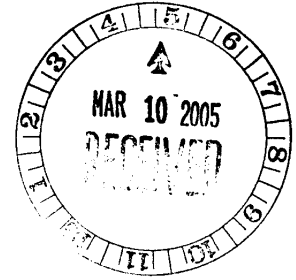


2/35/7

BEFORE THE
SURFACE TRANSPORTATION BOARD



AEP TEXAS NORTH COMPANY,

Complainant,

v.

BNSF RAILWAY COMPANY,

Defendant.

Docket No. 41191 (Sub-No. 1)

ENTERED
Office of Proceedings

MAR 10 2005

Part of
Public Record

**DEFENDANT'S OPPOSITION TO COMPLAINANT'S
UNAUTHORIZED REPLY TO A REPLY**

On February 28, 2005, complainant AEP Texas North Company ("AEP Texas") filed a reply to defendant BNSF Railway Company's ("BNSF") February 14, 2005 Response to Complainant's Post-Rebuttal RTC Analysis. That reply was unauthorized and it should be struck from the record.

BNSF's February 14, 2005 Response was filed pursuant to a January 14, 2005 order by the Board instructing BNSF to reply to AEP Texas' post-rebuttal RTC analysis. The Board's order did not provide for a responsive pleading by AEP Texas. Moreover, the Board's rules specifically state that "[a] reply to a reply is not permitted." 49 C.F.R. §1104.13(c). AEP Texas has already filed unauthorized post-rebuttal pleadings in an attempt to rescue its flawed SAC evidence. The Board should not permit it to make yet another unauthorized filing in this case.

AEP Texas purports to seek a waiver of the Board's rule against the filing of a reply to a reply on grounds that it needs to "correct misleading statements in BNSF's Response concerning the state of the evidentiary record on the matter of random operations failures on the BNSF system." Letter from Christopher Mills to Hon. Vernon Williams, February 28, 2005. But AEP

Texas' February 28, 2005 reply is little more than an attempt to defend once again AEP Texas' decision to disregard BNSF's evidence on random failures. AEP Texas has already addressed this question twice -- once in its rebuttal evidence and once again in response to BNSF's September 9, 2004 Motion to Strike.

This time, however, AEP Texas presents a different defense. AEP Texas now seeks to justify its rejection of BNSF's evidence on grounds that it was unaware that the random failures BNSF used in its evidence were of the type that produced signal indications that required trains to stop.¹ The record squarely contradicts AEP Texas' feigned surprise. AEP Texas was well aware that BNSF's random failures involved events associated with restricted signal indications. As AEP Texas itself stated on rebuttal:

BNSF suggests that when a random failure occurs 'an undesired restricted signal indication is displayed in the field and/or on the dispatcher's board, [and] for safety reasons a train must stop and wait at that location for authority from the train dispatcher before proceeding at restricted speeds.' [Citation omitted] The implication of this statement is that the failures were of a nature that actually caused the trains to stop and wait for clearance.

AEP Texas Reb. Nar. at III-D-171-72. It is utterly irresponsible for AEP Texas to claim now that it did not know that BNSF's random failures referred to events causing restricted signal indications. AEP Texas may now regret its decision to reject BNSF's random failure data, but that decision was a deliberate one made by Mr. Reistrup with a full understanding of BNSF's position.

¹ This is not the first time that AEP Texas has sought to shift the blame for its evidentiary failures to BNSF. In its November 8, 2004 petition to supplement the record with a new post-rebuttal RTC analysis, AEP Texas also tried to blame BNSF for the failure of AEP Texas' witnesses to include a large volume of trains in the rebuttal RTC analysis. BNSF responded to those claims in its November 24, 2004 Opposition to Complainant's Petition to Supplement the Record.

Indeed, it would have been obvious to anyone with even a minimal understanding of train operations that the random failures identified by BNSF were of a type that produced signal indications requiring trains to stop or proceed at restricted speeds. BNSF's electronic workpaper "June to July Engineering Data.xls." contains a column titled "Trouble Code." The failures identified by BNSF as involving restricted signals are highlighted in yellow. It is obvious that events referred to in the Trouble Code as "Signal Red," "Signal Dark," "Signal Restricted," "Signal Dropped," or "Signal Will Not Clear" *always* produce a restricted signal indication on the line.² Similarly, on a rail line governed by a system of signals, it is obvious that a track failure (e.g., "Track Indication") *always* produces a restricted signal indication. One of the functions of a failsafe signal system is to provide an automatic signal to oncoming trains when there is a problem with track integrity. Seventy random failures identified by BNSF in the spreadsheet are described as "Signal Red," "Signal Dark," "Signal Restricted," "Signal Dropped," "Signal Will Not Clear" or "Track Indication." AEP Texas cannot seriously expect the Board to believe that its witnesses were unaware that BNSF's evidence on random failures related to events that caused a restricted signal indication.

More important, AEP Texas' claim that "where these workpapers actually indicated that a red signal was involved, Mr. Reistrup included the event in his random outages" is demonstrably false. *See* AEP Texas' February 28, 2005 Reply at 4, note 2. There are 10 explicit references to red signals in the "June to July Engineering Data.xls" and Mr. Reistrup chose only *one* of those 10 events. *Compare* "June to July Engineering Data.xls", tab "Pikes Peak 6-26-02 to 7-11-02" line 19 with AEP Texas Rebuttal Exhibit III-C-4 (Pikes Peak, milepost 27.4-29.7). None of the other explicit "Signal Red" indications in that same spreadsheet tab or in the other

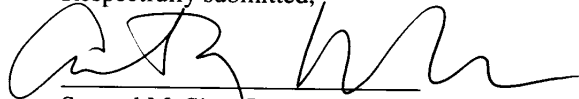
² For obvious reasons, a "dark signal," like a blank traffic light, requires a train to stop.

spreadsheet tabs in that electronic workpaper show up on Mr. Reistrup's list of random outages. In addition, there are 22 references to "Signal Restricted," "Signal Dark," and "Signal Will Not Clear" in the spreadsheet, and Mr. Reistrup chose only *one* of those events. Compare "June to July Engineering Data.xls", tab "Orin 6-26-02 to 7-11-02" line 46 with AEP Texas Rebuttal Exhibit III-C-4 (Orin, milepost 28.3-30.0).

In short, AEP Texas has no grounds for seeking a waiver from the Board's rule against the filing of a reply to a reply. AEP Texas' reply is an attempt to introduce further inaccuracies into the complex record that has already been developed in this case, and the Board should refuse to consider it.

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Respectfully submitted,



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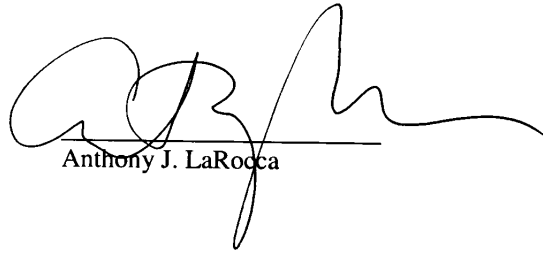
Attorneys for BNSF Railway Company

March 10, 2005

CERTIFICATE OF SERVICE

I hereby certify that this 10th day of March, I served a copy of the foregoing Defendant's Opposition To Complainant's Unauthorized Reply To A Reply on the following by hand delivery:

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