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SERVICE DATE – SEPTEMBER 28, 2023

SURFACE TRANSPORTATION BOARD

Docket No. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

ORDER APPROVING ISSUANCE OF LETTERS ROGATORY TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: Judge McCarthy

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 extended the procedural schedule so that the discovery period would end on September 28, 2023. On September 28, 2023, the Board issued an Order extending the procedural schedule for all discovery until November 30, 2023.¹

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").

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").

¹ A copy of the Board's Order is attached hereto for the District Court's consideration.

In an e-mail order dated September 26, 2023,² the undersigned issued the following orders:

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 new motion consistent with the aforementioned reasoning, which may in turn be considered by the U.S. District Court.

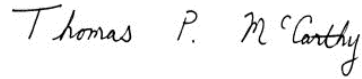
Finally, the undersigned **DENIES** BNSF's Second Subpoena Petitions. The issuance of subpoenas U.S. based subsidiaries of Japanese or Korean entities would contravene the procedures established through Article 17 of the U.S.-Japan Bilateral Consular Convention of 1963, and the the Hague Evidence Convention,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

Accordingly, the undersigned instructed that BNSF immediately prepare a new motion consistent with the aforementioned reasoning, which may in turn be considered by the U.S. District Court for the District of Columbia. BNSF filed its Amended Motion Seeking Recommendation to Issue Letters Rogatory on September 28, 2023. The undersigned has reviewed this amended motion and – consistent with the reasoning provided in the previous order –

² The September 26, 2023 Order, as well as a prior e-mail order dated September 7, 2023, are also attached below for reference.

hereby **APPROVES** distribution of the amended letters rogatory concerning NTEC's Japanese customers, and attachments thereto, to the U.S. District Court for further consideration.

So Ordered.



Thomas P. McCarthy
Administrative Law Judge
Surface Transportation Board

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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

**[Proposed] Recommendation to the United States District Court for the
District of Columbia to Issue Letters Rogatory for International Judicial
Assistance**

The undersigned Administrative Law Judge finds that the evidence that BNSF Railway Company (“BNSF”) seeks pursuant to the Proposed Letter Rogatory is reasonably necessary to investigate fully its defenses to Petitioner Navajo Transitional Energy Company, LLC’s (“NTEC”) claim that BNSF harmed NTEC’s business reputation. Specifically, the requested information from Japan is relevant to NTEC’s allegations that Japanese customers raised concerns about NTEC’s perceived “railroad problems” that affected customers’ willingness to conduct business with NTEC as a result. Thus, the undersigned recommends that the United States District Court for the District of Columbia issue, under its seal and signature, the attached Letters Rogatory to the appropriate judicial authorities in Japan.

A Letter Rogatory is the appropriate method of gathering the necessary requested evidence outside the United States. BNSF must transmit the Letters Rogatory with a District Court Judge’s signature and the District Court’s seal to the Office of American Citizen Services. The proposed Letters Rogatory solicit

international judicial assistance in obtaining relevant information abroad needed in the investigation into alleged reputational harm expressed by Japanese customers.

The undersigned has reviewed the requested Letters Rogatory and finds that they comply with the guidelines set forth by the U.S. Department of State relevant to Letters Rogatory standards generally and Japan specifically. *See* U.S. State Dep't, Preparation of Letters Rogatory, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/international-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html>; U.S. State Dep't, Japan Judicial Assistance Information (Apr. 21, 2023), <https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Japan.html>.

Accordingly, the undersigned respectfully requests the Court to assign a judge to issue the attached Letters Rogatory.

Respectfully submitted this 28th day of September, 2023

Thomas P. McCarthy

The Honorable Thomas McCarthy
Administrative Law Judge

Address for Return of Issued Letter Rogatory:

Timothy J. Strafford
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 429-3000
Email: tstrafford@steptoe.com

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

**BNSF RAILWAY COMPANY'S AMENDED
MOTION SEEKING RECOMMENDATION TO ISSUE LETTERS
ROGATORY**

Jill K. Mulligan
Tamara R. Middleton
Adam Weiskittel
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1330 Connecticut Ave., NW
Washington, DC 20036
(202) 429-3000

Counsel for BNSF Railway Company

Dated: September 28, 2023

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

**BNSF RAILWAY COMPANY'S AMENDED
MOTION SEEKING RECOMMENDATION TO ISSUE LETTERS
ROGATORY**

On August 24, 2023, BNSF Railway Company (“BNSF”) moved in two motions pursuant to 49 U.S.C. § 1321 and 49 C.F.R. § 1113.2 (the “Motions”) for orders recommending that the United States District Court for the District of Columbia issue Letters Rogatory on behalf of BNSF to obtain documents and deposition testimony from the following foreign third parties located in Japan:

Kyushu Electric Power Company
Mitsububishi Corporation
Joban Joint Power Co., LTD

The Motions also sought recommendations that the United States District Court for the District of Columbia issue Letters of Request on behalf of BNSF to obtain documents and deposition testimony from the following foreign third parties located in the Republic of Korea:

WoonBong Energy Co., LTD
Korea East West Power Co., LTD
Korea South-East Power Co., LTD
Korea Midland Power Co., LTD

On September 26, 2023, Administrative Law Judge Thomas P. McCarthy issued an Email Order granting the Motions as to the requested deposition testimony, but denying them as to the requests for production of documents. *See generally* Email Order Granting in Part and Denying in Part Motion Recommending Letter Rogatory; Granting in Party and Denying in Part Motion Recommending Request Letter; and Denying Subpoena Petitions (Sept. 26, 2023) (the “Order”). The Order directed BNSF to file an amended motion with the document requests removed from the proposed Letters Rogatory and Letter of Request. *See* Order at 21.

BNSF has removed all references to document production and all document requests from the proposed Letters Rogatory and Letters of Request (attached hereto as Exhibits 1-2). The Recommendations for Letters Rogatory and for Letters of Request (Exhibits 3-4) are ready for Administrative Law Judge’s signature, and BNSF intends to file the signed Recommendations, proposed Letters Rogatory and Letters of Request, supporting exhibits, NTEC’s Complaint, and certified Japanese and Korean translations of the documents with the United States District Court for the District of Columbia when ready.

Accordingly, BNSF respectfully requests that the Administrative Law Judge sign the Recommendations expeditiously to allow the foreign discovery process to begin. BNSF incorporates herein all points and arguments from the Motions.

Jill K. Mulligan
Tamara R. Middleton
Adam Weiskittel
Jill M. Rugema
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

Respectfully submitted,

/s/ Timothy J. Strafford
Anthony J. LaRocca
Timothy J. Strafford
Molly Bruder Fox
Onika K. Williams
Tara A. Woods
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, DC 20036
(202) 429-3000

Counsel for BNSF Railway Company

Dated: September 28, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding. I have also served the Administrative Law Judge assigned to this proceeding via electronic mail.

/s/ Onika K. Williams

Onika K. Williams

Attorney for BNSF Railway Company

September 28, 2023

EXHIBIT 1

100-8086 Tokyo
JAPAN

Joban Joint Power Co., LTD (“Joban”)
Kandasuda-Cho 1-Chome
101-0041 Chiyoda-Ku
JAPAN

Specifically, the Court requests that the Appropriate Judicial Authority of Japan direct the Japanese Customers to provide testimony as to the topics and questions set forth in **Attachments A, B, and C** to this Request.¹ With respect to the methods and procedures to be followed in connection with the requested deposition, the Court respectfully requests that, to the extent possible under Japanese law and appropriate treaties:

a) the Japanese Customers each be requested to designate one or more officers, directors, managing agents, or other person(s) who consent to testify on their behalf as to the topics set forth in **Attachments A, B, and C**;

b) an examination of the witnesses be conducted orally by a U.S. consular officer on U.S. consular premises;

c) the parties’ legal representatives, their interpreters, and a stenographer be permitted to be present during the examinations, provided they obtain a Japanese Special Deposition visa; and

¹ Attachment A requests testimony from Kyushu Electric. Attachment B requests testimony from Mitsubishi. Attachment C requests testimony from Joban.

d) the stenographer be permitted to record verbatim the examinations, and a full transcript of the examinations, in translation from Japanese to English through a qualified interpreter, be made at the time of the examinations.

