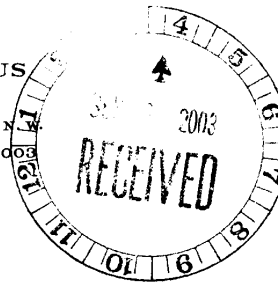


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September 22, 2003

VIA HAND DELIVERY

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

208956

ENTERED
Office of Proceedings

SEP 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's Reply In Opposition to Motion To Dismiss. A WordPerfect Diskette containing the filing also is enclosed.

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

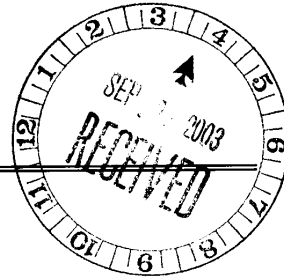
Thank you for your consideration in this matter.

Sincerely,

Kelvin J. Dowd
An Attorney for
AEP Texas North Company

KJD:dmb
Enclosure
cc: Parties of Record

BEFORE THE
SURFACE TRANSPORTATION BOARD



AEP TEXAS NORTH COMPANY)

Complainant,)

v.)

Docket No. 41191 (Sub-No.1)

THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY)

Defendant.)

**AEP TEXAS NORTH COMPANY'S REPLY IN
OPPOSITION TO MOTION TO DISMISS**

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Dated: September 22, 2003

Attorneys & Practitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

AEP TEXAS NORTH COMPANY	)	
	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 41191 (Sub-No.1)
	)	
THE BURLINGTON NORTHERN AND	)	
SANTA FE RAILWAY COMPANY	)	
	)	
Defendant.	)	

**AEP TEXAS NORTH COMPANY’S REPLY IN
OPPOSITION TO MOTION TO DISMISS**

Complainant, AEP Texas North Company (“AEP Texas”) hereby replies in opposition to the Motion to Dismiss filed by Defendant, The Burlington Northern and Santa Fe Railway Company (“BNSF”). Two federal courts have referred to the Board the issue of the reasonableness of the rates that BNSF seeks to charge for coal shipments from Wyoming origins other than the Rawhide Mine to AEP Texas’ Oklaunion Station, the same issue presented by AEP Texas’ Complaint. Orders by those same courts also have stayed BNSF’s separate civil action to collect the disputed rates while the Board considers their lawfulness. Despite these directives, however, BNSF’s Motion asks that the STB dismiss AEP Texas’ Complaint unless and until it pays the disputed rates. As will be shown, the relief sought by BNSF conflicts with the federal courts’ orders and the

governing statutory scheme, and is not justified by the facts and circumstances surrounding the rate dispute itself. The Motion is without merit, and should be denied.

BACKGROUND

The question of the reasonableness of BNSF's common carrier rates on coal shipments from non-Rawhide origins to Oklahoma has been the subject of proceedings before the Board since the Summer of 2000, when BNSF first sought to impose rates higher than \$13.68 per ton. While the Board's November 7, 2000 Decision in the predecessor docket held that these rates were not subject to the rate prescription applicable to BNSF's coal transportation services from Rawhide, the same ruling also extended the Board's jurisdiction over the non-Rawhide rates. After denying AEP Texas' request to reject outright the higher rates proposed by BNSF, the Decision held that "[t]his proceeding *is reopened* to determine the reasonableness of the \$15.78 per ton rate from other PRB origins." Docket No. 41191, *West Texas Utilities Company v. Burlington Northern Railroad Company*, STB served November 7, 2000 at 5 (emphasis added).

