



BRUSSELS CINCINNATI CLEVELAND COLUMBUS DAYTON NEW YORK WASHINGTON, D.C.

March 26, 2004

Via Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K St. N.W.
Washington, D.C. 20423

210408



RE: STB Docket No. 42071, *Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company*

Dear Secretary Williams:

Please find enclosed for filing the original and ten (10) copies of Otter Tail Power Company's Motion to Strike Portions of the Supplemental Reply Evidence of The Burlington Northern and Santa Fe Railway Company in the above referenced proceeding.

An extra copy of the Motion is enclosed for stamping and returning to our offices.

Should you have any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

Nicholas J. DiMichael
Jeffrey O. Moreno
Counsel for Complainant

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Office of Proceedings

MAR 26 2004

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Public Record

cc: Counsel for Defendant

42071

210408

Docket No. 42071

*** Expedited Consideration
Requested**

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Public Record

I. INTRODUCTION AND SUMMARY OF ARGUMENT

¹ On March 24, 2004, Otter Tail filed a motion to extend the due date for Rebuttal Evidence by one week, until April 29, 2004, to which BNSF has consented. The Board has not yet ruled on that motion.

² In order to enhance BNSF's ability to respond expeditiously, Otter Tail has provided BNSF with advance notice of its intent to file this Motion to Strike and will serve BNSF electronically, as well as by hand delivery.

so for the express purpose of “[a]llowing the parties here to address new issues raised by recent decisions.” BNSF, however, has used its Supplemental Reply Evidence to make arguments that it could have raised in its October 8, 2003 Reply Evidence, but chose not to do so. As such, those arguments do not address “new issues raised by recent decisions,” but instead reflect “buyer’s remorse” on the part of BNSF for not taking positions in its October 8, 2003 Reply Evidence that it wishes it had taken in hindsight. Such arguments are beyond the proper scope of supplemental evidence and should be stricken from the record. Otherwise, there would be no limits as to what issues parties may raise in supplemental evidence at any time before the close of the evidentiary record, with the consequence of expanding the duration, complexity, and expense of rate cases.

In this case, BNSF has raised two new arguments – each of which could have been made in its October 8, 2003 Reply Evidence – on non-coal traffic reroutes and modifications to the Modified Straight Mileage Prorate (“MSP”) methodology for allocating cross-over revenues. Specifically, these two arguments, and the reasons for striking them from the record, are summarized as follows:

1. Non-Coal Traffic Re-Routes. BNSF asks the Board to exclude non-coal cross-over traffic that moves between Fargo, North Dakota and Snowden, Montana because that traffic has been re-routed over longer distances and allegedly has greater transit times than current BNSF service. In its October 8, 2003 Reply Evidence, BNSF made precisely this same argument, but only with respect to “Z-Train” non-coal cross-over traffic. BNSF intentionally chose not to challenge Otter Tail’s inclusion of other non-coal cross-over traffic on this basis, even though it clearly could have done so. Therefore, Otter Tail asks the Board to strike BNSF’s attempt to extend this argument beyond the “Z-Train” traffic in its March 22, 2004 Supplemental Reply Evidence.
2. MSP Modifications. BNSF proposes a modification to the MSP procedures for assigning revenue block credits for originating and terminating cross-over traffic that it clearly could have presented in its October 8, 2003 Reply Evidence. In

fact, BNSF proposed similar modifications in TMPA³, more than a year before its October 8, 2003 Reply Evidence in this proceeding, with respect to the Modified Mileage Prorate (“MMP”) methodology, which is nearly identical to the MSP methodology. Otter Tail used the MMP methodology in its June 13, 2003 Opening Evidence and BNSF critiqued that methodology in its October 8, 2003 Reply Evidence. But, in its October 8, 2003 Reply Evidence, BNSF elected not to propose any modification to the MMP methodology. Therefore, Otter Tail asks the Board to strike BNSF’s proposed modifications, in its March 22, 2004 Supplemental Reply Evidence, to the MSP Methodology, which is identical to the MMP methodology in the way it assigns block credits for originating and terminating cross-over traffic.

