

STEPTOE & JOHNSON^{LLP}
ATTORNEYS AT LAW

Anthony J. LaRocca
202.429.8119
alarocca@steptoe.com

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May 18, 2005

via Hand Delivery

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings
MAY 18 2005
Part of
Public Record

Re: AEP Texas North Company v. BNSF Railway Company,
Docket No. 41191 (Sub-No. 1)

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are an original and ten copies of Defendant's Motion to Dismiss the Complaint.

Please date stamp the extra copy of this pleading and return it to the messenger who delivered this filing.

Sincerely,



Anthony J. LaRocca

Enclosure
cc: Complainant's Counsel

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

214012

AEP TEXAS NORTH COMPANY,)
)
 Complainant,)
 v.)
)
 BNSF RAILWAY COMPANY,)
)
 Defendant.)

Docket No. 41191 (Sub-No. 1)

ENTERED
Office of Proceedings

MAY 13 2005

Part of
Public Record

**MOTION OF BNSF RAILWAY COMPANY
TO DISMISS THE COMPLAINT**

Pursuant to 49 CFR §1111.5, BNSF Railway Company (BNSF) hereby moves to dismiss the complaint in STB Docket No. 41191 (Sub-No.1) in light of the April 8, 2005 decision of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in *Burlington Northern and Santa Fe Railway Company v. Surface Transportation Board*, No. 04-1162 ("*BNSF v. STB*").

In *BNSF v. STB*, the D.C. Circuit found that the Board did not lawfully vacate the rate prescription in STB Docket No. 41191, entered by the Board in 1996 and modified on May 29, 2003. That rate prescription expressly covered movements of PRB coal from the Rawhide mine to the Oklaunion Station. The D.C. Circuit vacated the Board's March 19, 2004 vacatur decision, thereby reinstating the rate prescription. The reinstatement of the rate prescription requires dismissal of AEP Texas' August 11, 2003 complaint, as amended on December 22, 2003 and April 19, 2004, challenging movements of coal from both Rawhide and non-Rawhide mines.

As to movements from the Rawhide mine, the reinstated rate prescription clearly applies to all movements of Rawhide coal covered by the complaint. The reinstated rate prescription

covers Rawhide movements that have occurred since May 2003, when the Board modified the rate prescription to give effect to the prior SAC calculations, and to all movements that will occur until the Board suspends or vacates the rate prescription. No complaint can be maintained while a valid rate prescription is in place.

As to movements from the non-Rawhide mines, the complaint must be dismissed for two reasons. First, the Rawhide rate prescription, reinstated by the D.C. Circuit, extends automatically under the rule announced in September 2004 in *TMPA* to non-Rawhide movements. In *TMPA*, the Board ruled that a SAC-based rate prescription for one mine automatically extends to other mines that were covered by the original complaint and that were included in the SAC analysis. Both conditions are satisfied here: The non-Rawhide movements were covered by the complaint that gave rise to the Rawhide rate prescription and the original SAC analysis covered movements originating at non-Rawhide mines. Since a rate prescription now covers the non-Rawhide movements, no complaint can be maintained challenging the rates for those movements.

While the “automatic extension” principle in the *TMPA* rule makes it clear that the Rawhide rate prescription covers all prospective movements of non-Rawhide coal, the point at which the non-Rawhide rates became subject to the Rawhide rate prescription is unclear. However, the Board need not address this issue because there is an independent reason to dismiss the complaint as it relates to historical movements of non-Rawhide coal. The complaint seeks a determination of the maximum reasonable SAC rates for movements that are already the subject of the Board’s prior 1996 SAC analysis. The Board’s 1996 SAC calculations covered the same transportation services that are at issue here. The 1996 SAC case involved the same parties that are involved in this case. The SAC analysis period in the 1996 case covers all of the historic

