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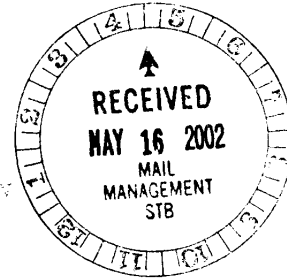
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205405
May 16, 2002

via Hand Delivery

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



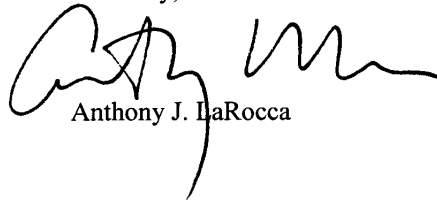
Re: *Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company*, Docket No. NOR 42071

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 Petition for Leave to File a Reply to Defendant's Reply to Complainant's First Motion to Compel.

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

Sincerely,



Anthony J. LaRocca

Enclosures

cc: Counsel for Complainant

- 1 -

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

OTTER TAIL POWER COMPANY

Complainant,

v.

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

Defendant.

Docket No. 42071



ENTERED
Office of the Secretary

MAY 16 2002

FILED
Public Record

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

Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby replies to the Petition of Complainant Otter Tail Power Company ("Otter Tail") For Leave To File A Reply To Defendant's Reply to Complainant's First Motion To Compel, filed May 7, 2002 ("Otter Tail's Petition").

Otter Tail's Petition should be denied. Otter Tail presents no compelling reason to suspend the Board's rule prohibiting replies to a reply. Otter Tail's Petition is merely an attempt to expand the scope of its original motion, which Otter Tail has now apparently concluded was too limited. Acceptance of Otter Tail's Petition under these circumstances would undermine the objectives of finality and expediency on which the Board's rule against a reply to a reply is based. However, if the Board does accept Otter Tail's Petition, BNSF requests that the Board consider a brief response, contained herein, demonstrating that an order compelling the

production of forecast-related information sought by Otter Tail is unnecessary and would be inappropriate.

I. OTTER TAIL'S PETITION FOR LEAVE TO FILE A REPLY TO A REPLY SHOULD BE DENIED

The Board's rules prohibit the filing of a reply to a reply. 49 C.F.R. §1104.13(c). The Board has waived this rule in the past only when there are "compelling reasons for a waiver."¹ Moreover, the Board requires a "persuasive showing that an exception to Rule 1104.13(c) should be made."² Otter Tail has not made such a showing here.

Otter Tail asserts that it is entitled to a responsive pleading for two reasons. First, it argues that it should be able to respond to "prejudicial representations" in BNSF's Reply to Otter Tail's First Motion to Compel that characterized Otter Tail's Motion as directed to long-range forecasts exceeding a 2-3 year forecast horizon.³ Second, Otter Tail argues that its reply to a reply should be authorized because it "had no knowledge of and no reason to know of the information BNSF presented in its Reply" when Otter Tail filed its original Motion.⁴ Neither assertion has merit.

¹ *Potomac Electric Power Co. v. CSX Transportation, Inc.*, Docket No. 41989, slip op. at 1, n.1 (served June 27, 1997).

² *Ocean Logistics Mgmt., Inc. v. NPR, Inc. and Holt Cargo Sys., Inc.*, Docket No. WCC-102, slip op. at 3 (served Jan. 14, 2000).

³ Otter Tail's Petition at 2. BNSF filed its Reply to Complainant's First Motion to Compel Production of Documents on May 1, 2002 ("BNSF's Reply"); Otter Tail filed its First Motion to Compel Production of Documents on April 11, 2002 ("Otter Tail's Motion").

⁴ Otter Tail's Petition at 3.

BNSF did not mischaracterize Otter Tail's Motion. The bases for Otter Tail's request for an order compelling the production of forecast information were set out in a single paragraph in the summary section of Otter Tail's Motion (at page 4) and in a page and a half at the end of the Motion (at pages 16-17). That discussion made it clear that Otter Tail was concerned about BNSF's representation that it would only produce forecasts that had a time horizon of 2 to 3 years. Otter Tail's language was unambiguous: "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."⁵ Otter Tail explicitly stated its concern that "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."⁶

In its Reply, BNSF demonstrated that it simply does not prepare or rely on in the ordinary course of business traffic forecasts that extend beyond a 2 to 3 year time horizon. BNSF further explained that it intended to produce the forecasts that are prepared by the office responsible for preparing traffic and revenue forecasts; therefore an order compelling production was unnecessary.⁷ BNSF's Reply was addressed to the specific assertions in Otter Tail's Motion and it demonstrated why that Motion should be denied. BNSF did not mischaracterize Otter Tail's Motion and it made no "prejudicial representations" to which Otter Tail should be permitted to respond.

⁵ Otter Tail's Motion at 4.

⁶ Otter Tail's Motion at 16.

⁷ BNSF's Reply at 17-18.

Otter Tail has now decided, after filing its motion to compel, that it wants a different type of forecast-related information. Otter Tail now seeks an order compelling the production of "traffic projections prepared in connection with engineering studies or authorizations for expenditures or marketing studies or operating expense budgets or capital budgets or mergers or acquisitions of other carriers."⁸ None of these categories of information was discussed or referenced in Otter Tail's original Motion because that Motion was focused on a different issue, namely the existence of long-range forecasts. Therefore, it is clear that Otter Tail is not seeking permission to address any supposed misrepresentation by BNSF of the scope of Otter Tail's original Motion but rather is attempting to expand and refocus the scope of its Motion. If the Board allows a reply to a reply merely because the moving party becomes dissatisfied with the scope or argument of its original motion, the rule against a reply to a reply would become a nullity.

