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May 6, 2005

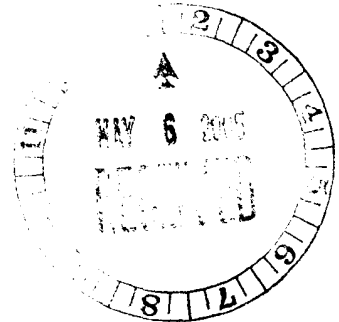
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VIA HAND DELIVERY

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

RECEIVED

TRANSPORTATION BOARD



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 docket, please find an original and 10 copies of AEP Texas North Company's Petition on Remand, together with a computer disk containing the filing and our check in the amount of \$200.00 to cover the requisite filing fee.

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

Thank you for your attention to this matter.

ENTERED
Office of Proceedings

Part of
Public Record

Sincerely,

Kelvin J. Dowd
An Attorney for
AEP Texas North Company

KJD:jml
Enclosures

FILED

MAY - 6 2005

TRANSPORTATION BOARD

213937



BEFORE THE
SURFACE TRANSPORTATION BOARD

WEST TEXAS UTILITIES COMPANY,

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 41191
(On Remand)

AEP TEXAS NORTH COMPANY'S
PETITION ON REMAND

FEE RECEIVED

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SURFACE
TRANSPORTATION BOARD

ENTERED
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Public Record

FILED

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SURFACE
TRANSPORTATION BOARD

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Dated: May 6, 2005

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	)	
WEST TEXAS UTILITIES COMPANY,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. 41191
	)	(On Remand)
THE BURLINGTON NORTHERN AND	)	
SANTA FE RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

Pursuant to 49 C.F.R. Part 1117.1, AEP Texas North Company (“AEP Texas”), successor in interest to Complainant, hereby petitions the Board for a decision in this remanded proceeding¹ which re-affirms the Board’s prior vacation of the rail rate prescription first imposed in 1996.² The vacation was effective as of April 18, 2004. *Docket No. 41191*, Decision served March 19, 2004 at 4 (“*2004 Decision*”).

² *West Texas Utilities Company v. Burlington Northern Railroad Company*, 1 S.T.B. 638 (1996) (“*West Texas I*”), modified by Decision served May 29, 2003 (“*West Texas II*”).

INTRODUCTION

On September 2, 2003, in response to a previous decision by the Board in this docket,³ AEP Texas filed a Petition To Vacate Rate Prescription (“*Petition*”) seeking an order that the Rawhide rate prescription which originally had been imposed in 1996 in *West Texas I*, and more recently had been increased by over 30% in *West Texas II*, was no longer valid or effective. *Petition* at 2. Two alternative grounds were asserted in support of this request.

First, AEP Texas argued that as the only party legally empowered to seek the prescription in the first instance, and the only intended beneficiary of its continuance, AEP Texas was entitled to surrender the protections of the prescription and have it vacated upon request, thereby restoring the ratemaking initiative to BNSF Railway Company (“BNSF”). *See Petition* at 9-12. In the alternative, AEP Texas presented evidence which showed that as a result of changed factual circumstances and changes in the Board’s administration of the *Coal Rate Guidelines*⁴ since 1996, the Rawhide prescription as modified was no longer valid as an upward limit on BNSF’s monopoly pricing of AEP Texas’ coal traffic. *See Petition* at 12-16 and the accompanying Verified Statement of Thomas D. Crowley.

Pleased with its success in *West Texas II* and apparently comfortable with the modified prescription, BNSF opposed AEP Texas’ *Petition*. In its Reply, which included a

³ *See* Decision served July 23, 2003.

⁴ *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520 (1985), *aff’d sub nom.*, *Consolidated Rail Corp. v. United States*, 812 F. 2d 1444 (3d Cir. 1987).

verified statement by its own economic witness, BNSF argued that (1) the Board could not vacate the prescription at AEP Texas' request without requiring an evidentiary showing that it was no longer valid;⁵ and (2) the evidentiary showing made by AEP Texas was insufficient to meet that standard. *See* BNSF Reply at 11-15. BNSF did not claim that the Board should not rule on the *Petition* without first receiving additional evidence from BNSF or conducting a more extensive hearing, and it did not attempt to present any further evidence of its own concerning other relevant, changed circumstances or request a further hearing.