time periods at issue here. Since the Board has already issued a decision evaluating the parties' evidence on the maximum SAC rates for this traffic, AEP Texas has no basis for maintaining a new action seeking a new determination on the same issues. As the D.C. Circuit stated in its April 8, 2005 decision, "[W]hen a matter has been once fully considered and decided it must be regarded as settled unless it appears from new facts presented that the Commission was wrong." *BNSF v. STB*, slip op. at 12 (quoting *Traugott Schmidt & Sons v. Michigan Central Railroad Co.*, 23 I.C.C. 684 (1912)). AEP Texas has submitted no facts relating to the continued validity of the Board's 1996 SAC calculations. It cannot bring a complaint seeking a determination of the maximum reasonable rates for non-Rawhide movements under the SAC test unless or until it has shown that the Board's prior calculations are no longer valid.

On May 6, 2005, AEP Texas filed a renewed request to vacate the Rawhide rate prescription. BNSF will respond to that request within the time frame provided by the Board's rules. However, the outcome of this Motion to Dismiss does not hinge on any action that the Board might take in response to AEP Texas' May 6, 2005 petition. Whatever action the Board takes on that request, including any vacatur of the rate prescription, would only be prospective. *Arizona Grocery* makes clear that a rate prescription remains in effect until it is properly suspended or vacated. BNSF does not believe that AEP Texas has or will be able to demonstrate that changed circumstances justify vacatur of the existing rate prescription. But in any event, no vacatur or change in the rate prescription for Rawhide or non-Rawhide movements can be implemented until the Board acts on AEP Texas' request. In the meantime, the complaint in this docket must be dismissed.

BACKGROUND

This motion is being filed in light of the recent D.C. Circuit decision in *BNSF v. STB* in which the court vacated the *March 2004 Decision* of the Board vacating the 1996 rate

prescription on Rawhide movements, as that rate prescription was modified on May 29, 2003. The rate prescription at issue in *BNSF v. STB* resulted from a complaint brought in 1994 by AEP Texas' predecessor, West Texas Utilities ("WTU"), challenging the reasonableness of rates for movements of coal from several PRB mines to the Oklaunion Station.¹ WTU specifically notified the ICC that it was seeking a rate prescription involving 11 PRB mine origins, covering BNSF-served mines from Eagle Butte in the north to Nacco Junction in the south.² SAC evidence submitted by the parties covered these movements.

On May 3, 1996, the Board issued its decision.³ The Board evaluated the parties' SAC evidence and made findings on contested SAC issues. The Board's treatment of SAC traffic, revenue and cost issues was extremely favorable to the complainant, and as a result the Board found that the maximum reasonable rate under the SAC test was below the jurisdictional threshold for the first several years of the discounted cash flow period.⁴ Since the Board cannot prescribe a rate that is below the jurisdictional threshold, the Board concluded that a rate prescription would have to be based on the variable cost evidence. The Board calculated variable costs only for movements from the Rawhide mine, since there was insufficient evidence of the variable costs for movements from other mines, and it issued an order requiring the

¹ WTU Verified Complaint, STB Docket No. 41191, at 7 (filed Jan. 12, 1994).

² The list, contained in WTU's February 17, 1995 letter to the Board, included Rawhide Jct., Caballo Jct., Belle Ayr, Eagle Jct., Rojo Jct., Cordero, Coal Creek Jct., Reno Jct., Jacobs Jct., Rochelle, and Nacco Jct. AEP Texas' Complaint (filed August 11, 2003) covered mine origins in "Campbell and Converse Counties, Wyoming." Complaint at ¶11.

³ *West Texas Utilities Co. v. The Burlington Northern and Santa Fe Railway Co.*, 1 STB 638 (1996) ("1996 Decision") *aff'd sub nom Burlington N. RR v. STB*, 114 F.3d 206 (D.C. Cir. 1997).

