

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

PUBLIC SERVICE COMPANY OF
COLORADO D/B/A XCEL ENERGY

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

Defendant.



Docket No. 42057 **ENTERED**
Office of the Secretary
MAR 15 2002
Part of
Public Record

**THIRD MOTION OF PUBLIC SERVICE COMPANY OF COLORADO
D/B/A/ XCEL ENERGY TO COMPEL DISCOVERY AND FOR SANCTIONS**

This motion to compel discovery and for sanctions against defendant Burlington Northern and Santa Fe Railway Company ("BNSF") is prompted by BNSF's utterly indefensible attempt to renege on numerous written and oral promises to produce certain data and information to complainant Public Service Company of Colorado d/b/a Xcel Energy ("Xcel") in discovery in this proceeding. As set out in more detail below, beginning January 29, 2001, BNSF expressly and repeatedly agreed orally and in writing to produce movement-specific road property return on investment and depreciation expense information and data to Xcel in response to Request No. 12 of Xcel's First Set of Discovery Requests. However, on March 7, 2002, at a meeting between counsel to discuss discovery, BNSF informed Xcel that BNSF was recanting its prior agreement and had adopted the entirely opposite position that it would not voluntarily produce any material in response to this request, despite the fact that BNSF freely acknowledges that it maintains the movement-specific data that Xcel seeks.

This motion also seeks an order from the Board compelling BNSF to produce road investment and depreciation data in response to two other Xcel document requests: Request Nos. 102 and 114. As for these requests, BNSF also informed Xcel on March 7, 2002 that it was terminating the parties' discussions regarding these requests and would not produce any data in response to them.¹ Request Nos. 12, 102 and 114 and BNSF's responses to them are attached hereto as Attachment 1.

In regards to Request No. 12, BNSF's abrupt about-face and the underlying basis for it are outrageous and unsupported by any rule or precedent of the STB, respectively. BNSF's actions amount to an extremely belated objection to discovery on relevance grounds. However, BNSF has long ago waived any objection to producing material responsive to Request No. 12 in this proceeding on such grounds. Second, if BNSF had objected on relevance grounds in a timely manner, this objection would have been untenable; the relevance and discoverability of movement-specific variable cost data is unassailable black letter law in coal rate reasonableness cases. Indeed, BNSF appears to have voluntarily provided precisely this same movement-specific data to two coal shipper complainants in coal rate reasonableness cases whose discovery periods and procedural schedules overlapped with this proceeding. The route at issue in one of those cases in part travels virtually the entire route of movement at issue in this case.

As for the reason BNSF asserts for renegeing on its agreement to produce data responsive to Request No. 12, it is essentially that BNSF has "learned" in recent months that its movement-specific road return on investment and depreciation data is "not useful" in the context of a coal rate reasonableness case. As explained by BNSF counsel on March 7, after decades of using this

¹ BNSF's representations as delivered through its counsel on March 7, 2002 are clearly a "failure to respond to discovery" within the context of 49 C.F.R. §1114.31. At the meeting BNSF counsel stated that BNSF would follow up its oral statements on this issue with a written explanation, but this has not occurred.

movement-specific data to adjust BNSF's system average costs, BNSF now claims that it cannot be used to make URCS-based adjustments to BNSF's system-average variable costs. One party's view of whether relevant data is "useful" is not a valid reason for withholding it from discovery, and it is not the real reason for BNSF's abrupt change of attitude in this proceeding in any event. Xcel believes that the real reason BNSF has engaged in this egregious behavior in this proceeding – in addition to the delay deciding this motion will entail – is the Board's treatment of this variable cost item in Docket No. 42051, *Wisconsin Power and Light Co. v. Union Pacific Railroad Co.*, (served Sept. 13, 2001)(*"WPL"*), a case which involved its own unique set of facts and a different railroad defendant.

The Board must sanction BNSF and its counsel for their actions, namely breaching written discovery agreements and abusing the discovery process in this proceeding. Further, BNSF counsel's actions on this matter violate the fundamental principles of the Board's Canons of Ethics that a practitioner's conduct should be "characterized by candor and fairness," and that practitioners should "observe scrupulously the principles of fair dealing and just consideration for the rights of others." 49 C.F.R. §1103.27(a). Accordingly, Xcel respectfully asks the Board to order BNSF any or its counsel to reimburse Xcel for the fees and costs it has incurred in preparing and filing this motion. Xcel also asks the Board to formally reprimand or otherwise appropriately discipline BNSF's counsel pursuant to 49 C.F.R. §1103.5.

I.

SUMMARY OF MATERIAL FACTS

Xcel filed its complaint in this proceeding on December 20, 2000, challenging the reasonableness of BNSF's rates for transporting unit coal trains between mine origins in Wyoming's Powder River Basin and Xcel's Pawnee Steam Electric Generating Station

("Pawnee") located in Brush, Colorado. Also on December 20, 2000, Xcel served its First Set of Discovery Requests directed to BNSF. On January 29, 2001 BNSF served its Responses and Objections to Xcel's First Set of Discovery Requests. Unfortunately, however, discovery in this case is still not complete and there is no procedural schedule. Much of this extraordinary delay has been due to BNSF's concerted effort to delay as long as possible the resolution of the parties' dispute over how to measure movement-specific locomotive fuel consumption costs in this proceeding.

Until now, the problem with most of the discovery Xcel has sought from BNSF has not been what BNSF will produce, but when BNSF will produce it. The correspondence attached hereto provides a year-long a chronology of the process through which Xcel asks BNSF to produce responsive materials and promises to do so. Consistently, BNSF has not produced in a timely manner the materials it has agreed to produce. Needless to say, Xcel has been extraordinarily patient with BNSF. That patience and willingness to resolve discovery disputes through discussions between the parties has now been rewarded by BNSF's bad faith in regards to its responses to Request for Production No. 12 and related requests dealing with road property return on investment and depreciation expenses.

Specifically, BNSF affirmatively represented to Xcel on no fewer than four separate occasions that it was collecting and was going to provide movement-specific road property return on investment and depreciation expense information. The first such instance was BNSF's initial written responses to Xcel's discovery requests. In response to Request No. 12 BNSF stated, after raising objections other than relevance, "Subject to these objections, BNSF will produce or make available responsive data, in the format in which such data is available, or other

materials from which responsive information may be derived, to the extent such data and other materials are reasonably available.” Attachment 1 (emphasis added).²

After BNSF failed to produce documents responsive to this and other document requests to Xcel by May of 2001, Xcel sent a letter to BNSF inquiring about such production. BNSF responded by stating in part that, “[a]s to Request for Production No[s]. . . .12 . . . BNSF is continuing to pull together responsive materials that are reasonably available and we expect to produce these materials shortly.” Letter from C. Quarterman to J. Noah, dated May 31, 2001 at 3, attached hereto as Attachment 2 (emphasis added). Following additional delay regarding the locomotive fuel consumption issue, coupled with continued inaction by BNSF on its production of other materials it had pledged to produce, counsel for the parties met face-to-face on September 5, 2001 at the request of Xcel to discuss BNSF’s discovery responses and other issues. At that meeting, Xcel again inquired about the status of BNSF’s production in response to Request No. 12 and many other requests, and BNSF’s counsel again confirmed it was collecting materials responsive to these and other requests for production to Xcel. *See* Letter from T. Wilcox to C. Quarterman dated September 17, 2001, attached hereto as Attachment 3. Moreover, since nearly a full year had now passed since the filing of the complaint, Xcel included data on road property investment and depreciation as part of a request for 2001 data. *See Id.*, (in part asking for 2001 data on road property and depreciation, and reminding BNSF that “as to four requests [for which 2001 data was being sought](12, 39 , . . . , 98 and 100), BNSF has provided no data at all despite having pledged to do so.”). On October 1, 2001 BNSF not only confirmed for the fourth time that it was producing materials responsive to Request No. 12,

² As discussed more fully below, this is the identical answer BNSF provided to identical document requests served on it by the complainants in Docket No. 42056, *Texas Municipal Power Agency v. BNSF* (“TMPA”), and Docket No. 42054, *PPL Montana, LLC v. BNSF* (“PPL”). *See* Attachment No. 8. BNSF appears to have voluntarily supplied data responsive to this request in those proceedings.

it further represented that “when we provide information responsive to Request Nos. 12, 98, and 100, BNSF will produce information that is currently available, subject to our previously stated objections.” A copy of the October 1, 2001 correspondence from C. Quarterman to T. Wilcox is attached hereto as Attachment 4 (emphasis added).

Sometime after October 1, 2001 BNSF decided to recant its belief that its movement-specific road property return on investment and depreciation expense data was relevant and discoverable, and to terminate its efforts to collect and produce this data to Xcel. However, at no time over the following four months did BNSF advise Xcel of BNSF’s about-face on this critical issue, choosing instead to deceive Xcel through silence. Moreover, despite its pledges in the face-to-face meeting between counsel in September, and contrary to its written representations after that meeting, BNSF still did not produce any documents it had promised to produce to Xcel. Upon the issuance of the February 1, 2001 Decision in this proceeding, Xcel yet again sought to prod BNSF into producing materials pursuant to its representations. Letter from J. Noah to C. Quarterman, dated February 12, 2002, attached as Attachment 5. In response, BNSF continued to provide no hint whatsoever about its decision to renege on its past representations. Letter from C. Quarterman to T. Wilcox dated February 15, 2002, attached as Attachment 6.³ It was not until near the end of the meeting between counsel on March 7, when asked point-blank by the undersigned counsel for Xcel for a date certain when such materials would finally be produced, that BNSF’s counsel revealed that BNSF was reneging on its prior representations regarding this data and that BNSF would not voluntarily produce any movement-specific road investment and depreciation data to Xcel.

³ Xcel’s response to this letter is also attached.

