

EXPEDITED CONSIDERATION REQUESTED

UP/SP-426

BEFORE THE
SURFACE TRANSPORTATION BOARD

245670

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

ENTERED
Office of Proceedings
May 4, 2018
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BNSF RAILWAY COMPANY
— TERMINAL TRACKAGE RIGHTS —
KANSAS CITY SOUTHERN RAILWAY COMPANY AND
UNION PACIFIC RAILROAD COMPANY

**UNION PACIFIC RAILROAD COMPANY'S
PETITION FOR RECONSIDERATION OF PROCEDURAL SCHEDULE**

RHONDA S. FERGUSON
CRAIG V. RICHARDSON
ELISA B. DAVIES
JEREMY M. BERMAN
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-7004

MICHAEL L. ROSENTHAL
BENJAMIN L. CAVATARO
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

May 4, 2018

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SURFACE TRANSPORTATION BOARD

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BNSF RAILWAY COMPANY
— TERMINAL TRACKAGE RIGHTS —
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**UNION PACIFIC RAILROAD COMPANY’S
PETITION FOR RECONSIDERATION OF PROCEDURAL SCHEDULE**

Union Pacific Railroad Company respectfully asks the Board to reconsider its decision served May 1, and corrected on May 4, which establishes a procedural schedule providing only 20 days for Union Pacific and other parties to file a reply after BNSF files its opening statement on May 11, 2018.

Remarkably, the Board’s decision grants BNSF as much time to file “rebuttal”—that is, an impermissible reply to a reply, *see* 49 C.F.R. § 1104.13(c)—as it gives Union Pacific and other parties to file their replies.

The Board’s scheduling order involves material error because the agency failed to consider Union Pacific’s arguments in our motion to establish a procedural schedule or explain its reasons for disregarding them. *See, e.g., Federal Election Comm’n v. Rose*, 806 F.2d 1081, 1088 (D.C. Cir. 1986) (“[A]n agency action accompanied by an inadequate explanation constitutes arbitrary and capricious conduct.”); *BNSF Ry. v. STB*, 741 F.3d 163, 168 (D.C. Cir. 2014) (“[A]n agency’s failure to respond meaningfully to objections raised by a party renders its decision arbitrary and capricious.”) (internal quotations omitted). The Board’s order also involves material error because it fails to provide Union Pacific sufficient time to prepare and present reply evidence addressing the complex operating issues presented by BNSF’s Petition. *See, e.g., Mathews v. Eldridge*, 424

U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”) (internal quotation omitted). In addition, BNSF’s slow response to discovery constitutes changed circumstances that would justify reconsideration.

Union Pacific requested a 90-day period after the close of discovery to prepare our reply evidence based on the complexity of the issues and our understanding that BNSF required at least that amount of time to develop the evidence supporting its Petition. Documents produced in discovery confirm that BNSF was in fact developing its Petition since before October 1, 2017, when it began a field study of operations on the Rosebluff Lead. Fundamental fairness requires the Board to give Union Pacific as much time as BNSF gave itself to submit evidence addressing the complex issues that would arise in establishing direct BNSF service to LYB and minimizing the impacts on other shippers on the Rosebluff Lead.

Union Pacific could not make full use of the time available since BNSF filed its Petition to prepare our reply, because BNSF failed to produce any workpapers with its Petition. Union Pacific was forced to seek such material through discovery. We served discovery requests on January 23, 2018, promptly after BNSF filed its Petition. BNSF produced workpapers for one witnesses (Baranowski) on February 2, 2018. But BNSF’s production then stalled. BNSF did not produce any other responsive documents until March 6, 2018. *See* Exhibit A. Even then, BNSF did not produce all the workpapers relating to its proposed operating plan. After more prodding from Union Pacific, BNSF produced an additional 540 pages of workpapers nearly two months later, on May 1 and 2, 2018. *See id.* However, BNSF still has not produced all of its responsive documents relating to capacity on the lines and in the yards BNSF trains would use to serve LYB. *See id.*

The Board plainly agrees with Union Pacific that BNSF's Petition provides an insufficient basis to evaluate BNSF's proposed operating plan. The Board's decision requires BNSF "to supplement its petition with additional information that would assist the Board in establishing the conditions and compensation for its use of the Rosebluff Lead." Decision at 8. The Board specifically requested "workpapers" and "analyses" regarding "BNSF's expectations of its use of the tracks at or near the Lyondell facility," as well as information regarding "any relevant capacity/availability issues." *Id.* To the extent BNSF supplements its Petition, Union Pacific will need time to evaluate that information for purposes of formulating our reply.

