

STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Telephone 202.429.3000
Facsimile 202.429.3902
www.steptoelaw.com

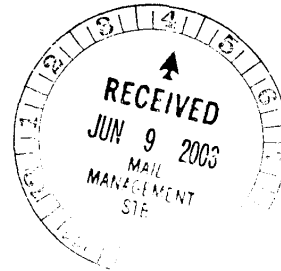
Anthony J. LaRocca
202.429.8119
alarocca@steptoelaw.com

June 9, 2003

708002

via Hand Delivery

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423



**Re: Procedures to Expedite Resolution of Rail Rate Challenges to be Considered
Under the Stand-Alone Cost Methodology, STB Ex Parte No. 638**

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and 10 copies of the Comments of the Burlington Northern and Santa Fe Railway Company On Discovery Matters Addressed In The Board's April 3, 2003 Order.

Please date stamp the extra copy of this cover letter and return it to the messenger who delivered this filing.

Sincerely,

A handwritten signature in black ink, appearing to read 'Anthony J. LaRocca'.

Anthony J. LaRocca
Counsel for The Burlington Northern
and Santa Fe Railway Company

Enclosures

ENTERED
Office of Proceedings

JUN 09 2003

Part of
Public Record

- 1 -

WASHINGTON

PHOENIX

LOS ANGELES

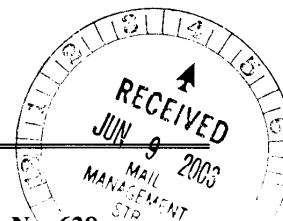
LONDON

BRUSSELS

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

STB Ex Parte No. 638



**COMMENTS OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY ON DISCOVERY MATTERS ADDRESSED IN THE
BOARD'S APRIL 3, 2003 ORDER**

Pursuant to the Board's Decision in STB Ex Parte No. 638, *Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology* (served Apr. 3, 2003) ("April 3rd Decision"), The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby submits these comments in response to the Board's specific questions on four discovery matters: (1) standardized discovery and mandatory initial disclosures; (2) limitations on the scope of additional discovery; (3) time periods covered by discovery; and (4) sharing of discovery costs.

I. Standardized Discovery

The Board requested that the parties "submit lists of all of the information and documents that (a) it believes it should be entitled to obtain as a matter of course in discovery in a SAC case and (b) it would expect to produce to the other party as a matter of course in discovery in a SAC case." April 3rd Decision at 5. The April 3rd Decision contemplates that the Board will review these lists (and responsive comments about them) and determine whether parties to SAC cases should be required to make "initial disclosures" of certain information and documents at an early point in a SAC case.

BNSF agrees that the Board can reduce the burdens associated with discovery in a SAC case by defining in advance the scope of permissible discovery. However, for reasons explained

below, BNSF believes that there should be only a limited role for mandatory “initial disclosures” in a SAC case. Instead of relying broadly on initial disclosures, BNSF urges the Board to identify the areas in which discovery can be pursued and then have the parties use traditional discovery procedures within those areas, i.e., require the submission of specific requests for information within the identified areas. BNSF believes that this approach, discussed further below, is the best way to reduce discovery burdens while minimizing discovery disputes.

1. Mandatory Initial Disclosures: In considering the proper scope of any standardized discovery and mandatory initial discovery disclosures, it is helpful to address separately discovery relating to stand-alone cost and variable cost issues. SAC discovery has the potential for imposing substantial burdens on defendants due to the fact that there is a wide range of factual issues potentially relevant to a complainant’s SAC evidence. If the only criteria for SAC discovery was the potential relevance of the requested information to the costs and revenues of a hypothetical railroad, the defendant in a SAC case would be exposed to broad and onerous discovery burdens. The Board and the ICC have recognized that the burden on defendants from SAC discovery can be kept to reasonable levels only by requiring that discovery requests be focused on specific data needed to determine the costs and revenues of the particular stand-alone railroad that the complainant intends to posit as the basis for its SAC evidence, and that the information is not available from other sources. *See* April 3rd Decision at 4.

Therefore, BNSF does not believe that the Board should require mandatory initial disclosures from a defendant on SAC issues. If mandatory initial disclosures were required on SAC issues, it would be necessary to specify the information to be produced at a detailed level. A requirement that a party produce SAC-related information of a general type, without specifying the particular information sought, would likely exacerbate existing discovery burdens, resulting either in the production of more information than needed in order to satisfy the initial

disclosure requirement or in more disputes about the adequacy of a party's discovery production. For example, if defendants were required to produce information generally about bridges or highway crossings, it would be unclear what specific information the complainant needs about those facilities or what geographic region would be relevant. But the creation of a more detailed list of required discovery on specific issues would be extremely difficult, since it would have to apply to all railroads that could be defendants in SAC litigation and it would have to be appropriate for all possible SARR configurations. An inclusive list might well be longer and more complicated than a list developed by the complainant for purposes of a particular SAC case involving a specific SARR configuration.

