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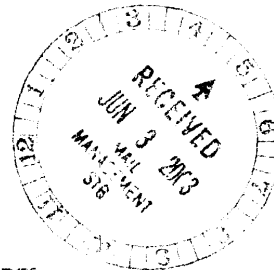
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June 3, 2003

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Via HAND DELIVERY

Honorable Vernon A. Williams
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

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JUN 3 2003

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Re: **Docket No. 41191 (Reopened), West Texas Utilities Company v.
The Burlington Northern and Santa Fe Railway Company**

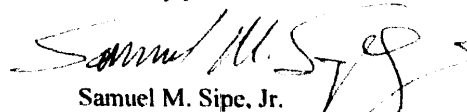
Dear Secretary Williams:

Enclosed for filing in the referenced proceeding, please find an original and 10 copies of BNSF's Reply to Petition to Establish Procedural Schedule.

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 yours,


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

cc: Kelvin J. Dowd (By Hand Delivery)

WASHINGTON

PHOENIX

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

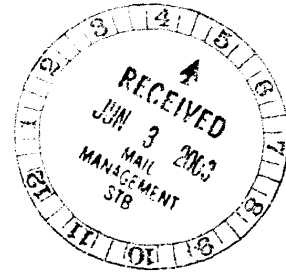
WEST TEXAS UTILITIES COMPANY,

Complainant,

v.

THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY,

Defendant.



Docket No. 41191

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BNSF'S REPLY TO PETITION TO ESTABLISH PROCEDURAL SCHEDULE

The Burlington Northern and Santa Fe Railway Company ("BNSF") submits this reply to the Petition To Establish Procedural Schedule filed on May 14, 2003, by AEP Texas North Company ("AEP Texas"), successor in interest to complainant West Texas Utilities Company ("WTU").¹

The Board established a rate prescription in 1996 for movements from the Rawhide mine in the Powder River Basin ("PRB") of Wyoming to AEP Texas' generating station in Oklahoma, Texas. Consistent with precedent establishing a strict standard for reopening proceedings, the Board stated in 2000 that it would reopen this proceeding to allow AEP Texas to submit limited supplemental evidence about extending that rate prescription to movements from non-Rawhide origins. However, AEP Texas instead proposes a fundamentally different evidentiary

¹ For simplicity, BNSF will use the term "AEP Texas" to refer both to the current company and to its predecessor in interest.

presentation that would make significant changes in the stand-alone cost ("SAC") analysis unrelated to modifying the analysis to cover non-Rawhide movements. Reopening should not serve as a vehicle for fundamentally revamping a SAC analysis. If AEP Texas wants to reopen this case, the reopened proceeding should be limited to extending the Rawhide rate prescription to non-Rawhide movements -- the very relief that AEP Texas sought from the Board in 2000 when BNSF established the non-Rawhide rates at issue here. Indeed, it would be a straightforward matter, and the most efficient means of bringing repose to this long-standing dispute, for the Board simply to extend the recently modified Rawhide rate prescription to non-Rawhide movements. BNSF is willing to enter into a mutual stipulation with AEP Texas to such an extension.

The Board should deny AEP Texas North's petition and make clear that it will not countenance AEP's attempt to bring a fundamentally new SAC case in the guise of a reopened proceeding.

I. BACKGROUND STATEMENT

A. The Board's 1996 Rate Prescription

In 1996, the Board prescribed a maximum reasonable rate for movements from the Rawhide mine in the PRB to AEP Texas' generating station in Oklahoma, Texas.² The Board reached its maximum reasonable rate determination by applying the SAC test based on a hypothetical stand-alone railroad proposed by AEP Texas. Based on its SAC analysis, the Board

² *West Texas Utilities Company v. Burlington Northern Railroad Company*, 1 STB 638 (Decided Apr. 25, 1996) ("1996 Decision").

set the prescribed maximum at 180% of variable costs. *1996 Decision* at 679. Last week, on May 28, 2003, the Board corrected this prescription to allow BNSF to charge the higher of the SAC rate or a rate set at the statutory jurisdictional threshold.³

In its 1996 decision, the Board made clear that its prescription applied only to movements from the Rawhide origin: "We limit our analysis and relief in this decision to the reasonableness of the rate from the Rawhide origin." *1996 Decision* at 644. The Board recognized that the parties could voluntarily agree on rates from other origins, and it stated that if the parties could not reach agreement, it would make a rate reasonableness determination after getting "supplemental evidence tailored to those sites." *Id.*

B. The Board's 2000 Order and 2001 Reconsideration Order

In 1997, the Rawhide mine closed -- temporarily, as it turned out -- and AEP Texas began to take its coal from other PRB mines. In mid-2000, BNSF notified the Board that it intended to increase from \$13.68 to \$15.78 per ton its common carrier rate on movements from non-Rawhide origins. 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, AEP Texas 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

³ *West Texas Utilities Company v. The Burlington Northern and Santa Fe Railway Company*, Docket No. 41191 (decided May 28, 2003) ("2003 Order")

any supplemental evidence, to apply to non-Rawhide movements. AEP Texas did not seek leave to reopen Docket 41191 to submit additional evidence.

