

SERVICE DATE – SEPTEMBER 28, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

Decided: September 28, 2023

On April 14, 2023, Navajo Transitional Energy Company, LLC (NTEC), filed a complaint and petition for declaratory order alleging that BNSF Railway Company (BNSF) has breached its common carrier obligation, failed to provide adequate car service, and engaged in unreasonable practices with respect to coal transportation service from NTEC's Spring Creek mine in Big Horn County, Mont., (Spring Creek) to the Westshore Terminals facility at Roberts Bank, B.C., Canada (Westshore).¹ BNSF filed an answer to NTEC's complaint and petition on May 5, 2023.

The Board adopted a procedural schedule on June 30, 2023. On August 7, 2023, the Board modified that schedule and appointed Administrative Law Judge Thomas McCarthy (the ALJ) to entertain and rule upon discovery matters and to resolve initially any disputes concerning discovery in this proceeding. After the ALJ's appointment, BNSF filed requests seeking third-party international discovery on August 8, 2023, August 24, 2023, and September 15, 2023. After replies from NTEC, the ALJ addressed BNSF's requests for third-party international discovery on September 7, 2023, September 20, 2023, and September 26, 2023.²

On September 18, 2023, BNSF filed a motion pursuant to 49 C.F.R. § 1104.7(b), seeking a 60-day extension of all deadlines in the procedural schedule in order to allow time for the

¹ In a separate docket, NTEC filed an ex parte application seeking an emergency service order pursuant to 49 U.S.C. § 11123 and, or alternatively, a preliminary injunction pursuant to 49 U.S.C. § 1321(b)(4). By a decision served on June 23, 2023, the Board issued a preliminary injunction ordering BNSF to transport a minimum of 4.2 million tons of coal on an annual basis in 2023 from Spring Creek for service destined to Westshore, and an additional one million annual tons as capacity is available to serve NTEC. See Navajo Transitional Energy Co.—Ex Parte Pet. for Emerg. Serv. Ord. (Injunction Decision), NOR 42178 (STB served Jun. 23, 2023), appeal docketed, No. 23-60402 (5th Cir. July 28, 2023).

² The ALJ also denied BNSF requests for subpoenas in the September 7, 2023, and September 26, 2023 decisions.

completion of third-party international discovery. (BNSF Mot. 1.) BNSF argues that, despite exercising diligence, it will be impossible for BNSF to finish third-party international discovery by September 28, 2023, the close of discovery under the current schedule. (Id. at 7-8.)

On September 21, 2023, NTEC filed a reply. Among other things, NTEC requests that, if the Board grants the extension, it also should modify BNSF's proposed schedule to reflect the end-of-year holidays and to allow for an extension of all discovery, rather than just international discovery, so as to allow for completion of follow-up inquiries. (NTEC Reply 6.)³ On September 22, 2023, BNSF responded,⁴ arguing, among other things, that NTEC can obtain "follow-up inquiries" without an extension and that a broad discovery extension will lead to more discovery issues and a waste of resources. (Id. at 6.)

Under 49 C.F.R. § 1104.7(b), the Board has discretion to extend any time period upon request and for good cause. In past cases, the Board has found good cause for extending procedural schedules in a variety of situations.⁵ Here, both parties have identified good cause to extend the discovery period. (See BNSF Mot. 4-6; NTEC Reply 6.) Extending the discovery period will help to ensure full development of the record. Therefore, for good cause shown, the period for all discovery will be extended.

NTEC also requests a schedule slightly different from BNSF's, to account for scheduling issues related to the end-of-year holidays. (NTEC Reply 6.) BNSF does not oppose this modification. This request is tailored to legitimate scheduling issues and will not materially prejudice the parties, and will be granted.

Therefore, the schedule will be modified as follows:

Discovery Ends	November 30, 2023 (all discovery)
NTEC Opening	January 12, 2024
BNSF Reply	February 23, 2024
NTEC Rebuttal	March 25, 2024

It is ordered:

1. The procedural schedule is modified as reflected above.

³ To the extent that NTEC raises other issues in its reply (see NTEC Reply 2-6), those issues are beyond the scope of this order.

⁴ Although 49 C.F.R. § 1104.13(c) does not permit a reply to a reply, in the interest of a complete record, the Board will accept BNSF's filing into the record in this proceeding.

⁵ E.g., N. Am. Freight Car Ass'n v. BNSF Ry., NOR 42137, slip op. at 1 (STB served June 26, 2013); Capitol Materials, Inc.—Pet. for Dec. Order—Certain Rates & Practices of Norfolk S. Ry., NOR 42068, slip op. at 6 (STB served Apr. 19, 2002).

2. This decision is effective on its service date.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.