Following the Board's ruling, BNSF and AEP Texas knowingly deferred both the rate reasonableness challenge and any BNSF claim for higher payments pending what BNSF itself describes as "broad negotiations" that "continued over a period of two years." Motion at 7. It was only after those negotiations terminated without a final agreement being reached that BNSF filed a collection action in the United States District

Court for the Northern District of Texas, under 49 U.S.C. §10743. *Id.* Consistent with its rights under the Federal Rules of Civil Procedure, AEP Texas answered BNSF's claim and filed a counterclaim, challenging both the rates that BNSF sought to charge and the \$13.68 rate that AEP Texas then was paying, and seeking reparations on shipments previously made. AEP Texas also filed a Motion to Refer to the Surface Transportation Board and a Motion to Stay Pending Referral ("Motion to Refer"), asking the District Court to maintain the status quo with respect to the rates then being paid by AEP Texas, refer the issue of the reasonableness of the rates that BNSF sought to collect to the Board, (where the issue already was pending) and stay any further proceedings until the Board issued a final ruling. BNSF was afforded a full opportunity to respond to this Motion, and submitted extensive briefing on all the issues before the Court.

On August 5, 2003, the District Court issued its Order granting AEP Texas' Motion in all respects, and staying BNSF's underpayment claim pending the outcome of the Board's rate reasonableness determination. The District Court based its Order on a careful consideration of the long history of the parties' dispute over the non-Rawhide rates, and exercised its jurisdictional discretion to maintain the status quo pending referral. BNSF Motion, Att. B at 1 (internal citation omitted) ("the equities' in this case indicate that the Court should not proceed immediately to judgment on . . . [the] complaint without waiting for the STB to rule on the reasonableness of BNSF's rates for transportation.").

BNSF sought reversal of the District Court's Order through a Petition for Writ of Mandamus before the United States Court of Appeals for the Fifth Circuit. In a ruling issued on September 19, 2003 (copy attached hereto as Exhibit A), the Fifth Circuit denied BNSF's request and let the District Court's Order stand.

Both AEP Texas' Complaint and the two federal courts' orders place the issue of the reasonableness of BNSF's non-Rawhide rates squarely before the Board for resolution, pending which BNSF's civil claim for underpayments and AEP Texas' counterclaim for overpayments have been stayed. Significantly, the District Court did *not* refer the question of which rate AEP Texas should pay pending the outcome of the Board's reasonableness determination. The Court decided that issue itself, in AEP Texas' favor. Once the Board serves a final decision on the merits in the instant proceeding, the District Court will proceed to judgment on the parties' competing claims for payments.

Since the District Court's Order was issued, BNSF has made repeated efforts in multiple forums to try to overturn it.¹ Through its Motion to Dismiss, BNSF now seeks to enlist the Board in its battle against the Order. As shown below, however, the STB lacks jurisdiction to interfere with the District Court's Order, and there is no support in the governing statute or case law for BNSF's dismissal claims. The Board should deny the Motion.

¹ As noted, last week the Fifth Circuit rejected BNSF's Petition for a Writ of Mandamus. On September 9, 2003, BNSF filed a Motion for Reconsideration of the Order with the District Court, which remains pending.

ARGUMENT

I. DISMISSAL IS A DISFAVORED REMEDY

It is well-established that “[a]s a general rule, a motion to dismiss is a disfavored request and rarely granted in judicial and administrative proceedings.” Finance Docket No. 31590, *Garden Spot & Northern Ltd. Partnership and Indiana Hi-Rail Corp. - Purchase and Operate - Indiana Rail Road Company Line Between Newton and Browns, IL*, ICC served January 5, 1993, at 2. Even in cases where legal issues primarily are involved, this stringent standard generally requires that the Board permit evidence and argument to be filed before dismissal is considered. *Department of Public Service Regulation and Public Service Commission of the State of Montana v. Union Pacific Railroad Co.*, Docket No. 40913 (ICC served March 15, 1993); *Zoneskip, Inc. v. United Parcel Service, Inc. and United Parcel Service of American, Inc.*, Docket No. 40519 (ICC served June 26, 1992) at 10. The Board’s predecessor elaborated on this standard:

[A]s a general rule, motions to dismiss prior to the submission of evidence or the agency’s pronouncement of standards are denied to ensure that participants have a full and fair opportunity to meet their burden of proof.

Docket No. 40169, *National Grain and Feed Assoc. v. Burlington Northern RR. Co., et al.*, ICC served June 1, 1990, at 4 (citation omitted).

