

SERVICE DATE – MAY 14, 2025

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42180

EVERGY, INC., EVERGY METRO, INC., AND EVERGY KANSAS CENTRAL, INC.

v.

BNSF RAILWAY COMPANY

Digest:¹ This decision grants, in part, BNSF Railway Company's second motion to compel and updates the procedural schedule.

Decided: May 14, 2025

Evergy, Inc. (Evergy), Evergy Metro, Inc. (Evergy Metro), and Evergy Kansas Central, Inc. (EKC) (collectively, Complainants), have filed a complaint against BNSF Railway Company (BNSF), alleging that BNSF violated its obligations under 49 U.S.C. §§ 11101(a), 10702(2), and 11121(a)(1). BNSF filed its answer on May 20, 2024.²

On September 27, 2024, BNSF filed a motion asking that the Board compel Complainants to produce and disclose certain information in response to BNSF's written discovery requests. By decision served March 4, 2025, the Board granted, in part, BNSF's motion. On March 28, 2025, BNSF filed a second motion asking the Board to compel Complainants to produce certain documents and information. For the reasons discussed below, the Board will grant, in part, BNSF's second motion to compel and update the procedural schedule.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

² The complaint also sought an order declaring the scope of BNSF's service obligations to Complainants. By decision served November 14, 2024, the Board granted a motion, filed by BNSF, to dismiss Complainants' request for a declaratory order. Evergy, Inc. v. BNSF Ry., NOR 42180, slip op. at 1 (STB served Nov. 14, 2024).

BACKGROUND³

Evergy, a Missouri corporation, engages in the transmission and distribution of electrical power generated by operating subsidiaries across a system territory covering major portions of Missouri and Kansas. (Compl. ¶ 2.) Evergy Metro and EKC are operating subsidiaries of Evergy. (Id. ¶ 3.) Among other facilities, Evergy Metro operates a 1,725-megawatt, coal-fired generating station in Iatan, Mo., and EKC operates a 484-megawatt, coal-fired generating station in Lawrence, Kan. (Id. ¶¶ 3-4.) Complainants state that Evergy is responsible for procuring coal and coal transportation for both stations. (Id. ¶ 5.)

According to Complainants, for more than 20 years, BNSF transported coal from the Southern Powder River Basin region of Wyoming to the Iatan and Lawrence stations in private railcar unit train configurations pursuant to a series of contracts. (Id. ¶¶ 4, 8, 9.) Complainants state that BNSF informed them in 2020, for the Lawrence station, and in 2021, for the Iatan station, that their rail service would no longer be provided under contract but rather pursuant to tariffs. (Id. ¶¶ 14-15.)⁴ The tariffs included a “service limitation notice,” providing that “[t]he provision of service and acceptance of any tenders for movement under this publication . . . shall, for the foreseeable future, be subject to BNSF’s sole discretion.” (Id. ¶ 14.)

Complainants allege that, beginning in early 2022, BNSF restricted the number of railcars it accepted in service for Iatan and Lawrence, citing the service limitation notice. (Id. ¶ 18.) Complainants further state that BNSF conditioned its service on Complainants’ scheduling shipments “ratably” throughout the year, meaning that the volume of coal scheduled each month was required to be approximately one-twelfth of the total nomination for the year. (Id. ¶ 19.) Complainants assert that, as a result of a shortage of available trainsets, they lost opportunities to earn revenues and profits and incurred significant additional costs related to coal conservation measures, coal inventory, and system reliability protection.⁵ (Id. ¶ 23.)

³ The parties designated certain information in their pleadings as confidential or highly confidential. While attempting to avoid references to confidential or highly confidential information in Board decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. In this case, the Board determined that it could not present its findings with respect to the issues without disclosing certain information.

⁴ The fifteenth numbered paragraph of the complaint is erroneously numbered as a second paragraph 14. All references to that paragraph will be to paragraph 15. The remaining paragraphs in the complaint are numbered correctly.

