

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. NOR 42179
	)	
BNSF RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

Dated: August 28, 2023

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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	)	

REPLY TO BNSF PETITION FOR SUBPOENA

Complainant Navajo Transitional Energy Company, LLC (“NTEC”) hereby replies in opposition to the Petition for Subpoena (“Petition”) which Defendant BNSF Railway Company (“BNSF”) filed in this proceeding on August 8, 2023. BNSF’s Petition seeks a subpoena ostensibly directed to JERA Global Markets North America, LLC (“JERA Global NA”), a stranger to this litigation and an entity with which NTEC has had no prior business relationship. NTEC respectfully requests that the Surface Transportation Board (“Board”) deny BNSF’s Petition.

BNSF’s Petition constitutes an effort to end-run the geographic restriction of the Board’s 49 U.S.C. § 1321 subpoena power through the artifice of a subpoena directed to an uninvolved U.S. affiliate with instructions that such U.S. affiliate obtain responsive documents from one or more foreign entities. Specifically, BNSF asks the Board (*see* Petition at 2 n.1 and 6 n.2) to require JERA Global NA to obtain documents from one or

more of its Japan- and Singapore-headquartered affiliates – none of which: (i) is a party to this litigation; (ii) maintains an office in the United States; or (iii) is a direct corporate parent of JERA Global NA. The Board lacks the authority to grant such relief, as BNSF itself concedes. 49 U.S.C. § 1321(c) (“The Board may subpoena witnesses and records related to a proceeding of the Board *from any place in the United States . . .*”) (emphasis added); *see also* BNSF Petition at 2 n.1 (admitting that JERA Trading Pte Ltd. is “not subject to the Surface Transportation Board’s subpoena power”).¹

In addition, BNSF’s Petition asks the Board take actions in “direct contravention” of the 1963 evidentiary treaty between the United States and Japan (for JERA Co.) and the Hague Convention (for the Singapore-based Jera Trading Pte Ltd.). *Fujikura Ltd. v. Finisar Corp.*, Case No. 15-mc-80110-HRL (JSC), 2015 WL 5782351, at *7 (N.D. Cal. May 14, 2015) (“*Fujikura*”). In *Fujikura*, the district court held that a party’s “attempt to seek discovery from a Japanese company merely by serving a Rule 45 subpoena on a California subsidiary *is in direct contravention of the evidentiary treaty between the United States and Japan* – specifically, Article 17 of the U.S.-Japan Bilateral Consular Convention of 1963.” (Emphasis added). The *Fujikura* court added that: (i) it would not allow a party to “skirt” rules “merely by serving a subsidiary of a foreign parent

¹ In its proposed Subpoena, BNSF defines “JERA Global” as including “JERA Global Markets [NA], JERA Trading Pte Ltd. [a Singapore-based entity], JERA Trading International Pte Ltd. [a joint venture between a Japanese company and a French company], and JERA Co., Inc. [a Japanese joint venture and leading power producer].” Proposed Subpoena at 4. The proposed Subpoena requests the production of documents within the possession, custody, or control of each of these entities. *Id.* at 2.

corporation on U.S. soil;” and (ii) allowing the use of a subpoena in such a circumstance would render the U.S.-Japan Consular Convention *and the Hague Convention*, for countries that are signatories thereto, “entirely toothless for a large number of global companies with U.S. subsidiaries.” *Id.*

Given the absence of any business relationship between JERA Global NA and NTEC, there is no reason to believe that any individual associated with JERA Global NA would have the ability to provide relevant information through the deposition that BNSF has requested. In any event, this information is largely duplicative and cumulative of information that NTEC and BNSF have within their own possession, custody, and control.

NTEC respectfully requests that the Board deny BNSF’s Petition insofar as it constitutes yet another effort: (i) to delay in the procedural schedule; (ii) to harass NTEC’s former (and potential future) export-coal customer; and/or (iii) to obtain international discovery in Singapore and/or Japan through the pretense of a subpoena directed to a non-party, U.S.-based entity that has no connection to NTEC or to this proceeding.

BNSF’S LONG DELAY

The record shows that BNSF has dragged its feet with respect to seeking third-party discovery. Specifically, BNSF waited 2.5 months from the date on which it first raised the subject of a supposed need for third-party discovery (*i.e.*, May 23, 2023) before filing its subject Petition for Subpoena and its contemporaneously filed Motions for Letters Rogatory (*i.e.*, August 8, 2023).

