

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
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September 13, 2023
Part of

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

**NAVAJO TRANSITIONAL ENERGY COMPANY, LLC'S
RESPONSE TO BNSF RAILWAY COMPANY'S
MOTION SEEKING RECOMMENDATION TO
ISSUE LETTERS ROGATORY TO KOREAN ENTITIES**

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Dated: September 13, 2023

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Pursuant to 49 C.F.R. Part 1104, Navajo Transitional Energy Company, LLC (“NTEC”) hereby submits this response to BNSF Railway Company’s (“BNSF”) Motion Seeking Recommendation to Issue Letters Rogatory (“Motion”) to four Korean entities: (1) WoonBong Energy Co., LTD (“Woon Bong”); (2) Korea East West Power Co., LTD (“Korea East West”); (3) Korea South-East Power Co., LTD (“Korea South-East”); and (4) Korea Midland Power Co., LTD (“Korea Midland”) (collectively “Korean Entities”).

I. BACKGROUND

BNSF’s August 24, 2023 Motion is essentially indistinguishable from the Motions it filed on August 8, 2023 seeking documents and depositions from a Japanese and a Canadian entity, except that these requests are directed to Korean entities and that the

Republic of Korea is a signatory to the Hague Convention on Obtaining Evidence Abroad in Civil and Commercial Matters (“Hague Convention”). On September 7, 2023, Administrative Law Judge McCarthy granted in part and denied in part BNSF’s two motions for Letters Rogatory (“Decision”). As described herein, the Board should reject BNSF’s Motion and its ever-growing attempts to expand its unprecedented international discovery fishing expedition.

A. Korean Entities

BNSF’s Motion seeks information from four Korean entities. BNSF seeks a deposition and documents from Woon Bong. Woon Bong is not a customer of NTEC. Instead, Woon Bong is NTEC’s exclusive agent for sales to all Korean customers. Thus, the references to communications that NTEC provided in its Supplemental Interrogatory responses reflect communications from Woon Bong about information coming from Korean customers. Woon Bong also attended all in-person meetings with NTEC’s end customers – namely Korea East West, Korea South-East, and Korea Midland.

BNSF also seeks documents from three Korean electric utilities. However, BNSF’s Motion does not explain that Korea East West, Korea South-East, and Korea Midland are all wholly owned subsidiaries of Korea Electric Power Corporation (“KEPCO”) (collectively “KEPCO”). KEPCO is majority-owned and governed by the Republic of Korea.¹ Thus, BNSF’s request is not merely to a Korean corporation and its

¹ <https://home.kepco.co.kr/kepco/EN/A/htmlView/ENACHP00301.do?menuCd=EN010403> and SEC Form 20-F at 1 (filed April 28, 2023).

subsidiaries, but effectively the government of South Korea itself.² A portion of the shares of KEPCO are also publicly traded.

B. Procedural Background

NTEC restates the pertinent background and procedural history of this case. 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 June 30, 2023, the Board established a procedural schedule in this case. On July 10, BNSF filed an appeal of the procedural schedule noting, in part, that it intended to seek third-party discovery of foreign entities through the use of letters rogatory and

² “Under relevant laws of Korea, the Government is required to own, directly or indirectly, at least 51% of our capital. Direct or indirect ownership of more than 50% of our outstanding common voting stock enables the Government to control the approval of certain corporate matters relating to us that require a shareholders’ resolution, including approval of dividends. The rights of the Government and Korea Development Bank as holders of our common stock are exercised by the Ministry of Trade, Industry and Energy, based on the Government’s ownership of our common stock and a proxy received from Korea Development Bank, in consultation with the Ministry of Economy and Finance.” SEC Form 20-F at 36 (filed April 28, 2023).

other means. On August 7, 2023, the Board flatly rejected BNSF's appeal and established a slightly modified procedural schedule which 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.

II. ARGUMENT

A. BNSF's Motion Seeking Letters Rogatory to Korean Entities Further Pushes the Bounds of Its Unreasonable Requests to Extend the Board's Discovery Procedures to Encompass Foreign Entities

As NTEC previously described in detail in its August 28, 2023 consolidated reply to BNSF's motions for letters rogatory, BNSF's Motions seeking Letters Rogatory are unprecedented at the STB or the Interstate Commerce Commission. The opening of a new and untested discovery method ought not to be undertaken lightly, and certainly not on the thin showing that BNSF has made for this discovery. That thin showing is particularly troubling in light of the likelihood that NTEC will produce sufficient information and the fact that BNSF may already possess some of the sought-after information.

BNSF's Motion notes that the Republic of Korea is a signatory to the Hague Convention (23 U.S.T. 2555), and that letters rogatory are a recognized means under the Hague Convention for obtaining evidence from a foreign entity. Motion at 3. However, BNSF provides no explanation of whether or not its request meets the requirements under governing precedent for the issuance of such a request – namely the test annunciated in *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the Southern District of*

Iowa, 482 U.S. 522, 542-543 (1987) (“*Aerospatiale*”) – especially with respect to an entity of the government itself. In addition, BNSF’s does not explain that in issuing letters rogatory to a stranger to the litigation at hand, the issuing entity should “should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position.” *Id.* at 486; *see also Ingenico Inc. v. Ioengine, LLC*, 2021 WL 765757 at *2 (D. Del. Feb. 26, 2021) (“courts have looked to the Supreme Court’s cautionary language in *Aerospatiale* even when deciding requests for letters rogatory targeted at foreign parties over which there is no federal jurisdiction.”) (citations omitted). The *Ingenico* court further explained that in such circumstances, courts have adopted the five-factor test from *Aerospatiale* described below. *Id.*

In *Aerospatiale*, the Supreme Court explained that the reviewing body should consider principles of international comity in issuing letters rogatory, which require analysis of five factors:

- (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.

