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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

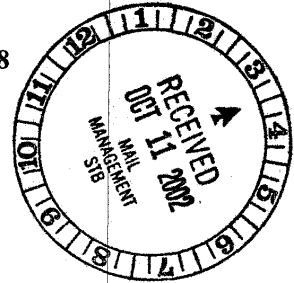
**PROCEDURES TO EXPEDITE RESOLUTION
OF RAIL RATE CHALLENGES TO BE
CONSIDERED UNDER THE
STAND-ALONE COST METHODOLOGY**

STB Ex Parte No. 638

**ENTERED
Office of Proceedings**

OCT 11 2002

**Part of
Public Record**



**COMMENTS OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY**

The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby submits these comments in response to the Board's September 4, 2002 Notice of Proposed Rulemaking. In its Notice, the Board proposes to adopt a mandatory mediation process, to establish a more restrictive discovery standard, and to expedite resolution of motions to compel. As explained below, BNSF shares the Board's objective of resolving potential rate disputes to the maximum extent possible through market-based approaches, and when litigation does result, to streamline proceedings by restricting excessive discovery. Accordingly, BNSF supports the Board's rulemaking proposals, although in a few areas BNSF proposes some clarifications and modest changes. BNSF also joins in the comments filed in this proceeding by the Association of American Railroads.

First, BNSF is strongly in favor of market-based resolutions of rate reasonableness issues and it therefore supports the Board's proposal for confidential mediation prior to the filing of a

rate reasonableness complaint. For the proposed mediations to produce frank and open discussions, the Board needs to make it clear that the mediation will be confidential. Therefore, BNSF proposes that the Board clarify its rule to state that no record of the mediation will be kept and that no information about the mediation will be shared with the Board itself.

Second, BNSF shares the Board's concern that expansive discovery has prolonged rate reasonableness litigation and it supports the STB's goal of streamlining discovery. To accomplish this goal, however, it is important to acknowledge that the vast majority of discovery in SAC litigation involves requests for information by complainants. Moreover, it has been BNSF's experience in several past and pending SAC cases that complainants typically seek broad and overreaching discovery from defendants. Responding to complainants' overly broad discovery requests has imposed unnecessary burdens and costs on BNSF and prolongs the litigation of rate reasonableness disputes. BNSF therefore supports a restrictive discovery standard for SAC cases. Since discovery decisions by the Board in the past few months have permitted broad discovery by complainants that is inconsistent with the proposed restrictive standard, the Board's rulemaking should specify that recent discovery decisions in favor of complainants will not be considered precedent under the Board's new rules.

Third, BNSF agrees with the Board that the scope of discovery by defendants from complainants is generally more narrow than the scope of discovery by complainants from defendants. However, the Board's new rules should make it clear that the new discovery standard will be applied in an even-handed manner and that the Board does not intend to establish a presumption against discovery conducted by defendants. As described in more detail below, there are several areas in which a complainant has relevant and important information

necessary for the resolution of its rate reasonableness claims. The Board should make it clear that its new standard is not intended to preclude a defendant's discovery of this information.

Finally, BNSF supports the Board's proposal to expedite resolution of motions to compel but it does not believe that the time for replying to such motions should be shortened. Recent experience has shown that motions to compel can be complex and not infrequently implicate substantive issues that may be relevant to SAC evidence. Shortening the time for responding to such motions from 20 to 10 days will not have any noticeable effect on the schedule of a SAC case, but it could significantly undermine the respondent's ability to explain to the Board the important issues that need to be addressed in resolving the motion.

I. The Mediation Proposal

BNSF is strongly in favor of market-based resolution of rate disputes with its shippers. Because mediation may promote private resolution of rate disputes, BNSF supports the Board's proposal that the parties to potential litigation engage in non-binding mediation prior to the initiation of a rate reasonableness case. However, BNSF believes that a frank discussion of the issues will be possible only if the parties are confident that the mediation is confidential and that discussions and exchanges of documents in the context of the mediation will not affect any subsequent litigation. Therefore, BNSF proposes that the Board's rules state specifically that there will be no record kept of the mediation and there will be no sharing of information by the parties or the mediator with the Board. BNSF further believes that it would be appropriate for the parties to propose for Board adoption a protective order prior to the initiation of the mediation to ensure that the mediation proceedings will be conducted in a confidential manner.

