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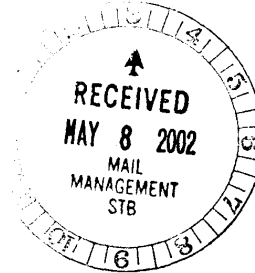
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May 8, 2002



via Hand Delivery

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

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

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and 10 copies of BNSF's Reply to Otter Tail's Second Motion to Compel.

Please date stamp the extra copy of this cover letter and return it to the messenger who delivered this filing.

Sincerely,


Cynthia L. Quarterman

Enclosures

cc: Counsel for Complainant

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Office of the Secretary

MAY - 8 2002

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WASHINGTON

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LOS ANGELES

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

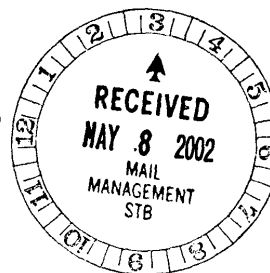
OTTER TAIL POWER COMPANY,

Complainant.

v.

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

Defendant.



Docket No. NOR 42071

**ENTERED
Office of the Secretary**

MAY - 8 2002

**Part of
Public Record**

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

The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby replies to the Second Motion to Compel Production of Documents ("Second Motion to Compel"), filed by complainant Otter Tail Power Company ("Otter Tail") on April 18, 2002.

Otter Tail's Second Motion to Compel seeks an order requiring BNSF to produce confidential coal and non-coal transportation agreements as well as certain confidential information derived from those agreements. BNSF has objected to the production of those materials on grounds that confidentiality provisions in many of the requested agreements limit BNSF's ability to disclose the materials unless compelled to do so. BNSF has also objected to production of the requested materials on grounds that Otter Tail's requests are unreasonably broad and unduly burdensome in that they seek transportation agreements and related information on all BNSF movements in a five state region. While Otter Tail has indicated to BNSF that it is willing to narrow the scope of its request, it has not yet proposed an alternative to its broad and unreasonably burdensome requests. Notwithstanding these objections, BNSF is not opposed to an order compelling the production of the requested materials so long as the parties

are able to reach agreement on an appropriate scope of production. Therefore, BNSF requests that the Board either defer action on Otter Tail's Motion to Compel pending the parties' attempt to resolve the issue of the scope of the documents to be produced or, in the alternative, issue an order that is expressly limited to BNSF's objection to the production of the requested materials on confidentiality grounds.

DISCUSSION

Otter Tail's discovery requests broadly seek *all* BNSF coal transportation agreements covering coal transportation in five states.¹ These states include those that encompass the Powder River Basin coal origins as well as numerous BNSF lines that are heavily used for coal traffic. Unless narrowed, Otter Tail's request would cover the vast majority of BNSF's coal transportation agreements. Otter Tail also has requested production of *all* of BNSF's non-coal transportation contracts in the same five states.² BNSF handles a large volume of non-coal transportation in those states under confidential transportation agreements.

BNSF acknowledges that some discovery of confidential information relating to transportation contracts is appropriate in stand-alone cost proceedings. However, BNSF has two basic objections to Otter Tail's requests for production of the transportation agreements and related information. First, the commercial sensitivity of the requested information, frequently reflected in confidential provisions in the agreements, makes it necessary for BNSF to ensure that the production of the requested information is limited to the minimum necessary. Information relating to confidential coal contracts is highly sensitive to BNSF and its coal

¹ Otter Tail Request for Production No. 45, attached to Second Motion to Compel as Exhibit A. The five stand-alone railroad states are Montana, Nebraska, North Dakota, South Dakota and Wyoming.

² Otter Tail Request for Production No. 46, attached to Second Motion to Compel as Exhibit A.

shippers; therefore, the scope of discovery of such information must be carefully tailored to fit the information necessary for a complainant to present its evidence. The Board is aware from recent cases that shippers often object to the production of confidential contracts to their competitors.³ While the Board normally orders the production of materials over these objections, it is nevertheless appropriate to limit the scope of production to minimize this confidentiality concern.