The Court understands that the information requested may be of a confidential nature. As such, the Court understands that such testimony may be designated under and treated pursuant to the Protective Order entered in this matter, which can be found in **Attachment D**.

Based on the representations made by Petitioner Navajo Transitional Energy Company, LLC (“NTEC”), this Court believes that the Japanese Customers have knowledge regarding material facts that are relevant for the proper defense of the above-referenced administrative proceeding.

II. FACTS

NTEC is an energy company owned by the Navajo Nation. Among other ventures, NTEC operates the Spring Creek Mine in Montana. BNSF is a rail transportation service provider that provides rail service shipping coal for NTEC from the Spring Creek Mine to domestic destinations as well as the Westshore Terminals (“Westshore”) in British Columbia, Canada. From Westshore, the NTEC coal is shipped to markets in Asia, including Japan.

The U.S. Surface Transportation Board (the “Board”) is an independent agency that acts in a quasi-judicial function to adjudicate certain disputes among railroads and their customers. NTEC has alleged in a legal action with the Board that BNSF has breached its common carrier service obligations to NTEC. NTEC has sought,

among other relief, an injunction mandating a certain level of rail service that BNSF must provide from Spring Creek Mine to Westshore. The Board instituted proceedings shortly after NTEC filed its Complaint on April 14, 2023. A decision by the Board is subject to review by a United States Court of Appeals. *See* 28 U.S.C. § 2342.

The Board and this Court seek judicial assistance from the Appropriate Judicial Authority of Japan to evaluate certain NTEC allegations regarding its business reputation in Asia. In particular, NTEC has claimed that, as a result of BNSF's alleged failures to provide adequate rail service, NTEC has experienced damage from "the impact on NTEC's business reputation when railroad deliveries are inconsistent or non-existent." Compl. ¶ 38 (Apr. 14, 2023). Based on information and belief, the Japanese Customers possess information unavailable from other sources concerning NTEC's allegations that Asian customers have chosen not to do business with NTEC due to their perceived problems with BNSF's rail service. The request for judicial assistance stems from NTEC's allegation that Japanese customers raised concerns about NTEC's perceived "railroad problems" and chose not to conduct business with NTEC as a result. The requested information regarding dealings with NTEC are narrow and should not present an undue burden on the Japanese Customers.

III. EVIDENCE

The questions to which the Japanese Customers' testimony is requested are set forth in **Attachments A, B, and C**. And the Board-entered Protective Order is

contained in **Attachment D**. Finally, the Board's regulations that govern the proceedings (49 C.F.R. Parts 1112-13) are reproduced in **Attachment E**.

IV. URGENCY

A response is requested as soon as practicable. Expeditious treatment of this request will allow the parties and the witnesses to arrange a mutually agreeable date for testimony and avoid disruption of the witnesses' business or personal plans.

V. OFFER OF RECIPROCAL ASSISTANCE

The United States District Court for the District of Columbia is willing to provide similar assistance to the Appropriate Judicial Authority of Japan.

VI. REIMBURSEMENT FOR COSTS

BNSF's counsel is willing to reimburse the Appropriate Judicial Authority of Japan for costs and expenses incurred in executing this Letter Rogatory. BNSF's counsel may be contacted at the following address:

Timothy J. Strafford
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 429-3000
Email: tstraftford@steptoe.com

Signed by:

The Honorable _____
United States District Judge
United States District Court for the District of Columbia
333 Constitution Ave., N.W.
Washington, D.C. 20001
United States of America

Signed in _____, this _____ day of _____, 20_____

[Affix seal of court below:]

ATTACHMENT A

DEFINITIONS

1. “Kyushu Electric” shall refer to Kyushu Electric Power Company Inc. and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by any of these entities, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of these same entities.

2. “BNSF” shall mean BNSF Railway Company and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by BNSF Railway Company either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of BNSF Railway Company.

3. “NTEC” shall mean Navajo Transitional Energy Company, LLC, and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Navajo Transitional Energy Company, LLC, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Navajo Transitional Energy Company, LLC.

4. “Cloud Peak Energy, Inc.” shall mean Cloud Peak Energy, Inc., and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past

or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Cloud Peak Energy, Inc., either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Cloud Peak Energy, Inc.

5. The term “Spring Creek Mine” shall mean the Spring Creek Mine located in Montana, operated by Cloud Peak Energy, Inc. or NTEC.

6. The term “contract” or “agreement” includes agreements, purchase orders, pricing authorities, or contracts in any form, however made, including all documents referred to in the contracts or agreements which set out the rights and obligations of the parties thereunder.

7. The term “any” shall be construed as one or more whenever necessary to bring within the scope of the request all responses that might otherwise be construed as outside its scope.

8. The term “communication” shall mean every manner or method of disclosure, transfer, or exchange of information, whether orally or by document (as defined herein), and whether face-to-face, by telephone, mail, email, facsimile, personal delivery, or other method.

9. “Concerning,” “relating to,” “relate to,” “relates to,” “related to,” “referring or relating to,” “referring to,” “regarding,” and “refer or relate to” shall mean, in whole or in any part, responding to, concerning, relating to, connected with, involving, commenting on, in respect of, about, associated with, discussing, evidencing, showing, describing, reflecting, analyzing, summarizing, memorializing,

consisting of, constituting, identifying, stating, tending to support, tending to discredit, referring to, or in any way touching upon.

10. “Date” as used herein shall mean the exact day, month, and year, if ascertainable, or, if not, the best approximation (including any relationship to other events) thereof.

11. “Describe” shall mean to set out in detail every act, event, fact, or occurrence of any kind whatsoever that explains the answer to the question.

12. The term “document” shall include, without limitation, any written, typed, printed, recorded or graphically portrayed matter in any form or embodiment, that is produced, reproduced, or stored by photographic, magnetic, electronic, mechanical or any other means, and that is in your actual or constructive custody or control, and all copies of the foregoing on which any mark, alteration, writing, or other change from the original has been made.

13. The term “identify,” when used with respect to a person, means to state the person’s full name, present or last known address, and when referring to a natural person, additionally, the occupation or business in which the person is engaged, and the person’s present or last employer and title or position.

14. The term “identify,” when used with respect to a document, means to state, to the extent known, the (i) type of document, (ii) general subject matter, (iii) date of the document, (iv) authors, addressees, and recipients, and (v) when applicable, the Bates range for the document.

15. The term “identify,” when used with respect to a communication, means

to state, to the extent known, the (i) means of communication (*e.g.*, telephone call, meeting, etc.), (ii) date of the communication, (iii) general subject matter of the communication, and (iv) originator, recipient, and any other party to the communication.

16. The terms “person” or “persons” refer to any individual, corporation, partnership, sole proprietorship, firm, board, joint venture, association, agency, authority, commission or other entity.

17. The terms “You” and “Your” shall mean Kyushu Electric, its successors, agents, members, and employees.

DEPOSITION TOPICS AND WRITTEN QUESTIONS

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.

ATTACHMENT B

DEFINITIONS

1. “Mitsubishi” shall refer to Mitsubishi Corporation and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by any of these entities, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of these same entities.

2. “BNSF” shall mean BNSF Railway Company and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by BNSF Railway Company either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of BNSF Railway Company.

3. “NTEC” shall mean Navajo Transitional Energy Company, LLC, and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Navajo Transitional Energy Company, LLC, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Navajo Transitional Energy Company, LLC.

4. “Cloud Peak Energy, Inc.” shall mean Cloud Peak Energy, Inc., and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past

or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Cloud Peak Energy, Inc., either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Cloud Peak Energy, Inc.

5. The term “Spring Creek Mine” shall mean the Spring Creek Mine located in Montana, operated by Cloud Peak Energy, Inc. or NTEC.

6. The term “contract” or “agreement” includes agreements, purchase orders, pricing authorities, or contracts in any form, however made, including all documents referred to in the contracts or agreements which set out the rights and obligations of the parties thereunder.

7. The term “any” shall be construed as one or more whenever necessary to bring within the scope of the request all responses that might otherwise be construed as outside its scope.

8. The term “communication” shall mean every manner or method of disclosure, transfer, or exchange of information, whether orally or by document (as defined herein), and whether face-to-face, by telephone, mail, email, facsimile, personal delivery, or other method.