In the *2004 Decision*, the Board granted AEP Texas' vacation request solely on the basis of the first ground asserted in the *Petition*. The Board apparently did not consider, and certainly did not rule upon AEP Texas' alternative argument that changed factual and regulatory circumstances showed that the prescription no longer was valid. *2004 Decision* at 3-4. BNSF filed a timely Petition for Review of the *2004 Decision* in the U.S. Court of Appeals for the District of Columbia Circuit.

In its April 8, 2005 decision on review, the Court first found that BNSF had standing to appeal the *2004 Decision*. *Slip Op.* at 7-9. Moving on to the merits, the Court ruled that allowing a shipper to obtain vacation of a rate prescription upon request while requiring a railroad to present evidence of its invalidity to secure the same relief amounted to "treating similarly situated parties differently." *Id.* at 9. After considering the rationale set forth in the *2004 Decision*, the Court found that the Board had not provided an adequate

⁵ BNSF Reply at 8-11.

explanation for this disparate treatment, and that “[a]bsent inclusion of a reasoned basis for determining that rate prescriptions should be more readily subject to vacation upon the petition of a shipper than a carrier,” the *2004 Decision* was arbitrary and capricious. *Id.* at 13. The Court then vacated the *2004 Decision*, and remanded the matter to the Board. *Id.*

On remand, the Board should re-affirm its prior ruling vacating the Rawhide prescription. As explained below, reasoned justification exists for treating shippers and carriers differently when it comes to prescriptions, which comply with the legal requirements cited by the Court. Additionally, and in the alternative, the Board can re-affirm its prior order based upon the second ground asserted by AEP Texas, which was not addressed in the *2004 Decision* and which meets the test that BNSF itself urged before the Court.

ARGUMENT

1. The Board Has the Authority to Re-Affirm Vacation of the Former Rawhide Rate Prescription

The decision of the Court of Appeals vacated the *2004 Decision* and “remand[ed] the case to the Board.” *Slip Op.* at 13. Significantly, the Court did not purport to direct any specific action by the Board on remand, including in particular the reinstatement of the former Rawhide prescription.⁶ Thus, BNSF’s rate on shipments from Rawhide

⁶ In its Brief to the Court, BNSF openly requested that the Court remand with instructions to “reinstate the *West Texas I* rate prescription.” Brief of Petitioner at 51. Given the specificity of the prayer and the fact that BNSF repeated it in its Reply Brief, the Court’s decision not to issue such an order must be considered deliberate.

continues to be unaffected by any valid prescription, and the question whether the prior vacation of the prescription should be re-affirmed on remand properly lies before the Board.

That the Court declined to direct any specific rate action by the Board on remand is consistent with the well-established principle that reviewing courts are without power to establish rates, or otherwise encroach on the Board's exclusive jurisdiction in this area. *See, e.g., Consolidated Rail Corp. v. National Assoc. of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981); *Atchison, T.&S.F.R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 818-819 (1973). *See also Union Pacific Railroad Co. v. Nevada Power Co.*, 950 F. 2d 1429, 1433-1435 (9th Cir. 1991). On the particular subject of rate prescriptions, the *San Antonio* proceedings provide controlling authority here.

In *San Antonio*, a decision of the Board's predecessor vacating a prior rate prescription and approving new, higher rates itself was vacated by the Court of Appeals. *San Antonio, Texas v. United States*, 631 F. 2d 831 (D.C. Cir. 1980). In a subsequent order clarifying its mandate, the Court held – over BNSF's objection – that the effect of its decision was to reinstate the prior rate prescription, on grounds that the prior prescription was the *status quo* prior to the agency action that the Court had vacated. *San Antonio, Texas v. United States*, 655 F. 2d 1341, 1343 (D.C. Cir. 1981). The Court of Appeals reasoned that this result was compelled by *Consolidated Rail* and *Wichita Board of Trade*, *supra*, holding that “we are without authority to determine interim transportation policy pending further ICC action after a decision of this court vacating an ICC order.” *Id.*

On petition for writ of *certiorari* filed by BNSF, a unanimous Supreme Court rejected the Court of Appeals' conclusion:

We agree that *Consolidated Rail and Wichita Board of Trade* control this case, but these holdings require federal courts to defer to the Commission on questions concerning the applicable rates; accordingly, we reverse.

Burlington Northern, Inc. v. United States, 459 U.S. 131, 138 (1982). The import of this precedent for the instant case is clear: the Court of Appeals' vacation of the *2004 Decision* did not reinstate the prior Rawhide rate prescription⁷. Equally clear is that for the reasons that follow, the Board's vacation of that prescription should be re-affirmed.

