

May 7, 2002

Via Messenger

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

205342
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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

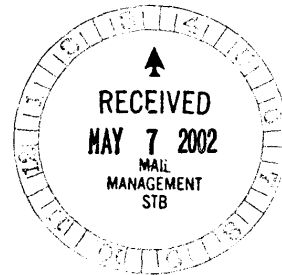
Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

Respondent.

205342
Docket No. NOR 42071



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COMPLAINANT'S REPLY TO
DEFENDANT'S REPLY TO
COMPLAINANT'S FIRST MOTION TO COMPEL

Complainant, Otter Tail Power Company ("Otter Tail"), hereby submits this brief reply to "Defendant's Reply to Complainant's First Motion to Compel Production of Documents." Contemporaneous with this Reply, Otter Tail has filed a "Petition for Leave to Reply to Defendant's Reply."

Otter Tail filed "Complainant's First Motion to Compel Production of Documents" on April 11, 2002. That Motion asked the Board to compel defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF"), to produce documents in two specific areas: (1) road property investment and depreciation costs, and (2) forecasts of revenue and traffic volumes. BNSF filed its Reply on May 1, 2002. This Reply is directed only to BNSF's arguments in the second area.

BNSF has mischaracterized Otter Tail's motion to compel forecasts of revenue and traffic volumes as moot. BNSF narrowly and inaccurately states that "Otter Tail seeks production of

BNSF forecasts that extend beyond three years.” BNSF Reply at 17. Because BNSF asserts that no longer term forecasts exist, it concludes that the motion to compel is moot. Id. at 18.

The Board should reject BNSF’s assertion because Request for Production No. 47 is much broader than characterized by BNSF. Otter Tail has asked the Board to “order BNSF to produce documents that respond fully to RFP-47.” Motion at 17. RFP-47 states:

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 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 presentation to the financial community.

Motion, Exhibit A [emphasis added]. BNSF’s discovery response included a specific objection to much of the underlined text, including traffic and/or revenue projections prepared in connection with engineering studies, AFEs, marketing studies, operating studies, operating expense budgets, capital budgets, or mergers. Id. BNSF’s Reply to Otter Tail’s Motion to Compel, however, addresses only its overly narrow description of RFP-47, without any explanation as to why it should not produce documents responsive to all of RFP-47.

Otter Tail’s Motion includes each of the specifically enumerated items in the underlined text. BNSF’s Reply does not assert that it does not generate, maintain, or possess these types of documents. Nor does BNSF state that it is producing those documents. It seems implausible that

BNSF would specifically object to producing such documents if it does not possess any. Moreover, it seems highly unlikely that BNSF would not prepare traffic or revenue projections in connection with some, if not all, of the enumerated documents.

BNSF's Reply also still does not offer any distinction between "official" and "unofficial" forecasts, despite the fact that Otter Tail raised this issue in its Motion. This leaves open the distinct possibility that BNSF possesses responsive information, including longer term forecasts, that are cloaked behind the undefined, and potentially arbitrary, "unofficial" designation. The Board should grant Otter Tail's Motion to avoid any risk that BNSF is hiding relevant forecasts through such word games.

WHEREFORE, Otter Tail respectfully requests that the Board order BNSF to respond fully to Request for Production No. 47.

Respectfully submitted,



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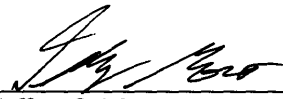
CERTIFICATE OF SERVICE

I hereby certify that this 7th day of May, 2002, I served a copy of the foregoing
"Complainant's 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