

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

**REPLY OF BNSF RAILWAY COMPANY
TO NTEC'S REQUESTS FOR RELIEF**

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Dated: September 22, 2023

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In its “Reply to BNSF Railway Company’s Motion to Modify the Procedural Schedule,” the Navajo Transitional Energy Company, LLC (“NTEC”) has requested three new forms of relief from the Board: an untimely “*sua sponte*” review of Judge McCarthy’s decision on international discovery, an extension of the preliminary injunction issued by the Board in a different proceeding, and NTEC’s own modified procedural schedule. (NTEC Reply to BNSF Mtn. to Modify the Procedural Sched., NOR 42179, Sept. 21, 2023 (“NTEC Reply”). BNSF accordingly submits this Reply to NTEC’s requests for relief.¹

I. International Discovery

NTEC has requested that, while ruling on BNSF’s Motion to Modify the Procedural Schedule, the Board should also “*sua sponte*” reconsider Judge

¹ BNSF submits this Reply to address the new issues raised by NTEC not addressed in BNSF’s Motion to Modify the Procedural Schedule. To the extent that this Reply may be construed as a reply to a reply, BNSF accordingly in the alternative asks the Board for leave to file in the interests of a complete record.

McCarthy’s rulings on BNSF’s international discovery motions. (NTEC Reply, at 2). The Board’s rules provide NTEC with a mechanism for appealing an ALJ’s discovery rulings. NTEC did not utilize that mechanism. The time for doing so has now passed, and the Board should not allow NTEC to circumvent the Board’s rules by impermissibly suggesting that the Board conduct a “*sua sponte*” review.

The Board considers an appeal of an appointed ALJ’s discovery ruling to be an “interlocutory appeal” governed by 49 C.F.R. §§ 1115.1 and 1115.9. *Finch Paper, LLC—Pet. for Declaratory Order*, FD 35981, slip op. at 5-6 (STB served Jan. 11, 2017). The regulations, as interpreted by the Board in *Finch Paper*, provide a two-step process for granting interlocutory appeals: first, the appeal must be brought from an order which falls into one of the categories listed in 49 C.F.R. § 1115.9; and second, the appeal must correct a clear error or prevent manifest injustice. *Id.*; see also *Omaha Pub. Power Dist. v. Union Pac. R.R. Co.*, NOR 42173, slip op. at 3 (STB served Nov. 18, 2022). In any event, interlocutory appeals are “not favored” and are “granted only in exceptional circumstances[.]” 49 C.F.R. § 1115.9(b). As relevant here, such appeals must be filed within seven days of the ruling from which the appeal is taken. *Id.*

Judge McCarthy entered the discovery ruling that NTEC now requests the Board to reconsider on September 7, 2023. Under the previously explained rules, NTEC was required to appeal that ruling on or before a deadline of September 14, 2023. NTEC did not do so. It cannot now bypass that deadline, nor the detailed standard of review, by suggesting that the Board conduct a “*sua sponte*” review of

the ALJ's decision in a September 21 reply to an unrelated procedural motion. A *sua sponte* review is, by nature, on the tribunal's own action – not upon the request or suggestion of a party, and not in consideration of a party's arguments. NTEC's request for "*sua sponte*" review is accordingly a disingenuous attempt to cure NTEC's failure to appeal Judge McCarthy's ruling in a timely manner.

For these reasons, the Board should disregard NTEC's impermissibly submitted request with respect to the ALJ's rulings on international discovery.

II. Extending the Preliminary Injunction

NTEC has also requested that the Board "include a commensurate, pro-rata extension to the Board's preliminary injunction" if the Board grants BNSF's Motion to Modify the Procedural Schedule. (NTEC Reply, at 5.) BNSF has made its position clear that the preliminary injunction issued in the parallel proceeding was improper, and BNSF has asked the U.S. Court of Appeals for the Fifth Circuit to vacate the injunction. While BNSF recognized that the injunction remains in place in its Motion to Modify the Procedural Schedule, BNSF's recognition in no way suggested that the preliminary injunction should be extended. (BNSF Mot. to Modify the Procedural Schedule, NOR 42179, Sept. 18, 2023, at 11.) To the extent that NTEC now requests such an extension of the injunction through its Reply, that request is improper, and the Board should reject it out of hand.

If NTEC wishes to seek an extension of the preliminary injunction, it should make an appropriate motion on the appropriate docket: NOR 42178. A preliminary injunction is an "extraordinary remedy," and the injunction in this case was entered

after extensive briefing and an oral argument. *Navajo Transitional Energy Co., LLC—Ex Parte Pet. for Emerg. Serv. Order*, NOR 42178, slip op. at 1-2, 4 (STB served June 23, 2023) (quoting *Richard Best Trans., Inc. v. Union Pac. R.R.*, NOR 42149, slip op. at 4 (STB served Dec. 22, 2016)). The Board based the injunction on what it characterized as a request for service for 2023, and explicitly did not make any findings regarding 2024. *Id.*, slip op. at 15 n.16. Moreover, the current briefing schedule already extends into 2024, so there is no connection between the extension sought by BNSF and the status of the injunction after December 31, 2023. Any proposed extension of the injunction should be given an appropriate amount of consideration, with fully developed arguments exchanged between the parties using the proper procedure for doing so. NTEC’s reply to an unrelated procedural motion in a parallel proceeding is not the proper procedure for seeking an injunction in 2024, and the Board should accordingly disregard NTEC’s improper request.

III. NTEC’s Proposed Procedural Schedule

Lastly, NTEC has proposed that it “generally supports an extension of the [procedural] schedule on other grounds” than those argued by BNSF, and NTEC provides its own proposed procedural schedule. (NTEC Reply, at 6.) NTEC’s grounds for supporting its proposed extension are that it plans to prepare “follow-up inquiries” to BNSF’s produced electronic traffic records and associated data. *Id.* NTEC accordingly requests extending *all* discovery by 60 days, as opposed to BNSF’s narrow request that only international discovery is extended by 60 days. *Id.*

In short, BNSF believes that there is no need for the Board to formally hold open domestic discovery because the parties can supplement responses and exchange “follow-up inquiries” beyond the close of discovery, when exchange of new materials will stop. In contrast, BNSF’s requested extension is for the limited purpose of obtaining of new information from international third-parties – not to continue the exchange of new information between BNSF and NTEC. Allowing all discovery to be held open for 60 days would provide an opportunity for more discovery issues to arise, and would lead to a waste of resources. The parties have already exchanged significant amounts of information and BNSF expects to complete domestic discovery by September 28. Because NTEC can obtain the “follow-up inquiries” it seeks without an extension of discovery, it has not shown good cause for its requested modification of the procedural schedule. In the absence of good cause, the Board should accordingly reject NTEC’s proposed procedural schedule.

Respectfully submitted,

/s/ Peter W. Denton

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *Reply to NTEC's Requested Relief* 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 22, 2023