

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Public Record

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

**BNSF RAILWAY COMPANY'S SURREPLY IN SUPPORT OF
PETITION FOR SUBPOENA¹**

BNSF Railway Company ("BNSF") respectfully submits this Surreply in Support of its Petition for Subpoena. BNSF requests that the Administrative Law Judge issue the Subpoena (attached as Exhibit 1 to the Petition for Subpoena) to JERA Global Markets North America, LLC ("JERA Global").

I. INTRODUCTION

Throughout this case, Navajo Transitional Energy Company, LLC ("NTEC") has alleged it suffered reputational harm and lost sales in Asia as a result of BNSF's alleged shipping failures. It does so through a second-hand retelling of what some undisclosed Asian customers allegedly said about NTEC's reputation and the rail service NTEC receives from BNSF. 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

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.

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. In the argument on NTEC’s request for an Emergency Service Order, the Board credited statements by NTEC officials offering hearsay that Asian customers had declined to do business with NTEC due to railroad and shipping problems, and awarded NTEC a preliminary injunction. *See* NOR 42178 slip op. at 10 (STB served June 23, 2023) (citing the “reputational injuries [NTEC] is suffering” as irreparable harm to support its grant of a preliminary injunction).

If NTEC is going to continue to allege that it suffered reputational harm and lost sales because of BNSF, fundamental fairness dictates that BNSF must be able to investigate those purported conversations. NTEC argues that the totality of evidence sought in the subpoena is already in NTEC or BNSF’s possession, but that is false. Neither NTEC nor BNSF could possibly have detailed records or information regarding, for example, Asian customers’ true reasons for taking business elsewhere.

Contrary to NTEC’s substantive arguments, the Surface Transportation Board (“STB” or the “Board”) has authority under 49 U.S.C. § 1321 to subpoena JERA Global without violating U.S. or foreign law. Further, BNSF has not delayed in bringing this Petition. To ensure that BNSF is afforded meaningful discovery and a fair opportunity to defend against NTEC’s allegations, the Administrative Law Judge should grant BNSF’s Petition and issue a subpoena to JERA Global.

II. ARGUMENT

A. The Board's Authority to Issue Subpoenas Under 49 U.S.C. § 1321 Is Not Limited to Oral Hearings

NTEC relies on a single, 36-year-old case by the Interstate Commerce Commission for the proposition that the Surface Transportation Board does not have authority to issue subpoenas outside of oral hearings. *See* NTEC Reply at 17-19. This is contrary to both STB regulations and the Board's decisions. *See, e.g., Wisconsin Power and Light Co.*, No. 42051, 2000 WL 799085, at *1 (STB served June 20, 2000) ("Our authority to issue subpoenas is not limited to oral hearings, as we have express statutory authority under 49 U.S.C. § 721(c) [now § 1321(c)] to subpoena witnesses and records related to a proceeding."); *E. W. Resort Transportation, LLC, and Tms, LLC, d/b/a Colorado Mt. Express--Pet. for Declaratory Or.--Motor Carrier Transportation of Passengers in Colorado*, No. MC-F-21008, 2005 WL 1284922, at *2 (STB served June 1, 2005) (issuing subpoena on non-parties for documents and deposition under § 1321(c)); *Arizona Pub. Serv. Co. & Pacificorp*, No. 41185, 2003 WL 23009129, at *1 (STB served Dec. 23, 2003) (issuing subpoena to non-party "as long as it is 'related to a proceeding of the Board'"); *see also* 49 U.S.C. § 1321(c)(1) ("The Board may subpoena witnesses and records related to a proceeding of the Board from any place in the United States, to the designated place of the proceeding.").²

² BNSF's requested subpoena properly balances the relevance of the information sought and the burden of production. *See Ballard Terminal R.R. Co., L.L.C. – Acquisition and Operation Exemption*, No. AB 6 (Sub-No. 465X), 2013 WL 2157801, at *2 (STB served May 17, 2013). First-hand information from NTEC's

B. The Board Has Authority to Issue a Subpoena to JERA Global

NTEC offers no support for its assertion that issuing a subpoena on a U.S. entity would violate 49 U.S.C. § 1321(c)(1). Nor could it. Under the plain text of the statute, “[t]he Board may 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). It is uncontested that JERA Global is located in the United States. Courts frequently issue subpoenas on U.S. subsidiaries despite the fact that they may have to obtain some of the requested information from affiliated corporations. *See* Petition at 6 n.2; *see also Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127, 130 (D. Del. 1986) (“Discovery requests have sought successfully documents held by a foreign parent corporation through a subsidiary.”).³

