

April 18, 2002

205205

Via Messenger

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001



RE: Docket No. NOR 42071; *Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company*

Dear Secretary Williams:

Enclosed please find an executed original and ten (10) copies of Complainant's Second Motion to Compel Production of Documents for filing in the above-referenced docket.

Also, enclosed is one additional copy of the foregoing motion for stamp and return. Kindly date-stamp the additional copy for return to this office by messenger.

If you have any questions, please do not hesitate to contact me. My direct dial number is (202) 263-4107.

Sincerely,

Nicholas J. DiMichael
Jeffrey O. Moreno
Michael H. Higgins

ENTERED
Office of the Secretary

APR 18 2002

Part of
Public Record

Attorneys for Otter Tail Power Company

Enclosures

cc: George Koeck, Esq. (w/encl.)

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



OTTER TAIL POWER COMPANY)

Complainant,)

v.)

THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY)

Respondent.)

Docket No. NOR 42071

**COMPLAINANT'S SECOND
MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

Complainant, Otter Tail Power Company ("Otter Tail"), hereby moves the Board for issuance of an order pursuant to 49 C.F.R. § 1114.31 compelling Respondent, The Burlington Northern and Santa Fe Railway Company ("BNSF"), to produce certain documents, as described below, which documents Otter Tail requires for the preparation of evidence in this proceeding. Good cause exists for the issuance of the requested order.

I. DISCUSSION

On January 17th, 2002, Otter Tail served its First Set of Interrogatories and Requests for Production of Documents on BNSF. In individual document requests, Otter Tail sought, *inter alia*, coal transportation contracts and similar documents; contracts and similar documents covering non-coal traffic; traffic and volume forecasts and projections and similar documents; and, documents related to projected and actual cycle times, including standard or expected contractual cycle times for certain movements. See Otter Tail's Request For Production Nos. 45,

46, 47, and 50, attached as Exhibit "A." The foregoing requests seek information relevant to and necessary for Otter Tail's preparation of its Stand-Alone Cost (SAC) evidence.

BNSF served its 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 upon Otter Tail on February 19, 2002. BNSF objected to the foregoing requests on similar grounds, including that the requests "require[] production of materials which, if produced, could result in the violation of contractual obligations to third parties." BNSF also asserted the same objection in General Objection No. 3. BNSF's responses and objections are attached as Exhibit "B."

Counsel for Otter Tail and BNSF have since conferred regarding Otter Tail's initial discovery and BNSF's responses and objections, including Request Nos. 45, 46, 47, and 50.¹ Although the parties believe that they can reach a negotiated resolution to most of BNSF's objections to these Requests, consistent with its stance in past rate reasonableness cases, BNSF has maintained that it cannot produce copies of certain documents within the scope of the foregoing requests without an order from the Board, because of confidentiality clauses contained in, or otherwise affecting, such documents. BNSF has maintained this position despite the protective order that governs this proceeding.

In this motion, Otter Tail takes no position on BNSF's stance and neither agrees nor disagrees as to the necessity of a Board order. At the same time, Otter Tail maintains that ample Board precedent establishes that private agreements, including rail transportation contracts, are discoverable in rail rate reasonableness proceedings. See STB Docket No. 41295, Pennsylvania

¹ Counsel for BNSF and Otter Tail have discussed discovery in this proceeding and generally have agreed not to seek strict enforcement of the 10 day rule under 49 C.F.R. § 1114.31 in an attempt to resolve discovery disputes without Board intervention. Otter Tail submits that rigid application of this rule for the remainder of BNSF's discovery responses is inappropriate and impractical because good faith discussions concerning discovery are ongoing and will take time to complete.

Power and Light Co. v. Consolidated Rail Corp., CSX Transportation, Inc., and Norfolk Southern Railway Company, (served March 10, 1997); STB Docket No. 42054, PPL Montana, LLC v. The Burlington Northern and Santa Fe Railway Company, (served November 9, 2000) and STB Docket No. 42056, Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, (served February 9, 2001).

In order to address BNSF's concerns, Otter Tail asks the Board to order BNSF to produce contracts and other responsive documents that BNSF has objected to producing based on the potential violation of confidentiality clauses. Assuming that the Board expeditiously issues the order requested herein, Otter Tail anticipates that it will work with BNSF to address BNSF's other objections.

The requested order will serve the interests of justice and facilitate the discovery process in this proceeding by allowing BNSF to produce relevant and necessary documents without risk of incurring liability to third parties. Furthermore, Otter Tail believes that the protective order should allay confidentiality concerns regarding production of documents within the scope of the requests that are the subject of the instant motion.

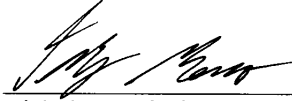
II. CONCLUSION

WHEREFORE, for the foregoing reasons, Otter Tail respectfully asks the Board to issue an order that:

1. Overrules BNSF's General Objection No. 3 and its specific objections to Document Request Nos. 45, 46, 47, and 50 based upon violations of contractual obligations to third parties; and
2. Compels BNSF to produce documents responsive to Otter Tail's Request for Production Nos. 45, 46, 47, and 50 to which BNSF has objected on the basis of confidentiality

clauses in third-party contracts, subject to the parties' resolution of other BNSF objections that may apply.

Respectfully submitted,



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Jeffrey O. Moreno, Esq.
Michael H. Higgins, Esq.
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George Koeck, Esq.
General Counsel
OTTER TAIL CORPORATION
3203 32nd Avenue, SW, Suite 110
Fargo, ND 58103

Attorneys for Complainant

April 18, 2002

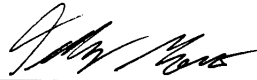
CERTIFICATE OF SERVICE

I hereby certify that this 18th day of April, 2002, I served a copy of the foregoing "Complainant's Second 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:

Samuel M. Sipe
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20026

and by overnight mail:

Michael Roper
Senior General Counsel
The Burlington Northern and Santa Fe Railway Company
2500 Lou Menk Drive
P.O. Box 961057
Fort Worth, TX 76161-0057



Jeffrey O. Moreno

EXHIBIT 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.	)	
	)	

**COMPLAINANT'S FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

Complainant Otter Tail Power Company ("Otter Tail"), pursuant to 49 C.F.R. §§ 1114.21, 1114.26 and 1114.30, hereby submits its First Set of Interrogatories and Requests for Production of Documents to Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF").

Answers to Otter Tail's Interrogatories and copies of responsive documents should be delivered to the offices of Thompson Hine, LLP, 1920 N Street, N.W., Suite 800, Washington, D.C. 20036, within thirty (30) days from the date hereof unless otherwise agreed by the parties. Otter Tail is prepared to cooperate with BNSF to facilitate the expeditious production of documents with the minimum practicable burden.

I.

DEFINITIONS

The following defined terms are used herein:

1. "Big Stone" means Otter Tail's Big Stone Generating Station located near Milbank, SD, including its railcar unloading facilities.

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.

- 9 -

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.

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.

Request for Production No. 50:

Please provide documents, in computer readable format to the extent available, sufficient to show the projected and actual cycle times, and the standard or expected or contractual cycle time for each movement originating, terminating or passing through the SARR states for each year or partial year 1999 to the present.

EXHIBIT 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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**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. 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 it 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. 50:

Please provide documents, in computer readable format to the extent available, sufficient to show the projected and actual cycle times, and the standard or expected or contractual cycle time for each movement originating, terminating or passing through the SARR states for each year or partial year 1999 to the present.

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 requires production of materials which, if produced, could result in the violation of contractual obligations to third parties. 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.