The record also shows that the Board was unpersuaded by BNSF's effort to use the threat of such international non-party discovery as a justification for significantly extending the procedural schedule in this case. As noted, BNSF first raised the subject of a supposed need for third-party discovery in its May 23, 2023 Motion for Procedural Schedule. BNSF argued that "[t]he allegations in the complaint in this proceeding 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" and that "[a]s such, *third-party and foreign discovery* may be necessary and expert testimony is likely." BNSF May 23, 2023 Motion at 1 (emphasis added). Despite its awareness of BNSF's stated intention to pursue extensive third-party and foreign discovery, the Director of the Board's Office of Proceedings declined to grant BNSF's Motion for extended discovery and for an extended procedural schedule, but instead, adopted the schedule that NTEC had proposed with only minor modifications, setting August 14, 2023 as the close of discovery. *See NTEC v. BNSF Ry.*, NOR 42179, 1-2 (STB served June 30, 2023).

On July 10, 2023, BNSF filed a motion appealing the June 30 Scheduling Order. BNSF asked the Board to vacate the procedural schedule so that BNSF could seek discovery from entities in Asia and Canada. *See BNSF July 10, 2023 Appeal of Director's June 30, 2023 Order Adopting a Procedural Schedule*, at 5-6. The Board rejected BNSF's motion and instead made only minor modifications to the schedule NTEC suggested. *See NTEC v. BNSF Ry.*, NOR 42179, at 4-5 (STB served Aug. 7, 2023). The Board noted that BNSF's claims regarding the supposed need for third-party and foreign discovery had shifted over time, and the Board at least implicitly faulted

BNSF for failing to initiate discovery at an earlier point in time. *Id.* at 3-4. More importantly, the August 7 Decision confirms that the Board was aware of BNSF's claims regarding the need for time-consuming foreign and third-party discovery but did not grant BNSF's request to extend the schedule.

Meanwhile, BNSF waited until *the day after* the Board ruled against its Appeal from the Director's Scheduling Order before filing its long-contemplated Petition for Subpoena (and its Motions Seeking Letters Rogatory), all while BNSF was aware of the deadline for the conclusion of discovery.

