

BEFORE
THE SURFACE TRANSPORTATION BOARD



OTTER TAIL POWER COMPANY,

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

Defendant.

Docket No. NOR 42071

ENTERED
Office of the Secretary

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COMPLAINANT'S
FIRST MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Complainant, Otter Tail Power Company ("Otter Tail") hereby moves for an order compelling Defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF"), to produce information sought in "Complainant's First Set of Interrogatories and Requests for Production of Documents" and in Complainant's "Third Set of Requests for Production of Documents," which were served on January 17, 2002 and on March 8, 2002, respectively. Otter Tail's Motion addresses two specific areas of discovery. First, this Motion asks the Board to order BNSF to respond to certain discovery on road property investment and depreciation costs, which is covered by Requests for Production ("RFP") Nos. 12, 13, 14, 109, 110 and 112. Second, this Motion asks the Board to order BNSF to respond to RFP-47, which encompasses forecasts of revenue and traffic volumes. Copies of these Requests and BNSF's responses and objections are attached hereto as Exhibits "A" and "B."

This Motion is supported by the Verified Statement of Joseph J. Plaistow ("Plaistow V.S."), a Vice President of L.E. Peabody & Associates, Inc. and a former employee of BNSF for

15 years. Mr. Plaistow explains the critical importance of road property investment information to accurately develop variable cost of providing rail service; states how Otter Tail intends to use that information in this proceeding; and describes how BNSF's refusal to provide this information will substantially impair Otter Tail's case. Mr. Plaistow's Verified Statement is attached as Exhibit "C."

I. BACKGROUND

Otter Tail filed its Complaint on January 2, 2002. The Complaint alleges that BNSF's common carrier rates for unit train transportation of coal from various mines in the Powder River Basin to Otter Tail's Big Stone Generating Station, located near Milbank, South Dakota ("Otter Tail movement"), are unreasonably high and therefore unlawful.

On January 17, 2002, shortly after filing its Complaint, Otter Tail served "Complainant's First Set of Interrogatories and Requests for Production of Documents." In RFP Nos. 12, 13 and 14, Otter Tail requested standard information on road property investment and depreciation. This information, which is routinely sought in stand-alone rate cases, will enable Otter Tail to calculate movement-specific variable costs. In RFP-47, Otter Tail requested forecasts or projections of future traffic volumes and revenues for both coal and non-coal traffic in the Stand-Alone Railroad ("SARR") states and along the Otter Tail route.

BNSF served its responses and objections to Otter Tail's first discovery requests on February 19, 2002. See Exhibit "A." In response to RFP Nos. 12, 13, and 14, requesting line-specific road property investment and depreciation, BNSF asserted the following identical objections:

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 on grounds that the data maintained by BNSF would not be relevant to or consistent with URCS-based calculation of variable costs.

[emphasis added] The first sentence simply is a rote objection that BNSF asserted in response to virtually every Otter Tail document request, including those to which BNSF responded that it will produce documents. For RFP Nos. 12, 13 and 14, however, BNSF has refused to produce any documents for the reason stated in the underlined text.

On March 8, 2002, in an attempt to address BNSF's objections to RFP Nos. 12, 13, and 14, Otter Tail served additional road property investment and depreciation discovery requests in its third set of discovery requests to BNSF. Those requests included RFP Nos. 109, 110 and 112.¹ Nevertheless, BNSF repeated verbatim the same objections it asserted to RFP Nos. 12, 13, and 14 and added objections to specific subparts.² See Exhibit "B." Though BNSF indicated that it would provide Otter Tail with a more detailed written explanation of its objection, it has not done so.

In response to RFP-47, on projections and forecasts, BNSF asserted a series of confusing and convoluted objections without clearly stating whether it would produce any documents and, if so, what types of documents. In subsequent discussions between the parties, BNSF clarified that the following sentence from its objections defines the scope of what BNSF is willing to produce:

BNSF further objects to this Request to the extent it seeks any projections or forecasts other than BNSF's official traffic volume and revenue projections.

¹ Otter Tail believes that the information requested in RFP Nos. 109, 110 and 112 also are encompassed by RFP-12. Nevertheless, Otter Tail served the more narrowly tailored RFP Nos. 109, 110 and 112 in order to avoid any dispute over this fact.

² Although BNSF responded that it would produce documents in response to RFP-112, its willingness to do so is subject to its objection that "the data maintained by BNSF would not be relevant to or consistent with URCS-based calculation of variable costs." Because Otter Tail is unsure what, if anything, BNSF will produce in light of that objection, this Motion to Compel encompasses RFP-112.

[emphasis added] BNSF subsequently explained that its “official” forecasts consist of selected 2-3 year projections. Although BNSF has not denied the existence of longer term forecasts, it has classified those forecasts as “unofficial” and thus beyond the scope of what BNSF is willing to produce. BNSF has not explained its criteria for distinguishing “official” from “unofficial” forecasts, which remains unclear.

BNSF has made plain that it will not produce to Otter Tail the vast majority of the information requested on road property investment and depreciation or on traffic volume and revenue projections. Because this information is critical to Otter Tail’s calculation of variable costs (and investment) and its calculation of stand-alone costs (forecasts), Otter Tail has filed this Motion to Compel.

II. ARGUMENT

Since the Interstate Commerce Commission (“ICC”) adopted Constrained Market Pricing (“CMP”) in Coal Rate Guidelines, Nationwide, 5 I.C.C. 2d 520 (1985), both the ICC and the Board have recognized the need for broad discovery by shippers and have granted such discovery. In Coal Rate Guidelines at 548, the ICC stated “We recognize that shippers may require substantial discovery to litigate a case under CMP, and we are prepared to make that discovery available to them.” The Board’s Rules of Practice promote this policy by permitting “discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding . . .” 49 C.F.R. § 1114.21(a).

The information that Otter Tail seeks from BNSF through this Motion to Compel is well within the broad scope of discovery in rate reasonableness proceedings. Moreover, this information is essential to Otter Tail’s ability to calculate variable costs and stand-alone costs. In the following sections, Otter Tail demonstrates its real and practical need for discovery of

BNSF's (1) road property investment and depreciation costs and (2) revenue and traffic volume forecasts.

A. Road Property Investment and Depreciation Costs.

1. Otter Tail has a real and practical need to discover BNSF's road property investment and depreciation costs.

The relevance of road property investment and depreciation cost data to variable cost calculations is unquestioned because the information is needed to make line-specific adjustments to system average costs. The Board repeatedly has recognized that “[b]ecause a carrier’s systemwide average costs are not necessarily representative of the costs of providing a particular service, [], appropriate adjustments are made in individual rate cases to determine as nearly as possible the costs attributable to providing the service at issue.” Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Ry. Co., STB Docket No. 42038, 2000 STB Lexis 126, at *6 (served Mar. 6, 2000); see also West Texas Utils. v. Burlington Northern R.R., 1 S.T.B. 638, 717 (1996); Arizona Pub. Serv. Co. & Pacificorp v. The Atchison, Topeka and Santa Fe Ry. Co., STB Docket No. 41185, 1997 STB Lexis 169 (served July 29, 1997). The Board has concluded that such adjustments are particularly appropriate “to reflect the economies and efficiencies that are associated with high-volume, repetitive movements such as . . . unit train service.” Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co., STB Docket No. 42056, 2001 STB Lexis 125, at *6 (served Feb. 9, 2001) (“TMPA”); see also, PPL Montana, LLC v. The Burlington Northern and Santa Fe Ry. Co., STB Docket No. 42054, 2000 STB Lexis 657, at *5 and n.8 (served Nov. 9, 2000); FMC Wyoming Corp. v. Union Pac. R.R. Co., STB Docket No. 42022, 2000 STB Lexis 269, at *89 (served May 12, 2000) (“FMC”).