In evaluating a motion to dismiss, the Board “construe[s] the factual allegations in a light most favorable to the complainant.” *Grain Land Coop v. Canadian Pacific Limited and Soo Line Railroad Company d/b/a/ CP Rail System*, Docket No. 41687 (STB served Dec. 8, 1999) at 3; accord *Sierra Pacific Power Company and Idaho Power Company v. Union Pacific R.R.*, Docket No. 42012 (STB served Jan. 16, 1998).

Both on the law and the facts as construed in a light most favorable to AEP Texas, it is clear that BNSF’s Motion cannot meet the strict standard for pre-emptive dismissal of a properly-pleaded rate complaint.

II. THE STB LACKS JURISDICTION TO DISTURB THE DISTRICT COURT’S ORDER

Pursuant to 49 U.S.C. §10743, a rail carrier asserting a claim for underpayments must do so in accordance with 49 U.S.C. §11705. Section 11705, in turn, specifies that a carrier seeking to recover charges for transportation service “must begin a *civil action* . . . within 3 years after the claim accrues.” (Emphasis added). The plain language of the governing statute vests exclusive jurisdiction over underpayment claims in the courts.² See also *White v. U.S.*, 989 F. 2d 643, 647-48 (3d Cir. 1993).

Proceeding under Sections 11705 and 10743, BNSF commenced an action in the District Court seeking payments for transportation services in excess of the

²Compare 49 U.S.C. §11705(c), which specifies that “[a] person must file a complaint with the Board” to raise a claim for damages resulting from the establishment of an unreasonable rate.

payments already made by AEP Texas for those services. AEP Texas defended on rate reasonableness grounds, and counterclaimed for overpayments. In response to AEP Texas' Motion to Refer,³ the District Court exercised its exclusive jurisdiction and informed discretion and stayed further proceedings on the collection and overcharge claims pending a determination by the Board as to the reasonableness of the underlying rates. On further challenge by BNSF, the District Court's Order was reviewed by the Fifth Circuit and allowed to stand. The Order is binding on the parties, and provides direct guidance to the Board regarding the exercise of its own exclusive jurisdiction over the reasonableness of rail rates.

BNSF's Motion to Dismiss effectively asks the Board to ignore the District Court's Order and require AEP Texas to satisfy BNSF's underpayment claim – a claim over which the Board has no jurisdiction – before proceeding to determine the reasonableness of the rates at issue. BNSF seeks to implicate the Board in defiance of the District Court, which (with the subsequent approval of the Fifth Circuit) has concluded that the equities of this case warrant maintenance of the status quo while the Board adjudicates the rate reasonableness dispute now pending on AEP Texas' Complaint in this docket. However, there is absolutely no legal support for such a subversion of federal judiciary authority. While BNSF devotes considerable attention to the statutory

³AEP Texas also filed a Motion for Protective Order, to avoid unnecessary discovery on BNSF's underpayments claim while the Board's rate reasonableness determination was pending.

provisions relating to a carrier's rate-making initiative, it has offered no statutory or case law that suggests the Board has the power to ignore or alter validly-entered federal court orders. This alone compels denial of BNSF's Motion.

III. AEP TEXAS' COMPLAINT IS CONSISTENT WITH THE STATUTORY SCHEME

In its Motion, BNSF argues that it would "flout the statutory scheme" if AEP Texas does not pay the rates that BNSF has demanded through its Texas civil action while the Board considers the reasonableness of those rates in this proceeding. *See* Motion at 12. Putting aside for a moment that this same argument already was presented to and rejected both by the District Court and the Fifth Circuit, there is no absolute "pay-first" rule that serves as a predicate to commencing or prosecuting a maximum rate case.⁴ Controlling precedent holds that where, as here, there is a collection action being pursued in federal district court and a defense has been asserted that the rates at issue are unreasonable, the rate reasonableness issues should be referred to and decided by the Board without any requirement that the shipper first pay the challenged rates:

⁴BNSF bases its "pay first" argument on a single authority, *Burlington N.R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 695 (D.C. Cir. 1996). That case does not in any way address BNSF's "pay first" theory, or the special circumstances involved in this case. That ruling dealt solely with the Board's authority to order a defendant rail carrier to *file a tariff* that could be challenged by a shipper prior to traffic actually moving under the subject rate. In this proceeding, the common carrier rates at issue have been under challenge before the Board at least since November 2000.

