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April 5, 2006

*via Hand Delivery*

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

**FILED**

MAR - 5 2005

**SURFACE  
TRANSPORTATION BOARD**

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

216185

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are an original and ten copies of BNSF Railway Company's Petition for Reconsideration.

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

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SURFACE TRANSPORTATION BOARD

**FILED**

MAR - 5 2005

SURFACE  
TRANSPORTATION BOARD

Docket No. 41191 (Sub No. 1)



AEP TEXAS NORTH COMPANY,

Complainant,

v.

BNSF RAILWAY COMPANY,

Defendant.

**FILED RECEIVED**

APR 5 2006

SURFACE  
TRANSPORTATION BOARD

**BNSF RAILWAY COMPANY'S PETITION FOR RECONSIDERATION**

Pursuant to 49 CFR §1115.3, BNSF Railway Company ("BNSF") hereby requests that the Board reconsider its March 17, 2006 Order in the above-captioned case requiring the parties to submit supplemental evidence based on the traffic group contained in complainant AEP Texas North Company's ("AEP Texas") post-rebuttal evidence, filed November 8, 2004. BNSF requests that the Board revise its March 17, 2006 Order to specify that the parties must submit supplemental evidence based on the traffic group contained in BNSF's reply evidence, filed May 24, 2004.

**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

As discussed in more detail below, the traffic group in AEP Texas' post-rebuttal evidence contains a substantial volume of traffic that was rerouted from its real world route of movement to a longer SARR route. The Board has established a presumption against the inclusion of such rerouted traffic in a SAC analysis. AEP Texas attempted to rebut that presumption in three rounds of evidence already filed in this case, but it has failed to do so in each attempt. AEP Texas itself admitted that its first two evidentiary presentations on this issue were flawed, and the Board's March 17, 2006 Order indicates that the Board recognizes that AEP Texas' third

evidentiary presentation contains a serious flaw relating to unplanned outages on the SARR. Since AEP Texas has failed to carry its burden of proof on this issue as the record now stands, the Board should order the parties to submit supplemental evidence based on a traffic group that does not include the rerouted traffic. It would be impermissible for the Board to give AEP Texas yet another opportunity to rebut the presumption against including the rerouted traffic.

The rerouted traffic should also be excluded because it produces a distortion in the SAC analysis contrary to the principle set out in the recent *Otter Tail* decision that cross-over traffic is supposed to simplify SAC analyses, not bias SAC results. See *Otter Tail Power Co. v. BNSF Ry. Co.*, STB Docket No. 42071, slip op. at 14 (STB served Jan. 27, 2006) ("*Otter Tail*"). As BNSF explained in its reply evidence in this case, the SARR posited by AEP Texas is similar to the SARR at issue in the 1996 *WTU* case (*West Texas Utilities Co. v. Burlington Northern R.R. Co.*, 1 STB 636 (1996)) except for the addition of cross-over traffic. See BNSF Rep. Nar. at III.A-21 to 24. BNSF showed that AEP Texas used cross-over traffic in this case not to simplify the SAC analysis but to produce substantially different, and more favorable, results as compared to the SAC results that would be obtained without cross-over traffic. BNSF further showed that the distortion produced by the rerouted cross-over traffic was particularly great since the revenues allocated to the rerouted traffic are far out of proportion to the minimal use of SARR facilities by the rerouted traffic in the real world. See *id.* at III.A-29 to 33. To eliminate this distortion, the rerouted traffic should be excluded from the SARR traffic group.

The grounds for this petition are set out in greater detail below.

## **II. PROCEDURAL BACKGROUND**

AEP Texas relied heavily on cross-over traffic in its SAC evidence. Its March 1, 2004 opening evidence traffic group contained 173 million tons of cross-over traffic, of which the majority used only the SARR facilities in the PRB and exited the SARR heading east at Alliance,

NE. *See* BNSF Rep. Nar. at III.A-3 and n.9. In contrast, the issue traffic, and other traffic using the issue traffic facilities, moves south on lines that parallel the front range of the Rocky Mountains. None of the cross-over traffic exiting the SARR at Alliance was included in the SARR at issue in the 1996 *WTU* case. The traffic group in that case did not include any cross-over traffic.

