

EXPEDITED CONSIDERATION REQUESTED

242130

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
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November 28, 2016
Part of
Public Record

DOCKET NO. FD 36077

**NORTH COAST RAILROAD AUTHORITY and
NORTHWESTERN PACIFIC RAILROAD COMPANY
PETITION FOR DECLARATORY ORDER**

**NORTH COAST RAILROAD AUTHORITY and NORTHWESTERN
PACIFIC RAILROAD COMPANY - OPPOSITION TO SONOMA-MARIN
AREA RAIL TRANSIT DISTRICT'S MOTION FOR EXTENSION OF
THE PROCEDURAL SCHEDULE**

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This proceeding was filed in October 2016 after SMART began using its dispatching authority to prohibit the Railroad from conducting *any* transportation because SMART asserted contractual arguments that the Railroad was contractually prohibited from transporting or storing LPG railcars. By the time of the telephone conferences SMART had voluntarily relented to allow the Railroad to move any railcars except loaded LPG railcars.

The Board in its November 3rd Decision denied emergency relief but converted the application to a Petition for Declaratory Order with an expedited briefing schedule which did not contemplate the delays that would be caused by SMART's broad discovery demands. SMART has now requested an extension of time to accommodate SMART initiating discovery.

The Railroad opposes the request for an extension because it interferes with the Board's schedule and prejudices the Railroad by extending the time that SMART can block rail

transportation by denying track warrants at times for all goods, and at other times to deny track warrants for certain goods such as LPG.

After the Railroad complied with the Board's schedule and filed its brief SMART simultaneously served discovery requests and a request for extension on November 25. SMART's pretext for extension is that it must conduct broad discovery because the Railroad's Brief did not "provide in sufficient detail the information sought by the Board's November 3, 201r decision." (Motion for Extension, p. 3.) SMART is not asserting that the Railroad failed to provide the requested information, but that in SMART's judgment it was not "in sufficient detail." The Railroad complied with the Board's request for "[e]vidence, such as bills of lading, demonstrating that NWPCo uses the Schellville yard to transport goods in interstate commerce as part of a rail movement." The Railroad's provision of representative inbound and outbound waybills for both shippers, supported by sworn testimony that the waybills were in fact representative complied with the Board's request that the Railroad demonstrate the transportation in interstate commerce, i.e. the shippers ship to NWPCo at interchange, NWPCo moves the railcars to a place of storage, a service provided the shipper to stage the railcars to market, and then complies with the shipper's outbound request. SMART apparently believes that the Board wanted every single waybill for hundreds of cars, because that is what SMART requested in its discovery request. Likewise, the Board requested the typical time period" for storage, not documentation of the storage time for each and every of the hundreds of LPG railcars.

SMART asserts in its extension request that the 12 cars have been moved out from their position blocking the mainline track. While this is true, the basis of the Railroad' request was not the fact that the 12 cars were stranded , but that SMART had denied track warrants for a train of 18 cars, including six grain cars. The fact that the Railroad refused delivery of additional cars

minimized the number of cars stranded at interchange to 12. Because SMART is currently imposing its contractual interpretation by denying track warrants for LPG cars the Railroad will be prejudiced by the delays contemplated by SMART in its extension request.

It is submitted that SMART does not need discovery and certainly not as broad as that requested. SMART does not need discovery because the issue is whether the railcars moved by the Railroad and stored and staged for the shippers as a service constitutes “transportation by a rail carrier.” The evidence submitted by the Railroad provides the basis for that determination. Providing that evidence in comprehensive volume, or delaying the proceeding to the prejudice of the Railroad is not in accord with the Board’s November 3rd Decision.

Furthermore, SMART’s discovery requests are objectionable. (See Exhibit A for the Discovery requests; and Exhibit B for the Railroad’s statement of objections). There obviously is a discovery dispute which will require substantially more time to resolve than the time contemplated by SMART in its request for extension to the great prejudice of the interests of interstate commerce, and the interests of the Railroad. Delay caused by discovery poses absolutely no prejudice to SMART. However, to alleviate any concern of SMART the Railroad offers in its Statement of Objection to make every Waybill for the LPG cars no later than the close of business on November 29 and to make an officer of NWPCo available for deposition, telephonic or otherwise, on November 30, so that SMART will have any arguably legitimate information available to it so it can respond by the time ordered by the Board.

