

205-642

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

OTTER TAIL POWER COMPANY,

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant .



Docket No. NOR 42071

**JOINT OPPOSITION OF OTTER TAIL POWER COMPANY
AND L.E. PEABODY & ASSOCIATES, INC. TO
DEFENDANT'S PETITION FOR SUBPOENA DUCES TECUM**

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June 17, 2002

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Introduction and Summary of Argument

Complainant, Otter Tail Power Company ("Otter Tail"), and its expert witness on rail rates, L.E. Peabody & Associates, Inc. ("LEPA"), hereby submit this joint opposition to "Defendant's Petition for Subpoena Duces Tecum" ("Petition"), served by the defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF"), on May 28, 2002.

This Opposition is presented in two parts. Part I is the Verified Statement of Thomas D. Crowley ("Crowley V.S."), President of LEPA. Mr. Crowley describes the extreme breadth of BNSF's subpoena request, the nature of the requested information, the irrelevance of the requested information, and the substantial burden that the request would impose upon LEPA if the requested subpoena were to be granted. Part II sets forth the factual background leading up to BNSF's Petition and demonstrates that both legal precedent and public policy militate against granting BNSF's Petition.

BNSF has requested that the Board issue a subpoena to LEPA for all documents in LEPA's files prepared after January 1, 1999, including the confidential files of LEPA's clients who are not parties to this proceeding, "that discuss or refer to forecasts, estimates or projections of rail rates for the transportation of Powder River Basin coal." Petition at 20 (Ex. 1A). BNSF's Petition is an unprecedented attempt to expand the scope of discovery in rate reasonableness proceedings, with profound implications for the conduct of all pending and future rate cases.

The Board considers four factors when determining the proper scope of expert discovery. These factors, which are enunciated in FMC, ask whether the requested discovery is burdensome, and if so, whether the requesting party has made a substantial showing of both relevance and need. The Board then asks whether the requested material is confidential, privileged, or covered by a protective order. If the requested material is covered by a protective order, the Board further inquires whether the requesting party has made a showing of extraordinary circumstances to justify modification of that protective order.

The burden of responding to BNSF's subpoena would be enormous. The subpoena request encompasses every document prepared by LEPA that discusses or refers to forecasts, estimates, or projections of PRB rail rates. Mr. Crowley explains how LEPA would have to review approximately 250 client files over the past five years for responsive information. Complicating this review, most, if not all, of the responsive documents are commercially sensitive, subject to protective orders, and/or subject to the attorney-client privilege and attorney work product doctrine. Thus, LEPA would be required to notify all interested third parties and ask whether they wish to assert applicable privileges. This scope of discovery is far broader than the expert discovery denied by the Board in FMC, which the Board concluded was burdensome on its face.

BNSF's only attempt to demonstrate substantial relevance and need is to speculate that the requested information might provide evidence to impeach LEPA's testimony on future rail rates. BNSF does not present any facts to support this supposition. Furthermore, BNSF assumes that all rate forecasts are sufficiently comparable and therefore relevant to SAC-related forecasts. Mr. Crowley, however, explains that forecasts are prepared in a variety of contexts and for a variety of reasons. BNSF's subpoena would open the door to an endless quagmire of collateral disputes concerning the relevance of unrelated forecasts for impeachment purposes. The Board concluded in FMC that vague allegations of the type made by BNSF in its Petition that LEPA's client-specific files will provide possible impeachment evidence does not constitute a substantial showing of relevance and need.

BNSF's subpoena is sufficiently broad to encompass LEPA's testimony in prior rate cases. The third factor in FMC clearly holds such documents to be non-discoverable, unless the fourth factor, a showing of extraordinary circumstances, can be satisfied. BNSF has not attempted to address these two factors at all.

In addition to the legal standards that BNSF has not satisfied, the Petition should be denied on procedural due process grounds. Because LEPA prepares forecasts in many different contexts, knowledge of the underlying facts and assumptions is essential to ascertaining whether it is appropriate even to compare one forecast with another. This information is not always apparent in the forecast documents prepared by LEPA. Otter Tail will not possess this knowledge or have access to this information, and LEPA will be precluded from sharing its knowledge with Otter Tail because the information may be commercially confidential, privileged, and/or subject to a protective order. Thus, Otter Tail will be handicapped in its

ability to rebut BNSF's attempts to impeach LEPA's testimony with prior forecasts that BNSF has taken out of context.