9. “Concerning,” “relating to,” “relate to,” “relates to,” “related to,” “referring or relating to,” “referring to,” “regarding,” and “refer or relate to” shall mean, in whole or in any part, responding to, concerning, relating to, connected with, involving, commenting on, in respect of, about, associated with, discussing, evidencing, showing, describing, reflecting, analyzing, summarizing, memorializing,

consisting of, constituting, identifying, stating, tending to support, tending to discredit, referring to, or in any way touching upon.

10. “Date” as used herein shall mean the exact day, month, and year, if ascertainable, or, if not, the best approximation (including any relationship to other events) thereof.

11. “Describe” shall mean to set out in detail every act, event, fact, or occurrence of any kind whatsoever that explains the answer to the question.

12. The term “document” shall include, without limitation, any written, typed, printed, recorded or graphically portrayed matter in any form or embodiment, that is produced, reproduced, or stored by photographic, magnetic, electronic, mechanical or any other means, and that is in your actual or constructive custody or control, and all copies of the foregoing on which any mark, alteration, writing, or other change from the original has been made.

13. The term “identify,” when used with respect to a person, means to state the person’s full name, present or last known address, and when referring to a natural person, additionally, the occupation or business in which the person is engaged, and the person’s present or last employer and title or position.

14. The term “identify,” when used with respect to a document, means to state, to the extent known, the (i) type of document, (ii) general subject matter, (iii) date of the document, (iv) authors, addressees, and recipients, and (v) when applicable, the Bates range for the document.

15. The term “identify,” when used with respect to a communication, means

to state, to the extent known, the (i) means of communication (*e.g.*, telephone call, meeting, etc.), (ii) date of the communication, (iii) general subject matter of the communication, and (iv) originator, recipient, and any other party to the communication.

16. The terms “person” or “persons” refer to any individual, corporation, partnership, sole proprietorship, firm, board, joint venture, association, agency, authority, commission or other entity.

17. The terms “You” and “Your” shall mean Mitsubishi, its successors, agents, members, and employees.

DEPOSITION TOPICS AND WRITTEN QUESTIONS

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 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 C

DEFINITIONS

1. “Joban” shall refer to Joban Joint Power Co., LTD and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by any of these entities, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of these same entities.

2. “BNSF” shall mean BNSF Railway Company and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by BNSF Railway Company either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of BNSF Railway Company.

3. “NTEC” shall mean Navajo Transitional Energy Company, LLC, and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Navajo Transitional Energy Company, LLC, either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Navajo Transitional Energy Company, LLC.

4. “Cloud Peak Energy, Inc.” shall mean Cloud Peak Energy, Inc., and all predecessors, successors, subsidiaries, divisions, parents, and affiliates thereof, past

or present, joint ventures, and other legal entities that are or were wholly owned or controlled by Cloud Peak Energy, Inc., either directly or indirectly, and all past or present directors, officers, owners, employees, agents, representatives, consultants, attorneys, and others acting for or on behalf of Cloud Peak Energy, Inc.

5. The term “Spring Creek Mine” shall mean the Spring Creek Mine located in Montana, operated by Cloud Peak Energy, Inc. or NTEC.

6. The term “contract” or “agreement” includes agreements, purchase orders, pricing authorities, or contracts in any form, however made, including all documents referred to in the contracts or agreements which set out the rights and obligations of the parties thereunder.

7. The term “any” shall be construed as one or more whenever necessary to bring within the scope of the request all responses that might otherwise be construed as outside its scope.

8. The term “communication” shall mean every manner or method of disclosure, transfer, or exchange of information, whether orally or by document (as defined herein), and whether face-to-face, by telephone, mail, email, facsimile, personal delivery, or other method.

9. “Concerning,” “relating to,” “relate to,” “relates to,” “related to,” “referring or relating to,” “referring to,” “regarding,” and “refer or relate to” shall mean, in whole or in any part, responding to, concerning, relating to, connected with, involving, commenting on, in respect of, about, associated with, discussing, evidencing, showing, describing, reflecting, analyzing, summarizing, memorializing,

consisting of, constituting, identifying, stating, tending to support, tending to discredit, referring to, or in any way touching upon.

10. “Date” as used herein shall mean the exact day, month, and year, if ascertainable, or, if not, the best approximation (including any relationship to other events) thereof.

11. “Describe” shall mean to set out in detail every act, event, fact, or occurrence of any kind whatsoever that explains the answer to the question.

12. The term “document” shall include, without limitation, any written, typed, printed, recorded or graphically portrayed matter in any form or embodiment, that is produced, reproduced, or stored by photographic, magnetic, electronic, mechanical or any other means, and that is in your actual or constructive custody or control, and all copies of the foregoing on which any mark, alteration, writing, or other change from the original has been made.

13. The term “identify,” when used with respect to a person, means to state the person’s full name, present or last known address, and when referring to a natural person, additionally, the occupation or business in which the person is engaged, and the person’s present or last employer and title or position.

14. The term “identify,” when used with respect to a document, means to state, to the extent known, the (i) type of document, (ii) general subject matter, (iii) date of the document, (iv) authors, addressees, and recipients, and (v) when applicable, the Bates range for the document.

15. The term “identify,” when used with respect to a communication, means

to state, to the extent known, the (i) means of communication (*e.g.*, telephone call, meeting, etc.), (ii) date of the communication, (iii) general subject matter of the communication, and (iv) originator, recipient, and any other party to the communication.

16. The terms “person” or “persons” refer to any individual, corporation, partnership, sole proprietorship, firm, board, joint venture, association, agency, authority, commission or other entity.

17. The terms “You” and “Your” shall mean Joban, its successors, agents, members, and employees.

DEPOSITION TOPICS AND WRITTEN QUESTIONS

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 why Signal Peak did not experience the same rail service problems as NTEC.

ATTACHMENT D

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
July 18, 2023
Part of
Public Record

NAVAJO TRANSITIONAL ENERGY
COMPANY, LLC,

Complainant,

v.

BNSF RAILWAY COMPANY,

Defendant.

Docket No. NOR 42179

JOINT MOTION FOR AMENDED PROTECTIVE ORDER

BNSF RAILWAY COMPANY

Anthony J. LaRocca
Timothy J. Strafford
Onika K. Williams
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NAVAJO TRANSITIONAL
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(202) 347-7170

Attorneys for Complainant

Dated: July 13, 2023

 GRANTED Office of Proceedings	DECISION ID NO.: <u>51801</u>
	DECIDED DATE: <u>7/18/2023</u>
	SERVED DATE: <u>7/18/2023</u>
	APPROVED: <u><i>M. Jaffe</i></u>
	Director
☐ _____	

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. NOR 42179
	)	
BNSF RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

JOINT MOTION FOR AMENDED PROTECTIVE ORDER¹

Pursuant to 49 C.F.R. § 1104.14, Complainant Navajo Transitional Energy Company, LLC (“NTEC”) and Defendant BNSF Railway Company (“BNSF”) file this joint amended motion requesting that the Surface Transportation Board (“STB” or “Board”) enter a protective order for the above-referenced proceeding, in the form provided in Appendix A to this Motion. The proposed protective order is necessary to protect the confidentiality of any materials containing competitively sensitive, proprietary, and other confidential information that may be provided in this proceeding. The proposed protective order follows the format of the protective orders that the Board has approved in recent cases.²

¹ NTEC and BNSF filed a similar Motion in this proceeding on July 11, 2023. The parties intend the instant Motion to supersede or amend that prior version.

² *Central Valley Ag Grinding, Inc. and Central Valley Ag Transport v. Modesto and Empire Traction Co.*, NOR 42159 (STB served Sept. 17, 2018); *Dyna Nobel Inc. & Dyna Nobel La. Ammonia, LLC v. NuStar Pipeline Operating P'ship, L.P.*, NOR 42147 (STB served Apr. 26, 2017); *Finch Paper LLC-Pet. for Declaratory Order*, FD 35981 (STB served May 11, 2016);

Accordingly, NTEC and BNSF jointly request that the Board enter a protective order in this proceeding in the form provided in Appendix A to this motion, including the forms of undertaking that accompany it.

BNSF RAILWAY COMPANY

NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC

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Timothy J. Strafford
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Dated: July 13, 2023

and *Agrium Inc. & Agrium US, Inc. v. Canadian Pac. Ry. Co.*, NOR 42145 (STB served Nov. 27, 2015). The proposed protective order also includes elements regarding scope of use from the protective order in *Navajo Transitional Energy Co., LLC – Ex Parte Application for Section 11123 Emergency Service Order*, NOR 421278 (STB served April 20, 2023).