⁴ The Board staff developed a discounted cash flow (DCF) model projecting the SAC maximum rate levels through the year 2014, which the Board included as Table E-1. *Id.* at 711.

defendant to establish and maintain a common carrier rate for movements from the Rawhide mine that did not yield revenues in excess of the 180 percent revenue/variable cost limit as calculated by the Board.⁵ The Board noted, however, that it would extend its findings to cover rates from non-Rawhide mines if location-specific supplemental evidence was presented.⁶

In 1997, the Rawhide mine closed, and WTU began to obtain its base-load coal from other mines in the PRB.⁷ BNSF maintained the rate for non-Rawhide movements at the level prescribed by the Board in the *1996 Decision*, which was based on 180 percent of variable costs as calculated in 1996 on Rawhide movements, until mid-2000. By this time, the SAC maximum rate had risen to a level that exceeded the prescribed rate based on the jurisdictional threshold. On June 16, 2000, BNSF notified the Board of its intention to increase its common carrier rate on non-Rawhide movements to the SAC maximum level calculated in the *1996 Decision*. AEP Texas asked the Board to disallow BNSF's rate increase and further asked the Board to extend the Rawhide rate prescription to the non-Rawhide movements.

In a November 7, 2000 decision, the Board held that BNSF was lawfully entitled to raise its common carrier rate for non-Rawhide movements to \$15.78, an amount that was consistent with the SAC-based rate calculated by the Board in the *1996 Decision*.⁸ However, the Board also reopened the 1996 rate prescription "to determine the reasonableness of the \$15.78 per ton

⁵ *Id.* at 679.

⁶ *Id.* at 644.

⁷ The Rawhide mine was later reopened, as discussed below, and AEP Texas resumed shipping coal from that origin in 2002.

⁸ *West Texas Utilities Co. v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 41191, at 4 (filed Nov. 7, 2000) ("*November 2000 Decision*").

rate from other PRB origins.”⁹ In a March 23, 2001 decision on reconsideration, the Board identified three limited categories of supplemental evidence that would enable it to determine the maximum reasonable rate on movements from the non-Rawhide origins based on the record already developed: (1) whether additional resources would be needed to serve the additional mines; (2) whether there were other significant changed circumstances affecting the rate analysis; and (3) whether the rate resulting from the SAC analysis would exceed 180 percent of variable costs.¹⁰

AEP Texas did not pursue the reopening that it had previously requested until May 2003, when it asked the Board to establish a procedural schedule. In the meantime, AEP Texas began moving coal once again from the reopened Rawhide mine in 2002. BNSF therefore sought from the Board a declaration that the *1996 Decision* had improperly limited the prescribed rate for movements from the Rawhide mine to the jurisdictional threshold of 180 percent of variable costs regardless of the level of the SAC maximum reasonable rate.¹¹ The Board concluded that it had erred in the *1996 Decision* by focusing solely on the jurisdictional threshold and it modified the rate prescription to allow the prescribed rate to increase to the maximum reasonable level determined under the Board’s prior SAC calculations.¹² It further stated that if AEP Texas

⁹ *Id.*

¹⁰ *West Texas Utilities Co. v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 41191 at 2 (filed Mar. 23, 2001) (“*March 2001 Decision*”).

¹¹ Petition of the Burlington Northern and Santa Fe Railway Company for a Declaration Regarding the Rate Prescription on Coal Movements from Rawhide, Wyoming to Oklahoma, Texas, STB Docket No. 41191 (filed April 17, 2003).

¹² *West Texas Utilities Co. v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 41191 (served May 29, 2003) (“*May 2003 Decision*”). However, the Board did not allow BNSF to recover the amounts to which it would have been entitled but for the Board’s error in formulating its rate prescription in the *1996 Decision*. The Board’s decision recognized

wished to challenge the level of the SAC rate, it must do so through a reopening of the 1996 Rawhide rate prescription. AEP Texas never pursued that option.

In July 2003, the Board issued a decision in which it noted the possibility that AEP Texas might no longer be interested in having the Rawhide rate apply to the either the Rawhide or the non-Rawhide movements in light of the Board's *May 2003 Decision* allowing the previously determined SAC rate to take effect.¹³ The Board stated that AEP Texas had a choice whether to pursue its rate reasonableness challenge in a reopening of the Rawhide rate prescription or in the context of a new case. The Board suggested that if AEP Texas chose the latter course, its recourse was to seek "to have the rate prescription vacated, allow the railroad to establish a new common carrier rate, and then file a complaint challenging the railroad's new rate." *July 2003 Decision* at 3.