Otter Tail also will be procedurally disadvantaged in its pursuit of comparable discovery from BNSF's experts. Because BNSF has refused to identify its experts until Otter Tail submits its opening evidence, Otter Tail will not be able to petition for a subpoena until that time, which is well after the close of discovery. Even if the Board permits such discovery at that time, the procedural schedule will have to be extended by several months.

Contrary to Congressional intent, BNSF's subpoena will radically complicate and extend an already complex and costly process for litigating rate cases. BNSF's subpoena of LEPA in this case will open the door to similar subpoenas of every expert witness proffered by shippers and rail carriers alike on whatever matters may be the subject of their testimony. Shippers, for example, would be entitled to discover information in the private client files of rail experts on rail construction costs and various components of variable costs. The evidentiary pleadings will grow longer and more complex as the parties try to use this discovery to impeach each other's expert testimony. The procedural schedules necessarily will have to be lengthened to accommodate this new universe of discovery. Moreover, numerous third parties are likely to intervene in each case in order to assert privileges over a substantial portion of the documents. The mere speculation that an expert's private client files may contain impeachment evidence cannot justify the scope of discovery that inevitably will follow from a decision to grant BNSF's subpoena request.

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PART I:

VERIFIED STATEMENT OF THOMAS D. CROWLEY

My name is Thomas D. Crowley. I am an economist and President of the economic consulting firm of L.E. Peabody & Associates, Inc. ("LEP&A"). The firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, Virginia 22314. My statement of qualifications is attached as Appendix A to this Verified Statement.

The purpose of this Verified Statement is to describe the circumstances and the burden that would be associated with The Burlington Northern And Santa Fe Railway Company's ("BNSF") May 28, 2002 "Petition for Subpoena Duces Tecum" in this proceeding ("BNSF Petition"). The draft subpoena attached as Exhibit 1 to the BNSF Petition ("Draft Subpoena") seeks "all

documents prepared by L.E. Peabody for shippers of Powder River Basin coal, including documents prepared for any individual shipper, since January 1, 1999, that discuss or refer to forecasts, estimates or projections of rail rates for the transportation of Powder River Basin coal." This Draft Subpoena contains no restrictions as to the client for which the document was prepared, the potential confidential nature of any responsive documents, or the purpose for which the document was generated. BNSF's Draft Subpoena is unprecedented. I have testified in every Interstate Commerce Commission ("ICC") or Surface Transportation Board ("STB" or "Board") rail rate case since the development of the ICC/STB's "Stand-Alone Cost" procedures, and have never produced nor have been required to produce this information previously.

As a preliminary matter, however, I will state the obvious for the record. Neither LEP&A nor any of its principals or employees, nor any LEP&A clients whose files have been requested are currently a party to the maximum rate case currently pending before the STB between Otter Tail Power Company ("Otter Tail") and BNSF (*i.e.*, Docket No. NOR 42071). I have been retained by Otter Tail as an expert in this case on rail rates.

By way of background, LEP&A is a forty-six (46) year-old consulting firm that, in part, specializes in rail transportation matters before the STB. I and other LEP&A personnel have submitted a considerable volume of testimony in a variety of proceedings before the STB and its predecessor, the ICC. In addition, LEP&A also provides consulting services to a broad spectrum of clients regarding rail transportation and coal supply matters. We currently employ twenty-nine (29) professional consultants, and at any given time, may be involved in as many as thirty-five (35) to fifty (50) different consulting projects. In the course of this work, we often are called upon to

generate formal or informal forecasts, estimates or projections of rates for transportation of PRB coal on a confidential basis. These forecasts, estimates or projections are prepared under a wide variety of circumstances and can involve the rates in rail transportation contracts (existing or proposed) or analyses used in litigation (existing or potential). In some instances, LEP&A develops the assumptions for the analyses and in some instances, the inputs or assumptions are provided by the client. In addition, we have also been called upon to review and evaluate forecasts, estimates, or projections prepared by third parties, including information developed by railroads.

The BNSF Petition claims that its Draft Subpoena "...is narrowly drawn to cover only that information that will be needed to assess the credibility of Mr. Crowley's testimony on the subject of future rail rates." (BNSF Petition, page 13) BNSF also asserts that the Draft Subpoena "...is more focused and limited than the discovery sought in the WPL case." (BNSF Petition, page 13) (emphasis added) As a factual matter, both of BNSF's claims are wrong.

