

SERVICE DATE – SEPTEMBER 26, 2023

SURFACE TRANSPORTATION BOARD

Docket No. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

**E-MAIL ORDER GRANTING IN PART AND DENYING IN PART MOTION
RECOMMENDING LETTER ROGATORY; GRANTING IN PART AND DENYING IN
PART MOTION RECOMMENDING REQUEST LETTER; AND DENYING
SUBPOENA PETITIONS**

Before: Judge McCarthy

It cannot be gainsaid that transnational discovery requests are becoming more routine because of the global nature of international commerce. This case presents another example. The Board is in receipt of multiple additional filings from each party in NOR 42179. Given the narrow timeframe for discovery imposed by the Board in this matter, the undersigned issues a second truncated e-mail order.¹

I. Procedural History

On August 4, 2023, the undersigned was assigned as the Administrative Law Judge tasked with overseeing discovery disputes in NOR 42179 pursuant to an interagency agreement between the Federal Mine Safety and Health Review Commission and the Surface Transportation Board. The Board memorialized this assignment in a Decision issued on August 7, 2023. In that Decision, the Board initially extended the procedural schedule so that the discovery period would end on September 28, 2023.

On August 8, 2023, the Board received multiple filings from BNSF Railway Company (“BNSF”), including:

- a. BNSF’s Motion Seeking Recommendation to Issue Letter Rogatory [“JERA Motion”];
- b. BNSF’s Motion Seeking Letter Rogatory [“Westshore Motion”]; and
- c. BNSF’s Petition for Subpoena [JERA Global Petition].

¹ On September 18, 2023, BNSF moved the Board to extend the procedural schedule by 60 days to permit limited international discovery. On September 22, 2023, NTEC filed a reply seeking, inter alia, its own modified procedural schedule extending all discovery.

On August 28, 2023, the Board received the following two filings from the Navajo Transitional Energy Company (“NTEC”):

- a. NTEC’s Consolidated Reply to BNSF’s August 8th Motions Seeking Letters Rotatory [“Consolidated Response”]; and
- b. NTEC’s Reply to BNSF’s August 8th Subpoena Petition [“Subpoena Response”].

On September 1, 2023, the Board received two additional filings from BNSF, including:

- a. BNSF’s Sur-reply in Support of Motions for Letters Rogatory; and
- b. BNSF’s Sur-reply in Support of Petition for Subpoena.

Later that day, NTEC filed a letter with the Board, requesting that the Board “reject BNSF’s impermissible replies to replies and deny BNSF’s underlying Petition and Motions.” In the interest of a clear and complete record, the undersigned accepted the submission of 1) BNSF’s Sur-reply in Support of Motions for Letters Rogatory, 2) BNSF’s Sur-reply in Support of Petition for Subpoena, and 3) NTEC’s letter in opposition to the filings of BNSF’s Sur-replies.

In an e-mail interlocutory Order dated September 7, 2023, the undersigned granted BNSF’s request that a letter rogatory be issued seeking documents and witness testimony from Westshore. Furthermore, the undersigned granted BNSF’s request to recommend that a letter rogatory be issued seeking witness testimony from JERA, but the undersigned denied the portion of the JERA Motion seeking the production of documents from JERA. Finally, the undersigned denied the JERA Global Petition for Subpoena and held that holding that approving the issuance of such 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 constitute an improper failure to comply with an international treaty. *See generally, Fujikura Ltd. v. Finisar Corp.*, Case No. 15-mc-80110-HRL (JSC), 2015 WL 5782351, at *7 (N.D. Cal. May 14, 2015).

On August 24, 2023, the Board received additional filings from BNSF, including:

- a. BNSF’s Third Motion Seeking Recommendation to Issue Letter Rogatory (“Japanese Entities Motion”);
- b. BNSF’s Motion Seeking Recommendation to Issue Letter Request (“Korean Entities Motion”); and
- c. BNSF’s Second Petition for Subpoenas (“Second Subpoena Petition”).

As the twenty-day period for NTEC’s response had not yet elapsed on September 7, 2023, the undersigned did not consider BNSF’s August 24 filings in my September 7 Order. *See* 49 CFR § 1104.13. On September 13, 2023, the Board received timely responses to BNSF’s August 24 filings in the form of

- a. NTEC’s Response to BNSF’s Motion Seeking Recommendation to Issue Letters Rogatory to Japanese Entities (“Japanese Entities Response”);

- b. NTEC's Response to BNSF's Motion Seeking Recommendation to Issue Letters Rogatory (sic) to Korean Entities ("Korean Entities Response"); and
- c. NTEC's Reply to BNSF's Petition for Subpoenas ("Second Subpoena Response").

The undersigned now considers BNSF's August 24, 2023 filings and NTEC's September 13, 2023 responses.

