

Before the
SURFACE TRANSPORTATION BOARD

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Finance Docket No. 32760 (Sub-No. 46)

BNSF RAILWAY COMPANY
—TERMINAL TRACKAGE RIGHTS—
KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY

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APPLICATION FOR TERMINAL TRACKAGE RIGHTS

BNSF's Reply to UP's Motion for Protective Order

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APPLICATION FOR TERMINAL TRACKAGE RIGHTS

BNSF's Reply to UP's Motion for Protective Order

On May 14, 2018, UP¹ filed a motion for protective order in the above-captioned proceeding (UP/SP-428 or the “UP Motion”). On May 15, 2018, the Board issued *Decision No. 5* in this proceeding, requiring BNSF to file its reply to the UP Motion no later than today, May 17, 2018. BNSF hereby respectfully requests that the Board deny the UP Motion and order UP “to provide or permit discovery,” pursuant to 49 C.F.R. § 1114.21(c).

BACKGROUND

UP claims that “[g]ood cause exists” for the Board to order that UP “need not respond” to discovery requests made by BNSF on May 11, 2018. UP Motion at 2. UP alleges, without evidence, that BNSF “plainly timed its discovery requests to annoy, oppress, and create undue burden or expense” for UP as it prepares its reply evidence. *Id.* (quotations omitted) (citing 49 C.F.R. § 1114.21(c)). UP asserts that “BNSF had no valid reason to wait to serve discovery requests until 20 days before our reply evidence is due.” *Id.*

¹ The acronyms and defined terms used herein are the same as those used in the BNSF Petition to Establish Conditions of Use and Compensation (BNSF-132, the “BNSF Petition”) filed in this proceeding on January 12, 2018.

Furthermore, UP claims that “BNSF’s timing also suggests an attempt to manipulate the procedural schedule to obtain more time to prepare its rebuttal,” because “BNSF knows [UP] cannot comply with its requests before [BNSF’s] rebuttal is due on June 20.” *Id.* at 2-3. Remarkably, UP seems to imply through this statement that BNSF is not entitled to *any* discovery at this stage of the proceeding.

Before filing its Motion, UP neither served BNSF with objections to BNSF’s discovery requests nor contacted BNSF in an attempt to negotiate a resolution of the issues. On May 15, 2018, the day after UP filed its Motion and before the Board issued *Decision No. 5*, counsel for BNSF called counsel for UP in an unsuccessful effort to resolve these issues amicably. Later on May 15, following issuance of *Decision No. 5*, counsel for BNSF e-mailed counsel for UP and KCS in a further effort to resolve these issues amicably. Counsel for UP responded by requesting that BNSF agree to unreasonable terms as prerequisites to any such informal discussion. We have attached this correspondence as Exhibit A.

ARGUMENT

1. BNSF Is Entitled to Discovery, and None of UP’s Allegations About BNSF’s Motives Is True.

BNSF has a well-established right to obtain this discovery. As the Board knows well, parties to Board proceedings “may obtain 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). Generally, “methods of discovery may be used in any sequence and the fact that a party is conducting discovery . . . should not operate to delay any party’s discovery.” *Id.* § 1114.21(d).

None of the motives ascribed to BNSF by UP is true. Rather than seeking to “annoy,” “oppress,” or “create undue burden or expense” for UP, BNSF requests discovery from UP in an effort to clarify factual issues and develop BNSF’s rebuttal evidence and argument. Furthermore,

BNSF timed its service of discovery in accordance with the schedule set by the Board. BNSF initially considered waiting to serve its discovery requests until after UP and KCS filed their replies, much as the parties conducted discovery in the application phase of this proceeding.² However, given the expedited procedural schedule set by the Board on May 1, 2018 (which allows BNSF twenty days to prepare its rebuttal evidence and argument after reply evidence and argument is filed on May 31, 2018), BNSF decided to seek discovery sooner, and instead served its requests on May 11, 2018. By not waiting to serve UP and KCS with discovery requests until after each party had filed its reply evidence and argument, BNSF sought to avoid the need to delay the procedural schedule with extension requests while still providing UP and KCS with adequate time to reply to BNSF's discovery requests.