First, the information requested by BNSF will not be limited in application to the future rail rates in the proceeding between Otter Tail and BNSF (Docket No. NOR 42071). Much of the material requested would cover rail movements that are not involved with the route traversed by Otter Tail's trains, or even the railroad used by Otter Tail. For example, documents prepared by LEP&A that discuss or refer to forecasts, estimates or projections of PRB rail rates over the Union Pacific Railroad Company ("UP") appear to be encompassed by BNSF's Draft Subpoena, even though Otter Tail has never utilized, and cannot physically utilize, UP transportation service.

Furthermore, it is highly unlikely that any coal transported by UP would be considered in a Stand-Alone Cost analysis involving Otter Tail.

Second, the BNSF's document request is much more complicated and broader in scope than the UP's document requests in WPL^{1/} and is certainly much broader in scope than the documents produced to UP pursuant to the STB's order in WPL. In order to comply with BNSF's document request, I will be required to review all applicable files and find instances where there is a forecast, estimate or projection of PRB rail rates, or a document in which a forecast, estimate or projection of PRB rail rates is discussed or even referred to. Then the document will have to be reviewed to determine whether it was prepared by LEP&A (which would be responsive to BNSF's Draft Subpoena) or whether it was prepared by our clients, a railroad or some other source such as a government agency (which would not be responsive to BNSF's Draft Subpoena). However, I would note that the BNSF's Draft Subpoena appears to cover documents that were prepared by LEP&A that simply "discuss" or "refer" to forecasts, estimates, or projections. In other words, if a client, another railroad, or a government agency made a forecast, estimate, or projection of one or more PRB rail rates, and a document prepared by LEP&A discussed or even referred to that forecast, estimate or projection, then that document would appear to be responsive to BNSF's Draft Subpoena (though not the forecast, estimate or projection itself, unless the forecast, estimate, or projection was an attachment or appendix to the document prepared by LEP&A). The information requested by BNSF also appears to include LEP&A summaries or analyses of forecasts, estimates or projections previously furnished by BNSF or other railroads in other proceedings or negotiations, since such

^{1/} STB Docket No. 42051, Wisconsin Power and Light Company v. Union Pacific Railroad Company ("WPL").

documents would be "prepared" by LEP&A and would "discuss" or "refer" to forecasts, estimates, or projections of rail rates for the transportation of PRB coal. In summary, BNSF's Draft Subpoena covers a very, very large number and type of documents.

As the Board knows, economic consulting is necessarily a "forward-looking" endeavor. We constantly are engaged in efforts to predict future trends as part of the professional advice that our clients hire us to develop. The BNSF's Draft Subpoena thus covers a very substantial percentage of our ongoing business. The BNSF's Draft Subpoena would require us to undertake a page-by-page, line-by-line search of virtually all of our office's current and retired files (presumably in both hard copy and electronic format) developed in the last 5 years to determine if potentially responsive information exists. Even though BNSF has only requested documents created since January 1, 1999, prior files will require review, since client matters and files initiated prior to 1999 may include analyses in 1999 or later.

Given this high level of involvement in economic forecasting activities, responding to BNSF's Draft Subpoena would be particularly onerous for us. It is extremely difficult for me to determine the precise amount of time that it would take to respond to such a subpoena or the precise volume of the material that such a broad search would generate. Nevertheless, I can confirm that such an obligation would seriously disrupt our business for many weeks and would require hundreds (if not thousands) of hours of consultant time to complete. Even with BNSF's limitation to documents created subsequent to January 1, 1999, we would be required to search the files of over 250 projects for our clients, occupying something on the order of 850 linear feet of shelf space. Our search for responsive documents would also have to include the retrieval and review of thousands of computer

files (spreadsheets, data bases, programs, etc). The potential business harm to LEP&A from the production of the requested documents to BNSF cannot be measured.

In performing work for our clients, LEP&A undertakes to keep such information confidential, and we take that obligation very seriously. Our clients understand and respect the confidentiality of the work that we perform for them. I can state with absolute confidence that our work on virtually every project that we undertake was regarded as highly sensitive and confidential, both by our firm and by our clients and their counsel. This is true both for analyses performed for ongoing or potential negotiations as well as analyses performed for existing or anticipated litigation. In many instances, I believe that our clients in the future would not provide us with the required information or may choose not to retain LEP&A if they understood that confidential material from our files could be turned over to BNSF and another utility's outside counsel and consultants in STB proceedings unrelated to that client's project. Grant of the BNSF Petition, therefore, has the potential to permanently damage our business.

