

BEFORE THE
SURFACE TRANSPORTATION BOARD

PUBLIC SERVICE COMPANY OF
COLORADO D/B/A/ XCEL ENERGY

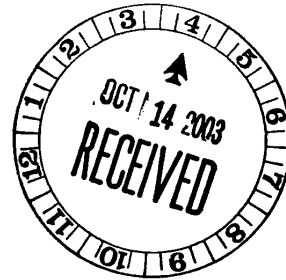
Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

Defendant.

Docket No. 42057



ENTERED
Office of Proceedings

OCT 15 2003

Part of
Public Record

BNSF'S REPLY TO XCEL'S MOTION TO STRIKE

Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby replies in opposition to the September 25, 2003 Motion to Strike filed by complainant Public Service Company of Colorado d/b/a Xcel Energy ("Xcel").

Xcel requests that the Board strike a paragraph and a footnote from BNSF's Final Brief on grounds that they contain "new argument and evidence." Motion to Strike at 1. The paragraph at issue, set out at pages 17 and 18 of BNSF's Brief, discusses delays associated with SARR trains moving coal for the Western Resources Jeffrey plant, an issue addressed at length in BNSF's reply evidence in this proceeding. The footnote, note 62, discusses the infirmities in BNSF's internal road property data that render such data useless for producing a reliable segment-specific calculation of road property variable costs. As discussed below, those materials should not be struck from the record.

1. Paragraph on 17-18: Xcel does not contend that BNSF presents any new *facts* in the paragraph at pages 17-18 of the Final Brief. Rather, it complains that BNSF is “making an *argument* in its Brief that it did not raise in its evidentiary submission.” Motion to Strike at 2 (emphasis added). The alleged new argument is that the Board should not permit the complainant to assume a rerouting of Jeffrey traffic in the stand-alone world from BNSF’s current route through Edgemont, SD and Alliance, NB to the SARR route because of “the seriously increased risk of delay” on the SARR route. *Id.*

Xcel cites no authority to support its position that new argument, as opposed to new evidence, should be struck from final briefs. Indeed, a rule against new argument in a final brief would undermine the purpose of final briefs, which the Board has described as allowing each party to “focus the issues” and “to set forth its position on key issues in light of the full record.”¹ The only precedent that Xcel cites for striking the paragraph is the Board’s recent decision in Docket No. 42069 in which the Board found that the defendant had impermissibly submitted new *facts* with its final brief.² The parties should not present new factual evidence in a final brief, but they must be allowed to provide the Board with a framework for understanding the factual evidence that has been submitted. A rule against new argument would covert final briefs into a simplistic clerical exercise that produced little more than a listing of page cites to evidence in the record.

¹ *Public Service Company of Colorado d/b/a Xcel Energy v The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42057, slip op. at 1 (served August 8, 2003) (“*Xcel Briefing Order*”).

² *Duke Energy Corporation v. Norfolk Southern Railway Company*, STB Docket No. 42069 (served March 25, 2003)(striking evidence on second-half 2002 traffic volumes that were not in the record).

In any event, Xcel's claim that BNSF presented new argument in the brief is misplaced. A major focus of BNSF's reply evidence on the Jeffrey movement related to the delays associated with the operation of Jeffrey trains over the SARR compared to the real world route of movement of Jeffrey traffic. Moreover, *every* fact discussed in the paragraph at pages 17-18 of BNSF's Brief is in the record.

First, BNSF demonstrated the "seriously increased risk of delay" by showing that Xcel's own evidence assumed that the rerouted Jeffrey trains would take longer to traverse the SARR lines than they take to traverse the current BNSF route through Edgemont/Alliance. The evidence on the delays that would be experienced by Jeffrey trains as a result of the proposed rerouting of those trains is set out at pages III.A.23-27 of BNSF's Reply Narrative and included in Table III.A-1 and corresponding electronic workpapers. Additional evidence comparing the longer transit times experienced by all trains on the congested SARR, including the Jeffrey trains, to actual transit times on BNSF is included at Table III.B-4 and Table III.C-1.

Second, BNSF explained at III.A-23-24 of the Reply Narrative that the current route through Edgemont/Alliance was less likely to produce unacceptable delays on Jeffrey trains than the alternative SARR route because the current route was more efficient for trains, like the Jeffrey trains, that originate coal at the northern PRB mines. This discussion is supported by a map comparing the Edgemont/Alliance route to the SARR route that passes through the cluttered PRB. BNSF Reply Exhibit III.A-2. BNSF further noted that the routing of Jeffrey trains south through the PRB would add trains to southern PRB lines that are already congested. BNSF Reply Nar. at III.A-24.

