

BEFORE THE
SURFACE TRANSPORTATION BOARD

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DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

COMPLAINT AND PETITION FOR
DECLARATORY ORDER

**BNSF RAILWAY COMPANY'S
MOTION TO MODIFY THE PROCEDURAL SCHEDULE**

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Dated: September 18, 2023

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**BNSF RAILWAY COMPANY'S
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BNSF Railway Company (“BNSF”) respectfully requests that the Board modify the procedural schedule in this matter pursuant to 49 C.F.R. § 1104.7(b). BNSF seeks a limited 60-day extension to complete approved international discovery, and a corresponding extension of the filing deadlines established in this proceeding. As explained below, good cause exists for granting this necessary extension.

I. Background

The Complaint filed by Navajo Transitional Energy Company, LLC (“NTEC”) involves a broad and unprecedented international scope, as it “addresses BNSF’s [purported] failures to transport export coal from NTEC’s Spring Creek Mine located in Big Horn County, Wyoming . . . to the Westshore Terminal[s] facility located at Roberts Bank, British Columbia, Canada,” where “NTEC sells its export coal to customers in Asia on an f.o.b. ocean-vessel basis,” in addition to “on rare occasions, [] points in Japan or Korea.” (NTEC Compl., 2, 2 n.2, Apr. 14, 2023). Indeed, the Complaint references a U.S. state; a Canadian province; the entire

Asian continent; and more specifically, Japan and Korea. (*Id.*). Alleging it has suffered harm in the international coal markets, NTEC seeks more than \$10 million in damages from BNSF. (*Id.* at 24).¹ This high-stakes and complex dispute between two commercially sophisticated entities accordingly involves discovery in multiple jurisdictions across the world, as the Board has recognized.

On June 30, 2023, the Board entered the original procedural schedule in this matter. On August 7, 2023, the Board adopted a modified procedural schedule, noting that “the Board acknowledges that third-party and foreign discovery may be time-consuming in this proceeding[.]” (*Navajo Transitional Energy Co. v. BNSF Ry. Co.*, NOR 42179, slip op. at 3 (STB served Aug. 7, 2023)). The modified procedural schedule sets the end of discovery for September 28, 2023, in addition to deadlines for party submissions in November, December, and January. (*Id.*, slip op. at 4-5). The Board noted that “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.” (*Id.*, slip op. at 5 (citing 49 C.F.R. § 1104.7(b))). By the same order, the Board appointed Administrative Law Judge

¹ In the related proceeding where NTEC sought an emergency order, the Board entered a preliminary injunction in NTEC’s favor, relying upon, among other things, uncorroborated factual assertions regarding the relationships between NTEC and its Asian coal customers and potential damage to NTEC’s reputation within the global coal commodity market. See *Navajo Transitional Energy Co.—Ex Parte Pet. for Emerg. Serv. Order*, NOR 42178 (STB served June 23, 2023), *appeal docketed*, No. 23-60402 (5th Cir. July 28, 2023) (“June 23, 2023 Prelim. Inj. Decision”).

Thomas McCarthy “for the handling of all discovery matters and initial resolution of all discovery disputes.” (*Id.*).

The next day after the Board’s order, on August 8, 2023, BNSF filed three international discovery requests: one seeking a recommendation to issue a letter rogatory to JERA, a Japanese entity (BNSF Mot. Letter Rogatory (JERA), NOR 42179, Aug. 8, 2023); one seeking a recommendation to issue a letter rogatory to Westshore Terminals in Canada (BNSF Mot. Letter Rogatory (Westshore), NOR 42179, Aug. 8, 2023); and one seeking a subpoena on JERA’s U.S. subsidiary. (BNSF Pet. for Subpoena, NOR 42179, Aug. 8, 2023) (collectively the “First Set”). After 20 days, the maximum amount of time permitted to respond, NTEC filed objections to all three requests. (NTEC Reply to BNSF Pet. for Subpoena, NOR 42179, Aug. 28, 2023; NTEC Consolidated Response, NOR 42179, Aug. 28, 2023).