As for Requests 102 and 114, although BNSF had timely objected to these requests, the parties had nevertheless entered into discussions over BNSF's objections in an attempt to ensure that BNSF understood what was being requested, and also to ascertain whether, despite BNSF's objections, it had relevant materials responsive to these requests. *See* Attachment 3 at 3. On March 7, 2002, BNSF unilaterally terminated those discussions as part of its overall refusal to produce road property investment and depreciation expense data.⁴

II.

ARGUMENT

A BNSF Has Long Ago Waived Any Objection to the Relevance of
Movement-Specific Road Return on Investment and Depreciation Expense
Data Responsive to Request No. 12

As a threshold matter, BNSF's about-face is fatally defective from a procedural standpoint. By reversing course and claiming now that the information Xcel seeks is not discoverable because it is "not useful," BNSF is, at bottom, objecting to this discovery request on grounds of relevance. However, BNSF did not raise this objection (or any other general objection that no material sought by this request is discoverable) in its January 29, 2001 responses to Xcel's First Set of Discovery Requests. In fact, BNSF stated it would produce responsive material. Furthermore, BNSF subsequently affirmed orally and in writing that not only did it consider the data sought by Request No. 12 relevant, but also that it was "pulling together" this material for production to Xcel "shortly." Indeed, BNSF still later agreed to update this information to reflect its most current movement specific data. Thus, BNSF has

⁴ Xcel submits that any arguments BNSF may make about the untimeliness of this motion as it applies to Requests 102 and 114 be rejected. In the first place, the parties informally agreed at the commencement of this case that they would not strictly enforce the "10-day" rule of 49 C.F.R. §114.31(a). Second it is Xcel's position that prior to March 7, 2001 the parties were engaged in discussions about these requests, and this motion is being filed within 10 days of that date. Finally, under the circumstances, Xcel would be prejudiced by the inability to seek discovery of the information sought by Request Nos. 102 and 114, but BNSF would not be prejudiced by having to produce it, since BNSF's production of materials to Xcel is ongoing.

waived its relevance objection or any other objection beyond those stated in its January 29, 2001 written responses. It is hornbook civil procedure that “when a party fails to object timely to interrogatories, production requests, or other discovery efforts, objections thereto are waived.” *In Re United States*, 864 F.2d 1153, 1156 (5th Cir. 1989); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992) (failure to raise objection of secrecy in timely manner prevented party from raising that objection a year later in response to a motion for sanctions); and see *Maloney v. Universalcom, Inc.*, 2001 U.S. Dist. Lexis 122, at *3-4 (E.D. La. Jan. 3, 2001) (citing cases). See also *Martin v. Brown*, 151 F.R.D. 580, 594 (W.D. Pa. 1993) (“Thus, the fact that a demand for production is objectionable in part is not an excuse for producing nothing. Failure to produce documents or parts of documents to which no objection applies is regarded as sufficient ground for imposition of sanctions”). This latter point has particular application in this case. Therefore, in addition to clearly violating an agreement concerning discovery, BNSF has forfeited its right in this proceeding to object to Request No. 12 on relevance grounds. Thus, there is no need to consider the merits of BNSF’s a newly-minted relevance objection to Request No. 12 in order to grant the relief Xcel seeks as to this discovery request.

However, even if under these circumstances the Board somehow determines that BNSF’s relevance objection to Request No. 12 is not procedurally defective or otherwise invalid, this objection is utterly without merit, as set forth below.

- B. The Relevance, Discoverability, and Use of Movement-Specific Road Investment and Depreciation Data is Well-Established and Unquestioned⁵
 - 1. The Relevance and Evidentiary Value of Movement-Specific Variable Cost Data is Unquestioned

It is black letter law in coal rate reasonableness cases that movement-specific variable cost data is not only relevant and discoverable, it is extremely useful in accurately determining a railroad's variable cost of service on a particular movement. Thus, a fundamental rule applied by the Board is that "adjustments to a defendant carrier's system-average costs are appropriate to reflect the economies and efficiencies that are associated with high-volume, repetitive movements such as . . . unit train service." *TMPA*, decision served February 9, 2001 at 3. *See also PPL*, decision served November 9, 2000 at note 8 ("Movement specific adjustments are commonly proposed by parties to coal rate reasonableness proceedings, and when supported by probative evidence, have been accepted by the Board."); and STB Docket No. 42022, *FMC Wyoming v. Union Pacific Railroad Company*, decision served May 12, 2000 at 48 ("*FMC*").

A primary reason why such adjustments are considered and accepted is that the failure to accept a valid adjustment can have significant distortive effects, even to the point of divesting the STB of jurisdiction to review a particular rate. The Board fully recognizes that an overstatement of a railroad's variable costs, by not making a proper adjustment to system-average variable costs, "would result in an understatement of the revenue-to-variable cost ratio of the transportation at issue, which could in turn affect whether we have authority under 49

⁵ Sections B and C of this motion do apply to Xcel's request that the Board order BNSF produce materials in response to Requests Nos. 102 and 114. These requests also seek information and data that could be used to adjust BNSF's system average road property investment and depreciation costs. More specifically, Request Nos. 102 and 114 seek the production of documents and data concerning the write-up of BNSF's railroad assets from its purchase of the Atchison Topeka and Santa Fe Railway Company ("ATSF"). To the extent this "merger premium" has been assigned to any of the line segments making up the Pawnee route, Xcel needs this information to adjust BNSF's system average costs.

U.S.C. 10707(d)(1) to review the rates or the extent to which we can afford relief if the rates are found to be unreasonable.” See *TMPA*, supra, at 5, note 10.

2. Movement-Specific Data on Road Property Investment and Depreciation is Particularly Relevant and Probative in this Proceeding

Complainants and defendants alike have long made an adjustment to system average variable costs using movement-specific road investment and depreciation costing information in coal rate reasonableness cases. The attached verified statement of Mr. Joseph J. Plaistow of L.E. Peabody & Associates, Inc. summarizes how movement-specific road property investment adjustments have been made by BNSF’s predecessors in prior coal rate cases before the Board and its predecessor, the Interstate Commerce Commission. Attachment 7, Verified Statement of Joseph J. Plaistow at 4-5.⁶ Mr. Plaistow, a former 15-year employee of the Burlington Northern Railroad Company, also summarizes how, based on the historical treatment of movement-specific road property investment and depreciation data, Xcel would expect to use the data provided to it by BNSF to adjust BNSF’s system-average variable costs to show a more accurate calculation of the variable costs to provide coal transportation service to Pawnee. Xcel maintains that BNSF has realized significant economics of scale on the track used to deliver coal from the PRB to Pawnee, as this is the primary route used by BNSF to make such deliveries to its coal customers located south of the PRB. *Id.* at 3. Accordingly, using system average costs for road property investment and depreciation expenses in this proceeding would produce a highly inaccurate and substantially overstated variable cost calculation. *Id.* at 9. Finally, Mr. Plaistow explains how BNSF’s position that the movement-specific road property and investment data it maintains is no longer useful for making URCS-based calculations of

⁶ Mr. Plaistow’s testimony necessarily addresses BNSF’s treatment of this issue up to and including STB Docket No. 41191, *West Texas Utilities Company v. The Burlington Northern Railroad Company*, 1 S.T.B. 638 (1996)(“*WTU*”). It does not address BNSF’s treatment of this issue in any pending proceeding involving BNSF.

BNSF's variable costs is simply not true. He concludes that BNSF should produce this important data in whatever form it is kept by BNSF.

3. It is for the Board, Not BNSF, to Decide How Much Weight is to Be Afforded Movement-Specific Variable Cost Data

By reversing course and adopting a stance that its movement-specific road investment and depreciation data is now no longer discoverable by Xcel, BNSF is attempting to unilaterally remove from the STB's purview the entire issue of whether an adjustment to this component of BNSF's system-average variable costs is appropriate for the Pawnee movement. Presumably BNSF seeks to do the same in any other rate case in which BNSF is the defendant. BNSF's position is preposterous and shockingly transparent.

As previously stated, and more fully explained below, it is no coincidence that BNSF adopted this extremely convenient position after the Board's decision in *WPL*. In that proceeding, the Board determined that a perceived flaw in the movement-specific data produced by UP in that case prevented that adjustment proposed by *WPL* from being made to UP's system average costs. *WPL* at 31. In his Verified Statement Mr. Plaistow briefly explains how the unique facts and circumstances that resulted in the Board's decision in *WPL* are not present in this proceeding. Attachment 7 at 5-6.⁷

Nevertheless, the correlation between BNSF's epiphany about its movement-specific road return on investment and depreciation expenses and the date of the *WPL* decision could not be more obvious. That decision was served on September 13, 2001. At that time, discovery had been substantially completed in both the *PPL* case and the *TMPA* case, two proceedings whose procedural schedules overlapped to some degree with Xcel's. The undersigned counsel

⁷ Counsel for Xcel has been informed by counsel for WPL that WPL has asked the Board to reconsider this aspect of the decision.

for Xcel has obtained from counsel for PPL and TMPA copies of the versions of Request No. 12 and BNSF's responses in those cases. Attachment 8.⁸ In each case, this request and BNSF's response to it were identical to the question and response in Xcel's case. Based on the Board's public docket, however, neither of those complainants sought an order from the Board mandating BNSF to produce materials responsive to the request, which is a strong indication that BNSF voluntarily produced the movement-specific data they were seeking. This is entirely consistent with BNSF's repeated representations to Xcel prior to the issuance of the *WPL* decision. Moreover, virtually the entire Pawnee route for which movement-specific road property investment and depreciation data has been sought by Xcel is coextensive with track used by BNSF to deliver coal to TMPA.⁹ The strong inference from these facts is that, prior to the issuance of *WPL*, BNSF voluntarily produced movement-specific data responsive to Request No. 12 in *TMPA* which included virtually the same track segments for which Xcel's Request No. 12 seeks movement-specific road investment and depreciation data.