Union Pacific has made diligent use of its time since BNSF filed its Petition, and we have obtained discovery from BNSF, so we no longer need the full 90 days we initially requested to develop our reply. However, Union Pacific asks the Board to reconsider its decision and allow parties 45 days, rather than 20 days, to file reply arguments and evidence after BNSF supplements its Petition.

Respectfully submitted,

RHONDA S. FERGUSON
CRAIG V. RICHARDSON
ELISA B. DAVIES
JEREMY M. BERMAN
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
(402) 544-7004

/s/ Michael L. Rosenthal
MICHAEL L. ROSENTHAL
BENJAMIN L. CAVATARO
Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
(202) 662-6000

Attorneys for Union Pacific Railroad Company

May 4, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 2018, I caused a copy of the foregoing document to be served by email on counsel for BNSF, KCS, and CITGO.

/s/ Michael L. Rosenthal

Rosenthal, Michael

From: Denton, Peter W. <PDenton@mayerbrown.com>
Sent: Tuesday, May 01, 2018 6:43 PM
To: Rosenthal, Michael
Cc: Steel, Jr., Adrian L.; WMullins@bakerandmiller.com
Subject: RE: FD 32760 (46) - Discovery

Mike,

We inadvertently omitted from today's production seven documents related to the October 2017 observational study. We will send you and Bill discs tomorrow containing those documents.

We will check with BNSF again regarding your questions about Document Request No. 4 and get back to you.

Regards,
Peter

Peter W. Denton
Mayer Brown LLP
D +1-202-263-3329
M +1-202-276-2900

From: Rosenthal, Michael [mailto:mrosenthal@cov.com]
Sent: Tuesday, May 01, 2018 5:45 PM
To: Denton, Peter W.; WMullins@bakerandmiller.com
Cc: Steel, Jr., Adrian L.
Subject: RE: FD 32760 (46) - Discovery

Peter,

I've reviewed the additional documents produced by BNSF. I believe BNSF's production remains incomplete.

As I noted below, documents produced by BNSF indicate that the observational study took place between October 1 and October 7/8. However, I've seen only one set of materials that appears to reflect BNSF's observations, and those materials appear to reflect a limited set of observations between October 1 and October 4 (and maybe a few hours on October 5).

In addition, I still have not seen anything relating to Document Request No. 4, as narrowed by our agreement. This is surprising because BNSF's operating plan exhibit refers to the 50/50 Line's capacity, average trains/day from January 1, 2017 through October 13, 2017, and average trains operating during particular hours of the day -- the documents supporting those calculations should be responsive to Document Request No. 4. Moreover, the analyses that generated these data should have been part of Mr. Reilly's workpapers or part of BNSF's response to Document Request No. 5.

Regards,

Mike

From: Denton, Peter W. <PDenton@mayerbrown.com>
Sent: Tuesday, May 01, 2018 4:42 PM
To: Rosenthal, Michael <mrosenthal@cov.com>; WMullins@bakerandmiller.com

Cc: Steel, Jr., Adrian L. <ASteel@mayerbrown.com>

Subject: RE: FD 32760 (46) - Discovery

Mike and Bill,

The discs that will be delivered to your offices this afternoon are protected by the following password: **FD32760!**

Regards,
Peter

Peter W. Denton
Mayer Brown LLP
D +1-202-263-3329
M +1-202-276-2900

From: Denton, Peter W.
Sent: Monday, April 30, 2018 12:15 PM
To: 'Rosenthal, Michael'; WMullins@bakerandmiller.com
Cc: Steel, Jr., Adrian L.
Subject: RE: FD 32760 (46) - Discovery

Mike and Bill,

We plan to produce tomorrow additional documents that are responsive to the clarifications made by Mike in emails on April 10 and April 20 (copied below). Per these emails and Bill's email on April 17 (attached), we are waiving attorney-client privilege or the attorney work product doctrine with respect to certain of these documents, subject to UP's and KCS's agreement that this waiver does not constitute a "subject matter waiver" of the privilege or the doctrine with respect to any other similarly situated documents.