Otter Tail’s discovery requests seek line-specific valuation data that will enable Otter Tail to make appropriate adjustments to BNSF’s system average road property investment and

depreciation costs. In Iowa Pub. Serv. Co. v. Burlington Northern R.R. Co., No. 37029, 1985 ICC Lexis 542, at *8-9 (March 11, 1985) (“IPS”), the ICC held that

Line-specific valuation data are necessary to determine a railroad’s investment base, the consideration of which is dispensable [sic] to any analysis of its cost of doing business. An inability to gain access to such data would substantially impair a rate complainant’s opportunity to develop its case before the Commission. Thus, the information is clearly relevant.

[emphasis added] The ICC ordered BN to produce the same type of information that Otter Tail has requested in RFP-12. Moreover, the ICC considered the information so important that it required BN to perform a special study, if necessary, or to allow IPS to conduct its own study using BN’s records. Id.; see also Platte River Power Authority v. Burlington Northern R.R. Co., No. 39687, slip op. at 2 (served Oct. 3, 1984).

Without discovery of BNSF on road property investment and depreciation costs, Otter Tail will be forced to rely upon system average costs, which almost certainly will overstate BNSF’s variable costs for the Otter Tail movement. The Board recognizes that such an overstatement of variable costs, by not making a proper adjustment to system average 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 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.” TMPA at *10, note 10.

Otter Tail Witness Plaistow describes the impact that reliance on system average road property investment and depreciation costs would have had on past rate cases absent discovery of the railroad. Plaistow V.S. at 8-9. For example, in West Texas Utilities, the line specific road property depreciation was 74.6% of system average and the return on road property was 45.0% of system average. Id. at 8. At the jurisdictional threshold, the difference equaled \$1.28 per ton,

which amounts to \$2.6 million per year on West Texas' 2 million ton annual coal movement. Id. Otter Tail almost certainly would suffer a similar adverse impact without discovery of BNSF sufficient to enable Otter Tail to make appropriate movement-specific adjustments to system average costs. Clearly, BNSF's goal is to force such a result in this case and all future rate cases.

2. Otter Tail's discovery requests are reasonably tailored to permit movement-specific adjustments to BNSF's system average road property investment and depreciation costs.

Otter Tail's discovery requests on road property investment and depreciation costs are intended to permit Otter Tail to make the same kinds of adjustments to BNSF's system average data that have been made by both shippers and railroads, including BNSF's predecessors, and accepted by the Board for over fifteen years. Specifically, in order to calculate movement-specific variable costs, Otter Tail intends to determine road property investment and depreciation costs for the specific line segments traversed by Otter Tail trains based on BNSF's valuation records obtained through discovery. This is the same approach approved by the Board in other recent rate cases, including FMC Wyoming Corp. v. Union Pacific Railroad Co., STB Docket No. 42022, 2000 STB Lexis 269 (served May 12, 2000), and that BNSF itself used with Board approval in West Texas Utilities Co. v. Burlington Northern R.R., 1 S.T.B. 638, 724 (1996); see also San Antonio, Texas v. Burlington Northern R.R., 1 I.C.C. 2d 561 (1986); Omaha Pub. Power Dist. v. Burlington Northern R.R., 3 I.C.C. 2d 123 (1986), aff'd, 3 I.C.C. 2d 853 (1987).

As described by Otter Tail Witness Plaistow, Otter Tail intends to include all URCS road investments in its road depreciation and return on road costs. Otter Tail will accomplish this by dividing URCS road investments into two categories: (1) road investments that receive a line-specific adjustment, and (2) road investment that will remain in Otter Tail's costs on a system average basis. Plaistow V.S. at 5. In the first category, Otter Tail will calculate return on road property investment and annual depreciation expenses attributable to the Otter Tail movement

using BNSF's recorded line segment-specific investment and depreciation data by valuation section, which Otter Tail has requested in RFP Nos. 12, 13, and 14. Otter Tail also will use the information from these requests and RFP Nos. 109, 110 and 112 to determine what portion of non-line-specific road investment should be included in Otter Tail's movement costs on a system average basis.

What little explanation BNSF has provided to Otter Tail as the basis for its objection that "the data maintained by BNSF would not be relevant to or consistent with URCS-based calculation of variable costs" appears to be premised on an assertion that the line-specific data does not add up to the total road property investment in BNSF's Annual Report Form R-1. As a result, BNSF concludes that its own data is inconsistent with URCS. But, as Otter Tail Witness Plaistow explains, this assertion is nonsense, because BNSF cannot keep two sets of books on road property. Plaistow V.S. at 11. The data that is recorded on BNSF's line-specific records on road property must be the same information that was used as inputs to total the road property figures recorded on BNSF's R-1.³

It appears that BNSF is claiming that some, but not all, of its road property investment and depreciation costs are recorded on a line-specific basis, and that the failure to record 100% of these costs by line segment renders the line-specific cost elements inconsistent with URCS. This argument appears to be tied to the Board's recent decision in Wisconsin Power and Light Co. v. Union Pacific R.R. Co., STB Docket No. 42051, 2001 STB Lexis 740 (served Sept. 12, 2001) ("WPL"), where the Board declined to accept either party's line-specific adjustments to road property investment and depreciation costs and, instead, defaulted to system average costs. The Board used system average costs as the best evidence of record in that case because neither

³ The Board has ruled that, even if a particular costing procedure or formula is not discoverable because it is inconsistent with URCS, the data inputs are relevant and discoverable. Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Ry. Co., STB Docket No. 42038, 1999 STB Lexis 244, at *21-22 (served May 11, 1999).

of the adjustments proposed by WPL or UP accounted for unassigned costs. Id., at *84-86. But, the Board did not state, as BNSF seems to believe, that the existence of unallocated road investment and depreciation costs renders the data unreliable and requires the Board to “default” to system average. In fact, Otter Tail has formulated its discovery requests to address the WPL concerns by eliciting information that will allow Otter Tail to make line-specific adjustments that will account for all road property costs, both assigned and unassigned, that are used by the Otter Tail traffic. Plaistow V.S. at 10, 12, 13.

Specifically, there are methods by which the parties can determine whether certain unassigned or shared system costs could be assigned to the Otter Tail movement. For example, BNSF’s unallocated costs may fall within the following three categories: (1) costs that ultimately will be, but have not yet been, allocated due to a time lag between the recording of costs on BNSF’s books and the allocation of those costs to specific line segments; (2) costs attributable to write-ups of assets as a result of the merger of The Burlington Northern Railroad Company with The Atchison, Topeka & Santa Fe Railway.; and (3) shared system costs that typically are not allocated to specific line segments. Otter Tail intends to address the first category through RFP-110, which would provide Otter Tail with the same information that BNSF eventually would use to allocate the investment among specific line segments. Otter Tail intends to address the second category through RFP Nos. 13 and 14, which attempt to identify merger-related write-ups.⁴ Finally, through RFP-109, Otter Tail attempts to identify the third category of unallocated costs, so that Otter Tail can evaluate and assign those costs that are used,

⁴ This reference to merger-related write-ups should not be confused with the argument rejected by the Board in FMC, at *11-12 and note 7, that UP should have used book value, rather than the acquisition value, for assets acquired from other railroads. In FMC, the Complainant attempted to exclude the acquisition premium paid for lines over which the issue-traffic moved. In this proceeding, since the Otter Tail movement does not traverse any former ATSF line, there is no basis to attribute any portion of the ATSF write-up of road property assets to the Otter Tail line segments.

in part, by the Otter Tail traffic. By including all URCS-related road investments in its road depreciation and return on road costs, both assigned and unassigned, Otter Tail would address both BNSF's relevance objection and the deficiencies that the Board found in the WPL parties' adjustments to system average costs.