THE PARTIES

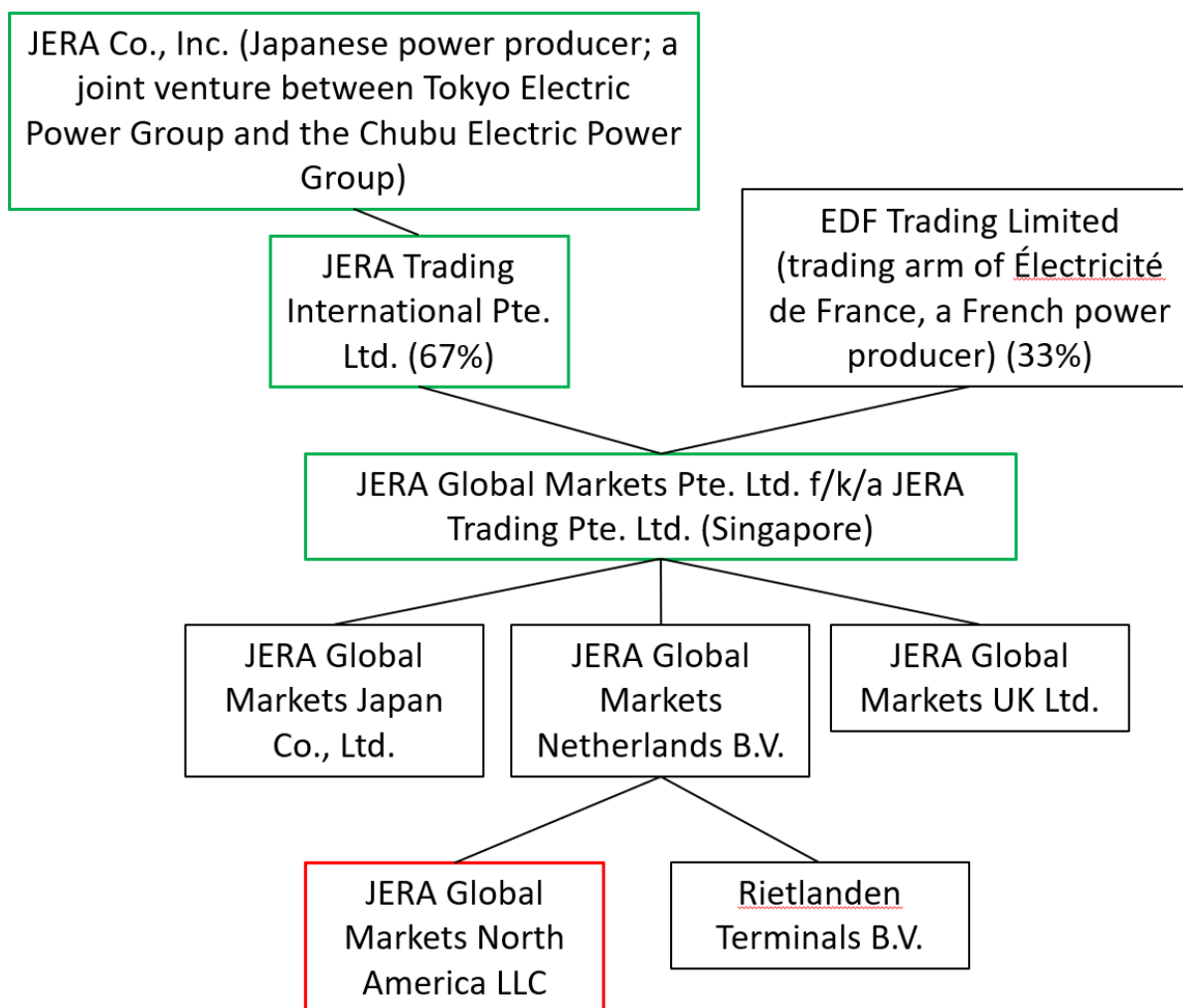
Plaintiff NTEC was created by the Navajo Nation in 2013. It is a single-member limited liability company, organized under the laws of the Navajo Nation. The Navajo Nation, itself, is NTEC's sole shareholder. As such, NTEC is an entity of the Navajo Nation. NTEC's corporate offices are located at 385 Interlocken Crescent, Suite 400, Broomfield, Colorado 80021.

Defendant BNSF is a Class I rail carrier. It is a Delaware corporation with its principal place of business at 2650 Lou Menk Drive, Fort Worth, Texas 76131. BNSF operates a rail network of 32,500 route miles in twenty-eight states and three Canadian provinces. BNSF is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, which in turn is wholly-owned by Berkshire Hathaway, Inc.

The ostensible target of BNSF's subpoena is JERA Global NA. NTEC has no current or prior business relationship with JERA Global NA. In its Petition, BNSF refers to JERA Global NA as "JERA Global" and refers to JERA Trading Pte Ltd. as "JERA

Parent.” BNSF Petition at 1. As the following explanation of corporate relationships demonstrates, it is evident that the relationship between JERA Global NA and JERA Trading Pte. Ltd. (n/k/a JERA Global Markets Pte. Ltd.) is more attenuated than a simple parent-subsidary relationship and that the intended target(s) of BNSF’s discovery effort are far-removed from the U.S. entity. In fact, BNSF’s Petition and the absence of any NTEC relationship with JERA Global NA indicate that JERA Global Markets Pte Ltd. (Singapore), JERA Trading International Pte Ltd., or even JERA Co., Inc. are the actual (albeit-indirect) targets of BNSF’s Petition for Subpoena.

JERA Global NA is 100% owned by JERA Global Markets Netherlands B.V., a company incorporated in the Netherlands whose principal businesses include acting as an investment holding company and selling washed coal:



Source: March 31, 2022 Annual Financial Statements for JERA Global Markets Pte. Ltd. and its Subsidiaries.

JERA Global Markets Netherlands B.V., in turn, is a wholly owned subsidiary of JERA Global Markets Pte. Ltd. JERA Global Markets Pte. Ltd. is headquartered in Singapore and is a seaborne energy trader specializing in liquified natural gas (“LNG”), coal, and other freight with a platform to trade across the North American, European, Middle Eastern, African, and Asian markets. Prior to April 1, 2019, JERA Global Markets Pte. Ltd. had been known as “JERA Trading Pte. Ltd.”