II. BNSF's International Discovery Requests

A. Document Production from NTEC's Japanese Customers

Within the Japanese Entities Motion, BNSF delineates its request for the production of documents from NTEC's Japanese Customers, namely Kyushu Electric Power Company Inc. ("Kyushu Electric"), Mitsubishi Corporation ("Mitsubishi"), and Joban Joint Power Co., LTD ("Joban"). More specifically, BNSF seeks:

From Kyushu Electric

1. Contracts or agreements between Kyushu Electric and Cloud Peak Energy, Inc. or NTEC related to the shipment of coal from the Spring Creek Mine to Japan.
2. Communications related to any decision by Kyushu Electric to renew or not renew a contract with NTEC for coal supply.
3. Communications related to rail service NTEC received for the shipment of coal from the Spring Creek Mine to Japan.
4. Documents sufficient to show the amount of coal purchased from NTEC as a percentage of coal purchased by Kyushu Electric in 2020, 2021, and 2022.
5. Communications related to or regarding the following purported conversation between Kyushu Electric and NTEC:

Date	Customer	Location	Communication	NTEC's Summary
January 31, 2023	Kyushu Electric	Fukuoka, Japan	In-person	Kyushu expressed concerns that NTEC may not be a reliable supplier for future coal shipments. NTEC discussed BNSF's rail performance and its efforts to secure reliable rail service. Kyushu has not signed on for an additional long-term contract for 2023-24, and the meeting indicated that Kyushu may be difficult to win back as a customer after BNSF's persistent service issues to NTEC.

[Attachment A to Japanese Entities Motion]

From Mitsubishi

1. Contracts or agreements between Mitsubishi and Cloud Peak Energy, Inc. or NTEC related to the shipment of coal from the Spring Creek Mine to Japan or related to sales-related services that Mitsubishi provides to NTEC.
2. Communications related to any sales-related services that Mitsubishi provides and any decision by any coal customer to renew or not renew a contract with NTEC for coal supply.
3. Communications related to rail service NTEC received for the shipment of coal from the Spring Creek Mine to Japan.
4. Documents sufficient to show the amount of coal purchased from NTEC by various customers as a percentage of coal purchased by those customers in 2020, 2021, and 2022.
5. Communications related to or regarding any of the following purported conversations between Mitsubishi and NTEC:

Date	Customer	Location	Communication	NTEC's Summary
January 30, 2023	Mitsubishi	Tokyo, Japan	In-person	Meeting with Mitsubishi, which provides sales-related services to NTEC in the Japanese market. Mitsubishi indicated that if NTEC did not find a fix or solution for BNSF's inconsistent and inadequate rail performance, NTEC (and via extension Mitsubishi) would find it difficult to market in Japan given that Japanese buyers require reliability for long-term business relationships.
June 12, 2023	Mitsubishi	Phone call	Phone	Mitsubishi discussed the Japanese markets. Mitsubishi again asked for details on NTEC's expectations for BNSF service and whether NTEC expected to meet customer reliability and volume expectations in light of its rail service issues.
Date	Customer	Location	Communication	NTEC's Summary
July 26, 2023	Mitsubishi	Video call	Call	Mitsubishi discussed the Japanese markets. Mitsubishi again asked for details on NTEC's expectations for BNSF service and whether NTEC expected to meet customer reliability and volume expectations in light the STB's preliminary injunction.

[Attachment C to Japanese Entities Motion]

From Joban

1. Contracts or agreements between Joban and Cloud Peak Energy, Inc. or NTEC related to the shipment of coal from the Spring Creek Mine to Japan.
2. Communications related to any decision by Joban to renew or not renew a contract with NTEC for coal supply.

3. Communications related to rail service NTEC received for the shipment of coal from the Spring Creek Mine to Japan.
4. Documents sufficient to show the amount of coal purchased from NTEC as a percentage of coal purchased by Joban in 2020, 2021, and 2022.
5. Communications related to or regarding the following purported conversation between Joban and NTEC:

Date	Customer	Location	Communication	NTEC's Summary
January 31, 2023	Joban	Tokyo, Japan	In-person	Joban required assurances that NTEC was taking appropriate actions to resolve the ongoing rail service issues with BNSF. Joban specifically inquired as to why Signal Peak did not experience the same rail service problems as NTEC.

[Attachment E to Japanese Entities Motion]

B. Testimony from NTEC's Japanese Customers

Additionally, BNSF seeks testimony on the following deposition topics or questions from NTEC's Japanese customers:

From Kyushu Electric

1. Describe the process by which Kyushu Electric decides which foreign companies from which to purchase coal.
2. Describe the reasons for any decision by Kyushu Electric to renew or not to renew any contract or agreement with NTEC for the purchase and shipment of coal.
3. Describe Kyushu Electric's satisfaction with the shipment of coal pursuant to any contract or agreement with Cloud Peak Energy, Inc. or NTEC.
4. Describe NTEC's reputation as a supplier of coal.
5. Identify any failures by NTEC to comply with any contract or agreement with Kyushu Electric for the shipment of coal to Japan.
6. Identify any problems or delays in NTEC's shipment of coal to Japan that Kyushu Electric believed to be the result of rail service interruption.
7. Describe the substance and background behind the following purported conversation with NTEC:

Date	Customer	Location	Communication	NTEC's Summary
January 31, 2023	Kyushu Electric	Fukuoka, Japan	In-person	Kyushu expressed concerns that NTEC may not be a reliable supplier for future coal shipments. NTEC discussed BNSF's rail performance and its efforts to secure reliable rail service. Kyushu has not signed on for an additional long-term contract for 2023-24, and the meeting indicated that Kyushu may be difficult to win back as a customer after BNSF's persistent service issues to NTEC.
Date	Customer	Location	Communication	NTEC's Summary

