

¹¹ The rate that BNSF is currently charging for both Rawhide and non-Rawhide movements is \$18.04 per ton, i.e. the SAC maximum rate for the year 2003 as determined by the Board. However, AEP is not paying the \$18.04 rate on any PRB coal movements. It is not shipping any coal from Rawhide (and has not since the \$18.04) took effect. It is continuing to pay only \$13.68 per ton for on non-Rawhide movements.

The rail carrier “shall provide transportation . . . in accordance with the rates” it establishes. 49 U.S.C. § 11101(3). A shipper that avails itself of the common carrier rate established by the rail carrier is obligated to pay that rate. 49 U.S.C. § 10743. Where the rail carrier is market dominant, the shipper may challenge a common carrier rate as unreasonably high, but is obligated to pay the rate pending a determination of reasonableness. See *Burlington N.R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 695 (D.C. Cir. 1996) (under pre-ICCTA scheme that allowed for limited investigation and suspension of rates, Congress “decided to allow carrier-chosen rates to go into effect before the Commission had the chance to pass on them, except where relatively narrow criteria for suspension were met”). The statutory scheme contemplates that the shipper can be made whole by the payment of reparations. 49 U.S.C. § 11704(b).¹²

In this case, the existence of a lawfully established common carrier rate is beyond dispute. To resolve any uncertainty regarding the scope of the Board’s rate prescription in the *1996 Decision*, BNSF specifically sought the Board’s authorization in connection with its implementation of the \$15.78 rate for non-Rawhide movements effectively July 7, 2000. The Board explicitly authorized BNSF “raise its rates from non-Rawhide PRB origins to \$15.78 per

¹² The logic of the statutory scheme was succinctly summarized by the United States Court of Appeals for the Fifth Circuit in *S. Pacific Transp. Co. v. City of San Antonio, Tex.*, 748 F.2d 266, 274 (5th Cir. 1984):

The Interstate Commerce Act . . . entails a balanced and coherent system for the payment and review of rates. The shipper is required to pay the filed rate at the time of shipment but may later seek review and reparations in the ICC. The carrier, on the other hand, receives assurance that payment will not be delayed pending review; but the carrier must be prepared to reimburse amounts later found to be unreasonable.

As pertinent here, the post-ICCTA statutory scheme differs from that described by the Court in *Southern Pacific* only to the extent that the rate is not literally “filed;” instead, it established. The shipper’s obligation to pay the rate unless and until it is found to be unreasonable is unchanged.

ton, effective July 7, 2000.”¹³ It further stated that “BNSF has the rate freedom to increase the rates without precondition except for the 20-day notice.”¹⁴ AEP itself acknowledges that “[o]ver WTU’s protest, the Board allowed the higher non-Rawhide rate to go into effect, subject to WTU’s right to challenge the reasonableness of the rate.”¹⁵ There is no dispute that the rate “in effect” is the rate that the shipper is supposed to pay. The statute provides no mechanism for a shipper to opt out of its payment obligations or to exercise self-help in the face of rates that it believes to be unreasonably high.¹⁶

AEP apparently takes the position that it has been and remains free to disregard BNSF’s lawfully established common carrier rates for non-Rawhide movements because BNSF did not take action to compel the payment of those rates during the period that the parties were attempting to negotiate a broad commercial arrangement which, if consummated, could have had the effect of retroactively forgiving by contract AEP’s short payments. Such an argument is unavailing. BNSF’s forbearance in these circumstances did not amount to a waiver of its right to seek the money it was owed or to an agreement that AEP was not liable for payment of the rates. Indeed, as Mr. Shalah explains in his verified statement, BNSF continued to apprise AEP of the increasing magnitude of its shortfall in payments.¹⁷ Both parties knew perfectly well that AEP

¹³ *W. Tex. Utilities Co. v. BNSF*, Docket No. 41191 (decided Nov. 3, 2000) (“2000 Order”) at 4.

¹⁴ *Id.* at 5.

¹⁵ AEP Tex. Compl. at 5-6.

¹⁶ Under the pre-ICCTA regime, a shipper could seek to invoke the limited suspension provisions of the statute in an effort to avoid paying a newly established rate. *See Burlington N., supra*, 75 F.3d at 692-695. ICCTA strengthened the carrier’s ratemaking initiative by eliminating the suspension provision.

¹⁷ Shalah V.S. at 3.

remained liable for the charges assessed and that BNSF would insist on their payment in the event that negotiations were unsuccessful. That in fact is what BNSF did. It filed a lawsuit to recover AEP's short payments following the termination of the parties' negotiations and well within the three-year limitations period governing such collection actions set out in 49 U.S.C. § 11705(a).

