

208954
209043

WILLIAM L. SLOVER
C. MICHAEL LOFTUS
DONALD G. AVERY
JOHN H. LE SEUR
KELVIN J. DOWD
ROBERT D. ROSENBERG
CHRISTOPHER A. MILLS
FRANK J. PERGOLIZZI
ANDREW B. KOLESAR III
PETER A. PROHL
DANIEL M. JAFFE
KAREN HASSELL HERREN
KENDRA A. ERICSON

SLOVER & LOFTUS
ATTORNEYS AT LAW
1224 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036-3003

TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:

cam@sloverandloftus.com

September 22, 2003



VIA HAND DELIVERY

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

ENTERED
Office of Proceedings

SEP 22 2003

Part of
Public Record

41191 Sub 1

Re: Docket No. 41191, West Texas Utilities 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 First Motion to Compel Responses to Discovery Requests (related to the production of rail transportation contracts) in the above proceeding.

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

Thank you for your prompt attention to this matter.

Sincerely,

Christopher A. Mills
An Attorney for
AEP Texas North Company

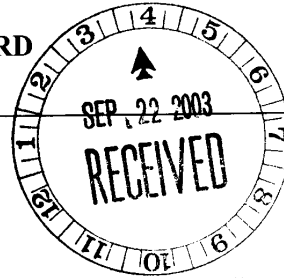
CAM:dmb
Enclosures
cc: Parties of Record

ENTERED
Office of Proceedings

OCT 02 2003

Part of
Public Record

**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)

**COMPLAINANT'S FIRST MOTION TO COMPEL
RESPONSES TO DISCOVERY REQUESTS**

Pursuant to 49 C.F.R. § 1114.31, Complainant AEP Texas North Company ("AEP Texas") hereby moves for an order compelling Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") to produce relevant rail transportation contracts as requested in AEP Texas' First Set of Interrogatories and Requests for Production of Documents served August 26, 2003.

On August 11, 2003, AEP Texas filed its Verified Complaint in this proceeding challenging the level of BNSF's common carrier rates for transporting coal in unit trains from mines in the Wyoming Powder River Basin to AEP Texas' Oklaunion Generating Station in Texas. The Complaint requests the Board to examine the reasonableness of the rates in issue using its Constrained Market Pricing (stand-alone cost) methodology.

On August 26, 2003, AEP Texas served its initial discovery requests on BNSF. Request for Production No. 38 therein provides as follows:

Please produce all transportation contracts, including amendments and supplements thereto (or letters of understanding with appendices or attachments), and all common carrier pricing authorities or other documents containing common carrier rate and service terms, that BNSF entered into, agreed to or provided which govern shipments handled by BNSF as originating, terminating, overhead or single-line carrier to, from or through the SARR States¹ in any of the years 2000 and beyond.”

On September 17, 2003, pursuant to the Board’s directive in its Decision served September 11, 2003, counsel for the parties met to discuss discovery matters. At that meeting counsel for BNSF advised counsel for AEP Texas that, due to confidentiality restrictions in its rail transportation contracts, it could not produce such contracts absent an order from the Board compelling their production. BNSF’s counsel subsequently confirmed this in a letter dated September 17, 2003, a copy of which is appended hereto as Attachment 1. In this letter BNSF states that “BNSF would not be opposed to a motion by AEP Texas in this proceeding for an order compelling production of relevant transportation contracts.”

The Board has consistently held that rail transportation contracts are relevant and necessary documents for purposes of developing a stand-alone railroad traffic group and its associated traffic volumes and revenues, and has ordered their

¹ The “SARR States,” which are the states in which the lines of the stand-alone railroad to be designed by AEP Texas are likely to be located, were defined to include Wyoming, Nebraska, Colorado, New Mexico and Texas. Subsequently, AEP Texas identified for BNSF the specific line segments in these and nearby states for which information is sought.

production subject to the provisions of governing protective orders. See e.g. Docket No. 42071, Otter Tail Power Co. v. Burlington Northern and Santa Fe Ry. Co. (STB served November 15, 2002 at 11); Docket No. 42058, Arizona Electric Power Cooperative, Inc. v. Burlington Northern and Santa Fe Ry. Co. and Union Pacific R. Co. (STB served September 11, 2002 at 5); Docket No. 42056, Texas Municipal Power Agency v. Burlington Northern and Santa Fe Ry. Co. (STB served February 9, 2001 at 2-3); Docket No. 42054, PPL Montana, LLC v. Burlington Northern and Santa Fe Ry. Co. (STB served November 9, 2000). As the Board noted in ordering transportation contract production in the Texas Municipal Power Agency case, in which several BNSF shippers had opposed the complainant's motion to compel production of their contracts, "we are satisfied that the parties' agreements regarding scope and the application of the 'highly confidential' provisions of the protective order are sufficient to protect the interests of third-party shippers." (Id.; Decision served February 9, 2001 at 2-3.)

Consistent with these decisions, AEP Texas requests that the Board enter the necessary order so that BNSF may produce the requested coal transportation contracts governing freight shipments to, from and within the SARR States, subject to their designation and treatment as "highly confidential" under the terms of the Board's Protective Order served in this proceeding on September 11, 2003.

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
Frank J. Pergolizzi
Slover & Loftus
1224 Seventeenth Street N.W.
Washington, D.C. 20036
(202) 347-7170



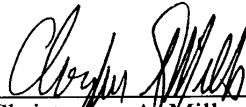
Dated: September 22, 2003

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2003, I served a copy of the foregoing First Motion to Compel by hand upon counsel for Defendant, as follows:

Samuel M. Sipe, Jr., Esq.
Anthony J. LaRocca, Esq.
Brooke L. Gaede, Esq.
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, D.C. 20003



Christopher A. Mills

STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Telephone 202.429.3000
Facsimile 202.429.3902
www.steptoelaw.com

Brooke L. Gaede
202.429.6467
bgaede@steptoelaw.com

September 17, 2003

Via Facsimile and U.S. Mail

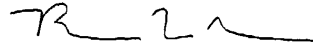
Kelvin J. Dowd, Esq.
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036-3003

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

Dear Kelvin:

At our meeting today on discovery matters, we discussed the production of confidential transportation contracts. As we discussed, BNSF acknowledges the complainant's need for those materials in a stand-alone cost proceeding. However, BNSF must object to the production of those contracts because they are generally covered by strict confidentiality provisions. An order by the Board directing BNSF to produce relevant contracts, subject to the provisions of the protective order, can facilitate and expedite production of those materials. This letter is to advise you that BNSF would not be opposed to a motion by AEP Texas in this proceeding for an order compelling the production of relevant transportation contracts.

Sincerely,



Brooke L. Gaede