

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
September 21, 2023
Part of _____

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC,	)	
	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
BNSF RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

Public Record

Docket No. NOR 42179

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

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ENERGY COMPANY, LLC

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Dated: September 21, 2023

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SURFACE TRANSPORTATION BOARD**

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**REPLY TO BNSF RAILWAY COMPANY’S
MOTION TO MODIFY THE PROCEDURAL SCHEDULE**

Complainant Navajo Transitional Energy Company, LLC (“NTEC”) hereby replies to Defendant BNSF Railway Company’s (“BNSF”) Motion to Modify the Procedural Schedule (“Motion”) filed on September 18, 2023. NTEC submits that: (1) the unprecedented request to seek discovery from foreign non-party strangers to this proceeding is one the Board should independently consider before allowing the discovery to proceed; (2) if the Board grants BNSF’s Motion, the Board’s should extend the preliminary injunction, which has been critical in preserving service for NTEC during the past months, for the duration of this proceeding; and (3) if the Board grants the extension, it make minor modifications to BNSF’s proposed schedule to reflect the end-of-year holiday schedule. Notwithstanding the foregoing, NTEC does not oppose a limited

extension of the schedule in this proceeding, albeit for reasons different from those offered by BNSF, as explained herein.

I. The Board Should Closely Scrutinize BNSF's Unprecedented and Far-Reaching Requests for Discovery from Foreign Third Parties

NTEC respectfully submits that the Board should consider, *sua sponte*, whether opening the Pandora's Box of international discovery against non-party strangers to a Board proceeding, which is the basis for BNSF's Motion to extend the schedule, is one that is needed here given the unprecedented nature of the request. Indeed, NTEC submits that the issuance of letters rogatory is a major change in Board practice, especially since the Board's discovery and procedural rules are not exact mirrors of the Federal Rules of Civil Procedure¹ and the Board has noted many times that it is not a court.² Moreover, the Board set the current procedural schedule despite BNSF's threat to pursue its international discovery – clearly suggesting that the Board did not contemplate transforming this dispute about BNSF's poor service into a multi-year proceeding requiring third-party discovery from strangers to the litigation in at least three foreign countries.

¹ *Expedited Procedures for Processing Rail Rate Reasonableness, Exemption & Revocation Procedures*, Ex Parte No. 527, 1996 WL 406655, at *6 (July 18, 1996) (“The Federal rules are merely a general guide, and that they will not be followed where they would frustrate our processes.”).

² “The Commission is not a court of general jurisdiction, but an administrative agency with limited powers.” *Annual Volume Rates on Coal – Wyoming to Flint Creek*, AR, 361 I.C.C. 533, 538 n15 (1979); *Petition for Declaratory Order -Nancy Hall*, Docket No. 42048, 2001 WL 251330, at *2 (Mar. 9, 2001) (“This is an administrative agency, not a court of law.”) (Accepting certain evidence that might have been hearsay).

Heightened scrutiny of the letters rogatory process is especially warranted given the tenuous connection between this proceeding, the parties to whom the discovery is directed, the actual discovery sought, and the traditional party-based discovery that is available relating to these same foreign entities. In addition, the Board ought to consider whether burdening: (1) a federal court; (2) the State Department; (3) at least three foreign governments; and (4) multiple foreign corporations with the letters rogatory process is warranted considering comity with those countries and the likely limited probative value of the discovery – even if in ordinary circumstances, the Board might have granted BNSF’s requests had they been directed to third-party customers in the United States. Moreover, the need to burden those agencies is especially diminished given that the ALJ’s decision, in accordance with international agreement, granted only an option to seek a voluntary deposition regarding one of NTEC’s Japanese customers (JERA). *Navajo Transitional Energy Co. v. BNSF Ry. Co.*, NOR 42179 at 5 (STB served Sept. 7, 2023).

BNSF’s multi-party foreign discovery effort asks essentially only one question of consequence: “what did your company think of NTEC in light of BNSF service issues?”³ ALJ McCarthy determined, with respect to JERA, that BNSF ought to be able to probe this issue, notwithstanding the schedule in this case, the remoteness of the parties, and the fact that the NTEC’s own discovery includes at least some of the information sought by

³ BNSF’s requests to Westshore are dubious insofar as they seek, in large part, information that BNSF or NTEC likely has in its possession. Moreover, the requests are not directed to NTEC’s reputation in the export market.

BNSF. *Id.* However, Judge McCarthy was not called upon to consider, nor in his limited role did he address, the potential implications for the Board's procedural schedule that such a decision brings.