BNSF, however, would deny Otter Tail the discovery that it needs to make these line-specific adjustments to system average road property investment and depreciation costs. If, after seeing Otter Tail's evidence and argument, BNSF still believes that the data used and/or adjustments made by Otter Tail are inconsistent with URCS, it can make that argument in its evidentiary submission. For now, BNSF should produce (1) the line-specific information that it maintains in the ordinary course of business, and (2) the non-line specific information for all other investments. The Board then will select the best evidence of record after both parties have made fully documented evidentiary submissions.

3. BNSF's objections go to the probative weight of the data, not to its discoverability.

The Board may easily dispense with BNSF's objections to Otter Tail's road property investment and depreciation discovery requests because BNSF's objections go to the probative weight of the evidence, not its discoverability. At the heart of BNSF's refusal to produce any information is its objection "on grounds that the data maintained by BNSF would not be relevant to or consistent with URCS-based calculation of variable costs." But, as demonstrated in the preceding section, the requested information is the same information that both the Board and BNSF have used to make movement-specific adjustments to road property investment and depreciation costs in numerous prior proceedings. Therefore, the relevance of this information has been long-established.

BNSF's objection does not provide Otter Tail or the Board with any explanation as to why the requested information no longer is consistent with URCS. Rather, Otter Tail is expected to accept BNSF's conclusion without question or any opportunity to make its own assessment. In fact, BNSF's refusal to produce responsive material denies Otter Tail access to the very data that is necessary either to verify or refute the accuracy of BNSF's conclusory objection. More importantly, the objection usurps the Board's responsibility to make that determination for itself based on the evidence and arguments presented by the parties.

BNSF's only explanation of its objection, which was provided orally to Otter Tail's counsel, is that the line valuation data is "unreliable" because it does not correspond with BNSF's R-1 totals.⁵ But, as previously demonstrated in Part II.A.2, supra, even if true, this assertion does not render the data inconsistent with URCS. Moreover, numerous ICC and STB decisions uniformly hold that the alleged unreliability of data is not grounds for withholding that data from discovery.

For example, in IPS, 1985 ICC Lexis 542, IPS sought to compel BN to produce system track information to calculate maintenance of way costs using the "Speed Factored Gross Ton" formula that the ICC had approved in prior cases. BN asserted a relevance objection based upon the reliability of the data. In ordering BN to produce the data, the ICC held:

BN's objection to the production of its track data goes to the probative weight that the information may have and not to its relevance. Although BN and IPS each cite conflicting initial decisions by [ALJs] to support their positions regarding the validity of the SFGT formula in determining maintenance-of-way costs, BN does not deny that such costs are a significant portion of a railroad's variable costs or that expenditures for maintenance-of-way are relevant in this proceeding. Thus, we cannot find that discovery would not lead to introduction of relevant evidence.

⁵ BNSF provided this explanation at a discovery conference held on March 7, 2002. BNSF also indicated that it would provide Otter Tail with a more detailed written explanation of BNSF's objections, but it has not done so.

Challenges to the reliability of the data are more properly raised if or when the data are offered in evidence.

Id. at *6-7 [emphasis added].

Similarly, in The Kansas Power & Light Co. v. Burlington Northern R.R., No. 39386, 1984 ICC Lexis 423 (June 22, 1984), the ICC ordered BN to produce its computerized accounts system, which was designed to provide expenditures for maintenance-of-way and structures over BN line segments. BN argued that “this system is unaudited, not fully developed, and not used or relied upon by BN personnel for any purpose.” Id. at *6. In overruling BN’s objections, the ICC determined that:

Data pertaining to MOW is relevant in determining the cost of service. Relevance, and not probative weight, is the test for determining the discoverability of information. 49 C.F.R. 1114.21(a)(1). Moreover, information is discoverable if it is “reasonably calculated to lead to the discovery of admissible evidence.” 49 C.F.R. 1114.21(a)(2). The weight to be accorded to this information may be determined subsequently.

Id. [emphasis added]. See also Utility Fuels, Inc. v. Burlington Northern R.R., No. 39002, 1984 ICC Lexis 407, at *9 (June 29, 1984), in which the ICC concluded that “BN’s arguments that it should not be required to produce the documents because they consist of either simulations or isolated test results, all of which are out of date, go to their substantive or probative weight and not to their admissibility or relevance.”

Finally, in Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Railway Co., STB Docket No. 42038, 1999 STB Lexis 244 (served May 11, 1999), the Board overruled DMIR’s objections to producing line-specific joint facility cost calculations:

DMIR contends that such documents are not relevant because they rely on derived, not actual, gross tons or mileages. Nevertheless, MPI avers that it cannot calculate line-specific joint facility costs without the missing items. Accordingly, MPI’s motion to compel ... will be granted. DMIR is free to challenge the probative value of the derived data in the evidentiary phase of this proceeding.

Id. at *18 [emphasis added].

In each of the cases discussed above, the railroads' objections closely resemble BNSF's objections to producing road property investment and depreciation cost data in this proceeding. Just like the costs in those cases, road property investment and depreciation costs are a significant component of variable costs and thus are relevant to this proceeding. BNSF has not contended otherwise. Rather, BNSF has challenged the reliability of its data by challenging its consistency with URCS-based variable cost calculations. That, however, does not render the data irrelevant, as BNSF alleges in its objection. At the very least, the data is discoverable because it is "reasonably calculated to lead to the discovery of admissible evidence." 49 C.F.R. § 1114.21(a)(2).

BNSF's objections to the reliability of its data go to the data's probative weight, not its relevance. Such arguments, as the above-cited cases make abundantly clear, are more properly raised if or when Otter Tail offers the data in evidence. Otherwise, Otter Tail "may be deprived of a meaningful opportunity to prepare and file its opening evidentiary statement, since it has not yet reviewed the material." Utility Fuels, Inc. at *10.

4. The Board should overrule BNSF's objections for lack of specificity.

BNSF's failure to adequately explain its objections, in and of itself, provides an adequate basis to overrule its objections. BNSF's response to RFP Nos. 12, 13, 14, 109, 110 and 112 each contain the following identical language:⁶

⁶ BNSF adds further objections to specific subparts in RFP Nos. 109 and 110. In RFP-109, BNSF appears to be playing word games. It states that the depreciation data requested in subparts (b)-(e) is not available in the database that includes some of the Otter Tail line segment investment data. This response suggests that the data does exist in another database, but BNSF does not agree to produce that database even though it also would be responsive to RFP-12. BNSF objects to subpart (f) because the data requested has not been allocated to a specific line segment. But, Otter Tail has requested the data precisely because it is unallocated, so that it may evaluate whether any portion does in fact relate to the Otter Tail line segments.

