

BEFORE THE
SURFACE TRANSPORTATION BOARD

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DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

**BNSF RAILWAY COMPANY'S SURREPLY IN SUPPORT OF
MOTIONS SEEKING LETTERS ROGATORY¹**

BNSF Railway Company ("BNSF") respectfully submits this Surreply in Support of its Motions Seeking Letters Rogatory (Aug. 8, 2023).² BNSF requests that the Administrative Law Judge issue a Recommendation (attached as Appendix A to the JERA Motion) to the United States District Court for the District of Columbia recommending issuance of a Letter Rogatory to obtain evidence from JERA Trading Pte Ltd.³ ("JERA") in Japan and a Letter Rogatory (Appendix A to

¹ To the extent leave is deemed necessary to file this Surreply, BNSF requests such leave in the interest of a complete record and to correct NTEC's mischaracterizations. This Surreply is especially appropriate here to address the complicated issues and processes at play both in the United States and abroad when dealing with letters rogatory.

² BNSF submitted two separate motions for issuance of letters rogatory, one each for Japan (JERA Trading Pte Ltd.) ("JERA Motion") and Canada (Westshore Terminals Ltd.) ("Westshore Motion"). NTEC consolidated its response to the Motions in a single brief. *See* NTEC's Consolidated Response to BNSF's Motions Seeking Recommendation to Issue Letters Rogatory (Aug. 28, 2023) ("Reply"). For the Board's convenience, BNSF is submitting a single Surreply for both Motions.

³ BNSF's Motion Seeking Letters Rogatory referenced JERA Trading Pte Ltd. based on NTEC stating in its Complaint that it had a sales agreement with that

Westshore Motion) to the appropriate judicial authorities in Canada to obtain evidence from Westshore Terminals Ltd. (“Westshore”).

INTRODUCTION

Navajo Transitional Energy Company, LLC (“NTEC”) has made several allegations in this case necessitating discovery from foreign entities. According to NTEC’s Reply, however, BNSF and the Board must simply take NTEC at its word that it has suffered reputational harm and lost sales abroad due to BNSF’s alleged shipping failures. In particular, NTEC has alleged that BNSF has caused “NTEC to lose significant holdings at Spring Creek, to miss vessel loadings at Westshore, and to be unable to operate Spring Creek at levels sufficient to meet demand.” Compl.

¶ 53. In turn, these supposed shortcomings have allegedly harmed “NTEC’s business reputation,” *id.* ¶ 38, and caused NTEC to lose sales, *see id.* ¶¶ 54, 61.

NTEC doubled down on these allegations at the argument on its request for an Emergency Service Order, with officials offering hearsay that Asian customers had declined to do business with NTEC due to railroad and shipping problems. *See generally* JERA Motion at 4-5.

If NTEC continues to press reputational harm and lost sales as damages, BNSF must be able to probe these allegations. Absent discovery from Westshore and JERA, two entities that are able to shed light on these claims, NTEC’s allegations are not just based on hearsay but are entirely speculative. NTEC

entity in Japan. *See* Compl. ¶ 9 (referencing agreement governing coal sale to “a single customer in Japan (*i.e.*, JERA Trading Pte Ltd. or ‘JERA’)”).

argues that the totality of evidence sought in the proposed Letters Rogatory is already in NTEC or BNSF's possession, but that cannot be the case. NTEC cannot possibly have detailed records or information regarding prioritizing and loading processes at Westshore, nor can it have evidence regarding Asian customers' true reasons for taking business elsewhere.

It is thus a matter of fundamental fairness that BNSF be allowed to pursue this discovery. NTEC has mischaracterized the standards for issuing letters rogatory; nothing in NTEC's cited authority describes the procedure as "extraordinary" or having a particularly high threshold. Contrary to NTEC's arguments, BNSF has not unduly delayed in bringing these Motions. The Administrative Law Judge should grant the Motions and allow BNSF to obtain this important discovery.

