

BEFORE THE
SURFACE TRANSPORTATION BOARDENTERED
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August 8, 2023
Part of
Public Record

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

**BNSF RAILWAY COMPANY'S
PETITION FOR SUBPOENA**

Pursuant to 49 U.S.C. § 1321(c), 49 C.F.R. §§ 1113.2(b), and 1117.1, BNSF Railway Company (“BNSF”) hereby respectfully petitions the Surface Transportation Board (“STB” or “Board”) to issue a subpoena directed to JERA Global Markets North America, LLC (“JERA Global”) located at 1629 Thames Street, Suite 310, Baltimore, MD 21231-3440 for production of documents and deposition testimony. The specific information sought is detailed in the proposed subpoena attached as Exhibit 1. These requests relate to Navajo Transitional Energy Company, LLC’s (“NTEC”) damage claims in this proceeding, including NTEC’s claim concerning “the impact on NTEC’s business reputation when railroad deliveries are inconsistent or non-existent.” Compl. ¶ 38. More specifically, NTEC has repeatedly cited reputational harm and lost sales as damages, *see, e.g.*, May 10, 2023 Hearing Tr. 116:8-17, and specifically identified JERA Global’s parent company, JERA Trading Pte Ltd. (“JERA Parent”)

in its Complaint, Compl. ¶ 9.¹ These requests are directly related to an integral issue involved in this decision, are narrowly drawn so that the benefit of production far outweighs any burden on JERA Global, and are plainly “relevant to the subject matter involved in [this] proceeding” and discoverable under 49 C.F.R. § 1114.21(a).

I. BACKGROUND

The present Petition arises from a complaint filed by NTEC before the Surface Transportation Board (“the Board”) on April 14, 2023, alleging inadequacies in BNSF’s rail service shipping coal from NTEC’s Spring Creek Mine in Big Horn County, Montana (“Spring Creek”) to domestic destinations as well as the Westshore Terminals (“Westshore”) in British Columbia, Canada. From Westshore, the NTEC coal is shipped to markets in Asia, including Japan. In its Complaint, NTEC alleges that BNSF (1) breached its obligation to provide adequate common carrier service on reasonable request; (2) engaged in unreasonable practices in establishing and implementing the terms for such service; and failed to provide safe and adequate coal service. Compl. at 1.

Also on April 14, 2023, NTEC filed an *ex parte* application seeking an emergency service order and/or a preliminary injunction for the Board to restore and

¹ BNSF is also seeking the issuance of a letter rogatory to JERA Parent. Notwithstanding the letter rogatory, BNSF is seeking this subpoena directed to JERA Global because (1) like its parent company, JERA Global is involved in the coal trade; (2) JERA Parent is not subject to the Surface Transportation Board’s subpoena power, 49 U.S.C. § 1321; and (3) letters rogatory can take a year or more to execute, U.S. State Dep’t, Preparation of Letters Rogatory, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/international-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html>. Under the current schedule, the discovery period extends only until September 28, 2023.

maintain adequate coal transportation service from Spring Creek to Westshore. On May 10, 2023, the Board held an oral argument, during which officials from NTEC vaguely testified regarding the alleged reputational damage it claims:

- “When we traveled to Asia in February, and met with Japanese customers, the whole conversation – the vast majority of the conversation was on train service. We hear you have a train problem.” May 10, 2023 Hearing Tr. 116:8-17.
- “That was probably the most disconcerting, you know, conversations we had when people would say well you know, this railroad problem exists, but it only exists for you.” *Id.* at 123:16-22.
- “So, the position that BNSF has put all of these shippers in, not just us, but we're the ones who are here, is that you know, there is a real concern that there will be no way to plan your business, no way to execute that business, and there will be millions of dollars in revenues lost, irreparable harms to relationships.” *Id.* at 29:22-30:10.
- “Because if they cut our trains and we can't deliver, we may not get back into that market because we are struggling right now in re-establishing our credibility in that market because of what took place.” *Id.* at 117:5-9.
- “And so this is a conversation we have to have again and again as to why is it that the railroad's performing this way? When is it going to get better? What are you doing to ensure that you can be reliable on the future? So

that's impacting every single commercial discussion we're having with our customers in Asia.” *Id.* at 122:22-123:7.