(footnote cont'd on page 14)

BNSF objects to this Request to the extent that it is overly broad and unduly burdensome, that 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 on grounds that the data maintained by BNSF would not be relevant to or consistent with URCS-based calculation of variable costs.

These objections do not even assert that a request actually is overly broad or unduly burdensome, whether the information is maintained by BNSF in the normal course of business, whether the information is maintained in the format requested, or whether a special study would be required. As a consequence, Otter Tail cannot determine whether, or even how, to address these objections in this Motion to Compel. Also, as previously discussed in this Motion, BNSF has provided very little explanation of its objection “on grounds that the data maintained by BNSF would not be relevant to or consistent with URCS-based calculation of variable costs.”

The rules governing discovery in STB proceedings are modeled on the discovery rules contained in the Federal Rules of Civil Procedure and the STB frequently has looked to judicial interpretations of those rules for guidance. E.g., Potomac Elec. Power Co. v. CSX Transp., Inc., STB Docket No. 41989, 1997 STB Lexis 121, at *2 and n.5 (1997) (“Our discovery rules ... follow generally those in the Federal Rules of Civil Procedure.”); Arizona Electric Power Coop., Inc. v. The Atchison, Topeka, and Santa Fe Ry. Co., No. 37437, 1986 ICC Lexis 104, at *31 (Oct. 16, 1986) (referring to Fed. R. Civ. P. 26(b)(4) to determine application of the work-product doctrine); Westinghouse Elec. Corp. v. The Alton & Southern Ry., 1 I.C.C. 2d 182, 185-86 (1984). Under the Federal Rules, “The resisting party must make a particular and specific demonstration of fact and cannot rely on simple conclusory assertions about the difficulty of

In RFP-110, BNSF objects to subpart (e) “on the ground that BNSF does not maintain data at the level of detail that would permit BNSF to respond to this Request.” BNSF proceeds to state, however, that it will allocate these investments to particular accounts “at some point in time.” Otter Tail simply asks that BNSF produce the same information that it will rely upon to make this future allocation, so that Otter Tail can make that allocation itself.

complying with a discovery request.” Coker v. Duke & Co., 177 F.R.D. 682, 686 (M.D. Ala. 1998); see also McLeod, Alexander, Powel, and Apffel v. Quarles, 894 F.2d 1482, 1485 (5th Cir. 1990) (boilerplate objections to document requests as “overly broad, burdensome, and oppressive” are insufficient); Swift v. First USA Bank, No. 98 C 8238, 1999 U.S. Dist. Lexis 19474, at *18 (N.D. Ill. 1999) (failure to cite a basis for boilerplate objections violates the Federal Rules’ requirement to specifically state the grounds and legal basis for each objection). Accordingly, under the Federal standard, the Board must reject BNSF’s “litany” objections as legitimate bases for refusing Otter Tail’s document requests.

The second part of BNSF’s objection fails for the same reason. BNSF objects on the unexplained grounds that “the data maintained by BNSF would not be relevant to or consistent with URCS-based calculation of variable cost.” BNSF’s assertion is nothing more than an impermissible, conclusory allegation. As such, it fails to supply a valid basis for BNSF’s refusal to produce responsive documents. See Burns v. Imagine Films Entertainment, Inc., 164 F.R.D. 589, 593 (W.D.N.Y. 1996) (“Defendants did not meet their burden under Rule 33(a) of making a specific showing of reasons why the interrogatories should not be answered or documents not produced where they merely made conclusory objections.”). Accordingly, the Board should order BNSF to produce documents responsive to Otter Tail’s road property investment and depreciation discovery requests.

A very practical reason for requiring objections to be raised with specificity is the need to have sufficient information upon which to base a Motion to Compel. Without an adequate explanation, the proposer of discovery often will find it difficult to prepare a Motion to Compel, particularly when, as here, the facts relied upon to support an objection are not readily apparent. In this proceeding, Otter Tail is left without any knowledge as to whether BNSF’s “litany”

objections even apply to a particular Request. In addition, Otter Tail must divine the basis for BNSF's assertion that its road property investment and depreciation data is inconsistent with URCS-based variable cost calculations. The Board must not permit BNSF to "sand-bag" Otter Tail by holding arguments until its opposition that it should have made initially, thereby depriving Otter Tail of the opportunity to address the objection in its Motion to Compel.

B. Traffic Volume and Revenue Forecasts.

RFP-47 asks BNSF to produce "all forecasts or projections prepared by or for BNSF from 1999 through the present, or in BNSF's possession, of future traffic volumes and/or revenues" for both coal and non-coal traffic that use BNSF lines in the SARR states and any portion of the BNSF lines along the Otter Tail route. Otter Tail requires this information in order to develop appropriate traffic volumes and revenues over the life of the stand-alone railroad.

BNSF has agreed only to produce its "official" traffic volume and revenue projections, which BNSF has told Otter Tail make only 2-3 year projections. BNSF does not deny the existence of other, longer term, forecasts. Nor does BNSF explain why the production of such forecasts would be overly broad, unduly burdensome, or irrelevant. BNSF also has not explained what distinguishes an "official" forecast from an "unofficial" forecast, except to issue vague utterances that it does not rely on forecasts longer than three years. Instead, BNSF makes conclusory allegations and characterizations that should be rejected on the same precedent cited in Part II.A.4., supra.

The ICC and the STB long have held the production of traffic volume and revenue forecasts to be relevant. The ICC ordered ATSF to produce such information in Arizona Electric Power Cooperative, Inc. V. The Atchison, Topeka, & Santa Fe Railway Co., No. 37437, 1986 ICC Lexis 104 (Oct. 16, 1986), finding that "[t]he requested information is integral to the stand-

alone cost constraint under 1985 Guidelines . . . where we determined that the stand-alone cost constraint is a long-term concept involving traffic projections.” Id. at *20-21, citing Ex Parte No. 347, slip op. at 30-31; see also The Kansas Power & Light Co. v. Burlington Northern R.R., No. 39386, 1984 ICC Lexis 423, at *4-5 (June 22, 1984); San Antonio, Texas v. Burlington Northern R.R., No. 36180, 1986 ICC Lexis 56, at *10 (Nov. 24, 1986) (ordering production of coal and non-coal traffic volume projections over BN claims of imprecision and unreliability).

In West Texas Utilities Co. v. Burlington Northern Railroad, 1 S.T.B. 638, 662-63 (1996), the Board found that BN’s own traffic forecasts prepared in the ordinary course of business, and not for purposes of litigation, to be persuasive evidence of traffic growth. Similarly, in McCarty Farms, Inc. v. Burlington Northern Railroad, 2 S.T.B. 460, 474 (1997), the STB declared its preference for normal business forecasts made by the carrier serving a particular market over a projection that merely assumes historical trends will continue in the future. The Board reached the same conclusion as to forecasts for both traffic volumes and revenues in FMC, at *57 and 66-67.

Because BNSF’s long-term forecasts clearly are relevant and BNSF has not supported its claims of burden and overbreadth, the Board should order BNSF to produce documents that respond fully to RFP-47.

III. CONCLUSION

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

1. Information on road property investment and depreciation that is requested in RFP Nos. 12, 13, 14, 109, 110 and 112; and
2. All traffic volume and revenue forecasts that are requested in RFP-47.