On November 3, 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.⁴ The Board rejected AEP Texas' argument that the Board should extend the prescription to other PRB origins on the present record, stating that it "would not make such a prescription without receiving 'supplemental evidence tailored to those sites.'" *2000 Order* at 5 (quoting *2000 Decision*, 1 S.T.B. at 644). The Board stated that "[w]e will, however, reopen this proceeding to address WTU's opposition to the \$15.78 rate." *Id.*

AEP Texas sought reconsideration of this order, and the Board denied the reconsideration petition.⁵ The Board reminded AEP Texas that it had stated in its *2000 Decision* "that the reasonableness of rates from other mine origins could be resolved in a decision based on supplemental evidence *about the specific origins*." *2001 Reconsideration Order* at 3 (emphasis added). The Board continued, "before the rate prescription could be extended to non-Rawhide mines, evidence is needed on whether additional resources (investment or expenses) would be necessary for the stand-alone railroad to serve these additional mines, whether there are other significant changed circumstances that would affect the rate analysis, and whether the rate

⁴ *West Texas Utilities Company v. Burlington Northern Railroad Company*, Docket No. 41191 (decided Nov. 3, 2000) ("*2000 Order*").

⁵ *West Texas Utilities Company v. Burlington Northern Railroad Company*, Docket No. 41191 (decided March 21, 2001) ("*2001 Reconsideration Order*").

resulting from the stand-alone cost test would exceed the regulatory floor for rate relief (180 percent of variable costs)." *Id.*

C. BNSF's Collection Case Concerning Non-Rawhide Movements

To understand the context of the current dispute, the Board should be aware that AEP Texas has refused to pay the higher rates for movements from non-Rawhide origins that the Board authorized in its *2000 Order* decision. Pursuant to the *2000 Order*, BNSF lawfully charged a rate of \$15.78 for non-Rawhide movements from July 2000 until August 21, 2002. Effective August 21, 2002, BNSF increased its common carrier rate for movements to Oklahoma from non-Rawhide origins to \$17.25 per ton, giving the required 20 days notice of the increase. However, AEP Texas has paid only \$13.68 per ton throughout this period. Accordingly, on March 26, 2003, BNSF filed a complaint in the U.S. District Court for the Northern District of Texas seeking to recover the difference between its common carrier rate for non-Rawhide movements and the lower payments that AEP Texas actually has made.⁶ AEP Texas has filed an answer and counterclaim, contending among other things that the Board has primary jurisdiction over the reasonableness and lawfulness of BNSF's rate for non-Rawhide movements and that the court should refer all issues concerning the reasonableness and lawfulness of those rates to the Board.

In its federal court collection action, BNSF does not seek to establish that the non-Rawhide rates are reasonable within the meaning of ICCTA. BNSF merely seeks a

⁶ *BNSF v. American Elec. Power Co., et al.*, Complaint, Civil Action No. 4-03CV-213-Y (filed March 26, 2003).

determination that those rates were lawfully established and that BNSF is entitled to collect them, notwithstanding what the Board might subsequently determine regarding their reasonableness.

II. DISCUSSION

A. Most of the new evidence that AEP Texas seeks to present does not fall within the narrow limits that the Board articulated in its prior orders in this Docket or that are generally applicable to reopened proceedings

The Board stated that it would reopen the proceeding to consider “supplemental evidence tailored to those [non-Rawhide] sites” 2000 Order at 5 (quoting 1996 Decision, 1 S.T.B. at 644)). However, AEP Texas proposes to present “supplemental” evidence concerning a host of issues that have nothing to do with tailoring the prior SAC analysis to movements from non-Rawhide origins. AEP Texas provides a laundry list of open-ended categories of supplemental evidence: “changes in capital costs and rates of inflation; changes in the traffic and operating characteristics of BNSF service from non-Rawhide origins to Oklahoma; changes in coal volumes and revenues for BNSF traffic that moves over the route of the stand-alone railroad; and modifications in the methodology applied by the Board to determine variable and stand-alone costs under the *Coal Rate Guidelines*.” Petition at 10. While stating that it “does not anticipate expanding the configuration or geographic scope of the stand-alone system described in the 1996 Decision,” AEP Texas admits that it “intend[ed] to submit evidence of changes in stand-alone traffic volumes and revenues attributable both to coal movements included in the original traffic group, and coal movements that presently use the route of the original stand-alone system but were not available to BNSF when the original record was being developed.” Petition at 10-11.

