

SERVICE DATE – AUGUST 7, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

Digest:¹ The Board denies an appeal of the procedural schedule but issues a revised schedule. The Board also appoints an administrative law judge to resolve initially any disputes concerning discovery in this proceeding.

Decided: August 4, 2023

On April 14, 2023, Navajo Transitional Energy Company, LLC (NTEC), filed a complaint and petition for declaratory order alleging that BNSF Railway Company (BNSF) has breached its common carrier obligation, failed to provide adequate car service, and engaged in unreasonable practices with respect to coal transportation service from NTEC's Spring Creek mine in Big Horn County, Mont., (Spring Creek) to the Westshore Terminals facility at Roberts Bank, B.C., Canada (Westshore).² BNSF filed an answer to NTEC's complaint and petition on May 5, 2023.

On May 23, 2023, pursuant to 49 C.F.R. § 1111.11, NTEC filed a report on the parties' preliminary scheduling conference. NTEC stated that the parties were unable to agree on a proposed procedural schedule and requested that the Board adopt its proposed schedule. (NTEC Report 1.) BNSF, also on May 23, filed a separate motion for the Board to adopt its proposed

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² In a separate docket, NTEC filed an ex parte application seeking an emergency service order pursuant to 49 U.S.C. § 11123 and, or alternatively, a preliminary injunction pursuant to 49 U.S.C. § 1321(b)(4). By a decision served on June 23, 2023, the Board issued a preliminary injunction ordering BNSF to transport a minimum of 4.2 million tons of coal on an annual basis in 2023 from Spring Creek for service destined to Westshore, and an additional one million annual tons as capacity is available to serve NTEC. The Board also directed BNSF and NTEC to file regular status reports. See Navajo Transitional Energy Co.—Ex Parte Pet. for Emerg. Serv. Ord. (Injunction Decision), NOR 42178 (STB served Jun. 23, 2023), appeal docketed, No. 23-60402 (5th Cir. July 28, 2023).

procedural schedule. On June 30, 2023, the Board, through the Director of the Office of Proceedings, issued a decision adopting a procedural schedule. Navajo Transitional Energy Co. v. BNSF Ry. (Director Order), NOR 42179 (STB served June 30, 2023). The Director explained that under NTEC’s proposal, discovery would close in mid-August and the evidentiary record would close on November 16, 2023; under BNSF’s proposal, discovery would close in September (following the exchange of expert reports in August) and the record would close in February 2024. The Director, after reviewing the parties’ proposals, adopted the procedural schedule outlined below:

Discovery ends	August 14, 2023
NTEC Opening	September 22, 2023
BNSF Reply	November 2, 2023
NTEC Rebuttal	November 30, 2023

On July 10, 2023, BNSF filed an appeal of the Director Order. BNSF argues that the decision shows clear error and manifest injustice by adopting a highly compressed procedural schedule that would not permit BNSF to conduct discovery to fully develop the record in this proceeding, particularly in light of the Board’s decision issuing a preliminary injunction in NOR 42178. (BNSF Appeal 4.) BNSF asks that the Board “adopt the time intervals contained in the procedural schedule proposed by BNSF in its May 23, 2023 filing, measured from the date of the Director’s procedural schedule.” (*Id.* at 8.) On July 20, 2023, NTEC replied, arguing that the appeal does not show clear error or manifest injustice; nevertheless, NTEC proposes a revised schedule “in recognition of the delay in commencement of discovery,” under which each date would be extended by approximately 45 days. (NTEC Reply 6-7.)

DISCUSSION AND CONCLUSIONS

BNSF’s Appeal. Under 49 C.F.R. § 1011.6(c)(3), the Chairman has delegated to the Director of the Office of Proceedings the authority to dispose of routine procedural matters. Appeals of those decisions are decided by the Board. 49 C.F.R. §§ 1011.6(b), 1115.1(c). Such appeals “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), 1115.1(c). As discussed below, BNSF has not shown a clear error of judgment or manifest injustice in the Director Order.

The Board first notes that some of the arguments BNSF makes on appeal are different or, at a minimum, more certain and elaborate than the arguments it made before the Director. Delegations are made to, among other things, promote administrative efficiency, improve the quality of service to the public, and expedite the disposition of routine procedural matters. If the Board were to consider—for the purpose of finding whether the Director made a clear error in judgment—different or more certain and elaborate evidence and argument on appeal, it could undermine the very purpose of delegation. The Board therefore declines to find clear error based on evidence and arguments that were not first presented to the Director.

Here, BNSF argues that “the discovery requests that NTEC has already served on BNSF are extensive and involve the type of data normally requested in rate reasonableness cases. . . .