The Board found these claims probative, citing the “reputational injuries [NTEC] is suffering” as irreparable harm to support its grant of a preliminary injunction. *See* NOR 42178 slip op. at 10 (STB served June 23, 2023). BNSF seeks documents and deposition testimony from JERA Global regarding NTEC’s reputation in Asia and whether NTEC’s reputation has impacted its ability to conduct business. In addition, BNSF seeks documents and deposition testimony regarding NTEC’s allegations of lost sales in Asian markets in which JERA Global is a market participant.

II. THE BOARD SHOULD ISSUE THE REQUESTED SUBPOENA

The Board is authorized to “subpoena witnesses and records related to a proceeding of the Board from any place in the United States.” 49 U.S.C. § 1321(c)(1). Under the Board’s rules, a party requesting a subpoena to compel the production of documentary evidence must show “general relevance and reasonable scope of the evidence sought.” 49 C.F.R. § 1113.2(b)(2). In deciding whether to issue a subpoena, the Board considers “the relevance of the material sought, and the burden on the nonparty.” *Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, FD 35557, slip op. at 5 (STB served June 25, 2012). “The requirement of relevance means that the information might be able to affect the outcome of a proceeding.” *Ballard Terminal R.R.—Aquis. & Operation Exemption—Woodinville Subdivision*, FD 35731 et al. slip op. at 2 (STB served May 17, 2013) (citing *Waterloo Ry.—Adverse*

Aband.—Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. In Aroostook Cnty. et al., Me., AB 124 (Sub-No. 2), (STB served Nov. 14, 2003).)

The standards for issuance of a subpoena under the Board’s discovery rules have been met. *See* 49 U.S.C. § 1321(c). The Board’s Rules of Practice permit “discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a). It is also well-settled that the Board’s discovery rules are to be liberally construed. *See, e.g., Duke Energy Corp. v. Norfolk S. Ry.*, NOR 42069, slip op. at 4 (STB served July 26, 2002) (“The Board’s rules generally provide for liberal discovery of non-privileged matter that is reasonably calculated to lead to discovery of admissible evidence.”).

BNSF requires the discovery information described in Exhibit 1 to respond to claims made by NTEC regarding the impact of BNSF’s service on NTEC’s reputation and ability to sell coal to customers in Asia. The scope of the requested subpoena is reasonable, and compliance would not be unduly burdensome for JERA Global. The subpoena has been narrowly tailored to seek only the relevant documents and testimony related to any lost sales or any “reputational harm” NTEC allegedly suffered in the eyes of JERA Global. The Board has previously granted petitions for a subpoena ordering a non-party to produce relevant information that may be used by a party in its evidentiary presentation. *See, e.g., Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions*, FD 35557, slip op. at 1 (STB served Feb. 27, 2012)

(Board found that individual members of the Western Coal Traffic League were subject to discovery under the Board’s subpoena power).²

Finally, while BNSF has tailored its requests to be as unobtrusive as possible, and do not expect that compliance with the subpoena will present any significant burdens for JERA Global, BNSF agrees to work with JERA Global to address any concerns as to burden that may be raised.

III. CONCLUSION

For the foregoing reasons, BNSF moves that the Board issue a subpoena directed to JERA Global for production of documents and deposition testimony that is responsive to the requests specified in the schedule contained in Exhibit 1 hereto, and stipulate that the protective order in this case governs the production of all documents in response to those requests. Given the time associated with obtaining evidence from Asia and the importance of obtaining this information in a timely

² The fact that JERA Global may need to ask JERA Parent for certain discovery requested under the subpoena has no bearing on the court issuing the subpoena. 8B Charles Alan Wright, Arthur R. Miller, 8B Fed. Prac. & Proc. Civ. § 2210 at 1 n.8 (3d ed. 2023) (“A party need not have actual possession of documents to be deemed in control of them.”). Courts have repeatedly required recipients of discovery requests to obtain the required discovery from affiliated corporations under several separate theories, including (i) whether the “alter ego” doctrine would justify piercing the corporate veil, (ii) whether the litigant corporation acted as the agent of the nonparty corporation in connection with the matter in litigation, (iii) whether the litigant corporation could secure materials from the nonparty corporation to meet its own business needs, and (iv) whether, by virtue of stock ownership or otherwise, one corporation effectively controls the other. *Id.* at 1. Here, JERA Parent has a 66.67% stake in JERA Global, thereby effectively controlling JERA Global. *See* JERA Global, About Us, <https://www.jeragm.com/about-us> [<https://perma.cc/FP3H-KVEG>]. Further, both JERA Global and JERA Parent are involved in the coal trade. *Id.*; *see also Japan Halon Co. v. Great Lakes Chem. Corp.*, 155 F.R.D. 626, 627-28 (N.D. Ind. 1993) (rejecting argument that discovery on Japanese parent company needed to be pursued through letters rogatory and ordering U.S. subsidiary to produce documents from parent).