[Attachment B to Japanese Entities Motion]

From Mitsubishi

1. Describe Mitsubishi's relationship with NTEC, including but not limited to the services that Mitsubishi provides to NTEC.
2. Describe the reasons for coal customers' decisions to renew or not to renew any contract or agreement with NTEC for the purchase and shipment of coal, to the extent Mitsubishi has that information in the sales related services it provides to NTEC.
3. Describe NTEC's reputation as a supplier of coal.
4. Identify any failures by NTEC to comply with any contract or agreement with a coal customer for the shipment of coal to Japan.
5. Identify any problems or delays in NTEC's shipment of coal to Japan that Mitsubishi believed to be the result of rail service interruption.
6. Describe the substance and background behind the following purported conversations with NTEC:

Date	Customer	Location	Communication	NTEC's Summary
January 30, 2023	Mitsubishi	Tokyo, Japan	In-person	Meeting with Mitsubishi, which provides sales-related services to NTEC in the Japanese market. Mitsubishi indicated that if NTEC did not find a fix or solution for BNSF's inconsistent and inadequate rail performance, NTEC (and via extension Mitsubishi) would find it difficult to market in Japan given that

Date	Customer	Location	Communication	NTEC's Summary
				Japanese buyers require reliability for long-term business relationships.
June 12, 2023	Mitsubishi	Phone call	Phone	Mitsubishi discussed the Japanese markets. Mitsubishi again asked for details on NTEC's expectations for BNSF service and whether NTEC expected to meet customer reliability and volume expectations in light of its rail service issues.
July 26, 2023	Mitsubishi	Video call	Call	Mitsubishi discussed the Japanese markets. Mitsubishi again asked for details on NTEC's expectations for BNSF service and whether NTEC expected to meet customer reliability and volume expectations in light the STB's preliminary injunction.

[Attachment D to Japanese Entities Motion]

From Joban

1. Describe the process by which Joban decides which foreign companies from which to purchase coal.
2. Describe the reasons for any decision by Joban to renew or not to renew any contract or agreement with NTEC for the purchase and shipment of coal.
3. Describe Joban's satisfaction with the shipment of coal pursuant to any contract or agreement with Cloud Peak Energy, Inc. or NTEC.
4. Describe NTEC's reputation as a supplier of coal.
5. Identify any failures by NTEC to comply with any contract or agreement with Joban for the shipment of coal to Japan.
6. Identify any problems or delays in NTEC's shipment of coal to Japan that Joban believed to be the result of rail service interruption.
7. Describe the substance and background behind the following purported conversation with NTEC:

Date	Customer	Location	Communication	NTEC's Summary
January 31, 2023	Joban	Tokyo, Japan	In-person	Joban required assurances that NTEC was taking appropriate actions to resolve the ongoing rail service issues with BNSF. Joban specifically inquired as to
Date	Customer	Location	Communication	NTEC's Summary
				why Signal Peak did not experience the same rail service problems as NTEC.

[Attachment F to Japanese Entities Motion]

C. Document Production from NTEC's Korean Customers

Within the Korean Entities Motion, BNSF requests assistance from the appropriate Korean judicial authority in obtaining documents from NTEC's Korean customers and business partners, including WoonBong Energy Co., LTD ("WoonBong Energy"), Korea East West Power Co., LTD ("Korea East West"), Korea South-East Power Co., LTD ("Korea South-East"), and Korea Midland Power Co., LTD (Korea Midland). BNSF seeks production of e-mail correspondence from Korea South-East and WoonBong Energy, as listed below:

Date	Customer	Location	Communication	NTEC's Summary
May 15, 2023	Korea South-East Power	Email	Email	NTEC responded to KOSEP's request for information regarding the STB Emergency Service order hearing and its potential impact on rail service.

Date	Customer	Location	Communication	NTEC's Summary
March 27, 2023	Woon Bong Energy	Email	Email	NTEC addressed the possible need to discontinue offering coal sales to Korean customers due to BNSF continuing service deficiencies and due to awaiting BNSF's commitment to provide more trains per month.
April 5, 2023	Woon Bong Energy	Email	Email	Email addressed BNSF's unexpected increase in train counts for April and May and customer interest in additional cargos on short notice for 2Q23.
July 5, 2023	Woon Bong Energy	Email	Email	Multiple Korean customers inquired about the impact of the MRL bridge collapse on potential BNSF service to NTEC.

[Schedules A and B to Korean Entities Motion]

D. Testimony from NTEC's Korean Customers

Additionally, BNSF seeks deposition testimony from NTEC's Korean customers and asks a representative for each customer to answer sixteen questions concerning the nature of the respective customer's interactions with NTEC during the period from January 1, 2019 to August 31, 2023. *See* Korean Entities Motion at Schedules A-D. These questions are as follows:

1. What is your name?
2. What is your current position at [entity] and how long have you had that position?
3. When did you begin working at [entity]? What was your title when you first began there?
4. Please state your various positions at [entity] between January 1, 2019 and August 31, 2023 to the extent they have not been covered in the prior questions. If you had multiple titles, please provide which dates you held each title.
5. Did any of these roles relate to purchasing, selling, or marketing coal? If so, please describe these roles.
6. Describe any relation [entity] has to the coal trade, including (i) whether [entity] buys, sells, or markets coal; (ii) what markets it buys from, sells to, or trades with.

