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Office of Proceedings
July 10, 2023
Part of
Public Record

July 10, 2023

VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

**Re: STB Docket No. NOR 42179, Navajo Transitional Energy Co., LLC v.
BNSF Railway Co.**

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced proceeding is BNSF's Appeal of Director's Order Adopting a Procedural Schedule.

The filing fee of \$450 was paid using pay.gov. Please contact me if you have any questions.

Respectfully submitted,

/s/ Anthony J. LaRocca

Anthony J. LaRocca
Attorney for BNSF Railway Company

FILED
July 10, 2023
SURFACE
TRANSPORTATION BOARD

cc: Daniel M. Jaffe, Slover & Loftus LLP
Frank J. Pergolizzi, Slover & Loftus LLP
Andrew B. Kolesar III, Slover & Loftus LLP

FEE RECEIVED
July 10, 2023
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

**APPEAL OF DIRECTOR'S ORDER
ADOPTING A PROCEDURAL SCHEDULE**

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Dated: July 10, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

**APPEAL OF DIRECTOR'S ORDER
ADOPTING A PROCEDURAL SCHEDULE**

Pursuant to 49 C.F.R. § 1011.6(b), BNSF Railway Company (“BNSF”) hereby respectfully appeals the June 30, 2023 order by the Director of the Office of Proceedings of the Surface Transportation Board (“STB” or “Board”) adopting a procedural schedule in this proceeding. As described below, the Board should grant this appeal and amend the procedural schedule, specifically by increasing the length of the discovery period to correspond to the scope and complexity of the issues raised by the claims made in this matter and by providing the parties with an opportunity to exchange materials regarding experts, in order to correct a clear error of judgment and to prevent manifest injustice.

I. Background

On April 14, 2023, the Navajo Transitional Energy Company, LLC (“NTEC”) filed a complaint and petition for declaratory order alleging that BNSF has breached its common carrier obligation, failed to provide adequate car service, and engaged in unreasonable practices with respect to coal transportation service from

NTEC’s Spring Creek mine in Big Horn County, Mont. (“Spring Creek”), to the Westshore Terminals facility at Roberts Bank, B.C., Canada (“Westshore”). In a separate docket, NTEC also filed a related *ex parte* application seeking an emergency service order pursuant to 49 U.S.C. § 11123, or alternatively, a preliminary injunction pursuant to 49 U.S.C. § 1321(b)(4) directing BNSF to maintain certain levels of coal transportation service. (See NTEC Appl., NOR 42178, Apr. 14, 2023.)

By a decision served on June 23, 2023, the Board issued a preliminary injunction ordering BNSF to transport a minimum of 4.2 million tons of coal on an annual basis in 2023 from Spring Creek for service destined to Westshore, and an additional one million annual tons as capacity is available to serve NTEC. See *Navajo Transitional Energy Co.—Ex Parte Pet. for Emerg. Serv. Order (June 23, 2023 Prelim. Inj. Decision)*, NOR 42178 (STB served June 23, 2023). The Board also directed BNSF and NTEC to file regular status reports. In finding that NTEC had a likelihood of success on the merits of the claims in this proceeding, the Board’s preliminary injunction order relied upon, among other things, factual assertions regarding the relationships between NTEC and its Asian coal customers and potential damage to NTEC’s reputation within the global coal commodity market. The Board’s decision also relied upon the terms of past contracts between NTEC and BNSF, and contract negotiations between NTEC and BNSF in 2022, in taking the view that contractual dealings (a subject concededly beyond the Board’s jurisdiction) delimit BNSF’s common carrier obligation a year later.

On May 16, 2023, while the preliminary injunction decision was pending, the parties held a preliminary scheduling conference pursuant to 49 C.F.R. § 1111.11 regarding a procedural schedule for Docket No. NOR 42179. On May 23, 2023, NTEC filed a report stating that the parties were unable to agree on a proposed procedural schedule and proposed a procedural schedule with a discovery period that ran 90 days from the parties' scheduling conference and that would end on August 14, 2023. (*See* NTEC Report 1, May 23, 2023.) Because of the complex questions of capacity allocation and claims of damages implicated by NTEC's complaint, BNSF filed a separate motion for a procedural schedule. BNSF proposed that after approximately 90 days of discovery (running from the date of the parties' submissions), the parties would exchange preliminary expert reports on August 23, 2023, that identify expert witnesses, their area of expertise, and a summary of topics that will be addressed in their testimony, thus allowing each party to then conduct any necessary discovery related to those reports. (BNSF Mot. 1, May 23, 2023.) Discovery would close 30 days later on September 22, 2023, with NTEC's opening submission due on November 21, 2023, BNSF's reply due on January 22, 2024, and NTEC's rebuttal due on February 21, 2024. (*Id.* at 1-2.)¹