APPENDIX A

PROTECTIVE ORDER

1. Any party producing information, data, documents, or other material (hereinafter collectively referred to as “material”) in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:

- (a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising herefrom, and not for any other business, commercial, or competitive purpose.
- (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of the preparation and presentation of evidence and argument in STB Docket No. NOR 42179, any related proceedings before the Board, and/or any judicial review proceedings in connection with STB Docket No. NOR 42179 and/or with any related proceedings, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.
- (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising herefrom. However, counsel and consultants for a party are permitted to retain file copies of all pleadings which they were authorized to review under this Protective Order, including Paragraph 10.
- (d) If contained in any pleading filed with the Board shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.” See 49 CFR 1104.14.

2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper and/or private railcar owner car costs or pricing data or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board. Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising herefrom and/or from any related proceedings, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, and execute the

attached Undertaking for Highly Confidential Material prior to receiving access to such materials. Material designated as “HIGHLY CONFIDENTIAL” and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation paragraph 1.

3. In the event that a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to designate the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.

4. In the event that a party inadvertently produces material that is protected by the attorney client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.

5. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material to the Board, or the court, as appropriate, with a written request that the Board or the court: (a) restrict attendance at the hearings during discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

6. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such “CONFIDENTIAL,” and/or “HIGHLY CONFIDENTIAL” material is used shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

7. Each party is ordered to produce to the other party documents, including rail transportation and other contracts, or other documents or information which, because of confidentiality provisions, cannot be produced without a Board order directing their production to the extent that (1) the other party has requested that the documents be produced in discovery, and (2) the parties agree that the requested documents would be properly discoverable in this proceeding but for the confidentiality provisions(s). Such documents shall be required to be produced only after the other party(ies) to a contract (or other document subject to a confidentiality provision) who are entitled to prior notice have been provided written notice and a reasonable opportunity to object to that production and obtain a ruling from the Board on that objection. Any documents or contracts produced pursuant to this Section 7 shall be treated as "HIGHLY CONFIDENTIAL" and shall otherwise be subject to the terms of this Protective Order. To the extent that material reflecting the terms of contracts, shipper-specific traffic data, other traffic data, or other proprietary information is produced by a party in this or any related proceedings and is held and used by the receiving person in compliance with this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904.

8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release "CONFIDENTIAL" and/or "HIGHLY CONFIDENTIAL" material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the "CONFIDENTIAL" material, "HIGHLY CONFIDENTIAL" material, or copies or notes are to be released, or within 3 working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.

9. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly shall not be subject to this Protective Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.

10. Each party has a right to view its own data, information and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information and documentation has been designated as "HIGHLY CONFIDENTIAL" by a producing party, without securing prior permission from the producing party. If a party (the "filing party") files and serves upon another party (the "reviewing party") a pleading or evidence containing the filing party's "HIGHLY CONFIDENTIAL" material, the filing party shall also prepare and serve contemporaneously upon the reviewing party a "CONFIDENTIAL" version of the pleading or evidence from which the filing party's "HIGHLY CONFIDENTIAL" material has been redacted. The "CONFIDENTIAL" version may be provided in hardcopy or electronic format at the option of the filing party and may be disclosed to those personnel employed by the reviewing party who have read a copy of this Protective Order and executed the attached Undertaking for Confidential Material ("In-house Personnel"). In lieu of preparing a "CONFIDENTIAL" version, the filing party may (simultaneously with the party's submission to the Board of its "HIGHLY CONFIDENTIAL" version) make available to outside counsel for

any other party a list of all “HIGHLY CONFIDENTIAL” information that must be redacted from its “HIGHLY CONFIDENTIAL” version prior to review by in-house personnel, and outside counsel for any other party must then redact that material from the “HIGHLY CONFIDENTIAL” version before permitting any clients to review the submission.

11. Any party filing with the Board a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on July_, 2023, governing the production of confidential documents in STB Docket NOR 42179, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket NOR 42179 or any judicial review proceeding arising herefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel and consultants may retain copies of pleadings which they were authorized to review under the Protective Order. I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Signed: _____

Print: _____

Dated: _____

UNDERTAKING HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on July __, 2023, governing the production of confidential documents in STB Docket NOR 42179, understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated "HIGHLY CONFIDENTIAL" to any person or entity who: (i) is not eligible for access to "HIGHLY CONFIDENTIAL" material under the terms of the Protective Order, or (ii) has not executed a "HIGHLY CONFIDENTIAL" undertaking in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising herefrom, that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding and any judicial review proceeding arising herefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel and consultants may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT]

Print: _____

Dated: _____

ATTACHMENT E

Pt. 1112

(2) The movement would exceed 500 highway miles between origin and destination;

(3) There is no intramodal competition from other railroads;

(4) There is no barge competition;

(5) There is no pipeline competition;

(6) The complainant has used truck for 10% or less of its volume (by tonnage) subject to the rate at issue over a five-year period; and

(7) The complainant has no practical build-out alternative due to physical, regulatory, financial, or other issues (or combination of issues).

(b) A complainant may rely on any competent evidence, including a verified statement from an appropriate official(s) with knowledge of the facts, in demonstrating the factors set out in paragraph (a) of this section. An appropriate official is any individual who has either direct or supervisory responsibility for, or otherwise has knowledge or understanding of, the complainant's transportation needs and options. The official(s) should provide his or her title and a short description of his or her duties in the verified statement. In demonstrating the revenue to variable cost ratio, a complainant must show its quantitative calculations.

(c) A defendant's reply evidence under the streamlined market dominance approach may address the factors in paragraph (a) of this section and any other issues relevant to market dominance. A complainant may elect to submit rebuttal evidence on market dominance issues. Reply and rebuttal filings under the streamlined market dominance approach are each limited to 50 pages, inclusive of exhibits and verified statements.

(d)(1) Pursuant to the authority under §1011.6 of this chapter, an administrative law judge will hold a telephonic evidentiary hearing on the market dominance issues at the discretion of the complainant in lieu of the submission of a written rebuttal on market dominance issues.

(2) The hearing will be held on or about the date that the complainant's rebuttal evidence on rate reasonableness is due. The complainant shall inform the Board by letter submitted in the docket, no later than 10 days after defendant's reply is due, whether it

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elects an evidentiary hearing of lieu of the submission of a written rebuttal on market dominance issues.

(3) The Board will provide an unofficial copy of the hearing transcript no later than 5 days after the conclusion of the hearing. The Board will provide the official hearing transcript shortly thereafter. The hearing transcript will be part of the docket in the proceeding.

[85 FR 47697, Aug. 6, 2020]

PART 1112—MODIFIED PROCEDURES

Sec.

1112.1 When modified procedure is used.

1112.2 Decisions directing modified procedure.

1112.3 Default for failure to comply with schedule; effect of default.

1112.4 Petitions to intervene.

1112.5 Joint pleadings.

1112.6 Verified statements; contents.

1112.7 Records in other Board proceedings.

1112.8 Verification.

1112.9 Sample verification for statement of fact under modified procedure.

1112.10 Requests for oral hearings and cross examination.

1112.11 Authority of officers.

AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 1321.

SOURCE: 47 FR 49558, Nov. 1, 1982, unless otherwise noted.

§ 1112.1 When modified procedure is used.

The Board may decide that a proceeding be heard under modified procedure when it appears that substantially all material issues of fact can be resolved through submission of written statements, and efficient disposition of the proceeding can be accomplished without oral testimony. Modified procedure may be ordered on the Board's initiative, or upon approval of a request by any party.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1112.2 Decisions directing modified procedure.

A decision directing that modified procedure be used will set out the schedule for filing verified statements by all parties and will list the names and addresses of all persons who at that time are on the service list in the

Surface Transportation Board

§ 1112.10

proceeding. In this part, a statement responding to an opening statement is referred to as a “reply”, and a statement responding to a reply is referred to as a “rebuttal”. Replies to rebuttal material are not permitted. The filing of motions or other pleadings will not automatically stay or delay the established procedural schedule. Parties will adhere to this schedule unless the Board issues an order modifying the schedule.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 58491, Nov. 15, 1996]

§ 1112.3 Default for failure to comply with schedule; effect of default.