AEP Texas filed a new complaint on August 11, 2003 and a motion to vacate the existing rate prescription on September 2, 2003.¹⁴ The Board granted AEP Texas' request to vacate the 1996 rate prescription on March 19, 2004. BNSF appealed the Board's decision vacating the rate prescription to the D.C. Circuit. BNSF argued in its appeal, among other things, that the strong interests of finality and repose require that a rate prescription remain in effect until the party seeking to change or eliminate the prescription shows that significant changed circumstances justify modification or vacatur of the prescription. On April 8, 2005, the D.C.

that the refusal to allow BNSF to recover the amounts to which it would have been entitled deprived BNSF of more than \$8 million in revenues for 2002 and 2003.

¹³ *West Texas Utilities Co. v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 41191, slip op. at 2 (served July 23, 2003) ("*July 2003 Decision*").

¹⁴ AEP Texas North Company's Petition to Vacate Rate Prescription, STB Docket No. 41191 (filed Sept. 2, 2003) ("Petition to Vacate").

Circuit issued its decision, agreeing with BNSF that the Board's vacatur of the rate prescription was arbitrary and capricious. The court therefore vacated the Board's decision.

ARGUMENT

I. The Complaint Must Be Dismissed As It Relates To Rawhide Movements

The D.C. Circuit's April 8, 2005 decision vacated the Board's March 19, 2004 order vacating the 1996 rate prescription. AEP Texas previously described the effect of a vacatur in its rebuttal evidence in this proceeding: "As succinctly summarized in a venerable legal treatise: 'When an order is set aside or vacated, the result is the destruction of the order in its entirety. Its effectiveness is ended, the previously existing status is restored, *and the effect is the same as though the order had never existed.*'" AEP Reb. Nar. at I-6 (filed July 27, 2004) (quoting 60 C.J.S. Motions and Orders §71 (2003)) (emphasis added by AEP Texas).

By vacating the Board's March 19, 2004 order, the D.C. Circuit thus restored the status in place before the March 19, 2004 order -- i.e., the 1996 rate prescription remains in effect. Moreover, the D.C. Circuit's vacatur restores the preexisting status as though the March 19, 2004 order "had never existed." Thus, the 1996 rate prescription has remained in effect without interruption. While AEP Texas has renewed its request that the rate prescription be vacated, *Arizona Grocery* makes clear that the existing rate prescription remains in effect until the Board properly suspends or vacates it. (BNSF will respond to AEP Texas' May 6, 2005 request in the time frame provided by the Board's rules.) BNSF does not believe that AEP Texas will be able to demonstrate any factual basis for vacating the rate prescription, but in any event, no change in the rate prescription can be implemented until the Board rules on AEP Texas' request.

In the meantime, AEP Texas cannot maintain its complaint as it relates to historical or prospective movements of Rawhide coal. The Board has repeatedly stated that when an existing rate prescription is in effect, a new complaint cannot be filed involving the movements covered

by the rate prescription unless and until the existing rate prescription has been vacated. *See APS v. BNSF*, Docket No. 41185, slip op. at 5, n.7 (served May 12, 2003); *July 2003 Decision* at 3.

II. The Complaint Must Be Dismissed As It Relates To Movements Of Non-Rawhide Coal

The D.C. Circuit's reinstatement of the 1996 rate prescription also requires dismissal of the complaint as it relates to rates charged on movements of non-Rawhide coal. Under current legal standards, the rate prescription on Rawhide movements, reinstated by the D.C. Circuit's April 8, 2005 decision, extends automatically to movements of non-Rawhide coal. Thus, all current and prospective movements of non-Rawhide coal are covered by a rate prescription and they cannot be the subject of a new complaint while that prescription is in effect. As to historical movements of non-Rawhide coal, the D.C. Circuit's decision means that the SAC-based Rawhide rate prescription has been continuously in effect since May 2003, when the Board modified the 1996 rate prescription to give effect to the Board's prior SAC calculations. Since the 1996 SAC calculations covered movements of coal from non-Rawhide origins, AEP Texas cannot bring a new complaint seeking a new determination of the maximum reasonable rates for those movements based on the SAC test unless it first shows that the Board's prior SAC calculations were wrong. AEP Texas has not even attempted to make such a showing.