These two arguments appear on the following pages of BNSF’s Supplemental Reply Evidence, which Otter Tail asks the Board to strike—

1. Non-Coal Traffic Reroutes:
 - a. Part III.A.1.d.(2)(a), on pages III.A-22 through 24, which is the core of BNSF’s improper supplemental evidence on this issue.
 - b. The paragraph that extends from the bottom of page I-9 to the top of I-10.
 - c. The 2nd and 3rd sentences in the last paragraph on page III.A-4.
 - d. The 3rd, 4th and 5th sentences in the second paragraph on page III.A-20.
 - e. All referenced and supporting exhibits and workpapers in the above sections.
2. MSP Modifications:
 - a. Exhibit III.A-9, which is the core of BNSF’s improper supplemental evidence on this issue.
 - b. Part III.A.3.c.(1), at pages III.A-34 through 35, which is the chief narrative section on this issue.
 - c. Exhibit III.A-10.
 - d. Page I-18, note 30.
 - e. All referenced and supporting exhibits and workpapers in the above sections.

II. PROCEDURAL BACKGROUND

The parties filed Opening Evidence in this proceeding on June 13, 2003. They subsequently filed Reply Evidence on October 8, 2003. Rebuttal Evidence was then to have been filed by the parties on November 24, 2003.

³ Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co., STB Docket No. 42056 (served March 24, 2003).

On November 10, 2003, however, Otter Tail filed a “Motion to Modify Procedural Schedule and Petition to Supplement the Evidentiary Record” in order to modify its stand-alone cost evidence in response to the new MSP methodology that the Board adopted for allocating cross-over revenues in Duke/NS.⁴ In an order served on November 21, 2003, the Board granted Otter Tail’s motion on the grounds that “[a]llowing the parties here to address new issues raised by recent decisions is reasonable because it will provide the Board with more relevant evidence and allow it to apply recent precedent.” The Board directed Otter Tail to file Supplemental Evidence on January 9, 2004; BNSF to file Supplemental Reply Evidence on February 9, 2004; and the parties to simultaneously file Rebuttal Evidence on March 11, 2004. Otter Tail filed its Opening Supplemental Evidence on February 9, 2003, consisting of approximately 50 pages plus computer records. The latter two dates, however, were extended, in a decision served on December 12, 2003, until February 23, 2004 and March 25, 2004, respectively.

On February 6, 2004, BNSF requested a 4-week extension of the above dates for filing the Supplemental Reply Evidence and Rebuttal Evidence, until March 22, 2004 and April 22, 2004, respectively, purportedly “to address in its supplemental reply evidence an issue regarding rerouted traffic in light of the Board’s recent decision in Duke Energy Corp. v. CSX Transportation Inc., STB Docket No. 42070 (served Feb. 4, 2004).”⁵ (“Duke/CSX”) In a decision served on February 19, 2004, the Board granted the request in order to allow BNSF “to file additional rerouted traffic evidence in light of the Board’s recent discussion of standards governing the inclusion of rerouted traffic in [Duke/CSX].” The Board noted that:

In initially granting Otter Tail’s request to file supplemental evidence and extend the procedural schedule in this case, the

⁴ Duke Energy Corp. v. Norfolk Southern Ry., STB Docket No. 42069 (served Nov. 6, 2003).

⁵ “Defendant’s Motion to Modify Procedural Schedule” at 1 (filed Feb. 6, 2003).

Board's decision served November 21, 2003, stated that allowing the parties to address new issues raised in recent decisions is reasonable because it will provide more relevant evidence and allow the Board to apply recent precedent. The extension of the procedural schedule proposed here will further that end and is reasonable.