If a party fails to comply with the schedule for submission of verified statements, or any other requirements established by the modified procedure decision, that party will be deemed to be in default and to have waived any further participation in the proceeding. Thereafter, the proceeding may be disposed of without notice to and without participation by parties in default.

§ 1112.4 Petitions to intervene.

(a) The Board may grant a petition to intervene in a proceeding set for modified procedure if intervention:

(1) Will not unduly disrupt the schedule for filing verified statements, except for good cause shown; and

(2) Would not unduly broaden the issues raised in the proceeding.

(b) The petition to intervene shall set out:

(1) The petitioner’s interest in the proceeding;

(2) Whether the petitioner supports or opposes the relief sought or the action proposed or is otherwise concerned with the issues presented in the proceeding; and

(3) The petitioner’s request, if any, for relief.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1112.5 Joint pleadings.

Parties with common interests are encouraged to prepare joint pleadings whenever possible.

§ 1112.6 Verified statements; contents.

A verified statement should contain all the facts upon which the witness relies, and to the extent that it contains arguments, they should be based only on those facts. Parties filing reply and rebuttal verified statements will be considered to have admitted the truth of material allegations of fact contained in their opponents’ statements unless those allegations are specifically challenged. Rebuttal statements shall be confined to issues raised in the reply statements to which they are directed.

§ 1112.7 Records in other Board proceedings.

If any portion of the record before the Board in any proceeding other than the proceeding at issue is offered in evidence, a true copy should be presented for the record.

[47 FR 49558, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1112.8 Verification.

The original of any pleading filed must show the signature, capacity, and seal, if any, of the person administering the oath, and the date thereof.

§ 1112.9 Sample verification for statement of fact under modified procedure.

State of _____,
County of _____,
SS: _____

_____ being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

Signed _____.
Subscribed and sworn to before me this ____ day of _____.
Notary Public of _____.
My Commission expires _____.

§ 1112.10 Requests for oral hearings and cross examination.

(a) *Requests.* Requests for oral hearings in matters originally assigned for handling under modified procedure must include the reasons why the matter cannot be properly resolved under modified procedure. Requests for cross examination of witnesses must include the name of the witness and the subject matter of the desired cross examination.

§ 1112.11

(b) *Disposition*. Unless material facts are in dispute, oral hearings will not be held. If held, oral hearings will normally be confined to material issues upon which the parties disagree. The decision setting a matter for oral hearing will define the scope of the hearing.

[61 FR 52712, Oct. 8, 1996]

§ 1112.11 Authority of officers.

Except to the extent that they apply only to the conduct of a public hearing, the officer assigned to handle a proceeding under the modified procedure shall have the same authority as officers assigned to conduct oral hearings as described in § 1113.3(a) and (b).

PART 1113—ORAL HEARING

Sec.

- 1113.1 Scheduling hearings; continued hearings.
- 1113.2 Subpoenas.
- 1113.3 Authority of officers.
- 1113.4 Prehearing conferences.
- 1113.5 Stipulations.
- 1113.6 Appearances; withdrawal or absence from hearing.
- 1113.7 Intervention; petitions.
- 1113.8 Witness examination; order of procedure.
- 1113.9 Prepared statements.
- 1113.10 Records in other Board proceedings.
- 1113.11 Abstracts of documents.
- 1113.12 Exhibits.
- 1113.13 Filing evidence subsequent to hearing.
- 1113.14 Objections to rulings.
- 1113.15 Interlocutory appeals.
- 1113.16 Oral argument before the hearing officer.
- 1113.17 Transcript of record.
- 1113.18 Briefs.
- 1113.19 Pleadings: part of the record.
- 1113.20–1113.30 [Reserved]

AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 1321.

SOURCE: 47 FR 49559, Nov. 1, 1982, unless otherwise noted.

§ 1113.1 Scheduling hearings; continued hearings.

(a) *Assignment; service and posting of notice*. In those proceedings in which an oral hearing is to be held, the Board will assign a time and place for hearing. Notice of hearings will be posted on the Board's Web site, will be served upon the parties and such other persons as may be entitled to receive notice under the Act, and will be avail-

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able for inspection at the Board's office.

(b) *Requests for changes in assignment*. Requests for postponements of date of hearing will be granted only in exceptional circumstances.

(c) *Continuances*. (1) A continuance may be granted at the discretion of the presiding officer.

(2) If the presiding officer announces the time and place of a continued hearing on the record, no further notice need be given.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996; 74 FR 52907, Oct. 15, 2009]

§ 1113.2 Subpoenas.

(a) *Issuance*. A subpoena may be issued upon the direction of the Board on its own motion or upon request. A subpoena may be issued by the Board or by the officer presiding at a hearing and must be signed by the Director of the Office of Proceedings or a member of the Board.

(b) *Requests*. (1) A request for a subpoena to compel the appearance of a person at a hearing to give oral testimony, but not to produce documents, may be made either by letter (only the original need be filed with the Board) or orally upon the record at the hearing. A showing of general relevance and reasonable scope of the evidence sought to be introduced through the subpoenaed person may be required.

(2) A request for a subpoena to compel a witness to produce documentary evidence should be made in writing by petition. The petition should specify with particularity the books, papers, or documents desired and facts expected to be proved, and should show the general relevance and reasonable scope of the evidence sought. The officer presiding at a hearing may grant a request for such a subpoena made orally upon the record.

(c) *Service*. The original subpoena should be exhibited to the person served, should be read to him if he is unable to read, and a copy should be delivered to him by the officer or person making service.

(d) *Return*. If service of subpoena is made by a United States marshal or his deputy, service should be evidenced by his return of the subpoena. If made by

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any other person, such person shall make an affidavit stating the date, time and manner of service; and return such affidavit on, or with, the original subpoena in accordance with the form thereon. In case of failure to make service the reasons for the failure should be stated on the original subpoena. The written acceptance of service of a subpoena by the person subpoenaed will be sufficient without other evidence of return. The original subpoena bearing or accompanied by the required return, affidavit, statement, or acceptance of service, should be returned forthwith to the Chief, Section of Administration, Office of Proceedings, unless otherwise directed.

(e) *Witness fees.* A witness who is summoned and responds to the summons is entitled to the same fee as is paid for like service in the courts of the United States. Such fee is to be paid by the party at whose insistence the testimony is taken at the time the subpoena is served, except that when the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered at the time of service.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996; 74 FR 52907, Oct. 15, 2009; 81 FR 8854, Feb. 23, 2016]

§ 1113.3 Authority of officers.

(a) *General.* (1) The presiding officer has the authority to regulate the procedure in the hearing before him, and has authority to take all measures necessary or proper for the efficient performance of the duties assigned him. These include authority: (i) To hold hearings; (ii) to administer oaths and affirmations; (iii) to grant intervention; (iv) to accept any pleading; (v) to establish special rules of procedure appropriate to the effective handling of the particular proceeding; (vi) to examine witnesses; (vii) to issue subpoenas at the hearing; (viii) to dispose of requests for discovery; (ix) to hold conferences for the settlement and simplification of issues; (x) to rule on motions and dispose of procedural requests; (xi) to make initial decisions; (xii) to exclude any person from the hearing for contemptuous conduct; and (xiii) to take any other action authorized by this part, by the Administra-

tive Procedure Act, or by the Interstate Commerce Act and related acts.

(2) The presiding officer has the authority: (i) To terminate examination or cross-examination of repetitious or cumulative nature; (ii) to limit direct examination to material matters; (iii) to limit cross-examination to disputed material facts; (iv) to require that principal examination or cross-examination be conducted by one or more counsel representing similar interests in proceedings where several parties are involved; (v) to set reasonable schedules for the presentation of witnesses; (vi) and to set reasonable time limits for the examination or cross-examination of witnesses. In order to enforce this paragraph, the officer may require a clear statement on the record of the nature of the testimony to be given by any witness.

(b) *Motions to dismiss; amendments.* (1) The presiding officer shall have power to decide any motion to dismiss the proceeding or other motion which involves final determination of the merits of the proceeding.

(2) The presiding officer may grant leave to amend any application or complaint.