Of course, the protective orders in effect in the *PPL* and *TMPA* proceedings prevent Xcel from knowing exactly what BNSF produced in those proceedings or how the respective parties in those cases treated this data in their evidentiary submissions to the Board. The Board is obviously not so constrained. The evidentiary records in those cases will speak for themselves regarding the position or positions BNSF has taken regarding this data and when BNSF asserted these positions were asserted in relation to the date *WPL* was issued. The salient point for purposes of this proceeding, however, from all information in the public record, is that the data BNSF promised and now denies to Xcel was considered by BNSF to also be relevant and

⁸ These written responses were not designated Confidential or Highly Confidential in those proceedings.

⁹ In order to deliver coal to its Texas customers from the PRB, BNSF must pass right by the Pawnee plant in Brush, Colorado in both empty and loaded directions. As Mr. Plaistow points out in his Verified Statement, this was also the case for BNSF's predecessor in the *WTU* proceeding. Attachment 7 at 5.

discoverable in those cases, and evidently was voluntarily produced to the respective complainants in *PPL* and *TMPA*.

The goal of BNSF's actions in this proceeding concerning its movement-specific road investment and depreciation data is obvious: post-*WPL*, BNSF wants to force the Board to use system average road property return on investment and depreciation expense data in this case, too. However, at least in *WPL*, UP's movement-specific road investment and depreciation data was presented to the Board for a decision on whether an adjustment should be made. BNSF's post-*WPL* unilateral decision that the movement-specific road property investment and depreciation data it has voluntarily produced, or in Xcel's case agreed to produce, is now not even discoverable, would divest the Board of its authority to rule on relevant evidence in this case, a result that would be highly prejudicial to Xcel. *See* 49 C.F.R. §1114.21(a)(2) ("It is not grounds for objection that the information will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.").

In summary, BNSF's reasons for reversing its view on the relevance and probity of this data are not credible, given its past treatment of this data and the circumstances under which BNSF's dramatic reversal of position occurred. If BNSF wishes to take issue with the usefulness and value of any of the movement-specific data it produces in this proceeding, it is by all means free to do so in its evidentiary submissions to the Board. *See TMPA, supra* at 8 (an argument that movement specific data is not reliable or accurate goes to the weight to be accorded such data, not discoverability). But BNSF cannot just flatly refuse to produce clearly relevant movement-specific cost data in its possession just because BNSF would rather that Xcel not propose adjustments to BNSF's system average costs in this proceeding.

C. The Board Must Not Condone the Conduct of BNSF and its Counsel on This Issue

Finally, under 49 C.F.R. §1114.31 and the Board's Canons of Ethics, the Board has broad authority to sanction parties and counsel if circumstances dictate.¹⁰ Such circumstances exist on this particular issue in this case. BNSF's blatant breach of an agreement between the parties regarding discovery, and its attempt to take advantage of the circumstances of this proceeding and Xcel's justifiable reliance on BNSF's past representations regarding the production of this material are unconscionable and should not go unpunished.

Moreover, as stated above, BNSF's counsel's actions on this issue, which include breaching a written agreement regarding discovery, and concealing for months BNSF's reversal of its position on the production of materials responsive to Document Request No. 12, clearly violate the Board's Canons of Ethics. 49 C.F.R. §1103.27. Xcel respectfully requests the Board, in addition to expeditiously granting this motion, to also order BNSF to pay the attorneys fees and costs Xcel has incurred in seeking an order from the Board compelling BNSF to produce the data at issue. Xcel also asks the Board to reprimand or otherwise appropriately discipline BNSF's counsel for their behavior on this issue. 49 C.F.R. §1103.5(a)(2). This is particularly important given that BNSF has yet to produce to Xcel many of the materials and data that BNSF has agreed over the past 13 months to produce in this case in response to Xcel's discovery requests.

¹⁰ STB Finance Docket No. 33995, *SF&L Railway, Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Railway Corp. Between La Harpe and Peoria, IL*, decision served March 15, 2002 at 3.

III.

CONCLUSION

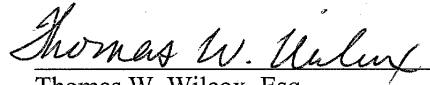
In conclusion, BNSF's attempt to renege on its repeated representations regarding the production of road property investment and depreciation data must be recognized for what it is: a blatant attempt to abuse the discovery process and to corrupt the evidentiary process in this proceeding. BNSF cannot freely admit the discoverability of this information in this proceeding and proceedings prior to *WPL*, and then abruptly reverse course simply because the Board issues a decision which has no application to BNSF, even though BNSF desperately wishes that it would.

WHEREFORE, for all of the foregoing reasons, Xcel respectfully requests the Board to issue an order compelling BNSF to immediately produce to Xcel the following data and information:

1. The most current documents and data in BNSF's custody and control responsive to Request No. 12 and each of its subparts, in whatever form BNSF maintains this data;
2. The most current documents and data in BNSF's custody and control responsive to Request Nos. 102 and 114 and each of their subparts, in whatever form BNSF maintains this data.

Xcel also requests the Board to issue an order granting the other relief requested herein and any other relief the Board deems appropriate under the circumstances.

Respectfully submitted,



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March 15, 2002

PUBLIC SERVICE COMPANY OF COLORADO
D/B/A XCEL ENERGY,

V.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

**DEFENDANT'S RESPONSES AND OBJECTIONS TO
COMPLAINANT'S FIRST SET OF DISCOVERY REQUESTS**

GENERAL OBJECTIONS AND OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

1. BNSF objects to Xcel Energy's Discovery Requests to the extent that they are overly broad and unduly burdensome.
2. BNSF objects to Xcel Energy's Discovery Requests to the extent that they seek documents that constitute or disclose confidential or proprietary information, including third party proprietary information, or other sensitive nonpublic information. Notwithstanding this

REQUEST FOR PRODUCTION NO. 12: For each BNSF valuation section traversed in whole, or in part, by the Xcel Energy trains, provide the following information for each year 1997 through the present in a computer-readable format to the extent available, and specify, for each subpart, (1) whether the accounting methodology is on a depreciation accounting basis or on a betterment accounting basis and (2) whether or not the figures provided include the write-up of investment associated with the merger between the Burlington Northern Railroad Company ("BN") and the Atchison, Topeka and Santa Fe Railway Company ("ATSF"):

- a. A description by milepost and station name of the properties encompassed by each valuation section (as of December 31st for each year);
- b. A description by milepost and station name of the portion of the valuation section identified in response to (a) above traversed by any Xcel Energy unit train (as of December 31st for each year);
- c. Gross values by ICC/STB property account included within the valuation section identified in response to (a) above (as of December 31st for each year);

- d. Annual depreciation by ICC/STB property account for all properties included within each valuation section identified in response to (a) above (as of December 31st for each year);
- e. Accumulated depreciation by ICC/STB property account for all properties included within each valuation section identified in response to (a) above (as of December 31st for each year);
- f. Gross values by ICC/STB property account of only those properties used by Xcel Energy unit trains for each valuation section identified in response to (a) (as of December 31st for each year);
- g. Annual depreciation by ICC/STB property account for all properties used by Xcel Energy unit trains for each valuation section identified in response to (a) above (as of December 31st for each year);
- h. Accumulated depreciation by ICC/STB property account for all properties used by Xcel Energy unit trains for each valuation section identified in response to (a) above (as of December 31st for each year);
- i. The annual total gross ton-miles of cars and contents and the annual total gross ton-miles of locomotives and cabooses for each year 1997 through 1999 traversing the entire valuation section for each valuation section identified in response to (a) above where the properties used by Xcel Energy unit trains are less than the total properties within the valuation section; and
- j. The annual total gross ton-miles of cars and contents and the annual total gross ton-miles of locomotives and cabooses for each year 1997 through 1999 for each valuation section identified in response to (a) above.

BNSF RESPONSE: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested. BNSF further objects to this Request to the extent it seeks information about matters occurring prior to January 1, 1998. Subject to these objections, BNSF will produce or make available responsive data, in the format in which such data is available, or other materials from which responsive information may be derived, to the extent such data and other materials are reasonably available.

REQUEST FOR PRODUCTION NO. 102: Provide all documentation related to (a) the book value of ATSF and the actual amount paid by BN for ATSF at the time of the merger between BN and ATSF and (b) how BNSF treated the differential between the book value and the actual amount paid in its accounting system.

BNSF RESPONSE: BNSF objects to this Request on grounds that it seeks information and documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

PUBLIC SERVICE COMPANY OF
COLORADO D/B/A XCEL ENERGY

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

Defendant.

Docket No. 42057

**DEFENDANT'S RESPONSES AND OBJECTIONS TO
COMPLAINANT'S SECOND SET OF DISCOVERY REQUESTS**

Defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF"), by its attorneys Steptoe & Johnson LLP, hereby objects and responds to Complainant's Second Set of Discovery Requests ("Xcel's Second Discovery Requests").

**GENERAL OBJECTIONS AND
OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS**

BNSF hereby incorporates by reference the General Objections and Objections to Definitions and Instructions stated in Defendant's Responses and Objections to Complainant's First Set of Discovery Requests dated January 29, 2000.

RESPONSES

Subject to the General Objections and Objections to Definitions and Instructions referenced above, which are incorporated into each of the following responses, BNSF responds to Xcel's Second Discovery Requests as follows:

REQUEST FOR PRODUCTION NO. 114: Provide all workpapers and supporting documents, in a computer-readable format to the extent available, underlying:

- a. The aggregate figures, by ICC/STB account, contained in ATSF's 1995 Annual Report Form R-1, Schedule 330, Column (d);
- b. The line segment-specific figures, by ICC/STB account, underlying the aggregate figures identified in (a) above; and
- c. The basis for allocating the amounts to each line segment.

BNSF RESPONSE: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome to the extent it seeks information that is not maintained by BNSF in the normal course of business, or that would require a special study to compile or to report in the format requested. BNSF further objects to this Request on grounds that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and is beyond the scope of permissible discovery.