JERA Global Markets Pte. Ltd., in turn, is a joint venture between JERA Trading International Pte. Ltd (67% ownership) and EDF Trading Limited, the trading arm of a leading European power producer (Électricité de France) (33% ownership). JERA Trading International Pte Ltd., in turn, is a wholly owned subsidiary of JERA Co., Inc., which operates a large number of electric generating stations in Japan.²

From late 2019 through early 2023, JERA Global Markets Pte. Ltd. purchased export coal from NTEC for use as boiler fuel in a single electric generating station in Japan.

BACKGROUND

In 2019, NTEC purchased substantially all of the assets of Cloud Peak Energy, Inc., a public company that had filed for bankruptcy protection. The primary assets included three coal mines located in the Powder River Basin of Montana and Wyoming: the Spring Creek Mine, the Antelope Mine, and the Cordero Rojo Mine. Each of those three mines produces substantial quantities of sub-bituminous coal. NTEC sells coal from Cordero Rojo and Antelope for domestic use. NTEC sells thermal coal from Spring Creek both for domestic use and for export to Japan and Korea. NTEC produces several million tons of coal per year for export sale and expected to ship approximately 5.5 million tons, in common carrier service, for export in 2023.

² JERA Co., Inc. is a joint venture between Tokyo Electric Power group and the Chubu Electric Power Group. See <https://www.jera.co.jp/en/corporate/about/origin>.

Over the past 15+ years, BNSF has provided rail transportation service for the movement of export coal shipments from Spring Creek to Westshore Terminals (“Westshore”) at Roberts Bank, British Columbia. BNSF is the only rail carrier that serves Spring Creek and therefore is the only rail carrier capable of providing single-line service to the port. At Westshore, coal from Spring Creek is loaded onto vessels for transportation to Asia (Japan and Korea).

As noted above, NTEC began supplying coal to JERA Global Markets Pte. Ltd. in late 2019 pursuant to a multi-year coal sales agreement. The point of sale for this coal supply was Westshore. Under the coal sales agreement, NTEC was responsible for arranging the transportation of coal to Westshore via BNSF rail service. BNSF transports export coal to Westshore on behalf of what is a limited set of coal producers, historically including only (1) NTEC; (2) Global Coal Sales Group, LLC; and (3) Arch Coal Sales Company, Inc.

The quality of BNSF’s contract-based coal transportation service to NTEC began to deteriorate appreciably in the Spring of 2022. While BNSF increased its overall volume of export coal movements to Westshore through the first eight months of 2022 (relative to the first eight months of 2021), BNSF’s movement of NTEC coal to Westshore nevertheless fell by thirty percent on a year-over-year basis during that same time period. *See* NTEC Ex Parte Application for Section 11123 Emergency Service Order, STB Docket No. NOR 42178, Verified Statement of Matthew D. Babcock at ¶¶ 24-26 (April 14, 2023).

The principal coal transportation agreement between NTEC and BNSF expired on December 31, 2022. That agreement governed the movement (to Westshore) of all coal other than coal to be sold to JERA. NTEC and BNSF also were parties to a separate coal transportation agreement governing the movement (to Westshore) of JERA-bound coal. That agreement expired on March 31, 2023. However, all shipments under the transportation contract for JERA-bound coal were completed within the first two to three weeks of 2023.

BNSF's poor transportation service continued in the initial months of 2023. In addition, BNSF warned NTEC that it would substantially reduce the number of June train loadings that it would provide to NTEC relative to NTEC's needs (*i.e.*, sixteen June train loadings rather than the twenty-nine train loadings per month that NTEC had requested for 2023).

Faced with the risk of substantially reduced rail service in the key Spring and Summer months, NTEC initiated two actions before the STB on April 14, 2023. In Docket No. NOR 42178, NTEC sought an emergency service order pursuant to 49 U.S.C. § 11123 (or a preliminary injunction) requiring BNSF to transport twenty-nine trains per month for NTEC. In Docket No. NOR 42179, NTEC filed a Complaint and Petition for Declaratory Order asking the Board to define BNSF's common carrier service obligation and to award damages to NTEC as a result of BNSF's failure to comply with its common carrier obligation.