BNSF necessarily limited the First Set to those international entities which BNSF understood would likely have relevant information. But BNSF was not aware at that time of the actual identities of NTEC’s foreign customers, as NTEC initially refused to provide their customers’ identities in response to BNSF interrogatory requests. After resolving that issue with NTEC and learning the identities of NTEC’s customers, BNSF promptly filed, on August 24, 2023, additional requests for international discovery directed at those customers, including: one seeking a letter rogatory to NTEC’s Japanese customers (BNSF Mot. Letter Rogatory (Kyushu Electric), NOR 42179, Aug. 24, 2023), one seeking a letter of request for documents and/or testimony from several Korean power companies

and a broker (BNSF Mot. Letter Rogatory (WoonBong Energy), NOR 42179, Aug. 24, 2023), and one seeking subpoenas from U.S. subsidiaries of foreign power companies, (BNSF Second Pet. for Subpoenas, NOR 42179, Aug. 24, 2023), (collectively the “Second Set”).

Again, NTEC waited the full 20 days to file responses to the Second Set. In the interim, however, Judge McCarthy granted two of BNSF’s requests from the First Set.² Judge McCarthy stated that:

Denying BNSF a reasonable opportunity to seek both clarification and verification of the third-party claims that NTEC has put before the Board and which have resulted in a preliminary injunction **would belie fundamental notions of fairness and due process**. It is NTEC’s prerogative to pursue damages in the form of alleged lost sales and harm to its business reputation, but **it is BNSF’s countervailing prerogative to probe these allegations**, even if though a creative and rarely used discovery mechanism.

(*Navajo Transitional Energy Co. v. BNSF Ry. Co.* (Email Order), NOR 42179, slip op. at 5 (STB served Sept. 7, 2023)). Judge McCarthy also recognized “the narrow timeframe for discovery imposed by the Board in this matter,” in addition to “the complexity of the underlying discovery-related issues at hand.” (*Id.*, slip op. at 1, 3) (emphasis added). The Second Set of requests are fully briefed and await disposition by Judge McCarthy. Since Judge McCarthy granted two of BNSF’s motions from the First Set on September 7, BNSF has moved diligently to carry out

² Specifically, Judge McCarthy (1) granted BNSF’s letter rogatory to Westshore (Canada), granted BNSF’s letter rogatory to JERA Trading Pte Ltd. (Japan), except for BNSF’s requests for documents under Japanese law, and (3) denied BNSF’s petition for subpoena.

the authorized international discovery, but those processes have not yet been completed. *See infra* part III.A.

With the resolution of issues still outstanding, and international discovery underway but not yet complete, the deadline for completing all discovery still stands on September 28, 2023.

II. Legal Standard

49 C.F.R. § 1104.7(b) provides for extensions of time in matters before the Board. In relevant part, the regulation states that “[a]ny time period . . . may be extended by the Board in its discretion, upon request and for good cause.” In past cases, the Board has found good cause for extending procedural schedules in a wide variety of situations. *E.g.*, *N. Am. Freight Car Ass’n v. BNSF Ry. Co.*, NOR 42137, slip op. at 1 (S.T.B. served June 26, 2013) (extending discovery period where “timely completion . . . has been unavoidably delayed” due to counsel health issues and technical issues with document production); *Cap. Materials, Inc.—Petition for Dec. Order—Certain Rates and Practices of Norfolk So. Ry. Co.*, NOR 42068, slip op. at 6 (S.T.B. served Apr. 19, 2002) (granting an extension of the procedural schedule to allow sufficient time to comply with a new protective order); *SCIO Pottery Co. v. Consol. Rail Corp.*, NOR 40330, 1990 WL 287229, at *1 n.1 (I.C.C. Jan. 18, 1990) (finding “a sufficient basis” for extending discovery based on movant’s assertion “that it needs additional time to complete desired discovery[.]”)