In other words, AEP Texas proposes to change the stand-alone traffic group and quite possibly to include cross-over traffic, which was not included in the original SARR. Although AEP Texas is silent on the subject, changes in the traffic group would logically entail changes in operating and capital costs as well.⁷

AEP Texas seeks to make changes in the Board's SAC analysis that go well beyond those necessary to extend the Rawhide rate prescription to non-Rawhide movements. The Board should not permit AEP Texas to bring what amounts to a new rate case in the guise of reopening Docket 41191 to present limited supplemental evidence. As the Board reaffirmed in this Docket only last week, when the Board reopens a proceeding, it must "achieve an appropriate balance between the interests of fairness to all parties and of administrative finality and repose." *2003 Order* at 2-3. Allowing AEP Texas to submit supplemental evidence that goes well beyond modifying the SAC analysis to include non-Rawhide origins would frustrate the interest in administrative finality and repose and be fundamentally unfair to BNSF.⁸

The Board approaches petitions to reopen "cautiously." *2003 Order* at 2-3. Under the Board's precedents, the scope of a proceeding upon reopening is no broader than necessary to address the statutory basis for reopening. Under 49 U.S.C. § 722 (2003), the Board may reopen

⁷ AEP Texas does not specifically state whether it proposes a new DCF period for its new SAC analysis. However, AEP Texas' proposed procedural schedule, Exhibit A to its petition, contains the statement "Base Period for Cost Determinations [--] 3Q2000."

⁸ Extension of the Rawhide rate prescription to movements from non-Rawhide origins would presumably result in maximum reasonable rates for the non-Rawhide movements essentially the same as the maximum reasonable rate on Rawhide movements. At all times, BNSF has charged rates on the non-Rawhide movements that have been no higher than the SAC maximum for Rawhide movements, as established in the Board's *2003 Order*. A broad reopening that resulted in a maximum reasonable rate materially lower than that prescribed for Rawhide would be unfair to BNSF.

a proceeding in three circumstances: "material error, new evidence or substantially changed circumstances." Reopening is not the proper vehicle for the open-ended evidentiary presentation that AEP Texas has in mind.

AEP Texas does not contend that its challenge to the reasonableness of rates for non-Rawhide movements involves any "material error" in the *1996 Decision*, which after all did not even address the reasonableness of non-Rawhide rates. See *2003 Order* at 3 (applying the material error test). Nor does AEP Texas appear to contend that the evidence it seeks to submit constitutes "new evidence" within the meaning of the statute. This requirement is met only when a party seeks to introduce evidence that goes to a central issue in the case and that was not available during the prior proceedings. See *Arkansas Power & Light v. The Burlington Northern and Santa Fe Railway Co. and Missouri Pacific R.R. Co.*, Docket No. 39802, 1984 ICC LEXIS 28 at *2 (served Dec. 21, 1984); *Platnick Brothers v. Norfolk and Western Railway Co.*, 367 I.C.C. 782, 1983 ICC LEXIS 13 at *6 (Nov. 3, 1983). The reasonableness of non-Rawhide rates was not an issue in prior proceedings.

The third ground for reopening – substantially changed circumstances – applies only when the changed circumstance involves "the basic assumptions" upon which the prior STC analysis was based. *Arizona Public Service v. The Burlington Northern and Santa Fe*, Docket No. 41185 and STB Docket No. 42077, slip op. at 5 (served May 12, 2003) ("APS"). In *APS*, the Board allowed reopening because (1) the original decision was based on a prediction that once coal ran out from one mine, the shippers would have access to coal from reserves on adjacent lands, (2) that prediction "proved inaccurate," and (3) "the changed circumstance relates to a specifically identified and contested assumption." Slip op. at 4. The Board limited the scope of reopening to a more developed record on how the utilities would re-source their coal needs, what

portion of that traffic could flow over the SARR and "what revenues the SARR could reasonably expect to earn from that coal traffic." *Id.* at 5. Here, the only "basic assumption" that AEP Texas seeks to challenge is the limitation of the prior rate reasonableness determination to movements from the Rawhide mine to Oklahoma. A reopening to address this changed assumption should be limited to account for movements from other mine origins to Oklahoma. The changed circumstances about which AEP Texas seeks to submit new evidence go far beyond this assumption.

