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May 7, 2002

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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 Co. v. The Burlington Northern
and Santa Fe Railway Co.*

Dear Secretary Williams:

Enclosed please find an executed original and ten (10) copies of (1) Complainant's Petition for Leave to File a Reply to Defendant's Reply to Complainant's First Motion to Compel; and (2) Complainant's Reply to Defendant's Reply to Complainant's First Motion to Compel 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

*Attorneys for Otter Tail Power Co.**Enclosures*

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

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

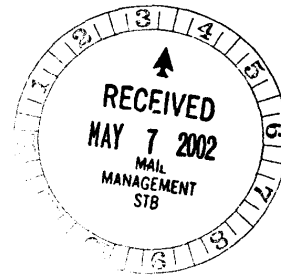
OTTER TAIL POWER COMPANY)

Complainant,)

v.)

THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY)

Respondent.)



Docket No. NOR 42071

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**COMPLAINANT'S PETITION FOR LEAVE TO FILE A REPLY TO
DEFENDANT'S REPLY TO COMPLAINANT'S FIRST MOTION TO COMPEL**

Complainant, Otter Tail Power Company ("Otter Tail") hereby submits this Petition for Leave to File a Reply to Defendant's Reply to Complainant's First Motion to Compel, pursuant to 49 C.F.R. §§ 1100.3 and 1117.1. Good cause and compelling reasons exist for the Board to waive application of 49 C.F.R. § 1104.13(c) because BNSF's reply offered arguments and prejudicial misrepresentations that Otter Tail could not have anticipated when it filed its Motion to Compel. Otter Tail's tendered reply is limited to a narrow portion of BNSF's reply.

Otter Tail filed "Complainant's First Motion to Compel Production of Documents" on April 11, 2002. In that Motion, Otter Tail asked the Board to compel BNSF to produce documents on two discrete subjects: (1) road property investment and depreciation costs, and (2) forecasts of revenue and traffic volumes. BNSF filed its Reply on May 1, 2002.

In its opposition to producing materials relating to the second subject, BNSF seriously mischaracterizes the scope of Otter Tail's Request For Production No. 47 for the purpose of arguing that the request is moot. In support of its distorted version of the request, BNSF submits a verified statement from its General Director of Finance Planning & Control, which describes

BNSF's forecasting operations. Otter Tail had no knowledge of the information contained in the statement at the time it filed its motion to compel; nor could Otter Tail have anticipated BNSF's gross distortion of Otter Tail's discovery request. Otter Tail's reply will correct the record in order to avoid the substantial prejudice that would occur to Otter Tail if the Board were to accept BNSF's assertions that Otter Tail's Motion is moot based on the statement of BNSF's witness.

The Board will waive the prohibition on a reply to a reply in appropriate circumstances. STB Docket No. AB-369 (Sub-No. 3X), *Buffalo and Pittsburgh Railroad, Inc.—Abandonment Exemption—In Erie and Cattaraugus Counties, NY*, Slip Op. at 2 (Served Sept. 17, 1998). Generally, the Board has applied a good cause standard when considering whether to allow a reply to a reply. See *Delaware and Hudson Railway v. Consolidated Rail Corp.—Reciprocal Switching Agreement*, 9 I.C.C. 2d 989, 990 (1993) (“*Delaware and Hudson*”). In particular, the Board has permitted a reply to a reply “[i]n the interest of a complete record.” STB Finance Docket No. 34041, *Arizona Electric Power Coop. v. BNSF*, 2001 STB Lexis 986 (Served December 26, 2001). The Board has also allowed a reply to a reply where the initial reply raised new arguments or evidence. STB Docket No. 41989, *Potomac Electric Power Co. v. CSX Transportation, Inc.*, 1997 STB Lexis 137 (Served June 27, 1997) (“*Pepco*”). See *SF&L, Inc.—Acquisition and Operation Exemption—Toledo, Peoria and Western Ry. Corp., between La Harpe and Peoria, Ill.; Kern W. Schumacher and Morris H. Kulmer—Continuance in Control Exemption—SF&L Ry., Inc.*, 2002 STB Lexis 87, *3 (Served February 1, 2002).

Otter Tail has good cause for submitting a reply to BNSF's reply because BNSF has distorted the scope of Otter Tail's RFP-47 and because, at the time Otter Tail filed its motion to compel, it had no knowledge of and no reason to know of the information that BNSF presented in its reply. See *Delaware and Hudson*, 9 I.C.C. 2d at 989-90 (finding good cause to accept a

reply to a reply because the respondent had "seriously distort[ed] the circumstances and import" of the Commission's prior decision and that petitioner "could not have anticipated the arguments" raised in opposition when it filed its petition). Here, BNSF has perpetrated a distortion that similarly justifies Otter Tail's reply. As explained in the tendered reply, BNSF misrepresents the scope of Otter Tail's request and then asserts its inability to respond to the improperly narrowed request. Under *Delaware and Hudson*, Otter Tail clearly has good cause to file its reply in order to address BNSF's flagrant mischaracterization and to correct the record.

WHEREFORE, for all the foregoing reasons, Complainant Otter Tail Power Company respectfully petitions the Board for an order granting it leave to file a reply to reply.

Respectfully submitted,



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May 7, 2002

CERTIFICATE OF SERVICE

I hereby certify that this 7th day of May, 2002, I served a copy of the foregoing
"Complainant's Petition for Leave to File a Reply To Defendant's Reply To Complainant's First
Motion To Compel" on Defendant, The Burlington Northern and Santa Fe Railway Company by
hand-delivery upon counsel for Defendant at the following address:

Samuel M. Sipe
Stephoe & 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