

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC,	)		306868
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	)		
Complainant,	)		ENTERED
	)		Office of Proceedings
	)		July 20, 2023
v.	)	Docket No. NOR 42179	Part of
	)		Public Record
	)		
BNSF RAILWAY COMPANY,	)		
	)		
Defendant.	)		
	)		

**REPLY TO APPEAL OF DIRECTOR'S ORDER
ADOPTING A PROCEDURAL SCHEDULE**

NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC

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Dated: July 20, 2023

Attorneys for Complainant

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SURFACE TRANSPORTATION BOARD**

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Complainant,	)	
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v.	)	Docket No. NOR 42179
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BNSF RAILWAY COMPANY,	)	
	)	
Defendant.	)	
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**REPLY TO APPEAL OF DIRECTOR’S ORDER
ADOPTING A PROCEDURAL SCHEDULE**

Pursuant to 49 C.F.R. § 1011.6(b), Complainant Navajo Transitional Energy Company, LLC (“NTEC”) hereby replies in partial opposition to BNSF Railway Company’s (“BNSF”) July 10, 2023 Appeal (“Appeal”) of the Director’s June 30, 2023 Decision Adopting a Procedural Schedule (“Scheduling Order”).

Appeals of decisions issued pursuant to delegated authority “are not favored and will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.” 49 C.F.R. § 1011.6(b). As NTEC explains below, BNSF falls far short of this exceptionally high standard for overturning the Scheduling Order. Rather than demonstrating any “clear error in judgment” or “manifest injustice,” BNSF instead argues that the Board should vacate the Scheduling Order based on claims BNSF either failed to raise, or raised only in passing, in its May 23, 2023 Motion for Procedural Schedule. BNSF’s arguments do not justify vacation of the Scheduling Order.

Nevertheless, NTEC recognizes that the commencement of discovery in this Complaint proceeding was delayed pending consideration of NTEC's request for emergency and injunctive relief and that the parties did not serve discovery on each other until after the release of the June 30 Scheduling Order. Accordingly, while NTEC opposes BNSF's request to vacate the Director's Order in its entirety, NTEC does not oppose a 45-day extension in the dates set forth in that Order, as described below.¹

A. Section 1011.6(b) Appeals are Not Favored and are to be Granted Only in Exceptional Circumstances

Absent a demonstration that the Director made a clear error of judgment or that granting BNSF's Appeal is necessary to prevent manifest injustice, BNSF's appeal should be denied. The Board has declined such appeals in the past, including a situation in which the disgruntled party complained about the Director's establishment of a procedural schedule and about the impact of that schedule on potential discovery.

Eastern Alabama Ry. LLC – Pet. for Decl. Order, FD 35583, at 2-3 (STB served Feb. 22, 2012); *see also Union Pac. R.R. – Abandonment Exemp. – In Lafayette County, MO*, Docket No. AB 33 (Sub-No. 297X), at 5 (STB served July 22, 2011) (rejecting a Section 1011.6(b) appeal and finding an absence of manifest injustice where the appealing party requested “[i]n essence,” that it “be given a second bite at obtaining the Line through an OFA.”); *Tongue River R.R. – Rail Constr. and Oper. – In Custer, Powder River and*

¹ BNSF did not contact NTEC prior to filing its Appeal. Instead, NTEC first learned that BNSF intended to challenge the Scheduling Order when NTEC received the electronic service copy of BNSF's Appeal filing at 7:20 p.m. on July 10, 2023.

Rosebud Counties, Mont., Docket No. FD 30186, at 3 (STB served Aug. 19, 2015) (“*Tongue River*”) (denying a Section 1011.6(b) appeal where SMART-386 “has not articulated a necessary basis to broaden the scope of its reply opportunity beyond the reasonable limitation set by the Director” and where “SMART-386 has already had a full and fair opportunity to comment on the merits of TRRC’s application . . .”).

B. BNSF’s Appeal Does Not Meet the Section 1011.6(b) Standard

BNSF requests that the Board amend the procedural schedule – in some unspecified manner – to allow BNSF to engage in an unprecedented discovery exercise requiring the Board, at least one federal court (most likely), and the State Department to facilitate BNSF’s duplicative, dilatory, and harassing “letters rogatory” to NTEC’s customers. In support of that request, BNSF complains that the Director did not devote sufficient attention to the Board’s June 23 preliminary injunction Decision.

In particular, BNSF argues that the Scheduling Order “did not consider any of the factual issues and assumptions relied on by the Board in its [June 23] preliminary injunction decision.” BNSF Appeal at 4. BNSF adds that “[t]he Board’s [June 23] preliminary injunction decision relied heavily upon NTEC’s allegations regarding statements made by such [Asian] international parties to find, among other things, that NTEC had a likelihood of success on the merits of its claims in this proceeding.” *Id.* at 6. BNSF’s argument is inapposite.

The Director was under no obligation to consider whether, after having been ordered to provide service on a preliminary injunction basis, BNSF might have wished to recast or greatly expand its May 23 Motion. By virtue of: (i) NTEC’s April 14, 2023

Complaint and Emergency Service Petition; (ii) the additional, extensive filings that the parties submitted in NOR 42178 early May; and (iii) the record of the nearly seven-hour May 10 hearing, BNSF was fully aware of the nature and details of NTEC's claims in this proceeding, including NTEC's claims regarding the impact of BNSF's poor service on NTEC's export coal sales to Asia and on NTEC's reputation as a coal producer.²

If BNSF had been concerned that "letters rogatory" or any other discovery tools may have been necessary, BNSF should have raised those arguments in its May 23 Motion. BNSF failed to do so. Nothing about the scope of this proceeding changed on June 23, 2023. The only thing that changed was that the Board granted NTEC's request for a preliminary injunction. The granting of that preliminary injunction does not give BNSF grounds to fault the Director's Scheduling Order.