[T]he production of this type of data . . . involves a time-consuming collection of detailed and voluminous data by railroad employees.” (BNSF Appeal 6-7.) BNSF argues that stand-alone-cost rate proceedings involve at least 150 days of discovery, if not more when extensions are granted, and claims that third-party and foreign discovery mean that discovery in this proceeding will be even more complicated than in a rate reasonableness case. (*Id.* at 7.) BNSF did not make these arguments in its motion for procedural schedule. Therefore, even assuming BNSF’s characterization of discovery in this proceeding is correct, the Director did not clearly err by not considering arguments that had not yet been made, and BNSF has not shown that the hardships alleged here reach the level of manifest injustice. However, as described further below, the Board notes that it will extend the time allotted for discovery and update the procedural schedule accordingly.

BNSF argues that the Director Order should have addressed the need for extensive third-party discovery and potential foreign discovery. (BNSF Appeal 5-6.) In its motion for a procedural schedule, BNSF frames foreign and third-party discovery as a possible need: “[t]he allegations in the complaint . . . present complex questions of capacity allocation on BNSF’s rail network and potentially implicate claims of damages as a result of lost sales in Asia. As such, third-party and foreign discovery *may* be necessary.” (BNSF Mot. 1 (emphasis added).) In contrast, in its appeal, BNSF now claims that third-party discovery will be “required,” and it provides additional explanation as to why it believes such discovery will require more time than the schedule provides, such as the potential need for letters rogatory, which it did not mention in its motion for procedural schedule. (See BNSF Appeal 5-6; BNSF Mot. 1.) While the Board acknowledges that third-party and foreign discovery may be time-consuming in this proceeding, the Director did not clearly err in light of the equivocal statements regarding third-party and foreign discovery in BNSF’s motion for procedural schedule, and BNSF has not shown that this dynamic reaches the level of manifest injustice.

Beyond the different or more certain and elaborate points on appeal, BNSF argues that the schedule is “highly compressed” with only 45 days for discovery, which BNSF argues is “extremely short even for a simple STB proceeding.” (BNSF Appeal 4.) In complaint proceedings, the Board has adopted initial procedural schedules with discovery periods of varying lengths. See, e.g., Horry Cnty., S.C. v. Baltimore & Annapolis R.R., NOR 42138 (STB served Nov. 25, 2013) (45-day discovery period); Sierra R.R. v. Sacramento Valley R.R., NOR 42133 (STB served Jan. 17, 2012) (53-day discovery period); Colo. Wheat Admin. Comm. v. V & S Ry., NOR 42140 (STB served June 25, 2015) (60-day discovery period); N. Am. Freight Car Ass’n v. Union Pac. R.R., NOR 42119 (STB served Sept. 26, 2011) (70-day discovery period); Kingsbury Elevator, Inc. v. Grand Trunk W. R.R., NOR 42170 et al. (STB served Dec. 2, 2020) (90-day discovery period); CF Indus. Sales, LLC v. Canadian Nat’l Ry., NOR 42151 (STB served Feb. 27, 2017) (92-day discovery period); N. Am. Freight Car Ass’n v. Union Pac. R.R., NOR 42144 (STB served Feb. 11, 2016) (165-day discovery period). Here, one week before the Director Order was issued, the Board issued the Injunction Decision addressing BNSF service levels for NTEC’s export coal shipments for the remainder of 2023. While the Board appreciates the points raised by BNSF, and again notes that the expedited schedule will be separately extended (as described further below), the Board emphasizes the appellate standard here sets a high bar. Under the aforementioned circumstances, and this standard, the Director did not make a clear error in judgment or issue a manifestly unjust order in

imposing a schedule with a discovery period that, although short, was not inconsistent with schedules adopted in some past complaint proceedings, and that would promote prompt resolution of the dispute that had been temporarily addressed by the injunction.

While BNSF suggests that the Director should have addressed “the factual issues and assumptions relied on by the Board in its preliminary injunction decision,” (BNSF Appeal 4), it was not incumbent upon the Director to speculate as to whether and how the Injunction Decision might affect the parties’ procedural schedule requests in this docket. As NTEC points out (NTEC Reply 3-4), at the time BNSF and NTEC filed their proposed procedural schedules, the record in NOR 42178 was more extensive than is typical and included a day-long hearing with the Board members, giving the parties further insight into the issues that may arise in this docket, which they presumably would have taken into account in their motions for procedural schedule.