Absent support in case law, NTEC instead suggests, that allowing this discovery would “contradict[] international agreements of the United States.” Reply at 14. The Supreme Court has already rejected this reasoning. *See Societe Nationale Industrielle Aerospatiale v. U. S. District Court*, 482 U.S. 522, 544 n.29

customers regarding their opinions of any reputational harm attributable to BNSF is essential to BNSF’s proper defense of this proceeding. Otherwise, BNSF has no way to investigate the circumstances and context behind the purported statements of NTEC’s customers. The scope of the discovery is narrowly tailored, with only four requests for production and a potential deposition. BNSF also agreed to work with JERA Global to address any concerns as to burden that may be raised. *See* Petition for Subpoena at 6.

³ Contrary to NTEC’s inferences, there is no requirement that JERA Global be the direct subsidiary of an affiliated company that effectively controls the company “by virtue of stock ownership or otherwise.” *See* Petition at 6 n.2. NTEC’s reply shows that both JERA Co., Inc. and JERA Global Markets Pte. Ltd. f/k/a JERA Trading Pte. Ltd. still own and control JERA Global, which is sufficient. *See* Reply at 7.

(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)).

C. Issuance of the Requested Subpoena Does Not Violate International Conventions

Next, NTEC argues that issuing a subpoena to JERA Global would violate the U.S.-Japan Bilateral Consular Convention (“U.S.-Japan Convention”) and the Hague Convention on Obtaining Evidence Abroad in Civil and Commercial Matters (“Hague Convention”).⁴ See Reply at 14-17. This argument misses the mark. Just because Japan is a signatory to the U.S.-Japan Convention does not mean that any request for evidence—including from a U.S. company—must go through that treaty.⁵

As the court recognized in *Japan Halon Co. v. Great Lakes Chem. Corp.*, 155 F.R.D. 626, 627-28 (N.D. Ind. 1993), parties can obtain evidence from foreign companies through letters rogatory or through third-party subpoenas issued to a

⁴ Japan is a signatory to the U.S.-Japan Convention but not the Hague Convention. JERA Co., Inc. is headquartered in Japan. Singapore is a signatory to the Hague Convention, which is where JERA Trading Pte Ltd. is based.

⁵ Even NTEC’s sole cited case recognized that the U.S.-Japan Convention is not the only avenue to get evidence in Japan. *Fujikura Ltd. v. Finisar Corp.*, No. 15MC80110HRLJSC, 2015 WL 5782351, at *7 (N.D. Cal. Oct. 5, 2015) (“A party also has available to it the option of sending a letter rogatory pursuant to the court’s inherent authority to do so.”).

U.S. subsidiary.⁶ NTEC attempts to distinguish this case by pointing out that, “[m]ost 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.” Reply at 16. But, whether Japan Halon was a Japanese company who availed itself of U.S. courts is irrelevant. What matters is that its Japanese parent company who was the eventual target of the subpoena was not a party to the litigation and did not avail itself of the U.S. judicial system. Yet, the court still issued the requested subpoena as the STB should do here.

D. BNSF Has Not Delayed Seeking Third Party Discovery

Finally, in its Reply, NTEC mischaracterizes the circumstances of BNSF’s request for subpoena. First, NTEC claims that BNSF waited two and a half months to serve this discovery. NTEC Reply at 3. 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

⁶ As stated in BNSF’s Petition for Subpoena, BNSF is simultaneously seeking the issuance of a letter rogatory to JERA Global’s parent company because (1) both JERA Global and its parent are involved in the coal trade; (2) JERA’s parent is not subject to the Board’s subpoena power; and (3) letters rogatory can take a year or more to execute. Petition for Subpoena at 2 n.1.

NTEC promptly, identified potential sources of third-party discovery (including JERA entities and Westshore Terminals Ltd.), and prepared not only the petition for subpoena and motions for letters rogatory, but also 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 4-5. 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 subpoena 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.

III. CONCLUSION

For the foregoing reasons, BNSF requests that the Administrative Law Judge assigned to this proceeding grant BNSF's Petition, issue the subpoena directed to JERA Global, and stipulate that the protective order in this case governs the production of all documents in response to those requests.

Respectfully submitted,

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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

Tara A. Woods

Attorney for BNSF Railway Company

September 1, 2023