

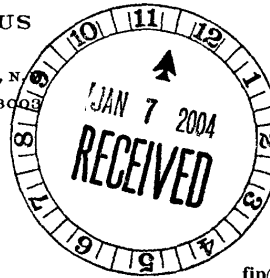
209799

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. PFOHL
DANIEL M. JAFFE
KAREN HASSELL HERREN
KENDRA A. ERICSON

SLOVER & LOFTUS

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

January 7, 2004



TELEPHONE:
(202) 347-7170

FAX:
(202) 347-3619

WRITER'S E-MAIL:
fjp@sloverandloftus.com

VIA HAND DELIVERY

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

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 above-referenced proceeding please find an original and ten copies of the Reply to Defendant's Motion to Dismiss Supplement to the Verified Complaint of AEP Texas North Company.

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.

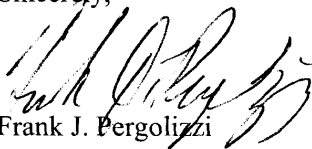
Thank you for your prompt attention to this matter.

Sincerely,

ENTERED
Office of Proceedings

JAN 07 2004

Part of
Public Record


Frank J. Pergolizzi
An Attorney for
AEP Texas North Company

FJP/jck
Enclosures
cc: Parties of 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)

**REPLY TO DEFENDANT'S MOTION TO DISMISS
SUPPLEMENT TO THE VERIFIED
COMPLAINT OF AEP TEXAS NORTH COMPANY**

INTRODUCTION

On December 22, 2003, Complainant AEP Texas North Company ("AEP Texas") submitted a Supplement to the Verified Complaint in the above-referenced matter. Through this Supplement, AEP Texas advised the Board that Defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF"), had increased the rates and amended the terms of service that are the subject of the above proceeding. AEP Texas objected to these amendments and affirmed that the rate increases and amended service terms were within the scope of its Complaint in this proceeding.

On December 31, 2003, BNSF submitted a document that was styled as a "Reply" to AEP Texas' Supplement. However, the substance of BNSF's filing was a motion to dismiss the AEP Texas Supplement, along with an unauthorized reply to AEP

Texas' Reply to BNSF's earlier-filed September 2, 2003 Motion to Dismiss. *See* BNSF Reply at 8. AEP submits the following in reply to BNSF's Motion to Dismiss the Supplement.

ARGUMENT

BNSF bases its request to dismiss the Supplement on the same arguments advanced in its September 2, 2003 Motion to Dismiss AEP Texas' Complaint in this Docket; *i.e.*, the claim that AEP Texas cannot challenge rates that it is not presently paying.¹ As AEP Texas explained in its September 22, 2003 Reply in Opposition to Motion to Dismiss, two federal courts² 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 Mine³) to AEP Texas' Oklaunion Station. These same courts also have rejected BNSF's claim that its "pay-first" rule is absolute, and have stayed collection of the challenged rates pending the Board's resolution of the reasonableness issue. These valid federal court decisions recognized that the parties had

¹ AEP Texas has made clear that any Board ruling that establishes the lawful rate will define AEP Texas' payment obligation for all shipments under the disputed rates. Once this obligation is defined, the parties will be able to assess whether (and to what extent) AEP Texas has under-paid or over-paid.

² *I.e.*, the United States District Court for the Northern District of Texas, and the United States Court of Appeals for the Fifth Circuit.

³ The Rawhide rate is subject to a prescription, which AEP Texas has requested the Board to vacate. That request, which was submitted at the Board's invitation on September 2, 2003, remains pending. In the event that this petition is granted, the Rawhide rate likewise will be brought within the scope of the Complaint in this Docket.

engaged in a course of conduct over a number of years in which they had voluntarily agreed to maintain the status quo pending the resolution of their rate dispute. Under these circumstances, it is was entirely appropriate for the courts to stay collection of the common carrier rate and for the Board to proceed with a determination of the issues that have been referred, and to maintain the status quo pending the resolution of these issues. *See* September 22, 2003 *Reply In Opposition to Motion Dismiss*, at 5, 6 and Exhibit A.

BNSF's request for dismissal of the Supplement improperly suggests that the Board may ignore the District Court's stay of BNSF's collection action – a stay that the Fifth Circuit upheld in denying BNSF's Petition for Writ of Mandamus – and require AEP Texas to pay the common carrier rate pending the resolution of the rate dispute.⁴ BNSF cites no authority that gives the Board the right to ignore these federal court rulings. Instead, it repeats the argument already rejected by the District Court and Fifth Circuit – that the Board *always* must require a shipper to pay a common carrier rate before challenging its lawfulness.

Finally, AEP Texas' action in submitting the Supplement is entirely consistent with recent rate case precedent, in which a carrier amended a challenged rate during the pendency of litigation and the Board ruled that such amendments were within

⁴ BNSF offers the creative interpretation that the federal court orders were intended only to apply to "past charges." BNSF Reply at 7, n.6. Nothing in these decisions suggests such a narrow interpretation was intended by either the District Court or the Fifth Circuit. If BNSF sincerely believed that this was the intent of these courts, it should have sought such a ruling from those courts, rather than try to get the Board to reach beyond the bounds of its jurisdiction and ignore the unequivocal stay of BNSF's right to collect the challenged common carrier rates pending the Board's resolution of the reasonableness issues.

the scope of the pending rate challenge. *See* STB Docket No. 42069, *Duke Energy Corporation v. Norfolk Southern Railway Company* (STB served July 26, 2002) (accepting a request to supplement a complaint to include amendments made to the challenged rate during the pendency of the rate litigation). BNSF offers no basis for a different result in this proceeding.

CONCLUSION

For all of the foregoing reasons, and the reasons stated in AEP Texas' September 22 Reply to Defendant's Motion to Dismiss Supplement to the Verified Complaint, BNSF's request for dismissal of AEP Texas' Supplement should be denied.

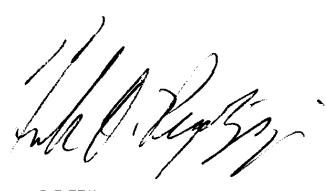
Respectfully submitted,
AEP TEXAS NORTH COMPANY
1 Riverside Plaza
Columbus, OH 43215

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



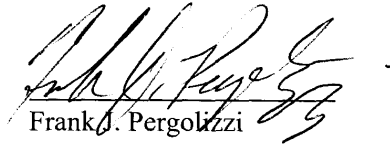
Dated: January 7, 2004

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2004, I served a copy of the foregoing Supplement-Amendment to the Verified Complaint of AEP Texas North Company 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


Frank J. Pergolizzi