2. UP Has Not Met Its Burden of Proof, and BNSF's Requests Are Not Unduly Burdensome

UP plainly failed to meet the burden of proof required for a motion for a protective order. It is “not sufficient” for the party moving for a protective order “merely to state its conclusion” that discovery requests are unduly burdensome. *George A. Hormel & Co.—Petition for Declaratory Order—Certain Rates & Practices of Silvey Refrigerated Carriers, Inc.*, No. 40802, 1992 WL 364330, *2 (ICC served Dec. 10, 1992) (“*Hormel*”).³ In its Motion, UP provided no

² In the application phase of this proceeding, UP and KCS filed reply briefs on August 24, 2015, and BNSF served discovery requests on UP and KCS on September 14, 2015 and September 15, 2015, respectively, in preparation for BNSF's rebuttal filing on October 23, 2015. UP and KCS each responded to the BNSF discovery requests in a timely fashion. BNSF served two earlier rounds of discovery on UP and KCS, the first round in preparation for BNSF's opening statement, served soon after the Board adopted a procedural schedule by decision served on December 1, 2014, and the second round in preparation for BNSF's rebuttal argument and evidence, originally due (before the Board held the proceeding in abeyance) on March 31, 2015.

³ See also *S. Plains Switching—Compensation for Use of Facilities in Alternative Rail Service—W. Tex. & Lubbock Ry.*, FD-35111, slip op. at 1 (STB served Dec. 28, 2007) (denying a motion for protective order where the movant “failed to show with any specificity” that the discovery requests “are either unduly burdensome or irrelevant”).

basis for concluding that BNSF's requests are "unduly burdensome" beyond stating the obvious fact that "[r]esponding to discovery takes time." UP Motion at 2. Discovery requests "may constitute a time-consuming exercise," but that "is not enough to establish that discovery [is] an undue burden." *Hormel* at *2.⁴

In fact, BNSF carefully tailored its discovery requests to reduce the burden on UP by covering only particularly salient issues that BNSF reasonably expects that UP will address in its reply evidence and argument. This includes BNSF's requests for the workpapers of UP witnesses that submit verified statements (Doc. Request No. 1),⁵ assumptions utilized in preparing UP's reply evidence and argument (Interr. No. 1), and documents related to the conditions of use and terms of compensation that UP proposes for BNSF's use of the Rosebluff Lead (Doc. Request No. 8, Interr. No. 6).

Additionally, many of BNSF's current discovery requests cover the same general ground as BNSF's discovery requests three years ago in the application phase of this proceeding. *See, e.g.*, Doc. Request Nos. 2, 3, 4, 5; Interr. Nos. 2, 3, 4, and 5. BNSF renewed those requests in this latest round of discovery in order to ensure that UP and KCS seasonably supplement their responses, consistent with 49 C.F.R. § 1114.29.

⁴ The Board's extension of the procedural schedule through *Decision No. 5* to grant UP all of the additional time that it requested further reduces any burden on UP to respond to BNSF's discovery requests. UP, represented by a major law firm, has adequate time and resources to timely respond to BNSF's discovery requests. Moreover, UP's reply evidence and argument is now due on June 25, 2018, twenty-five days after the original due date of May 31, 2018.

⁵ Regardless of the Board's ruling on the UP Motion, the Board should affirm (1) that all parties that file reply evidence and argument pursuant to the Board's procedural schedule must provide BNSF with workpapers for their verified statement witnesses on the filing date to allow BNSF to develop its rebuttal evidence and argument within the rebuttal window provided by the Board; and (2) that BNSF has the right to conduct discovery based on the reply evidence and argument filed in this proceeding.

Accordingly, BNSF intended its discovery requests to reduce the burden on UP by covering information and documents that UP will have most likely gathered in preparing its reply evidence and argument.