Second, BNSF is concerned that the scope of Otter Tail's request is overly broad and that the burden of producing the requested materials would be unreasonable, particularly in the area of non-coal transportation. The universe of potentially responsive non-coal transportation agreements is extremely large and many of the requested materials could turn out to be irrelevant to any stand-alone cost evidence that Otter Tail intends to submit. Moreover, BNSF handles a broad range of commodities and the marketing responsibility for these movements is spread throughout BNSF's marketing department. BNSF has not previously been required to produce non-coal transportation agreements, so the efforts that will be required to identify, review and produce responsive materials would be extensive, although the precise scope of those efforts is uncertain.

In meetings between BNSF and Otter Tail counsel, Otter Tail has acknowledged BNSF's burden and overbreadth concerns and has indicated that it is willing to narrow the scope of its requests in both the coal and non-coal transportation areas. However, Otter Tail has not yet provided BNSF with a list of the movements as to which it seeks corresponding transportation agreements, although Otter Tail's consultants have had BNSF's traffic tapes since late in March

³ *Duke Energy Corp. v. Norfolk Southern Ry. Co.*, STB Docket No. 42069, slip op. at 2 n.2 (served Mar. 4, 2002); *Texas Mun. Power Agency v. Burlington Northern Santa Fe Ry. Co.*, STB Docket No. 42056, slip op. at 2 (served Feb. 9, 2001).

2002. As a result, BNSF does not yet know whether there will be a dispute between the parties over the scope of Otter Tail's request that must be resolved by the Board.

Otter Tail's Motion also seeks an order compelling the production of confidential information derived from transportation agreements, specifically traffic forecasts and cycle time information. As to the forecast information sought by Otter Tail on coal traffic, BNSF's confidentiality objection is based on the fact that BNSF's coal traffic forecasts reflect the terms of confidential contracts. A Board order that permits BNSF to produce the contracts themselves will eliminate BNSF's confidentiality objection to produce the requested forecasts. As to non-coal forecasts, BNSF has determined that its forecasts for commodities other than coal do not rely on confidential information derived from transportation agreements. Therefore, BNSF intends to produce those materials without a Board order and Otter Tail's request for an order compelling the production of those forecast materials is moot. Finally, as to Otter Tail's request for cycle time information, BNSF's confidentiality objection was based on the fact that confidential transportation agreements often contain specific references to cycle times. Once again, an order from the Board that permits BNSF to produce the contracts themselves will eliminate BNSF's confidentiality objection to produce the requested cycle time information.

While BNSF is concerned over the scope of Otter Tail's discovery requests that are the subject of its Second Motion to Compel, BNSF nevertheless believes that an order compelling production of confidential contracts and the information derived from them will ultimately be necessary and appropriate, subject to the protection accorded to "Highly Confidential Information" under the protective order entered by the Board in this case. Many of the transportation agreements sought by Otter Tail specifically preclude BNSF from disclosing the agreements or their underlying terms to any other person absent agreement from the other

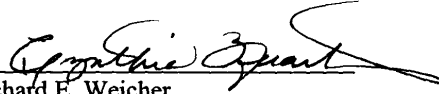
signatories or legal compulsion. A Board order would therefore simplify the discovery process as it relates to these materials once the parties have agreed on the appropriate scope.

However, the scope issue is potentially significant, and it is uncertain at this time that the parties will be able to reach an agreement on scope, particularly regarding non-coal transportation contracts. Therefore, BNSF requests that the Board defer ruling on Otter Tail's Motion until the parties have determined whether an agreement can be reached on the scope of production. Since Otter Tail has stated that it intends to provide BNSF with its list of transportation contracts soon, the parties should be able to resolve or define their differences on scope quickly and notify the Board accordingly. In the alternative, BNSF requests that any order issued by the Board in response to Otter Tail's Second Motion to Compel expressly state that it is directed only to BNSF's confidentiality objection and is not intended to overrule BNSF's objections on burden or overbreadth grounds.

CONCLUSION

For the reasons discussed above, BNSF requests that the Board either defer action on Otter Tail's Motion to Compel pending the parties' attempt to resolve the issue of the scope of the documents to be produced, or in the alternative, issue an order that is expressly limited to BNSF's objection to the production of the requested materials on confidentiality grounds.

Respectfully submitted,



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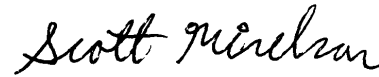
Attorneys for
The Burlington Northern and Santa Fe
Railway Company

Dated: May 8, 2002

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2002, a true and correct copy of the foregoing document
was served by hand on:

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