In addition, the use of mandatory initial disclosures contemplates that discovery would be conducted in phases, with the initial disclosures being followed up by additional discovery on remaining SAC issues. Such a mandatory process could interfere with the defendant's ability to manage the discovery process internally and could expand the amount of time and effort that a defendant must invest in the discovery process. For example, a single employee may be responsible for responding to several discovery requests. If that employee is required first to prepare information for initial disclosures and then to prepare information for subsequent discovery responses, the discovery burdens on that person and the interference with that person's performance of business responsibilities would be increased.

These concerns are not as acute in the area of variable cost discovery. Variable cost discovery, by definition, relates only to the issue traffic.¹ Therefore, the scope of information potentially relevant to the variable cost calculations is more certain and more limited than in the

¹ BNSF continues to believe that the Board should consider substantially streamlining the variable cost portion of SAC proceedings to expedite its proceedings. *See* Testimony of Richard E. Weicher on behalf of the Burlington Northern and Santa Fe Railway Company at 6 (Feb. 21, 2003), *citing* Written Testimony of AAR at 9-11. If the approach suggested by BNSF in that filing were adopted, discovery relating to variable cost issues could be reduced substantially.

case of SAC discovery. It is also possible to identify in advance several types of data that are repeatedly sought by parties and used in the presentation of variable cost evidence. Thus, it is possible to draw up a discrete and manageable list of standard discovery on variable cost issues.

However, it would be important to limit any initial disclosures on variable costs to information only relevant to variable cost issues. Several recurring discovery requests seek information relevant both to the variable costs of the issue traffic and more generally to SAC costs. For example, complainants request information about joint facilities used by issue traffic trains and about joint facilities on alternative SARR routes that are being evaluated. Discovery relating both to variable costs and SAC would be subject to the same problems identified above. For example, if the defendant produces discrete data relating to the variable costs of the issue traffic movement in an initial disclosure but then additional, and more extensive, information of the same type is sought because of its relevance to SAC issues, the defendant could be required to carry out multiple searches of the same files or data sources.

Exhibit A sets out certain types of variable cost information consistently sought by complainants in SAC cases that would be relevant only to the calculation of variable costs. BNSF proposes that a defendant be required to produce in an “initial disclosure” the information in Exhibit A without a specific discovery request from the complainant. (The timing of such disclosures is discussed below.)

BNSF believes that the same considerations discussed above apply with respect to discovery from complainants. Specifically, most SAC discovery should be carried out in response to particular discovery requests that are tailored to the circumstances of the shipper whose traffic is at issue in the litigation. However, there is a small set of discovery information that a complainant could reasonably be expected to disclose without the need for a specific discovery request. First, BNSF supports the proposal by the Association of American Railroads

("AAR"), contained in its comments filed on February 21, 2003 in this proceeding, that complainants be required to submit in an initial disclosure an URCS-based calculation of variable costs. Second, complainants have the burden of proving that the defendant has market dominance over the movement of the issue traffic and they usually have information that relates to the possibility of alternative transportation of the issue traffic. Therefore, the complainant should be required to produce in an initial disclosure all information in its possession, custody or control relating to intermodal and intramodal competition. The specific data BNSF believes that complainants should produce in an initial disclosure are identified in Exhibit B.

2. Scope of Additional Discovery: As explained above, BNSF believes that most discovery on SAC issues needs to be carried out on the basis of specific requests for information submitted by complainants. A general obligation to produce relevant information on particular topics would either result in the overproduction of information, thus expanding discovery burdens, or in more disputes about the adequacy of the discovery production. Narrowly tailored discovery requests on SAC issues prepared by the party that needs the information are more likely to result in a discovery process that satisfies the needs of the parties without extensive Board involvement.