A. Prospective Movements Of Non-Rawhide Coal Are Covered By The Rawhide Rate Prescription

In September 2004, the Board ruled in *TMPA* that a SAC-based maximum reasonable rate determination automatically extends "to all of the mines that were embraced in the complaint and the SAC analysis."¹⁵ The original complaint filed by WTU covered the non-Rawhide mine origins that are the subject of AEP Texas' August 11, 2003 complaint. Moreover,

¹⁵ *TMPA v BNSF*, STB Docket No. 43056, slip op. at 29 (served September 24, 2004).

the SAC evidence submitted by the parties in the proceeding that gave rise to the 1996 rate prescription, as well as the Board's SAC analysis, embraced those mine origins. Under *TMPA*, therefore, the maximum SAC rates determined in the 1996 proceeding automatically extend, by force of law, to the non-Rawhide origins. Since there is a maximum SAC rate determination that applies, by force of law, to the non-Rawhide origins, it is not permissible for AEP Texas to bring a separate complaint challenging the rates for those movements.

The Board explained in the *TMPA* decision the rationale for extending an existing SAC-based rate prescription to all mine origins covered by the original SAC calculations:

[W]e are persuaded that the better policy is for a rate prescription to be self-effectuating where a mine is embraced in both the original complaint and the SAC evidence. There is no sound legal or public policy reason why *TMPA* should be required to re-litigate its rate complaint, in whole or in part, to obtain the benefit of the rate prescription when it shifts traffic from one of the mines covered by its rate complaint to another mine covered by that same complaint.¹⁶

This rationale applies equally to shippers seeking to avoid relitigation of SAC issues when traffic shifts to another mine and to a railroad seeking to avoid relitigation under the same circumstances.

The D.C. Circuit found in *BNSF v. STB* that the protections afforded by rate prescriptions apply to both the shipper and the railroad -- the shipper is protected by a rate prescription from being required to pay unreasonable rates and the railroad is protected from repetitive litigation over the reasonableness of rates. Those protections apply here. Under the Board's *TMPA* rule and the D.C. Circuit decision in *BNSF v. STB*, BNSF should be protected from the relitigation of the maximum SAC rate for movements that were covered in the original complaint and were

¹⁶ *Id.*

included in the SAC analysis that produced the 1996 rate prescription. The Board should find that in accordance with the *TMPA* rule, the SAC-based rate that applies to movements of Rawhide coal automatically extends to all non-Rawhide movements that have occurred since the D.C. Circuit vacated the Board's March 19, 2004 decision and to all prospective non-Rawhide movements.

An important feature of the *TMPA* rule is that the rate prescription *automatically* extends to rates covered by the original complaint if the SAC analysis covered those mine origins. This begs the question, however, of when the extension of the Rawhide rate prescription to non-Rawhide rates occurred in this case. The *TMPA* decision was issued in September 2004, after the Board had purported to vacate the Rawhide rate prescription. If the Board had not improperly vacated the Rawhide rate prescription in March 2004, that rate prescription would have automatically extended, under the *TMPA* rule, to non-Rawhide origins no later than the effective date of the *TMPA* decision.

As a matter of equity and sound policy, the Rawhide rate prescription should be deemed to have extended automatically to the non-Rawhide movements even earlier. The policy underlying the *TMPA* rule -- to protect shippers (and railroads) against repetitive litigation over rates that were already the subject of a prior rate reasonable analysis -- applied equally to historical movements as it applies now. Moreover, both parties have taken the position in this case that the rates for all PRB origins should be determined in the context of a single rate reasonableness analysis.

