

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**DOCKET NO. NOR 42071**

**OTTER TAIL POWER COMPANY,**

**Complainant,**

**v.**

**THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY,**

**Defendant.**

**PETITION OF PPL MONTANA, LLC TO INTERVENE AS TO  
DISCOVERY ISSUES, AND REPLY IN OPPOSITION TO BNSF  
PETITION FOR SUBPOENA DUCES TECUM DIRECTED  
TO L. E. PEABODY & ASSOCIATES, INC.**

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**Dated: June 17, 2002**

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### **PETITION TO INTERVENE**

Pursuant to 49 C.F.R. § 1112.4, PPL Montana, LLC ("PPL") seeks leave to intervene in this case, for the limited purpose of defending its interests in a pending discovery dispute.

By Petition filed May 28, 2002, defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") seeks discovery of L. E. Peabody and Associates, Inc. ("Peabody"), expert witnesses for complainant Otter Tail Power Company ("Otter Tail"). PPL has seen a redacted version of BNSF's Petition (which is not otherwise publicly available), in which BNSF seeks not merely to depose Mr. Thomas D. Crowley, Peabody's President, but also to obtain all projections of rail rates for PRB coal shippers, whether or not parties to this case or any other cases before the STB.

PPL has obtained analyses from Peabody that could be encompassed by BNSF's Petition, and therefore has a direct interest in this matter.

The Board's rules permit intervention if intervention would not delay the proceeding or unduly broaden the issues raised. The first of these prerequisites is satisfied because the Board suspended the procedural schedule in this proceeding by its decision served May 30, 2002. The second prerequisite is also satisfied. It is BNSF, not PPL, that seeks to broaden this proceeding unduly, by obtaining access to critically sensitive shipper planning and strategic information that has no relevance to this case.

The Board's rules also specify that petitions to intervene must identify the petitioner's interest in the proceeding, explain whether the petitioner supports or opposes the relief sought or action proposed, and explain the requested relief. PPL takes no position on

the merits of Otter Tail's rate case, having no knowledge of its particulars. However, PPL strongly opposes BNSF's Petition and urges that it be denied, as detailed below.

### **REPLY IN OPPOSITION TO BNSF PETITION**

BNSF's Petition for Subpoena Duces Tecum is presented as routine discovery, to which there can be no legitimate objection. In fact, nothing could be farther from the truth.

In seeking discovery of private PRB coal rail rate projections for all Peabody clients -- not just Otter Tail -- BNSF is taking its propensity for aggressive litigation tactics to a new extreme. This demand by BNSF would have little bearing on the Otter Tail rate case, but it threatens severe damage to western coal shippers' ability to make fuel supply plans, and challenge unreasonable rail rates. BNSF's real goal is evidently to harass, if not neutralize Peabody, exacerbating the disadvantage shippers face in obtaining information they need in dealing with western coal-hauling railroads.

#### **I. BNSF Seeks Information of Exceptional Commercial Sensitivity**

While BNSF acknowledges that the information it seeks is commercially sensitive, it argues that the information is no more worthy of protection than the rail transportation contracts that are routinely subjected to discovery. It also argues that existing Protective Orders provide adequate guarantees that no injury will result from the requested disclosure. Petition at 14-15. BNSF is wrong on both counts.

The rail transportation contracts in BNSF's analogy are never produced by railroad defendants without a Board order granting a complaining shipper's motion to compel, and even when such a motion is filed, railroad resistance may arise. See, e.g., BNSF's May 8, 2002 reply to Otter Tail's Second Motion to Compel in this very case, in which BNSF calls for "minimum" disclosure because of the "highly sensitive" nature of the information. In

many respects, however, the information BNSF now seeks from Peabody is even more sensitive than the coal contract information BNSF is so reluctant to provide.

The existence of coal contracts is generally not a secret, and many of the details of such contracts, including mine origins and tonnages received, are available from public sources, such as DOE analyses or FERC Form 423s. Rate and rate escalation information may be less readily available (though it is sometimes possible to develop general estimates of rail rates from information about utilities' delivered fuel prices). However, even if such information were to be learned by shippers (as opposed to their outside counsel and consultants), the railroads have a long history of rejecting rate comparison arguments both in litigation and in negotiations.

Many of Peabody's private rail rate projections, in contrast, involve information that is not publicly available, and which could, if disclosed, provide the railroads or their consultants a clear and unfair advantage in any subsequent contract negotiations or litigation.

Peabody rail rate projections as to specified PRB origins could disclose to BNSF that a shipper is considering switching coal purchases to new mines, that may or may not be served by BNSF. Obviously, it may be more beneficial to BNSF for the shipper to contract with mine A than with mine B. There may be leverage BNSF, or its counsel or consultants, can bring to bear to steer the shipper to BNSF's preferred mines, or away from BNSF's disfavored mines. For example, many utilities face political pressure to use coal from mines located in the states in which they operate. A "leak" of information that a utility is considering out-of-state coals could deter the use of the coal that is cheapest and best, but not maximally profitable for the railroad.