The Board further notes that BNSF’s procedural schedule proposed starting discovery on June 1, 2023 (BNSF Mot. 1), but the Board’s regulations do not prevent parties from starting discovery before a procedural schedule is issued. “All discovery procedures may be used by parties without filing a petition and obtaining prior Board approval.” See 49 C.F.R. § 1114.21(b). Parties conduct discovery in Board proceedings without Board involvement unless a dispute arises. See 49 C.F.R. § 1114.21(f) (“Unless otherwise ordered by the Board, . . . depositions, interrogatories, requests for documents, requests for admissions, and answers and responses thereto, shall be served on other counsel and parties, but shall not be filed with the Board”); 49 C.F.R. § 1114.31 (procedures addressing failure to respond to discovery). Under the circumstances, which include BNSF’s awareness of the competing procedural schedules and its emphasis of the need for sufficient time for discovery in its motion (BNSF Mot. 2), the Director did not make a clear error in judgment or issue a manifestly unjust order in assuming that BNSF would initiate discovery without waiting for a Board order regarding the procedural schedule.

Finally, BNSF argues that the Director should have adopted BNSF’s proposal that the procedural schedule provide for the exchange of expert reports. (BNSF Appeal 7-8.) The Board notes that such an exchange is not routinely included in procedural schedules issued by the Board. See, e.g., CF Industries Sales, LLC, NOR 42151; Kingsbury Elevator, Inc., NOR 42170 et al. Further, NTEC opposed such an exchange. (NTEC Report on Conference 2.) Under the circumstances, the Director’s decision not to provide for the exchange of expert reports in the procedural schedule was not clear error or manifest injustice.

For the above reasons, BNSF has not shown clear error or manifest injustice in the Director Order. As a result, the appeal of the Director Order will be denied.

Procedural Schedule. Although the Board is denying BNSF’s appeal, the Board recognizes that the short procedural schedule, particularly in light of BNSF’s arguments on appeal, would be improved by an extension. It will therefore modify the procedural schedule as proposed by NTEC. The Board will adopt the following modified procedural schedule:

Discovery ends	September 28, 2023
NTEC Opening	November 6, 2023
BNSF Reply	December 18, 2023

NTEC Rebuttal

January 16, 2024

As development of the record progresses, if it becomes apparent that additional time is needed—including additional time for discovery—a party may request that the Board amend the procedural schedule for good cause. See 49 C.F.R. § 1104.7(b).

Administrative Law Judge. The Board has signed a Memorandum of Understanding with the Federal Mine Safety and Health Review Commission to employ the services of administrative law judges on a case-by-case basis to perform discrete, Board-assigned functions such as adjudicating discovery disputes in cases pending before the Board. The Board hereby assigns and authorizes Administrative Law Judge Thomas McCarthy to entertain and rule upon discovery matters and to resolve initially any disputes concerning discovery in this proceeding that are filed after the service date of this decision. The parties are directed to send copies of all their filings and documents in this proceeding, including submissions already filed with the Board, to Judge McCarthy at 1331 Pennsylvania Avenue, N.W., Suite 520N, Federal Mine Safety and Health Review Commission, Washington, DC 20004-1710, and at ctolbert@fmshrc.gov and cbrightwell@fmshrc.gov.

It is ordered:

1. BNSF's appeal of the Director's June 30, 2023 decision is denied.
2. The procedural schedule is revised as described above.
3. The Board hereby ratifies the loan of Administrative Law Judge Thomas McCarthy to the office of administrative law judge in the Surface Transportation Board, under terms and conditions prescribed in 5 U.S.C. § 3344 and 5 C.F.R. § 930.208, and the Board today approves his appointment as the Board's own action under the Constitution.
4. This proceeding is assigned to Judge McCarthy for the handling of all discovery matters and initial resolution of all discovery disputes.
5. In addition to filing pleadings with the Board and serving copies on parties of record, parties must send a copy of all filings and documents, including submissions already filed with the Board, to Judge McCarthy at 1331 Pennsylvania Avenue, N.W., Suite 520N, Federal Mine Safety and Health Review Commission, Washington, DC 20004-1710, and at ctolbert@fmshrc.gov and cbrightwell@fmshrc.gov.
6. Judge McCarthy will be added to the service list in this proceeding and a copy of this decision will be served upon him.
7. A copy of this decision will be served on the U.S. Office of Personnel Management (OPM), at Human Resource Solutions, ALJ Program Office, 1900 E Street N.W., Suite 2469, Washington, DC 20415-9400 and electronically at karyn.lusby@opm.gov. Judge McCarthy shall send a copy of the notice or order that constitutes the final disposition of his assignment of this case to OPM at the above address.

8. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.