While the Board's 2001 *Reconsideration Order* refers to supplemental evidence on "whether there are other significant changed circumstances *that would affect the rate analysis*," 2001 *Reconsideration Order* at 3 (emphasis added), it is clear from the context that the Board used the term "significant changed circumstances" in the narrow sense of adjusting the prior rate reasonableness analysis for the Rawhide movement to encompass movements from non-Rawhide origins. See 2000 *Order* at 5 (referring to "supplemental evidence tailored to those [non-Rawhide] sites). The expansive interpretation of this phrase that AEP Texas relies upon is inconsistent with the purpose of the Board's reopening in this case and its reopening precedent generally.

AEP Texas asserts that BNSF's real reason for not acceding to its proposed broad reopening is that BNSF seeks to "deprive AEP Texas of the ability to fully recover for overcharges since the inception of the challenged rates in July, 2000," noting that a complainant's right to claim retroactive reparations is limited by statute to two years. Petition at 8-9. The Board should enforce the restrictions on the scope of reopening regardless of their effect on the limitations period. However, the Board need not and should not decide any limitations issue in the context of this petition to establish a procedural schedule. If AEP Texas

pursues the limited reopening that it is entitled to under the *2000 Order* for purposes of extending the Rawhide rate prescription to non-Rawhide movements, it is unlikely to be entitled to any material recovery for "overcharges" for any time period, since the rates that BNSF has charged on the non-Rawhide movements are no higher than the SAC maximum on Rawhide movements permitted under the Board's *2003 Order*.⁹

Although there is no limitations issue to be resolved at this time, neither is there any valid reason why BNSF should not ultimately be entitled to the protections afforded by the statute. AEP may well be displeased that it could not obtain from the Board an offset in the form of reparations reaching back to July 2000 if BNSF succeeds in its pending lawsuit to recover AEP Texas' underpayment of the common carrier rate for non-Rawhide movements.¹⁰ But that is a

⁹ The Board stated that it was "error not to prescribe a maximum reasonable rate at the higher of the SAC rate or the statutory jurisdictional threshold rate." *2003 Order* at 3. As noted in footnote 7, the rate that BNSF has charged for non-Rawhide movements has never exceeded the higher of the SAC rate or the statutory jurisdictional threshold rate prescribed for the Rawhide movement. Thus, extending the Rawhide rate prescription to non-Rawhide movements would not materially alter the maximum reasonable rate that BNSF may charge on non-Rawhide movements and would not entitle AEP Texas to any material recovery, regardless of the limitations period.

¹⁰ The two-year limitations period would apply if AEP Texas were now to amend or supplement its original complaint in Docket 41191 to reach non-Rawhide movements because the Board's regulations provide that the amendment or supplement would not relate back to the filing of the original complaint. 49 C.F.R. § 1111.2; *Seinans-Allis, Inc. v. Aberdeen and Rockfish R.R. Co.*, Docket No. 37810S, 1984 ICC LEXIS 505 at *15 (served May 8, 1984). AEP Texas suggests that it faces no limitations bar because "[t]he Original Verified Complaint filed in this docket on January 12, 1994 sought the prescription of maximum reasonable rates for the rail transportation of coal from all BNSF-served mines in the Powder River Basin to Oklahoma." Petition at 4. However, as the Board reminded AEP Texas, "The original complaint referred only to Rawhide, as does Tariff 4232. Rawhide is the main focus of the complaint." *2000 Order* at 4, quoting *1996 Decision*, 1 S.T.B. at 644. More fundamentally, the original complaint is irrelevant. The statute of limitations is tolled only during the pendency of a proceeding until the final decision is issued and any subsequent appellate proceedings are completed. *Aluminum Company of America v. The Atchison, Topeka and Santa Fe Railway Co., et al.*, Docket No. 40112, 1988 ICC LEXIS 71 (served Jan. 28, 1988). Since the Board issued a final decision

(Continued ...)

risk that AEP Texas knew or should have known that it would incur by pursuing the strategies it pursued, while deliberately withholding payments for lawful transportation charges.

