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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 638



PROCEDURES TO EXPEDITE RESOLUTION
OF RAIL RATE CHALLENGES TO BE CONSIDERED
UNDER THE STAND-ALONE COST METHODOLOGY

REPLY COMMENTS

submitted by

OTTER TAIL POWER COMPANY

Otter Tail Power Company ("Otter Tail") hereby submits these Reply Comments in response to the request of the Surface Transportation Board ("STB" or "Board") in the above-captioned proceeding for comments upon certain proposals to expedite resolution of rail rate challenges under the stand-alone cost ("SAC") methodology. Otter Tail's reply comments are directed primarily to the opening comments of The Burlington Northern and Santa Fe Railway Company ("BNSF"), filed on October 11, 2002.

In its opening comments, BNSF uses examples from pending rate cases, including *Otter Tail v. BNSF*, Docket No. NOR 42071, to argue for a more restrictive discovery standard by complainants of railroad-defendants. Moreover, BNSF seeks to reverse STB discovery precedent and to submit argument on matters still pending before the Board in *Otter Tail* and other pending rate cases. Otter Tail's reply comments seek to dispel BNSF's mischaracterization of its dispute with Otter Tail and to respond to BNSF's attempts to substantially impair critical discovery by shippers in rate complaints.

On page 4 of its comments, BNSF identifies Otter Tail as an example of a complainant making broad and overreaching discovery requests. Specifically, BNSF states that Otter Tail

submitted "four sets of discovery requests . . . , including (with subparts) 10 requests for admission, 56 interrogatories, and approximately 600 requests for production." But, the number of requests, by itself, does not demonstrate that Otter Tail has sought broad and overreaching discovery.

By including subparts, BNSF has greatly exaggerated the volume of Otter Tail's discovery requests and completely ignored BNSF's obfuscatory role that has necessitated so many subparts. BNSF has turned discovery into a game of "hide-the-ball." Unless shippers ask for information with precision, they frequently do not receive it in response to general subject matter discovery requests. As a consequence, shippers have become detailed in their requests, which often requires that a request covering a single subject area be subdivided into several subparts and/or be asked in different ways. The number of discovery requests, thus, does not reflect over-reaching by complainants into extraneous subject areas. Rather, it reflects a need to be sufficiently detailed to ensure that information that is important to preparing SAC cases is provided by BNSF. In addition, Otter Tail's later sets of discovery requests were follow-up requests based upon new information learned from BNSF's initial responses or to refine prior discovery requests to which BNSF objected. Thus, BNSF itself is responsible in part for the number of discovery requests.

BNSF's assertion that responding to discovery requests is an enormous effort is a red-herring. Otter Tail does not doubt that BNSF must undertake a certain amount of effort to respond to discovery, but that has long been recognized by the Board as a necessary part of SAC cases. *Coal Rate Guidelines, Nationwide*, 5 I.C.C. 2d 520, 548 (1985) ("shippers may require substantial discovery to litigate a case under CMP, and we are prepared to make that discovery available to them."). After nearly twenty years of SAC cases, however, BNSF undoubtedly has streamlined its procedures. But, BNSF asserts that "[j]ust to understand the discovery requests and determine whether the requests are objectionable consumes a large amount of time by BNSF's counsel and employees." BNSF Comments at 4. Most of Otter Tail's discovery

requests, however, were identical to those served upon BNSF in the *TMPA*¹ and *Xcel*² rate cases, and probably others. BNSF's responses and objections to Otter Tail's discovery requests also were virtually identical to its responses to TMPA and Xcel. In a few instances, BNSF even forgot to change the name of the party in its responses to Otter Tail. Such "cookie-cutter" responses to the same requests that BNSF has seen repeatedly in prior rate cases hardly reflects an enormous burden that justifies narrowing the scope of discovery available to complainants.

BNSF, by its own admission, attempts to use this rulemaking proceeding to unravel nearly twenty years of discovery precedent in SAC cases. In particular, BNSF expressly asks the Board to state that its recent discovery rulings in the *Northern States*,³ *Xcel*⁴ and *AEPCO*⁵ cases "not be considered as guidance or precedent for the resolution of future disputes." BNSF at 2, 6. These decisions directly relate to pending discovery disputes in Otter Tail's rate case.

In *Xcel* and *AEPCO*, the Board ordered BNSF to produce road property investment data that is essential to the development of movement specific variable costs. Otter Tail has requested precisely the same information from BNSF and is awaiting the Board's decision on its motion to compel. In all three cases, BNSF has objected to producing the information based upon its unilateral determination that the data is unreliable because it is "incomplete, inconsistent [with URCS], and certain to complicate the presentation of evidence." BNSF Comments at 5. The Board has properly recognized that BNSF's objections go to the weight of the evidence rather than its admissibility. *AEPCO* at 7; *Xcel* at 2-3. This holding should not be disturbed even if the Board were to adopt a more restrictive discovery standard. Otherwise, the Board would be granting a defendant-railroad the exclusive right to determine the discoverability of information that is within its sole possession, without allowing the complainant to test or challenge such determinations.

¹ *Texas Municipal Power Agency v. BNSF*, STB Docket No. 42056.

² *Public Service of Colorado d/b/a/Xcel Energy v. BNSF*, STB Docket No. 42057.

³ *Northern States v. Union Pac. R.R. Co.*, STB Docket No. 42059 (served May 24, 2002).

⁴ *Xcel v. BNSF*, STB Docket No. 42057 (served Sept. 25, 2002).