AEP Texas assumed that 28 million tons of this new cross-over traffic in 2002 would be rerouted from the real world route of movement onto a longer SARR route. This rerouted traffic originates at southern PRB mines and is assumed to be routed north on the SARR through Donkey Creek. All of this traffic exits the SARR at Alliance. In the real world, this rerouted coal traffic travels south through Guernsey, WY, on a route that allows it to avoid the congested lines in the northern part of the PRB where numerous trains enter and exit the mines. AEP Texas' rerouted traffic movements are substantially longer than the real world routings. *See* BNSF Rep. Nar. at III.A-25 to 26. Under the Board's existing standards, these movements are presumed to be less efficient than the shorter, real world movement. *See Duke Energy Corp. v. CSX Transp., Inc.*, STB Docket No. 42070, slip op. at 16 (STB served Feb. 4, 2004) ("*Duke/CSX*"). AEP Texas attempted to rebut this presumption in its opening evidence through a transit time comparison between the SARR movements and the real world movements, relying on data generated by its RTC analysis to show that transit times for the rerouted traffic would not be longer than those on real world movements.

In its May 24, 2004 reply evidence, BNSF demonstrated that AEP Texas failed to rebut the presumption against including the rerouted traffic. BNSF explained that AEP Texas's RTC analysis depended on unrealistic assumptions, including, among other things, an assumption that SARR trains would encounter no unplanned track outages. *See* BNSF Rep. Nar. at III.B-3 to 17.

BNSF revised AEP Texas' model, incorporated realistic modeling assumptions in the operating plan for the SARR, and showed that the inclusion of the rerouted traffic produced gridlock on the SARR lines.

On rebuttal, filed July 27, 2004, AEP Texas acknowledged that in several important respects the operating assumptions it had used in its opening operating model were not appropriate. On some issues relating to the operating model, AEP Texas accepted BNSF's alternative evidence. On other operating model issues, AEP Texas acknowledged that its opening evidence was deficient but it did not accept BNSF's evidence and instead submitted new operating assumptions in violation of the Board's rules governing rebuttal evidence. *See* AEP Texas Reb. Nar. at III-B-5 to 22. For example, on the issue of unplanned outages on the SARR lines, AEP Texas accepted only a fraction of the outages identified by BNSF, claiming that the others were essentially unsupported or unrealistic.

On September 9, 2004, BNSF moved to strike AEP Texas' rebuttal transit time comparison because it exceeded the scope of permissible rebuttal and it was patently unreliable. Among other things, BNSF showed that AEP Texas had failed to include 17 percent of its proposed coal train movements in the rebuttal RTC analysis. As a result, all of AEP Texas' rebuttal data and analyses based on the RTC model, including AEP Texas' transit time comparison used to rebut the presumption against including the rerouted traffic, were flawed and unusable.

On October 20, 2004, AEP Texas acknowledged that its rebuttal evidence was insufficient, but it purported to blame BNSF for its failure to model the correct traffic group. Based on this assertion, and without waiting for permission from the Board to file post-rebuttal evidence, AEP Texas then filed a new operating model on November 8, 2004. On November 24,

2004, BNSF opposed AEP Texas' petition to file post-rebuttal evidence, pointing out that AEP Texas' attempt to shift the blame to BNSF was a smokescreen to cover the obvious deficiencies of its own evidence. BNSF showed that the flaws in AEP Texas' rebuttal evidence were clearly due to its consultants' errors and argued that it would make a mockery of the Board's rules governing the limits on rebuttal evidence to allow a complainant to submit new post-rebuttal evidence to repair errors that should have been obvious to the complainant before its rebuttal evidence was filed.

On January 14, 2005, the Board issued a decision stating that it was not prepared to address the parties' filings on the validity of AEP Texas' post-rebuttal evidence at that time and suggested that BNSF submit a reply in order to protect its interests. In its reply, filed February 14, 2005, BNSF identified two independent flaws in AEP Texas' post-rebuttal evidence, either of which would render the post-rebuttal evidence useless for purposes of assessing the transit times of SARR trains.

### **III. ARGUMENT**

#### **A. The Board Should Use BNSF's Traffic Group Because AEP Texas Has Failed To Justify The Inclusion Of Rerouted Traffic In The SARR Shipper Group**

It is well established that the complainant in a SAC case has the burden of proof. *See Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 547 (1985) ("*Guidelines*"). The burden of proof consists of a procedural and a substantive element. As to the procedural element, the complainant has the burden of coming forward with a prima facie case in its opening evidence. If a prima facie case is established, the burden of producing evidence shifts to the defendant. The defendant then replies to the complainant's opening SAC evidence and if appropriate, submits alternative SAC assumptions. The burden of production then shifts back to the complainant to respond on rebuttal to the defendant's evidence. Many of the recent SAC cases

have addressed the proper scope of a complainant's rebuttal evidence and the Board has established strict limits on the evidence a complainant can present on rebuttal. If the complainant seeks to go beyond those limits, it must first obtain permission from the Board on a showing of good cause. *See, e.g., Duke Energy Corp. v. Norfolk Southern Ry. Co.*, STB Docket No. 42069, slip op. at 14-15 (STB served Nov. 6, 2003) ("*Duke/NS*"). Notwithstanding this shifting back and forth of the burden to produce evidence, the complainant maintains the burden of persuasion on every element of the SAC analysis.