Respectfully submitted,



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Attorneys for Complainant

April 11, 2002

A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

OTTER TAIL POWER COMPANY,	)	
	)	
Complainant,	)	
	)	
v.	)	Docket No. NOR 42071
	)	
THE BURLINGTON NORTHERN AND	)	
SANTA FE RAILWAY COMPANY	)	
	)	
Defendant.	)	
	)	

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY'S RESPONSES AND OBJECTIONS TO
COMPLAINANT'S FIRST AND SECOND SET OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF DOCUMENTS AND
FIRST SET OF REQUESTS FOR ADMISSION**

Defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF"), by its attorneys Steptoe & Johnson LLP, hereby objects and responds to (1) Complainant's First Set of Interrogatories and Requests for Production of Documents, (2) Complainant's First Set of Requests for Admissions, and (3) Complainant's Second Set of Interrogatories and Requests for Production of Documents (collectively "Otter Tail's Discovery Requests").

I.

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

1. BNSF objects to Otter Tail's Discovery Requests to the extent that they are overly broad and unduly burdensome.
2. BNSF objects to Otter Tail's Discovery Requests to the extent that they seek documents that constitute or disclose confidential or proprietary information, including third party

Request for Production No. 12:

For each valuation section on the BNSF system traversed in whole or in part by the Otter Tail trains, please provide the following information for each year 1999 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, as applicable:

- 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 Otter Tail 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, accumulated depreciation, and depreciation rate 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 Otter Tail trains for each valuation section identified in response to (a) (as of December 31st for each year);
- f. Annual, accumulated depreciation, and depreciation rate by ICC/STB property account for all properties used by Otter Tail 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 1999 through 2001 traversing the entire valuation section for each valuation section identified in response to (a) above where the properties used by Otter Tail 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 1999 through 2001 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 on grounds that the data maintained by BNSF would not be relevant to or consistent with URCS-based calculation of variable costs.

Request for Production No. 13:

If the data provided in response to Request for Production No. 12 excludes or includes the write-up of investment associated with the merger of BN and ATSF, please provide the data necessary to allocate the difference between the as-paid amount and the book value to each affected ICC/STB property account of each affected valuation section.

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 on grounds that the data maintained by BNSF would not be relevant to or consistent with URCS-based calculation of variable costs.

Request for Production No. 14:

Please provide documents sufficient to show (i) the book value of the ATSF and the actual amount paid by BN for ATSF at the time of the merger between BN and ATSF, and (ii) 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 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 on grounds that the data maintained by BNSF would not be relevant to or consistent with URLS-based calculation of variable costs.

Request for Production No. 15:

Please provide copies of any lease agreements, rental agreements, or any other agreements, including all supplements and amendments, that pertain to rail lines used, but not owned, by BNSF in the SARR states. In addition, please provide copies of all billings among the parties that pertain to these agreements for the period 1999 through the present. Please include copies of

Request for Production No. 45:

Please produce all transportation contracts, including amendments and supplements thereto (or letters of understanding with appendices or attachments), and all tariffs or other documents containing common carrier rate and service terms that you entered into, agreed to or provided which govern shipments of coal (coal being identified as STCC 112) that traverse or that will traverse any portion of the BNSF owned or leased rail lines in the SARR States and that are handled by BNSF as originating, terminating, overhead or single-line carrier in any of the years 2001 and beyond.

BNSF RESPONSE: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome, seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and requires production of materials which, if produced, could result in the violation of contractual obligations to third parties.

Request for Production No. 46:

Please produce all transportation contracts, including amendments and supplements thereto (or letters of understanding with appendices or attachments), and all tariffs or other documents containing common carrier rate and service terms that you entered into, agreed to or provided which govern shipments of commodities other than coal and that are handled by BNSF as originating, terminating, overhead or single-line carrier over all or any portion of the BNSF owned or leased rail lines in the SARR States in any of the years 2001 and beyond.

BNSF RESPONSE: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome, seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and requires production of materials which, if produced, could result in the violation of contractual obligations to third parties.

Request for Production No. 47:

Please produce all forecasts or projections prepared by or for BNSF from 1999 through the present, or in BNSF's possession, of future traffic volumes and/or revenues (including any breakdowns of any such forecasts or projections whether by commodity classification, geographic region, line segment, customer or any other category) for (a) coal traffic that uses or could use any portion of the BNSF owned or leased rail lines in the SARR States; and (b) other freight traffic that uses or could use any portion of the BNSF lines comprising the Otter Tail route(s). Documents responsive to this request include, but are not limited to, traffic projections prepared in connection with engineering studies or authorization for expenditures or marketing

studies or operating studies or operating expense budgets or capital budgets or mergers with or acquisitions of other carriers. Projections or forecasts may include, but are not limited to, long range plans, short range plans, sales and marketing forecast of carloads and revenues, strategic planning budget of incomes, shareholder meeting presentations and presentations to the financial community.

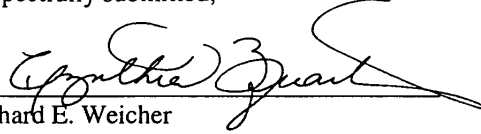
BNSF RESPONSE: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks all projections of traffic volume and/or revenues, including those prepared "in connection with engineering studies or authorization for expenditures or marketing studies or operating studies or operating expense budgets or capital budgets or mergers with or acquisitions of other carriers." BNSF further objects to this Request on grounds that is overly broad, unduly burdensome and beyond the scope of permissible discovery to the extent it requests traffic forecasts relating to traffic that "could use" BNSF lines in the SARR states. BNSF further objects to this Request to the extent it seeks any projections or forecasts other than BNSF's official traffic volume and revenue projections. BNSF also objects to this Request on grounds that it would require production of materials which, if produced, could result in the violation of contractual obligations to third parties.

Request for Production No. 48:

Please produce the following information pertaining to rail movements of all traffic in, out, and through the SARR States:

- a. For each movement of interline and overhead traffic, the revenue divisions received separately by the BNSF and the connecting railroad carrier(s) (including short-line, regional and Class I carriers).
- b. For each movement identified in 48a above, identify the commodity, the connecting railroad(s), the basis of the revenue divisions and the calculation of the revenue divisions.
- c. For each movement identified in 48b above, provide documentation that describes the methodology or convention that BNSF and the connecting rail carrier(s) followed to determine the revenue divisions.

Respectfully submitted,



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Attorneys for Defendant

February 19, 2002

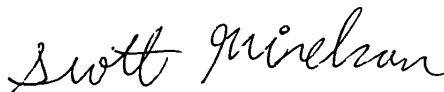
CERTIFICATE OF SERVICE

I hereby certify that this 19th day of February 2002, I served a copy of the foregoing Defendant's Responses and Objections to Complainant's First and Second Set of Interrogatories and Requests for Production of Documents and First Set of Requests for Admission to the following by first class mail, postage prepaid:

George Koeck, Esq.
General Counsel
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P.O. Box 496
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And by hand delivery to the following:

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Michael H. Higgins, Esq.
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Washington, DC 20036
(202) 331-8800



Scott M. Mirelson

B

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

OTTER TAIL POWER COMPANY,

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

Defendant.

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) Docket No. NOR 42071
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**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY'S RESPONSES AND OBJECTIONS TO
COMPLAINANT'S THIRD SET OF REQUESTS FOR PRODUCTION OF
DOCUMENTS**

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

I.