2. The Board Should Re-Affirm that the Rawhide Prescription Could Be Vacated Upon AEP Texas' Request

The Court's remand order was predicated on its determination that the *2004 Decision* lacked a "reasoned basis" for its holding that under the circumstances there presented, AEP Texas could obtain vacation of the modified *West Texas I* rate prescription without first making an evidentiary showing. *Slip Op.* at 13. In this case, one option now available to the Board is to re-affirm the *2004 Decision* in a new ruling which provides the additional reasoning required by the Court. *Association of American Railroads v. S.T.B.*, 306 F.3d 1108, 1110-1111 (D.C. Cir. 2002); *Board of Trade of the City of Chicago v. S.E.C.*, 187 F.3d 713, 725-726 (7th Cir. 1999). AEP Texas submits that indeed there are legitimate and rational bases for treating shippers and rail carriers differently in evaluating requests for the

⁷ Significantly, the Court's remand order in this case specifically cites the *San Antonio* proceedings summarized herein. *Slip Op.* at 13.

vacation of rate prescriptions, which support the *2004 Decision* and should be adopted by the Board on remand.

First, prescription vacation requests by shippers and railroads each carry very different degrees of risk from the standpoint of the National Rail Transportation Policy. As the Board argued on brief to the Court,⁸ protection of a captive shipper's right to secure a reasonable regulatory limit on its freight rate is an essential part of the Board's mandate and is compelled by Congressional policy. 49 U.S.C. § 10101(6). That policy is threatened whenever a railroad sets a captive coal rate higher than a maximum reasonable level. At the same time, because the methodology that is applied under the *Coal Rate Guidelines* sets maximum reasonable rates at levels which reflect the achievement of revenue adequacy,⁹ protection of the railroad's corresponding policy interest (e.g., 49 U.S.C. § 10101(3)) is always assured whenever the Board's regulatory authority is involved. The asymmetry of the risk of violating the NRTP is clear. Since a railroad exercising the rate-making initiative in the first instance may (and very often will) set captive coal rates above maximum reasonable levels, it is rational that the Board require that a carrier seeking vacation of a rate prescription first make an evidentiary showing that the prescription is invalid; i.e., that the

⁸ See Brief of Respondents at 22-23. The Court noted this argument, but did not address it as it was not included in the stated rationale for the *2004 Decision*. *Slip Op.* at 12.

⁹ This is so because the rates calculated under the stand-alone cost test include a rate of return for the hypothetical, stand-alone railroad equal to the current cost of rail industry capital. See, e.g., *Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42057, Decision served June 8, 2004 at 35.

proper regulatory rate ceiling should be raised. However, this need for threshold protection does not arise vis-a-vis a railroad's interest in the NRTP's revenue adequacy goal when it is the shipper that seeks vacation. Since the *Coal Rate Guidelines* methodology ensures that a vacation request proffered by a shipper cannot result in the railroad being compelled to accept a rate *lower* than the full SAC ceiling,¹⁰ no protective evidentiary prerequisite is needed.

A related rationale for imposing different requirements on shippers and carriers seeking the vacation of rate prescriptions lies in the consequences to the shipper should vacation be granted. Since a rail carrier need not secure vacation in order to establish a *lower* rate, it will only proceed – as BNSF did in 2003 – when its intent is to set a rate higher than the existing cap. If the carrier succeeds, the shipper effectively is compelled to shoulder an expensive and extensive litigation burden in order to reclaim the protection afforded by 49 U.S.C. § 10701(d)(1) and secure a reasonable rate. It is appropriate to require a railroad to present evidence that an existing prescription is no longer valid before permitting it to force its customer to re-litigate the case under pain of a guaranteed rate increase. Where the shipper seeks vacation, on the other hand, renewed litigation is by no means certain, as it only will be undertaken after the shipper evaluates the rate set by the carrier once the prescription is lifted and determines that it likely exceeds a maximum reasonable level under the *Coal*

¹⁰ When a prescription is vacated at the request of a shipper, only two subsequent scenarios are possible. Either the rate set by the railroad in its discretion will be acceptable to the shipper, as well as the railroad, or the Board will prescribe a new rate ceiling which implicitly assures that the railroad will earn a return at the revenue adequacy level.

Rate Guidelines.¹¹ In effect, the shipper is handing the railroad determinative control over the commercial relationship through the exercise of its rate-setting discretion. A captive shipper should not have to present evidence to justify its assumption of this risk.