One of the essential elements of a complainant's SAC case is the identification of a valid SARR traffic group. *See Guidelines*, 1 I.C.C.2d at 544. A recurring issue in recent cases has been whether a valid traffic group can contain traffic that has been rerouted from its real world route of movement. The Board has stated that it would not be appropriate to exclude altogether rerouted traffic, but it has established a presumption that rerouted traffic may not be included in the SAC analysis if that traffic moves a greater distance over the SARR than its real world route of movement. *See Duke/NS* at 26; *Duke/CSX* at 16. A complainant seeking to include such rerouted traffic bears the burden of rebutting the presumption that the longer SARR route for the traffic is less efficient than the incumbent's real world route.

AEP Texas has not carried its burden of demonstrating that the rerouted traffic at issue here may be included in the SAC analysis. That traffic is assumed to move a significantly longer distance on the SARR than the real world route of movement, over a congested SARR route where empty trains are constantly entering mines and loaded trains are merging onto the SARR's mainline tracks. AEP Texas failed to demonstrate both on opening and on rebuttal that the transit times on these movements would be no longer than the transit times for the real world movements. The Board's rules give complainants two opportunities to present evidence to carry

their burden of persuasion on critical elements of the SAC test, and AEP Texas failed to carry this burden on the issue of rerouted traffic on both occasions.

Even if the Board were to allow AEP Texas to rely on its post-rebuttal evidence, there would be no basis for including the rerouted traffic in the supplemental evidence. The Board's March 17, 2006 decision suggests that the Board has concluded that AEP Texas' post-rebuttal operating model failed to account properly for the random failures that would be faced by the SARR. While the Board did not specifically make such a ruling in the March 17, 2006 decision, this conclusion is implicit in the Board's call for new supplemental evidence based on assumptions about outages other than those contained in AEP Texas' post-rebuttal evidence. Thus, the Board itself appears to have concluded that AEP Texas has not up to this point presented evidence sufficient to rebut the presumption that the rerouted traffic should be excluded from the traffic group.

Since AEP Texas has not carried its burden of showing that the rerouted traffic can be included in the SARR traffic group, the supplemental evidence should not include that traffic. It would be impermissible for the Board to give AEP Texas another opportunity to carry its burden of rebutting the presumption against including rerouted traffic in the SARR traffic group, yet that is the practical effect of the Board's decision. Indeed, the Board's instruction in the March 17, 2006 decision that the parties must ensure that the RTC analysis used in the supplemental evidence runs to completion appears to contemplate that AEP Texas will make changes in its operating model and SARR configuration that would allow the SARR to handle the rerouted traffic. It is inconsistent with established rules governing the burden of proof in SAC cases to give the complainant post-rebuttal opportunities to rehabilitate its case on critical elements of the SAC test.

Moreover, the Board's treatment of the presumption regarding rerouted traffic in this case is directly contrary to the approach the Board took in the recent *Otter Tail* case, where virtually the same issue was presented. In *Otter Tail*, the complainant assumed in its opening evidence that certain traffic would be rerouted over a SARR route that was longer than the real world route. It presented evidence on both opening and rebuttal purporting to show that the longer reroute was justified. BNSF showed that both evidentiary presentations were flawed. Thus, when the Board called for supplemental evidence after the record had been closed, the Board made it clear that *Otter Tail* would not have another opportunity to justify the inclusion of the rerouted traffic. The Board ordered the parties to present supplemental evidence without the rerouted traffic. *Otter Tail*, slip op. at 2 (served Dec. 13, 2004). There is no rational justification for treating the rerouted AEP Texas traffic differently from the *Otter Tail* rerouted traffic.

**B. The Rerouted Traffic Should Be Excluded Because It Distorts The SAC Analysis**

The Board recently clarified in the *Otter Tail* decision that cross-over traffic is supposed to simplify the presentation of SAC evidence, not bias the SAC results. *Otter Tail*, slip op. at 14 (served Jan. 27, 2006). AEP Texas' SAC evidence in this case vividly demonstrates the bias that can be introduced into the SAC analysis through a complainant's use of cross-over traffic. The SARR at issue in this case has a route structure that is very similar to the route structure of the SARR at issue in the 1996 *WTU* SAC analysis. However, the 1996 *WTU* case did not involve any cross-over traffic. Therefore, any differences in SAC results between the 1996 *WTU* SAC analysis and the analysis in this case should be attributable either to (1) changes in the underlying market for coal transportation and the costs to construct and operate a SARR, or (2) the impact of AEP Texas' addition of cross-over traffic.