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

BNSF incorporates by reference its general objections to definitions and instructions set forth in BNSF's Responses and Objections to Complainant's First and Second Set of Interrogatories and Requests for Production of Documents and First Set of Requests for Admission served on February 19, 2002.

II.

RESPONSES

Subject to the General Objections and Objections to Definitions and Instructions incorporated herein, BNSF responds to Otter Tail's Discovery Requests as follows:

DOCUMENT PRODUCTION REQUESTS

Request for Production No. 109:

If BNSF has any road property investments not allocated to a specific line segment, but included in the same database that includes the Otter Tail line segment investment data, please produce documents, in a computer readable format to the extent available, which provide the following information for those investments by ICC/STB account number for the years 1999, 2000, and 2001:

- a. Road property investment;
- b. Annual depreciation;
- c. Accumulated depreciation;
- d. Depreciation method;
- e. Annual depreciation rate; and
- f. Any information indicating that these investments relate, in any way, to the Otter Tail line segments.

BNSF RESPONSE: BNSF objects to this Request to the extent that it is overly broad and unduly burdensome, that 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 on grounds that the data maintained by BNSF would not be relevant to or consistent with URCS-based calculation of variable costs. As to subparts (b)-(e), BNSF states that depreciation data are not available in the database referred to here that includes some of the Otter Tail line segment investment data. BNSF further objects to subpart (f) on the ground that the

data being sought by definition are investments that have not been allocated to a specific line segment. BNSf states, however, that most of those unallocated investments are associated with purchasing ballast, some of which was probably used on line segments over which Otter Tail's traffic moves. As to subpart (a), subject to these objections, BNSF will produce or make available responsive data, in the format in which such data are 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. 110:

If BSNF has made investments in road property that have not been "pushed down" to individual valuation sections, please produce documents, in a computer readable format to the extent available, which provide the following information for those investments by ICC/STB account number for the years 1999, 2000, and 2001:

- a. Road property investment;
- b. Annual depreciation;
- c. Depreciation method;
- d. Annual depreciation rate;
- e. Any information indicating that these investments relate, in any way, to the Otter Tail line segments; and
- f. If the depreciation method is group depreciation, please produce documents, in a computer readable format to the extent available, which provide the cumulative impact by ICC/STB account of individual gains (and, separately losses) absorbed in accumulated depreciation at the time that each group was last analyzed and adjusted for gains (and, separately, losses) realized upon retirement plus the year for which this analysis and adjustment was last carried out.

BNSF RESPONSE: BNSF objects to this Request to the extent that it is overly broad and unduly burdensome, that 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 on grounds that the data maintained by BNSF would not be relevant to or consistent with URCS-based calculation of variable costs. BNSF further objects to subpart (e) on the ground that BNSF does not maintain data at the level of detail that would permit BNSF to respond to this Request. BNSF states, however, that at some point in time these investments will be allocated to particular accounts and in all likelihood some of these investments will be allocated to line segments serving Otter Tail. As to subparts (a)-(d) and (f), subject to these objections, BNSF will produce or make available responsive data, in the format in which such data are 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. 111:

For any road property investments that have been allocated to the Otter Tail line segments, please produce documents, in a computer readable format to the extent available, which provide the following information by ICC/STB account number for the years 1999, 2000, and 2001:

- a. Depreciation method; and
- b. Annual depreciation rate.

BNSF RESPONSE: As to subpart (a), BNSF states that for purposes of the R-1 all road property investments are depreciated using group depreciation. As to subpart (b), BNSF states that annual depreciation rates are set out in its R-1. Accumulated depreciation based on group depreciation accounting does not exist for the specific assets used in Otter Tail service.

Request for Production No. 112:

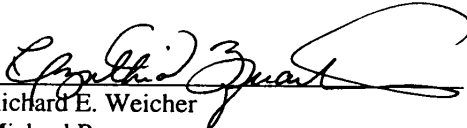
If the depreciation method used to depreciate the Otter Tail line segment investments is group depreciation, please produce by line segment and ICC/STB account:

- a. The cumulative impact of individual gains (and, separately, losses) absorbed in accumulated depreciation at the time that each group was last analyzed and adjusted for gains (and, separately, losses) realized upon retirement;
- b. The year for which this analysis and adjustment was last carried out; and
- c. If this information is only maintained for a category including all line segments, not just the Otter Tail line segments, please provide the entire category of investments.

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 on grounds that the data maintained by BNSF would not be relevant to or consistent with URCS-based calculation of variable costs. BNSF further states that the data sought in this Request are not available on a line segment specific basis. Subject to these objections, BNSF will produce or make available responsive data, in the format in which such data are available, or other materials from which responsive information may be derived, to the extent such data and other materials are reasonably available.

a special study to compile or to report in the format requested. BNSF further objects to this Request to the extent it seeks information relating to all locomotives in BNSF's fleet. Subject to these objections, BNSF will produce or make available responsive documents or data, in the format in which such data are available, or other materials from which responsive information may be derived, to the extent that such documents, data or other materials are reasonably available and relate to locomotives that are relevant to this proceeding.

Respectfully submitted,


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Attorneys for Defendant

March 28, 2002

CERTIFICATE OF SERVICE

I hereby certify that this 28th day of March 2002, I served a copy of the foregoing
BNSF's Responses and Objections to Complainant's Third Set of Requests for Production of
Documents to the following by first class mail, postage prepaid:

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Fergus Falls, MN 56538-0496

And by hand delivery to the following:

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Cynthia L. Quarterman

C

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

OTTER TAIL POWER COMPANY)

Complainant,)

v.)

THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY)

Defendant.)

Docket No. NOR 42071

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 graduated in 1967 from Michigan Technological University with a Bachelor of Science Degree in Metallurgical Engineering. In 1972 I graduated from the University of Minnesota with a Masters Degree in Business Administration.

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. In 1987 and 1988, I was Vice President, FMI, Inc where I was responsible for managing the efficient operation of refrigerated boxcars. In 1988, I joined Snavelly King & Associates, an economic consulting

firm that provides services to clients on railroad matters. In 1998, I became a Vice President of L.E. Peabody & Associates, Inc.

I am a Past President of the Washington Chapter of the Transportation Research Forum. I am also the national Secretary of the Cost Analysis Chapter of the Transportation Research Forum.

In 1976, I was admitted to practice before the Interstate Commerce Commission ("ICC") as a non-attorney practitioner. I am a member of the Association for Transportation Law, Logistics and Policy. I am familiar with practices and procedures before the ICC and its successor the Surface Transportation Board ("STB"). I have testified before the STB and the ICC many times on cost and economic issues. Throughout my 30-year career in transportation, I have studied the economics of providing transportation services by private and public transportation companies.

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 Otter Tail to address BNSF's recent refusal in this proceeding to produce movement-specific road property investment data to Otter Tail. According to Otter Tail, BNSF has stated its reason for this position to be that the movement-specific data it keeps is not useful for the purpose for which Otter Tail 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 Otter Tail has no validity and that it would significantly affect Otter Tail's ability to accurately determine the economics associated with BNSF's provision of coal unit train service to Otter Tail's Big Stone Generating Station ("Big Stone") near Milbank, SD. 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 Significance of Line-Specific Road Capital Costing to Otter Tail;
- D. The Evidentiary Anomalies That Led to the Board's Decision in *Wisconsin*¹ Are Not Present in This Case; and
- E. 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) (*Evidence*)², 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 system average cost evidence or the expectation expressed in *Coal Rate Guidelines* that shippers such as Otter Tail will receive timely and adequate discovery of the information needed to present a case under Constrained Market Pricing ("CMP"). *Coal Rate Guidelines*, 1 I.C.C. 2d at 548.