II. The Proposed Restrictive Discovery Standard

BNSF is the defendant in several pending rate reasonableness cases.¹ In each of those cases, discovery has been completed or is in the final stages. It has been BNSF's experience in those cases that complainants have pursued extremely broad and often overreaching discovery. Discovery is not generally supervised by the Board, so the Board may be unaware of the scope of complainants' discovery in SAC cases. To give a recent example, in the *Otter Tail Power* case, the complainant submitted four sets of discovery requests, covering more than 60 pages of text, including (with subparts) 10 requests for admission, 56 interrogatories, and approximately 600 requests for production. The effort of responding to these discovery requests is enormous. Just to understand the discovery requests and determine whether the requests are objectionable consumes a large amount of time by BNSF's counsel and employees. The subsequent production of information imposes substantial burdens on numerous BNSF departments, computer resources, and dozens of employees who must take time away from their day-to-day business responsibilities.

BNSF therefore supports the Board's proposal that discovery should be limited in SAC cases to information for which there is a demonstrated need. Discovery should not be carried out under the permissive "relevance" standard that has characterized complainants' discovery in the past. The more restrictive standard proposed by the Board is appropriate for SAC cases and it is consistent with the original intent of the ICC when the *Coal Rate Guidelines* were promulgated.

¹ *Texas Municipal Power Agency v. BNSF*, STB Docket No. 42056; *Public Service of Colorado d/b/a Xcel Energy v. BNSF*, STB Docket No. 42057 (hereinafter *Xcel v. BNSF*); *Arizona Electric Power Cooperative v. BNSF and UP*, STB Docket No. 42058 (hereinafter *AEPCO v. BNSF*); and *Otter Tail Power Company v. BNSF*, STB Docket No. 42071. BNSF was also the defendant in a recently completed rate reasonableness investigation in *PPL Montana v. BNSF*, STB Docket No. 42055.

The *Guidelines* indicated that there should be limits on broad discovery and that complainants should be required to demonstrate a “real, practical need” for information requested that is “reasonably tailored to the particular charges to be proved and reflect the least intrusive means of obtaining the information.” *Coal Rate Guidelines*, 1 ICC.2d 520, 548 (1985).

BNSF also agrees with the Board that discovery disputes in recent SAC cases, at least discovery pursuits prompted by complainants’ requests, have been decided under significantly more liberal standards than the standard proposed by the Board in its Notice. The Board’s existing discovery approach involving discovery initiated by complainants is illustrated in several recent decisions. For example, in *Northern States v. Union Pac. R.R. Co.*, STB Docket No. 42059 (May 24, 2002), the Board permitted discovery of Union Pacific Railroad’s FIST accounting records notwithstanding evidence that the information would not be useful in calculating line specific maintenance of way (“MOW”) costs. *Id.* at 3. Similarly, in *AEPCO v. BNSF*, STB Docket No. 42058 (Sept. 11, 2002), the Board ordered BNSF to produce road property investment data notwithstanding that the data were incomplete, inconsistent with the Board’s URCS costing methodology, and certain to complicate the presentation of evidence. Given the problems with the requested data, it is highly unlikely that the complainant could have presented a “clear, demonstrable need” for the data under the Board’s new rule.² The Board also ordered BNSF to produce a train performance simulator model on grounds that such models can be used to estimate fuel consumption on particular trains. However, since the Board has found in the past that fuel consumption estimates based on such a model are not reliable, it would be difficult for a complainant to demonstrate a clear need for such information under the new

² See also *Xcel v. BNSF*, STB Docket No. 42057 (Sept. 25, 2002).

discovery standard. See *Wisconsin Power and Light Co. v. Union Pac. R.R. Co.*, STB Docket No. 42051 slip opin. at 55 (Sept. 13, 2001) (hereinafter *WPL v. UP*).

In light of the Board's objective to restrict discovery and the fact that recent discovery rulings reflect a liberal discovery standard, BNSF suggests that the Board should expressly state that recent discovery rulings in the *Northern States*, *Xcel* and *AEPCO* cases should not be considered as guidance or precedent for the resolution of future disputes.

As to discovery sought by defendants, BNSF believes that defendants generally need less extensive discovery than complainants. However, it is important for the Board's new regulations to make it clear that there is no presumption against defendant-initiated discovery. The Board should state explicitly that all parties will be held to the same standard when seeking discovery and that the Board's new discovery rules will be applied in an even-handed manner.