manner so that it may be utilized in preparing the parties' evidentiary submissions, BNSF respectfully requests that the Board expedite its consideration of this Petition.

Respectfully submitted,

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Dated: August 8, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding. I have also served the Administrative Law Judge assigned to this proceeding via electronic mail.

/s/ Tara A. Woods

Tara A. Woods

Attorney for BNSF Railway Company

August 8, 2023

EXHIBIT 1

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

SUBPOENA

Pursuant to 49 U.S.C. § 1321(c), the Surface Transportation Board (“Board”) hereby issues this Subpoena directing JERA Global Markets North America, LLC (“JERA Global”) to produce the documentary evidence specified herein for use in the above-captioned proceeding. Part I sets forth instructions for complying with this Subpoena, and Part II sets forth definitions used in this Subpoena. Part III specifies the documents that are sought by this Subpoena.

I. Instructions

1. The documentary evidence requested in this Subpoena shall be produced within twenty days of service of the Subpoena on JERA Global, unless otherwise agreed by counsel to the parties. JERA Global should produce responsive documents to counsel for Defendant BNSF Railway Company (“BNSF”) to the offices of Steptoe & Johnson LLP, 1330 Connecticut Avenue, NW, Washington, DC 20036, or via electronic delivery means.

2. Responsive documents that are confidential or highly confidential may be produced in accordance with the terms of the Board's July 18, 2023 granted Protective Order in the above-captioned proceeding.

3. In responding to the following document requests, furnish all available documents in JERA Global's possession, custody, or control.

4. If you lack the ability to comply with a particular document request, specify whether the inability to comply is because the particular document or category of documents requested never existed; has been destroyed; has been lost or misplaced; has been stolen; or has never been or is no longer in your possession, custody, or control. If the particular document or category of documents is no longer in your possession, custody, or control, identify the name and address of any person or entity known or believed by you to have possession, custody, or control of that document or category of documents.

5. In answering the following document requests, furnish all available information, including information in the possession, custody, or control of any of your attorneys, directors, officers, agents, employees, representatives, associates, investigators, divisions, affiliates, partnerships, parents or subsidiaries, and persons under your control, who have knowledge.

6. In the event that you object to any document request on the ground that it is allegedly overbroad and/or unduly burdensome for any reason, respond to that request as narrowed to the least extent necessary, in your judgment, to render it not

overbroad/unduly burdensome and state specifically the extent to which you have narrowed that request for purposes of your response.

7. In the event that you object to any document request on the ground that it is purportedly vague and/or ambiguous, identify the particular words, terms or phrases that are asserted to make such request vague and/or ambiguous and specify the meaning actually attributed to you by such words for purposes of your response thereto.

8. For any information requested that is not readily available from your records in exactly the form requested, furnish carefully prepared estimates, designated as such. Attach a statement of the basis for such estimates and identify the person or persons making them.

9. If any information called for by one of these document requests is withheld on the grounds of privilege or any other claim of immunity from discovery, then for each document or communication containing withheld information, state the following: (1) the type of document (*e.g.*, letter, memorandum, contract, etc.); (2) its title; (3) its date; (4) its subject matter; (5) the name, address, and employer at the time of preparation of the individual who authored, drafted, or prepared it; (6) the name, address, and employer at the time of dissemination of the individual to whom it was directed, circulated, copied, or who otherwise had access thereto; (7) its number of pages; (8) the nature of the privilege claimed and the facts upon which you rely to support the claim of privilege; and (9) the identification of each discovery request to which the withheld information is responsive.

10. Where an identified document is in a language other than English, state whether an English translation of such document exists. If a document is in a language other than English and an English translation exists, identify and provide both documents.