The Board has declined to find good cause in cases where the moving party has made no effort to justify its request for modification. *E.g.*, *CSX Trans., Inc.—*

Abandonment Exemption—in Clark, Floyd, Lawrence, Orange and Washington

Cnty., *Ind.*, No. AB 55 (Sub-No 775X), slip op. at 1 (S.T.B. served Feb. 6, 2018)

(noting that the movant made “no attempt to explain why it [was] unable to comply with the regulations in the extended time it ha[d] already been given.”). BNSF has provided ample justification in this Motion, thus showing good cause for the granting of a tailored 60-day extension of the procedural schedule.

III. Argument

Under the existing procedural schedule, discovery is set to end on September 28, 2023. In light of ongoing third-party international discovery and outstanding discovery issues awaiting the Board’s decision, discovery cannot be completed in the next ten days. Accordingly, BNSF now moves for a 60-day extension of all deadlines in the procedural schedule in order to continue to pursue the necessary international discovery. NTEC is not prejudiced by the requested modification. Good cause accordingly exists to modify the procedural schedule, and the Board should exercise its discretion to grant BNSF’s motion.

A. BNSF cannot complete international discovery in the “narrow timeframe” provided by the current procedural schedule.

As noted above, Judge McCarthy has recognized that the existing procedural schedule imposes a “narrow time frame for discovery.” (*Email Order*, NOR 42179, slip op. at 1). Within the bounds of that narrow time frame, BNSF has diligently sought to investigate NTEC’s claims, which the Board has acknowledged as multi-jurisdictional at every stage of this proceeding. After BNSF’s motions for

international discovery were granted, BNSF immediately began pursuing the permitted discovery. But those processes take time.

With respect to the Canadian process, BNSF is actively coordinating with counsel in Canada to advance these discovery documents in court in Canada. Westshore Terminals will have 21 days after service to respond to BNSF's discovery motion once it is filed and served in Canada.³ The Canadian court will then have to consider BNSF's motion. If the motion is granted, Westshore will receive additional time to respond to BNSF's discovery requests. Therefore, it is plainly impossible for BNSF to complete the approved Canadian discovery in the next 10 days. A 60-day extension of the discovery period is the minimum necessary to give this Canadian discovery process time to play out.

BNSF is likewise diligently pursuing the approved international discovery from JERA in Japan, and it is equally inconceivable that the JERA discovery will be completed in 10 days. BNSF has filed a revised JERA discovery motion as instructed by Judge McCarthy and now awaits issuance of a recommendation for letters rogatory directed to the District Court. Once BNSF receives the signed recommendation from Judge McCarthy and the Japanese language translations are completed, it will file a petition in the U.S. District Court in furtherance of the JERA discovery, which will likewise take time for the Court's consideration.

³ To date, Westshore has not taken a position on whether it will voluntarily engage in discovery. BNSF is continuing to discuss with Westshore whether it will consent to the discovery. Absent prompt agreement to comply voluntarily, BNSF will file its request for Letters Rogatory in court in Canada.

Assuming that the District Court will grant BNSF's motion, BNSF will then turn to the Japanese courts to enforce the discovery requests.

NTEC itself recognized the impossibility of the current procedural schedule to permit international discovery when it responded to BNSF's international discovery motions. In its Response to BNSF's motion for letters rogatory, NTEC wrote that "it is extremely unlikely" that BNSF will be able to complete international discovery within the existing procedural schedule. (NTEC Consolidated Response, NOR 42179, at 21, Aug. 28, 2023). While NTEC simultaneously chided BNSF for unsubstantiated "unusual delays" in that Response, it showed no urgency in responding to BNSF's discovery motions.

The Board and Judge McCarthy have acknowledged that NTEC's claims necessitate international discovery. Therefore, the procedural schedule needs to accommodate that discovery. As Judge McCarthy recognized in granting BNSF's international discovery motions:

NTEC itself introduced third-party characterizations of alleged lost sales and damage to its business reputation . . . and NTEC has repeatedly referenced these third-party characterizations throughout the development of these proceedings. Denying BNSF a reasonable opportunity to seek both clarification and verification of [these] claims . . . would belie fundamental notions of fairness and due process.