Ironically, SMART’s citation of authority for “good cause” for a delay is Arkansas Electric Cooperative Corp- Petition for Declaratory Order, STB Finance Docket 35305, slip op.at 2 (STB Served May 11, 2010) where the delay was granted to provide time to review

“voluminous, detailed and technical “ evidence being submitted in a reply. This is inapposite to the situation here where SMART complains that the relevant information was summarized, at the request of the Board in its Decision, and it needs more time to obtain voluminous material through discovery.

It is requested that the Request for Extension be denied.

Dated: November 28, 2016

/s/ Douglas Bosco

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EXHIBIT A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36077

**NORTH COAST RAILROAD AUTHORITY AND NORTHWESTERN PACIFIC
RAILROAD COMPANY – PETITION FOR DECLARATORY ORDER**

DISCOVERY REQUESTS OF SONOMA-MARIN AREA RAIL TRANSIT DISTRICT

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November 25, 2016

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36077

**NORTH COAST RAILROAD AUTHORITY AND NORTHWESTERN PACIFIC
RAILROAD COMPANY – PETITION FOR DECLARATORY ORDER**

DISCOVERY REQUESTS OF SONOMA-MARIN AREA RAIL TRANSIT DISTRICT

Pursuant to 49 C.F.R. Part 1114, subpart B, the Sonoma-Marin Area Rail Transit District ("SMART") hereby serves these Discovery Requests upon Northwestern Pacific Railroad Company ("you"). Responses should be served as soon as possible, and in no event later than 15 days from the date of service hereof in accordance with the Board's regulations. You are requested to contact the undersigned promptly to discuss any objections or questions regarding these requests with a view to resolving any disputes or issues of interpretation informally and expeditiously.

INSTRUCTIONS

1. These Discovery Requests ("Discovery Requests" or "Requests," and each of them a "Discovery Request" or "Request") call for all documents and information in the possession, custody, or control of Northwestern Pacific Railroad Company or its employees, officers, agents, or affiliates.
2. Where a Request has a number of separate subdivisions, or related parts or portions, a complete response is required to each part or portion. Any objection to a Request shall clearly indicate the subdivision, part, or portion of the Request to which it is directed.
3. Each Request shall operate and be construed independently, and, unless otherwise indicated, no Request limits the scope of any other Request.

4. Words used in the singular shall include the plural and words used in the plural shall include the singular, whenever the context permits. Terms such as "and," "or," "any," "all," or "including" shall be construed in the broadest and most inclusive manner, in the disjunctive or conjunctive as necessary, in order to bring into the scope of each Discovery Request all information which might otherwise be construed as outside the scope of the Request.
5. References to the present tense shall be construed to include the past tense, and references to the past tense shall be construed to include the present tense, as necessary to bring within the scope of each Request all responsive information that might otherwise be construed to be outside the scope of the Request.
6. If you believe that any Request or definition or instruction applicable thereto is ambiguous, please specify the language that you believe is ambiguous and the interpretation that you are using in responding to the Request.
7. If any document covered by a Request is withheld for whatever reason, including any privilege, furnish a written document identifying all withheld documents in the following manner:
 - a. the specific Request to which the document is responsive;
 - b. the date of the document;
 - c. the name of each author or preparer;
 - d. the name of each person who received the document and the name of such person's employer at the time the person received the document;
 - e. a brief description of the subject matter of the document and any withheld attachments or appendices;