By decision served June 23, 2023, the Board granted NTEC's request for a preliminary injunction. *See Navajo Transitional Energy Company, LLC – Ex Parte*

Petition for Emergency Service Order, Docket No. NOR 42178 (STB served June 23, 2023). On July 28, 2023, BNSF filed a Petition for Review of the STB's decision in the United States Court of Appeals for the Fifth Circuit. *See BNSF Ry. v. STB and United States of America*, Case No. 23-60402 (5th Cir.) (Doc. 1). On July 17, 2023, BNSF filed a petition for partial stay (at the STB) of the June 23 Decision. On August 3, 2023, in the Fifth Circuit, BNSF filed a Petition for Partial Stay of the Board's June 23 Decision and a Motion to Expedite Briefing and Decision (Docs. 19 and 20). On August 14, 2023, the Board denied BNSF's petition for partial stay. In addition, on the same August 14, 2023, the Board and the U.S. Department of Justice filed their opposition in the Fifth Circuit to BNSF's petition for partial stay and to BNSF's Motion to Expedite Briefing and Decision (Docs. 59 and 60).

The schedule in STB Docket No. NOR 42179 includes the following deadlines: (1) Discovery ends September 28, 2023; (2) NTEC's Opening is due on November 6, 2023; (3) BNSF's Reply is due on December 18, 2023; and (4) NTEC's Rebuttal is due on January 16, 2024.³

³ As noted above, the Board's August 7 Decision rejected BNSF's July 10 request for an extended discovery period (which BNSF expressly had sought in order to allow time for foreign discovery), and the Board also rejected BNSF's request for the separate scheduling of preliminary expert reports.

ARGUMENT

A. BNSF Improperly Seeks Foreign Discovery from a Non-Party to this Litigation which – by BNSF’s Own Admission – May Lack (and Very Likely Does Lack) Actual Possession of Responsive Documents and Information

BNSF’s Petition for Subpoena improperly seeks discovery from entities located outside the United States. To achieve that end, BNSF has sought to subpoena a U.S.-based, non-party to this litigation which has no existing or prior business relationship with NTEC and which, by BNSF’s own admission (BNSF Petition at 6 n.2) “may need to ask” foreign entities for the discovery requested by BNSF. Given the absence of any business relationship between NTEC and JERA Global NA, it is very likely that JERA Global NA does not have actual possession of any of the requested documents or information. The Board should reject BNSF’s effort.

1. BNSF’s Purported Justifications are Unavailing

In its Petition for Subpoena, BNSF offers three justifications for its effort to seek a subpoena directed towards JERA Global NA:

- (1) like its parent company, JERA Global [NA] is involved in the coal trade;
- (2) JERA [Trading Pte Ltd.] 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.

BNSF Petition at 2 n.1. None of these justifications has merit.

The fact that JERA Global NA has some involvement in the coal trade is insufficient to justify the issuance of a subpoena against it in the absence of a more direct link to the dispute between NTEC and BNSF. Again, NTEC has no business relationship

with JERA Global NA. BNSF's second and third purported justifications are even less persuasive insofar as they merely constitute admitted defects in (or impediments to) BNSF's effort to obtain international discovery (*i.e.*, Section 1321 does not allow subpoenas directed towards witnesses or records located outside the United States and letters rogatory can take a year or more to execute). Essentially, BNSF seeks to justify its invitation that the Board violate Section 1321 by observing that BNSF does not have any better option for delaying this case. Significantly, however, the Board lacks the power to issue a subpoena requiring a U.S. company to produce documents that are located outside the United States.

2. BNSF's Requested Relief Exceeds the Board's Authority Under 49 U.S.C. § 1321

As BNSF itself acknowledges, the Board is authorized under Title 49 of the United States Code to subpoena witnesses and records only "from any place in the United States." Petition at 4 (citing 49 U.S.C. § 1321(c)(1)). By its own admission, BNSF seeks documents that are in the possession of an entity in Japan (and whether BNSF realized it or not, Singapore). Petition at 6 n.2 (claiming that the fact that the U.S.-based target of the subpoena "may need to ask" its affiliate in Japan for the subject documents "*has no bearing* on the court [sic] issuing the subpoena") (emphasis added); *see also* BNSF's proposed Subpoena at 2, 4 (defining the target company of the requests as including foreign entities in Singapore and Japan).

