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January 13, 2004



Via HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

JAN 13 2004

Part of
Public Record

Re: Docket No. 41191 (Sub-No.1), AEP Texas North Company
v. The Burlington Northern and Santa Fe Railway Company

Dear Secretary Williams:

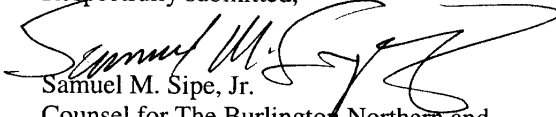
Attached to this letter are the two federal court decisions that complainant AEP Texas North Company ("AEP") refers to in its January 7, 2004 Reply to Defendant's Motion to Dismiss Supplement to the Verified Complaint of AEP Texas North Company. AEP grossly mischaracterizes these decisions. AEP irresponsibly asserts, without pointing to any supporting language, that "[t]hese federal court decisions recognized that the parties had engaged in a course of conduct over a number of years *in which they had voluntarily agreed to maintain the status quo pending resolution of their rate dispute.*" AEP Reply at 3-4 (emphasis added). The attached decisions do not even hint at the existence of such an agreement much less that any alleged agreement was the basis of either decision. Moreover, the suggestion that BNSF ever made such an agreement is false. The unrefuted testimony of BNSF's Vice President of Coal Marketing, Sami M. Shalah, shows that BNSF did not seek to enforce its common carrier rights while commercial negotiations were pending, but BNSF never agreed that AEP could pay less than the established rate in the event commercial negotiations were unsuccessful. *See* Verified Statement of Sami M. Shalah, Attachment A to Motion of The Burlington Northern and Santa Fe Railway Company to Dismiss the Complaint (filed September 2, 2003).

BNSF urges the Board to read the attached decisions. AEP's position is that these two decisions preclude the Board from enforcing the governing statute and complying with established procedures in rate reasonableness disputes. Nothing in these decisions provides a shred of support for this position. The two decisions merely state that the federal courts will not exercise their authority in this dispute until the Board has addressed the underlying rate

The Honorable Vernon A. Williams
January 13, 2004
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reasonableness claims. The two decisions did not, and could not, restrict the Board's own exercise of jurisdiction over AEP's rate reasonableness claims.

Respectfully submitted,



Samuel M. Sipe, Jr.
Counsel for The Burlington Northern and
Santa Fe Railway Company

cc: Counsel for Complainant

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED

JUN 16 - 1 2003

CLERK, U.S. DISTRICT COURT
BY _____
DEPUTY

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

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VS.

CIVIL ACTION NO. 4:03-CV-213-Y

AMERICAN ELECTRIC POWER
COMPANY, INC., ET AL.

ORDER GRANTING DEFENDANT'S MOTION TO REFER TO THE SURFACE
TRANSPORTATION BOARD AND MOTION
TO STAY PENDING REFERRAL AND ADMINISTRATIVELY STAYING CASE

Pending before the Court is defendant AEP Texas North Company ("AEP")'s Motion to Refer to The Surface Transportation Board ("STB") [doc. # 20-1] and Motion to Stay Pending Referral [doc. # 20-2], filed June 12, 2003. Having carefully considered the motion, response, and the reply, and the supplemental response, and in light of the decisions of the United States Court of Appeals for the Fifth Circuit in *Advance United Expressways, Inc. v. Eastman Kodak Co.*, 965 F.2d 1347 (5th Cir. 1992) and the United States Supreme Court in *Reiter v. Cooper*, 507 U.S. 258 (1993), the Court concludes that the equities¹ in this case indicate that the Court should not proceed immediately to judgment on plaintiff Burlington Northern and Santa Fe Railway Company ("BNSF")'s complaint without waiting for the STB to rule on the reasonableness of BNSF's rates for transportation.

¹The following factors tip the equities in favor of referring the reasonableness issue to the STB: (1) that BNSF first sought guidance from the STB whether it could raise its rates for transportation service to Oklahoma Station; (2) the various attempts by the parties, over a period of several years, to negotiate a settlement; and (3) the on-going pendency of the rate dispute before the STB.

Consequently, it is ORDERED that AEP's Motion to Refer to the STB [doc. # 20-1] is GRANTED. The issue of the reasonableness of BNSF's rates for transportation service from mines in the Powder River Basin ("PRB") of Wyoming (excluding the Rawhide mine) to Oklaunion, Texas is referred to the STB.

It is further ORDERED that AEP's Motion to Stay Pending Referral [doc. # 20-2] is GRANTED. All proceedings in the above-styled and numbered cause are STAYED until further order of the of Court.

In an effort to manage this Court's docket more efficiently, the above-styled and numbered cause should be and is hereby ADMINISTRATIVELY CLOSED. The case may be reopened, without prejudice, upon the motion of either party, once the STB has issued a ruling on the reasonableness of BNSF's rates for transportation service from mines in the PRB to Oklaunion Station.

SIGNED ^{August} ~~July~~ 1, 2003.


TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

TRM/knv



IN THE UNITED STATES COURT OF APPEALS, U.S. COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED

SEP 19 2003

NO. 03-10872

CHARLES R. FULBRUGE III
CLERK

In Re: BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY

Petitioner

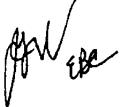
Petition for Writ of Mandamus to the United States
District Court for the
Northern District of Texas, Fort Worth

Before JOLLY, WIENER, and CLEMENT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is
DENIED.