Indeed, courts have frequently referred rate reasonableness issues . . . prior to payment by the shipper.¹¹ The fact that courts have, over the years and without argument, referred cases prior to payment of the filed rate, supports the proposition that referral is permitted under a normal, unstrained reading of the statute.

¹¹ *E.g., Pennsylvania, supra*, [363 U.S. 202] at 203 (where the railroad sued the United States to recover additional charges, the lower court properly “suspended proceedings to enable the parties to have the [I.C.C.] pass on the reasonableness of the rates”) . . . *Chicago, R.I. & Pac. R.R. v. Furniture Forwarders of St. Louis, Inc.*, 420 F.2d 385 (8th Cir. 1970) (where the railroad sued for additional unpaid freight charges and shippers claimed the rates were unreasonable, the court was the required to stay its hand until the ICC reached a final decision); *Union Pac. R.R. v. Bay Area Shippers Consol. Ass’n*, 594 F.2d 1291 (9th Cir. 1979) (railroad sought additional freight charges; the district court was required to refer the rate reasonableness issues to the Commission); *Delta Traffic Serv., Inc v. Transtop, Inc.*, 902 F.2d 101, 104-05 (1st Cir. 1990) . . . (cases collected).

Petitions For Issuance of Rate Reasonableness and Unreasonable Practices Policy Statement, 8 I.C.C.2d 61, 70 (1991); accord *Union Pacific R.R. v. Bay Area Shippers Consolidating Ass’n, Inc.*, 594 F.2d 1291 (9th Cir. 1979).

Even in instances where there has not been a specific referral of rate reasonableness issues to the agency by a competent court, Board precedents long have held that rates may be challenged as unreasonable prior to their actually being paid by a complainant, or to the accrual of actual damages.⁵ For example, in many of the early

⁵ See, e.g., *ICC v. Baird*, 194 U.S. 25, 39 (1904) (even where the rates were not
(continued...))

western coal rate cases, the Board's predecessor decided rate reasonableness challenges where none of the complainant's traffic actually had moved yet between the challenged origin-destination pairs.⁶ BNSF's "pay first" theory is contrary to this controlling line of authority.

The Board has a nondiscretionary obligation to take appropriate action to enforce a railroad's compliance with its duty to establish reasonable rates. 49 U.S.C. §11701(a). Such an obligation can be triggered upon complaint by an affected shipper⁷ or

⁵(...continued)

paid and no direct harm was shown, "no alternative is left the Commission but to investigate the complaint, if it presents a matter within the purview of the act and the powers granted to the Commission"); *Georgia Public Service Commission v. Atlantic Coast Line Ry.*, 186 I.C.C. 157 (1932) (same); *Wisconsin Bridge & Iron Co. v. Illinois Terminal Co.*, 161 I.C.C. 176 (1930) (rate reasonableness determination made where rates sought to be enforced but not actually paid were challenged as unreasonable); *Charleston Traffic Bureau v. Alabama Great Southern Railroad Co.*, 89 I.C.C. 501, 502 (1924) (motion to dismiss denied even though complainant had not paid the challenged rates, because "complainants have a legitimate interest in securing an adjustment of rates" and the statute "provides that no complaint shall be dismissed because of absence of direct damage to complainant"); *Alabama Passenger Fares and Charges*, 88 I.C.C. 621 (1924) (reasonableness of rail passenger fares decided even though rates at issue not yet in force or paid). See also *Arizona Public Service Co. & Pacificorp v. The Burlington Northern and Santa Fe Railway Co.*, Docket Nos. 41185 and 42077 (STB served May 12, 2003) (see discussion, *infra*).