In the weeks that followed, no action was taken on the scheduling submissions and the parties engaged in no discovery while waiting for the Board to address NTEC's pending emergency service/preliminary injunction request. By a

¹ BNSF's May 23, 2023 motion proposed due dates of January 22, 2023 for BNSF's reply and February 21, 2023 for NTEC's rebuttal. These dates should have been January 22, 2024 and February 21, 2023, respectively.

decision served on June 30, 2023, the Board, through the Director of Proceedings, issued an order adopting a procedural schedule that has scheduled only 45 days of discovery with the discovery period ending on August 14, 2023, NTEC's opening due September 22, 2023, BNSF's reply due November 2, 2023, and NTEC's rebuttal due November 30, 2023. *See Navajo Transitional Energy Co. v. BNSF Ry. Co. (Director's Order)*, NOR 42179, slip op. at 2 (STB served June 30, 2023).² For the reasons explained below, BNSF appeals the June 30, 2023 *Director's Order* to correct a clear error of judgment and to prevent manifest injustice.

II. Argument

The discovery period established by the Board in the June 30, 2023 *Director's Order* provides for a highly compressed procedural schedule with a discovery period of only 45 days – a discovery period that would be extremely short even for a simple STB proceeding. The compressed schedule will not even permit BNSF to conduct full discovery into the factual issues that the Board has already relied upon in issuing a preliminary injunction, much less additional issues that are relevant to NTEC's complaint. The *Director's Order* did not address any of the issues raised by BNSF and did not consider any of the factual issues and assumptions relied on by the Board in its preliminary injunction decision. As a result, the adoption of an accelerated procedural schedule, with an extremely abbreviated discovery period, constitutes a clear error of judgment and manifest injustice. As explained below, the

² The *Director's Order* was served late in the afternoon on Friday, June 30, 2023, ahead of the July Fourth holiday.

Director's schedule will not permit a full development of the complex and consequential regulatory, liability and damages issues that are raised in this case.

First, the issues that will need to be developed in this matter will require extensive third-party discovery. For example, NTEC alleges that BNSF service has “caused NTEC to lose export coal sales” in Japan and Korea. (*See* NTEC Compl. ¶ 61, Apr. 14, 2023; *also see id.* at ¶ 6, 8.) NTEC also makes allegations about the effect of BNSF's service on its reputation among its customers. *See June 23, 2023 Prelim. Inj. Decision*, NOR 42178, slip op. at 8-9. These allegations alone will require information about the third parties involved in the export coal trade. In prior matters before the Board, third-party discovery has given rise to complex disputes and special procedures. *See, e.g., Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions*, FD 35557, slip op. at 1 (STB served Feb. 27, 2012) (Board found that individual members of the Western Coal Traffic League were subject to discovery under the Board's subpoena power). Indeed, the Board in that case made it clear that it would be inappropriate to allow a procedural schedule “to preclude legitimate third-party discovery. . . .” *Id.*, slip op. at 3. The Director's decision here not only ignored the need for third-party discovery, but established an accelerated schedule that will heavily constrain BNSF's ability to conduct the necessary third-party discovery.

Second, an important and unique feature of this case is that the third-party discovery will involve parties located in foreign countries, including parties located in Asia and Canada. NTEC's complaint addresses BNSF's alleged failures to

transport export coal from Spring Creek to Westshore. (NTEC Compl. 2.) NTEC sells its export coal to customers in Asia on an f.o.b. ocean-vessel basis at Westshore. (*Id.* at 2 n.2.) The Board's preliminary injunction decision relied heavily upon NTEC's allegations regarding statements made by such international parties to find, among other things, that NTEC had a likelihood of success on the merits of its claims in this proceeding. Third-party discovery related to NTEC's allegations about these Asian and Canadian parties will not be simple. Third-party discovery in Japan, for example, will require the preparation of letters rogatory, which are the customary means of obtaining judicial assistance outside the United States in the absence of a treaty or other agreement.³ Even if BNSF already knew the identity of the relevant third parties in Asia, the current discovery schedule does not permit that process to be completed. But BNSF does not yet know the identity of those third-parties at this juncture of the proceeding. BNSF has requested information regarding NTEC's international customers and is awaiting NTEC's initial responses. BNSF will need information from NTEC's initial discovery responses before being able to pursue third-party discovery. The current procedural schedule does not allow adequate time to pursue the necessary discovery.