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Cynthia L. Quarterman
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cquarter@steptoelaw.com

May 31, 2001

Via Facsimile and First Class Mail

Jennifer L. Noah
Thompson, Hine & Flory LLP
1920 N Street, NW
Washington, DC 20036-1601

Re: *Public Service of Company of Colorado d/b/a Xcel
Energy v. The Burlington Northern and Santa Fe
Railway Company*, STB Docket No. 42057

Dear Jennifer:

This letter is in response to your letters of May 18, 22, and 30, 2001, regarding BNSF's responses to Xcel's First and Second Set of Discovery Requests. We address the issues below in the order in which you presented them in your May 22nd letter:

A. Responses That Xcel Claims Are Incomplete

BNSF will provide materials responsive to Request for Production Nos. 3(d)-(i). As to Nos. 3(j) and (k), no responsive materials are available without conducting a burdensome special study, which BNSF is not willing to undertake.

BNSF will produce year 2000 density information responsive to Request for Production Nos. 5(h), 6 (e), 7, and 8.

We are still investigating whether the data requested in Request for Production No. 9 is available without conducting a burdensome special study. If the data can be obtained through reasonable efforts, we will produce it as soon as it is available.

BNSF will produce information responsive to Request for Production No. 15, except for information sought in subparts 15(p)(2-3), which BNSF does not maintain.

With respect to Xcel's Request for Production Nos. 22-24 and 27, BNSF has produced responsive data that includes data for the full year 2000. When we provided you with this data, we incorrectly stated that it covered the period through March 2001. BNSF did not intend to produce year 2001 data and does not intend to do so now.

WASHINGTON

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Jennifer L. Noah
May 31, 2001
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We will provide information responsive to Request for Production No. 31(e) and (h).

As to Requests for Production Nos. 33, 34 and 88, we have produced a list of leases from which Xcel may identify lease agreements it would like produced. So long as you request a reasonable number of leases, we will provide you with copies and a trip to Fort Worth will not be necessary. We will provide the additional information you requested regarding Contract No. BF 00013657.00.

BNSF has collected the data responsive to Request for Production No. 49 and we will produce it shortly.

We will provide the cost information regarding the track geometry car in Request for Production No. 58(t).

BNSF does not maintain the data requested in Request for Production No. 63 (c). As to Request for Production No. 82, to the extent responsive information exists, it can be found in the AFE's that are the subject of other requests.

We will produce ad valorem tax information as to the state of Montana responsive to Request for Production No. 86. That production, however, should not be construed as a waiver of BNSF's general objection to providing information relating to Montana.

With respect to Request for Production Nos. 87 and 111, BNSF objects to the production of joint facility agreements and bills for those facilities in states or portions of states that are not part of the route used to provide service to Xcel trains. It would be extremely burdensome to produce such information, which is not relevant to issues raised in this proceeding.

With respect to Request for Production No. 96, more recent information for the year 2000 is not available.

B. Requests That Xcel Claims Have Not Been Answered

With respect to Request for Admission Nos. 1, 3 and 4 and Interrogatory Nos. 1, 3 and 4, BNSF does not have anything to add to the responses that were originally provided. BNSF has responded to Interrogatory No. 7 through the information it has produced in response to discovery requests. We intend to provide you with a response to Interrogatory No. 8. BNSF maintains its objection to Interrogatory No. 9.

Your letter asserts that there are certain Requests for Production to which BNSF has not provided any responsive documents. There are several instances where your information is inaccurate. With respect to Request for Production Nos. 11, 41, 42, and 57, BNSF has produced responsive information. As to Request for Production Nos. 36, 102, 103(c) & (d), 105, 107-10,

Jennifer L. Noah
May 31, 2001
Page 3

112 and 114, BNSF stated objections in its January 29 and March 20, 2001 responses and maintains those objections. As to Request for Production Nos. 9, 12, 45, 71, 72, 89, 90, 97-100, 103(a-b, e-f), 104 and 113, BNSF is continuing to pull together responsive materials that are reasonably available and we expect to produce those materials shortly. Request for Production Nos. 38-40 are the subject of a pending motion to compel.

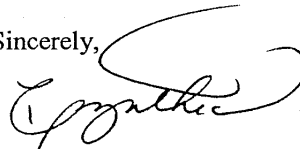
With regard to on-site visits, your May 22nd letter accurately states the five locations, which we have specified in earlier communications, where Xcel will be required to travel to obtain information responsive to its requests. Your letter also accurately states which requests require on-site visits.

In response to your letter of May 18, 2001, which requested that BNSF provide a list of all land sales and appraisals without regard to whether they are in the vicinity of the Xcel route right-of-way in response to Request for Production Nos. 77 and 78, BNSF is investigating to determine whether a list of all land sales in the designated states is reasonably available. If so, we will produce it. However, we have determined that such a listing of land appraisals is not available. Also, with regard to your May 18th letter, BNSF is in the process of assembling a list of locomotive leases and we will produce it once it is available.

Finally, we take exception to the characterization of BNSF's efforts to comply with Xcel's discovery requests made in your March 30, 2001, letter. As you know, Xcel did not produce any information responsive to BNSF's discovery requests until a few days before the discovery deadline was scheduled to close in this case. Moreover, Xcel refused to respond to most of BNSF's discovery requests until after BNSF had filed a motion to compel. In comparison, BNSF has been more than reasonable in addressing Xcel's discovery demands.

If you have any questions regarding our summary of the status of discovery in this case, please do not hesitate to call.

Sincerely,



Cynthia L. Quarterman



BRUSSELS CINCINNATI CLEVELAND COLUMBUS DAYTON WASHINGTON, D.C.

September 17, 2001

Via Hand Delivery

Cynthia Quarterman, Esq.
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, DC 20036-1795

Re: STB Docket No. 42057, *Public Service Company of Colorado d/b/a Xcel Energy*
v. The Burlington Northern and Santa Fe Railway Company

Dear Cynthia:

On September 5, 2001 counsel for the parties met at Xcel's request to discuss BNSF's discovery to Xcel in this proceeding. I have set forth below my understanding of the matters discussed at the meeting and where things stand. This listing takes into account the materials and documents that were produced by BNSF after our meeting but before the date of this letter. Document Requests and Interrogatories not mentioned are not considered by Xcel to be incomplete or otherwise in dispute.

2001 Data - In accordance with our representations at the meeting, in which BNSF complained of the alleged burden of providing 2001 material for all of the items listed in the attachment to our letter of August 17, 2001, I have attached hereto a pared-down list of the responses for which Xcel requests 2001 data. You will note that, as to four requests (12, 39 (see below), 98, and 100), BNSF has provided no data at all despite having pledged to do so. For these requests, Xcel expects BNSF to provide data for the years 1998 to 2001. This listing is provided in good faith, but it is also the list for which we would be ready and willing to seek an order from the STB requiring BNSF to produce materials in response to. Please let me know by September 21, 2001 whether BNSF agrees to produce materials in response to the listed requests.

Request Nos. 39 and 40 - You confirmed that BNSF will produce its revenue and traffic forecasting materials as soon as the STB rules on the pending motion to compel production of BNSF's transportation contracts. We expect that BNSF will reciprocate and provide forecasting materials prepared in 2001.

Requests Nos. 12, 89, 90, 97, 98, 99, 100 and 104 - You confirmed that in May BNSF stated it was collecting materials responsive to these requests, but that BNSF has yet to produce any materials responsive to these requests.

Request Nos. 73, 74, 75 and 78 - BNSF is copying materials identified by Xcel's representatives at BNSF locations for production to Xcel.

Request Nos. 5, 6 and 7 - BNSF is reviewing Xcel's letter of August 6, 2001 regarding the discrepancy in density information identified by L.E. Peabody & Associates, Inc.

Request Nos. 22, 23, 24 and 27 - You confirmed that BNSF is collecting the data requested by Xcel and will produce this information in the near future.

September 17, 2001
Page 2

Request No. 25 - BNSF is looking for the missing train activity reports from Sterling, Colorado

Request No. 63(c) - BNSF is revisiting its prior representation that it does not maintain any information regarding the costs it incurs at at-grade crossings other than the costs of components required for an automatic type interlocking. Xcel maintains that BNSF must keep some records in the ordinary course of business regarding maintenance costs, construction costs, labor costs, third party contracting costs, etc.

Request Nos. 66, 67, 68, 69, 71 and 92 - Xcel has agreed to drop its request for data from Montana responsive to these requests.

Request No. 71 - Xcel is still awaiting production of information from Colorado, which BNSF has agreed to produce.

Request No. 72(c) - BNSF has still not produced information regarding the original costs and applicable time periods of construction of the facilities responsive to Request No. 1. It is Xcel's understanding that BNSF is collecting this information and will produce it.

Request Nos. 87 and 111 - Xcel has determined it does not need any additional information related to these document requests (joint facility agreements)

Request No. 96 - You have agreed to check whether there is BNSF cost of capital information available for 2000.

Request No. 107 and 108 - BNSF objects to any production on grounds that these requests seek production of BNSF's internal management costs.

Request No. 109 - BNSF objects to this request on a variety of grounds, but primarily on the ground that it is burdensome. However, Tony LaRocca indicated that BNSF would consider providing data in response to this request and invited Xcel to present BNSF with a narrower version of this question that would respond to BNSF's burden concerns. A narrower version of this question is attached.

Request No. 112 - BNSF has objected to producing any information related to fiber optics.

THOMPSON HINE

September 17, 2001

Page 3

Request No. 114 - BNSF is revisiting its answer to this question and its response to related Request No. 102 for the purpose of determining whether BNSF's answer of January 29, 2001 has changed.

Please do not hesitate to call if you have any questions.