Nor is Otter Tail correct in asserting that it did not know and could not have known BNSF's position on the issue of traffic forecasts at the time it filed its original Motion. In fact, on April 10, 2002, Otter Tail's counsel informed BNSF's counsel via telephone that it intended to file a motion to compel on issues related to road property data and traffic and revenue projections. Counsel for BNSF responded that she believed a motion on traffic and revenue projections would be unnecessary and promised to provide further information that BNSF was in the course of gathering in response to various Otter Tail discovery requests. Rather than wait for a specific description of the materials that BNSF was planning to produce, Otter Tail filed its Motion the next day. Having chosen to file its Motion before receiving the promised

⁸ Complainant's Reply to Defendant's Reply to Complainant's First Motion to Compel, filed May 7, 2002 ("Otter Tail's Reply to BNSF's Reply").

information, Otter Tail cannot now use its supposed ignorance of BNSF's position as grounds for waiving the Board's rule against a reply to a reply.

Otter Tail's request for authorization to file a reply to a reply should therefore be rejected. Otter Tail could originally have defined the scope of its Motion to include the materials it now seeks, but it did not. Otter Tail's desire to modify and refocus its original Motion does not constitute a compelling reason that would justify suspension of the Board's rule against a reply to a reply.

II. AN ORDER COMPELLING PRODUCTION OF THE MATERIALS DESCRIBED IN OTTER TAIL'S REPLY TO BNSF'S REPLY WOULD BE INAPPROPRIATE

As discussed above, Otter Tail's original Motion was focused on the production of long-term traffic forecasts, specifically forecasts covering a time period exceeding 2 to 3 years. Otter Tail now seeks an order compelling the production of a much broader category of information. Otter Tail explains in its Reply to BNSF's Reply that it actually seeks traffic forecasts or assumptions made by a broad range of BNSF employees extending from engineering to operating personnel. The scope of this request is unreasonably broad.

BNSF has agreed to provide the traffic forecasts that it produces and relies on in the ordinary course of business, and its discovery obligations should go no further. BNSF explained in response to Otter Tail's Motion that BNSF's Finance, Planning & Control Department is responsible for producing traffic and revenue forecasts on which BNSF relies for purposes of generating financial projections and budgets. BNSF has agreed to produce the forecasts prepared by this Department, which are BNSF's "official" forecasts, for all freight commodities that traverse the Otter Tail route of movement. There is no justification for requiring BNSF to

conduct a more extensive and burdensome search of numerous additional departments for any informal traffic projections that may exist.

If BNSF employees outside of the Finance, Planning & Control Department make informal traffic projections in connection with other activities, such as engineering studies, it is clear that the focus of that activity is not traffic forecasting. It would be a substantial burden even to determine whether such materials exist because those materials would, by definition, be generated only as a byproduct of other activity. BNSF should not be required to undertake that burdensome effort since it has agreed to produce its official, formal traffic forecasts. The *Coal Rate Guidelines* provide that "discovery requested must be reasonably tailored to the particular charge to be proved and reflect the least intrusive means of obtaining the information."⁹ The production of BNSF's official traffic and revenue forecasts covering all of the traffic that is potentially relevant to Otter Tail's stand-alone railroad clearly satisfies this standard.

Otter Tail cites no support for an order requiring a more extensive production of forecast-related materials. It cites a few cases from the 1980s in which The Atchison, Topeka and Santa Fe Railway Company and the Burlington Northern Railroad Company were required to respond to interrogatories seeking "traffic volume projections over the lines that serve complainant."¹⁰ Clearly, BNSF's production of its official forecasts would satisfy the requests that were at issue in those cases. In addition, the Board has expressed a preference in past cases

⁹ 1 I.C.C. 2d 520, 548 (1985).

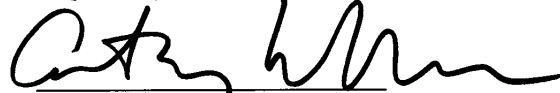
¹⁰ *Arizona Electric Power Cooperative, Inc. v. The Atchison, Topeka and Santa Fe Railway Company*, Docket No. 37437, 1986 ICC Lexis 104, *19 (Oct. 16, 1986). See also *San Antonio, Texas, Acting By and Through Its City Public Service Board v. Burlington Northern Railroad Company*, Docket No. 36180, 1986 ICC Lexis 56, *10-12 (Nov. 24, 1986); and *The Kansas Power & Light Company v. Burlington Northern Railroad Company*, Docket No. 39386, 1984 ICC Lexis 423, *3-5 (June 22, 1984).

for "normal business forecast[s]." ¹¹ There is no reason to impose on BNSF the enormous burden of searching numerous departments for materials relating to traffic forecasts when there is a single department responsible for producing those forecasts and BNSF has agreed to produce the materials generated by that department.

Therefore, even if the Board permits Otter Tail to expand the scope of its original Motion by accepting its Reply to BNSF's Reply, the Board should deny Otter Tail's request for an order compelling the production of additional forecast information. BNSF has agreed to produce materials that are reasonably available and clearly responsive. There is no reason to require BNSF to conduct a burdensome search for other potentially responsive materials.

Richard E. Weicher
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Respectfully submitted,



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Attorneys for The Burlington Northern
and Santa Fe Railway Company

Dated: May 16, 2002

¹¹*McCarty Farms v. Burlington Northern Railroad Company*, 2 S.T.B. 460, 474 (1997).

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2002, a true and correct copy of the Defendant's Reply
To Complainant's Petition For Leave To File A Reply To A Reply was served by hand on:

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Jeffrey O. Moreno
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