(*Email Order*, NOR 42179, slip op. at 5).

In requesting a modification of the procedural schedule, BNSF seeks a reasonable opportunity to investigate NTEC's claims. Judge McCarthy has determined that BNSF is entitled to this investigation as a matter of "fundamental notions of fairness and due process." (*Id.*). Those same fundamental notions

require the Board to permit BNSF to complete the international discovery that has already been approved by Judge McCarthy.

B. BNSF is seeking the minimum extension of time needed to complete approved international discovery.

As previously explained, in spite of BNSF's diligent and continuing efforts to complete the approved international discovery, it is not possible for BNSF to complete that discovery in the next 10 days. Outstanding issues awaiting the Board's resolution also necessitate a modification of the procedural schedule. As Judge McCarthy explained in his most recent order, three motions filed by BNSF remain pending, as NTEC had not filed a response to those motions when the order was issued. (*Email Order*, NOR 42179, slip op. at 1-2). The parties currently await Judge McCarthy's decision on those motions.

BNSF's request for an extension is narrow and focused. As further explained below, BNSF seeks an extension solely for purposes of completing the Board-approved international discovery. Discovery from domestic sources can and will be completed within the existing September 28 deadline. BNSF's narrow request is necessary to address claims involving international issues that are central to NTEC's Complaint, and it is brought in good faith to prepare a defense to NTEC's claims. Far from being a prolonged "fishing expedition," as NTEC has previously asserted, (*see generally* NTEC Consolidated Response, NOR 42179, Aug. 28, 2023), BNSF's pursuit of international discovery is necessary to address NTEC's claims, and BNSF must be given an opportunity to pursue that discovery.

C. NTEC is not prejudiced by an extension of the procedural schedule.

Lastly, NTEC is not prejudiced by a 60-day extension of the procedural schedule. There is no particular urgency to complete this portion of NTEC's case. NTEC has already obtained an emergency injunction in its favor. The parties are submitting regular status reports to the Board in the parallel proceeding, indicating that BNSF is providing NTEC with as much service as NTEC has requested. *See generally Navajo Transitional Energy Co., LLC – Ex Parte Pet. for Emerg. Serv. Order*, NOR 42178. In other words, NTEC's interests are being preserved by the preliminary injunction instituted in the parallel proceeding, and, consequently, no justification exists for short-cutting discovery in this matter. Because BNSF only seeks an extension to pursue international discovery, NTEC risks no additional expenditure of resources, nor does NTEC risk any delay in obtaining its own discovery. BNSF will comply with its existing discovery obligations under the current September 28 deadline with respect to NTEC.

IV. Conclusion

BNSF accordingly requests that the Board modify the procedural schedule to include a 60-day extension to all deadlines, with the discovery period only being extended with respect to third-party international discovery approved by the Board. BNSF will continue to diligently pursue the approved international discovery. However, several issues remain outstanding, including Judge McCarthy's decision on BNSF's remaining international discovery motions, and the decisions of other courts, including the U.S. District Court and foreign courts. Since the resolution of

these outstanding issues may precipitate the need for further modification of the procedural schedule, BNSF reserves the right to request further modifications of the procedural schedule as international discovery progresses, and as pending issues are resolved.

Proposed Modified Procedural Schedule

Fact and Expert Discovery Ends: September 28, 2023

At this deadline, all discovery must end except for the third-party international discovery requested by BNSF and approved by the Board.

Third-Party International Discovery Ends: November 27, 2023

NTEC Opening: January 5, 2024

BNSF Reply: February 16, 2024

NTEC Rebuttal: March 18, 2024⁴

Respectfully submitted,

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Dated: September 18, 2023

⁴ The existing deadline for NTEC's rebuttal is January 16, 2024. An exact 60-day extension from that date would place the new deadline on Saturday, March 16, 2024. To avoid a weekend filing deadline, BNSF proposes Monday, March 18, 2024.

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *Motion to Modify the Procedural Schedule* to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Molly Bruder Fox
Molly Bruder Fox

Attorney for BNSF Railway Company

September 18, 2023