(c) *Preparation of the decision by the prevailing party.* Any proceeding in which an oral hearing is held and in which the officer is able to announce his decision either:

(1) On the record after the close of the taking of testimony and the hearing of arguments by the officer, or

(2) By appropriate notification to the parties after the close of the hearing, may be made the subject of an initial decision prepared by a party or parties in whose favor the officer decides, within a period specified by the officer, and subject to such changes as the officer considers appropriate in the draft prepared for him.

(d) *Recording; media coverage.* The presiding officer shall have authority to permit or to refuse to permit the recording of the hearing by means of live or delayed television or radio broadcast, or the use of a tape recorder or

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other electronic or photographic equipment by any person other than the official reporter.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996; 81 FR 8854, Feb. 23, 2016]

§ 1113.4 Prehearing conferences.

(a) *Purposes.* Upon written notice by the Board in any proceeding, or upon written or oral instruction of an officer, parties or their representatives may be directed to appear before an officer at a specified time and place for a conference, prior to or during the course of a hearing, or in lieu of personally appearing, to submit suggestions in writing, for the purpose of formulating issues and considering:

- (1) The simplification of issues;
- (2) The necessity or desirability of amending the pleadings either for the purpose of clarification, amplification, or limitation;
- (3) The possibility of making admissions of certain averments of fact or stipulations concerning the use by any or all parties of matters of public record, such as annual reports and the like, to avoid the unnecessary introduction of proof;
- (4) The procedure at the hearing;
- (5) The limitation of the number of witnesses;
- (6) The propriety of prior mutual exchange between or among the parties of prepared testimony and exhibits; and
- (7) Such other matters, including disposition of requests for discovery, as may aid in the simplification of the evidence and disposition of the proceeding. Parties may request a prehearing conference.

(b) *Facts disclosed privileged.* Facts disclosed in the course of the prehearing conference are privileged and, except by agreement, will not be used against participating parties either before the Board or elsewhere unless fully corroborated by other evidence.

(c) *Recordation and decision.* Action taken at the conference, including a recitation of the amendments allowed to the pleadings, the agreements made by the parties as to any of the matters considered, and defining the issues, will be recorded in an appropriate decision unless the parties enter into a written

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stipulation as to such matters, or agree to a statement thereof made on the record by the officer.

(d) *Objection to the decision; subsequent proceedings.* If a decision is entered, the parties may, within 20 days of the date of service, or within such lesser time as is set by the officer, present objections on the grounds that the decision does not fully or correctly embody the agreements reached at the conference. Thereafter the terms of the written stipulation or statement of the officer, as the case may be, will determine the subsequent course of the proceedings, unless modified to prevent manifest injustice.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.5 Stipulations.

Apart from the procedure contemplated by the prehearing provisions, the parties may, by stipulation in writing filed with the Board at any stage of the proceeding, or orally made at the hearing, agree upon any pertinent facts in the proceeding. The parties should agree to facts in this manner whenever practicable.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.6 Appearances; withdrawal or absence from hearing.

(a) *Who may appear.* Any individual may appear for himself. Any member of a partnership which is a party to any proceeding may appear for such partnerships upon adequate identification. A bona fide officer or a full-time employee of a corporation, association, or of an individual may appear for such corporation, association, or individual by permission of the officer presiding at the hearing. A party also may be represented by a practitioner.

(b) *Withdrawal or absence from hearing.* A practitioner who has entered his appearance at the hearing shall not be permitted to withdraw from the hearing, or willfully be absent therefrom, except for good cause and, wherever practicable, only with the permission of the presiding officer. If a person who has entered an appearance withdraws from the hearing in a manner other than that specified, the Board or the

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Officer may take such action as, in the interest of justice and the protection of the lawful rights of all parties to the proceeding, the circumstances of the case may warrant, including the striking out of all or any part of any pleading of the offending party, and including the possible dismissal of the action or proceeding, or any part thereof, the entry of an order of default against that party, or if the withdrawal is without the permission of the presiding officer, disciplining of the practitioner concerned.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.7 Intervention; petitions.

(a) *How requested.* Intervention will normally be granted only upon petition. In exceptional circumstances, where the issues would not be broadened or the proceeding delayed, an officer may, at his or her discretion, allow intervention upon motion made orally at the hearing.

(b) *Content generally.* A petition for leave to intervene must set forth the grounds for the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or in opposition to the relief sought. If the proceeding is by formal complaint and affirmative relief is sought by petitioner, the petition should conform to the requirements for a formal complaint.

(c) *When filed.* A petition for leave to intervene in any proceeding should be filed prior to or at the time the proceeding is called for hearing, but not after, except for good cause shown.

(d) *Broadening issues; filing.* If the petition seeks a broadening of the issues and shows that they would not thereby be unduly broadened, and in respect thereof seeks affirmative relief, the petition should be filed in time to permit service upon and answer by the parties in advance of the hearing.

(e) *Copies; service; replies.* When a petition for leave to intervene is tendered at the hearing, sufficient copies of the petition must be provided for distribution to the parties represented at the hearing. When a petition for leave to intervene is not tendered at the hearing, the petition should be submitted

to the Board together with a certificate that service has been made by petitioner. Any reply in opposition to a petition for leave to intervene not tendered at the hearing must be filed within 20 days after service of the petition to intervene. At the discretion of the Board, leave to intervene may be granted or denied before the expiration of the time allowed for replies.

(f) *Disposition.* Leave to intervene will be granted only when the petitioner addresses issues reasonably pertinent to the issues already presented and which do not unduly broaden them. If leave is granted the petitioner becomes an intervenor and a party to the proceeding.

[47 FR 49559, Nov. 1, 1982, as amended at 53 FR 19301, May 27, 1988; 61 FR 52712, Oct. 8, 1996; 84 FR 12944, Apr. 3, 2019]

§ 1113.8 Witness examination; order of procedure.

Witnesses will be orally examined under oath before the officer unless the facts are presented to the Board in the manner provided under modified procedure. In formal complaint, application, and investigation proceedings, complainant, applicant, and respondent, respectively, shall open and close at the hearing. In the event of further hearings granted on petition, the petitioners requesting further hearing shall open and close the proceeding. Instances exist in which parties other than the respondent may open and close in investigations where the burden of proof is not upon the respondent. Intervenor shall follow the party on whose behalf the intervention is made. The foregoing order of presentation may be varied by the officer.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996; 81 FR 8854, Feb. 23, 2016]

§ 1113.9 Prepared statements.

With the approval of the officer, a witness may read into the record, as his testimony, statements of fact or expressions of opinion prepared by the witness, or written answers to interrogatories of counsel. A prepared statement of a witness who is present at the hearing may be received as an exhibit, provided that the statement does not include argument. Before any such

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statement is read or admitted in evidence, the witness shall deliver to the officer, the reporter, and to opposing counsel, as may be directed by the officer, a copy of such statement or of such interrogatories and the written answers thereto. The admissibility of the evidence contained in such statement will be subject to the same rules as if such testimony was produced orally, including the right of cross-examination of the witness. The officer may require that the witness testify orally if, in the officer's opinion, the memory or demeanor of the witness may be of importance.

§ 1113.10 Records in other Board proceedings.

A portion of the record before the Board in another proceeding may be offered in evidence at an oral hearing. A party making such an offer must provide, as an exhibit, a certified copy of the material sought to be introduced. A hearing officer may waive the requirement that a copy be provided, subject to such conditions as he or she may impose to assure that a copy will be available later, if needed, at no expense to the Board and to assure that the interests of other parties are not prejudiced. An offer of evidence under this section will be subject to objection by other parties.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.11 Abstracts of documents.

When documents, such as freight bills or bills of lading, are numerous, the officer may refuse to receive all the documents in evidence and instead admit only a limited number of representative documents. He may instruct, if the proffer be for the purpose of proving damages, that introduction be deferred until there is opportunity to comply with § 1133.2. If the proffer be for another purpose the officer may require the party in orderly fashion to abstract the relevant data from the documents, affording other parties reasonable opportunity to examine both the documents and the abstract, and

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thereupon offer such abstract in evidence in exhibit form.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996; 81 FR 8854, Feb. 23, 2016]

§ 1113.12 Exhibits.

(a) *Copies.* Unless the officer otherwise directs, the original and 10 copies of each exhibit of a documentary character should be furnished for the use of the Board. The original will be delivered to the reporter, and the copy to the officer. If the hearing is before a board, a copy of the exhibit should be furnished to each member of the board, unless the board otherwise directs. Unless the officer for cause directs otherwise, a reasonable number of copies should be furnished to counsel in attendance at the hearing.