Contrary to BNSF's claim, the fact that JERA Global NA is not likely to have any documents in its actual possession in the United States has considerable bearing on the

question of whether the Board should issue the subject subpoena. Absent the express geographic limitation that appears in 49 U.S.C. § 1321(c)(1), there would be no reason whatsoever for BNSF to seek discovery against JERA Global NA. JERA Global NA is an energy-trading subsidiary of a Netherlands-incorporated company.

BNSF has identified JERA Global NA as the one member of the overall JERA corporate family with a United States location and BNSF seeks to use that location to circumvent the statutory limit on the Board seeking to subpoena witnesses and records from outside the United States. Effectively, BNSF's Petition invites the Board to undermine Title 49 by granting to itself the power to subpoena records and witnesses of any entity in the world that happens to have an affiliate (however distant in terms of corporate structure and however distant in terms of litigation subject matter) that maintains an office in the United States. The Board should decline that invitation given that it is unnecessary and, more importantly, contradicts international agreements of the United States.

3. BNSF's Request Relief Violates International Conventions

As BNSF is seeking discovery from JERA entities in Singapore and possibly Japan, the Board must consider the appropriate international rules that apply. The U.S.-Japan Bilateral Consular Convention of 1963 and the Hague Convention on Obtaining Evidence Abroad in Civil and Commercial Matters are two international agreements to which the United States is a signatory, and which establish procedures to protect and respect the sovereignty each country's judicial system by limiting the means by which discovery is obtained from entities within each country's borders. Obviously, Japan is a

signatory to the U.S.-Japan Convention and Singapore is a signatory to the Hague Convention. Under those conventions, the *Fujikura* court, as noted above, held that a party's attempt to seek discovery from a Japanese company by serving a subpoena on a U.S. subsidiary "*is in direct contravention*" of the U.S.-Japan Bilateral Consular Convention of 1963 (and the Hague Convention). *Fujikura* at *7 (emphasis added).

The *Fujikura* case pertained to subpoenas that the Finistar Corporation issued in its patent infringement action against Nistica, Inc. in the Northern District of California. *Id.* at *1. In stark contrast to the case at issue here, the target of the subpoenas, Fujikura Ltd., a Japanese company, was the indirect parent of Nistica, Inc., the defendant in the underlying action. Moreover, Nistica admitted that "Fujikura is footing the bill for defending Nistica in the patent infringement action that Finisar brought." *Id.* Notwithstanding the clear corporate relationship to an active party to the case, the court found that the effort to secure discovery from the Japanese parent (including the productions of documents) – merely by serving a Rule 45 subpoena on a California subsidiary – was unlawful:

There is a separate reason to quash Finisar's subpoenas: its attempt to seek discovery from a Japanese company merely by serving a Rule 45 subpoena on a California subsidiary *is in direct contravention of the evidentiary treaty between the United States and Japan*—specifically, Article 17 of the U.S.-Japan Bilateral Consular Convention of 1963.[] See International Judicial Assistance: Japan, <http://travel.state.gov/content/travel/english/legal-considerations/judicial/country/japan.html>, last visited May 8, 2015. Article 17(1)(f) of the Treaty provides that a consular officer may "obtain copies of or extracts from documents of public registry," *but not other documents*, such as those in the hands of the third party. *Thus, a party is obligated to proceed through consular*

officials to obtain documentary discovery. A party also has available to it the option of sending a letter rogatory pursuant to the court's inherent authority to do so. *See Asis Internet Servs. v. Optin Global, Inc.*, No. C-05-05124-JCS, 2007 WL 1880369, at *3 (N.D. Cal. June 29, 2007) ("A court is inherently vested with authority to issue letters rogatory." (citing *United States v. Staples*, 256 F.2d 290, 292 (9th Cir. 1958)); *see also* 28 U.S.C. § 1781(a)(2) (implicitly providing federal courts with authority to issue letters rogatory)).

Finisar cannot skirt these rules merely by serving a subsidiary of a foreign parent corporation on U.S. soil. If that were the case, the U.S.-Japan Consular Convention (and the Hague Convention, for countries that are signatories thereto) would be entirely toothless for a large number of global companies with U.S. subsidiaries.

Id. at *7 (emphasis added).