3. UP Did Not Serve Objections or Contact BNSF Before Filing Its Motion

If UP had formally responded or objected to BNSF's requests, or informally contacted BNSF to ask about BNSF's requests or attempt to negotiate some reduced scope of discovery, BNSF would have explained its need, in light of the expedited schedule, to serve its discovery, and negotiated the scope and timing of the requests. Instead, UP rushed to file its Motion the morning of the next business day after BNSF served its requests. In filing its Motion precipitously, UP ignored the Board's (and the ICC's) repeated admonitions to parties to attempt to resolve discovery issues through negotiation *before* invoking Board dispute-resolution processes.⁶ UP's Motion burdens the Board with resolving issues that might well have been amicably resolved by the parties had UP simply reached out to BNSF first.

⁶ See, e.g., *Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology*, EP-638, slip op. at 4 (STB served Apr. 3, 2003) ("As in the past, we encourage parties to resolve discovery disputes themselves, rather than bringing them to the Board in the form of motions to compel. We believe that, as a general rule, these matters can be resolved more efficiently and often more effectively by the parties."); *N. Ind. Pub. Serv. Co. v. Consol. Rail Corp.*, NOR-42027, slip op. at 1 (STB served May 21, 1998) ("*If the parties are unable to resolve discovery issues under the protective order*, a motion to compel may be filed.") (emphasis added); *Ariz. Pub. Serv. Co. v. The Atchison, Topeka & Santa Fe Railway Co.*, No. 41185, 1995 WL 277089, at *1 (served May 12, 1995) ("If a dispute occurs with regard to the withholding or nondisclosure of requested discovery materials, the moving party must make a good faith effort informally to resolve the dispute prior to filing a motion to compel. . . ."); *Scio Pottery Co. v. Consol. Rail Corp.*, No. 40330, 1990 WL 287670, at *1 (Apr. 6, 1990) ("[I]t is noted that the production of documents is a proper aspect of discovery in a proceeding such as this and the parties receiving such a request should *either* produce the responsive documents *or* raise objections to the relevance or privileged character of the requested documents. The party requesting documents to which *an objection has been made* may *then* file a motion to compel . . .") (emphasis added). Although most Board and ICC decisions discuss the need to attempt to resolve discovery disputes amicably before filing *motions to compel*, the same rationales supporting negotiated resolutions of discovery disputes apply when the recipient of a discovery request files a motion for a protective order.

To the extent that UP found any particular BNSF discovery requests to be unduly burdensome, BNSF would have been (and still is) open to discussing with UP a potential resolution of its concerns. Instead, UP exercised the “nuclear option” and immediately filed the Motion, asserting that BNSF effectively is not entitled to discovery at all. In doing so, UP attributed false intentions to BNSF and ignored the Board’s rules and long-standing precedent regarding negotiated resolutions of discovery disputes.

4. UP Now Makes Unreasonable Demands As Prerequisites to Informal Resolution

As discussed above, counsel for BNSF reached out to counsel for UP on May 15, 2018, in an attempt to resolve these disputes. *See* Exhibit A at 2-3. In response, UP’s counsel set three prerequisites to UP’s participation in any informal discussion regarding BNSF’s discovery requests. *See* Exhibit A at 2. Unfortunately, BNSF cannot agree to any of these unreasonable demands from UP.

First, it is unreasonable for UP to require BNSF, as a precondition to any further discussions between the parties, to agree to treat its discovery requests as served when UP files its reply on June 25, 2018. *See* Exhibit A at 2. Assuming that BNSF continued to require UP to respond within 20 days, this would give BNSF only one day to review UP’s responses prior to filing its rebuttal evidence and argument on July 16, 2018. By responding to BNSF’s discovery requests by May 31, 2018, as initially requested by BNSF, UP will still have 25 days to focus solely on preparing its reply.⁷ BNSF understands that UP cannot provide workpapers for its reply witnesses until UP files its reply on June 25, 2018. BNSF does not believe, however, that this

⁷ With the Board’s extension of the procedural schedule in *Decision No. 5*, UP will now have had 55 days to prepare its reply since the Board set the procedural schedule on May 1, 2018, and 164 days since BNSF filed its petition on January 12, 2018.

timing would otherwise limit UP responding to BNSF's discovery requests by May 31, 2018. Moreover, nothing in the Board's rules prohibit BNSF from seeking discovery at this juncture.