BNSF must demonstrate that its requests are aimed at discovery that is material to the litigation, and that is not duplicative, burdensome, or available through other means. *See Aerospatiale*, 482 U.S. at 546. The consideration of these factors involves more than an cursory evaluation of whether the discovery could lead to relevant documents, but instead (and more importantly), requires careful evaluation of the importance of the requested discovery to the litigation. Indeed, “where the relevancy or materiality is doubtful, the court should not grant the application for letters rogatory.” *United States v. Rosen*, 240 F.R.D. 204, 215 (E.D. Va. 2007).

B. BNSF’s Deposition Topics Do Not Meet the *Aerospatiale* Factors And They Are Duplicative and Irrelevant

BNSF’s requests for deposition testimony from the KEPCO³ entities on multiple topics that BNSF has identified do not meet the *Aerospatiale* factors. *See* BNSF Motion at Attachments A-D. BNSF already has requested documents from NTEC that will provide significant detail on the business relationship between NTEC, KEPCO, and Woon Bong, including any communications between the various entities which may or do include:

- a description of the relationship with NTEC;
- the entity’s “understanding” of NTEC’s reputation in the market (and the basis for that understanding);
- why the entity was choosing not renew its contract with NTEC;

³ With the exception of possible inquiries about NTEC’s reputation in the market, the deposition topics to Woon Bong are inapplicable since Woon Bong is not a customer of NTEC.

- whether it was satisfied/dissatisfied with the shipment of coal under NTEC or Cloud Peak contracts;
- concerns that the entity may have had with NTEC's ability to perform as a supplier;
- whether it ever expressed concern to NTEC regarding its U.S. rail transportation;
- the substance of conversations at certain meetings;
- failures by NTEC to comply with its contractual obligations to the entity; and
- any problems or delays in NTEC's shipment of coal to the entity believed were the result of rail transportation service interruptions (Deposition Topic 6).

The only proposed BNSF deposition topic not addressed in BNSF's discovery requests to NTEC is Deposition Topic 7, which addresses "the process by which [the entity] decides which foreign companies from which to purchase coal." The speculative relevance of this last topic simply does not rise to the level of materiality needed to justify letters rogatory.

BNSF's deposition topics are also plainly duplicative of prior requests for Letters Rogatory and the discovery requests directed to NTEC. Disturbingly, BNSF is now proposing to illicit the views of every export coal customer or potential customer that NTEC identified as ever having expressed a concern about BNSF's rail service and the impact of that poor service on NTEC's ability to provide reliable coal deliveries. The Decision suggests that because NTEC has raised these concerns, BNSF ought to be able to probe that question. Decision at 5. NTEC respectfully submits, however, that the

Decision failed to consider the potential further harm to NTEC's business that a discovery expedition designed to harass all of NTEC's customers might have on it.

NTEC further notes that the Board must balance BNSF's far-reaching discovery attempt here with the fact that NTEC's personnel have already provided the Board and BNSF with direct testimony on the nature of the conversations they had with those customers – which is the crux of what BNSF is seeking in its Motion. *See, e.g.*, Transcript of May 10, 2023 hearing at 116:9-122:10.

NTEC also notes that the Decision suggested that the deposition topics, which are essentially the same here, present questions “that could not be verified without contacting the original third-party source of that information.” Decision at 5. To the extent that documents produced in discovery by NTEC provide the information that BNSF seeks to elicit through deposition (*e.g.*, reasons why it decided to renew or not renew a contract with NTEC, the entity's view of NTEC's reputation, or problems that it believed were tied to rail service) there is no reason to resort to the testimony of a third-party involved in the correspondence to “verify” that information – such correspondence is plainly a business record that is regularly relied upon in Board cases without need for authentication.

BNSF's Motion ultimately hinges on the possibility that an NTEC customer may have some different view of the circumstances in the commercial relationship than NTEC (or a different view than it expressed to NTEC), but the mere potential of a difference should be weighed against the extraordinary discovery sought, the testimony already provided by NTEC, and the discovery already produced or which will be produced

regarding NTEC's relationships with its export coal customers. Indeed, NTEC has already provided over 50,000 pages of emails, many of which evidence the concerns of those shippers and the related issues that arose in their commercial relationships, and NTEC's document production is still ongoing (but will be completed by the September 28, 2023 close of discovery).

C. BNSF's Motion Should Be Rejected to the Extent It Seeks Documents That are Duplicative of Documents that NTEC has Already, or Will, Produce in This Case

BNSF's Motion seeks four documents, in total, from two of the Korean Entities, each of which is an email to or from NTEC and the entity. *See* Schedules A and B to BNSF's Motion. BNSF Motion is moot with respect to these four documents. NTEC has already produced all three of the documents listed in Schedule A,⁴ and NTEC has, and will produce, the fourth document from Schedule B.

⁴ NTEC_42179_00002366-2367; NTEC_42179_00004195-4199; and NTEC_42179_00005290-5292.

CONCLUSION

For all the foregoing reasons, the Board should deny BNSF's Motion in its entirety.

Respectfully submitted,

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Dated: September 13, 2023

CERTIFICATE OF SERVICE

I hereby certify that this 13th day of September, 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