BNSF filed its Supplemental Reply Evidence on March 22, 2004, consisting of approximately 350 pages and associated computer records. The parties are scheduled to simultaneously file Rebuttal Evidence on April 22, 2004, in accordance with the Board's February 19, 2004 decision.⁶ Because BNSF's Supplemental Reply Evidence presents arguments far beyond the scope of the Board's two orders permitting supplemental evidence, Otter Tail now submits this Motion to Strike.

III. BNSF HAS RAISED AN IMPROPER AND UNTIMELY CHALLENGE TO RE-ROUTES OF CERTAIN NON-COAL CROSS-OVER TRAFFIC.

BNSF concedes that it "is excluding substantially more of the rerouted non-coal traffic in this supplemental reply" than it did in its October 8, 2003 Reply.⁷ Although BNSF purports to do so based upon new issues raised in the Board's recent decisions in Duke/NS and Duke/CSX, this is not accurate.

BNSF has presented two separate and independent arguments for excluding this additional non-coal traffic in Parts III.A.1.d.(2)(a) and (b). Otter Tail challenges only the propriety of the first argument and evidence in support thereof, which is contained in Part III.A.1.d.(2)(a), on pages III.A-22 through 24, of BNSF's Supplemental Reply Evidence.

The second argument, which is contained in Part III.A.1.d.(2)(b), is proper because it addresses a new re-routing issue discussed by the Board in Duke/CSX, which is the issue that

⁶ On March 24, 2004, Otter Tail filed a motion to extend the due date for Rebuttal Evidence by one week, until April 29, 2004, to which BNSF has consented. The Board has not yet ruled on that motion.

⁷ BNSF Supp. Reply at III.A-20.

BNSF informed the Board, in its February 6, 2004 “Motion to Modify Procedural Schedule,” that it intended to address in its Supplemental Reply Evidence. The Board’s February 19, 2004 decision, in turn, expressly stated that it was granting BNSF’s Motion in order “to allow it to file additional rerouted traffic evidence in light of [Duke/CSX].” But, in contrast, BNSF’s argument in Part III.A.1.d.(2)(a) is not based upon any new issue discussed in Duke/CSX, and therefore, is beyond the scope of the Board’s decision.

In Part III.A.1.d.(2)(a), BNSF belatedly contends that all of the SARR’s non-coal traffic that moves between Fargo, North Dakota and Snowden, Montana should be excluded because it has been re-routed over a greater distance with longer transit times. Both the evidence and legal principles that BNSF relies upon, however, are not new and could have been argued by BNSF in its October 8, 2003 Reply Evidence. BNSF’s attempt to raise this issue now is an abuse of the Board’s process for submitting supplemental evidence by “smuggling in” additional arguments that it wishes it had raised, but chose not to do so, in its October 8, 2003 Reply Evidence.

The fundamental legal standard that BNSF invokes was announced in TMPA, well before BNSF filed its October 8, 2003 Reply Evidence. There, the Board held that a “determination of what traffic may be included in a SAC analysis...is based on...a factual assessment of whether the transportation needs of the shipper would be met by the SARR.”⁸ This holding means that, “if a complainant wishes to reroute cross-over traffic, it must ensure that the combined operations of the SARR and the residual carrier would be at least as efficient as the existing operations.”⁹

⁸ TMPA at 19.

⁹ Duke/CSX at 16, citing TMPA at 18-24.