(b) *Interchange prior to hearing.* Whenever practicable, the parties should interchange copies of exhibits or other pertinent material or matter before or at the commencement of the hearing; and the Board or presiding officer may so direct.

(c) *When excluded how treated.* When exhibit has been identified, objected to, and excluded, the officer will develop whether the party offering the exhibit withdraws the offer, and if so, permit the return of the exhibit to him. If the excluded exhibit is not withdrawn, it should be given an exhibit number for identification and be incorporated in the record. Exhibit numbers once used for identification will not be duplicated thereafter.

[47 FR 49559, Nov. 1, 1982, as amended at 53 FR 19301, May 27, 1988; 61 FR 52712, Oct. 8, 1996]

§ 1113.13 Filing evidence subsequent to hearing.

Except as provided in this section or as expressly may be permitted in a particular instance, the Board will not receive in evidence or consider as part of the record any documents, letters, or other writings submitted for consideration in connection with any proceeding after close of the hearing, and may return any such documents to the sender. Before the close of a hearing the officer may, at the request of a party or upon his own motion, or upon agreement of the parties, require that

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a party furnish additional documentary evidence that supplements the existing record, within a stated period of time. Documentary evidence to be furnished in this way will be given an exhibit number at the time of filing and the parties advised accordingly.

[47 FR 49559, Nov. 1, 1982, as amended at 53 FR 19301, May 27, 1988; 61 FR 52712, Oct. 8, 1996; 84 FR 12944, Apr. 3, 2019]

§ 1113.14 Objections to rulings.

It is sufficient that a party, at the time the ruling is made or sought, make known to the officer on the record the action which he desires the officer to take or his objection to the action of the officer and his grounds for that objection. An objection not pressed in brief will be considered as waived. Where no brief is filed an objection will be considered as waived if not pressed in an appeal or reply to an appeal, if filed, or in a separate petition dealing only with that objection.

§ 1113.15 Interlocutory appeals.

Rulings of the presiding officer may be appealed prior to service of the initial decision only if:

- (a) The ruling denies or terminates any person's participation,
- (b) The ruling grants a request for the inspection of documents not ordinarily available for public inspection,
- (c) The ruling overrules an objection based on privilege, the result of which ruling is to require the presentation of testimony or documents, or
- (d) The presiding officer finds that the ruling may result in substantial irreparable harm, substantial detriment to the public interest, or undue prejudice to a party.

§ 1113.16 Oral argument before the hearing officer.

At the discretion of the hearing officer and upon reasonable notice to the parties, oral argument may be made at the close of testimony before him as an alternative to the filing of written briefs. Such argument, which should include requested findings and conclusions, will be recorded and made a part of the transcript of testimony, and will be available to the Board for consideration in deciding the case. The making

of such argument will not preclude oral argument before the Board.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.17 Transcript of record.

(a) *Filing.* After the close of the hearing, the complete transcript of the testimony taken and the exhibits shall be part of the record in the proceeding.

(b) *Corrections.* A suggested correction in a transcript ordinarily will be considered only if offered not later than 20 days after the date each transcript is filed with the Board. A copy of the letter (original only need be filed with the Board) requesting the suggested corrections should be served upon all parties of record and with 2 copies to the official reporter.

(c) *Objections to corrections.* Parties disagreeing with corrections suggested pursuant to paragraph (b) of this section should file written objections in the same manner as suggested corrections are to be filed. Objections to suggested corrections should be filed not later than 15 days after the filing with the Board of suggested corrections. If no objections are timely filed, the Office of Proceedings shall make the suggested corrections to the transcript. If objections are timely filed, the officer who presided at the hearing shall determine the merits of the suggested correction and enter an appropriate decision in the proceeding.

(d) *No free copies.* The Board will not furnish free copies of the transcript to any party to any proceeding.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996; 74 FR 52907, Oct. 15, 2009]

§ 1113.18 Briefs.

(a) *When filed.* In a proceeding which has been the subject of oral hearing, and in which briefs are to be filed, that fact will be stated by the officer on the record. The officer shall fix the time for filing briefs. Simultaneous filing will normally be required, and reply briefs will not normally be permitted.

(b) *Evidence abstract.* A brief filed after a hearing may contain an abstract of the evidence relied upon by the party filing it, preferably assembled by subjects, with reference to the

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pages of the record, if written, or exhibit where the evidence appears. In the event the party elects not to include a separate abstract in his brief, he should give specific reference to the portions of the record, whether transcript or otherwise, relied upon in support of the respective statements of fact made throughout the brief.

(c) *Requested findings.* Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Board to make.

(d) *Exhibit reproduction.* Exhibits should not be reproduced in the brief, but may be shown, within reasonable limits, in an appendix to the brief. Analysis of such exhibits should be included in the brief where pertinent.

[47 FR 49559, Nov. 1, 1982, as amended at 61 FR 52712, Oct. 8, 1996]

§ 1113.19 Pleadings: part of the record.

Matters of fact that are verified and filed prior to oral hearing and that are not specifically denied constitute evidence and are part of the record. A witness, who would present such evidence, must be made available for cross-examination if a request is reasonably made. This rule does not apply to protests against tariffs or schedules.

[47 FR 49559, Nov. 1, 1982, as amended at 64 FR 53268, Oct. 1, 1999]

§§ 1113.20–1113.30 [Reserved]

PART 1114—EVIDENCE; DISCOVERY

Subpart A—General Rules of Evidence

Sec.

- 1114.1 Admissibility.
- 1114.2 Official records.
- 1114.3 Admissibility of business records.
- 1114.4 Documents in Board's files.
- 1114.5 Records in other Board proceedings.
- 1114.6 Official notice of corroborative material.
- 1114.7 Exhibits.

Subpart B—Discovery

- 1114.21 Applicability; general provisions.
- 1114.22 Deposition.
- 1114.23 Depositions; location, officer, time, fees, absence, disqualification.
- 1114.24 Depositions; procedures.
- 1114.25 Effect of errors and irregularities in depositions.

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- 1114.26 Written interrogatories to parties.
- 1114.27 Request for admission.
- 1114.28 Depositions, requests for admission, written interrogatories, and responses thereto: inclusion in record.
- 1114.29 Supplementation of responses.
- 1114.30 Production of documents and records and entry upon land for inspection and other purposes.
- 1114.31 Failure to respond to discovery.

AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 1321.

SOURCE: 47 FR 49562, Nov. 1, 1982, unless otherwise noted.

Subpart A—General Rules of Evidence

§ 1114.1 Admissibility.

Any evidence which is sufficiently reliable and probative to support a decision under the provisions of the Administrative Procedure Act, or which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States, will be admissible in hearings before the Board. The rules of evidence will be applied in any proceeding to the end that necessary and proper evidence will be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996]

§ 1114.2 Official records.

An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by a deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record

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.

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

51863
ALJ

SERVICE DATE – SEPTEMBER 7, 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 JERA MOTION;
GRANTING WESTSHORE MOTION; AND DENYING JERA GLOBAL SUBPOENA
PETITION**

Before: Judge McCarthy

The Board is in receipt of multiple filings from each party in NOR 42179. Given the narrow timeframe for discovery imposed by the Board in this matter, the undersigned issues the following truncated order via e-mail.

The following abbreviated procedural history has been provided for the sake of clarity. 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 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].

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

- a. A motion seeking a recommendation to issue a third letter rogatory;
- b. A motion seeking issuance of a letter of request; and
- c. A second subpoena petition.

As twenty days have not yet elapsed since the filing of the latter three documents, the undersigned will address the August 24 filings once the Navajo Transitional Energy Company (“NTEC”) has been afforded a right to respond. *See* 49 CFR § 1104.13.

On August 28, 2023, the Board received the following two filings from 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.”

After careful consideration, the undersigned makes the following findings.

First, in the interest of a clear and complete record, the undersigned accepts 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.