³ See U.S. Dept. of State, *Preparation of Letters Rogatory*, available at <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internal-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html> (last visited July 10, 2023). The process requires translation of documents, issuance of letters rogatory and transmission of materials to the State Department for service. Obviously, the compressed time period in the Director's schedule would be insufficient to accommodate these procedural requirements.

Third, the discovery requests that NTEC has already served on BNSF are extensive and involve the type of data normally requested in rate reasonableness cases. (See Ex. 1, Excerpt of NTEC First Set of Discovery Requests). As the Board is aware, the production of this type of data, which is the core data produced for stand-alone cost rate cases, involves a time-consuming collection of detailed and voluminous data by railroad employees. The Board has previously recognized the complexity of the process to gather and produce this type of information, as reflected in the Board's regulatory schedule which provides for at least 150 days of discovery in those cases. See, e.g., 49 C.F.R. § 1111.9(a). Indeed, rate cases, which notably do not typically involve the kind of third-party or foreign discovery that will be required here, often have the prescribed 150-day discovery period extended. See, e.g., *E.I. DuPont de Nemours & Co. v. Norfolk S. Ry. Co. (DuPont)*, NOR 42125, slip op. at 1 (STB served Aug. 25, 2011) (Board granted motion to modify the procedural schedule and adjust the due dates by approximately three months, including the close of discovery, in order to account for a three-month delay in production of traffic data); *DuPont*, NOR 42125, slip op. at 1 (STB served Jan. 13, 2012) (Board granted motion to extend procedural schedule because the production of discovery continued beyond the date ordered in the August 25, 2011 order). The Director's schedule sets a completely unrealistic schedule that is less than one-third of the regulatory schedule in stand-alone rate cases where similar discovery is pursued.

Fourth, the issues raised by NTEC and the discovery request it has already served in this proceeding since the issuance of the June 30, 2023 *Director's Order*

demonstrate that the parties will likely need to rely on experts in this proceeding. BNSF's May 23, 2023 motion proposed to facilitate that process by building in time for the parties to exchange preliminary expert materials after approximately 90 days of discovery. (BNSF Mot. 1.) BNSF suggested that the parties would exchange brief reports that identify expert witnesses, their area of expertise, and a summary of topics that will be addressed in their testimony, thus allowing each party to then conduct any necessary discovery related to those reports. (*Id.*) Under the current procedural schedule adopted in the June 30, 2023 *Director's Order*, the time for expert discovery is not even contemplated.

III. Conclusion

For these reasons, BNSF respectfully requests that the Board modify the Director's procedural schedule and adopt the time intervals contained in the procedural schedule proposed by BNSF in its May 23, 2023 filing, measured from the date of the Director's procedural schedule, so that the parties can properly address the complex issues raised by NTEC's complaint allegations.

Respectfully submitted,

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Counsel for BNSF Railway Company

Dated: July 10, 2023

EXHIBIT 1

EXCERPT OF NAVAJO TRANSITIONAL ENERGY COMPANY, LLC.'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Request for Production No. 3

Please produce the databases, data warehouses and computer programs (with all documentation related to these databases and computer programs and associated selection criteria), in a computer-readable format, that include the information listed below for each movement handled by BNSF during the time period from January 1, 2020 through the present as originating, terminating, overhead, single-line, interline, or AAR Rule-11 carrier and originating, terminating or traversing the States of Idaho, Montana, Nebraska, Oregon, South Dakota, or Washington, as well as British Columbia, Canada. For purposes of this request, please produce and identify the appropriate fields to correctly link the data in the event the data are in separate tables. Please also include and identify fields required to correctly link this data to the car and locomotive event data produced in response to Request for Production No. 4 and to the train movement data produced in response to Request for Production No. 5, and please include any “foreign key(s)” that BNSF uses in the normal course of business to link the data sets.