ARGUMENT

I. The Proposed Letters Rogatory Are Necessary and Appropriate, and Must Issue

With respect to the merits of the Motions, NTEC offers little more than mischaracterization of what the Letters Rogatory will actually seek and relevant case law. The Letters Rogatory must issue because Westshore and JERA have information critical to this case, and, though it could meet the standards NTEC cites, BNSF does not need to meet some heightened threshold to justify the issuance. But the inquiry need not be that complicated: NTEC has alleged that BNSF's shipments of coal to Westshore have been inadequate, and that customers in Asia have cited these delays to explain not purchasing from NTEC. These

allegations require some sort of verification from Westshore and the Asian customers if they are to stand. The requested discovery is thus appropriate.

A. Westshore and JERA Possess Relevant Documents and Information

NTEC argues that the documents sought through the Letters Rogatory “in large part, can be obtained from NTEC’s and BNSF’s files.” Reply at 13. This strains credulity. First, with respect to Westshore, NTEC insists that BNSF must have all the information it needs because “BNSF is the party that delivers those trains.” *Id.* at 19. But that ignores what the Board Chairman himself observed with respect to Westshore’s significance to this dispute: “[E]verybody seems to agree that the rotation of these trains *ultimately is determined by Westshore*, and whether those are shipped there because *Westshore handles the loading of the ships*.” Hearing Tr. 232:18-22 (NOR 42178 May 10, 2023) (emphasis added). While BNSF obviously possesses information regarding the volume of its own shipments to Westshore, it could not possibly have information that would show whether delays or procedures at Westshore (such as a strike in 2022) contribute wholly or in part to the delays NTEC alleges. Additionally, internal Westshore information regarding train and vessel slotting and overall capacity is relevant to damages and the reasonableness of NTEC’s common carrier request.

NTEC’s arguments regarding JERA are even weaker. NTEC states that it “has represented to BNSF that it will produce any communications with JERA that are responsive to” BNSF’s request regarding “JERA’s decision not to renew the NTEC/JERA coal supply contract.” Reply at 16. But communications between

JERA and NTEC are only a small part of this issue. Internal *JERA* communications and records will likely show that there were myriad other potential market-based reasons for non-renewal and that blaming railway issues, if that indeed is what happened, was perhaps a means to maintain a cordial business relationship with NTEC.

Finally, NTEC argues that JERA and Westshore are “not integral to the subject STB litigation.” Reply at 10-11. That cannot be the case as long as NTEC alleges lost sales and reputational harm. NTEC should not be allowed to proceed with untestable damages claims. At a minimum, NTEC should not be permitted to submit evidence regarding topics on which BNSF has not had the opportunity to obtain meaningful discovery. To allow NTEC to rely on such submissions would be fundamentally unfair.

B. NTEC Mischaracterizes the Legal Authority

NTEC attempts to muddy the legal waters by suggesting that letters rogatory are “extraordinary” tools not to be used “cavalierly.” *See, e.g.*, Reply at 11. But while their use may be less common than conventional subpoenas for obvious reasons, there is no support in any of NTEC’s cases for the notion that letters rogatory must meet some high threshold or be a last resort in order to be granted.

Take NTEC’s exaggeration of *Societe Nationale Industrielle Aerospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522 (1987) (“*Aerospatiale*”). According to NTEC, *Aerospatiale* “requires” analysis of five factors

before granting letters rogatory.⁴ See Reply at 11-12 (citing *Aerospatiale*, 482 U.S. at 544 n.28). But the Supreme Court’s footnote in *Aerospatiale* simply repeated factors from the Restatement on Foreign Relations Law that are “relevant” but “not . . . a consensus of international views” regarding international comity concerns. 482 U.S. at 544 n.28. The Court even emphasized, “We do not articulate specific rules to guide this delicate task of adjudication.” *Id.* at 546. NTEC then cites to the Court’s call for “special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position,” to argue against issuance of Letters Rogatory here. Reply at 11 (citing *Aerospatiale*, 482 U.S. at 522, 546). But the Court in that case was dealing with a *litigant* who argued that the Hague Convention should apply over the Federal Rules of Civil Procedure to discovery of its own documents. 482 U.S. at 529. The Court’s admonition regarding “special vigilance” was to ensure that the *parties* to a case do not face such different discovery rules as to be unfair to one party over another. *Id.* at 546.