¹ STB Docket No. 42051, *Wisconsin Power and Light Company v Union Pacific Railroad Company* ("Wisconsin"), slip opinion served September 13, 2001.

²See *Evidence*, decided March 12, 2001.

In its decision in Ex Parte No. 431 (Sub-No. 1) *Adoption of the Uniform Railroad Costing System As A General Purpose Costing System For All Regulatory Costing Purposes* ("Adoption of URCS" 894, 5 ICC 2d), the ICC established the principles for the post-Rail Form A era by stating that URCS was:

"...not intended to foreclose the use of demonstrably superior cost estimating procedures in those situations where the Commission has traditionally accepted alternative evidence. For example, in situations where engineering analysis has produced demonstrably better maintenance costs for specified movements in the rate reasonableness phase of a maximum rate case, the Commission has preferred the engineering analysis over the RFA-produced estimates. The Commission intends, in such situations, to continue to rely on whichever estimating process produces the best evidence of record." (See 898 5 ICC 2d, *Adoption of URCS*)

The *Adoption of URCS* proceeding embraced linear cost functions as the basis for determining system average unit costs, but it encouraged movement-specific adjustments replacing the general purpose system average costs whenever a party could show the superiority of such movement- or line-specific costs.³ Both shippers and railroads (including Burlington Northern and the Atchison Topeka and the Santa Fe - - BNSF's predecessors) supported the acceptance of movement-specific costs when a party is able to demonstrate the superiority of such costs.⁴

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 Otter Tail 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

³See *Adoption of URCS*, pages 894 and 904.

⁴Comments of Association of American Railroads, March 20, 1989, page 33, in Ex Parte No. 431 (Sub-No. 1).

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-Big Stone Station coal line in particular. 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. There is no justification for failure to reflect these economies of scale.

In conformance with the Board's preference for movement-specific variable costs, Otter Tail intends to calculate Road Capital Costs for the specific line segments traversed by Otter Tail trains based on BNSF's valuation records. Otter Tail proposes to include all URCS road investments in its Road Depreciation and Return on Road costs. Otter Tail'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 Otter Tail's costs on a system average basis.⁵

For the Adjusted Road Capital Costs portion, Otter Tail will calculate return on road property investment and depreciation expenses attributable to the Big Stone Station coal movements using BNSF's recorded line segment-specific gross investment and depreciation data by valuation section, which Otter Tail has requested be provided in response to Otter

⁵The 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, 37 Roadway Machines and 39 Public Improvements. All other road property accounts will be included in Otter Tail's line-specific Road Capital Costs in the overheads allocated to the Otter Tail movement.

Tail's discovery requests.⁶ This is the same approach approved by the Board in other recent rate cases, including *FMC*⁷, and that BNSF used (and the Board approved) in *West Texas Utilities*.⁸

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 Otter Tail contradicts the position that BNSF took on numerous occasions in the past, most notably in *West Texas Utilities*, *San Antonio*, and *OPPD*, where BNSF (and the Board) relied on the same type of line segment-specific Adjusted Road Capital Costs that Otter Tail proposes to submit in this proceeding, in lieu of system averages.

The *West Texas Utilities* proceeding involved BNSF unit train coal service from the Powder River Basin to Texas. In *West Texas Utilities*, BNSF was faced with evidence submitted by the complainant which showed, as Otter Tail would expect to show in this proceeding, that Adjusted Road Capital Costs for the rail lines traversed by the West Texas Utilities' trains were substantially lower than system average. BNSF responded with line segment-specific Adjusted Road Capital Costs based on the same type of information that Otter Tail 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

⁶See Otter Tail RFP's 12, 13, 14, and 109-112.

⁷ STB Docket No. 42022, *FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company* ("*FMC*"), slip opinion, served May 12, 2000.

⁸See *West Texas Utilities*, slip opinion, served May 3, 1996, page 82.

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.”⁹

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 a 50% URCS variability factor. BNSF’s line-specific analysis 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 Otter Tail 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 Otter Tail the line segment-specific road property investment and depreciation information needed to properly determine Big Stone movement-specific 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 Otter Tail 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 Otter Tail’s right to a fairly determined maximum reasonable rate.

⁹*West Texas Utilities*, 1 S.T.B. at 724.

C. The Significance of Line-Specific Road Property Capital Costing to Otter Tail

With access to the BNSF road property investment information sought in this motion to compel, I expect to demonstrate that Road Capital Costs associated with the Otter Tail route are significantly below system average. That has been the case in many previous maximum rate proceedings. Unfortunately, most of the STB's maximum rate decisions do not disclose the results of road capital costing in sufficient detail to support my conclusion with publicly available information. The *West Texas Utilities* and *FMC* decisions, however, did report sufficient detail. The *West Texas Utilities* decision allows me to support my conclusion both as to return on road property investment and annual road property depreciation expense. (Recall from the previous Section B, above, that in *West Texas Utilities*, the Board relied upon BNSF cost witnesses Klick and Kent's Road Capital Cost evidence.) The *FMC* decision¹⁰ only discloses enough information to support my conclusion regarding annual road property depreciation expense.

Exhibit__ (JJP-1) shows that line-specific road property depreciation from the *West Texas Utilities* decision was \$39.33 per car (74.6% of system average) and return on road property was \$53.93 per car (45.0% of system average). Total *West Texas Utilities* line-specific Road Capital Costs were \$93.26 per car or \$0.84 per ton. If system averages had been used, Road Capital Costs would have been reported as \$1.55 per ton, an overstatement of \$0.71 per ton. At the jurisdictional threshold level, this difference amounts to \$1.28 per ton (\$0.71 times 1.80). Assuming West Texas received 2 million tons of coal each year, then the

¹⁰ See *FMC*, pages 77 and 78.

jurisdictional threshold would be overstated by \$2.6 million dollars per year. (Otter Tail expects to burn 2,029,000 tons of coal in 2002.)

Exhibit__ (JJP-2) shows that line-specific *FMC* annual road property depreciation expense varied from 46.6% to 74.2% of system average, all of which are lower than *West Texas Utilities'* 74.8%.¹¹

If the Board compels BNSF to produce the required road property investment information, I expect to be able to demonstrate that Road Capital Costs for the Otter Tail route are significantly below system average costs. If the Board does not compel BNSF to produce the required information, I may not be able to demonstrate this fact, but the conclusion that Otter Tail line-specific Road Capital Costs are significantly less than system average Road Capital Costs will remain unaltered.

D. The Evidentiary Anomalies That Led to the Board's Decision in *Wisconsin* are Not Present in This Case

In *Wisconsin*, the Board declined to accept either Union Pacific's or Wisconsin Power and Light's line-specific road property investment and depreciation costs and defaulted to system average costs, because Union Pacific Railroad Company ("UP") had shown that a

¹¹ *Wisconsin* also reported favorably on a movement-specific adjustment to Road Capital Costs. In *Wisconsin* with regard to Return on Investment and Depreciation for Road Property, the STB stated, "In *FMC*, we accepted the procedure advocated by WPL here, because no evidence had been presented indicating that any of the unassigned costs related to the line segments at issue there." (See *Wisconsin*, page 53)

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.”¹² The unique problem that led the Board to default to system average in *Wisconsin* does not exist here, since it is Otter Tail’s intention to include system average costs for all road property investments shown to be used by the Otter Tail movement, but not directly assigned to the movement. For road property investments that BNSF has assigned directly to the Otter Tail Big Stone line segments, it is Otter Tail’s intention to charge the related Road Capital Costs directly to the traffic using those investments.