7. Describe the process by which [entity] decides which foreign companies from which to purchase coal.
8. Describe the relationship between [entity] and NTEC, including (i) the approximate date the relationship started and ended (if applicable), (ii) the circumstances of the relationship, and (iii) what portion of its coal business involves NTEC versus other export coal companies selling coal from North American mines.
9. Describe [entity]'s satisfaction with the shipment of coal pursuant to any contract or agreement with Cloud Peak Energy, Inc. or NTEC.
10. Identify any failures by NTEC to comply with any contract or agreement with [entity] for the shipment of coal to the Republic of Korea.
11. Identify any problems or delays in NTEC's shipment of coal to the Republic of Korea that [entity] believed to be the result of rail service interruption.
12. Please describe your understanding of NTEC's reputation in the export coal market.
13. What is the basis for your understanding of NTEC's reputation?
14. Has [entity] ever expressed a concern to NTEC regarding its U.S. rail transportation? If so, what was that position?
15. Describe the reasons for any decision by [entity] to renew or not to renew any contract or agreement with NTEC for the purchase and shipment of coal.
16. Describe the substance of, estimated duration of, and attendees at the following purported conversations with NTEC:

Date	Customer	Location	Communication	NTEC's Summary
January 30, 2023	Woon Bong Energy	Tokyo, Japan	In-person	Meeting with Woon Bong Energy (NTEC Sales Agent in Korea) regarding BNSF service
				deficiencies and specifically why NTEC's rail service lagged far behind other US coal producers in 2022. The meeting also included discussion of prospects for BNSF service to NTEC in 2023.
July 5, 2023	Woon Bong Energy	Email & Phone	Email & Phone	Multiple Korean customers inquired about the impact of the MRL bridge collapse on potential BNSF service to NTEC.

Date	Customer	Location	Communication	NTEC's Summary
April 26, 2023	Korea South-East Power	Jinju, S. Korea	In-person	KOSEP required assurances that that NTEC was taking appropriate actions to resolve the ongoing rail

Date	Customer	Location	Communication	NTEC's Summary
				service issues with BNSF. KOSEP indicated that it would reduce its reliance on NTEC unless NTEC could resolve its logistics issues now and going forward. KOSEP asked many questions regarding BNSF and rail operations generally in the United States.

Date	Customer	Location	Communication	NTEC's Summary
April 27, 2023	Korea Midland Power	Boryeong, S. Korea	In-person	KOMIPO's primary topic of discussion was why BNSF continually refused to provide NTEC with requested service levels. KOMIPO indicated that they had heard rumors that NTEC had unfavorable rail

Date	Customer	Location	Communication	NTEC's Summary
				agreements versus other potential suppliers.

Date	Customer	Location	Communication	NTEC's Summary
April 25, 2023	Korea East-West Power	Ulsan, S. Korea	In-person	EWP management requested updates on Spring Creek Mine production and the outlook for BNSF's rail service. EWP expressed specific concerns future business opportunities with NTEC due to its poor logistics reputation in light of its ongoing rail service issues.

E. Second Subpoena Petition

BNSF further requests that the Board issue subpoenas to U.S. based subsidiaries of NTEC's Japanese customers, including Mitsubishi Corporation RtM (Americas) ("RtMA") and Kyuden Urban Development America Co LTD ("Kyuden"). BNSF also requests issuance of a subpoena for EWP Renewable Corporation ("EWPRC"), a U.S.-based subsidiary of one of NTEC's Korean customers. These subpoena petitions request production of documents and deposition testimony concerning "the impact on NTEC's business reputation when railroad deliveries are inconsistent or nonexistent." Compl. ¶ 38. The specific documents and deposition testimony requested are as follows:

From RTMA

1. All contracts or agreements between RtMA and Cloud Peak Energy, Inc. or NTEC related to the shipment of coal from the Spring Creek Mine to Japan or related to sales-related services that RtMA provides to NTEC.
2. All communications related to any sales-related services that RtMA provides and any decision by any coal customer to renew or not renew a contract with NTEC for coal supply.
3. All communications related to rail service NTEC received for the shipment of coal from the Spring Creek Mine to Japan.
4. All documents sufficient to show the amount of coal purchased from NTEC by various customers as a percentage of coal purchased by those customers in 2020, 2021, and 2022.
5. All communications related to or regarding the following purported conversations between RtMA and NTEC:

Date	Customer	Location	Communication	NTEC's Summary
1/30/2023	Mitsubishi Japan	Tokyo, Japan	In-person	Meeting with Mitsubishi, which provides sales-related services to NTEC in the Japanese market. Mitsubishi indicated that if NTEC did not find a fix or solution for BNSF's inconsistent and inadequate rail performance, NTEC (and via extension Mitsubishi) would find it difficult to market in Japan given that Japanese buyers require reliability for long-term business relationships.
6/12/2023	Mitsubishi Japan	Phone call	Phone	Mitsubishi discussed the Japanese markets. Mitsubishi again asked for details on NTEC's

Date	Customer	Location	Communication	NTEC's Summary
				expectations for BNSF service and whether NTEC expected to meet customer reliability and volume expectations in light of its rail service issues.
7/26/2023	Mitsubishi Japan	Video call	Call	Mitsubishi discussed the Japanese markets. Mitsubishi again asked for details on NTEC's expectations for BNSF service and whether NTEC expected to meet customer reliability and volume expectations in light the STB's preliminary injunction.