⁶See *San Antonio, TX v. Burlington N. Inc.*, 355 I.C.C. 405 (1976), *aff'd sub nom. Burlington N. Inc. v. United States*, 555 F.2d 637 (8th Cir. 1977); *Incentive Rate on Coal – Gallup N.M. to Cochise, Ariz.*, 357 I.C.C. 683, 716-18 (1977) and *Incentive Rate on Coal – Cordero, Wyo. to Smithers Lake, Tex.*, 358 I.C.C. 537, 586-87 (1977), both *aff'd sub nom. Houston Lighting & Power Co. v. United States*, 606 F.2d 1131 (D.C. Cir. 1979).

⁷See 49 U.S.C. §11701(b).

by court referral. Here, both triggers are present. The only grounds provided under the statute for pre-emptive dismissal of such an action is if the complaint fails to “state reasonable grounds for investigation and action” (49 U.S.C. §11701(b)). BNSF has made no such allegation concerning AEP Texas’ rate challenge.

That a complainant’s failure to pay the challenged rate and thereby suffer harm is not grounds to preclude the rate challenge also is confirmed by the governing statute:

the Board may not dismiss a complaint made against a rail carrier . . . because of the absence of direct damage to the complainant.

49 U.S.C. §11701(b); *accord, ICC v. Baird, supra*. BNSF’s intimation that AEP first must pay the disputed rate and incur some damage before the Board can proceed to adjudicate the reasonableness of that rate is contrary to the law.

While it is clear that AEP Texas need not show direct harm through the current payment of the challenged rates as a precondition to the Board’s exercise of its jurisdiction over the reasonableness of those rates, it is also clear that the issues presented by AEP Texas’ Complaint and the District Court’s Order are far from academic or declaratory in nature. As the District Court held, following a decision by the Board on the lawfulness of the subject rates, the Court will reopen the collection action and render judgment on the amount actually owed by AEP Texas for transportation services rendered during the relevant time period. *See* BNSF Motion, Att. B at 2. If the

challenged rates are upheld by the Board as reasonable, AEP Texas would be required to pay the rates retroactively, with interest.⁸

IV. THE INTEGRITY OF THE STATUTORY SCHEME REQUIRES DENIAL OF BNSF'S MOTION

BNSF insists that AEP Texas' pursuit of the very issue that has been referred to the Board for decision by the valid Order of the District Court is somehow a "misuse of the Board's processes" and would be harmful to the "integrity of the statutory scheme." These contentions are without merit.

BNSF cites *R.R. Ventures, Inc. -- Abandonment Exemption*, Finance Docket No. 33385 (STB decided Oct. 3, 2000) as support for its contentions in this regard. In that case, the Board cancelled the transfer of certain railroad right-of-way property where the offending railroad party had "repeatedly disregarded our regulatory processes" by, among other things, acquiring a rail line without receiving necessary Board authority, refusing to meet its common carrier obligations, and preventing needed repairs to be made on the line. *Id.* at 12 n.37.

⁸Conversely, as the Fifth Circuit noted, if the Board determines that the maximum reasonable rates for the time periods in question were *lower* than those actually paid by AEP Texas, then judgment would be rendered in AEP Texas' favor on its counterclaim, and BNSF not only would not be entitled to collect any additional amounts, but would have to rebate back to AEP Texas amounts already paid, with interest. See Exhibit A at 3 n.1.

In this case, the Board itself reopened *Docket No. 41191* in November, 2000, and informed the parties that it would consider the reasonableness of BNSF's rates for service from non-Rawhide origins to Oklahoma. As confirmed in the Verified Statement of Mr. Shalah appended to BNSF's Motion, the parties thereafter engaged in protracted commercial negotiations, during which AEP Texas continued to pay the rate that was in effect prior to the Board's reopening order. BNSF does not dispute that it refrained from collecting the higher rates that are the subject of its civil claim throughout the duration of the negotiations. See BNSF Motion at 6 ("[t]he matter of the short payments was subsumed in the broader negotiations between the parties"). After BNSF instituted a collection action before the District Court in March of this year, AEP Texas answered the carrier's claims and reasserted its challenge to the rates at issue in the Board's November, 2000 Decision, as contemplated by that Decision. Nothing that AEP Texas has done before the Board or in the District Court violates any agency rulings.