However, the Board can reduce the burdens on the Board and the parties from SAC-related discovery by identifying in advance the scope of SAC discovery that can be pursued. BNSF therefore believes it would be appropriate for the Board to identify areas within which a complainant and defendant may pursue discovery through particularized discovery requests. If a party believes it is entitled to discovery outside of these areas, it can seek voluntary compliance with additional discovery requests or request that the Board order such additional discovery. BNSF sets out in Exhibit C the areas in which a complainant would be entitled to pursue

discovery. Exhibit D sets out the areas in which a defendant would be entitled to pursue discovery.²

3. Timing of Initial Disclosures: If the Board requires any initial discovery disclosures from either party, it should adopt a realistic timeframe within which parties must provide those disclosures. It would not be appropriate to require that any initial disclosures by a defendant be made with its answer to the complaint. Even if the defendant knows that certain variable cost data will need to be produced, it takes time to collect the data. To give just one example, BNSF is generally able quickly to identify specific locomotives used in issue traffic service, but substantial additional time is needed to collect relevant financial information for the identified locomotives. The 20 days provided in the rules for an answer to a complaint would not be sufficient time to collect the relevant information. In addition, the Board's new mediation procedures will require the attention of in-house and outside counsel who are also involved in organizing the collection and production of discovery. BNSF therefore proposes that any initial disclosures by a defendant be made 10 days after mediation is over. Complainants should also be required to produce initial disclosures in the same time frame.

II. Additional Discovery Limitations

The Board also seeks comment on whether it should limit the number of interrogatories and document requests that can be made without leave, and, if so, why, and to what extent. April 3rd Decision at 5-6. BNSF does not believe that a limitation on the number of document requests would be necessary if the Board limits the scope of discovery by identifying the areas within which discovery is permitted, as discussed above. Limits on the number of discovery requests can be too easily avoided by artificially combining requests or by expanding subparts.

² The materials in the attached exhibits, particularly the materials relating to discovery from complainants, focus on information needed in cases brought by coal shippers.

On the other hand, if the parties are required to limit their discovery requests to a discrete set of issues, the number of requests will necessarily be reduced.

However, BNSF believes it would be appropriate to limit the number of interrogatories and requests for admissions that a party may propound. Interrogatories and admission requests are generally used by the parties in SAC proceedings merely to restate document requests or to ask questions whose answers are readily ascertainable from documents. Therefore, circumscribing the number of interrogatories will not unduly constrain the parties' discovery efforts and will likely reduce discovery burdens by requiring the parties to focus their interrogatories on matters that are best addressed to that discovery format. BNSF specifically recommends that the number of interrogatories and requests for admissions be limited to 15, including subparts.

III. Discovery Time Periods

The Board also sought comments on possible time limitations that could be imposed on discovery. April 3rd Decision at 7. BNSF agrees that discovery burdens can be reduced by limiting the period covered by discovery and it believes that standard discovery time periods should be established. BNSF recognizes, however, that exceptions to these standard time periods may be appropriate in some areas. Exceptions to the standard time periods could be negotiated at initial discovery conferences.

BNSF believes that SAC and variable cost discovery should generally cover only a single, full year's worth of historical information or data. Recent SAC cases have involved SARRs that operate primarily in the future. These SARRs generally use a "base year" of historical data from which projections are made into the future. Complainants do not generally need or use data stretching back beyond the base year, so a one-year discovery period should not interfere with the complainant's preparation of SAC evidence. If a complainant needs older data

to develop construction or road property investment costs, exceptions to the one-year standard can be negotiated by the parties. Similarly, if a complainant intends to rely on a SARR that has more extensive historical operations, the parties can negotiate over the scope of historical data needed to present the SAC evidence.

The time period for market dominance discovery should be more expansive. A party's assessment of competitive alternatives may extend over several years. Moreover, assessments made of competitive issues such as build-out options are likely to continue to be relevant years after they were made. Therefore, the parties should be permitted to pursue discovery related to market dominance over a five year time period. In addition, defendants should be permitted to obtain discovery from complainants over a more extensive time period about projected coal supply and consumption if current projections are not sufficiently detailed or comprehensive.

Finally, the Board sought comments on whether a cut-off point should be imposed on requests for additional discovery. BNSF believes that discovery can and should be conducted within the time frame established by the procedural order that the Board generally adopts at the beginning of a proceeding. Accordingly, if a party wishes to pose additional discovery requests after initial discovery is carried out, it should do so sufficiently in advance of the close of discovery to allow the production of materials in the discovery period.

IV. Discovery Cost Sharing

The Board also asked parties to consider whether it would be appropriate to require the sharing of discovery costs. Specifically, the Board asked about “(1) [its] authority to require such cost-sharing, (2) the circumstances, if any, under which parties should be required to share those costs, (3) how the costs of production would be quantified, and (4) how, if at all, the costs should be divided.” April 3rd Decision at 6.