[Exhibit 1 to Second Subpoena Petition]

From EWPRC

1. All contracts or agreements between EWPRC and Cloud Peak Energy, Inc. or NTEC related to the shipment of export coal from the Spring Creek Mine.
2. All communications related to any decision by EWPRC to renew or not renew a contract with NTEC for the shipment of export coal from the Spring Creek Mine.
3. All communications related to BNSF's provision of rail services to NTEC for the shipment of export coal from the Spring Creek Mine.
4. All documents sufficient to show the amount of export coal purchased from NTEC as a percentage of coal purchased by EWPRC in 2020, 2021, and 2022.
5. Communications related to or regarding the following purported conversation between EWPRC and NTEC:

Date	Customer	Location	Communication	NTEC's Summary
4/25/2023	Korea East-West Power	Ulsan, S. Korea	In-person	EWP management requested updates on Spring Creek Mine production and the outlook for BNSF's rail service. EWP expressed specific concerns future business opportunities with NTEC due to its poor logistics reputation in light of its ongoing rail service issues.

[Exhibit 2 to Second Subpoena Petition]

From Kyuden

1. All contracts or agreements between Kyuden and Cloud Peak Energy, Inc. or NTEC related to the shipment of export coal from the Spring Creek Mine.
2. All communications related to any decision by Kyuden to renew or not renew a contract with NTEC for the shipment of export coal from the Spring Creek Mine.
3. All communications related to BNSF's provision of rail services to NTEC for the shipment of export coal from the Spring Creek Mine.
4. All documents sufficient to show the amount of export coal purchased from NTEC as a percentage of coal purchased by Kyuden in 2020, 2021, and 2022.
5. All communications related to or regarding the following purported conversation between Kyuden and NTEC:

Date	Customer	Location	Communication	NTEC's Summary
1/31/2023	Kyushu Electric	Fukuoka, Japan	In-person	Kyushu expressed concerns that NTEC may not be a reliable supplier for future coal shipments. NTEC discussed BNSF's rail performance and its efforts to secure reliable rail service. Kyushu has not signed on for an additional long-term contract for 2023-24, and the meeting indicated that Kyushu may be difficult to win back as a customer after BNSF's persistent service issues to NTEC.

[Exhibit 3 to Second Subpoena Petition]

III. Analysis

A. Denial of BNSF's Requests for Documents from NTEC's Japanese and Korean Customers

As a threshold matter, the undersigned incorporates reasoning from the Order dated September 7, 2023, and finds that BNSF's request for production of documents from NTEC's Japanese customers is impermissible. Both the United States and Japan are signatories to the U.S.-Japan Bilateral Consular Convention of 1963 (15 U.S.T. 768). That agreement controls the exchange of evidence between the two countries. Section 17(e)(i) of that Convention covers the serving of documents, taking of voluntary depositions, and administering of oaths. Section 17(f) provides for the production of copies of, or extracts from, documents of public registry, rather than document discovery within a common-law system. 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). Thus, the undersigned **DENIES** BNSF's request for production of documents from NTEC's Japanese customers.

BNSF is similarly precluded from requesting production of documents from NTEC's Korean customers. Both the U.S. and Korea are signatories to *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, opened for signature, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 ("Hague Evidence Convention"). The Hague Convention establishes procedures by which a judicial authority in one contracting nation state may request evidence located in another contracting nation state. *See Societe Nationale Industrielle Aerospatiale v. United States District Court for the District of Iowa*, 482 U.S. 522, 524 (1987); *In re Baycol Prod. Litig.*, 348 F. Supp. 2d 1058, 1059 (D. Minn. 2004) ("The Hague Evidence Convention ... prescribes procedures by which judicial authority in one contracting state may request evidence located in another state."). This multilateral treaty governs the exchange of evidence among signatories and constitutes the "supreme law of the land" equivalent to that of a federal statute. *See Laker Airways Ltd. v. Pan Am. World Airways*, 103 F.R.D. 42, 49 (D.D.C. 1984) ("The Hague Convention . . . is an international treaty and as such is entitled to be recognized as part of the supreme law of the land."); *see also Kapar v. Kuwait Airways Corp.*, 845 F.2d 1100, 1104 (D.C. Cir. 1988) ("As a treaty of the United States, the Convention 'is equal in stature and force as any other domestic federal law.'").

Since both the United States and the Republic of Korea are signatories to the Hague Evidence Convention, each state authorizes the exchange of letters of request or letters rogatory under certain circumstances. 23 U.S.T. 2555; *see also* 28 U.S.C. § 1781 (permitting "the transmittal of a letter rogatory or request directly from a tribunal in the United States to the foreign or international tribunal, officer, or agency to whom it is addressed and its return in the same manner"); Fed. R. Civ. P. 28(b)(1) ("A deposition may be taken in a foreign country . . . under an applicable treaty or convention [or] under a letter of request"); Hague Conference on Private International Law, Republic of Korea. In acceding to the Hague Evidence Convention, both countries explicitly recognized Article 2 thereof, which states that "A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them."