Second, it is also unreasonable for UP to require BNSF, as a precondition to any further discussions between the parties, to agree not to seek an extension of time for BNSF to file its rebuttal evidence and argument. *See Exhibit A at 2.* As discussed above, BNSF did not time its service of discovery requests as an "attempt to manipulate the procedural schedule to obtain more time to prepare its rebuttal." UP Motion at 2. However, BNSF cannot agree at this point to never seek an extension of time to file its rebuttal, given the myriad potential issues that may arise prior to the rebuttal deadline, currently set for July 16, 2018. Regardless, UP should not be permitted to demand that BNSF circumscribe its rightful procedural options before agreeing to conduct Board-favored discovery dispute negotiations.

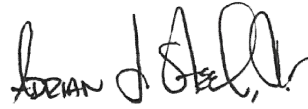
Finally, it is also unreasonable for UP to require BNSF, as a precondition to any further discussions between the parties, to provide specific proposals to narrow BNSF's discovery requests. *See Exhibit A at 2.* UP provided no specific objections to BNSF's discovery requests prior to or after filing its Motion, which requests that the Board order that UP "need not respond" at all to any of BNSF's discovery requests, including BNSF's requests for workpapers of UP's witnesses that submit verified statements with UP's reply evidence and argument. In the face of UP's failure to provide BNSF with any specific objections, UP is effectively demanding that BNSF negotiate against itself by proposing alternatives to BNSF's own discovery requests in the hope that some unilateral compromise will anticipate and satisfy UP's unstated objections. BNSF is certainly willing to entertain specific objections by UP, but UP is apparently unwilling to provide any such objections.

In an e-mail earlier today to UP's counsel, counsel for BNSF explained why BNSF could not agree to each of UP's preconditions. *See* Exhibit A at 1-2. Counsel for UP responded by continuing to protest about timing issues and BNSF's alleged motivations, and provided no justification for UP's preconditions to informal resolution. *See* Exhibit A at 1. UP should not be able to set such unreasonable preconditions to Board-favored informal resolution of discovery disputes, and the Board should reject such blatant gamesmanship.

CONCLUSION

Because UP has not met its required burden of proof, the Board should deny the UP Motion and order UP "to provide or permit discovery," pursuant to 49 C.F.R. § 1114.21(c).

Respectfully submitted,



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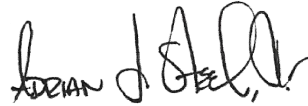
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(817) 352-2383

Counsel for BNSF Railway Company

Dated: May 17, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2018, copies of the foregoing BNSF's Reply to UP's Motion for Protective Order have been served by e-mail on Counsel for UP and KCSR.

A handwritten signature in black ink, appearing to read "Adrian L. Steel, Jr.", is positioned above a horizontal line.

Adrian L. Steel, Jr.

Denton, Peter W.

From: Rosenthal, Michael [mrosenthal@cov.com]
Sent: Thursday, May 17, 2018 8:06 AM
To: Denton, Peter W.; wmullins@bakerandmiller.com
Cc: Steel, Jr., Adrian L.
Subject: RE: Lake Charles - Teleconference re Discovery

Peter,

Your protests ring hollow. BNSF knows Union Pacific could not produce the material responsive to BNSF's discovery request in 20 days. After all, BNSF needed from January 23 until May 8 to complete its responses to requests served by Union Pacific. And BNSF knew it would have only a short period for preparing rebuttal – BNSF asked for an expedited schedule. If BNSF was concerned the Board provided BNSF slightly less time to prepare rebuttal than BNSF requested, BNSF could have joined with Union Pacific in seeking reconsideration of the procedural schedule. Instead, BNSF asked the Board to deny Union Pacific's petition and "affirm the procedural schedule."

If BNSF truly believed it needed discovery from Union Pacific, it could have and should have served its requests long ago.