- a. Unique Waybill number and date;
- b. The name of the consignor, consignee, shipper, payee, and customer for each shipment record;
- c. Commodity (seven-digit Standard Transportation Commodity Code “STCC”);
- d. Toxic Inhalation Hazard/Poisonous Inhalation Hazard (“TIH/PIH”) Commodity Identifier;
- e. Origin station and origin State (or province);
- f. Destination station and destination State (or province);
- g. For shipments that originated on BNSF’s system(s), the date and time the shipment was originated;
- h. For shipments BNSF received in interchange, the on-junction location station, state, Standard Point Location Code (“SPLC”), Freight Station Accounting Code (“FSAC”), and milepost;
- i. For shipments BNSF received in interchange, the road received from;
- j. For shipments BNSF received in interchange, indicate whether BNSF provided any crosstown dray service or whether it was a steel-wheel interchange;
- k. For shipments BNSF received in interchange, the date and time the shipment was interchanged;

- l. For shipments given in interchange, off-junction location station, state, SPLC, FSAC, and milepost;
- m. For shipments given in interchange, the railroad given to;
- n. For shipments given in interchange, indicate whether BNSF provided any crosstown dray service or whether it was a steel-wheel interchange;
- o. For shipments given in interchange, the date and time the shipment was interchanged;
- p. For shipments terminated on BNSF's system, the date and time the shipment was terminated;
- q. Origin FSAC;
- r. Destination FSAC;
- s. Origin SPLC;
- t. Destination SPLC;
- u. Number of rail cars;
- v. Number of intermodal containers or trailers;
- w. A unique shipment identification or order number for each intermodal container or trailer;
- x. Shipment weight tons (net);
- y. Rail car tare weight;
- z. Intermodal container or trailer tare weight;
- aa. Total freight revenues from origin to destination, or BNSF's share of the total freight revenues in the event that BNSF was not the sole carrier for a particular movement, including any adjustments thereto, along with a description of the adjustment (*i.e.*, add to or subtract from gross revenue);
- bb. Total revenues from surcharges or accessorial charges (including but not limited to fuel surcharges, storage (dwell) charges, demurrage, empty repositioning charges, and expedited upcharges), and whether such revenue from surcharges is included in the total freight revenues and BNSF's division thereof provided in response to Subpart z above;
- cc. An identification of the contract, agreement, tariff, or other pricing authority that the shipment is billed under including the amendment and item numbers;
- dd. TOFC/COFC plan;
- ee. Car/trailer/container initial for each car/trailer/container used to move the shipment (for intermodal movements provide both the railcar and container/trailer initial);
- ff. Car/trailer/container number for each car/trailer/container used to move the shipment (for intermodal movements provide both the railcar and container/trailer number);
- gg. The unique train identification initial and number of all trains used to move the shipment;

- hh. The total horsepower, by train identification, by line segment, used to move the shipment;
- ii. The station, state and SPLC(s) where the traffic was interchanged between trains;
- jj. Total loaded movement miles;
- kk. Total loaded miles on BNSF's system;
- ll. AAR car-type code;
- mm. Provider of car and container/trailer (BNSF-owned, BNSF-leased, shipper or foreign road, or TTX);
- nn. Total empty movement miles;
- oo. Total empty miles on BNSF's system;
- pp. Miles used to derive applicable fuel surcharges;
- qq. Applicable fuel surcharge rate;
- rr. Intermodal service plan code and the intermodal line of business code for each intermodal shipment;
- ss. Length, width and height for each car/container/trailer used to move the shipment; and
- tt. Number of articulated wells included (where applicable) in an individual railcar used to move an intermodal (or other) shipment.

Request for Production No. 4

Please produce documents, in a computer-readable format to the extent available, which contain complete information (including all events) tracking and describing car, trailer/container, and locomotive movements (including yard and hub operations) for all waybills included in the production responsive to Request for Production No. 3. The requested car event information includes, but is not limited to, the following:

- a. Car/Locomotive Initial;
- b. Car/Locomotive Number;
- c. Locomotive Type;
- d. Locomotive Horsepower;
- e. The number and type of locomotives, by train identification, by segment, used to move the shipment;
- f. Car Owner (System, Foreign, Private);
- g. Car/Locomotive Tare weight;
- h. Car Lading weight;
- i. Number of loaded intermodal units on flat cars;
- j. Number of empty revenue units on flat cars;
- k. Number of empty non-revenue units on flat cars;
- l. Event Sequence Number;