From the beginning of AEP Texas' use of non-Rawhide mines, BNSF has charged rates consistent with the Board's 1996 rate prescription, even though BNSF strongly disagreed with the dramatic rate reduction imposed by the 1996 decision. Thus, from 1997 to 2000, BNSF

applied to non-Rawhide movements the prescribed rate based on the jurisdictional threshold for Rawhide movements. In 2000, BNSF began charging the SAC-based rates determined by the Board in the 1996 decision and it advised the Board that it would have accepted an extension of the SAC-based rate prescription to the non-Rawhide movements. BNSF specifically agreed in 2003, after the Board corrected the 1996 decision to allow the SAC rate to come into effect, to extend the existing Rawhide rate prescription to all PRB origins. In the SAC evidence presented after AEP Texas initiated a new rate reasonableness case, BNSF repeatedly argued that it would be irrational and arbitrary to establish new SAC-based rates that differed significantly from the SAC-based rates determined in the Board's 1996 SAC analysis without some factual basis for the difference. *See* BNSF Op. Nar. at I-14 to I-17 (filed March 1, 2004); BNSF Reply Nar. at I-5 to I-13 (filed May 24, 2004).

AEP Texas has also repeatedly taken the position that there is no reason to have multiple rates in effect for similar transportation from multiple PRB origins. Indeed, in its reply evidence in this proceeding, AEP Texas urged the Board to address all PRB rates in a single proceeding to ensure that rates were consistent among all PRB origins:

Strong public policy considerations also favor extending the Board's rate prescription in this proceeding to shipments from all of the PRB origins to which the BNSF rates under challenge apply. ... Limiting the Board's ruling in this case to only some of the movements covered by the challenged rates unnecessarily would result in piecemeal regulatory action as AEP Texas' coal sources inevitably shift.¹⁷

The Board's July 2003 decision also reflects its apparent belief that the rates for Rawhide and non-Rawhide movements would be addressed in the same proceeding to ensure consistency. The Board's July 2003 Decision gave AEP Texas two options for challenging the non-Rawhide

¹⁷ *See* AEP Texas Reply Nar. at I-7 (filed May 24, 2004).

rates. The first option was for AEP Texas to pursue the reopening of the 1996 rate prescription that the Board had instituted in response to AEP Texas' request. AEP Texas had filed on May 14, 2003 a petition for a procedural schedule governing the evidence to be submitted in the reopening proceeding.¹⁸ Since the evidence in such a reopening would be limited, the Board suggested in the July 2003 decision a second alternative that AEP Texas might pursue a challenge to the non-Rawhide rates through a new complaint. However, the Board apparently believed that any new complaint would be preceded by the vacatur of the Rawhide rate prescription. According to the Board:

If a shipper wishes to establish a current maximum reasonable rate using a SAC analysis that is based on different assumptions than originally used, its recourse is to have the rate prescription vacated, allow the railroad to establish a new common carrier rate, and then file a complaint challenging the railroad's new rate.

July 2003 Decision at 3.

If the Board determines that the policy underlying the *TMPA* decision and the parties' agreement that the rates for Rawhide and non-Rawhide movements should be determined in a single proceeding justifies extension of the Rawhide rate prescription to non-Rawhide movements for all relevant historical time periods, then the complaint should be dismissed as it relates to historical non-Rawhide movements for the same reason that it should be dismissed as to prospective movements -- the rates are already covered by an existing rate prescription. It is not necessary, however, to determine whether the Rawhide rate prescription should be deemed to have extended to non-Rawhide movements for historical periods because there is an independent

¹⁸ AEP Texas North Company's Petition to Establish Procedural Schedule (filed May 14, 2003).

reason for dismissing the complaint as it relates to historical movements of non-Rawhide coal.

This is discussed below.