BNSF cites no Board or ICC decisions granting letters rogatory. NTEC similarly finds no cases addressing this issue. Indeed, the only Board decision NTEC could identify that even mentions letters rogatory is one in which the ICC adopted a variety of modified versions of the Federal Rules of Civil Procedure, and with respect to former Rule 59(b) (current Rule 28(b)), "Persons Before Whom Depositions May Be Taken," the ICC noted that its "adopted subrule is more narrowly drawn since we do not find it necessary to set forth provisions for the taking of depositions pursuant to letters rogatory in foreign jurisdictions." *General Rules of Practice*, 346 I.C.C. 603, 625 (1974). Given the fact that this discovery effort presents a case of first impression, NTEC submits that the Board should review the ALJ's decision, *sua sponte*, considering, as well, the Board's existing precedents which erect high bars to depositions⁴ or third-party discovery,⁵ let alone depositions/discovery of third-party foreign entities that are strangers to the pending matter.

⁴ "The pertinent Commission rule, thus, provides that permission to take a deposition will be granted only upon a showing '...that the deposition will prevent a failure or delay of justice....'" *Reynolds Metals, Inc. – Petition for Declaratory Order – Certain rates and Practices of Transcon Lines*, 1993 WL 203803, *2 (Decision served June 14, 1993) (citing *General Rules of Practice*, 346 I.C.C. at 620-621).

⁵ See *Asphalt Supply & Serv., Inc. v. Union Pac. R.R.*, 1987 WL 98155 at *1 (ICC decided March 27, 1987) ("from very early in its existence the Commission has required the laying of a very strong foundation before it will use its subpoena power").

II. Extension of the Preliminary Injunction Should Run Concurrently with the Schedule

NTEC submits that any extension in the current procedural schedule should include a commensurate, pro-rata extension to the Board's preliminary injunction. While BNSF does not mention that issue in its Motion, BNSF acknowledges that "NTEC's interests are being preserved by the preliminary injunction instituted in the parallel proceeding" BNSF Motion at 11. As the Board is aware, BNSF has now sought to extend the schedule multiple times all while seeking to overturn the Board's preliminary injunction in the United States Court of Appeals for the Fifth Circuit.

The Board's preliminary injunction has provided, and continues to provide, significant protections to NTEC. Thus, to the extent the Board grants BNSF's Motion, NTEC respectfully requests that the Board modify the initial expiration of the preliminary injunction accordingly. NTEC respectfully submits that the record evidence on which the Board based its June 23 Decision similarly supports the requested extension beyond the end of 2023. *See* June 23 Decision at 15 n.16 ("[T]o the extent the factual situation for 2024 mirrors the record established for 2023, the Board expects it would apply the same analytical framework applied here to any further claims by NTEC under the common carrier obligation."). NTEC's need for reliable BNSF service continues to exist; BNSF's prior willingness to commit to serving NTEC continued through 2024; and the parties' weekly reporting in NOR 42178 demonstrates that BNSF has been able to provide the ordered service for NTEC even without any need to secure additional railcar sets.

NTEC's requested protection therefore is warranted. While NTEC is pleased with the volumes that BNSF is transporting while operating under the terms of the preliminary injunction, the extended protection of the Board's preliminary injunction is vital.

III. NTEC Generally Supports an Extension with Minor Modifications to BNSF's Revised Schedule

Notwithstanding the foregoing, NTEC generally supports an extension of the schedule on other grounds. Specifically, on September 11, 2023, BNSF produced its electronic traffic records and its associated revenue waybill data. NTEC's experts are currently reviewing that information. NTEC anticipates, based on its initial review, that follow-up inquiries regarding that data will be required. Given the technical nature of the inquiries, the preparation of such follow-up inquiries and responses takes several weeks or more, thereby requiring, typically, 30-60 days to resolve.

BNSF's Motion proposes to extend the schedule by 60 days unless the new due date falls on a weekend or holiday. NTEC requests that the Board revise BNSF's proposed schedule by approximately one week. Due to the end-of-year holidays, NTEC anticipates that previous commitments of experts and NTEC personnel that may be required to prepare the evidence will be unavailable. Therefore, NTEC proposes in the alternative the following schedule:

Discovery Ends: November 30, 2023 (all discovery)

NTEC Opening: January 12, 2024

BNSF Reply: February 23, 2024

NTEC Rebuttal: March 25, 2024

CONCLUSION

For the foregoing reasons, NTEC respectfully requests that the Board take the actions requested herein.

Respectfully submitted,

NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC

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Dated: September 21, 2023

CERTIFICATE OF SERVICE

I hereby certify that this 21st 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