The Republic of Korea has issued multiple reservations to the Convention. In accordance with Article 33 of the Convention, the Republic of Korea excluded the application of Articles 16 and 17 of the Convention within its territory. For reference, Articles 16 and 17 of the Convention provides as follows.

Article 16 of the Hague Evidence Convention states:

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if –

- a. a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and
- b. he complies with the conditions which the competent authority has specified in the permission.

Article 17 of the Hague Evidence Convention states:

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if –

- a. a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and
- b. he complies with the conditions which the competent authority has specified in the permission.

Thus, any requests for the production of evidence from a South Korean entity must be processed and issued directly through the central authority designated under Article 2 of the Convention and cannot be obtained directly by a representative or appointee of a second state party to the Convention.

The Republic of Korea has taken additional steps in restricting the type of evidence requests that might be accepted by its Central Authority. In accordance with Article 23 of the Convention, the Government of the Republic of Korea has

declared that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. The Government of the Republic of Korea further declares that it understands "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:

- a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his or her possession, custody or power; or
- b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his or her possession, custody or power.

See Declarations of Reservations of the Republic of Korea, Hague Conference on Private International Law, Hague Conference on Private Int'l Law, http://www.hcch.net/index_en.php?act=status.comment&csid=1057&disp=resdn (last visited Sept. 24, 2023).

Based on the foregoing authority, it is clear that the Republic of Korea has taken the formal position that it will not execute a Letter of Request for the production of documents sought to be presented

within the common-law discovery process. Given the unambiguous nature of this position, the undersigned finds that he cannot recommend that BNSF's request for document discovery from NTEC's Korean Customers be issued to the Korean Central Authority. Hence, the undersigned **DENIES** BNSF's request for the production of documents from NTEC's Japanese and Korean customers.

B. Grant of BNSF's Requests for International Assistance with Witness Testimony from NTEC's Japanese and Korean Customers

The undersigned now turns to BNSF's request for international assistance with the production of witness testimony from NTEC's Korean and Japanese customers.

As stated in my initial interlocutory Order dated September 7, 2023, NTEC opened the door by introducing third-party customer characterizations of alleged lost sales and damage to its business reputation when it filed its Complaint and Petition for Declaratory Order on April 14, 2023. NTEC has repeatedly referenced these third-party customer characterizations throughout the development of these proceedings. Denying BNSF a reasonable opportunity to seek 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. Nevertheless, this tribunal must balance these considerations of fairness and due process with principles of international law, including existing treaty obligations and principles of international comity. See Order dated September 7, 2023.

Regarding BNSF's requests concerning NTEC's Korean customers, BNSF bears the burden to prove that such discovery is necessary and appropriate. *See In re Baycol Prods. Litig.*, 348 F. Supp. 2d at 1059. This burden is not especially onerous as "the Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the Convention." *Id.* (internal citations omitted). In determining whether Hague Convention procedures should be used, this adjudicatory administrative tribunal² may consider:

- a. The importance to the litigation of the documents or other information requested;
- b. The degree of specificity of the request;
- c. Whether the information originated in the United States;
- d. The availability of alternative means of securing the information; and

² The undersigned finds that the Surface Transportation Board is a tribunal or agency contemplated by the express language of 28 U.S.C. § 1781(b)(2). *Cf., In Re Letters Rogatory Issued by Director of Inspection of Government of India*, 385 F.2d 1017 (2d Cir. 1967) (independent agency in the Executive Branch of the U.S. Government is a tribunal under 28 U.S.C. § 1782); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 242-43, (2004) (Commission of the European Communities is tribunal under 28 U.S.C. § 1782 permitting domestic discovery for use in foreign proceedings when it acts as first-instance decisionmaker). *See also Broadcom Corp. v. LG Elec., Inc.*, No. 17-mc-1811-JDB, ECF No.3 (D.D.C. Aug. 15, 2017) (ALJ order pursuant to International Trade Commission's investigation into patent infringement suit granting unopposed motion to issue letter rogatory to obtain 31 document requests and deposition testimony on 54 topics to third-party Taiwanese corporation). It is noteworthy that the discovery requests at issue in *Broadcom* were broader and more burdensome than those at issue here.

- e. The extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where information is located.

Aerospatiale, 482 U.S. at 544 n.28; *see also* Restatement Third of Foreign Relations Law § 442(1)(c). “In supervising pretrial proceedings ... American courts should ... take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.” *Id.*

The Supreme Court’s *Aerospatiale* decision emphasized that “before the Convention was ratified it was often extremely difficult, if not impossible, to obtain evidence from nonparty witnesses abroad.” 482 U.S. at 541. The Court further found it “clear to us that the optional Convention procedures are available whenever they will facilitate the gathering of evidence by the means authorized by the Convention.” *Id.* The *Aerospatiale* factors were raised by the Supreme Court at fn. 28 in the context of a moreover analysis that rejected a rule of first resort for Convention procedures.

Despite this context, and the fact that “[t]he Convention was drafted at the request and with the enthusiastic participation of the United States, which sought to broaden the techniques available for the taking of evidence abroad” (see 482 U.S. at 549, four Justices concurring in part and dissenting in part), NTEC argues that the Board and this tribunal should closely scrutinize BNSF’s unprecedented and far-reaching requests for discovery from foreign third-parties, apply the comity-related factors enumerated at footnote 28 of *Aerospatiale*, and deny BNSF’s international discovery requests.