Other strategic plans could be compromised. Peabody's private rail rate projections for power plants in certain years but not others could reveal a utility's plans to put a power plant on line, or to close it down, or could disclose that a utility plans to purchase a power plant from a competitor, or acquire a competitor. The requested discovery could also disclose when these transactions might occur.

Some of this information might be immune from disclosure under the attorney-client or work-product privilege, and PPL does not waive these privileges as to any studies performed for it by Peabody. However, these privileges may fail to protect the Peabody private rate projections where litigation was not anticipated, or no attorney was involved. Some projections may have been produced by Peabody directly to utility fuel department personnel, who were considering fuel sourcing or power production options for business reasons. Assuredly, such Peabody clients never anticipated that their private projections could be disclosed to the very railroads and railroad consultants who might be sitting across the negotiating table from them.

BNSF argues that there is no reason for concern because of the Board-approved Protective Order in the Otter Tail case. Petition at 3-4. However, that order only covers production by a party to this proceeding. Peabody is not a party to this proceeding, and Otter Tail, which is, does not possess or control the private rate projections for other shippers that BNSF seeks to obtain. At page 14 of its Petition, BNSF quotes language from the Board's decision served June 6, 2000 in Wisconsin Power & Light Co. v. Union Pacific R. Co., Docket No. 42051, for the proposition that third parties have nothing to fear. The Board stated:

Third parties who may have apprehensions regarding disclosure of their extremely sensitive materials can allay their

fears by expressing their concern to LEPA [Peabody], who in turn can, along with WPL and UP, determine what level of confidentiality should be assigned to the material produced.

Slip opinion at 3, n. 7, emphasis added.

The quoted language is dicta, because the decision in question dismissed the shipper complainant's motion to quash subpoena as moot, but the quoted language emphatically does not allay third parties' fears. On the contrary, the third party must depend on Peabody, and the shipper complainant in the rate case (here, Otter Tail) and the railroad (here, BNSF) to decide whether its information will be designated Confidential or Highly Confidential. The third party evidently has no control over the designation.

Even if non-parties and Peabody were able to designate such materials as Highly Confidential, several problems remain. First, if these materials are used in BNSF's depositions or in litigation, controlling the information and tracing the source of any disclosure would be difficult. Private rate studies for many utilities, including strategic information described above, would no longer be known only to Peabody and Peabody's client. It would also be known by BNSF's outside counsel and consultants, Otter Tail's counsel and consultants and the STB.

Second, the Protective Order allows even Highly Confidential materials to be disclosed under certain circumstances (e.g., upon order of the STB or an ALJ), and the Order also recognizes the possibility of inadvertent disclosure. Non-parties have only three days to oppose the former, and no chance to prevent the latter.

It is difficult to overstate the potential damage to Peabody clients from disclosure of the information BNSF seeks. It is also difficult to identify railroad information that is of comparable sensitivity. As explained above, their contracts are not comparable.

A better analogy might be to the railroads' internal management costs. The railroads have vigorously resisted disclosure of such costs, and the Board has gone along. See, e.g., the Board's decision served July 8, 1999 in Minnesota Power, Inc. v. DM&IR, Docket No. 42038, slip opinion at 3: "But requiring DMIR to reveal that sort of information would be tantamount to giving access to DMIR's proprietary costing system."

If Peabody's private rate projections are to be fair game for shippers, the Board may need to revisit the issue of discovery (subject to protective order) of internal railroad management costs. Why shouldn't railroads' system average URCS costs be subject to "impeachment" by reference to their internal management costs?

BNSF argues that "If Mr. Crowley is going to sponsor expert testimony on the subject of future rail rates in stand-alone cost proceedings, the credibility of that testimony should be judged in light of analyses and forecasts of rail rates that L. E. Peabody generates for its real world clients." Petition at 12-13. But BNSF can't have it both ways.

For reasons discussed below, PPL regards BNSF's rationale for its Petition as a pretext, but there can certainly be no warrant for railroad non-disclosure of their "real world" costing under this rationale. There are no reasons for presuming that railroads are uniquely transparent, and many reasons to regard their public pronouncements with suspicion.<sup>1</sup> If the Board accepts BNSF's demand for third party information on trumped-up "impeachment" grounds, it is not clear why any information should be off limits.

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<sup>1</sup> BNSF observes (Petition at 11) that in WPL, the Board rejected Peabody's evidence, without mentioning that UP's evidence was also rejected. See the Board's decision served September 13, 2001 at 28 ("Finally, we are troubled by UP's exclusion of information on rates in seven additional contracts that have recently expired.").

## **II. Shipper Self Protection Measures May Compromise the Value of Peabody as a Key Resource**

The discovery sought by BNSF is so potentially damaging to shippers that some shippers are unlikely to be willing to assume that STB protective orders, in this or any other rate case, will provide adequate protection. Such shippers, however, have few alternative means of self-defense available.