AEP Texas also respectfully submits that complainant shippers and defendant railroads in fact are not “similarly situated” parties when the issue is vacation of a rate prescription. *Cf., Ace Motor Freight, Inc. v I.C.C.*, 557 F.2d 859, 862 (D.C. Cir. 1977). In its decision, the Court noted that both the shipper and the railroad are “bound by a prescribed rate” *Slip. Op.* at 11. However, that is the only capacity in which the two potentially could be considered “similarly situated,” and the most material difference between them negates any general similarity. The relevant cases show that the “similarity” determination focuses on the parties’ status as litigants before the agency. *See, e.g., Contractors Transport Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976). Before the Board, the defendant railroad stands as a party already found to have committed an unlawful act in establishing its rate, a status which by itself has been held to provide justification for disparate treatment. *Mesa Petroleum Co. v. Federal Power Commission*, 441 F. 2d 182, 185 (5th Cir. 1971).¹²

¹¹ *See Coal Rate Guidelines*, 1 I.C.C. 2d at 524..

¹² Although AEP Texas brought this precedent to the Court’s attention, it was not addressed in the decision. *See* Brief of Intervenor at 20.

Finally, a re-affirmation of the Board's prior ruling is not in conflict with the *de facto* policy against repetitive claims¹³ reflected in *Traugott Schmidt & Sons v. Michigan Central Railroad*,¹⁴ which was cited by the Court. *Slip Op. at 12*. In *Traugott Schmidt*, a party sought to re-assert a claim only 15 months after an identical claim had been rejected by the agency. *See* 23 I.C.C. at 685. Here, by contrast, more than 7 years had passed since *West Texas I*, and the intervening time was marked by a series of Board rulings that continued the evolution of the Board's administration of the *Coal Rate Guidelines* that had been underway on a case-by-case basis since 1986. *See, e.g., Bituminous Coal-Hiawatha, Utah to Moapa, Nevada*, 6 I.C.C. 2d. 1, 18-20 (1989), and Unprinted Decision served January 8, 1991 at 6. Assuming *arguendo* that *Traugott Schmidt* retains any precedential vitality in light of the multiplicity of major statutory changes since 1912, the circumstance it describes is not presented here and is unfathomable in the modern era, where the cost of even *filing* a rate complaint exceeds \$100,000.00 and the cost of the rate litigation itself can exceed \$4,000,000.00.

¹³ There can be no fixed *per se* rule precluding an unsuccessful rate litigant before the Board from re-asserting the same claims in a subsequent proceeding, as it is well-settled that such rate actions are not *res judicata*. *See Tagg Bros. & Moorhead v. U.S.*, 280 U.S. 420, 445 (1930); *Norfolk & Western Railway Co. v. U.S.*, 768 F. 2d 373, 378 (D.C. Cir. 1985). The policy referenced by the Court is one of practicality: if nothing has changed and the second claim follows the first by only a short time, there is no reason to expect any different outcome.

¹⁴ 23 I.C.C. 684 (1912).

**3. The Evidence Before the Board Demonstrated that
the Rawhide Prescription No Longer Was Valid**

Before the Board, AEP Texas asserted a second, separate ground for vacation of the Rawhide prescription which was not addressed in the *2004 Decision* and, thus, was not before the Court on review; to wit, that material intervening changes in factual circumstances and the Board's own regulatory standards combined to render the 1996 prescription invalid. *See Petition* at 12-15 and the accompanying Verified Statement of Thomas D. Crowley. Regardless of whether the Board decides to provide additional justification for treating shipper and carrier requests for prescription vacation differently, as AEP shows above that it should, the Board can and should re-affirm its 2004 vacation order on this alternate ground.

In its Opinion, the Court summarized the standard historically applied by the Board and its predecessor to requests for vacations of rate prescriptions, that until this case have been presented only by carriers, as requiring "that the party seeking to vacate a rate prescription demonstrate a change in legal or factual circumstances which would render the prior rate analysis invalid." *Slip Op.* at 10, *citing, inter alia, San Antonio v. Burlington Northern, Et Al.*, 364 I.C.C. 887 (1981). In its *Petition*, AEP Texas made the requisite showing under this same standard. *Petition* at 12.