- m. Year;
- n. Month;
- o. Day;
- p. Unique Train Identification Symbol and/or Number;
- q. Train Date;
- r. Unique Waybill Number;
- s. Waybill Date;
- t. Load/Empty Indicator;
- u. Unique Shipment Identification Number or order number for each intermodal container or trailer;
- v. Actual event date/time stamp for nodal events;
- w. Time zone indicator;
- x. Event type indicator specifying if the event was an arrival, a departure, an intermediate switching/handling event, or an instantaneous time as in the case of a non-dwell event (e.g., passing a scanner);
- y. Unique System/Network Location Identifier to include the following:
 - 1) Station name;
 - 2) City or metropolitan name;
 - 3) State/Province name
 - 4) SPLC;
 - 5) Latitude and longitude;
 - 6) Engineering Milepost; and
 - 7) Transportation Milepost.
- z. Trackage Rights Indicator;
- aa. Switching Type Indicator;
- bb. Line Segment Name;
- cc. Direction of Travel;
- dd. Interchange Indicator specifying if the car was received or delivered in interchange;
- ee. Identification of interchange railroad;
- ff. Industry Handling Indicator specifying if the car was pulled from origin or placed at destination;
- gg. Switching Indicator specifying if the car was switched to another train, from another train, or to a different position on the same train;
- hh. Time elapsed at event location;
- ii. Event timestamp;
- jj. Time elapsed between event locations; and
- kk. Miles between event locations.

Request for Production No. 5

Please produce complete train movement data (in a computer-readable format to the extent available and including all events and intermediate stations) for all waybills included in the production responsive to Request for Production No. 3. The requested train movement information includes, but is not limited to, the following:

- a. Unique Train Identification Symbol and/or Number;
- b. Train Date;
- c. Train Month and Year (for repeating train dates)
- d. Train Type;
- e. Event Sequence number;
- f. Year;
- g. Month;
- h. Day;
- i. Event date/time stamp;
- j. Time zone indicator;
- k. Event type indicator specifying if the event was an arrival, a departure, an intermediate switching/handling event, or an instantaneous time as in the case of a non-dwell event (e.g., passing a scanner);
- l. Event indicator identifying crew change locations;
- m. Event indicator identifying inspection locations;
- n. Event indicator identifying fueling locations;
- o. Event indicator identifying bad order car switching events;
- p. Event indicator identifying interchange locations;
- q. Unique System/Network Location Identifier to include the following:
 - 1) Station name;
 - 2) City or metropolitan name;
 - 3) State/Province name
 - 4) SPLC;
 - 5) Latitude and longitude;
 - 6) Engineering Milepost; and
 - 7) Transportation Milepost.
- r. Trackage Rights Indicator;
- s. Number of active locomotives arriving at station;
- t. Total Horsepower of all active locomotives arriving at station;
- u. Number and horsepower of idled locomotives arriving at station;
- v. Number of active locomotives departing station;
- w. Total horsepower of all active locomotives departing station;
- x. Number and horsepower of idled locomotives departing station;
- y. Number of loaded railcars arriving at station;
- z. Number of empty railcars arriving at station;
- aa. Number of loaded railcars departing from station;
- bb. Number of empty railcars departing from station;

- cc. Number of loaded intermodal units arriving at station;
- dd. Number of loaded intermodal units departing from station;
- ee. Number of empty intermodal units arriving at station;
- ff. Number of empty intermodal units departing from station;
- gg. Intermodal unit Identification Symbol and/or Number;
- hh. Switching Indicator;
- ii. Number of cars switched onto train;
- jj. Number of cars switched out of train;
- kk. Line Segment Name;
- ll. Direction of Travel;
- mm. Interchange Indicator specifying if the train was received or delivered in interchange;
- nn. Identification of interchange railroad;
- oo. Industry Handling Indicator specifying if cars were pulled from origin or placed at destination;
- pp. Time elapsed at event location;
- qq. Event timestamp;
- rr. Time elapsed between event locations; and
- ss. Miles between event locations.

Request for Production No. 6

Please produce documents, regardless of date, sufficient to identify all geographic station point locations referenced in BNSF's responses to Requests for Production Nos. 3, 4, and 5 including:

- a. SPLC;
- b. FSAC;
- c. Transportation Milepost;
- d. Engineering Milepost;
- e. Railroad (owner);
- f. Freight Station Name;
- g. City;
- h. Metropolitan Name;
- i. State/Province;
- j. Division;
- k. Subdivision;
- l. Latitude; and
- m. Longitude.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *Appeal of Director's Order Adopting a Procedural Schedule* to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Onika K. Williams

Onika K. Williams
Attorney for BNSF Railway Company

July 10, 2023