Clearly, a relevant factor in any analysis of whether rail service is efficient and meets the transportation needs of the shipper is the length of haul and transit times. Indeed, BNSF itself made this factor the centerpiece of its challenge to Otter Tail's inclusion of re-routed non-coal "Z-Train" traffic on the SARR, in its October 8, 2003 Reply Evidence.¹⁰ Although BNSF was well aware of the longer haul, and thus the potential for longer transit times, on the remaining non-coal traffic re-routes, it chose not to challenge Otter Tail's inclusion of that traffic on the SARR.¹¹ Therefore, BNSF should not be permitted to do so now.¹²

BNSF seems to contend that its belated attempt to exclude most of Otter Tail's re-routed non-coal traffic is justified by the Board's statement in Duke/NS that "[t]he starting point for the Board's analysis for rerouted traffic will be length of haul" and that a longer overall haul will establish a rebuttable presumption that the re-route is less efficient.¹³ But, these statements did not raise any new issues or adopt any new standards, and therefore, are an inappropriate basis for filing supplemental evidence. Rather, Duke/NS adopted an evidentiary rule, to simplify the Board's determination under the existing standard, which raises the issue of whether the combined operations of the SARR and the residual carrier over the re-route would be at least as

¹⁰ BNSF Reply Evid. at III.A-41 through III.A-49.

¹¹ Although, at page III.A-23, note 48, BNSF cites to Otter Tail's Supplemental Opening Evidence as the source of its statement that "the rerouted non-coal traffic does not meet real world BNSF service levels," this same evidence was available in Otter Tail's Opening Errata workpapers. See OTP Opening Errata electronic workpapers "timese.DBF" and "timesl.DBF" contained in "OTRR_String_Errata.zip." In fact, BNSF itself made a comparison of transit times in its October 8, 2003 Reply Evidence. See BNSF Reply Evid. at III.A-43, note 70 and BNSF Reply electronic workpaper "Revised Transit Times Comparison.xls," of which the latter contains data comparing BNSF and OTRR transit times for all re-routed traffic. Thus, BNSF cannot claim that its argument simply responds to Otter Tail's Opening Supplemental Evidence.

¹² Otter Tail does not know why BNSF chose not to challenge these other non-coal re-routes in its October 8, 2003 Reply Evidence, at the same time BNSF challenged the "Z-Train" re-routes, nor is the reason relevant. Otter Tail, at this late date, should not be required to develop and prepare evidence to rebut an argument that BNSF could have made at the appropriate time in the procedural schedule.

¹³ BNSF Supp. Reply at III.A-22, citing Duke/NS at 26. Although BNSF cites Duke/CSX as the origin of the Board's rebuttable presumption, the Board first enunciated the presumption in Duke/NS.

efficient as the existing operations, by elevating length of haul above other relevant factors in the initial analysis.¹⁴ The existing standard itself was adopted in TMPA, well before BNSF filed its October 8, 2003 Reply Evidence, and was not changed in Duke/NS, or for that matter, Duke/CSX. As BNSF's challenge to Otter Tail's re-route of "Z-Train" traffic makes abundantly clear, BNSF was well aware of the substantial relevance and importance of the length of haul and transit times to any re-route when it chose not to challenge Otter Tail's re-route of other non-coal traffic. Thus, it is improper for BNSF to use its supplemental evidence to challenge Otter Tail's re-route of non-coal traffic on the basis of the length of haul and transit times.

IV. BNSF IMPROPERLY PROPOSES MODIFICATION OF THE MSP METHODOLOGY IN ITS SUPPLEMENTAL REPLY EVIDENCE.

In Part III.A.3.c.(1) and Exhibit III.A-9 of its Supplemental Reply, BNSF presents an untimely argument for modifying the MSP methodology that it could have raised in its October 8, 2003 Reply Evidence, but chose not to do so. Specifically, BNSF advocates what it calls "more appropriate mileage block credits for originating and terminating coal, merchandise and intermodal traffic."¹⁵ BNSF improperly attempts to use its Supplemental Reply Evidence to reverse its decision not to submit this proposal in its October 8, 2003 Reply Evidence.

Compounding the egregious nature of BNSF's transgression is the fact that BNSF did, in fact, propose similar modifications in TMPA, over a year before filing its October 8, 2003 Reply Evidence in this proceeding.¹⁶ The only noticeable difference between the two arguments is that,

¹⁴ See Commissioner v. Clark, 202 F.2d 94, 99 (7th Cir. 1953) (While an irrebuttable presumption states a rule of substantive law, a rebuttable presumption only states a rule of evidence that the opposing party is entitled to overcome by proof.).