In my interlocutory Order dated September 7, 2023, the undersigned was mindful of the international comity-related concerns identified by NTEC in its respective filings to the Board, but did not explicitly set forth an analysis applying the *Aerospatiale* dicta to the facts at hand. The *Aerospatiale* Court recognized that the five factors contained within the Restatement “may not represent a consensus of international views on the scope of the district court’s power to order foreign discovery in the face of objections by foreign states,” but found the factors “relevant to any comity analysis[.]” *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 481 F.Supp. 2d 769, 792 (S.D.N.Y. 2012) (citing *Aerospatiale* at 544 n. 28).

The first factor, the importance of the information requested, is central to the determination that comity favors the issuance of letters rogatory. *Id.* at 792-793 (citing *Milliken & Co. v. Bank of China*, 758 F.Supp.2d 238, 246-47 (S.D.N.Y.2010)). The information sought by BNSF is “important,” if not vital to its defenses to NTEC’s allegations. If BSNF is not afforded at least the opportunity to seek foreign assistance with respect to voluntary witness testimony from NTEC’s Korean and Japanese customers, BNSF will be substantially limited in its ability to probe and test NTEC’s uncorroborated factual assertions that BNSF has harmed NTEC’s reputation and future business prospects with Asian coal customers. Those customers are in the unique position of providing information that BNSF needs to rebut the arguably self-serving and vague testimony from NTEC officials that Asian customers declined to do business with NTEC due to BNSF-related railroad and shipping problems.

With regard to the second factor, the requests for testimony from Japanese and Korean customers are specific, limited, and narrowly tailored to BNSF's defenses. In particular, the deposition topics requested from NTEC's Japanese customers ask for a description of the decision-making process to purchase foreign coal; the reasons for any decision to renew or discontinue contracts with NTEC for purchase and shipment of coal; a description of customer satisfaction with NTEC's contractual shipments of coal and NTEC's reputation as a coal supplier; an identification of any failure by NTEC to comply with contractual agreements; an identification of problems or delays in coal shipments due to rail service interruption; and a description of the context surrounding particular purported conversations involving BNSF rail service. Similarly, the deposition topics requested from NTEC's Korean customers and business partners ask about whether and how the entity interacts within the international coal trade; from whom the entity buys, sells, markets, or trades coal; the process by which the entity decides from which foreign companies to purchase coal; the nature of the relationship between the entity and NTEC; the entity's satisfaction with the shipment of coal pursuant to any contract or agreement with NTEC; identification of any failures by NTEC to comply with any contract or agreement. BNSF also asks that the Korean witnesses identify any problems or delays in NTEC's shipment of coal as a result of rail service interruption; explain the entity's understanding of NTEC's reputation in the export coal market; address whether the entity has expressed concern to NTEC regarding U.S. rail transportation; state the reasons for any decision to renew or not to renew any contract or agreement with NTEC; and identify the substance of alleged conversations between each entity and NTEC. The undersigned finds that the requested testimony is not unduly burdensome and categorically material to the issues in the Board proceeding.

NTEC now argues that the undersigned's September 7, 2023 Order "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." Response to Korean Entities Motion at 8; Response to Japanese Entities Motion at 5. NTEC did not previously raise this issue with any degree of specificity before me. Furthermore, the undersigned is not convinced that seeking foreign assistance through specific, limited, and narrowly tailored requests that seek voluntary foreign testimony under the Hague Convention can be accurately construed as harassment of nonparty customers. Congress has empowered federal Executive Branch tribunals such as this one to issue letters rogatory. *See Zurich*, 841 F. Supp at 776 (citing federal statutes, cases, and rules of civil procedure). Letters rogatory or letters of request are not buttressed by either this tribunal's power to compel or Board sanctions. They are simply requests to a foreign tribunal for help obtaining testimony that may be crucial to fair and proper adjudication of this case. The foreign tribunal giving assistance maintains the authority to enforce the requests, or not. *Id.* at 782.

With regard to the third factor, BNSF seeks witness testimony from NTEC customers located in Japan and Korea. Therefore, the foreign origin of the testimony somewhat weighs in favor of NTEC. However, where "the information cannot be *easily obtained* through alternative means," the origin of the information can be "counterbalance[d]" by the inability to obtain the information through an alternative means, thus favoring disclosure. *Zurich*, 841 F.Supp. at 793 (citing *Gucci Am., Inc. v. Curveal Fashion*, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639, at *3 (S.D.N.Y. Mar. 8, 2010)). In this case, the undersigned is persuaded by BNSF's arguments set forth that the requested testimony may shed light on the issue of whether NTEC's Asian customers had various other market-based reasons for taking or seeking to take business elsewhere.