- f. the specific factual and legal basis for withholding; and
 - g. the number of pages withheld.
- 8. Identify all persons who provided information and/or documents for each response.
- 9. For any part of an Interrogatory for which you cannot provide a full answer, after exercising due diligence to secure the information needed to do so, so state, and answer to the extent possible, specifying your inability to answer the remainder and stating whatever information or knowledge you have responsive to such part.
- 10. Where an Interrogatory seeks identification or information as to the existence or content of any document or study, producing or furnishing a copy of the document or study will be accepted as an adequate response to the Interrogatory.
- 11. Please make legible, complete, and exact copies of documents responsive to each Document Request and transmit them to the undersigned counsel. The originals of responsive documents should be retained in the files of you, your counsel, or the consultants or others who have assisted you in connection with this proceeding and have documents in their possession, and made available if requested.
- 12. If and to the extent that documents responsive to any Document Request are in electronic form, produce them in a format that can be read by widely available Windows-based software.
- 13. Documents responsive to each document request should be produced separately with a clear indication of which request they are responsive to, except that documents responsive to multiple requests need only be produced once. Subject to the foregoing, documents should be produced in the groupings in which they are maintained in the ordinary course of business.

DEFINITIONS

1. "Board" or "STB" means the United States Surface Transportation Board.
2. "CPUC" means the California Public Utilities Commission.
3. "Document" means any writing or other compilation of information, whether printed, typed, handwritten, recorded, or produced or reproduced by any other process, including but not limited to intra-company communications, correspondence, telegrams, memoranda, contracts, instruments, studies, analyses, projections, forecasts, summaries, or records of conversations or interviews, minutes or records of conferences or meetings, records or reports of negotiations, diaries, calendars, photographs, maps, tape recordings, computer tapes, computer disks, other computer storage devices, computer programs, computer printouts, models, statistical statements, graphs, charts, diagrams, plans, drawings, brochures, pamphlets, advertisements, circulars, trade letters, press releases, invoices, receipts, financial statements, accounting records, worksheets, drafts, revisions of drafts, and original or preliminary notes. Further, the term "document" includes:
 - a. both basic records and summaries of such records (including computer runs);
 - b. both original versions and copies that differ in any respect from original versions;
and
 - c. both documents in your possession, custody, or control and documents in the possession, custody or control of consultants or others who have assisted you in connection with this proceeding.
4. "FRA" means the "Federal Railroad Administration" of the U.S. Department of Transportation.

5. "NWP Line" means the line of railroad operated by NWP including all main line track, yard track, industrial track, and relevant sidings.
6. "Identify," when used in relation to an individual, corporation, partnership, or other entity, means to state the name, address, and telephone number thereof. "Identify," when used in relation to a document, means to:
 - a. state the nature of the document (e.g., letter, memorandum, etc.);
 - b. state the author, each addressee, each recipient, date, number of pages, and title of the document; and
 - c. provide a brief description of the contents of the document.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Please produce all documents relating to your transportation and storage of LPG loaded tank cars on the NWP Line, including but not limited to communications relating to the marketing of such service by NWP, the sale of such service by NWP, and any other communications by NWP relating to the transportation of LPG loaded tank cars and the storage of such cars at Schellville or at other places on the NWP Line.
2. Please produce all documents relating to the routing of the LPG loaded tank cars that have been stored at the Schellville yard, including but not limited to communications relating to the origin, storage destination and ultimate destination of such cars and NWP's role in the movement of such cars.
3. Please produce all documents relating to the length of time that the LPG loaded tank cars are scheduled to be stored at the Schellville yard, including but not limited to communications between NWP and the shipper, owner or other entity controlling the

final destination or disposition of such cars and their movement from Schellville to such final destination.

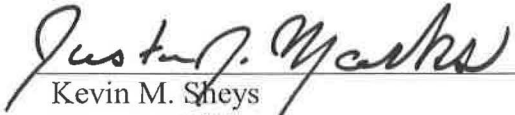
4. Please produce all copies of bills of lading relating to the LPG loaded tank cars that NWP has moved to the Schellville Yard since July 28, 2016.
5. Please produce all copies of contracts with Valero Marketing Supply Company and Tesoro Refining & Marketing Company LLC for the storage of LPG loaded tank cars.
6. Please produce all copies of contracts with any other shipper for the storage of LPG loaded tank cars or for the storage of any other hazardous material.
7. Please produce copies of the lease agreements that NWP has established pertaining to the tracks in Schellville on which it has stored the LPG loaded tank cars.
8. Please produce all documents identified in response to the Interrogatories below, and all documents used or consulted in the course of the preparation of your response to each of those Interrogatories.