⁵ Complainants are members of the Southwest Power Pool (SPP), a regional transmission organization responsible for managing the contributions of electricity from individual generating stations to meet consumer demand within its jurisdiction. (Compl. ¶ 21.) Complainants state that, under certain circumstances such as coal inventories falling substantially below target levels, SPP members can be required to implement coal conservation measures. (Id.) According to Complainants, coal conservation measures are steps that can force a utility to increase the prices at which its coal-fired generation is offered so that the market passes on the utility’s generation in favor of another source, and the utility conserves the coal that otherwise would have been used. (Id.)

In Count I of the complaint, Complainants allege that BNSF refused to meet their reasonable transportation needs in violation of BNSF's common carrier obligations under 49 U.S.C. § 11101(a). (Compl. ¶ 26.) In Counts II and III, Complainants allege that BNSF's establishment and use of the service limitation notice constituted an unreasonable practice in violation of 49 U.S.C. § 10702(2) and a failure to furnish adequate car service and to establish reasonable rules and practices on car service in violation of 49 U.S.C. § 11121(a)(1), respectively. (Compl. ¶¶ 28, 30.) Complainants allege damages under 49 U.S.C. § 11704(b) in excess of \$55 million. (Compl. 3; id. ¶¶ 26, 28, 30.)

As noted above, on September 27, 2024, BNSF filed a motion asking the Board to compel Complainants to produce and disclose certain information in response to BNSF's written discovery requests. BNSF also requested that the Board extend the discovery and evidence schedule. By decision served March 4, 2025, the Board granted, in part, BNSF's motion, directed the parties to meet and confer to coordinate the exchange of information and documents, and updated the procedural schedule. Evergy, Inc. v. BNSF Ry. (Mar. 4, 2025 Decision), NOR 42180, slip op. at 1, 9 (STB served Mar. 4, 2025). Under the updated procedural schedule adopted in the March 4, 2025 Decision, NOR 42180, slip op. at 1, 9, discovery would close on April 3, 2025.⁶

On March 28, 2025, BNSF filed a second motion to compel. In its motion, BNSF asks the Board to compel Complainants to produce two classes of information: (1) all of the production cost modeling software inputs and outputs that were generated and used by Complainants in the normal course of business in 2022,⁷ (BNSF Second Mot. to Compel 1-2, 13, 18, Mar. 28, 2025), and (2) communications and documents created in the ordinary course of business that relate to the management of Complainants' coal inventory (specifically requests for production (RFPs) 58 and 71), (id. at 2-3, 17).

First, BNSF states that electric utilities, such as Complainants, routinely use production cost modeling in the ordinary course of business to "understand the effects of certain variables on generating decisions and power plant revenues." (Id. at 10-11.) BNSF argues that it is entitled to see the modeling inputs and outputs that guided Complainants' business decisions during the time period for which Complainants are claiming damages. (Id. at 13.) BNSF also asserts that the historical modeling data it seeks would provide a "real-world check" on the models Complainants submit in support of their damages claims. (Id.) According to BNSF, Complainants agreed to produce samples of modeling runs from 2022 but have not done so. (Id. at 13-14.) BNSF further cites Complainants' representations that they have not retained any

⁶ Discovery was originally scheduled to close on November 1, 2024. See Evergy, Inc. v. BNSF Ry., NOR 42180, slip op. at 2 (STB served June 10, 2024). That deadline was tolled pending further order of the Board by decision served November 1, 2024. See Evergy, Inc. v. BNSF Ry., NOR 42180, slip op. at 2 (STB served Nov. 1, 2024).

⁷ According to BNSF, Complainants disclosed that they intend to use both PROMOD and PCI GenTrader production cost modeling programs to support their damages claims in this matter. (BNSF Second Mot. to Compel 2-3, Mar. 28, 2025.) BNSF states that its request applies to both programs. (Id. at 18.)