It is true that filing a “reply to a reply” is generally impermissible in STB proceedings. *See* 49 CFR § 1104.13(c). Indeed, the Board has often found either 49 CFR § 1104.13(c) or a preceding regulation to be dispositive as to whether a party’s request for leave to file a sur-reply will ultimately be granted. *See, e.g., B.J. Alan Co., Inc., et al.*, No. MC-C-30093, 1989 WL 237899 (DCSS Feb. 8, 1989) (striking complainants’ reply to respondents’ reply “because replies to replies are not permitted under the Commission’s rules.”). However, it is also true that the Board’s controlling rules should “be construed liberally to secure just, speedy and inexpensive determination of the issues presented.” 49 CFR § 1100.3. Both the Board and its predecessor, the Interstate Commerce Commission, have allowed leave to file a reply to a reply in the interest of a complete record, and due to the peculiarities involved within an individual case. *See, e.g., Cities of Auburn & Kent, Wa.-Petition for Declaratory Ord.-Burlington N. R.R. Co.-Stampede Pass Line*, No. 33200, 1997 WL 11352 at *1 (Jan. 10, 1997) (denying a motion to strike and accepting a reply to a reply “in the interest of a more complete record.”); *Conrail Abandonment of A Portion of the W. 30th St. Secondary Track in New York, Ny*, No. AB-167, 1988 WL 225779 at *2 (DCSS Jan. 29, 1988) (construing the procedural rules concerning replies liberally, and waiving rule 1104.13(c) “because of the unusual circumstances of this proceeding, and in order to obtain a complete record”); *Overbrook Farmers Union Coop. Ass’n-Petition for Declaratory Ord.-Violation of 49 U.S.C. 11101(a)*, No. 31166, 1989 WL 251252 at *1 (DCSS Feb. 9, 1989) (“it is apparent from the present record that the substance of the challenged testimony is in dispute. Since this is a declaratory order proceeding on court referral, the best possible record should be available for our consideration.”); *Burlington N., Inc.-Control & Merger-St. Louis-San Francisco Ry. Co.*, No. 28583, 1988 WL 225117 at *1 (DCSS Dec. 14, 1988). Here, it would have been preferable

for BNSF to file a request for leave prior to filing its two sur-replies, and henceforth in this matter both parties should seek leave anticipatorily rather than retroactively. However, given the condensed time frame provided for discovery in this matter, and due to the complexity of the underlying discovery-related issues at hand, the undersigned liberally interprets 49 CFR § 1104.13(c) and accepts BNSF's two sur-replies. Furthermore, in the interests of fairness and of maintaining a complete record, the undersigned also accepts NTEC's September 1 response letter – including those portions which contain substantive rebuttal of the arguments presented by BNSF in its two sur-replies and within its earlier submissions to this tribunal.

Second, after careful review, the undersigned **GRANTS** BNSF's request that a letter rogatory be issued seeking documents and witness testimony from Westshore. Furthermore, the undersigned **GRANTS** BNSF's request to recommend that a letter rogatory be issued seeking witness testimony from JERA, but **DENIES** the portion of the JERA Motion seeking the production of documents from JERA.¹

Within the JERA Motion, BNSF delineates its request for the production of documents from JERA [Attachment A to JERA Motion]. More specifically, BNSF seeks:

1. Contracts or agreements between JERA 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 JERA 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; and
4. Documents sufficient to show the amount of coal purchased from NTEC as a percentage of coal purchased by JERA in 2020, 2021, and 2022.

Additionally, BNSF seeks the production of the following deposition topics and questions from JERA [Attachment B to JERA Motion]:

1. Describe the process by which JERA decides which foreign companies from which to purchase coal;
2. Describe the reasons for any decision by JERA to renew or not to renew any contract or agreement with NTEC for the purchase and shipment of coal;
3. Describe JERA'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 JERA for the shipment of coal to Japan; and
6. Identify any problems or delays in NTEC's shipment of coal to Japan that JERA believed to be the result of rail service interruption.

¹ The JERA Motion references JERA Document Requests 1 through 4 within the text of the letter included at Appendix B to that motion. The undersigned will wait until BNSF supplies an amended motion before approving that the request letter be issued to the U.S. District Court.

Within the Westshore Motion, BNSF seeks the production of:

1. Documents related to Westshore's capacity to receive coal deliveries for NTEC and timing of deliveries for NTEC.
2. Documents related to Westshore's capacity to receive coal deliveries and timing for deliveries of BNSF transported coal.
3. Documents sufficient to show the number of train loads of coal allocated to NTEC in relation to other shippers or receivers of coal.
4. Documents sufficient to show forecasts for vessels to be loaded in 2023.
5. Documents sufficient to show which coal shippers store coal at Westshore, the cost of that storage, and the volume of storage available to each shipper.
6. Documents sufficient to show the impact the 2022 Strike had on the volume of shipments loaded and unloaded in 2022 at Westshore.

[Attachment A to Westshore Motion]

Moreover, BNSF requests the production of the following deposition topics and questions from Westshore:

1. Describe the process by which Westshore allocates loading and unloading capacity to coal shippers.
2. Describe the storage options Westshore offers to coal shippers.
3. Identify any options NTEC has had or currently has to store coal at Westshore for loading onto vessels bound for Asian markets.
4. Describe how Westshore decides the prioritization of vessels for loading.
5. Describe how Westshore decides the prioritization of trains for unloading.
6. Describe how the 2022 Strike impacted the volume of shipments loaded and unloaded at Westshore in 2022.

[Attachment B to Westshore Motion]

In its consolidated response to the JERA and Westshore Motions, NTEC argues that BNSF's requests must fail because the Board's powers enumerated at 49 U.S.C. § 1321 make no specific reference to letters rogatory. Consolidated Response at 9. Further, NTEC argues that the limitation of the Board's subpoena power under 49 U.S.C. § 1321(c) to witnesses and documents "from any place in the United States, to the designated place of the proceeding" necessarily preclude the Board from approving such a request. However, the limitation of the Board's subpoena power is precisely why BNSF has pursued such a rarely used mechanism for obtaining discovery, and the fact that Congress did not specifically promulgate restrictions either 1) empowering a party in a Board proceeding to avail itself of this mechanism, or 2) precluding a party to a Board proceeding from doing so is not dispositive here. NTEC's arguments suggesting that BNSF has unduly delayed in seeking international discovery are also unpersuasive, as BNSF has communicated its intention to pursue such discovery since the early stages of these proceedings. The fact that the Board has chosen to institute a narrow time frame for discovery does not inherently restrict BNSF from seeking such discovery and, in any event, the JERA

Motion, Westshore Motion, and first subpoena request were filed a mere four days after the undersigned was appointed to oversee discovery disputes in this matter.

Further, NTEC itself introduced third-party 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, 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 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 through a creative and rarely used discovery mechanism. Moreover, the documents and information that BNSF seeks through its motions are not, as NTEC puts it, "duplicative and cumulative of the discovery that is available within NTEC and/or BNSF's own files," but rather represent information that could not be verified without contacting the original third-party source of that information. According, this tribunal finds that, in the interest of fairness and due process, BNSF has the right to test NTEC's claims and should be afforded a reasonable opportunity to do so.

Nevertheless, this tribunal must balance BNSF's specific discovery requests with principles of international law, including existing treaty obligations and principles of international comity. Here, the parties have correctly concluded that neither Japan nor Canada is a state party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and that obligations imposed through the ratification of that multilateral agreement are not otherwise controlling. However, NTEC correctly identifies that both the United States and Japan are signatories to the U.S.-Japan Bilateral Consular Convention of 1963 (15 U.S.T. 768), which 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, while 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.

Given that 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), the undersigned **DENIES** BNSF's Requests 1 through 4 for the production of documents from JERA. However, as Japanese courts are empowered to cooperate in voluntary requests for assistance in taking testimony, the undersigned **GRANTS** BNSF's Requests 1 through 6 for the production of deposition topics and questions from JERA. Accordingly, the undersigned instructs that BNSF immediately prepare a new motion consistent with the aforementioned reasoning, which may in turn be considered by the U.S. District Court.

As Canadian courts are not similarly precluded from ordering document production, the undersigned **GRANTS** Requests 1 through 6 for the production of documents from Westshore and Requests 1 through 6 for the production of deposition topics and questions from Westshore.²

Finally, the undersigned **DENIES** the JERA Global Petition for Subpoena. Approving 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).

So Ordered.

Thomas P. McCarthy
Administrative Law Judge
Surface Transportation Board

² A signed copy of the letter included at Appendix A to the Westshore Motion is attached to this e-mail.