

	)	
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.	)	
	)	

REPLY TO BNSF PETITION FOR SUBPOENAS

Complainant Navajo Transitional Energy Company, LLC (“NTEC”) hereby replies in opposition to the Petition for Subpoenas (“Petition”) which Defendant BNSF Railway Company (“BNSF”) filed in this proceeding on August 24, 2023. BNSF’s Petition seeks subpoenas ostensibly directed to (1) Mitsubishi Corporation RtM (Americas) (“RtMA”), (2) EWP Renewable Corporation (“EWPRC”), and (3) Kyuden Urban Development America Co LTD (“Kyuden”) (collectively, “U.S. Subsidiaries”) for production of documents and deposition testimony.

As explained herein, each entity is a stranger to this litigation and an entity with which NTEC has had no prior business relationship. As with its August 8 petition seeking a subpoena to an American subsidiary of JERA, BNSF’s current Petition constitutes an effort to end-run the geographic restriction of the Board’s 49 U.S.C. § 1321 subpoena power through the artifice of a subpoena directed to an uninvolved U.S.

affiliate with instructions that such U.S. affiliate obtain responsive documents from one or more foreign entities. In a September 7, 2023 decision (“Decision”), the Surface Transportation Board (“Board”), through Administrative Law Judge McCarthy, denied BNSF’s request for a subpoena to JERA. Decision at 6. NTEC respectfully requests that the Board deny BNSF’s latest Petition as it is indistinguishable from the JERA Petition.

I. 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

BNSF's Petition for Subpoena improperly seeks discovery from entities located outside the United States. To achieve that end, BNSF seeks to subpoena the U.S. Subsidiaries of those entities, all of which are non-parties to this litigation with no existing or prior business relationship with NTEC and which, by BNSF's own admission (BNSF Petition at 8 n.8) "may need to ask" their respective foreign parent company entities for the discovery requested by BNSF. Given the absence of any business relationship between NTEC and the U.S. Subsidiaries, it is very likely that the U.S. Subsidiaries do not have actual possession of any of the requested documents or information.

The Board lacks the authority to grant BNSF's subpoena, as BNSF itself concedes. 49 U.S.C. § 1321(c) ("The Board may subpoena witnesses and records related to a proceeding of the Board *from any place in the United States . . .*") (emphasis added); *see also* BNSF Petition at 2 n.6 (admitting that the parent companies are "not subject to the Surface Transportation Board's subpoena power").

In addition, BNSF's Petition asks the Board to take actions in "direct contravention" of the 1963 evidentiary treaty between the United States and Japan (for Mitsubishi Corporation and Kyushu Electric Power Company Inc.) and the Hague Convention (for the Korea-based Korea East West Power Co., LTD). *Fujikura Ltd. v. Finisar Corp.*, Case No. 15-mc-80110-HRL (JSC), 2015 WL 5782351, at *7 (N.D. Cal.

May 14, 2015) (“*Fujikura*”). In *Fujikura*, the district court held that a party’s “attempt to seek discovery from a Japanese company merely by serving a Rule 45 subpoena on a California subsidiary *is in direct contravention of the evidentiary treaty between the United States and Japan* – specifically, Article 17 of the U.S.-Japan Bilateral Consular Convention of 1963.” (Emphasis added). The *Fujikura* court added that: (i) it would not allow a party to “skirt” rules “merely by serving a subsidiary of a foreign parent corporation on U.S. soil;” and (ii) allowing the use of a subpoena in such a circumstance would render the “U.S.-Japan Consular Convention (*and the Hague Convention*, for countries that are signatories thereto) . . . entirely toothless for a large number of global companies with U.S. subsidiaries.” *Id.* (emphasis added).

In the Decision, the ALJ denied a nearly identical request to a U.S. subsidiary of JERA hold that: “Approving the issuance of a subpoena to a U.S. based subsidiary would contravene the procedures established through Article 17 of the U.S.-Japan Bilateral Consular Convention of 1963, and thus constitute an improper failure to comply with an international treaty.” Decision at 6 (citing *Fujikura*). The pending Petition is nearly identical to BNSF’s August 8 petition. The Board should summarily reject this latest Petition on the same grounds.

CONCLUSION

For the foregoing reasons, NTEC respectfully requests that the Board deny BNSF’s Petition for Subpoenas.

Respectfully submitted,

NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC

By: /s/ Daniel M. Jaffe
Daniel M. Jaffe
Frank J. Pergolizzi
Andrew B. Kolesar III
SLOVER & LOFTUS LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

Attorneys for Complainant

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