PROMOD or PCI GenTrader run files from 2022, including inputs and outputs, that were made for purposes related to coal conservation or generation planning. (Id. at 7-8, 12.) BNSF focuses in particular on the non-retention of a PROMOD run created for that purpose on August 2, 2022. (Id. at 7, 12.) It claims that the lack of retention is “troubling” because, according to BNSF, Complainants were “consulting with counsel beginning earlier than 2022 regarding potential claims against BNSF.” (Id. at 12, 16.) BNSF therefore asks the Board to order Complainants to identify any runs that Complainants performed but have not retained and to explain why the files were not preserved. (Id. at 16, 18.)

Additionally, BNSF states that, in reviewing documents produced by Complainants, it identified two emails concerning coal inventory targets that were embedded in a spreadsheet but not produced as stand-alone documents. (Id. at 17.) BNSF argues that Complainants likely have other internal communications about coal inventories that they have not produced. (Id.) According to BNSF, Complainants stated that they had not searched for any such emails and did not plan to do so. (Id. at 18.) Therefore, BNSF requests that the Board order Complainants to produce communications and documents related to coal inventory (RFPs 58 and 71), which would demonstrate how Complainants’ decision-making affected coal inventory levels and whether Complainants acted to mitigate any loss. (Id.)

Complainants replied to BNSF’s second motion to compel on April 17, 2025. Complainants first argue that BNSF failed to demonstrate a genuine need for the production of every PROMOD or PCI GenTrader run that Complainants performed over a five-year period. (Id. at 13.) Complainants state that they execute model runs frequently throughout the year for a number of purposes (e.g, resource investment planning, fuel supply and transportation services planning and procurement, and interchange budgeting, among others). (Id. at 12.) Additionally, Complainants argue that these runs, which are based on an array of assumptions and inputs, are “hypothetical-driven exercises” with little to no relevance to evaluating the data-driven analysis Complainants may submit on opening. (Id. at 12-13.) Complainants state that they have already produced a substantial volume of material associated with PROMOD results, including the PROMOD run from August 2, 2022, that BNSF discusses in its motion. (Id. at 13-14.) Complainants also argue that BNSF’s document and data retention arguments lack merit. (Id. at 20-21.)

Complainants also urge the Board to reject BNSF’s request for communications and documents related to coal inventory, arguing that the request is a belated case for additional discovery. (Id. at 21.) Complainants state that they objected to BNSF’s coal-inventory related discovery requests on September 16, 2024, as being overbroad and burdensome and clearly stated the scope of the information they would provide instead: i.e., “documents sufficient to show” certain levels of coal inventory or coal reclaimed from inventory. (Id. at 22.) According to Complainants, if BNSF wanted additional discovery on coal inventory, it should have served a narrowed request in the weeks following Complainants’ September 16, 2024 responses or brought the matter to the Board in its first motion to compel. (Id. at 25.)

DISCUSSION AND CONCLUSIONS

In Board proceedings, parties are entitled to discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). Information is relevant when it “might be able to affect the outcome of a proceeding.” See Application of the Nat’l R.R. Passenger Corp. Under 49 U.S.C. § 24308(a)—Canadian Nat’l Ry., FD 35743, slip op. at 8 (STB served Sept. 23, 2014). It is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. 49 C.F.R. § 1114.21(a)(2). Under 49 C.F.R. § 1114.21(c), however, discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought. See, e.g., FMC Wyo. Corp. v. Union Pac. R.R., NOR 42022, slip op at 5 (STB served Feb. 5, 1998) (finding that, when the production of certain evidence is burdensome on its face, a substantial showing of relevance and need is necessary to outweigh the burden of producing evidence).