The product of such an overwhelming search would be subject in a large number of cases to legal confidentiality restrictions. These may stem from confidentiality agreements entered into between our clients and the rail carriers with whom they deal, which might permit our clients to share confidential information with us, provided that we in turn keep such information confidential; or from protective orders imposed by the STB or courts that are designed to protect third parties. These legal obligations would greatly complicate any effort to produce the subject materials since we would be required to undertake a considerable effort to identify and comply with our various duties under each of those protective orders or agreements. For example, some confidentiality agreements require notice to the other party if a document covered by the agreement is going to be

shared with a party outside of the agreement, in order to permit the other party to the agreement to prevent or limit the release. We would have to comply with all such conditions. In addition, a significant amount of material may be subject to the attorney-client privilege and/or the attorney work product doctrine.

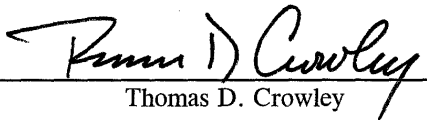
The complexity of this material and the existence of legal confidentiality obligations may create a variety of problems in the litigation of the Otter Tail case at the STB, for which I have been retained as an expert witness. In some instances, documents created by LEP&A responsive to BNSF's Draft Subpoena will be a summary of data provided by BNSF in STB litigation. For example, LEP&A submitted testimony in TMPA^{2/}. Because this maximum rate case involves the development of Stand Alone Costs from the PRB to TMPA's plant, the Discounted Cash Flow ("DCF") model would contain a forecast or projection of rail rates for each participant in the stand-alone group. While the analyses developed by LEP&A would, arguably, be responsive to the Draft Subpoena attached to the BNSF Petition, the underlying data upon which these analyses would be based (which may have been supplied by BNSF itself in response to TMPA's discovery) would not be responsive since that underlying data would not have been "prepared by L.E. Peabody." Otter Tail or its outside counsel would thus not be privy to the basis for LEP&A's analyses, since that underlying data would be subject to BNSF's "highly confidential" designation in TMPA. Moreover, I would not be at liberty to explain to Otter Tail's counsel either the basis or methodology for LEP&A's summary of the BNSF data because of legal confidentiality restrictions including "highly

^{2/} STB Docket No. 42056, Texas Municipal Power Agency v. The Burlington Northern And Santa Fe Railway Company ("TMPA").

VERIFICATION

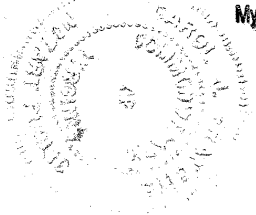
COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

THOMAS D. CROWLEY, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof and that the same are true as stated.


Thomas D. Crowley

Sworn to and subscribed)
before me this 15th day
of June, 2002.

Witness my hand and official seal.


My Commission Expires July 31, 2002


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PART II:

POINTS AND AUTHORITIES

BACKGROUND

BNSF's petition for a subpoena seeks broad and intrusive discovery from the confidential client files of LEPA, Otter Tail's expert witness on rail rates. BNSF originally directed this discovery to Otter Tail in Request for Production ("RFP") No. 49, which sought broad discovery of all of Otter Tail's expert witnesses:

Produce all projections, forecasts or estimates prepared by or contributed to by any witness who will present evidence in this case related to the subjects identified below, to the extent such projection, forecast or estimate was prepared after January 1, 1999 and relates to the demand for coal from the PRB anywhere in the United States, to the production of coal in the PRB, or to the future cost of transporting coal from the PRB.

Petition, Exhibit 3. Otter Tail raised numerous objections to this request, but ultimately agreed to produce general, *i.e.*, non client-specific, documents from its experts' files, pertaining to topics on which the expert would testify. Because such documents did not raise serious burden or client confidentiality concerns, Otter Tail and its expert witnesses consented to this scope of production. Otherwise, the requested documents were not within Otter Tail's possession, custody or control, and thus were not within Otter Tail's ability to produce. Otter Tail's voluntary scope of production also comported with the Board's decision in Wisconsin Power and Light Co. v. Union Pac. R.R. Co., STB Docket No. 42051, 2000 STB Lexis 341 (served June 21, 2000) ("WPL").

Unsatisfied with Otter Tail's response, BNSF filed a motion to compel Otter Tail to respond to RFP-49, among other requests, on April 17, 2002. Otter Tail responded that it could not produce the requested documents, even if ordered to do so, because the documents were not within Otter Tail's possession, custody or control.

Apparently recognizing the futility of compelling Otter Tail to produce documents it does not possess, BNSF now seeks to subpoena the documents directly from LEPA.¹ Otter Tail and LEPA object to BNSF's subpoena, which seeks unprecedented discovery, as unlawfully broad, unduly burdensome, and irrelevant. Moreover, such discovery will open a "Pandora's Box" of collateral issues that will make rate cases even more costly and time consuming.