No doubt the railroads would like shippers to stop using Peabody for rate and other projections, cost consulting, assistance with contract negotiations, and litigation support. Alternatively, the railroads might contend that Peabody may provide one of these services, but not all of them.

These "options", however, would threaten Peabody's value to shippers, and its financial viability, for no legitimate reason. Providing all of these services, day in and day out, makes Peabody uniquely qualified to help shippers deal with railroads. For a captive shipper to negotiate a contract without researching the benefits that might result from the alternative of litigation is unwise, and benefits only the railroad.

Shippers are already at a disadvantage in such encounters. Litigation is costly, burdensome and time consuming and the railroads' litigation tactics have become more aggressive in recent years, as the Board knows. An obvious example is the instant BNSF petition, but other examples include UP's abusive discovery in the FMC<sup>2</sup> case, BNSF's claim that it does not keep records of locomotive fuel consumption (and its resistance to fair testing of fuel use), the combined UP/BNSF assault on the stand-alone cost constraint, etc.

PPL, having litigated three rate cases in three decades, has more experience with railroad intransigence in contract negotiations, and with recourse to the ICC and STB, than

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<sup>2</sup> STB Docket No. 42022, FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad, decision served May 12, 2002.

many other coal shippers, but PPL's expertise in rail matters, even if above average, is no match for the information resources of a Class I railroad. Captive shippers need the expertise of Peabody in order to have a chance of success in contract negotiations or rate litigation. "[B]urdensome or otherwise improper discovery demands may serve to discourage experts from participating in lawsuits, to the prejudice of the party who seeks to retain them." Evanko v. Electronic Systems Assoc., 1993 U.S. Dist. LEXIS 218, \*7 (S.D.N.Y., Jan. 8, 1993).

BNSF's Petition can reasonably be seen as an attempt to deprive captive shippers of Peabody's assistance, by threatening Peabody's clients with the disclosure of some of their most confidential information. In effect, BNSF seeks to expand its monopoly over rates and service to a monopoly over the information necessary for fuel buying, rail contracting, and rail rate litigation before the Board.

### **III. BNSF's Rationale for its Petition is a Pretext**

At page 13, n. 34 of its Petition, BNSF argues that if discovery "is as narrow as possible and there is a significant need" for the requested information, production burdens (and presumably other considerations) must "yield to the need for the information."

It is disingenuous of BNSF to claim that its discovery is "as narrow as possible." On the contrary, in seeking all of Peabody's PRB rail rate projections, whether or not for a party to this case, or even for a litigant in a rail rate case, BNSF could hardly have made its request less narrow.

BNSF's claim of "significant need" is also spurious. BNSF does not (and cannot) cite a single decision in which the ICC or STB based its determination of future revenue growth on the mere opinion of any expert, for a railroad or shipper. Accordingly, Peabody

testimony on stand-alone railroad revenues is not the kind of testimony as to which there is a significant need for discovery aimed at impeachment.

As BNSF is well aware, the Board's analysis of these issues in recent decisions, including Docket No. 42051, Wisconsin Power & Light, decision served September 13, 2001 (at 24-25), and FMC, has turned on objective factors like the rates charged by defendant railroads when their contracts expire, and on internal railroad forecasts like the UP long range plans relied on in FMC (decision at 35-36).

It is well known that shippers and railroads may take different positions in contract negotiations and in rate cases. In negotiations, shippers with no competitive options will use any argument they can think of in an effort to minimize their rates or rate increases, even threatening traffic diversions that are not realistic. The railroads typically ignore such claims unless a rate case is filed, at which time the railroads will posit fanciful competitive alternatives. Similarly, railroads deny the relevance of profit margins in negotiations, and then exaggerate their variable costs in litigation, in order to minimize any shipper recovery.

If BNSF wants to argue that the trend line for PRB rail rates is flat or downward, it can do so without access to Peabody's private projections, using objective data of the kind found probative in past rate cases. There is no need for BNSF access to Peabody's private rate projections, let alone any significant need outweighing the risks of disclosure of critical shipper information and the damage that would be done to Peabody as a valued shipper consulting firm and as a viable business.

**CERTIFICATE OF SERVICE**

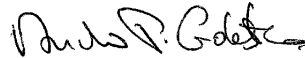
I hereby certify that I have this 17th day of June, 2002, served copies of the foregoing document on all parties to this proceeding by first class mail, postage prepaid, as follows:

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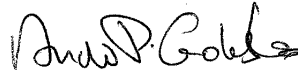
s:\mcd\PPL Reply

#### **IV. CONCLUSION**

BNSF's Petition is another effort by a major railroad to win rate cases not by establishing that its rates are reasonable, but by depriving shippers of the resources they need if the Board's complex Constrained Market Pricing methodology is to be effective. For the reasons set forth above, and in the reply of Otter Tail, BNSF's petition should be denied.

Dated: June 17, 2002

Respectfully submitted,



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