The changed factual circumstances that AEP Texas demonstrated in support of vacation included significant changes in the volumes and traffic patterns of coal to be

handled by the SARR that were assumed by the Board in *West Texas I*,¹⁵ evidence that rates of inflation assumed by the Board substantially overstated actual, experienced inflation;¹⁶ and changes in the railroad industry cost of capital that differed materially from those assumed by the Board.¹⁷ AEP Texas also pointed to a material change in the Board's regulatory methodology; *i.e.*, the shift from a "ton-based" method of capital recovery allocation to a "time-based" method.¹⁸ When these changes were taken into account in a re-run of the Discounted Cash-Flow model that was executed in the *West Texas I*,¹⁹ it was demonstrated that the then-effective, modified Rawhide prescription was *at least* \$2.18 per ton (or 13%) too high.²⁰

BNSF availed itself of its right to reply to AEP Texas' evidentiary showing, and took issue with several elements of that evidence.²¹ Significantly, however, BNSF did

¹⁵ *Petition* at 13; V.S. Crowley at 5-14.

¹⁶ *Petition* at 15; V.S. Crowley at 15-17.

¹⁷ *Id.*

¹⁸ *FMC Wyoming Corp., Et Al. v. Union Pacific Railroad Company*, STB Docket No. 42022, Decision served May 10, 2000.

¹⁹ *Petition*, V.S. Crowley at 19-20.

²⁰ *Id.* at 21. As Mr. Crowley pointed out, many other relevant changes in the factual and regulatory circumstances that prevailed in 1996 also had occurred which, if fully accounted for, would show even greater disparities between the rate that BNSF was charging on Rawhide shipments and the maximum reasonable rate under the *Coal Rate Guidelines*. *Id.* at 19. The full record now before the Board in *Docket No. 41191 (Sub-No. 1)* makes this clear.

²¹ While AEP Texas believes that the lack of merit in BNSF's arguments is self-evident, two clear misstatements are worthy of note here. First, in arguing against recognition of the
(continued...)

not claim that there were any other changed circumstances that should be taken into account by the Board in deciding whether vacation was warranted, or otherwise argue that the Board should conduct a more extensive hearing or that BNSF should be permitted to present additional evidence of its own. Thus, it is indisputable that at the time of the *2004 Decision*, “the parties [] had and [] exercised an opportunity to be heard that is fully adequate to resolve the question”²² of vacation of the Rawhide prescription.

On remand, an administrative agency clearly is empowered to issue a decision which re-affirms the prior ruling’s result on valid, alternative grounds not previously relied upon by the agency or the reviewing court. *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 201(1947); *City of Charlottesville v. F.E.R.C.*, 774 F. 2d 1205, 1212 (D.C. Cir. 1985); *Chicago & North Western Transp. Co. v. United States*, 574 F. 2d 926, 930 n.5 (7th Cir. 1978). It is equally clear that where an adequate evidentiary record already exists to support the ruling, the agency need not reopen the matter and receive new or additional evidence. *Midwest ISO Transmission Owners v. F.E.R.C.*, 383 F. 3d 1361, 1367-69 (D.C. Cir. 2004).

²¹ (...continued)

unanticipated changes in stand-alone traffic volumes, BNSF claimed that all 11 shippers in the original traffic group were “local” customers to the stand-alone railroad. BNSF Reply at 4, 13. However, the record shows that as of 1996, the traffic attributable to 5 out of the 11 actually originated and/or terminated off the lines of the stand-alone railroad. Even accounting for the subsequent merger between the former Burlington Northern Railroad and Atchison, Topeka & Santa Fe Railway, coal for 2 of the shippers still moved as cross-over traffic. See 1 S.T.B. at 658-59. Second, BNSF and its witness claimed that AEP Texas improperly changed the capital recovery pattern under the DCF model. BNSF Reply at 14. In fact, all AEP Texas did was incorporate the intervening change in the Board’s own methodology; *i.e.*, another materially changed circumstance.

²² *San Antonio*, 364 I.C.C. at 896.

In this case, AEP Texas presented substantial empiric evidence which demonstrated that the Rawhide prescription no longer was valid. BNSF challenged this showing, but did not argue that additional evidence pertaining to any other changed circumstances would have to be submitted or considered before the Board could rule. On remand, therefore, the Board should proceed to address this alternate ground for vacation of the prescription, and on that basis re-affirm the *2004 Decision* and accompanying order.

CONCLUSION

For the reasons set forth herein, the Board should re-affirm that the former Rawhide rate prescription was no longer valid as of the effective date set in the *2004 Decision*, and dismiss this remanded proceeding.

Respectfully submitted,

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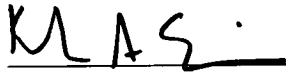
Dated: May 6, 2005

Attorneys & Practitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2005, I caused a copy of the foregoing Petition on Remand to be served by hand delivery on counsel for BNSF, as follows:

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