



Majel M. Russell • Georgette H. Boggio

Attorneys at Law

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307110

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

ENTERED
Office of Proceedings
September 12, 2023
Part of
Public Record

With a copy to:

Judge Thomas McCarthy
1331 Pennsylvania Avenue, N.W., Suite 520N
Federal Mine Safety and Health Review Commission
Washington, DC 20004-1710

Via email: ctolbert@fmshrc.gov and cbrightwell@fmshrc.gov

Re: NTEC Discovery Request

I am legal counsel for The Crow Tribe of Indians ("Crow Tribe"). I understand that as part of STB Docket No. NOR 42179, Navajo Transitional Energy Co., LLC v. BNSF Railway Co., Navajo Transitional Energy Co., LLC ("NTEC") has requested "all post-2021 correspondence between BNSF and the Crow Tribe regarding export coal transportation service, including but not limited to (a) any draft coal transportation agreements exchanged with the Crow Tribe; and (b) any communications with the Crow Tribe regarding the timing of such export coal transportation service or regarding any delays in the commencement of such export coal transportation service." This discovery request is broad and involves the disclosure of commercially sensitive and proprietary information.

There has been no impact to-date on NTEC's operations from correspondence that have been held between the Crow Tribe and BNSF during 2022 and 2023. The Crow Tribe has no export coal transportation agreement with BNSF and made no shipments in 2022 and none to-date in 2023. It is unclear how the exchange of correspondence over the last 18+ months between the Crow Tribe and BNSF has impacted NTEC and is in any manner connected to NTEC's claims in STB Docket No. NOR 42179 of a breach of common carrier obligation; failure to provide adequate car service, and unreasonable practice.

Like any member of the public, the Crow Tribe has the right to rail transportation services under BNSF's common carrier obligation and can engage in commercial discussions with BNSF for the purpose of entering a contract for services. Discussions have been held under a confidentiality obligation.

It is inappropriate for a competitor to have access to our costs and the terms and conditions of our agreements, including draft agreements. We request that our correspondence and draft agreements with BNSF are excepted from disclosure.

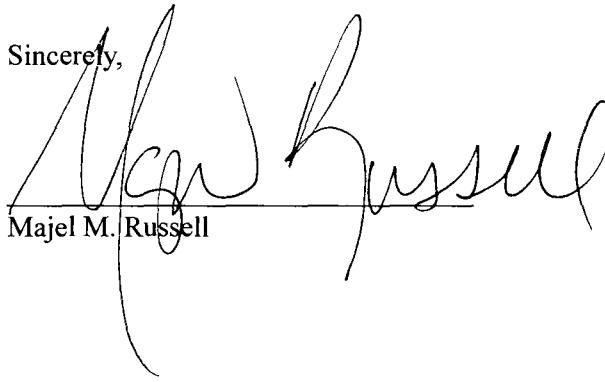
If information from our discussion with BNSF is required, NTEC should be under an obligation to request it with specificity in referring to NTEC's claims. As in FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company, Docket No. 42022, NTEC should have the obligation to (1) identify the information it requires with specificity; (2) explain the basis for that assertion (and, I would add, why the information is not available through alternative means); and (3) narrowly tailor its discovery request to information needed.

While we expect that no disclosure of correspondence between BNSF and the Crow Tribe should be provided pursuant to NTEC's request, if any disclosure is ordered by the Board, it should be protected under a HIGHLY CONFIDENTIAL designation pursuant to the Protective Order dated July 18, 2023 (STB Decision ID No. 51801, NTEC v BNSF, NOR 42179). Prior to making such order, the Crow Tribe would request a meeting with Judge McCarthy who has been authorized under STB Decision ID No. 51810, NTEC v. BNSF, NOR 42179 to entertain and rule upon discovery matters and resolve initially any disputes regarding discovery to first consider our position and legal rights.

Should our rights be infringed, the Crow Tribe will seek all available remedies. BNSF operates on a right-of-way through the Crow Reservation for substantially all coal export shipments, including all shipments from NTEC's Spring Creek mine. An 1889 Act of Congress granted BNSF the right-of-way across our Reservation and guaranteed that rail operations should be conducted with "due regard for the rights of the [Crow] Indians." We expect that all obligations to the Crow Tribe in connection with the operation of the railroad be fulfilled.

Should you have any questions, please contact me.

Sincerely,



Majel M. Russell

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the Letter RE: NTEC Discovery Request in Docket No. NOR 42179, Navajo Transitional Energy Co., LLC v. BNSF Railway Co., was mailed, e-mailed or hand-delivered on this 12th day of September 2023, at the following address:

Administrative Law Judge Thomas McCarthy
ctolbert@fmshrc.gov

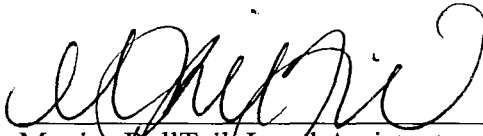
Timothy J. Strafford
tstrafford@steptoe.com

Anthony J. LaRocca
alarocca@steptoe.com

Onika K. Williams
owilliams@steptoe.com

Daniel M. Jaffe
dmj@sloverandloftus.com

Peter W. Denton
pdenton@steptoe.com



Monica Bull Tail, Legal Assistant
Elk River Law Office, PLLP