Before the District Court, AEP Texas defended itself against BNSF's civil collection suit by asserting, *inter alia*, that the rates that BNSF sought to collect are unreasonably high, and that the Court should stay its hand and not order AEP Texas to pay the higher rates unless and until the Board entered a final ruling on the merits of the instant case. While BNSF now claims that AEP Texas' action in the District Court

“subverted the statutory scheme,”⁹ the fact is that the District Court *agreed* with AEP Texas’ reading of the law, and, consistent with its own discretionary power and the governing tenets of Title 49, stayed the collection action and referred the reasonableness issue to the Board. The District Court’s Order subsequently was upheld by the Fifth Circuit. If anything could “subvert the statutory scheme” under these circumstances, it would be the Board siding with BNSF in open defiance of these valid federal court orders.

BNSF alleges that by refusing to dismiss, the Board will send a “message to similarly situated shippers . . . that they too can resort to self help by paying any rate they choose during the pendency of a rate reasonableness case.” Motion at 13. Given the very unique circumstances of this case (*e.g.* the proceeding’s long history, the complex and lengthy commercial negotiations, a nearly three year period of payments below the challenged rates, and a specific district court referral of rate reasonableness issues), this claim borders on the frivolous. The Board need not be concerned about a “widespread subversion of the congressionally mandated rate setting scheme” arising from compliance with the directives of two federal courts of competent jurisdiction.

Elsewhere, the Board has recognized that the particular equities of a situation can support prosecution of a rate reasonableness challenge when the complaining shipper is not paying the challenged rate in full. For example, in its recent

⁹See Motion at 12.

APS decision,¹⁰ the Board rejected BNSF's attempts to impose a rate increase on the issue traffic, and instructed it to collect no more than the prior rate during the pendency of the reopened proceeding. Given the unique circumstances of the case and its long history, the Board ordered that each party "keep account" of monies paid for service during the pendency of the reopened proceeding, in order that the prevailing party might be made whole at the conclusion of the case. It is hardly inconsistent with the statutory scheme for the District Court to reach a similar conclusion in the instant matter, particularly when – as the Fifth Circuit affirmed – the Court acted within its jurisdiction to balance the equities and stay BNSF's collection of higher rates until the question of the reasonableness of those rates is resolved. No authority cited by BNSF gives the Board the power to interfere with this ruling.

¹⁰*Arizona Public Service Co. & PacifiCorp v. The Burlington Northern and Santa Fe Railway Co.*, Docket Nos. 41185 and 42077 (STB served May 12, 2003).

CONCLUSION

For all of the foregoing reasons, BNSF's Motion to Dismiss should be denied.

Respectfully submitted,

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Dated: September 22, 2003

Attorneys & Practitioners

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS U.S. COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED

SEP 19 2003

NO. 03-10872

CHARLES R. FULBRUGE III
CLERK

In Re: BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY

Petitioner

Petition for Writ of Mandamus to the United States
District Court for the
Northern District of Texas, Fort Worth

Before JOLLY, WIENER, and CLEMENT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is
DENIED.

This case involves a dispute between a railroad company,
Burlington Northern and Santa Fe Railway Co. ("BNSF"), and a
utility company, AEP Texas North Co. ("AEP"), arising out of an
agreement between the two for AEP to ship coal along rail tracks
owned by BNSF. BNSF sued AEP to recover several million dollars of
allegedly unpaid transportation charges. AEP replied to this
action by arguing that the fees in question were not reasonable and
requested the district court stay the collection proceedings
pending the resolution of AEP's statutory reasonableness claim
before the Surface Transportation Board ("STB"). The district

court granted AEP's motion and ordered that the proceedings before it be stayed. BNSF now seeks mandamus relief from this order.

In order for mandamus relief to be appropriate, BNSF must show that (1) it lacks adequate alternative means to obtain the relief it seeks and (2) its right to the issuance of the writ is "clear and undisputable." Mallard v. United States Dist. Ct. for the S. Dist. of Iowa, 490 U.S. 296, 309 (1989); In re Occidental Petroleum Corp., 217 F.3d 293, 295 (5th Cir. 2000). A writ of mandamus is an "extraordinary remedy." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). The party requesting mandamus has the burden of proving a "clear and indisputable" right to the writ. Bankers Life and Cas. Co. v. Holland, 346 U.S. 379, 384 (1953).