Finally, AEP Texas is wrong when it contends that "BNSF's present position is contradicted by the carrier's prior, consistent actions in defense and support of the *November [2000] Decision*, and by its written representations" in prior proceedings. Petition at 8. BNSF has not objected, and does not object, to reopening this docket to allow AEP Texas to submit "supplemental evidence tailored to those sites" other than Rawhide that were not addressed in the *1996 Decision* and its underlying SAC analysis. *1996 Decision*, 1 S.T.B. at 644. BNSF objects only to AEP Texas' attempt to use the opportunity that the Board afforded to submit limited supplemental evidence in a reopened proceeding to file a substantially new SAC analysis with changes unrelated to the extension of the Rawhide rate prescription to non-Rawhide movements. If any party has changed its position, it is AEP Texas, not BNSF, because AEP Texas has apparently repudiated its prior position that modifying the 1996 prescription for Rawhide movements to apply to non-Rawhide movements would be a simple matter requiring no evidence or at most minor modifications to the prior rate reasonableness analysis.¹¹

concerning AEP Texas' complaint in 1996 and subsequent appellate proceedings were completed in 1997, any tolling of the statute of limitations based on the original complaint ended in 1997.

¹¹ Because BNSF has never questioned the validity of the *2000 Decision*, it has never had any reason to appeal it. If the Board had stated that it would reopen the docket to permit AEP Texas to file a substantially new SAC case in the guise of extending the 1996 prescription to non-Rawhide movements, BNSF likely would have appealed because such a decision would have been totally inconsistent with the Board's precedent limiting the scope of reopened proceedings. However, the Board's decision made clear that any reopening would be limited

B. AEP Texas' proposed procedural schedule should be rejected

AEP Texas submitted a proposed procedural schedule as Exhibit A to its Petition. The proposed schedule is premised on an invalid assumption – that the Board should reexamine in the context of a reopened proceeding aspects of its SAC analysis unrelated to modifying the analysis to include movements from non-Rawhide origins. Because the premise is wrong, the Board should not adopt the schedule.

In any event, AEP Texas' proposed procedural schedule is unreasonable. The schedule, which calls for discovery and various discovery and technical conferences with the Board's staff as well as the submission of evidence, apparently contemplates a full-scale new SAC case. But the intervals that AEP Texas proposes between opening and reply evidence and between reply and rebuttal evidence are significantly shorter than those that the parties have routinely agreed are appropriate in SAC cases currently pending before the Board. It would be particularly inappropriate for the Board to impose such an expedited schedule given the burdens imposed on all concerned by the large number of pending SAC cases currently pending before the Board.

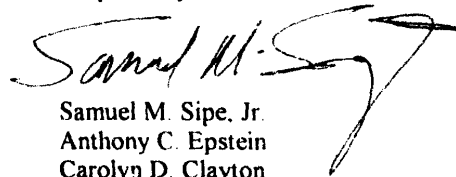
Any schedule that is eventually adopted should reflect the permissible scope of a proceeding on reopening. The Board should make clear that AEP Texas must limit its supplemental evidence to changes in the Board's rate reasonableness analysis necessary to extend the rate prescription on Rawhide movements to movements from non-Rawhide origins. BNSF was and is prepared to discuss a procedural schedule in this Docket for the submission of limited supplemental evidence of the kind contemplated in the Board's prior orders. Resolution of the narrow issues in a reopened proceeding could be accomplished promptly. Indeed, BNSF is willing to enter into a stipulation with AEP Texas that the existing Rawhide rate prescription,

as modified by the Board's 2003 order, applies to non-Rawhide origins, thereby obviating the need for further evidentiary proceedings.

III. CONCLUSION

The Board should deny AEP Texas' petition to establish a procedural schedule and make clear that the scope of this proceeding on reopening is limited to tailoring the existing rate prescription on the Rawhide movement to movements from non-Rawhide origins. BNSF believes that extension of the existing Rawhide rate prescription to non-Rawhide movements is the most efficient means of giving effect to this limited reopening and is willing to enter into a mutual stipulation with AEP Texas to such an extension.

Respectfully submitted,



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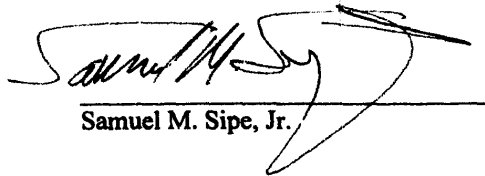
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June 3, 2003

CERTIFICATE OF SERVICE

I hereby certify that this 3rd day of June 2003, a copy of the foregoing was served by
hand delivery on:

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



Samuel M. Sipe, Jr.