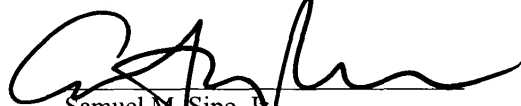
In prior SAC cases, as in most other litigation, the internal costs to a party associated with responding to discovery requests (e.g., opportunity costs for personnel required to search for requested materials) are borne by each party. External costs, such as fees paid to copy companies or to third parties that maintain data on a party's behalf, are generally paid for by the requesting party. BNSF believes that this approach to cost sharing is acceptable and appropriate for the most part. There is one area, however, where additional cost sharing would be appropriate.

In SAC cases, complainants often request a large quantity of electronic data maintained in large databases. BNSF objects to the production of these data to the extent it requires a special study to collect the data and report them in the format requested. However, even when the data are available in the format requested, there are significant programming costs associated with the retrieval of those data, including the time required to write appropriate database queries and the costs associated with running the defendant's computers to download the data. Under current discovery standards, complainants have no incentive to moderate their requests for such data and BNSF has found that responding to these requests has become one of the most difficult and intrusive aspects of the SAC discovery process. The Board should therefore consider establishing a requirement that a party seeking electronic data that must be extracted from existing databases pay the other party the costs associated with obtaining that data.

The authority to impose such a requirement flows from the Board's general power to supervise the discovery process in a SAC case and to disallow discovery that is unduly burdensome. Because the Board could clearly disallow burdensome discovery of this type, it could provide that the discovery be conducted under limited conditions designed to ameliorate the discovery burdens. The Board's regulations expressly provide the authority to require

reimbursement of costs associated with burdensome discovery requests.³ Indeed, some federal courts have made similar cost sharing arrangements relating to the production of electronic information in recognition of the special costs involved in such discovery efforts.⁴

Respectfully submitted,



Richard E. Weicher
Michael E. Roper
The Burlington Northern and Santa Fe
Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Cynthia L. Quarterman
Brooke L. Gaede
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

Attorneys for Defendant
The Burlington Northern and
Santa Fe Railway Company

June 9, 2003

³ 49 C.F.R. § 1114.21(c)(3).

⁴ *Byers v. Illinois State Police*, No. 99 C 8105, 2002 WL 1264004, at *12 (N.D. Ill. June 3, 2002); *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002).

CERTIFICATE OF SERVICE

I hereby certify that this 9th day of June 2003, a copy of the Comments of The Burlington Northern and Santa Fe Railway Company On Discovery Matters Addressed In The Board's April 3, 2003 Order was served by hand delivery or overnight mail on:

Gordon P. MacDougall
1025 Connecticut Avenue, N.W.
Washington, DC 20036

*Attorney for John D. Fitzgerald and the United
Transportation Union-General Committee of
Adjustment*

Steven D. Strege
Executive Vice President
North Dakota Grain Dealers Association
118 Broadway
606 Black Building
Fargo, ND 58102

North Dakota Grain Dealers Association

Rosalind A. Knapp
Deputy General Counsel
The United States Department
of Transportation
400 7th Street, S.W., Room 10428
Washington, DC 20590

*The United States Department
of Transportation*

Jon H. Mielke
Executive Secretary
North Dakota Public Service Commission
600 E. Blvd. Ave., Dept. 408, 12th Floor
Bismarck, ND 58505-0480

North Dakota Public Service Commission

Louis P. Warchot
Dennis J. Starks
Association of American Railroads
50 F Street, N.W.
Washington, D.C. 20001

*Attorneys for the Association of American
Railroads*

William L. Slover
C. Michael Loftus
John H. LeSeur
Kelvin J. Dowd
Christopher A. Mills
Slover & Loftus
1224 17th Street, N.W.
Washington, DC 20036

*Attorneys for The Western Coal
Traffic League*

Ray Hickman
OptionsNet
10435 S. Sandusky Ave.
Tulsa, OK 74137

OptionsNet

Thomas C. Canter
Executive Director
The National Coal Transportation Association
4 Meadow Lark Lane, Suite 100
Littleton, CO 80127-5718

*The National Coal Transportation
Association*

Nicholas J. DiMichael
Michael H. Higgins
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036

*Attorneys for The National
Industrial Transportation League*

Nicholas J. DiMichael
Jeffrey O. Moreno
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036

George Koeck
Otter Tail Corporation
3203 32nd Avenue, S.W.
Suite 110
Fargo, ND 58103

Attorneys for Otter Tail Power Company

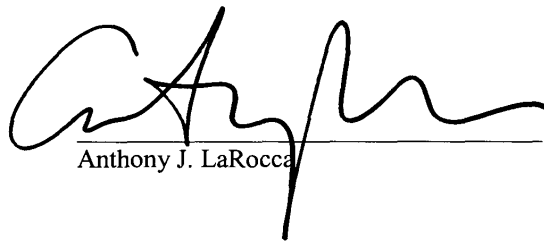
Michael F. McBride
LeBoeuf, Lamb, Greene & MacRae, LLP
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, DC 20009-5728