INTERROGATORIES

1. Identify and describe all communications relating to the lease agreements or arrangements that NWP has established pertaining to the tracks in Schellville on which it has stored the LPG loaded tank cars.
2. Identify and describe all communications relating to the purported voluntary hold that NWP has placed or arranged on approximately 30 LPG loaded tank cars that were bound for Schellville yard.
3. Identify and describe all communications with the FRA and CPUC regarding the movement and storage of the LPG loaded tank cars on the NWP Line.

4. Identify by name, title, and corporate affiliation all persons, including NWP employees, consultants, contractors, and any non-NWP employees, who authored, contributed to, or were otherwise responsible, in whole or in part, for any of the documents produced in response to the foregoing Document Requests, and identify, for each person, the document(s) for which they were responsible.

Respectfully submitted,



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Dated: November 25, 2016

EXHIBIT B

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November 28, 2016

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Dear Counsel,

The Board's Decision on November 3 contemplated prompt resolution of the controversy in the context of denying an emergency order, and in the further context of SMART currently interposing its contractual dispatch authority to obstruct the movement of LPG cars. For these reasons we believe that discovery is not appropriate and should not be had and we will seek an order denying discovery.

Alternative Proposal to Delay for Discovery

We provided representative waybills from both shippers with whom the Railroad has a commercial relationship. We believe that the filing of representative waybills was responsive to the questions posed by the Board's Decision of November 3. As an alternative to providing no discovery at all, and as an alternative to delaying the proceedings, we would be willing to provide all waybills for LPG cars after July 2016, and make an officer of NWPCo available for deposition this week to answer any questions you might properly have as to the waybills

Meet and Confer on the Discovery Requests.

The purpose of this letter is to meet and confer upon your discovery requests served on Friday November 25, 2016 in an effort to resolve discovery issues without involving the Board in any resolvable disputes

We are concerned with the reality that SMART has generated press coverage in an attempt to arouse public safety concerns. Specifically, On September 22 and simultaneously to sending us your initial written complaint as to our transportation activities SMART management

EXHIBIT B

invited an NBC affiliate to broadcast provocative coverage¹; On September 27 SMART's management inappropriately invited a news team to a scheduled FRA inspection of the NWPCo facilities², and the political appointees of the SMART Board of Directors have used the agency's public board meetings to publicly tout the argument that the Railroad is encroaching upon SMART's claim of a superior property interest, and irresponsibly attempting to stoke public fear .

Fundamentally, the requests are so overbroad so as to bring within its sweep documents which are not reasonably calculated to lead to discovery of admissible evidence. Specifically, the details of (1) confidential information, (2) restricted information which the FRA requires not be released, (3) NWPCo's commercial relationships and (4) day- to- day operations have no significance to the questions raised by the Board in its Decision of November 3, 2016 focusing on whether the LPG railcars are transported in interstate commerce, yet your discovery requests are so broadly stated as to require responsive information as to commercial relationships and operations

SMART's management arranged for a television crew to cover the NWPCO practices

1. This request is so overbroad as to include records that the Railroad is required to maintain for review of the FRA , but information that the Railroad is required to "restrict the distribution, disclosure and availability" to authorized officials of the Department of Transportation and Department of Homeland Security. (See 49 C.F.R. § 172.820.)

NWPCo would be willing to provide its communications marketing its transportation and storage service, but its marketing is conducted by contract marketing agents and those documents are not maintained or contractually controlled by the Railroad. Specifically, Allan Lambert marketed NWPCo's services to Tesoro Refining and Marketing Company LLC and BMT Group marketed NWPCo's services to Valero Marketing Supply Company, which marketing is not believed to have been through written communication, but by marketing calls to the respective shippers.