These documents fully address the UP document requests, as clarified in subsequent emails between the parties.

Regards,
Peter

Peter W. Denton
Mayer Brown LLP
D +1-202-263-3329
M +1-202-276-2900

From: Rosenthal, Michael [<mailto:mrosenthal@cov.com>]
Sent: Friday, April 20, 2018 4:50 PM
To: Denton, Peter W.; WMullins@bakerandmiller.com
Cc: Steel, Jr., Adrian L.
Subject: RE: FD 32760 (46) - Discovery

Peter,

As long as BNSF produces all documents (including documents you assert are privileged) related to the October 17 observational study or the translation of those observations into the operating plan documents, UP will not argue that the production creates any broader waiver of the privilege -- in the spirit of cooperation.

Essentially, we were expecting that our document requests and interrogatories would result in production of a set of Reilly workpapers, much like the Baranowski workpapers BNSF already produced. Indeed, BNSF's response to our discovery requests indicates there is a set of Reilly workpapers. The Reilly workpapers presumably include (among other things) documentation relating to the observational study, and the translation of the observations into exhibits, the

operating plan, and the animation -- the various material Reilly sponsored -- along with material supporting other assertions he made. If some of the workpapers would be privileged, we will not argue their production constitutes a broader waiver of the privilege, but Board precedent entitles us to the workpapers.

Along these lines, we don't think it is relevant that all the documents you've identified that relate to assumptions used to generate the animation are privileged. We're not asking for information about the privileged communication, we just want the underlying facts. (See Interrogatory No. 2) That is, we don't want to know that "The lawyers said 'Assume X.'" We just want to know that the animation assumes X. If BNSF is unwilling to produce the documents that contain both material you assert is privileged and factual information about the animation (subject to our agreement regarding waiver), we can understand that position, but then you need to generate a separate written response that serves as a supporting workpaper and responds to our interrogatories.

Regards,

Mike

From: Denton, Peter W. <PDenton@mayerbrown.com>
Sent: Tuesday, April 17, 2018 3:58 PM
To: Rosenthal, Michael <mrosenthal@cov.com>; WMullins@bakerandmiller.com
Cc: Steel, Jr., Adrian L. <ASSteel@mayerbrown.com>
Subject: RE: FD 32760 (46) - Discovery

Mike and Bill,

We have conducted a further search and have identified documents relevant to the October 2017 observational study and the translation of those observations into the operating plan documents. Certain of these documents are subject to attorney-client privilege. In the spirit of cooperation, we will waive the privilege with respect to those documents and produce the documents, subject to and without waiving the General Responses and General Objections set forth in the Responses and Objections of BNSF to UP's First Set of Discovery Requests to BNSF, served on February 11, 2018. Specifically, the production of these otherwise privileged documents shall not constitute a "subject matter waiver" of the attorney-client privilege.

Once each of you have confirmed your understanding of the limited nature of this waiver, we will deliver the documents to each of your offices.

We are continuing to review documents to determine if there are any further documents responsive to UP Document Request No. 4, as narrowed. We have identified documents related to the "assumptions used to generate the animation," but all such documents are subject to the attorney-client privilege.

Regards,
Peter

Peter W. Denton
Mayer Brown LLP
D +1-202-263-3329
M +1-202-276-2900

From: Rosenthal, Michael [<mailto:mrosenthal@cov.com>]
Sent: Tuesday, April 10, 2018 10:30 AM
To: Denton, Peter W.
Cc: Steel, Jr., Adrian L.; WMullins@bakerandmiller.com
Subject: RE: FD 32760 (46) - Discovery

Peter,

Yes. I expected to see more documents relating to Mr. Reilly's statement – specifically relating to the October observational study and the animation.