⁵ *Ariz. Elec. Power Coop, Inc. v. BNSF*, STB Docket No. 42058 (Sept. 11, 2002).

Furthermore, to disturb other discovery precedent would be counter-productive to the Board's intention in Ex Parte No. 638 to expedite resolution of SAC cases. It would reopen discovery disputes that were believed to be long-resolved. The result would be more, not fewer, discovery disputes to delay SAC cases.

The production of documents in SAC cases is normally not a cause of delay; rather it is the time it takes to resolve discovery disputes that delay the production of documents and ultimately the pace of SAC cases. A change in the discovery standard for SAC cases will not curtail discovery disputes, and is likely to increase them. Therefore, changing the discovery standard will not prevent delay.

The Board should concentrate on eliminating the ability and incentive to cause delays through the discovery process for tactical gain. Railroad-defendants, not complainants, are the beneficiaries of delay, since the complainant must pay the unreasonably high, often punitive, rail rate while the case is pending. The railroads have every incentive to object to discovery, which forces the complainants to choose between litigating the case without critical information or suffering through the delays of a motion to compel.⁶

For example, railroads are allowed to delay cases by objecting to discovery on clearly inappropriate grounds, knowing that there will be no repercussions for their behavior and that the Board is not likely to rule quickly upon a motion to compel. BNSF's refusal to produce road property investment is a case in point. A fundamental tenet of discovery, no matter where the forum, is that the reliability of information goes to its weight, not its relevance.⁷ Yet, BNSF successfully stalled the *AEPCO* and *Xcel* cases for six months with this objection, which the

⁶ Complainants, on the other hand, often incur the time and expense to produce clearly objectionable information to the railroads because they do not want to incur the delay of defending a motion to compel. See Otter Tail's Reply to BNSF's First Motion to Compel in Docket No. NOR 42071 (filed April 29, 2002), pp. 2, 13, 14, and 16.

⁷ The STB has applied this fundamental tenet repeatedly in discovery disputes. E.g., *Minnesota Power, Inc. v. DMIR Ry. Co.*, STB Docket No. 42038, 1999 STB Lexis 244, *18 (May 11, 1999); *Iowa Pub. Serv. Co. v. BN*, No. 37029, 1985 ICC Lexis 542, at *6-7 (March 11, 1985); *Kansas P&L Co. v. BN*, No. 39386, 1984 ICC Lexis 423, at *6 (June 22, 1984); *Utility Fuels, Inc. v. BN*, No. 39002, 1984 ICC Lexis 407, at *9 (June 29, 1984).

Board correctly ultimately rejected.⁸ Otter Tail's case remains stalled on the same issue, despite the Board's ruling in *AEPCO* a month ago.

Furthermore, the railroads have incentives to overreach in their discovery of complainants. For example, BNSF has sought to subpoena forecasts and projections generated for non-parties by Otter Tail's expert witness. Not only has the subpoena process caused delay to Otter Tail's case, but if the subpoena were granted, an entirely new and unprecedented delay would occur while these non-parties asserted privilege objections to much of their information in the possession of Otter Tail's expert witness. In this instance, neither Otter Tail nor its expert had the requisite possession, custody or control of the subpoenaed information, and therefore, could not have avoided the delay by consenting to their production. Ironically, BNSF asserts that the Board's proposed new discovery standard should allow it to obtain discovery of this information while denying Otter Tail discovery of BNSF's road property investment data.

Finally, it is not at all clear how the Board's proposed discovery standard differs from its application of the current standard. The Board always has required shippers to demonstrate "a real, practical need" for the requested information, to tailor their requests to the particular charges to be proved, and to employ "the least intrusive means of obtaining the information." *Coal Rate Guidelines, Nationwide* at 548. This sounds quite similar to the proposed new standard that "the party seeking discovery would have to have a clear, demonstrable need for the information in order to make its case, and the information would have to be such that it would not be readily available to that party through other means." Therefore, it is unclear how this proposed standard would "sharply restrict the scope of discovery in SAC rate cases" or that there is any need for a restriction. Delays in rate cases are caused by the dilatory discovery tactics of the defendant-railroads and the failure of the Board to create disincentives to such tactics, not by the Board's current discovery standard. The Board will expedite SAC cases, not by modifying

⁸ BNSF effectively delayed the *Xcel* case for over 20 months because, although it initially agreed to produce road property investment information, BNSF changed its mind after 14 months and the Board took an additional 6 months to rule on Xcel's motion to compel. The Board summarily declined Xcel's request to sanction BNSF for its dilatory and misleading conduct. *Xcel* at 3 (Sept. 25, 2002). This is an example of the need for disincentives to abuse the discovery process for delay.

the current discovery standard, but by expediting its own determinations of discovery disputes and creating disincentives to abuses of the discovery process.

Otter Tail supports the Board's efforts to expedite SAC cases. However, Otter Tail has grave concerns about the Board's proposal to narrow the discovery standard. That proposal is not directed to the cause of delays, which is the process for resolving discovery disputes. The proposal, in fact, would contribute to more delays by reopening prior discovery decisions for debate pursuant to the new standard. A narrowing of the discovery standard would be a double blow to complainants because it would reduce the amount of important information available to them and would allow defendant-railroads to relitigate previously resolved discovery disputes. Rather than change the discovery standard for SAC cases, the Board should apply its existing standards in a more timely manner to expedite rate proceedings.

Respectfully submitted,



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