The remainder of Request 1 is duplicative of other requests.

¹ See [Tanker Cars Full Of Hazardous Fuel Abandoned On SMART Train Tracks Near Sonoma](#)

² See [Train Filled With Hazardous Materials Sitting On Sonoma County Tracks Sparks Legal Fight](#)

2. We will produce all waybills for each movement of the transportation of LPG railcars, subject to the execution of an Undertaking- Confidential matter by all persons who will receive the information.
3. This Request 3 for category numbered 3 is unnecessary because no railcars are “scheduled” for storage, but instead are transported and stored by the Railroad on a non-scheduled basis. However, the thrust of this request seems to be satisfied by the production of the waybills.
4. This Request 4 is duplicative of Request 2, with which we will fully comply.
5. This request calls for confidential commercial information which has no bearing upon the issues in this case and has no likelihood of leading to admissible evidence. The issue is whether the Railroad is a rail carrier transporting in interstate commerce. The commercial arrangement with Railroad customers is highly sensitive proprietary information of the Railroad. Even if SMART had not been on a campaign to obstruct the Railroad at every corner, the release of this information to SMART is oppressive. Furthermore, Section 16.01 (a) and (b) of our contract limits the records to which SMART is entitled and the requested information is well beyond that scope.

SMART should not seek indirectly that which it is directly prohibited from receiving under the contract. We will seek an order excusing the production of these contracts under 49 C.F.R. §1114.21 (c) unless this Request 5 is promptly withdrawn.
6. Although the Railroad is marketing its service related to transportation of LPG railcars, including the activity of staging and storage, the Railroad only has relationships with Tesoro Refining & Marketing Company LLC and Valero Marketing Supply Company. If there were other such contracts the objections set forth in response to Request 5 *supra* would be interposed.
7. See response to Request No. 5.
8. See response to Interrogatories set forth below.

Interrogatories

1. These documents have been submitted to the Federal Railroad Administration. Regulatory submissions to federal agencies are not properly the subject of discovery. See Response to Request For Documents # 5.

2. We will produce all such documents to the extent that such documents exist.
3. These documents have been submitted to the Federal Railroad Administration. Regulatory submissions to federal agencies are not properly the subject of discovery. Specifically this request is broad enough to include the Security Plan submitted by the Railroad to the FRA which SMART has improperly asserted authority to review and approve, and the Safety Plan which the Railroad has submitted the FRA and which SMART has also improperly asserted authority to review and approve. The Federal Railroad Administration has specifically instructed the Railroad not to disclose these documents to SMART.

Furthermore this interrogatory is overbroad in that it seeks information related to broad regulatory matters.

Yours very truly,

Christopher J. Neary
Attorney for Petitioner

CJN/cm

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36077

NORTH COAST RAILROAD AUTHORITY and
NORTHWESTERN PACIFIC RAILROAD COMPANY

v.

SONOMA-MARIN AREA RAIL TRANSIT DISTRICT

CERTIFICATE OF SERVICE

I, Cyndi Mason, declare:

I am a citizen of the United State and resident of Mendocino County, California, I am over the age of eighteen and not a party to the within entitled action; my business address is 110 S Main Street, Suite C, Willits, California 95490.

On November 28, 2016, I served

NORTH COAST RAILROAD AUTHORITY and NORTHWESTERN PACIFIC RAILROAD COMPANY – OPPOSITION TO SONOMA-MARIN AREA REAIL TRANSIT DISTRICT’S MOTION FOR EXTENSION OF THE PROCEDURAL SCHEDULE

on the parties in said action by placing a copy of the above-described documents in sealed envelopes, with postage thereon fully prepared for First-Class Mail, addressed to the parties as set forth below, for collection and mailing at Willits, California, following ordinary business practices. I am readily familiar with the practice of Neary & O’Brien for processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service on the same day as it is placed for processing.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 28, 2016, at Willits, California.

/s/ Cyndi Mason
CYNDI MASON