BNSF’s first request seeks an order compelling Complainants “to identify and produce all 2022 PROMOD and PCI GenTrader runs that it retained, regardless of the purpose of the run.” (BNSF Second Mot. to Compel 18, Mar. 28, 2025.) The Board finds that, in general, production cost modeling runs executed in the ordinary course of business during the year for which damages are alleged would be relevant to the subject matter of this proceeding and that, in this case, the relevance of these documents would not be outweighed by the burden of producing them. Such runs could provide insight into Complainants’ considerations when making its business decisions at that time. Indeed, the Board’s regulations provide that business records are admissible evidence. 49 C.F.R. § 1114.3. See e.g., Omaha Pub. Power Dist. v. Union Pac. R.R., NOR 42173, slip op. at 7 (STB served Oct. 13, 2022); CSX Transp., Inc.—Joint Use Agreement, FD 35348, slip op. at 4 (STB served Aug. 16, 2010). Accordingly, the Board will order Complainants to produce all PROMOD and PCI GenTrader production cost modeling inputs and outputs created or used by Complainants in the ordinary course of business in 2022, to the extent that Complainants have retained that information.⁸ To be clear, this order compels the production of existing documents only; it does not require that Complainants identify all runs executed or otherwise create any new documentation “sufficient . . . to replicate the results.” (See BNSF Second Mot. to Compel, Ex. 10 at 2-3, Mar. 28, 2025.)

The Board finds that BNSF has presented insufficient evidence to warrant an inquiry into Complainants’ document and data retention policies. As Complainants point out, the August 2, 2022 run that BNSF discusses was conducted approximately a year and a half before this proceeding was initiated. (See Complainants Reply 21, Apr. 17, 2025.) BNSF has presented no evidence that the employees executing this run did so in support of potential litigation against BNSF or were even aware of the status of Complainants’ business relationship with BNSF. Further, BNSF failed to support its claim that Complainants should have retained the information

⁸ According to BNSF, Complainants have stated they have not retained inputs and outputs for any PROMOD runs executed in 2022 “for purposes related to coal conservation or generation planning” but may have retained data for PROMOD runs executed “for other purposes.” (See BNSF Second Mot. to Compel, Ex. 5 at 1, Mar. 28, 2025).

because they were otherwise contemplating litigation against BNSF.⁹ BNSF notes that Complainants consulted with outside counsel in 2022. (See BNSF Second Mot. to Compel 12, 16, Mar. 28, 2025). However, the fact that Complainants met with counsel in early 2022 does not, in itself, establish that litigation was anticipated. Complainants state that their outside counsel has represented them in a variety of matters for over 30 years, (see Complainants Reply 21, Apr. 17, 2025), and BNSF has not otherwise presented any information to support its claim that the consultations in 2022 were “about pursuing claims against BNSF,” (BNSF Second Mot. to Compel 12 (citing documents referencing a “conversation with counsel” and “[p]otential [l]egal [o]ptions” regarding coal inventory).) And, as noted above, the complaint in this proceeding was not filed until January 31, 2024, a significant time after the referenced consultations.

BNSF’s second request seeks “communications and other relevant documents related to the management of [Complainants’] coal inventory” that BNSF requested in RFPs 58 and 71. RFP 58 requests “[a]ll Documents and Communications relating to coal stockpiles at each of [Complainants’] coal plants, including, but not limited to, daily coal inventory or stockpile volume for each day from January 1, 2019 to present (including tons and heat content), monthly coal inventory or stockpile volume for each month from January 1, 2019 to present, adequacy of coal stockpiles, configuration of the coal stockpiles, and consideration of options to increase storage capacity for coal stockpiles.” (See BNSF Second Mot. to Compel 5 n.2, Mar. 28, 2025). RFP 71 requests “[a]ll Documents relating to [Complainants’] decisions to burn coal inventory at its plants.” (*Id.*) This request will be denied.