Regards,

Mike

From: Denton, Peter W. <PDenton@mayerbrown.com>
Sent: Thursday, May 17, 2018 12:11 AM
To: Rosenthal, Michael <mrosenthal@cov.com>; wmullins@bakerandmiller.com
Cc: Steel, Jr., Adrian L. <ASSteel@mayerbrown.com>
Subject: RE: Lake Charles - Teleconference re Discovery

Mike,

As I said yesterday, BNSF's service of discovery was not intended to interfere with UP's efforts to file its reply or to provide BNSF with a basis for seeking more time to file its rebuttal. BNSF requested discovery from UP in order to develop BNSF's rebuttal evidence and argument, just as BNSF requested discovery during the application phase of the proceeding. BNSF initially considered waiting to serve its discovery requests until after UP and KCS had filed their replies. However, given the expedited procedural schedule set by the Board, allowing BNSF for twenty days to prepare its rebuttal after replies are filed, BNSF decided that it needed to seek discovery sooner in order to be able to prepare its rebuttal. BNSF served its requests on May 11 and required responses by May 31, so that BNSF would have a full twenty days to review the replies and the discovery responses in preparing BNSF's rebuttal. We would have explained this if you had contacted us prior to your filing of the motion for protective order.

You have provided three prerequisites for any further discussions to attempt to resolve these issues amicably. Unfortunately, BNSF cannot agree to any of them.

1. BNSF cannot agree to treat its discovery requests as served when UP files its reply on June 25. Assuming that BNSF continued to give UP twenty days to respond, this would give BNSF one day to process UP's responses prior to filing its rebuttal evidence and argument. With the Board's extension of the procedural schedule, UP will have had 55 days to prepare its reply since the Board set the procedural schedule on May 1 and 164 days since BNSF filed its petition on January 12. By responding to BNSF's discovery requests by May 31, UP will still have 25 days to focus solely on preparing its reply. We understand that UP cannot provide workpapers for its reply witnesses until UP files its reply on June 25. We do not believe, however, that this would otherwise limit UP responding to BNSF's discovery requests by May 31.
2. Similarly, BNSF cannot agree at this point to never seek an extension of time to file its rebuttal evidence, given the potential issues that may arise over the next two months.

BNSF-137 Exhibit A

3. We would be willing to discuss the scope of BNSF's discovery requests if you identify issues with any particular request. At this point, you have simply stated through your motion that UP should not be required to respond to any of BNSF's requests.

We plan to include a copy of this correspondence with BNSF's reply to UP's motion, which we will file tomorrow.

Regards,
Peter

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From: Rosenthal, Michael [<mailto:mrosenthal@cov.com>]
Sent: Wednesday, May 16, 2018 2:13 PM
To: Denton, Peter W.; wmullins@bakerandmiller.com
Cc: Steel, Jr., Adrian L.
Subject: RE: Lake Charles - Teleconference re Discovery

Peter,

As I told you when we spoke yesterday, to help convince Union Pacific that the concerns expressed in its motion for a protective order about BNSF's discovery requests are misplaced -- that is, to help convince Union Pacific that BNSF did not serve its requests to interfere with its efforts to file its reply or to provide BNSF a basis for seeking more time to file its rebuttal -- an appropriate starting point would be for BNSF (1) to agree to treat the requests as served when Union Pacific files its reply, and (2) to agree not to seek an extension of time to file its rebuttal evidence. Will BNSF agree?

If BNSF agrees, and if BNSF provides some specific proposals to narrow its discovery requests to something that would be manageable under the procedural schedule, a discussion might prove worthwhile. Without such an agreement, and without any specific proposals for narrowing BNSF's requests, your suggestion of a three-way discovery conversation strikes us as an attempt to further the apparent BNSF strategy that led us to seek a protective order.

Regards,

Mike

From: Denton, Peter W. <PDenton@mayerbrown.com>
Sent: Tuesday, May 15, 2018 4:00 PM
To: Rosenthal, Michael <mrosenthal@cov.com>; wmullins@bakerandmiller.com
Cc: Steel, Jr., Adrian L. <ASSteel@mayerbrown.com>
Subject: Lake Charles - Teleconference re Discovery

Mike and Bill,

BNSF-137 Exhibit A

In light of the Board's decision released today, we thought it would be helpful to have a conference call tomorrow with the three of us to discuss any objections that you may have to BNSF's discovery requests. This could help inform BNSF's reply to UP's motion for protective order, which we will file by Thursday.

If you are amenable to this, please let us know which times work for you.

Thanks,
Peter

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