BNSF's Petition no makes reference to *Fujikura*. Instead, BNSF cites *Japan Halon Co. v Great Lakes Chem. Corp.*, 155 F.R.D. 626 (N.D. Ind. 1993) for the proposition that seeking discovery from an American subsidiary of a Japanese company is sufficient for obtaining documents from the Japanese parent company. BNSF Petition at 6 n.2. BNSF's citation of *Japan Halon* is not applicable to the procedural posture of this case and BNSF fails to acknowledge critical differences between the *Japan Halon* case and the circumstances presently before the Board. Most importantly, *Japan Halon* was a Japanese company that had chosen to avail itself of the U.S. judicial system and thus voluntarily subjected itself to normal Rule 34 document discovery procedures (including inquiries into whether the requested documents were in its possession, custody or control). Equally significant, the targets of the discovery in *Japan Halon* were parent companies of the plaintiff, *Japan Halon*. Accordingly, the discovery in *Japan Halon* was served under Rule 34 against a foreign plaintiff that submitted itself to U.S. jurisdiction

(unlike BNSF's Petition seeking discovery under Rule 45 against a non-party). In addition, the Court in *Japan Halon* did not consider the U.S.-Japan Bilateral Consular Convention, but instead briefly mentioned that the Hague Convention does not apply to Japan.

BNSF's Petition for Subpoena finds no basis in the law or treaty to seek documents from any foreign entity associated with JERA Global NA, and the Board should reject BNSF's Petition, especially given international comity and the remoteness of JERA Global NA and its related entities to the proceeding.

4. BNSF's Own Invocation of the STB's Rules Undermines BNSF's Petition

BNSF's Petition also implicitly acknowledges that the Board's own regulations do not contemplate the use of subpoenas in contexts other than Oral Hearings. In particular, BNSF states that it files its Petition under 49 C.F.R. §§ 1113.2(b) and 1117.1. Petition at 1. As the Interstate Commerce Commission's ALJ Paul J. Clerman ("ICC" or "Commission") explained in a 1987 decision, the agency's subpoena regulations relate only to oral hearings, not to efforts to acquire facts or knowledge in discovery:

Under the Commission's Rules of Practice at Section 1113.2, relied on by complainant, the Commission may issue a subpoena 'to compel the appearance of a person at a hearing to give oral testimony', and under subparagraph (b)(2), 'to compel a witness to produce documentary evidence.' Black's Law Dictionary defines subpoena as the process by which the attendance of a witness is required, an order directed to a person which requires his attendance at a particular time and place to testify as a witness and/or to bring with him specified documents. *Indeed, in the Commission's Rules the subject of subpoenas appears under the Part 1113 heading – ORAL HEARING.*

Asphalt Supply & Service, Inc. v. Union Pac. R.R., NOR 40121, 1987 WL 98155, at *1 (ICC served March 27, 1987) (“*Asphalt Supply*”) (emphasis added); *see also* 49 C.F.R. Part 1113 (“Oral Hearing”).

The Commission added, however, that the complaint in *Asphalt Supply* was seeking discovery, not hearing attendance:

It is quite clear from the petition, on the other hand, that *complainant does not here seek to compel the appearance at a hearing of a witness and his documents*. It is just as clear that what complainant is pursuing is *the ascertainment and acquisition of facts or knowledge, facts or knowledge that it believes is in the possession of Paramount*. This is discovery, and it is altogether appropriate for complainant to pursue discovery inasmuch as this proceeding is now in the discovery phase. . . . Under Part 1114, Subpart B—DISCOVERY, the Commission’s Rules provide a variety of methods for complainant to obtain from Paramount the facts or knowledge that it needs for this litigation.

Asphalt Supply at *1; *cf.* 49 C.F.R. Part 1114, Subpart B (“Discovery”).

The Board’s discovery regulations do not identify any procedures regarding the use of subpoenas and, as such, do not contemplate the issuance of subpoenas outside the context of an oral hearing.⁴ The present context involves BNSF’s request for documents (and for a deposition) to support BNSF’s preparation of written evidence. The Board should not permit BNSF to utilize hearing-based procedures to obtain written discovery (or deposition testimony) from companies and individuals that are outside the Board’s

⁴ BNSF’s citation of 49 C.F.R. § 1117.1 pertains to “Petitions for Relief Not Otherwise Covered.” That particular regulation is insufficient as a source of authority for overriding the geographic limitations of 49 U.S.C. § 1321(c).

statutory subpoena power, particularly where that effort is inconsistent with the Board's own regulations.