In issuing the June 30 Scheduling Order, the Director adopted NTEC's proposal with 10- to 14-day extensions in the due dates for Reply and Rebuttal Evidence. There is no clear error or manifest injustice associated with adopting a discovery schedule that only varied from BNSF's original request by five weeks (*i.e.*, discovery ending on August 14 rather than September 22). *Cf.* June 30 Scheduling Order at 2; BNSF May 23

² *See, e.g.*, NTEC April 14 Complaint at 3-4 ("If BNSF does not provide reasonable rail service consistent with NTEC's historical and current needs and chooses instead to favor other export coal producers relative to NTEC, then NTEC will face significant and perhaps insurmountable impediments to its ability to market coal successfully going forward. Simply put, customers in Japan and Korea may choose to purchase their coal supplies from the entity or entities that BNSF elects to favor with more reliable rail transportation service. Accordingly, BNSF's past service failures (and its anticipated Summer 2023 service failures) have had (and will have) a substantial, adverse effect upon NTEC."); *accord Tongue River* at 3.

Motion at 1.³ Similarly, there is no clear error or manifest injustice associated with rejecting a novel procedural suggestion from BNSF that would have required preliminary expert reporting.

C. BNSF Did Not Demonstrate – and Has Not Demonstrated – a Need for Third-Party Discovery

BNSF claims that the Director’s scheduling order ignored the need for “required” third-party discovery and the entities that third-party discovery “will involve.” Appeal at 5. BNSF’s May 23 Motion, however, did not establish any need for third-party discovery and there was no reason for the Director to set a schedule on the basis of an assumption that third-party discovery would be necessary. That continues to be the case.

Typically, a party may obtain third-party discovery only where it can demonstrate that the subject information is not available from a party or from a public source. *See, e.g., Application of the National Railroad Passenger Corp. Under 49 U.S.C. 24308(a) – Springfield Terminal Ry. Co., Boston and Maine Corp., and Portland Terminal Co.*, FD 33381, at 2-3 (STB served May 6, 1997) (denying B&M’s motion based on finding that “[i]nformation on Amtrak’s finances is available in the public domain or from Amtrak”); *see also Ariz. Elec. Pwr. Coop., Inc. v. The Burlington N. and S.F. Ry. and Union Pac. R.R.*, NOR 42058, at 4-5 (STB served Dec. 31, 2011) (“Because AEPCO is willing to furnish the information related to these mines, there is no need to subpoena third parties.”).

³ In addition, the schedule that NTEC identifies at the end of this Reply contemplates an end to discovery six days *after* the date that BNSF had proposed in its May 23 Motion (*i.e.*, September 28 rather than September 22).

BNSF offers no such showing here. Instead, BNSF relies upon the Board’s discovery determination in *Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions*, FD 35557, at 1 (STB served Feb. 27, 2012) (“*BNSF Coal Dust*”) to support its Appeal. But BNSF’s citation of this decision is irrelevant to the question of third-party discovery in the present case. In *BNSF Coal Dust*, the Board allowed discovery against the members of an organization (the Western Coal Traffic League) that was a party to the case where the organization’s individual members, rather than the organization itself, were in possession of the requested documents. That determination does not provide any support for BNSF’s claims regarding the supposed need for discovery against non-party coal customers located in Asia.

In any event, BNSF’s new third-party discovery assertions do not alter the fact that BNSF’s May 23 “argument” regarding the supposed need for third-party discovery consisted solely of the observation that NTEC’s claims “*potentially* implicate claims of damages as a result of lost sales in Asia” and the comment that “[a]s such, third-party and foreign discovery *may* be necessary” Motion at 1 (emphasis added). The Director’s decision to adopt the June 30 Schedule did not constitute error on that basis.

CONCLUSION

The Board should deny BNSF’s appeal of the Director’s order. In recognition of the delay in the commencement of discovery that BNSF notes, however, NTEC does not oppose a 45-day extension of the dates set forth in the Director’s June 30, 2023 Order as follows:

Event	Scheduling Order	Suggested Revision	Day of the Week	Interval (Days)
Discovery Ends	Aug. 14, 2023	Sept. 28, 2023	Thursday	45
NTEC Op.	Sept. 22, 2023	Nov. 6, 2023	Monday	45
BNSF Reply	Nov. 2, 2023	Dec. 18, 2023	Monday	46
NTEC Reb.	Nov. 30, 2023	Jan. 16, 2024	Tuesday	47

NTEC continues to oppose any introduction of preliminary expert reporting into the Board's June 30, 2023 schedule for the reasons articulated in NTEC's May 23, 2023 Report on Conference. BNSF has failed to meet the standard for reversing the Director's refusal to require the submission of such reports, and the Director's decision in this regard should be affirmed.

Respectfully submitted,

NAVAJO TRANSITIONAL
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Dated: July 20, 2023

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of July 2023 caused a copy of the foregoing to be served via email upon counsel for BNSF in this proceeding.

/s/ Andrew B. Kolesar III
Andrew B. Kolesar III
An Attorney for Complainants