Sincerely,



Thomas W. Wilcox

Enclosures

049837.7

cc: Barry Johnson
Thomas D. Crowley
Bruce A. Colt

XCEL DOCUMENT REQUESTS FOR WHICH 2001 DATA IS NEEDED

Document Request Number	Description	Time Periods Needed
(1)	(2)	(3)
<u>Updated information is necessary from the BNSF for the following.</u>		
14	Locomotive Lists for Locomotives in Alliance Pool	February 2001 to Current
15	Capital Data for Locomotives in Alliance Pool (Including Lease Payments)	February 2001 to Current
16	Locomotive Lease Agreements for Locomotives in Document Request # 15	February 2001 to Current
22	Crew Wage Data for each Pawnee Train	December 2000 to Current
23	Crew Wage Data - System	December 2000 to Current
27	Helper Crew Wage Data for each Pawnee Train	December 2000 to Current
37	BNSF Revenue and Traffic Waybill Data - MT, WY, SD, NE, CO	January 2001 to Current
49	BNSF Transportation Support System (TSS) Data	January 2001 to Current
96	Rail Cost Adjustment Estimates and cost of capital	Year 2000
101	BNSF GWOR Statistics - Pawnee Route	August 1999 to Current

Initially requested information has not been provided by BNSF for the following.

12	BNSF Road Investment - Pawnee Route	January 1998 to Current
39	Coal and Other System Traffic Forecasts-MT, WY, SD, NE, CO	January 1998 to Current
98	PRB Distributed Power Train Data - 1999 to Present	January 1998 to Current
100	PRB Future Distributed Power Service Plans or Forecasts	January 1998 to Current

Docket No. 42057, *Public Service Company of Colorado d/b/a Xcel Energy vs. The Burlington Northern and Santa Fe Railway Company*

Revised Request for Production No. 109

Produce data in computer-readable format (with all documentation related to this data), that include the information listed below for each coal movement handled by BNSF as originating, terminating, overhead or single-line carrier that traveled in the states of Montana, Wyoming, South Dakota, Nebraska, and Colorado (as identified in response to Request for Production No. 37) for each year or partial year 2000 to the present:

- a. The train identification number of all trains used to move the shipment;
- b. The number of locomotives, by train identification, by segment, used to move the shipment; and
- c. The total horsepower, by train identification, by line segment, used to move the shipment.

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October 1, 2001

Via Facsimile and First Class Mail

Mr. Thomas W. Wilcox
Thompson, Hine & Flory LLP
1920 N Street, NW
Washington, DC 20036-1601

Re: *Public Service of Company of Colorado d/b/a Xcel
Energy v. The Burlington Northern and Santa Fe
Railway Company*, STB Docket No. 42057

Dear Tom:

This letter is in response to your letter dated September 17, 2001, regarding BNSF's discovery to Xcel. This letter follows the format set forth in that letter.

2001 Data. With respect to your request for 2001 data, BNSF will update the information already produced in response to Request Nos. 14, 22, 23, 27 and 37, subject to the objections we have previously made to these requests. However, to ensure that current data is available for the presentation of evidence, BNSF does not intend to collect the updated information until a procedural schedule has been established. As to Request No. 49, BNSF agrees to update the train movement records, but only for the Xcel movement. As to Request No. 15, BNSF is not willing to undertake the substantial effort of updating the capital data for all of the locomotives in the Alliance pool. The collection of this information in the first place was extremely burdensome. We will consider providing financial information to the extent that new locomotives for which financial data was not previously produced have been used on Xcel trains. As to Request No. 16, we note that Xcel did not even request any copies of locomotive leases when BNSF made them available during the original discovery period. With respect to Request No. 96, BNSF will produce updated cost of capital information if such information is available when the other materials described above are produced. The material BNSF has already produced with respect to Request for Production No. 101 is the most current information available. When we provide information responsive to Request Nos. 12, 98, and 100, BNSF will produce information that is currently available, subject to our previously stated objections.

Request Nos. 39 and 40. Your letter accurately states that BNSF will produce its revenue and traffic forecasting materials as soon as the STB rules on the pending motion to compel production of BNSF's transportation contracts.

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LOS ANGELES

Mr. Thomas W. Wilcox
October 1, 2001
Page 2

Request Nos. 12, 89, 90, 97-100 and 104. BNSF is compiling and intends to produce information responsive to Request Nos. 12, and 97-100, subject to our previously stated objections. BNSF has already produced materials responsive to Request Nos. 89 and 90 at Bates label number BNSF/PSC/TAPE 124-129. As to Request No. 104, BNSF is investigating whether responsive materials are reasonably available.

Request Nos. 73-75 and 78. Your statement regarding these requests is accurate.

Request Nos. 5-7. Your statement regarding these requests is accurate.

Request Nos. 22-24 and 27. BNSF is attempting to locate the decoders and definitions requested in your letter of July 13, 2001, and will produce reasonably available information.

Request No. 25. Your statement regarding this request is accurate.

Request No. 63(c). We believe that our prior statements regarding this request are accurate. We are attempting to confirm their accuracy as you requested.

Request Nos. 66-69, 71 and 92. No further action is required on these requests.

Request No. 71. BNSF is collecting and will produce reasonably available information for the State of Colorado.

Request No. 72(c). We are in the process of trying to ascertain whether responsive information exists regarding this request and whether it can be compiled without unreasonable effort.

Request Nos. 87 and 111. No further action is required on these requests.

Request No. 96. As mentioned above, BNSF will produce updated cost of capital information if such information is available when the other updated materials described above are produced.

Request Nos. 107-108. You are correct that BNSF objects to these requests.

Request No. 109. BNSF has already produced materials responsive to your revised request. We refer to you to the train event data and/or waybill files previously produced by BNSF.

Request No. 112. You are correct that BNSF objects to this request.

Mr. Thomas W. Wilcox
October 1, 2001
Page 3

Request No. 114. We have confirmed that our prior statements regarding this request were accurate.

The above summarizes all outstanding discovery issues relating to BNSF's responses to Xcel's discovery requests, which are not subject to a motion to compel, that are pending in this matter. Please let me know if you have any further questions regarding these matters.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cynthia", with a large, sweeping loop at the end.

Cynthia L. Quarterman

February 12, 2002

Via Facsimile and U.S. Mail

Cynthia L. Quarterman, Esq.
Stephoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

RE: *Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42057

Dear Cynthia:

In an October 1, 2001 letter you make representations regarding BNSF's production of materials in this proceeding. *See*, Oct. 1, 2001 correspondence from C. Quarterman to T. Wilcox. As of October 1, 2001, BNSF was in the process of compiling responses to Xcel's Requests for Production Nos. 12, 73-75, 78, and 97-100. *Id.* However, Xcel has not received any document production from BNSF since your letter was sent. Additional outstanding discovery demands are detailed below.

Xcel has asked BNSF to confirm that its prior statements regarding Request for Production No. 63(c) are accurate. *Id.* Xcel is also waiting for an explanation of the density data discrepancy revealed by documents produced in response to its Requests for Production Nos. 5-7. *Id.*

Xcel is also awaiting production of the missing train activity reports for Sterling, Colorado in response to its Request for Production No. 25. *Id.*

BNSF was reported to be investigating whether materials responsive to Xcel's Requests for Production Nos. 72(c) and 104 were "reasonably available," as of October 1, 2001. *Id.* In addition, you stated that BNSF was in the process of collecting with the intent to produce "reasonably available information for the State of Colorado" in response to Request for Production No. 71. *Id.*

As of October 1, 2001, BNSF was reportedly attempting to locate the decoders and definitions requested in our July 13, 2001 letter regarding Request for Production Nos. 22-24 and 27. *Id.*

We also expect BNSF to produce financial information in response to Xcel's Request for Production No. 15 "to the extent that new locomotives for which financial data was not previously produced have been used on Xcel trains." *Id.*

We are disappointed that BNSF intends to withhold production of updated materials responsive to Xcel's Requests for Production Nos. 14, 22, 23, 27, 37, 49 (for the Xcel movement), and 96, until after the Surface Transportation Board has issued a revised procedural schedule in this proceeding. *Id.* We object to BNSF's refusal to produce this information now as contrary to the mandates of the Board. BNSF has a duty to timely supplement its discovery responses and should do so both now and after the Board issues a revised procedural schedule in this matter. *See*, 49 C.F.R. § 1114.29(c); *see also*, Complainant's First Set of Discovery Requests to The Burlington Northern and Santa Fe Railway Company, Instruction XXI.

Jennifer.Noah@ThompsonHine.com Phone 202.973.2705 Fax 202.331.8330

JLN 131822.1

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February 12, 2002

Page 2

You indicated on October 1, 2001, that the information BNSF has produced in response to Xcel's Request for Production No. 101 is the most current information available and that when BNSF provides information responsive to Request for Production Nos. 12, 98, and 100, it will produce information that is currently available, subject to its previously noted objections. *Id.* We ask that BNSF provide the most up to date information available in response to Xcel's Request for Production Nos. 12, 98, 100, and 101.

In a follow-up to your October 1, 2001 letter, we reiterated our request for "a description of the data, record layouts for all 39 files, and definitions for all the data contained in the files" related to materials produced by BNSF in response to Xcel's Request for Production Nos. 88 and 89 (receipts and payment data). See Oct. 25, 2001 correspondence from T. Wilcox to C. Quarterman.

We look forward to receiving all outstanding production from BNSF without further delay.

Please do not hesitate to contact the undersigned with any additional questions or concerns you may have regarding the foregoing.

Very truly yours,



Jennifer L. Noah

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February 15, 2002

Via U.S. Mail and Facsimile

Thomas W. Wilcox
Thompson Hine LLP
Suite 800
1920 N Street, N.W.
Washington, D.C. 20036

Re: STB Docket No. 42057, *Public Service Company of Colorado d/b/a/ Xcel
Energy v. The Burlington Northern and Santa Fe Railway Company*

Dear Tom:

This letter is to follow-up on several outstanding BNSF discovery requests to Xcel in the above-referenced matter. The first category involves requests that are the subject of BNSF's Motion to Compel filed on April 2, 2001. The second category involves requests on which we exchanged correspondence and met last fall.