For example, documents produced by BNSF indicate that the observational study took place between October 1 and October 7/8. However, I've seen only one set of materials that appears to reflect BNSF's observations, and those materials appear to reflect a limited set of observations between October 1 and October 4 (and maybe a few hours on October 5).

Similarly, there are no documents showing how the study observations were translated into BNSF's conclusions in its Time Study Debrief documents or the operating plan exhibit to Mr. Reilly's statement (which indicate conclusions are based on seven days of observations, and which show somewhat different conclusions in different drafts). Also, the purported level of detail in the debrief documents and exhibit seems inconsistent with the set of materials that appears to reflect BNSF's observations.

I also didn't see any documents or other materials reflecting the assumptions used to generate the animation. I realize BNSF says that the animation doesn't portray definitive start or stop times, isn't to scale, and doesn't depict locomotives starting or stopping for to throw switches, but surely there were some animating principles.

Finally, I was surprised not to see anything relating to Document Request No. 4, as narrowed by our agreement. This was especially so because BNSF's operating plan exhibit refers to the 50/50 Line's capacity, average trains/day from January 1, 2017 through October 13, 2017, and average trains operating during particular hours of the day. The analyses that generated these data also seem like they should have been part of Mr. Reilly's workpapers or part of BNSF's response to Document Request No. 5.

Regards,

Mike

From: Denton, Peter W. [<mailto:PDenton@mayerbrown.com>]
Sent: Monday, April 09, 2018 9:47 PM
To: Rosenthal, Michael <mrosenthal@cov.com>
Cc: Steel, Jr., Adrian L. <ASteel@mayerbrown.com>; WMullins@bakerandmiller.com
Subject: RE: FD 32760 (46) - Discovery

Mike,

We have completed our production. Is there anything particular that you think we are missing?

Thanks,
Peter

Peter W. Denton
Mayer Brown LLP
D +1-202-263-3329
M +1-202-276-2900

From: Rosenthal, Michael [<mailto:mrosenthal@cov.com>]
Sent: Monday, April 09, 2018 4:36 PM
To: Denton, Peter W.
Cc: Steel, Jr., Adrian L.; WMullins@bakerandmiller.com
Subject: RE: FD 32760 (46) - Discovery

Peter,

Has BNSF completed its document production? My sense from reviewing the documents is that it has not.

Regards,

Mike

From: Denton, Peter W. [<mailto:PDenton@mayerbrown.com>]
Sent: Thursday, March 15, 2018 2:33 PM
To: Rosenthal, Michael <mrosenthal@cov.com>; WMullins@bakerandmiller.com
Cc: Steel, Jr., Adrian L. <ASSteel@mayerbrown.com>
Subject: RE: FD 32760 (46) - Discovery

Mike and Bill,

We are producing another round of documents this afternoon. Discs will be delivered to your offices.

Thanks,
Peter

Peter W. Denton
Mayer Brown LLP
D +1-202-263-3329
M +1-202-276-2900

From: WMullins@bakerandmiller.com [<mailto:WMullins@bakerandmiller.com>]
Sent: Tuesday, March 06, 2018 2:14 PM
To: Denton, Peter W.
Cc: Steel, Jr., Adrian L.; Rosenthal, Michael
Subject: RE: FD 32760 (46) - Discovery

Thank you.

William ("Bill") A. Mullins
Partner
Baker and Miller PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
(202) 663-7823 (Direct)
(202) 663-7849 (Fax)

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From: "Denton, Peter W." <PDenton@mayerbrown.com>
To: "Rosenthal, Michael" <mrosenthal@cov.com>, "WMullins@bakerandmiller.com" <WMullins@bakerandmiller.com>
Cc: "Steel, Jr., Adrian L." <ASSteel@mayerbrown.com>
Date: 03/06/2018 02:07 PM
Subject: RE: FD 32760 (46) - Discovery

Mike and Bill,

The discs will be couriered to your office soon. The password to open documents on the discs is **FD32760!** We are continuing to review documents and plan to make another production round soon.