¹⁵ BNSF Supp. Reply Evid. at III.A-34. BNSF's proposed modifications also award the residual incumbent additional miles for interchanging traffic to other railroads and I & I switching. Thus, BNSF has proposed more than a change to the MSP formula; it has proposed a new formula with new variables.

¹⁶ BNSF Supp. Reply Evid., Exhibit III.A-9 at 4. See also TMPA at 31.

in TMPA, BNSF sought to modify the MMP methodology, and here, BNSF seeks to modify the MSP methodology. The MSP methodology, however, is only a slight variant upon the MMP methodology, and more to the point, the block credits for originating and terminating traffic are identical in both methodologies.¹⁷ Therefore, there is no relevant difference between BNSF's proposed modification to MMP's mileage block factor, in TMPA, and to MSP's mileage block factor, in this proceeding.

The fact that the Board adopted MSP in Duke/NS, after BNSF's October 8, 2003 Reply Evidence, does not justify BNSF's attempt to modify the MSP methodology in its Supplemental Reply Evidence. Nor does Otter Tail's use of MSP in its Supplemental Opening Evidence provide such justification. As pointed out in the preceding paragraph, there is very little difference between the MSP and MMP methodologies and absolutely no difference between the credit blocks that each methodology uses for originating and terminating traffic. Otter Tail used the MMP methodology in its June 13, 2003 Opening Evidence¹⁸ and BNSF critiqued the MMP methodology in its October 8, 2003 Reply Evidence.¹⁹ Yet, BNSF chose not to propose any modification to the MMP's credit blocks for originating and terminating traffic, even though it had an equal incentive to modify the credit blocks for both methodologies. The sole fact that Otter Tail now is using the MSP methodology in response to the Duke/NS decision should not give BNSF carte blanche to raise arguments that were equally applicable to the MMP methodology, but which BNSF chose not to raise in its October 8, 2003 Reply Evidence.

¹⁷ See Duke/NS at 24 ("The only difference between the two approaches is that the lumps in the [MMP] have been smoothed out.").

¹⁸ OTP Opening Evid. at III-A-21 through 23 and III-A-26, note 41.

¹⁹ BNSF Reply Evid. at III.A-81 through 82.

V. CONCLUSION

The Board granted Otter Tail and BNSF permission to file supplemental evidence solely for the purpose of addressing new issues raised in recent decisions. BNSF has flagrantly disregarded this scope of supplemental evidence by raising arguments that it could have presented in its Reply Evidence, but chose not to do so, and now wishes to change its mind. That is not the purpose of supplemental evidence. A contrary holding that would allow such evidence to remain in the record would permit the parties to supplement the record at any time and for any reason, simply by using the existence of an intervening decision as a pretext for making other changes to its evidentiary presentation. Such a policy would completely undermine the orderly presentation of evidence and turn the Board's narrow rule on the filing of supplemental evidence into carte blanche revisions of evidence. Moreover, Otter Tail should not be required to incur the time, effort and expense, in just the brief 30-day period between BNSF's Supplemental Reply Evidence and the filing of full Rebuttal Evidence, to rebut entirely new arguments that BNSF could have raised in its October 8, 2003 Reply Evidence.

For the foregoing reasons, Otter Tail requests that the Board strike the evidence and argument identified in Section I of this Motion.

Respectfully submitted,



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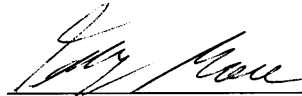
*Attorneys for Complainant
Otter Tail Power Company*

Dated: March 26, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2004, I served a copy of Complainant Otter Tail Power Company's Motion to Strike by hand delivery to counsel for Defendant at the following address:

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