But even if the Board were to adopt the *Aerospatiale* factors, BNSF meets them here. As argued above, the information sought is important to resolution of

⁴ Those five factors are: (1) The importance to the litigation of the documents or other information requested; (2) The degree of specificity of the request; (3) Whether the information originated in the United States; (4) The availability of alternative means of securing the information; and (5) The extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where information is located. See Reply at 11-12 (citing *Aerospatiale*, 484 U.S. at 544 n.28).

this case. BNSF has narrowly tailored its requests to specific information. *See* JERA Motion at 6; Westshore Motion at 5-6. The requested information did not originate in the United States nor can be found in the United States. There is no alternative means to obtain the discovery. And there is no reason to believe that the Letters Rogatory undermine any important national interests of the United States, Canada, or Japan. NTEC argues that BNSF must prove “that the existing processes for discovery at the Board are insufficient,” Reply at 11, but that is clearly the case here, as both parties agree that the Board’s subpoena power does not reach JERA or Westshore.

NTEC’s other cases similarly fail to support its arguments, as *none* holds that letters rogatory must meet an “extraordinary” threshold. NTEC cites *Tulip Computers International B.V. v. Dell Computer Corporation*, 254 F. Supp. 2d 469 (D. Del. 2003), for example, to argue that the party seeking letters rogatory bears “the burden of proving the necessity of such extraordinary action.” Reply at 12. But that case, which dealt with the burden of determining whether the Hague Evidence Convention applied, admitted, “That burden is not great.” *Tulip Computers*, 254 F. Supp. 2d at 474. BNSF meets that burden, to the extent it even applies, here.

Finally, NTEC attempts to confuse the issues further by arguing that the proposed Letter Rogatory for JERA is improper because “there is no means through Letters Rogatory to a Japanese Court to compel the production of documents.” Reply at 22. But nowhere did BNSF suggest that a Japanese company could be

compelled to produce documents.⁵ If the inability to compel production were fatal, then no letters rogatory to Japan could ever be issued. That does not mean that parties should not attempt to use the discovery tools available, in this case a Letter Rogatory seeking voluntary compliance.

II. BNSF Has Not Delayed Seeking Letters Rogatory

NTEC also mischaracterizes the circumstances of BNSF's requests for Letters Rogatory. First, NTEC claims that BNSF waited two and a half months to serve this discovery. Reply at 2. This is wrong. The Board first credited NTEC's unsubstantiated allegations of reputational harm in its June 23, 2023 order granting a preliminary injunction. *See* NOR 42178 slip op. at 10 (STB served June 23, 2023). However, the Board did not issue a procedural schedule or a protective order until June 30, 2023 and July 18, 2023, respectively. NOR 42179 (STB served June 30, 2023) (Procedural Schedule); NOR 42179 (STB served July 18, 2023) (Protective Order). Since the issuance of the procedural schedule, BNSF has diligently pursued discovery in this matter. BNSF served discovery requests on NTEC promptly, identified potential sources of third-party discovery (including U.S.-based subsidiaries of JERA), and prepared not only the JERA and Westshore

⁵ Even if NTEC's argument was applicable, the Supreme Court has already rejected it. *See Societe Nationale Industrielle Aerospatiale v. U. S. District Court*, 482 U.S. 522, 544 n.29 (1987) ("[I]t is well settled that such [foreign] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.") (citing *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204-06 (1958)).

Motions but the complete set of documents to be filed in district court or with diplomatic authorities, among other steps.

Next, NTEC mischaracterizes the Board’s decision regarding the duration of discovery in this matter. *See* Reply at 3-4. In its August 7, 2023 ruling, the Board extended the discovery deadline in this matter and stated that “[a]s 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).” NOR 42179, at 4-5 (STB served Aug. 7, 2023). The timing of BNSF’s Motions for Letters Rogatory request should not bear on the legitimacy of the request.

* * *

NTEC has thus far in this proceeding enjoyed an unfair advantage with the Board crediting unsubstantiated and unexamined evidence and hearsay testimony. NTEC’s Reply seeks to embed that advantage into the remainder of the proceeding. Due process and fundamental fairness dictate that BNSF be permitted a full opportunity to explore these topics, or else NTEC must be prevented from presenting them to the Board.

CONCLUSION

BNSF respectfully requests that the Administrative Law Judge assigned to this proceeding grant the Motions and issue the proposed Letter Rogatory (Canada) and Recommendation (Japan).

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Dated: September 1, 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

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September 1, 2023