Regards,
Peter

Peter W. Denton
Mayer Brown LLP
D +1-202-263-3329
M +1-202-276-2900

From: Denton, Peter W.
Sent: Tuesday, March 06, 2018 11:30 AM
To: Rosenthal, Michael; 'WMullins@bakerandmiller.com'
Cc: Steel, Jr., Adrian L.
Subject: RE: FD 32760 (46) - Discovery

Mike and Bill,

We are delivering discs to your offices today containing BNSF's initial production of documents responsive to UP's First Set of Discovery Requests to BNSF, consistent with the Responses and Objections of BNSF.

Regards,
Peter

Peter W. Denton
Mayer Brown LLP
D +1-202-263-3329
M +1-202-276-2900

From: WMullins@bakerandmiller.com [<mailto:WMullins@bakerandmiller.com>]
Sent: Tuesday, March 06, 2018 11:28 AM
To: Denton, Peter W.
Cc: Steel, Jr., Adrian L.; Edward Greenberg (EGreenberg@gkglaw.com); Rosenthal, Michael
Subject: RE: FD 32760 (46) - Discovery

Where does this stand? I note that BNSF has provided us copies with all Baranowski workpapers. In a 2/11 email, you also said that you would be producing additional responsive documents. Then, in the below email, you also said that BNSF would be producing responsive documents -- narrowed to reflect your discussions with UP. Other than the Baranowski workpapers, have there been other documents produced? If so, I don't seem to have a copy, although maybe a I missed an email. So just checking on status.

William ("Bill") A. Mullins
Partner
Baker and Miller PLLC
Suite 300
2401 Pennsylvania Ave, N.W.
Washington, D.C. 20037
(202) 663-7823 (Direct)
(202) 663-7849 (Fax)

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From: "Denton, Peter W." <PDenton@mayerbrown.com>
To: "Rosenthal, Michael" <mrosenthal@cov.com>
Cc: "Steel, Jr., Adrian L." <ASteel@mayerbrown.com>, "William A. Mullins (wmullins@bakerandmiller.com)" <wmullins@bakerandmiller.com>, "Edward Greenberg (EGreenberg@gkglaw.com)" <EGreenberg@gkglaw.com>
Date: 02/26/2018 04:52 PM
Subject: RE: FD 32760 (46) - Discovery

Mike,

Subject to and without waiving the General Responses and General Objections set forth in the Responses and Objections of BNSF to Union Pacific's First Set of Discovery Requests to BNSF, BNSF will produce documents that are responsive to UP Document Request No. 4, as revised in your below email.

I am copying Bill Mullins and Ed Greenberg to notify them of these revisions.

Regards,
Peter

Peter W. Denton
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006
D +1-202-263-3329
M +1-202-276-2900

From: Rosenthal, Michael [<mailto:mrosenthal@cov.com>]
Sent: Tuesday, February 20, 2018 9:40 AM
To: Steel, Jr., Adrian L.; Denton, Peter W.
Subject: FD 32760 (46) - Discovery

Peter and Adrian,

Thanks for discussing BNSF's responses to UP's discovery requests last Friday. I believe we have a common understanding with regard to all of BNSF's specific responses and objections, with the exception of BNSF's response and objections to UP Document Request No. 4.

With regard to Document No. 4, as we discussed, UP is willing to narrow its request to all studies, analyses, reports, and plans regarding rail capacity or rail congestion on the lines and in yards that BNSF trains would traverse to serve LyondellBasell from Lacassine Yard (i.e., the 50/50 Line, the Rosebluff Lead, the Montell Lead, and the Rosebluff Yard). Studies, analyses etc. would include, but would not be limited to, documents such as capacity estimates or models, utilization calculations, bottleneck calculations, throughput analyses, capital investment plans, and yard simulations.

Regards,

Mike

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