E. 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,¹³ and to revive the position unsuccessfully urged by

¹² See *Wisconsin*, pages 53-54.

¹³ See *Adoption of URCS*, page 898.

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.¹⁴ 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

¹⁴Any 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.

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 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.¹⁵

If BNSF has discontinued maintenance of all its line-segment specific road property investment databases, then BNSF should provide that information to Otter Tail 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 line segments used by the Otter Tail Big Stone traffic or whether they are unassigned. This data, if provided, will allow Otter Tail 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

¹⁵BNSF 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.

segments, then BNSF should provide that information and let the Board determine whether or not Otter Tail Big Stone 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.¹⁶ BNSF should be managing those assets intensively and specifically. Any capital intensive business hinders 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 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-

¹⁶Some 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.

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 Otter Tail Big Stone unit-train service. Failure to measure those reduced costs does nothing to alter this Board-recognized cost relationship.¹⁷

CONCLUSIONS

The methodology that Otter Tail intends to use to determine the Big Stone movement's Adjusted Road Capital Costs will be based on BNSF-provided line-specific investment data for those investments needed to provide service to Otter Tail's Big Stone Station. Most of that cost will be based on the actual investments and gross ton-miles over the valuation sections traversed by the Otter Tail trains. Appropriate adjustments will be made to reflect the issues of unallocated monies. These annual Road Depreciation expenses 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 Otter Tail the line segment-specific road property investment and depreciation information that Otter Tail needs to properly determine the Big Stone movement's Road Capital Costs. 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.

¹⁷ See the Board's February 9, 2001 decision in *TMPA*, page 3.

DEPRECIATION AND RETURN - WTU VS SYSTEM AVERAGE

<u>Item</u> (1)	<u>Source</u> (2)	<u>BNSF 1994</u> <u>Amount</u> (3)
1. Traffic and Operating		
a. Miles	WTU Decision, p. 19 1/	1,113.2
b. Tons per Car	WTU Decision, p. 76	110.48
c. Tare	WTU Decision, p. 79	21.66
d. Gross ton-miles per Car	$L1a * (1b + 1c * 2)$	171,210.160
2. Depreciation		
a. Road track maint & ownership	D1L234C10 2/	\$0.00027302
b. General Overhead Ratio	D8L608C01 2/	1.10311
c. Road incl GOH	$L2a * 2b$	\$0.00030117
d. GTM's per Car	L1d	171,210.160
e. Road Depr per Car	$L2c * 2d$	\$51.56
f. Index		1.02285
g. Road per car indexed	$L2e * 2f$	\$52.74
h. WTU depreciation per Car	WTU Decision, p. 81	\$39.33
i. WTU percent of System	$L2h + 2g$	74.6%
3. Return		
a. Road track maint & ownership	D1L251C10 2/	\$0.00064673
b. General Overhead Ratio	D8L609C01 2/	1.08266
c. Road incl GOH	$L3a * 3b$	\$0.00070019
d. GTM's per Car	L1d	171,210.160
e. Road Return per Car	$L3c * 3d$	\$119.88
f. WTU Road Return per Car	WTU Decision, p. 81	\$53.93
g. WTU percent of System	$L3f \div 3e$	45.0%
h. BNSF system Road & Depreciation	$L2g + 3e$	\$172.62
i. WTU Line Specific Road & Depreciation	$L2h + 3f$	\$93.26
j. Total Variable Costs	WTU Decision, p. 76	\$845.16
k. URCS Linking Factor	STB	0.9934
l. BNSF sysem Road & Depreciation/Ton	$L3h \div 1b * 3k$	\$1.55
m. WTU Line Specific Road & Depreciation/Ton	$L3i \div 1b * 3k$	\$0.84
n. Total Variable Costs/Ton	$L3j \div 1b * 3k$	\$7.60

1/ Miles from Eagle Butte to Oklaunion.

2/ From BNSF 1994 URCS formula produced by the STB and used in WTU.

DEPRECIATION - FMC VS SYSTEM AVERAGE UNION PACIFIC 1998

Item (1)	Source (2)	Moves A-G (3)	Moves H-J (4)	Move K (5)	Move L (6)	Move M (7)	Move N (8)	Move O (9)	Move P (10)
Depreciation									
a. Road track maint & ownership	D1L234C10	\$0.00029147	\$0.00029147	\$0.00029147	\$0.00029147	\$0.00029147	\$0.00029147	\$0.00029147	\$0.00029147
b. S&E - Depr - Work - R	D1 L222 C10	\$0.00000110	\$0.00000110	\$0.00000110	\$0.00000110	\$0.00000110	\$0.00000110	\$0.00000110	\$0.00000110
c. S&E - LR - Work - R	D1L223C10	0.00000000	0.00000000	0.00000000	0.00000000	0.00000000	0.00000000	0.00000000	0.00000000
d. Work Equip - Depr - R	D1L230C10	0.00000551	0.00000551	0.00000551	0.00000551	0.00000551	0.00000551	0.00000551	0.00000551
e. Work Equip - LR - R	D1L231C10	0.00000039	0.00000039	0.00000039	0.00000039	0.00000039	0.00000039	0.00000039	0.00000039
f. OE Shop Machinery - Depr - R	D1L232C10	0.00000005	0.00000005	0.00000005	0.00000005	0.00000005	0.00000005	0.00000005	0.00000005
g. OE Shop Machinery - LR - R	D1L233C10	0.00000000	0.00000000	0.00000000	0.00000000	0.00000000	0.00000000	0.00000000	0.00000000
h. Total Work and other Equip	Sum Lines b thru g	\$0.00000705	\$0.00000705	\$0.00000705	\$0.00000705	\$0.00000705	\$0.00000705	\$0.00000705	\$0.00000705
i. System Depr & Lease Less Work E	L1a - 1h	\$0.00028442	\$0.00028442	\$0.00028442	\$0.00028442	\$0.00028442	\$0.00028442	\$0.00028442	\$0.00028442
j. FMC Deprec Cost/GTM	FMC Decision, p.78	\$0.00013959	\$0.00014101	\$0.00021800	\$0.00017088	\$0.00014414	\$0.00014272	\$0.00019590	\$0.00018879
k. FMC Deprec less Work Eq	L1j - 1h	\$0.00013254	\$0.00013396	\$0.00021095	\$0.00016383	\$0.00013709	\$0.00013567	\$0.00018885	\$0.00018174
l. FMC Deprec percent of System	L1k + 1i	46.6%	47.1%	74.2%	57.6%	48.2%	47.7%	66.4%	63.9%

Source: FMC, slip opinion, decision served May 12, 2000, pages 77 and 78.

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Joseph J. Plaistow

Sworn to and subscribed)
before me this 14th day
of April, 2002.

Witness my hand and official seal.

My Commission Expires July 31, 2008

CERTIFICATE OF SERVICE

I hereby certify that this 11th day of April, 2002, I served a copy of the foregoing "Complainant's First Motion to Compel Production of Documents" on Defendant, The Burlington Northern and Santa Fe Railway Company by hand-delivery upon counsel for Defendant at the following address:

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