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

Dated: September 13, 2023

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC,	)	
	)	
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 JAPANESE ENTITIES**

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 three Japanese companies: (1) Kyushu Electric Power Company Inc. (“Kyushu Electric”), (2) Mitsubishi Corporation, and (3) Joban Joint Power Co., LTD (“Joban”) (collectively “Japanese Entities”).

I. BACKGROUND

BNSF’s August 24, 2023 Motion is essentially indistinguishable from the motion it filed on August 8, 2023 seeking documents and depositions from JERA, another entity with a Japanese presence. On September 7, 2023, Administrative Law Judge McCarthy

granted in part and denied in part BNSF's Motion for Letters Rogatory directed to JERA ("Decision"). As is pertinent here, the Decision denied BNSF's requests for document production from JERA noting "that it is generally understood that Japanese courts cannot compel the production of documents or other tangible evidence in executing letters rogatory from a foreign court" Decision at 5. The ALJ granted the JERA Letters Rogatory deposition requests, but did so solely to the extent that the Japanese courts "are empowered to cooperate in voluntary requests for assistance in taking testimony." *Id.*

BNSF's latest motion seeking documents from Japanese entities suffers from the same flaws as its previous motion directed to JERA, and in any event, is another attempt to expand BNSF's unprecedented international discovery fishing expedition. BNSF's Motion should be denied in its entirety.

A. Japanese Entities

As an initial matter, BNSF's Motion is directed to the wrong Mitsubishi entity. NTEC's commercial relationships exist with Mitsubishi RtM Japan, LTD, which is a subsidiary of Mitsubishi Corporation. Given the specificity required in seeking a deposition from a foreign entity and the issues of comity at stake here, BNSF's motion is irreparably flawed to the extent it would seek a deposition directed to the wrong entity.

BNSF Motion correctly identifies Kyushu Electric and Joban.

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 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 Japanese 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. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the Southern District of Iowa*, 482 U.S. 522, 542-543 (1987) (“*Aerospatiale*”). And while the *Aerospatiale* case did not directly involve the U.S.-Japan Bilateral Consular Convention of 1963 (“Consular Convention”) (15 U.S.T. 768) at issues here, but instead the Hague Convention covering discovery matters, it is self-evident from the restrictive and voluntary procedures of the Consular Convention that discovery of Japanese entities is one where the threshold for such discovery is not as liberal as F.R.C.P. 26. <https://jp.usembassy.gov/services/depositions-in-japan/>. Indeed, the ALJ’s decision recognizes this difference given that the partial grant of BNSF’s motion is still tied only to voluntary deposition in Japan. Decision at 5.

B. BNSF’s Motion Should Be Rejected To the Extent It Seeks Document Production

BNSF’s Motion seeks documents from each of the Japanese Entities. *See* Attachments A, C, and E to BNSF’s Motion. The ALJ’s Decision already rejected a similar request from BNSF for document production from JERA, holding that: “it is generally understood that Japanese courts cannot compel the production of documents or other tangible evidence in executing letters rogatory from a foreign court, *see, e.g., Japan Halon Co. v. Great Lakes Chem. Corp.*, 155 F.R.D. 626, 627 (N.D. Ind. 1993) (internal citations omitted), the undersigned DENIES BNSF’s Requests 1 through 4 for the

production of documents from JERA.” BNSF presents no rationale here to reach a different conclusion, and NTEC submits that the document discovery sought by BNSF should be rejected on the same basis relied upon in the Decision.

C. BNSF’s Deposition Topics are Duplicative and Irrelevant

BNSF’s deposition topics are 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

illicit 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).

CONCLUSION

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

Respectfully submitted,

NAVAJO TRANSITIONAL ENERGY COMPANY,
LLC

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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