B. AEP Texas Cannot Bring A Complaint Challenging Rates For Historical Movements of Non-Rawhide Coal Without First Showing That The Board's Prior SAC Calculations Were Flawed

BNSF has never charged a rate for movements of non-Rawhide coal that exceeds the maximum reasonable SAC rates that the Board calculated in the 1996 SAC case. It would be improper and irrational for the Board to conclude, in the present litigation, that the maximum SAC rates calculated in the 1996 proceeding were too high and that different, lower SAC maximum rates should be applied unless the Board were to determine that its prior SAC calculations were wrong. AEP Texas has not provided any evidence in this proceeding that would support such a finding.

The D.C. Circuit, in its April 8, 2005 decision, noted the general principle that “[W]hen a matter has been once fully considered and decided it must be regarded as settled unless it appears from new facts presented that the Commission was wrong.” *BNSF v. STB*, slip op. at 12 (quoting *Traugott Schmidt & Sons v. Michigan Central Railroad Co.*, 23 I.C.C. 684 (1912)). The SAC maximum rate for movements of PRB coal from non-Rawhide origins has already been determined by the Board. The Board’s 1996 SAC calculations covered the same transportation services that are at issue here. The 1996 SAC case involved the same parties that are involved in this case. The SAC analysis period in the 1996 case was 1995-2014, thus covering all of the historic time periods at issue here. AEP Texas cannot be permitted to bring a new complaint and ask the Board to establish new SAC-based rates for movements that are already covered by SAC calculations made in a prior decision involving the same parties and the same transportation.

BNSF noted in the reply evidence filed in this case that AEP Texas had failed to establish any facts that would support a conclusion that the 1996 SAC analysis is flawed. *See BNSF*

Reply Nar. at I-5 to I-13. Moreover, BNSF submitted evidence showing that changes in economic factors did not justify any reduction in the SAC-based rates calculated in 1996. In fact, when assumptions relating to traffic, revenue, and other economic factors in the original SAC analysis are updated, a modest increase in the prescribed rate would be justified. *Id.* at III.A-16 to 24.

AEP Texas' only response to BNSF's evidence was that the Board's March 2004 vacatur of the 1996 rate prescription made the 1996 SAC calculations irrelevant. "Whatever precedential effect the prior SAC analysis and resulting prescription may have had is gone, and it is as though the findings 'had never existed.'" AEP Texas Reb. Nar. at I-6 (filed July 27, 2004). This argument, however, is unavailing in light of the D.C. Circuit's April 8, 2005 decision vacating the Board's March 2004 vacatur of the 1996 rate prescription. The 1996 rate prescription remains in effect, and AEP Texas should not be able to challenge the validity of the SAC analysis in the 1996 decision unless it first presents a factual basis for concluding that the 1996 SAC analysis was flawed. Since it has presented no such facts, its complaint should be dismissed.

CONCLUSION

For the foregoing reasons, BNSF respectfully requests that the Board dismiss AEP Texas' complaint in this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Samuel M. Sipe, Jr.', written over a horizontal line.

Richard E. Weicher
Michael E. Roper
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

Samuel M. Sipe, Jr.
Anthony J. LaRocca
David F. Rifkind
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

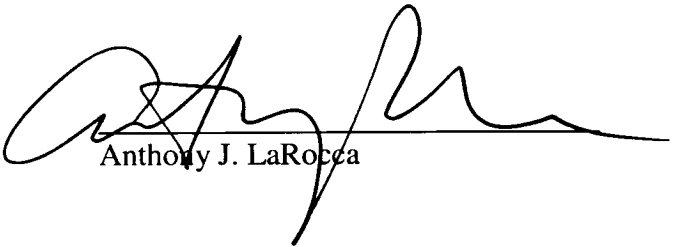
Attorneys for Defendant

May 18, 2005

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2005, I caused a copy of BNSF Railway Company's
Motion To Dismiss The Complaint to be served by hand upon the following:

William L. Slover
Kelvin J. Dowd
Christopher A. Mills
Daniel M. Jaffe
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, DC 20036


Anthony J. LaRocca