Some recent discovery decisions in cases where defendants have sought discovery from complainants already reflect a restrictive discovery standard. For example, in *Duke v. Norfolk Southern*, STB Docket No. 42069 & *Duke v. CSX*, STB Docket No. 42070 (July 26, 2002) (hereinafter referred to as *Duke*), and *Carolina Power & Light v. Norfolk Southern*, STB Docket No. 42072 (Aug. 26, 2002), the Board refused requests for discovery on electric power demand forecasts, electricity generation, alternative fuel consumption, and other matters relating to the shipper's future coal consumption. While this information was clearly relevant to SAC issues involving the configuration of a stand-alone railroad and its corresponding traffic assumptions, the Board denied the defendants' motions to compel on grounds that discovery must be narrowly drawn and should not be permitted where less intrusive means exist to obtain the information. *Duke*, slip opin. at 3; *CP&L*, slip opin. at 3. This standard is similar to the standard that the Board is now proposing for all discovery, and the Board should make it clear that it is not

proposing an even more restrictive standard for defendant-initiated discovery that might be construed as a presumption against such discovery.

There are several areas in which a defendant in a SAC proceeding may require discovery from a complainant and the Board's rules should make it clear that it does not intend to prohibit that discovery. One obvious example is discovery related to market dominance. The Board notes in its Notice that "Railroads should already be cognizant of any inter- or intramodal transportation alternatives available for the traffic at issue." While a railroad may be generally aware of competitive alternatives to its service, individual complainants often perform detailed analyses of inter- and intra-modal transportation alternatives to their particular plants. Evidence based on a complainant's own analyses could be regarded as more probative than evidence consisting of testimony from a defendant's witnesses. Defendants should therefore be entitled to information on competitive alternatives from complainants' files.

There are other areas in which a defendant is likely to need discovery from a complainant. For example, the issue of transportation rate projections has been the subject of contention in recent SAC cases. *See, e.g., WPL v. UP*, STB Docket No. 42051 (Sept. 13, 2001). Complainants and their consultants often make projections of transportation rates for internal business reasons. The defendant in a SAC case should be entitled to discovery of that information in order to assess the reasonableness of transportation rate projections that the complainant sponsors in its SAC evidence. Similarly, a complainant's internal coal consumption forecasts and the assumptions underlying those forecasts are important sources of discovery for a defendant. Defendants need to be able to assess the reasonableness of a complainant's SAC traffic assumptions, particularly given the aggressive growth assumptions that are typically made by complainants. A complainant should not be entitled to rely on aggressive growth assumptions

for coal consumption in its SAC evidence when internal projections and estimates made for business purposes reflect a different view of the future.

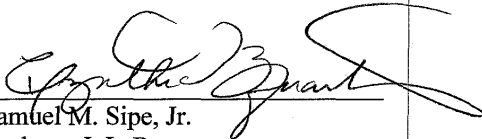
III. Motions To Compel

BNSF supports the Board's proposal for informal conferences with its staff. In many cases, such a conference would assist the Board staff to understand the issues involved in a discovery dispute and therefore to expedite the resolution of disputes. BNSF does not have any disagreement with the timetable proposed by the Board for such conferences.

BNSF does object, however, to the Board's proposal to decrease the response time for replies to motions to compel. A reduction in the 20-day response period will not significantly expedite resolution of motions to compel, but it will affect the ability of the responding party to present facts and argument relevant to the dispute and therefore could also make resolution of motions to compel more difficult for the Board staff. Recent cases have demonstrated that the issues generally raised in motions to compel are complex and often deal with substantive issues that may be relevant to SAC evidence. *See, e.g., AEPCO v. BNSF*, STB Docket No. 42058 (Sept. 11, 2002). The parties need to have a full opportunity to brief the issues if the Board is to make well considered rulings in a timely manner. Indeed, if the Board's proposed filing fee for motions to compel in Ex Parte No. 542 (Sub-No. 4) creates a disincentive to file motions to compel, then it is possible that any motions that do get filed will involve only the most complex and contentious issues. An artificial limit on the briefing time will not serve to expedite the resolution of those disputes. BNSF therefore believes that the Board should retain the present 20-day response time on motions to compel.

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

Respectfully submitted,


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

Attorneys for Defendant
The Burlington Northern and
Santa Fe Railway Company

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