This case involves a dispute between a railroad company,
Burlington Northern and Santa Fe Railway Co. ("BNSF"), and a
utility company, AEP Texas North Co. ("AEP"), arising out of an
agreement between the two for AEP to ship coal along rail tracks
owned by BNSF. BNSF sued AEP to recover several million dollars of
allegedly unpaid transportation charges. AEP replied to this
action by arguing that the fees in question were not reasonable and
requested the district court stay the collection proceedings
pending the resolution of AEP's statutory reasonableness claim
before the Surface Transportation Board ("STB"). The district



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US COURT OF APPEALS

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court granted AEP's motion and ordered that the proceedings before it be stayed. BNSF now seeks mandamus relief from this order.

In order for mandamus relief to be appropriate, BNSF must show that (1) it lacks adequate alternative means to obtain the relief it seeks and (2) its right to the issuance of the writ is "clear and undisputable." Mallard v. United States Dist. Ct. for the S. Dist. of Iowa, 490 U.S. 296, 309 (1989); In re Occidental Petroleum Corp., 217 F.3d 293, 295 (5th Cir. 2000). A writ of mandamus is an "extraordinary remedy." Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988). The party requesting mandamus has the burden of proving a "clear and indisputable" right to the writ. Bankers Life and Cas. Co. v. Holland, 346 U.S. 379, 384 (1953).

Underlying this case is a complex statutory scheme regulating the price that railways can charge shippers for their services. BNSF argues that the order at issue clearly conflicts with this statutory scheme, at least the way in which it has been interpreted by the courts. In response, AEP predictably asserts that the order does not contradict this statutory scheme, but instead is in complete accord with it. After preliminarily reading and analyzing the parties' arguments to this effect, BNSF makes out a plausible argument that the district court got the law wrong. However, it is definitely not clear that this is the case, as the issue presented is novel.

In any event, we need not examine these arguments to reach the conclusion that mandamus should be denied. There are two reasons. First, the order, even if based on an incorrect reading of the law, does not clearly impose any undue hardships on BNSF nor does it plainly constitute irreparable harm. Despite BNSF's assertions that the stay granted here will be of indefinite duration, it appears that under the relevant regulations, the STB must issue a final decision in the pending proceeding no later than December 11, 2004. Moreover, there is no evidence that AEP is insolvent or that it lacks sufficient funds to pay reparations if the STB ultimately rules that the current rate is reasonable. Thus, the hardship BNSF will face is waiting 14 more months to be paid the difference between what AEP is paying it now and what the STB determines will be the reasonable rate.¹ This possible harm does not warrant the use of the "extraordinary remedy" of mandamus.

Second, the Supreme Court has coined what might be characterized as a syllogism for purposes of a mandamus analysis that should be applied here: "if a matter is within the districts court's discretion, the litigant's right to a particular result cannot be 'clear and indisputable.'" Will v. Calvert Fire Ins.,

¹We incidentally note that it is possible that the STB proceeding will determine that the reasonable rate is lower than the rate AEP is currently paying. Indeed, this is the finding that AEP is seeking in that proceeding. Under such a finding, BNSF would end up owing AEP money and not the other way around. According to the District Court order, this was one of the factors in its decision to stay the collection action.

437 U.S. 655, 661 (1978). In Will, the district court had granted a party's motion to stay the proceeding pending the resolution of a state court claim involving similar issues between the parties. On appeal, the Supreme Court refused to issue a writ because the defendant remained free, as the state case progressed, to reurge the district court to reconsider its decision to defer. Id. at 665. More generally, the Court went on to hold that if a matter is within the district court's discretion, the litigant's right to a particular result cannot be "clear and indisputable." Id. at 666.

This holding in Will was most recently applied by this Court in Kmart Corp. v. Aronds, 123 F.3d 297 (5th Cir. 1997). In Kmart, the District Court had granted a motion to stay discovery in a civil suit for fraud pending the resolution of a related criminal proceeding against the same defendant. Id. at 298. We noted that, like the Will case, the district court was free to revisit its decision. Id. at 300. More importantly, we noted that the district court's decision to stay was within its discretion and thus, under Will, the plaintiffs' right to a particular result could never be "clear and indisputable." Id. As a result, the Kmart court concluded that the writ should be denied as the "very high mandamus threshold [was] not met." Id. at 301.

Like Wills and Kmart, this case concerns a matter that is determined by the exercise of the District Court's discretion -

namely, a decision to grant a stay; as in those cases, there is no clear abuse of that discretion. Also like Wills and Kmart, the District Judge here is free to revisit his decision if, for example, the pending STB proceedings are indefinitely delayed. Accordingly, it does not appear to us at this time that BNSF has met the high standard of showing that its entitlement to a particular result is "clear and indisputable."

Given the fact that it does not appear that BNSF can show that it is clearly and indisputably entitled to the result it seeks, the writ will be denied. A closer analysis of the statutory claims made by BNSF is therefore unnecessary.

MANDAMUS DENIED.