Both RFPs 58 and 71 are significantly overbroad. BNSF seeks the production of all documents and/or communications related to coal stockpiles and Complainants’ decisions to burn coal at all of Complainants’ plants. RFP 58 seeks this information over a five-year period. RFP 71 contains no temporal limitation whatsoever. As Complainants note, “coal inventory is a constant topic of interest for employees of the operator of a coal-fired electric generating facility,” and these queries would encompass an enormous volume of documents and data. (Complainants Reply 22, Apr. 17, 2025.) Although a narrower request might have been reasonable, BNSF does not ask the Board to order a more limited production now.

Nor, at this stage of the proceeding, would it be appropriate to order the parties to negotiate a more limited production of these documents. In their September 16, 2024 responses and objections, Complainants objected to these overbroad requests. They clearly stated that they would produce only “responsive and non-privileged documents sufficient to show the levels of coal inventory at Iatan and Lawrence from January 1, 2019, through December 31, 2022,” (RFP 58) and “responsive, non-privileged documents sufficient to show the coal reclaimed from inventory and burned at Iatan and Lawrence during 2022,” (RFP 71). (Complainants Reply 22, Apr. 17, 2025; BNSF Mot. to Compel, Ex. 7 (Second Set of Document Production Requests) at 6-7, 12-13, Sept. 27, 2024.) Thus, Complainants’ September 16, 2024 responses made clear

⁹ BNSF’s contention that Complainants, as a regulated energy utility, have an obligation under Missouri state law to preserve data associated with resource planning, is beyond the scope of this proceeding. (See BNSF Second Mot. to Compel 15-16, Mar 28, 2025; see also *id.*, V.S. Hibbard 9 & n.20.)

that they did not intend to produce anywhere near the full range of documents BNSF requested in RFPs 58 and 71. Yet, in its first motion to compel filed on September 27, 2024, BNSF did not seek to compel the production of communications and other documents related to the management of Complainants' coal inventory. Nor, based on the record, does it appear that BNSF engaged further with Complainants on the scope of these requests until the parties met and conferred on March 10, 2025, following the Board's March 4, 2025 Decision. (See BNSF Second Mot. to Compel 7-9, Mar. 28, 2025.) Instead, BNSF waited nearly half a year to raise this issue with the Board, by which time there were only six days before the scheduled close of an already extended discovery period. BNSF fails to explain why it could not have acted in a more timely fashion when it knew, as of September 2024, that Complainants' production would be limited to "documents sufficient to show" coal inventory and coal reclaimed at certain facilities. See Application of the Nat'l Passenger R.R. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc., FD 36496, slip op. at 11 (STB served Aug. 6, 2021) ("The Board encourages the parties to resolve discovery disputes promptly However, if parties cannot resolve discovery disputes, they should make every effort to raise them as soon as possible within the discovery period."). Under these circumstances, ordering the parties to begin negotiations concerning the scope of these RFPs at this stage of the proceeding would cause significant, unjustified delay, contrary to the congressional policy favoring the expeditious handling and resolution of Board proceedings. See 49 U.S.C. § 10101(15).

For the reasons discussed above, BNSF's second motion to compel is granted, in part. Complainants are directed to complete the document production required in this decision by June 4, 2025.¹⁰ To accommodate this production, the deadline for Complainants' opening evidence will be moved from May 22, 2025, to June 25, 2025. All subsequent deadlines will be adjusted accordingly.

It is ordered:

1. BNSF's motion to compel is granted, in part, as discussed in this decision.
2. The procedural schedule is modified as set forth in the Appendix to this decision.
3. This decision is effective on the date of service.

By the Board, Board Members Fuchs, Hedlund, Primus and Schultz.

¹⁰ The Board does not intend for the parties to conduct any discovery beyond the scope of this decision during this time period.

APPENDIX

Procedural Schedule

June 4, 2025	Deadline for completion of Complainants' production.
June 25, 2025	Complainants' Opening Evidence due.
October 23, 2025	BNSF Reply Evidence due.
November 26, 2025	Complainants' Rebuttal Evidence due.
December 29, 2025	Simultaneous Final Briefs, 30-page limit (including appendices), no new evidence.