Attorneys for Edison Electric Institute

Carolyn F. Corwin
Elizabeth Martell Walsh
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004

J. Michael Hemmer
Louise A. Rinn
Union Pacific Railroad Company
1416 Dodge Street, Room 803
Omaha, NE 68179

Attorneys for Union Pacific Railroad Company



Anthony J. LaRocca

EXHIBIT A

Proposed Initial Disclosure
By Defendants

1. Identify individual locomotives used in the issue traffic service and provide applicable lease or ownership information for those locomotives.
2. If the defendant provides the railcars used in the issue traffic service, identify individual railcars used and provide applicable lease or ownership information for those railcars.
3. Identify recently purchased end-of-train telemetry (“EOTD”) devices and provide applicable ownership information for those EOTDs.
4. Identify individual trainmen and enginemen working on each of the issue traffic trains and provide information sufficient to calculate the basis for and wages paid to each individual.
5. Identify individual trainmen and enginemen working on each of the helper services that aided any of the issue traffic trains and provide information sufficient to calculate the basis for and wages paid to each individual.
6. Provide electronic train movement records for the issue traffic.

EXHIBIT B

Proposed Initial Disclosure
By Complainants

1. Documents that evaluate, analyze or study the possibility of Complainant's use of a transportation provider other than the Defendant to transport coal to Complainant's plant or for any part of the movement of coal to Complainant's plant.
2. Documents that evaluate, analyze or study the costs of Complainant's use of a transportation provider other than the Defendant to transport coal to Complainant's plant or for any part of the movement of coal to Complainant's plant.
3. Documents reflecting or discussing contracts, solicitations, negotiations, or other communications or correspondence of any type between Complainant and any provider of transportation related to the transportation of coal for any part of the movement of coal to Complainant's plant.
4. Documents that evaluate, analyze or study the possibility, feasibility, or cost of acquiring, leasing or constructing any facilities, by the Complainant or by any other party, that could be used to transport coal to Complainant's plant or for any part of the movement of coal to Complainant's plant.
5. Documents reflecting or discussing contracts, solicitations, negotiations, or other communications or correspondence of any type between Complainant and contractors, engineers, providers of financing or other entities that could potentially assist in acquiring, leasing or constructing any facilities, by the Complainant or by any other party, that could be used to transport coal to Complainant's plant or for any part of the movement of coal to Complainant's plant.
6. Documents that evaluate, analyze or study the cost of non-rail transportation alternatives for any part of the movement of coal to any coal-fired electricity generating plants.
7. Documents that evaluate, analyze or study the cost of acquiring, leasing or constructing any facilities that could be used to transport coal to any coal-fired electricity generating plant.
8. Calculation of Defendant's revenue to variable cost ratio for the issue traffic movement using publicly available uniform rail costing system data.

EXHIBIT C

Scope of SAC Discovery from Defendants¹

Traffic Data
Car Per Diem Data
Cycle Time Reports
Line Segment Operating Statistics and Density Data
Train Activity and Dispatcher Reports
Timetables and Track Charts
Freight Car Leases and Purchase Agreements
Data related to Helper Services
Wage Rates for Relevant Employees
Material Costs and Price Lists
Standard Construction Specifications
Railroad Facility Locations and Costs (e.g., bridges, tunnels, crossings, etc.)
AFEs for Projects Greater Than \$1 Million
Valuation Maps
Ad Valorem Tax Data and Associated Route/Track Miles
Joint Facility Agreements and Billing Data
Loss and Damage Costs
Relevant Transportation Contracts
Traffic and Revenue Forecasts

¹ Discovery in these areas would be subject to the existence of the requested data and to other established limits on discovery.

EXHIBIT D

Scope of Discovery from Complainants¹

Coal Sources, Historical and Projected
Coal Consumption, Historical and Projected
Forecasts of Coal Transportation Volumes and Rates
Projected Changes in Transportation Requirements
Factors Affecting Future Demand for Coal Transportation
Plant Expansion or Modification
Planning Documents Submitted to Government Agencies
Facility Specifications
Capacity Utilization
Expected Plant Life
Rail Car Information
Information Related to the Issue Traffic Movement
Projected Demand for Coal and Coal Transportation Rates from the Mine or Region from which
Complainant Receives Coal
Information Relating to Coal Transportation to Other Plants That May Be Included in the Stand-
Alone Railroad Traffic Group
Market Dominance Issues Not Covered by Initial Disclosures

¹ Discovery in these areas would be subject to the existence of the requested data and to other established limits on discovery.