As to the fourth factor, although BNSF has sought evidence concerning NTEC's business relationships through traditional discovery channels, BNSF can gain genuine and unfiltered insight into NTEC's Asian customers' decision-making processes by seeking pointed and narrowly tailored witness testimony from a representative of each customer regarding the nature of its interactions with NTEC. *See Zurich* at 793-794 discussing *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. 51, 53, 2010 WL 1189341, at *2 (E.D.N.Y.2010); *see also In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06 MD 1775, 2010 WL 2976220, at *2 (E.D.N.Y. July 23, 2010) (finding no viable alternative means of discovery where response to request under Hague Convention was dependent on approval from ministry of foreign state); *see, e.g., Milliken*, 758 F.Supp.2d at 248 (finding in favor of requesting party where its "requests would not necessarily be honored, but would only be taken 'seriously' by Chinese authorities"); *Gucci Am., Inc.*, 2010 WL 808639, at *5 (finding in favor of requesting party where "the only alternative means by which [the p]laintiffs might receive the bank records ... is the commencement of an action in Malaysian courts against [the defendant] and securing a judgment, in order to" obtain discovery). Although NTEC references the transcript of the May 10, 2023 Board hearing to support the argument that the evidence sought by BNSF is otherwise available in the record before this tribunal (*see* transcript at 116:9-122:10), NTEC made only vague and passing reference to hearsay conversations with Asian customers during that hearing, and those references are framed only from NTEC's perspective. The undersigned is not aware of other options to obtain the important testimony requested from the primary customer sources, which provide the "easy" access contemplated by this comity analysis.

Finally, although the undersigned does not attempt to conduct a detailed and nuanced balancing of all the interests of the foreign signatories versus the United States, "[b]oth the issuance and enforcement of letters rogatory by U.S. and foreign courts 'rest upon the comity of courts toward each other, and customarily embody a promise of reciprocity.'" *Zurich*, 841 F.Supp. at 777. By providing broad assistance to foreign tribunals through 28 U.S.C. § 1782, the United States encourages foreign tribunals to do the same [through 28 U.S.C. § 1781(b)(2)], which benefits the United States. *In re Premises*, 634 F.3d 557, 563 (9th Cir. 2011).³ Moreover, foreign authorities charged with enforcing the requests may limit enforcement of the discovery devices where appropriate [and consistent with the Board's protective order]. Such a decision is best left to the judicial authorities in Japan and Korea, which can protect against any hardship posed by production of the testimony. *See Zurich*, 481 F.Supp. at 794-96 (citing cases).

In sum, for the reasons set forth above, the undersigned finds that the *Aerospatiale* factors and the interests of fairness and due process outweigh any concerns of international comity in this matter. Accordingly, the undersigned **GRANTS** BNSF's requests to recommend that the U.S. District Court issue letters rogatory or letter requests for the production of witness testimony from NTEC's Japanese and Korean customers.

³ The discovery requested by BNSF involves a relatively straightforward inquiry into the allegedly strained business relationship between NTEC and Asian customers, and no evidence has been presented to suggest that probing into the nature of NTEC's business relationships with these customers would be deleterious to any United States or foreign signatory interest.

C. Denial of BNSF's Second Set of Subpoena Petitions

As a final matter, the undersigned **DENIES** BNSF's Second Set of Subpoena Petitions seeking documents and witness testimony from RtMA, EWPRC, and Kyuden. In my interlocutory Order dated September 7, 2023, the undersigned found that

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. *See generally, Fujikura Ltd. v. Finisar Corp.*, Case No. 15-mc-80110-HRL (JSC), 2015 WL 5782351, at *7 (N.D. Cal. May 14, 2015).

Likewise, the approval of BNSF's Petitions for production of documents and witness testimony from RtMA and Kyuden would be in direct contravention of the U.S.-Japan Bilateral Consular Convention of 1963.

Similarly, the approval of BNSF's Petition for production of documents and witness testimony from EWPCR would contravene a separate, multilateral agreement between the United States and the Republic of Korea.

D. Conclusion

The Republic of Korea has expressly reserved against discovery-related document requests under Article 23 of the Hague Evidence Convention. Accordingly, the undersigned **DENIES** BNSF's requests for the production of documents from NTEC's Korean customers.

The Republic of Korea has not reserved against requests for witness testimony issued through the Korean Central Authority. Accordingly, the undersigned **GRANTS** BNSF's requests for the production of witness testimony from NTEC's Korean customers. The undersigned instructs BNSF to immediately prepare a new motion consistent with the aforementioned reasoning, which may in turn be considered by the U.S. District Court.

Since 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 for the production of documents from NTEC's Japanese customers.

Since Japanese courts are empowered to cooperate in voluntary requests for assistance in taking testimony, the undersigned **GRANTS** BNSF's Requests for the production of deposition topics and questions from NTEC's Japanese customers. The undersigned instructs BNSF to immediately prepare a separate new motion consistent with the aforementioned reasoning, which may in turn be considered by the U.S. District Court.

Finally, the undersigned **DENIES** BNSF's Second Subpoena Petitions. The issuance of subpoenas U.S. based subsidiaries of Japanese or Korean entities would contravene the procedures established through Article 17 of the U.S.-Japan Bilateral Consular Convention of 1963, and the

the Hague Evidence Convention, respectively, and would constitute improper failures to comply with international treaties. *See generally, Fujikura Ltd. v. Finisar Corp.*, Case No. 15-mc-80110-HRL (JSC), 2015 WL 5782351, at *7 (N.D. Cal. May 14, 2015); 23 U.S.T. 2555, T.I.A.S. No. 7444.

So Ordered.

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge
Surface Transportation Board