

BEFORE THE
SURFACE TRANSPORTATION BOARD



AEP TEXAS NORTH COMPANY,

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

2/2069

Docket No. 41191 (Sub-No. 1)

ENTERED
Office of Proceedings

SEP 23 2004

Part of
Public Record

DEFENDANT'S REPLY TO MOTION FOR EXTENSION OF TIME

Defendant The Burlington Northern and Santa Fe Railway Company opposes AEP Texas North Company's ("AEP Texas") September 21, 2004, Motion For Extension of Time ("Motion"). AEP Texas seeks additional time, not to respond to BNSF's September 9, 2004 Motion to Strike, but to enable it to submit new evidence. It has no right to submit new evidence at this stage of the proceeding so there is no reason to grant AEP Texas an extension of time. The Board must bring SAC litigation to a close. Complainants cannot be permitted to abuse the Board's procedural rules by making repeated attempts to create and present evidence in support of their claims. It is time for the Board to state that enough is enough. The Board should deny AEP Texas' extension request.

AEP Texas admits that it seeks an extension of time in order to prepare "a corrected RTC simulation that includes all appropriate, peak-period trains." Motion at 5. But this is not a proper response to BNSF's Motion to Strike. In fact, AEP Texas' admission that its Rebuttal RTC model was flawed should conclude any inquiry by the Board into AEP Texas' RTC analysis. AEP Texas has failed to submit viable evidence relating to the RTC analysis and the

record should now be closed on this point. AEP Texas has no right to submit yet another RTC analysis.

AEP Texas cannot shift blame for its own mistakes to BNSF. AEP Texas asserts that it failed to run the right number of trains through its Rebuttal simulation because of supposed flaws in the list of trains that BNSF ran through its own Reply simulation.¹ This claim is a fabrication. AEP Texas obviously knew what trains it wanted to run through its Rebuttal RTC model – it even provided the list of those trains in AEP Texas Rebuttal Exhibit III-B-5. The title of that exhibit is “Trains Used in AEP Texas’ Rebuttal RTC Model Run.” AEP Texas failed to implement its own train assumptions. The responsibility for that error rests squarely on AEP Texas’ shoulders.

AEP Texas asks for additional time so that it can carry out a “side-by-side comparison of the parties’ Reply and Rebuttal RTC train files to determine the actual number of loaded coal trains that should be added to the model set to match the total included in AEP Texas’ Rebuttal Exhibit III-B-5.” Motion at 4. But this exercise could and should have been performed at the rebuttal stage. There is certainly no reason to grant AEP Texas more time now to perform an exercise that should have been performed months ago.

The Board has attempted in recent SAC cases to limit complainants’ misuse of rebuttal evidence in order to bring finality to SAC litigation. It would undermine those efforts to allow AEP Texas to submit new RTC evidence now. BNSF’s Motion to Strike demonstrated that AEP Texas had violated restrictions on rebuttal evidence by filing a new, and flawed, RTC analysis on

¹ Had there been such flaws, the appropriate time to raise them was on rebuttal. AEP Texas had a full opportunity to review BNSF’s Reply Evidence and address any errors it found at the appropriate time. It failed to do so.

rebuttal. AEP Texas' Motion makes clear that BNSF was correct. AEP Texas cannot be allowed to submit yet another RTC analysis.

The Board should deny AEP Texas' motion for an extension of time.

Respectfully submitted,

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September 23, 2004

CERTIFICATE OF SERVICE

I hereby certify that this 23rd day of September, 2004, I served a copy of the foregoing

Reply to Motion for Extension of Time on the following by hand delivery:

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