BNSF demonstrated on reply that the far more favorable SAC results that AEP Texas presents in this case do not even remotely flow from changes in market and economic conditions between 1996 and the present. *See* BNSF Rep. Nar. at III.A-16 to 24. Instead, the more favorable SAC results posited by AEP Texas in this case are attributable almost exclusively to the addition of a large volume of cross-over traffic that does not even share the issue traffic route of movement. BNSF demonstrated that AEP Texas' addition of cross-over traffic to the SARR produced only a modest increase in capital costs (117 percent) from the 1996 SAC analysis done without cross-over traffic, while it generated an enormous increase in revenues (159 percent). *See id.* at III.A-22 to 23. This net increase in SARR revenues is a direct result of AEP Texas' adding cross-over traffic to the SARR without positing the full costs to handle the traffic end-to-end. The bias in SAC results produced by the addition of cross-over traffic in this case is undeniable.

AEP Texas does not even maintain the pretense that its use of cross-over traffic was for the purpose of simplifying the presentation of SAC evidence, notwithstanding the Board's statement in *Otter Tail* that simplification is the sole rationale for allowing cross-over traffic to be used in the SAC analysis. Instead, AEP Texas argued that a complainant should be able to use cross-over traffic to produce more favorable results by allowing a complainant to take advantage of economies of density without having to account for off-line costs needed to realize those densities. *See* AEP Texas Reb. Nar. at III-A-12. That position cannot be reconciled with the principle in *Otter Tail* that the results of the SAC analysis should not be biased by the inclusion of cross-over traffic.

BNSF's demonstration of the distortions produced by AEP Texas' use of cross-over traffic in this case should result in the exclusion of all cross-over traffic from the SAC analysis.

But even if the Board does not reject AEP Texas' use of cross-over traffic in its entirety, the Board cannot accept the use of the rerouted traffic, where the distortion produced by the revenue allocation rules governing cross-over traffic is particularly great. The rerouted traffic travels in the real world no more than 48.6 miles on the 1,192 mile SARR route. AEP Texas claims revenues from this traffic that are far out of proportion to the minimal use of SARR facilities by the rerouted traffic. See BNSF Rep. Nar. at III.A-29 to 30 and Table III.A-3. Even though the rerouted traffic shares only a few miles of SARR tracks with other SARR shippers in the real world, the rerouted traffic is assumed by AEP Texas to contribute a substantial portion of the base year SARR revenues. See *id.* at III.A-32.

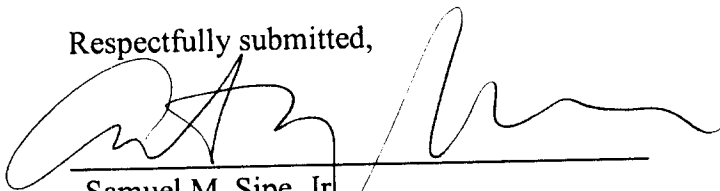
The Board should make it clear that it is serious about the principle it announced in *Otter Tail* that cross-over traffic is supposed to be a means of simplifying the SAC analysis and not a technique to be used by complainants to produce more favorable results. By allocating revenues to the rerouted traffic that are disproportionate to the minimal use of SARR facilities in the real world, AEP Texas has produced a distortion in SAC results that the Board should not allow. The Board should therefore exclude the rerouted traffic from the SARR traffic group.

#### **IV. CONCLUSION**

For both the foregoing reasons, the Board should reconsider its March 17, 2006 decision and order the parties to submit revised operating plans based on a traffic group that does not include the rerouted traffic.

Richard E. Weicher  
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Respectfully submitted,

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

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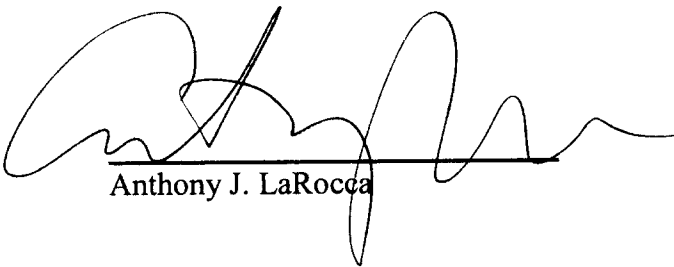
Attorneys for Defendant

April 5, 2006

**CERTIFICATE OF SERVICE**

I hereby certify that this 5th day of April, 2006, I served a copy of the foregoing Petition  
for Reconsideration of BNSF Railway Company to the following by hand delivery:

William L. Slover  
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