Although the Board has not addressed this particular hearing versus discovery distinction in certain of its subpoena-related decisions, NTEC respectfully submits that the distinction remains meaningful in the present context where, as discussed below, BNSF seeks a subpoena against a "stranger to the litigation" (as had been the case in *Asphalt Supply*).

B. BNSF Has Failed to Lay a "Very Strong Foundation" That its Subpoena Requests are Necessary

Notwithstanding all of the foregoing defects, it also is evident – even solely with respect to any documents actually in the possession of the U.S.-based JERA Global NA – that BNSF has failed to make the requisite showing of need for such discovery. In cases involving the use of subpoena power against a stranger to the litigation, a party is required to "lay[] a very strong foundation before [the agency] will use its subpoena power to compel . . . actions which may be expensive, oppressive or burdensome." *Asphalt Supply*, 1987 WL 98155 at *1.

In its Petition, BNSF relies upon the Board's 2012 decision in *Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions*, FD 35557 (STB served Feb. 27, 2012) ("*BNSF Coal Dust*"). Notably, the Board's *BNSF Coal Dust* decision itself analyzes *Asphalt Supply* and emphasizes that the requirement to lay a "very strong foundation" before granting a subpoena applies in situations involving strangers to the litigation. *BNSF Coal Dust* at 2. While the Board allowed discovery against non-parties in *BNSF*

Coal Dust, the subpoenas at issue in that case were directed to the individual members of an organization that itself was an active party to the case. In light of that participation, the Board held that the organization's members were not strangers to the litigation. *BNSF Coal Dust* at 2. Unlike the situation in *BNSF's Coal Dust*, JERA Global NA has no involvement whatsoever in the pending Complaint case.

Given that lack of involvement, the Board's heightened standard of proof applies. Under that standard, BNSF has failed to lay a "very strong foundation" that its requested subpoena is necessary, as NTEC explains below with regard to BNSF's individual discovery requests.

BNSF asks the Board to require JERA Global to produce documents (created on or after January 1, 2019) and to provide deposition testimony that is responsive to a set of four requests. NTEC addresses each request, in turn.

- (1) All contracts or agreements between JERA Global and Cloud Peak Energy, Inc. [*i.e.*, the prior owner of NTEC's Spring Creek Mine] or NTEC related to the shipment of export coal from the Spring Creek Mine.

This request is unnecessary because BNSF already has requested all of the responsive contracts, which NTEC has already produced or will produce.

- (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.

NTEC's document production in this proceeding already includes approximately 50,000 pages of NTEC-JERA (JERA Trading Pte Ltd.) communications, and NTEC will also produce NTEC internal discussions of negotiations with JERA. Those communications are far more likely to contain relevant information regarding the impact

(or lack of impact) of BNSF's service failures on the question of contract renewal than whatever records may exist in JERA Global NA's files.

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

As noted, NTEC's document production in this proceeding already includes a substantial volume of communications between NTEC and its JERA customer (JERA Global Markets Pte. Ltd./JERA Trading Pte Ltd.). Those communications are far more likely to contain relevant information regarding BNSF's service failures than whatever records may exist in JERA Global NA's files.

- (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.

BNSF fails to offer any explanation of the potential relevance of this request. NTEC's Complaint alleges that NTEC's reputation has been harmed (and that it therefore will be more difficult for NTEC to secure purchase agreements) because of BNSF's poor rail transportation service. There is no basis for concluding that NTEC's allegation would be any more or less valid in situations in which JERA previously purchased 1%, 10%, or 100% of its annual coal from NTEC. If JERA purchased all of its coal from NTEC, then the poor service likely would have had a greater adverse effect upon JERA. If JERA purchased only 1% of its coal from NTEC, then JERA presumably would have had an easier time finding alternative coal suppliers to replace the limited volume of NTEC-produced coal that it previously had purchased.

CONCLUSION

For the foregoing reasons, NTEC respectfully requests that the Board deny BNSF's Petition for Subpoena.

Respectfully submitted,

NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC

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Dated: August 28, 2023

CERTIFICATE OF SERVICE

I hereby certify that this 28th day of August, 2023, I have caused copies of the foregoing to be served via email upon counsel of record for BNSF Railway Company.

/s/ Daniel M. Jaffe
Daniel M. Jaffe