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BEFORE THE
SURFACE TRANSPORTATION BOARD

AEP TEXAS NORTH COMPANY,

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 41191 (Sub-No. 1)

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**REPLY OF THE BURLINGTON NORTHERN
AND SANTA FE RAILWAY COMPANY TO AEP TEXAS NORTH'S
REPORT PURSUANT TO 49 C.F.R. PART 1111.10(b)
AND REQUEST FOR PROCEDURAL SCHEDULE**

The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby replies to AEP Texas North's ("AEP") Report Pursuant to 49 C.F.R. Part 1111.10(b) and Request for Procedural Schedule ("Report and Request") filed with the Board in this docket on August 22, 2003. In its Report and Request, AEP faults BNSF for declining to attend a preliminary conference to discuss procedural matters in this case. BNSF has already explained in its August 25, 2003 letter to the Board and its September 2, 2003 Motion to Dismiss the Complaint that it declined to participate in the preliminary conference because AEP has abused the Board's complaint process by purporting to challenge the reasonableness of a rate that it refuses to pay. It would have made no sense for BNSF to discuss the procedural aspects of a case that should not

go forward unless and until AEP complies with the substantive requirements of governing law by paying the lawfully established rate that it seeks to challenge.¹

For the same reason, it would make no sense for the Board to adopt a procedural schedule given the current posture of the case. In its motion to dismiss, BNSF has raised a serious threshold argument that the Board must decline to entertain AEP's rate complaint unless and until AEP has complied with the statutory scheme by paying BNSF's lawfully established rate. BNSF's motion goes to the issue of whether this proceeding has been initiated properly. If the Board agrees with BNSF that it has not been initiated properly, then there is no need for a procedural schedule at this time.

It would be inappropriate for the Board to require BNSF to respond to discovery and otherwise begin preparing to defend against AEP's rate complaint while the threshold issue raised in BNSF's motion to dismiss is pending before the Board. AEP Texas argues that the filing of a motion to dismiss "does not operate to stay or delay proceedings," citing *Ex Parte No. 527, Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings*. Report and Request at 7 n.2. In that decision, the Board stated:

[W]e will not adopt the proposal that a motion to dismiss be filed with an answer or within 20 days after grounds for the motion arise. Rather, we will retain the existing rule that motions to dismiss can be filed at any time. However, to ensure that there is no misunderstanding as to the effect of the filing of any motion (whether a motion to dismiss, to compel discovery, or otherwise), we will follow a policy that, unless we issue an order altering the procedural schedule, parties to a proceeding will be expected to adhere to the established schedule pending a decision on the motion.

¹ AEP knows perfectly well that it is required to pay BNSF's established rate on the non-Rawhide movement. On September 2, 2003, AEP filed a Petition to Vacate Prescription on the Rawhide movement. In that pleading AEP states: "To be sure, removal of the prescription means that the carrier is free to set – and the shipper must pay – any new rate it chooses, subject to the Board's jurisdiction to review it on reasonableness grounds." Petition to Vacate at 11.

Ex Parte No. 527, *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings* at 9.

Here BNSF filed its motion to dismiss to address a fundamental defect in AEP's attempt to initiate the proceeding. The rate reasonableness issue has not been properly joined because AEP has not paid and is not paying the challenged rate. BNSF's motion to dismiss thus goes to the threshold question whether AEP has the ability to initiate any rate reasonableness proceeding. Moreover, BNSF filed its motion within the 20-day period following the filing of the complaint and no procedural schedule has yet been established. Under these circumstances, there is no reason to establish a procedural schedule before the Board has ruled on BNSF's motion.

In its motion to dismiss, BNSF asked the Board to dismiss AEP's complaint, without prejudice to refiling in the event that AEP pays the charges due and owing under the rates that it purports to challenge. If and when AEP pays the challenged rates and refiles its case, BNSF will be prepared to negotiate an appropriate procedural schedule.²

CONCLUSION

For the reasons set forth herein, BNSF respectfully requests that the Board refrain from addressing the matter of a procedural schedule until it has ruled on BNSF's motion to dismiss. If and when it becomes appropriate to establish a procedural schedule, the Board should direct the parties to negotiate a mutually agreeable procedural schedule and submit it to the Board.

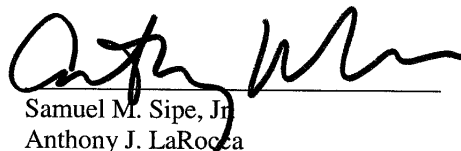
² BNSF would be prepared to negotiate a schedule based on its experience in recent coal rate cases. The procedural schedule that AEP has proposed contains time intervals that are too compressed to allow for the orderly conduct of discovery and the preparation of evidence.

Respectfully submitted,

OF COUNSEL

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September 11, 2003

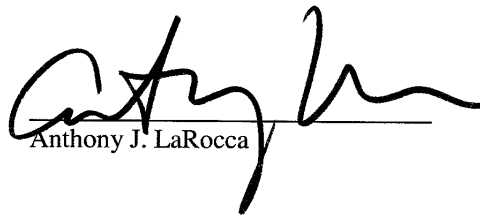
A handwritten signature in black ink, appearing to read "Samuel M. Sipe, Jr.", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by messenger on
this 11th day of September, 2003 on the following:

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