Whatever understanding AEP may claim to have had regarding its payment obligations while negotiations were ongoing, it certainly knew no later than later March or early April 2003, after BNSF brought its federal court collection action, that BNSF was insisting on the payment of its lawfully established common carrier rates. AEP did not pay the amounts owing. It did not begin to pay the new, higher rate of \$18.04 per ton that BNSF established effective May 13, 2003. Instead, AEP continued to flout the statutory scheme and the Board's *November 2000 Order* by paying for transportation of coal to Oklaunion at the unilaterally determined rate of \$13.68 per ton. AEP apparently has no intention of paying a different rate until the Board resolves the rate reasonableness issue raised by AEP's August 11, 2003 complaint.

II. THE BOARD SHOULD PROTECT THE INTEGRITY OF THE STATUTORY SCHEME BY DISMISSING AEP'S COMPLAINT

By deliberately withholding payment of lawfully established common carrier rates and seeking to defeat a court action brought to collect the unpaid amounts, AEP has subverted the statutory scheme governing the establishment and payment of rail rates. Having avoided its obligations under the statute, AEP now seeks to invoke the maximum rate protections of the statute. AEP's filing of a rate complaint under these circumstances amounts to a misuse of the Board's processes. This course of conduct should not be countenanced by the Board. The proper remedy is for the Board to dismiss AEP's rate complaint and to decline to entertain a challenge to BNSF's rates for non-Rawhide movements unless and until AEP pays the amounts

due and owing and represents that it will continue to pay the lawfully established rate pending the Board's determination of reasonableness.

The Board has ample authority to grant the relief requested by BNSF. "It is well settled that administrative agencies have inherent authority to protect the integrity of the regulatory processes that they are charged with administering, and to prevent or remedy a misuse of those processes." *R.R. Ventures, Inc. -- Abandonment Exemption*, STB Fin. Docket No. 33385, (decided Oct. 3, 2000) (voiding transfers of subsurface, surface, and air rights to correct a perceived "blatant effort to strip away" such property rights prior to impending sale to railroad), *aff'd*, *R.R. Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523 (6th Cir. 2002).¹⁸

Here there is particularly good cause for the Board to exercise its authority to protect the integrity of the statutory scheme governing the establishment of rail rates and shipper challenges to the reasonableness of those rates. If AEP is allowed to pursue its rate complaint, notwithstanding its refusal to pay the lawfully established rates, the message to similarly situated shippers will be that they too can resort to self help by paying any rate they choose during the pendency of a rate reasonableness case. The result could be widespread subversion of the congressionally mandated rate setting scheme.

The mechanism for the Board to protect the integrity of the statutory scheme is readily available this case. AEP has sought to invoke the Board's processes by filing a rate complaint. The Board clearly has authority to dismiss a rate complaint. A dismissal without prejudice to refiling if and when AEP pays the charges due and owing under BNSF's lawfully established common carrier rate would enforce the integrity of the statute which provides that the shipper

¹⁸ *Accord SF&L Ry., Inc. -- Abandonment Exemption*, STB Docket No. AB-448, (decided Jan. 31, 2003) ("[A]ny government agency has inherent authority to act to ensure 'the fairness, efficiency, and integrity of its processes and the appropriateness of the conduct of the parties appearing before it.'")

must pay the challenged rate while a rate complaint is pending. A dismissal of the complaint in these circumstances would not deprive AEP of any substantive right because AEP would be permitted to invoke the rate reasonableness remedy available to it under the statute when it has complied with its own obligations under the statute.

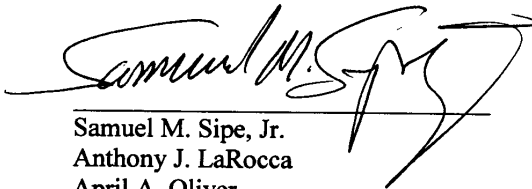
CONCLUSION

For the foregoing reasons, BNSF respectfully requests that the Board dismiss AEP's rate complaint in this proceeding without prejudice to refile if and when AEP pays the charges due and owing under the rates that it purports to challenge.

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
April A. Oliver
STEPTOE & JOHNSON, LLP
1330 Connecticut Ave. N.W.
Washington, D.C. 20036
Phone (202) 429-6486
Facsimile (202) 429-3902

VERIFIED STATEMENT OF SAMI M. SHALAH

My name is Sami M. Shalah. I am Vice President Coal Marketing East for The Burlington Northern and Santa Fe Railway Company. I have been continuously involved in coal marketing activities for BNSF and its predecessor since I joined Burlington Northern Railroad Company in 1987. I have been involved in developing and overseeing the commercial arrangements governing the transportation of coal by BNSF to the electric generating station at Oklaunion, Texas now owned and operated by AEP since prior to the filing of the rate complaint in Docket No. 41191 by West Texas Utilities Company in 1994.

The purpose of my Verified Statement is to describe the common carrier rates that have been in effect for the movement of coal from Powder River Basin mines other than the Rawhide mine since 1996 when the STB issued its maximum rate prescription for the Rawhide mine rate. I will describe in particular the status of those common carrier rates during the period of slightly over two years, from the fall of 2000 to the end of 2002 when BNSF was engaged in commercial negotiations regarding coal transportation with AEP's parent company, American Electric Power.