11. If possible and unless otherwise indicated, supply all financial data requested on a calendar year basis. If fiscal year data is provided, specify the dates on which the fiscal years begin and end.

12. Unless a different time period is specified, you are required to produce responsive documents created on or after January 1, 2019.

II. Definitions

1. “JERA Global” shall refer to JERA Global Markets, JERA Trading Pte Ltd., JERA Trading International Pte Ltd., and JERA Co., Inc., and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by any of these entities, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of these same entities.

2. “BNSF” shall mean BNSF Railway Company and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by BNSF Railway Company either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants,

attorneys, and others acting for or on behalf of BNSF Railway Company.

3. “NTEC” shall mean Navajo Transitional Energy Company, LLC, and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Navajo Transitional Energy Company, LLC, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Navajo Transitional Energy Company, LLC.

4. “Cloud Peak Energy, Inc.” shall mean Cloud Peak Energy, Inc., and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Cloud Peak Energy, Inc., either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Cloud Peak Energy, Inc.

5. The term “Spring Creek Mine” shall mean the Spring Creek Mine located in Montana, operated by Cloud Peak Energy, Inc. or NTEC.

6. The term “contract” or “agreement” includes agreements, purchase orders, pricing authorities, or contracts in any form, however made, including all documents referred to in the contracts or agreements which set out the rights and obligations of the parties thereunder.

7. The term “any” shall be construed as one or more whenever necessary to bring within the scope of the request all responses that might otherwise be construed

as outside its scope.

8. The term “communication” shall mean every manner or method of disclosure, transfer, or exchange of information, whether orally or by document (as defined herein), and whether face-to-face, by telephone, mail, email, facsimile, personal delivery, or other method.

9. “Concerning,” “relating to,” “relate to,” “relates to,” “related to,” “referring or relating to,” “referring to,” “regarding,” and “refer or relate to” shall mean, in whole or in any part, responding to, concerning, relating to, connected with, involving, commenting on, in respect of, about, associated with, discussing, evidencing, showing, describing, reflecting, analyzing, summarizing, memorializing, consisting of, constituting, identifying, stating, tending to support, tending to discredit, referring to, or in any way touching upon.

10. “Date” as used herein shall mean the exact day, month, and year, if ascertainable, or, if not, the best approximation (including any relationship to other events) thereof.

11. “Describe” shall mean to set out in detail every act, event, fact, or occurrence of any kind whatsoever that explains the answer to the question.

12. The term “document” shall include, without limitation, any written, typed, printed, recorded or graphically portrayed matter in any form or embodiment, that is produced, reproduced, or stored by photographic, magnetic, electronic, mechanical or any other means, and that is in your actual or constructive custody or control, and all copies of the foregoing on which any mark, alteration, writing, or other

change from the original has been made.

13. The term “identify,” when used with respect to a person, means to state the person’s full name, present or last known address, and when referring to a natural person, additionally, the occupation or business in which the person is engaged, and the person’s present or last employer and title or position.

14. The term “identify,” when used with respect to a document, means to state, to the extent known, the (i) type of document, (ii) general subject matter, (iii) date of the document, (iv) authors, addressees, and recipients, and (v) when applicable, the Bates range for the document.

15. The term “identify,” when used with respect to a communication, means to state, to the extent known, the (i) means of communication (*e.g.*, telephone call, meeting, etc.), (ii) date of the communication, (iii) general subject matter of the communication, and (iv) originator, recipient, and any other party to the communication.

16. The terms “person” or “persons” refer to any individual, corporation, partnership, sole proprietorship, firm, board, joint venture, association, agency, authority, commission or other entity.

17. The terms “You” and “Your” shall mean JERA Global, its successors, agents, members, and employees.

III. Documentary Evidence to Be Produced

1. All contracts or agreements between JERA Global and Cloud Peak Energy, Inc. or NTEC related to the shipment of export coal from the Spring Creek

Mine.

2. All communications related to any decision by JERA Global to renew or not renew a contract with NTEC for the shipment of export coal from the Spring Creek Mine.

3. All communications related to BNSF's provision of rail services to NTEC for the shipment of export coal from the Spring Creek Mine.

4. All documents sufficient to show the amount of export coal purchased from NTEC as a percentage of coal purchased by JERA Global in 2020, 2021, and 2022.