As to the first category, it appears that because of your October 23, 2001 letter to the Board, which reported that "[n]early all of the disputes covered by BNSF's motion have been resolved by the parties in their discussions," the Board in its February 1, 2002 order at footnote 4 misunderstood the status of BNSF's Motion to Compel. As correctly stated in Xcel's April 30, 2001 reply to BNSF's Motion to Compel, BNSF continues to maintain that it is entitled to receive responses to Requests for Production Nos. 3 and 47 of its February 1, 2001 discovery requests. Nothing has happened since then to alter BNSF's position as to those two requests. Those requests seek information regarding Xcel's negotiations with current and prospective coal suppliers, analyses of future coal sources, plans with respect to future coal sources, and its evaluation of alternative transportation to the Pawnee Station and its other facilities that will be included in its stand-alone network. The Board assumed BNSF's Motion to Compel was resolved (without prejudice to renew it) based on the erroneous belief that we had resolved all the issues pending. Unfortunately, that is not the case.

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LONDON

Thomas Wilcox
February 15, 2002
Page 2

BNSF stands ready to renew its Motion to Compel. However, in the interest of expediency, BNSF will consider any offers from Xcel to provide the information sought in those Discovery Requests voluntarily. In considering this option, Xcel may want to review the Board's decision in Arizona Electric Power Cooperative Inc. v. BNSF, STB Docket No. 42058 (decision served Dec. 31, 2001), in which the Board directed the complainant to supply information comparable to that sought in Request for Production No. 3.

As to the second category of requests, on September 4, 2001, we sent you a letter regarding Xcel's outstanding discovery responses to assist in preparation for our meeting on September 5, 2001. You responded to that letter on October 11, 2001. We later continued to communicate regarding the status of those matters via e-mail and telephone through early November 2001. This letter will serve to memorialize BNSF's understanding of our discussions regarding the status of Xcel's outstanding discovery responses.

We have reviewed the confidential portions of Xcel's Integrated Resource Plan filing with the Public Service of Colorado and BNSF is satisfied that no further documents need to be produced related to that filing.

With respect to Request for Production Nos. 52-54, we are still awaiting a response to my November 6, 2001 e-mail to you requesting that you confirm that the files have been searched of those person(s) within Xcel/PSC responsible for analyzing laws and regulations related to the sale of electric power, the burning of coal, and the building of coal-fired electric generating facilities for materials responsive to those requests. If you verify that those person(s) are the same as the ones who you listed in your November 6th e-mail to me, whose files have been searched, BNSF will be satisfied with the extent of the search Xcel conducted with respect to these requests.

Regarding BNSF's request for documentation supporting Xcel's electronic spreadsheets, you state in your October 11, 2001 letter that "there are few, if any, such materials in addition to what Xcel has already produced." To the extent there are any materials that have not been produced, BNSF renews its request for those supporting materials referred to in your letter that exist but that have not already been produced. In essence, we are interested in receiving the files supporting these spreadsheets maintained by the person who created the spreadsheets. If such a file exists, please produce it.

Finally, we have requested a copy of the entire Resource Data International ("RDI") Study, part of which was produced as XCEL02328 and 02329. Your November 2, 2001 e-mail to me indicated that your client was checking with RDI about production of that study. Please let us know the status of those discussions. BNSF continues to request that study be produced in its entirety.

We recently received a letter from Jennifer Noah of your office regarding the status of BNSF's production to Xcel, which we are in the process of reviewing. We will get back to you

Thomas Wilcox
February 15, 2002
Page 3

on those matters shortly and propose that we meet during the week of February 25, 2002 to discuss outstanding discovery issues more thoroughly. However, there were several statements in Ms. Noah's letter that are inconsistent with our prior understanding, which we wanted to address immediately. Based on your letter of October 25, 2001, we understood that "Xcel Energy ha[d] no substantial objection to [my] October 1, 2001 response to [your] September 17, 2001 letter regarding the status of BNSF's production." Ms. Noah's letter expresses disappointment and objects to some of the contents of that letter. This will serve as notice that BNSF intends to proceed in accordance with the terms set forth in my October 1, 2001 letter, which we understood Xcel had accepted. If you would like to discuss this further, please do not hesitate to call.

Sincerely,

A handwritten signature in black ink, appearing to read "Cynthia L. Quarterman", with a long, sweeping horizontal line extending to the right.

Cynthia L. Quarterman

February 25, 2002

Via Facsimile and U.S. Mail

Cynthia L. Quarterman, Esq.
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

RE: *Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42057

Dear Cynthia:

This letter responds to your letter of February 15, 2002 regarding discovery in this proceeding. Taking the issues in the order presented in your letter, please note the following:

Requests for Production 3 and 47

We agree these requests should be the topic of further discussions between the parties. Xcel has already produced materials responsive to these requests. The issue is whether we can reach agreement on the scope of the final production to BNSF. Naturally, we hope such an agreement can be reached. Also, we have reviewed the *AEPCO* decision referred to in your letter and conclude it has minimal application to these circumstances. While it is true the Board technically ordered *AEPCO* to produce certain coal contracting and forecasting materials, it is also true that *AEPCO* volunteered to produce them. Also, as we read the decision, the document requests at issue were directed to the issue of the long term supply of certain New Mexico coal mines. There is no issue in this proceeding over whether the Wyoming Powder River Basin has adequate supplies for Xcel's stand alone railroad.

Requests for Production 52-54

This letter will confirm that the Xcel personnel whose files were searched for documents responsive to these requests are the same persons who were listed in my November 6, 2001 e-mail to you. These persons are responsible for analyzing laws and regulations related to the items listed in your February 15, 2002 letter.

Documentation related to Electronic Spreadsheets

This letter will confirm that Xcel believes that it has produced all documentation supporting the referenced spreadsheets produced to BNSF.

The RDI Study

Xcel has made several requests to RDI for permission to produce the entire study from which XCEL02328 and 02329 were excerpted. Xcel's request has not been denied, but it has not been granted, either. We will continue to try to obtain RDI's permission.



February 25, 2002

Page - 2 -

As stated, we also believe it would be helpful to meet to discuss the status of discovery in this case, with the aim of moving closer to the establishment of a procedural schedule for presenting evidence and argument. Unfortunately, we are unavailable to meet this week for a variety of scheduling reasons. Please let me know what dates the week of March 4 are amenable to BNSF counsel.

Finally, we have reviewed the materials provided by Wabtec Railway Electronics in response to the subpoena *duces tecum* and are preparing a filing for the Board in response to its invitation in the February 1, 2002 decision in this case. However, we remain open to discussions with BNSF regarding a mutually acceptable means of incorporating the electronic fuel gauge readings into a fuel study in this proceeding.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tom Wilcox".

Thomas W. Wilcox

Cc: Duane L. Richards
Barry L. Johnson
Bruce A. Colt, Esquire

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

PUBLIC SERVICE COMPANY OF
COLORADO D/B/A XCEL ENERGY

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

Defendant.

Docket No. 42057

VERIFIED STATEMENT OF JOSEPH J. PLAISTOW

My name is Joseph J. Plaistow, I am a Vice President of L.E. Peabody & Associates, Inc. located at 1501 Duke Street, Suite 200, Alexandria, VA 22314. I am the same Joseph J. Plaistow who in this proceeding filed a verified statement accompanying Complainant Public Service of Colorado d/b/a Xcel Energy's ("Xcel") "Petition for Order Establishing Procedures for a Study to Measure Movement-Specific Locomotive Fuel Consumption" on March 27, 2001.

I was employed by Burlington Northern Railroad Company, a predecessor of defendant The Burlington Northern and Santa Fe Railway Company ("BNSF"), for 15 years as Director of Costs and Economic Analyses in the Finance Department, as Director of Equipment and Service, and Director of Planning and Equipment in the Food and Manufactured Products Business Unit of the Marketing Department from 1972 to 1987. As a Burlington Northern employee I was familiar with Burlington Northern's efforts to improve management of its assets. Key to the better management of assets was the development of information systems, databases and software capable of efficiently using information gathered in the accounting systems in the normal course of business. The guiding adage was, "What you don't measure, you can't manage." Today BNSF has over \$19 billion invested in road property assets. Crucial to the

effective, profitable management of that road property asset base are the related detailed accounting records.

I have been asked by Xcel to address BNSF's recent pronouncements in this proceeding that despite having previously agreed to produce movement-specific road property investment data to Xcel, BNSF is now refusing to provide this data. According to Xcel, BNSF has stated its reason for this reversal of position to be that the movement-specific data it keeps is not useful for the purpose for which Xcel seeks to use it, which is to propose adjustments to BNSF's system average variable costs. This pronouncement on its face conflicts with the "measure and manage" principle. I will show that BNSF's refusal to provide this critical road property information to Xcel has no validity and that it would significantly affect Xcel's ability to accurately determine the economics associated with BNSF's provision of coal unit train service to Xcel's Pawnee Steam Electric Generating Station in Brush, Colorado. My testimony is grouped under the following headings:

- A. The Board's Preference for Line-Specific Over System Average Road Property Capital Costs;
 - B. BNSF's Past Use of Movement-Specific Adjustments to System Average Costs;
 - C. The Evidentiary Anomalies That Led to the Board's Decision in STB Docket No. 42051 Are Not Present in This Case; and
 - D. BNSF's Claim That Its Road Investment Data is Not Relevant to or Useful For URCS-based Calculations of Variable Costs is Invalid
- A. The Board's Preference For Line-Specific Over System Average Road Property Capital Costs**

In Ex Parte No. 347(Sub-No. 3), *General Procedures for Presenting Evidence in Stand-Alone Rate Cases* (served March 12, 2001)(*Evidence*)¹, the Board standardized and simplified the process of presenting and critiquing evidence in maximum coal rate proceedings. However, nothing in *Evidence* suggested a relaxation of the Board's preference for movement-specific over

¹See *Evidence*, decided March 12, 2001.

system average cost evidence, whenever and wherever possible, or the expectation expressed in *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 548 (1985) (“*Coal Rate Guidelines*”) that shippers such as Xcel will receive timely and adequate discovery of the information needed to present a case under Constrained Market Pricing (“CMP”).