The Board's 1996 rate prescription in Docket No. 41191 applied only to coal movements from the Rawhide mine. Shortly after the Board decision was issued, I was approached by representatives of WTU's parent company, Central and Southwest, and asked whether BNSF would agree to apply the rate of \$13.68 per ton that had been prescribed for the Rawhide movements to movements to Oklaunion from PRB mine origins other than Rawhide. I indicated

that BNSF would be willing to apply the \$13.68 rate, subject to a minimum volume requirement and subject to future revision of the rate at BNSF's option.

WTU stopped shipping coal from the Rawhide mine in 1997 when that mine shut down, temporarily as it turned out. BNSF continued to transport coal from non-Rawhide mines to Oklaunion at the \$13.68 rate until the summer of 2000. In June 2000, we informed WTU that we would increase the rate for movements from non-Rawhide mines to \$15.78 per ton, effective July 7, 2000. We also sought confirmation from the STB that these non-Rawhide movements were not subject to the Board's rate prescription on the Rawhide movement. The Board confirmed that our understanding was correct in a November 2000 decision. The Board said that we had ratemaking freedom on the non-Rawhide movements, subject to the statutory notice provisions.

By late summer/early fall 2000, shortly after the rate for non-Rawhide movements had been increased, BNSF began exploring the possibility of a broad commercial arrangement that would govern coal transportation by BNSF to multiple electric generating stations owned by American Electric Power, including the electric generating station at Oklaunion. By this time, WTU's parent Central and Southwest had merged with American Electric Power, and American Electric Power had assumed responsibility for overseeing rail transportation arrangements to Oklaunion. As we entered into our commercial discussions with American Electric Power, we were aware that AEP was not making full payment at the effective rate of \$15.78 per ton for movements to Oklaunion. Instead, AEP was short paying us by paying at \$13.68 per ton.

In our negotiations with American Electric Power, BNSF repeatedly pointed out that AEP had been short paying freight bills for trains moving to Oklaunion after July 7, 2000. We reminded American Electric Power periodically of the amount that they were in arrears on the Oklaunion shipments. The matter of the short payments was one element in the broader

negotiations between the parties. One point of discussion between BNSF and American Electric Power was that BNSF might retroactively forgive the short payments on movements to Oklaunion as part of a comprehensive commercial arrangement. However, we never represented that AEP was free to pay a lower rate than that being charged or that BNSF would forego pursuing its right to those payments in the event that the negotiations were unsuccessful.

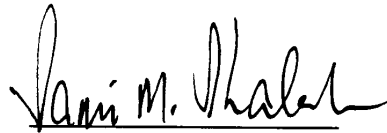
The broad negotiations between BNSF and American Electric Power continued over a period of more than two years, eventually terminating without an agreement at the end of 2002. During the course of the negotiations, we exercised our right to increase the common carrier rate on the non-Rawhide movement to Oklaunion to \$17.25 per ton, effective August 21, 2002. Despite being invoiced at the higher rate, AEP continued to pay at the rate of \$13.68 per ton. We continued to note the fact of these short payments in our discussions with American Electric Power and to quantify the accumulated amount of those short payments.

After our negotiations with American Electric Power had concluded and it had become clear that AEP would not voluntarily make us whole for short payments dating back to July 7, 2000, we filed suit in March 2003 to collect the amounts due. Subsequent to bringing our collection case, we increased the rate for movements to Oklaunion from non-Rawhide movements to \$18.04, effective May 13, 2003. This rate is the same as the SAC maximum rate for calendar year 2003 under the Board's recently modified rate prescription for movements to Oklaunion from the Rawhide mine.

VERIFICATION

I declare under penalty of perjury that I have reviewed the foregoing statement, that I have personal knowledge of the facts contained therein and that the contents thereof are true and correct.

Executed on August 27, 2003


Sami M. Shalah

Attachment B

ORIGINAL

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

AUG - 1 2003

CLERK, U.S. DISTRICT COURT
BY _____
DEPUTYTHE 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 STB: (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.

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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} ~~July~~ 1, 2003.


TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

TRM/knv

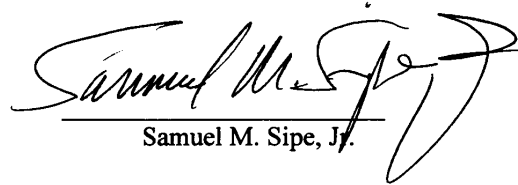
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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2003, a true and correct copy of the foregoing
document was served by hand on:

William L. Slover
Kelvin J. Dowd
Christopher A. Mills
SLOVER AND LOFTUS
1224 Seventeenth Street, N.W.
Washington, DC 20036



Samuel M. Sipe, Jr.