Underlying this case is a complex statutory scheme regulating the price that railways can charge shippers for their services. BNSF argues that the order at issue clearly conflicts with this statutory scheme, at least the way in which it has been interpreted by the courts. In response, AEP predictably asserts that the order does not contradict this statutory scheme, but instead is in complete accord with it. After preliminarily reading and analyzing the parties' arguments to this effect, BNSF makes out a plausible argument that the district court got the law wrong. However, it is definitely not clear that this is the case, as the issue presented is novel.

In any event, we need not examine these arguments to reach the conclusion that mandamus should be denied. There are two reasons. First, the order, even if based on an incorrect reading of the law, does not clearly impose any undue hardships on BNSF nor does it plainly constitute irreparable harm. Despite BNSF's assertions that the stay granted here will be of indefinite duration, it appears that under the relevant regulations, the STB must issue a final decision in the pending proceeding no later than December 11, 2004. Moreover, there is no evidence that AEP is insolvent or that it lacks sufficient funds to pay reparations if the STB ultimately rules that the current rate is reasonable. Thus, the hardship BNSF will face is waiting 14 more months to be paid the difference between what AEP is paying it now and what the STB determines will be the reasonable rate.² This possible harm does not warrant the use of the "extraordinary remedy" of mandamus.

Second, the Supreme Court has coined what might be characterized as a syllogism for purposes of a mandamus analysis that should be applied here: "if a matter is within the districts court's discretion, the litigant's right to a particular result cannot be 'clear and indisputable.'" Will v. Calvert Fire Ins.,

²We incidentally note that it is possible that the STB proceeding will determine that the reasonable rate is lower than the rate AEP is currently paying. Indeed, this is the finding that AEP is seeking in that proceeding. Under such a finding, BNSF would end up owing AEP money and not the other way around. According to the District Court order, this was one of the factors in its decision to stay the collection action.

437 U.S. 655, 661 (1978). In Will, the district court had granted a party's motion to stay the proceeding pending the resolution of a state court claim involving similar issues between the parties. On appeal, the Supreme Court refused to issue a writ because the defendant remained free, as the state case progressed, to reurge the district court to reconsider its decision to defer. Id. at 665. More generally, the Court went on to hold that if a matter is within the district court's discretion, the litigant's right to a particular result cannot be "clear and indisputable." Id. at 666.

This holding in Will was most recently applied by this Court in Kmart Corp. v. Aronds, 123 F.3d 297 (5th Cir. 1997). In Kmart, the District Court had granted a motion to stay discovery in a civil suit for fraud pending the resolution of a related criminal proceeding against the same defendant. Id. at 298. We noted that, like the Will case, the district court was free to revisit its decision. Id. at 300. More importantly, we noted that the district court's decision to stay was within its discretion and thus, under Will, the plaintiffs' right to a particular result could never be "clear and indisputable." Id. As a result, the Kmart court concluded that the writ should be denied as the "very high mandamus threshold [was] not met." Id. at 301.

Like Wills and Kmart, this case concerns a matter that is determined by the exercise of the District Court's discretion -

namely, a decision to grant a stay; as in those cases, there is no clear abuse of that discretion. Also like Wills and Kmart, the District Judge here is free to revisit his decision if, for example, the pending STB proceedings are indefinitely delayed. Accordingly, it does not appear to us at this time that BNSF has met the high standard of showing that its entitlement to a particular result is "clear and indisputable."

Given the fact that it does not appear that BNSF can show that it is clearly and indisputably entitled to the result it seeks, the writ will be denied. A closer analysis of the statutory claims made by BNSF is therefore unnecessary.

MANDAMUS DENIED.

CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of September, 2003, caused a copy of the foregoing Reply to be served by hand delivery on designated outside counsel for BNSF, as follows:

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April A. Oliver
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