Third, BNSF explained at III.B-8-9 of the Reply Narrative that a major reason for the delays experienced by SARR trains, including the Jeffrey trains, was the interaction of loaded and empty trains in the crowded southern PRB:

The WCC trains experience the longest transit times between the mines and Guernsey. The long transit time on this section is driven by the extended delays that empty trains experience waiting on passing sidings until loaded trains have cleared the single track segments of the WCC mainline.

As BNSF noted, evidence submitted by Xcel on opening showed that “[b]etween Bill and Guernsey, empty trains are shown waiting in passing sidings for hours until loaded trains clear the long single-track sections of track on the WCC.” BNSF Reply Nar. at III.B-9 n.6.

The paragraph at pages 17-18 of BNSF’s Final Brief does nothing more than summarize BNSF’s “position on [a] key issue[] in light of the full record.”³ It is indisputable that a key issue in this case is whether Xcel should be allowed to assume that the Jeffrey movement could be rerouted from its current route to a new route through Guernsey. BNSF argued vigorously on reply that the hypothesized rerouting of Jeffrey trains revenues was impermissible because, among other things, the SARR would not provide service that was as good as the incumbent’s service over the Edgemont/Alliance route. BNSF demonstrated the inferiority of SARR service with evidence of delays experienced by SARR trains and examined the causes of delays on the SARR lines, particularly the need for empty northbound trains to wait in sidings as loaded trains moved southward. All of the evidence in the paragraph at pages 17-18 of BNSF’s Brief is in BNSF’s reply evidence and there is no basis for striking it from the Final Brief.

2. Footnote 62: Footnote 62 of BNSF’s Final Brief contains a reference to the testimony of Xcel’s variable cost witness, Mr. Plaistow, in another pending case, *AEPCO v. BNSF*, STB

³ *Xcel Briefing Order*, at 1.

Docket No. 42058. Specifically, BNSF states in footnote 62 that Mr. Plaistow has sponsored a segment-specific calculation of BNSF's road property variable costs in this proceeding based on BNSF's internal road property data but has taken the position in the *AEPCO* proceeding that BNSF's internal data do not permit segment-specific calculations. Xcel objects to this reference because it was not included in BNSF's Reply Narrative even though BNSF knew at the time that Mr. Plaistow had taken this position in the *AEPCO* case. Xcel also argues that it was improper for BNSF to base its assertion in footnote 62 on a reference to AEPCO's opening evidence, which was filed under seal.

In preparing its response to Xcel's argument regarding footnote 62, BNSF realized that it had mistakenly cited to AEPCO's opening evidence, which was filed under seal, instead of AEPCO's rebuttal evidence, which included a public version. AEPCO's rebuttal evidence, filed on July 3, 2003, after BNSF's Reply evidence in this case, contains the following public statement attributed to Mr. Plaistow:

Because of inadequacies in the line-specific valuation data provided by BNSF in response to a Board order, AEPCO had to use system-average road property capital costs for the BNSF line segments used to transport the issue traffic.

AEPCO Rebuttal Narrative, at II-A-57 n.51 (filed July 3, 2003). This public statement was not available when BNSF filed its reply evidence in the present case on April 4, 2003.

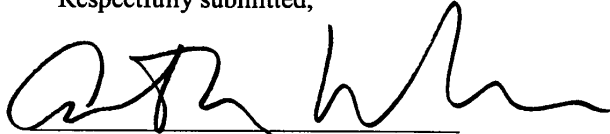
The Board should permit parties to refer in their final briefs to statements on the public record in other proceedings that they believe have a bearing on the credibility of testimony in the case at issue. The Board has recently taken steps to assure that evidence and argument in SAC cases is publicly available to the widest extent possible, consistent with the need to protect

genuinely confidential information. It would serve no legitimate purpose to prohibit parties from bringing inconsistent statements to the Board's attention in their final briefs.

* * * *

For the foregoing reasons, the Board should deny Xcel's Motion to Strike.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "S M Sipe Jr", written over a horizontal line.

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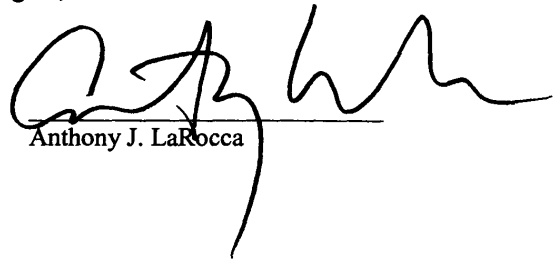
ATTORNEYS FOR THE BURLINGTON
NORTHERN AND SANTA FE RAILWAY
COMPANY

October 14, 2003

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2003, I caused a copy of the foregoing BNSF's Reply to Xcel's Motion to Strike to be served by hand upon the following counsel for Public Service Company of Colorado d/b/a Xcel Energy:

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