The railroads are the sole repository of most of the movement-specific road property information required to calculate road property investment return and depreciation costs (collectively, “Road Capital Costs”) in coal maximum rate cases. Shippers such as Xcel gather that information from the railroad’s responses to discovery requests.

The Board has consistently permitted adjustments to a defendant carrier’s system-average costs to reflect the economies and efficiencies that are associated with high-volume unit train coal movements. Costs tailored to the transportation characteristics of a particular movement (*i.e.*, movement-specific costs) generally are preferred over system average costs, because those costs long have been recognized by the Board as being more accurate than system-average costs. Significant economies of scale are realized on BNSF’s coal lines in general, and the PRB-to-Pawnee Station coal line in particular, because this is the primary line used by BNSF to transport coal from PRB mines to points south, such as Texas. While BNSF has made substantial road property investments in coal lines, the carrier also has been able to increase traffic volumes over those lines to such an extent that the cost per unit is much less than it is on the routes used by general freight or system average traffic. Particularly given the location of the Pawnee Station, there is no justification for failure to reflect these economies of scale in this evidence in this proceeding. BNSF’s decision to renege on its agreement to produce movement-specific property investment data to Xcel violates this longstanding and established practice.

In conformance with the Board’s preference for movement-specific variable costs, Xcel intends to calculate Road Capital Costs for the specific line segments traversed by Xcel trains based on BNSF’s valuation records. Xcel proposes to include all URCS road investments in its Road Depreciation and Return on Road costs. Xcel’s URCS road investments will be divided

into two categories: (1) road investments that receive a line-specific adjustment (that is, Adjusted Road Capital Costs); and (2) those that will remain in Xcel's costs on a system average basis.²

For the Adjusted Road Capital Costs portion, Xcel will calculate return on road property investment and depreciation expenses attributable to the Pawnee Station coal movements using BNSF's recorded line segment-specific gross investment and depreciation data by valuation section, which Xcel has requested be provided in response to Xcel's discovery requests for production of documents Nos. 12, 102, and 114. This is the same approach approved by the Board in other recent rate cases, including STB Docket No. 42022, *FMC Wyoming Corp. and FMC Corp. v. Union Pacific R.R.* (served May 12, 2000) ("*FMC*"), and that BNSF used (and the Board approved) in *West Texas Utilities Co. v. Burlington Northern R.R.*, 1 S.T.B. 638 (1996) ("*West Texas Utilities*").³

B. BNSF's Past Use of Movement-Specific Adjustments to System Average Costs

BNSF's refusal to provide the requested road property investment and depreciation information to Xcel contradicts the position that BNSF took on numerous occasions in the past, most notably in *West Texas Utilities, San Antonio, Texas v. Burlington Northern R.R.*, 1 I.C.C.2d 561 (1986) ("*San Antonio*"), and *Omaha Public Pwr. Dist. v. Burlington Northern R.R.*, 3 I.C.C.2d 123 (1986); *aff'd* 3 I.C.C.2d 853 (1987) ("*OPPD*"), where BNSF (and the Board) relied on the same type of line segment-specific Adjusted Road Capital Costs that Xcel proposes to submit in this proceeding, in lieu of system averages.

²The property investment accounts that will be assigned on a specific basis will be determined by the accounts flowing into the URCS unit costs for road depreciation (D1L234C10) and road return (D1L251C10). Those accounts are 2 Land, 3 Grading, 4 Other ROW, 5 Tunnels and Subways, 6 Bridges, Trestles & Culverts, 7 Elevated Structures, 8 Ties, 9 Rails & OTM, 11 Ballast, 13 Fences, Snow Sheds & Signs, 17 Roadway Buildings, 27 Signals & Interlockers and 39 Public Improvements. All other road property accounts will be included in URCS, but not on a Gross Ton-Mile basis, so they will be included in Xcel's costs on a system average basis. Account 37 Roadway Machines is also included in the URCS unit costs.

³See *West Texas Utilities*, 1 S.T.B. at 724.

The *West Texas Utilities* proceeding involved BNSF unit train coal service from the Powder River Basin to Texas. Nearly all the BNSF track used to provide service to Xcel's Pawnee Station is included within the routing that was at issue in *West Texas Utilities*. In *West Texas Utilities*, BNSF was faced with evidence submitted by the complainant which showed, as Xcel would expect to show in this proceeding, that Adjusted Road Capital Costs were substantially lower than system average. BNSF responded with line segment-specific Adjusted Road Capital Costs based on the same type of information that Xcel has requested of BNSF in this proceeding. As the Board summarized in its final decision in 1996:

"To adjust system-average road property return on investment (ROI) cost, BN utilizes its 1994 road property investment database. BN identifies the actual book value of the road property and the annual depreciation associated with the issue traffic ...Our restatement utilizes the BN-developed unit cost for ROI."

West Texas Utilities, 1 S.T.B. at 724.

In *West Texas Utilities*, both the Complainant and BNSF presented Adjusted Road Capital Costs as superior to and more accurate than system averages. Both parties calculated those costs using BNSF's "...road property investment database ...," and their methodology was accepted by the Board as the best evidence of record. The same type of data used by the parties and accepted by the Board in *West Texas Utilities* should be produced by BNSF in this proceeding. It is that line segment-specific information that Xcel proposes to rely upon in this case.

In my opinion and based on my experience in coal rate reasonableness proceedings, BNSF has no valid grounds for refusing to provide Xcel the line segment-specific road property investment and depreciation information needed to properly determine Pawnee movement Road Capital Costs. BNSF should provide (1) the line segment-specific information it maintains in the ordinary course of business, and (2) non-line segment-specific information for all other investments, and let the Board select the best evidence of record after both sides have made fully documented presentations. If the Board acquiesces to BNSF's efforts to force Xcel and the

Board to rely on system average Road Capital Costs, those costs will be substantially overstated for the route at issue in this proceeding, and will fail to protect Xcel's right to a fairly determined maximum reasonable rate.

C. The Evidentiary Anomalies That Led to the Board's Decision in STB Docket No. 42051 are Not Present in This Case

In STB Docket No. 42051, *Wisconsin Power and Light Co. v. Union Pacific R.R.* (served Sept. 12, 2001) (“*WPL*”), the Board declined to accept either Union Pacific Railroad Company's (“UP”) or Wisconsin Power and Light's line-specific road property investment and depreciation costs and defaulted to system average costs, because UP had shown that a portion of its investment that was assigned to a general (default) account and not to specific line segments was needed to provide service to the complainant.

The Board selected system average costs as the best evidence of record even though “Both parties adjusted the URCS system-average return on investment and depreciation expenses for road property by a ratio of UP's investment in the route used for the *WPL* traffic (on a per-GTM basis) to system-average investment (on a per-GTM basis).” See *WPL* at 53.

The unique problem that led the Board to default to system average in *WPL* does not exist here, since it is Xcel's intention to include system average costs for all road property investments shown to be used by the Xcel movement, but not directly assigned to the movement. For road property investments that BNSF has assigned directly to the Xcel Pawnee line segments, it is Xcel's intention to charge the related Road Capital Costs directly to the traffic using those investments.

D. BNSF's Claim That Its Road Investment Data is Not Relevant to or Useful for URCS-based Calculations of Variable Costs is Invalid

After decades of making movement-specific adjustments to its system average Road Capital Costs, BNSF now claims that its road property investment database is no longer useful for this purpose. BNSF's denigration of its own records appears to be another part of its larger effort to reverse the Board's longstanding and correct policy of preferring movement-specific

costs in unit train coal cases, and to revive the position unsuccessfully urged by railroad defendants in the past to base variable cost determinations on much higher system average costs.

System average Road Capital Costs are representative of average traffic, but average traffic and average costs are irrelevant in this case, which is focused on highly efficient unit trains moving over a heavy density coal route – not “average traffic.” Economies of scale made possible by high volume coal traffic have allowed BNSF to realize greatly reduced costs relative to system average, which, in turn, have benefitted BNSF financially over the last several decades.

The fact that a database for a line or movement-specific adjustment may not correspond directly to a railroad’s individual R-1 accounts cannot be a valid basis to reject movement-specific costs.⁴ The Board’s routine acceptance of adjustments to system averages based on special studies belie the notion, and a contrary rule would allow market dominant railroads to ensure that all rates in all circumstances are evaluated solely against system average costs simply by modifying their internal account formats. As for the “plausibility” of road property unit costs on high density lines being significantly lower than system averages, one need only look at BNSF’s highest density/highest investment line segments for confirmation of this fact.

BNSF’s claim that its movement-specific data is not useful for making adjustments to URCS-based costs is preposterous. URCS is based on the books and records of BNSF as filed in its Annual Report Form R-1. It is a regulatory requirement that BNSF file this information each year, and BNSF complies with that regulatory requirement. BNSF cannot keep two sets of books and records for regulatory purposes, so BNSF’s R-1 data has to be consistent with URCS-based calculations of variable costs. Alternatively, what BNSF must be claiming is that they do not maintain their road property investment and depreciation records on a line-segment specific

⁴Any movement-specific or line-specific refinement to system average costs must be based upon that portion of accounting and operating records that pertain to that specific movement or line. The refinement cannot be based upon an entire R-1 account or operating statistic. If it were based on the entire account or statistic, it would not constitute a refinement to system average costs, it would constitute system average costs.

basis. However, this cannot be true because until recently, BNSF itself has been relying on such line-segment specific investment information for its own determinations of Road Capital Costs.⁵

If BNSF has discontinued maintenance of all its line-segment specific road property investment databases, then BNSF should provide that information to Xcel for the latest time period for which that data is available. BNSF should be required to provide all categories of road property investments whether the category is assigned to the Xcel Pawnee line segments or whether they are unassigned. This data, if provided, will allow Xcel to determine Road Capital Costs that are more representative than system average costs. It is not within BNSF's authority to make the regulatory decision that the data should not be provided because it supposedly is inconsistent with URCS-based variable cost determinations. Only the Board has the authority to make that determination.

If BNSF still maintains a portion of its road property investment and depreciation information by line segment and a portion of that information unassigned to specific line segments, then BNSF should provide that information and let the Board determine whether or not Xcel Pawnee route Road Capital Costs determined as described earlier are consistent with URCS-based variable cost determinations.

I submit that BNSF may be maintaining detailed and accurate net investment by line-segment. BNSF may be measuring and managing its \$19 billion dollars investment in fixed, road property assets.⁶ BNSF should be managing those assets intensively and specifically. Any capital intensive business hushes such large investments. Failure to do so jeopardizes the ability of the corporation to continue making such large investments. It strains credulity and logic that a company that depends on lucrative coal traffic for a significant share of its annual

⁵BNSF also needs this line segment-specific road property data for state tax purposes. Several states assess property taxes on the actual value of real property. For example, Wyoming, which contains the bulk of the Powder River Basin, assesses taxes on the basis of the value of each mile of main track. *See 2001 State Tax Handbook*, page 215, published by CCH Incorporated, Chicago, IL.

⁶Some investment monies may not be assigned to a particular valuation section because the project has not been completed or the investment covers a wide geographic area. The methodology used in past cases will account for these issues.

revenues and profits does not monitor and accurately record its current investment in the assets that lie at the core of its business.

I believe that most road property investments can be assigned to individual line segments, but failing to assign 100% of the investments does not invalidate the movement-specific adjustment of the portion that is directly assigned. I further believe that the appropriate treatment of the unassigned portion is to treat it on a system-average basis, that is, to allocate the Road Capital Costs associated with the unassigned investment to all traffic moving on the system. I also believe that failure to assign 100% of road property investments to individual line segments does not change the fact that movement-specific Road Capital Costs for high-volume coal unit train service are likely to be lower than system average Road Capital Costs and that those reduced costs arise because of the economies and efficiencies that are associated with high-volume, repetitive movements such as the Xcel Pawnee unit-train service. Failure to measure those reduced costs does nothing to alter this Board-recognized cost relationship.⁷

CONCLUSIONS

The methodology that Xcel intends to use to determine the Pawnee movement's Adjusted Road Capital Costs will be based on BNSF-provided line-specific investment data for those investments needed to provide service to Xcel's Pawnee Station. Most of that cost will be based on the actual investments and gross ton-miles over the valuation sections traversed by the Xcel trains. Appropriate adjustments will be made to reflect the issues of unallocated monies. These Road Depreciation and Return on Road costs will be more movement-specific (and far more accurate) than the system average calculation.

BNSF has no valid grounds for refusing to provide Xcel the line segment-specific road property investment and depreciation information that Xcel needs to properly determine the Pawnee movement's Road Capital Costs. In my opinion the failure to provide this information

⁷ See STB Docket No. 42056, *Texas Municipal Power Agency v. BNSF*, decision served February 9, 2001, at 3.

will result in a significant overstatement of BNSF's variable cost of service for this movement. BNSF should provide the line segment-specific information it maintains in the ordinary course of business, non-line segment-specific information for all other investments, and let the Board select the best evidence of record after both sides have made fully documented presentations.

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

JOSEPH J. PLAISTOW, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof and that the same are true as stated.

Joseph J. Plaistow
Joseph J. Plaistow

Sworn to and subscribed
before me this 15th day
of March, 2002.

Witness my hand and official seal.

Carol J. Francois
My Commission Expires July 31, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

PPL MONTANA, LLC,

Complainant.

v.

**THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,**

Defendant.

Docket No. 42054

**DEFENDANT'S RESPONSES AND OBJECTIONS TO
COMPLAINANT'S FIRST SET OF REQUESTS FOR ADMISSIONS AND
INTERROGATORIES AND FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS**

Defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF"), by their attorneys Steptoe & Johnson LLP, hereby object and respond to Complainant's First Set of Requests for Admissions and Interrogatories and First Set of Requests for Production of Documents ("PPL's Discovery Requests").

**GENERAL OBJECTIONS AND OBJECTIONS TO DEFINITIONS AND
INSTRUCTIONS**

1. BNSF objects to PPL's Discovery Requests to the extent that they are overbroad and unduly burdensome.
2. BNSF objects to PPL's Discovery Requests to the extent that they seek documents that constitute or disclose confidential or proprietary information, including third party proprietary information, or other sensitive nonpublic information. Notwithstanding this

REQUEST FOR PRODUCTION NO. 12: For each BNSF valuation section traversed in whole, or in part, by the trains, from the Origins to the Destination, please provide the following information for each year 1997 through 1999 in a computer-readable format to the extent available, and specify, for each subpart, whether the accounting methodology is on a depreciation accounting basis or on a betterment accounting basis:

- a. A description by milepost and station name of the properties encompassed by each valuation section (as of December 31st for each year);
- b. A description by milepost and station name of the portion of the valuation section identified in response to "a" above traversed by any unit train (as of December 31st for each year);
- c. Gross values by ICC/STB property account included within the valuation section identified in response to "a" above (as of December 31st for each year);
- d. Annual depreciation by ICC/STB property account for all properties included within each valuation section identified in response to "a" above (as of December 31st for each year);
- e. Accumulated depreciation by ICC/STB property account for all properties included within each valuation section identified in response to "a" above (as of December 31st for each year);
- f. Gross values by ICC/STB property account of only those properties used by unit trains for each valuation section identified in response to "a" above (as of December 31st for each year);

- g. Annual depreciation by ICC/STB property account for all properties used by unit trains for each valuation section identified in response to "a" above (as of December 31st for each year);
- h. Accumulated depreciation by ICC/STB property account for all properties used by unit trains for each valuation section identified in response to "a" above (as of December 31st for each year);
- i. The annual total gross ton-miles of cars and contents and the annual total gross ton-miles of locomotives and cabooses for each year 1997 through 1999 traversing the entire valuation section for each valuation section identified in response to "a" above, where the properties used by unit trains are less than the total properties within the valuation section; and,
- j. The annual total gross ton-miles of cars and contents and the annual total gross ton-miles of locomotives and cabooses for each year 1997 through 1999 for each valuation section identified in response to "a" above.

BNSF RESPONSE: BNSF objects to this Request on grounds that it is overbroad and unduly burdensome to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested. Subject to these objections, BNSF will produce or make available responsive data, in the format in which such data is available, or other materials from which responsive information can be derived, to the extent such data and other materials are reasonably available.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

TEXAS MUNICIPAL POWER AGENCY

Complainant,

v.

**THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,**

Defendant.

Docket No. 42054

**DEFENDANT'S RESPONSES AND OBJECTIONS TO
COMPLAINANT'S FIRST SET OF INTERROGATORIES AND
REQUESTS FOR ADMISSIONS AND PRODUCTION OF DOCUMENTS**

Defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF"), by its attorneys Steptoe & Johnson LLP, hereby object and respond to Complainant's First Set of Interrogatories and Requests for Admissions and Production of Documents ("TMPA's Discovery Requests").

**GENERAL OBJECTIONS AND OBJECTIONS TO DEFINITIONS AND
INSTRUCTIONS**

1. BNSF objects to TMPA's Discovery Requests to the extent that they are overbroad and unduly burdensome.
2. BNSF objects to TMPA's Discovery Requests to the extent that they seek documents that constitute or disclose confidential or proprietary information, including third party proprietary information, or other sensitive nonpublic information. Notwithstanding this objection, BNSF will produce or make available confidential documents that are not otherwise objectionable, subject to the terms of an appropriate protective order.

REQUEST FOR PRODUCTION NO. 12: For each BNSF valuation section traversed in whole, or in part, by the TMPA trains, please provide the following information for each year 1997 through the present in a computer-readable format to the extent available, and specify, for each subpart, (1) whether the accounting methodology is on a depreciation accounting basis or on a betterment accounting basis and (2) whether or not the figures provided include a write-up of investment associated with the merger between BN and ATSF:

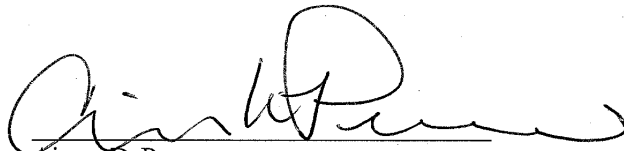
- a. A description by milepost and station name of the properties encompassed by each valuation section (as of December 31st for each year);
- b. A description by milepost and station name of the portion of the valuation section identified in response to (a) above traversed by any TMPA unit train (as of December 31st for each year);
- c. Gross values by ICC/STB property account included within the valuation section identified in response to (a) above (as of December 31st for each year);
- d. Annual and accumulated depreciation by ICC/STB property account for all properties included within each valuation section identified in response to (a) above (as of December 31st for each year);
- e. Gross values by ICC/STB property account of only those properties used by TMPA unit trains for each valuation section identified in response to (a) (as of December 31st for each year);
- f. Annual and accumulated depreciation by ICC/STB property account for all properties used by TMPA unit trains for each valuation section identified in response to (a) above (as of December 31st for each year);
- g. The annual total gross ton-miles of cars and contents and the annual total gross ton-miles of locomotives and cabooses for each year 1997 through 1999 traversing the entire valuation section for each valuation section identified in response to (a) above where the properties used by TMPA unit trains are less than the total properties within the valuation section; and
- h. The annual total gross ton-miles of cars and contents and the annual total gross ton-miles of locomotives and cabooses for each year 1997 through 1999 for each valuation section identified in response to (a) above.

BNSF RESPONSE: BNSF objects to this Request on grounds that it is overbroad and unduly burdensome to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested. Subject to these objections, BNSF will produce or make available responsive data, in the format in which such data is available, or other materials from which responsive information may be derived, to the extent such data and other materials are reasonably available.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March, 2002, I served a copy of the THIRD MOTION OF PUBLIC SERVICE COMPANY OF COLORADO D/B/A/ XCEL ENERGY TO COMPEL DISCOVERY AND FOR SANCTIONS by Hand Delivery to counsel for Defendant at the following address:

Samuel M. Sipe, Jr., Esq.
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Aimee DePew