¹ Apparently, BNSF is content with the production of non-client specific documents from Otter Tail's other experts, since the subpoena is directed only to LEPA.

ARGUMENT

I. BNSF HAS FAILED TO ARTICULATE THE PROPER LEGAL STANDARD FOR DISCOVERY OF EXPERTS AND HAS OTHERWISE FAILED TO SATISFY THE OBJECTIVE STANDARD ESTABLISHED BY THE BOARD.

BNSF incorrectly draws three overly broad principles from the FMC² and WPL decisions that are at odds with the true factors actually considered by the Board in determining the proper scope of expert discovery. See Petition at 7. First, while it is true that experts can be compelled to produce information from their internal files, the Board has not ordered experts to produce client-specific files of non-parties. Second, although discovery must be specifically tailored to address the issues that will be the subject of the expert's testimony, that does not automatically entitle one to discover an expert's client-specific files for non-parties in unrelated matters. Third, the impeachment value of evidence, by itself, is almost never sufficient to obtain discovery of an expert's files of non-party clients. The three "guiding principles" that BNSF has asserted are not the objective standards that the Board applied in FMC and WPL.

In FMC, the Board set forth the factors that it considers when determining the proper scope of discovery from a non-party expert: (1) whether the requested expert discovery is burdensome; (2) if so, whether the requesting party has made a substantial showing of relevance and need to outweigh the burden of production; (3) whether the requested material is confidential, privileged, or covered by a protective order in another proceeding; and (4) if the material is covered by a protective order, whether the requesting party has made a showing of extraordinary circumstances to justify modification of that protective order. FMC, 1998 STB Lexis 28, at *11-13. Applying those four factors in FMC, the Board denied UP's request for LEPA's prior written testimony in Stand-Alone Cost ("SAC") cases. All four factors are

² FMC Wyoming Corp. v. Union Pac. R.R. Co., STB Docket No. 42022, 1998 STB Lexis 28 (served Feb 5, 1998) ("FMC").

implicated in this case to an even greater degree, and an analysis of the four factors leads ineluctably to the conclusion that the BNSF's Petition should be denied.

A. BNSF's Subpoena is Unlawfully Broad and Burdensome on its Face.

In determining whether to permit discovery of a non-party expert, the Board first considers the breadth of the information requested from the expert's files and the burden of producing such information. FMC at *11. In this case, the scope of the discovery request is extremely broad and the burden of producing the materials is very substantial, since the requested subpoena would require LEPA to review a tremendous volume of client files and would extend to a wide array of confidential and privileged material that has little or no relevance to the issues in this proceeding. BNSF's only justification for such a broad request — a speculative and unsubstantiated allegation of possible impeachment value — does not outweigh the undue burden of production.

1. BNSF's subpoena request is extremely broad and covers a wide array of unrelated material that is confidential, privileged, and/or subject to protective orders.

The breadth of BNSF's subpoena is apparent on the face of the request itself:

Document Req. No. 1: Produce all documents prepared by L.E. Peabody for shippers of Powder River Basin coal, including documents prepared for any individual shipper, since January 1, 1999, that discuss or refer to forecasts, estimates or projections of rail rates for the transportation of Powder River Basin coal.

Petition, Exhibit 1 [emphasis added]. BNSF broadly defines "documents" to include virtually every conceivable piece of paper or electronic file prepared by LEPA that discusses or refers to forecasts, estimates, or projections of PRB rail rates that have been prepared by anyone for anyone. Id. This would extend to any review, critique, or reference by LEPA of any forecast, estimate, or projection of a PRB rail rate prepared by anyone else.

BNSF's subpoena request encompasses LEPA rate forecasts, estimates or projections that are prepared in a wide variety of contexts that are wholly unrelated to Otter Tail's rate case. For example, LEPA forecasts the changes in rates pursuant to contract rate adjustment formulas, both for existing contracts and contracts under negotiation. Crowley V.S. at 3. LEPA also has been called upon to review and evaluate rail rate forecasts, estimates and projections prepared by third parties, including forecasts developed by railroads. Id. The breadth of BNSF's requested subpoena extends far beyond the issues in Otter Tail's rate case, to shippers that may not be on a stand-alone railroad presented by Otter Tail in this case. Much of the requested material will include rail movements that are not part of the route traversed by Otter Tail's trains, including movements entirely on Union Pacific Railroad, which have no relation whatsoever to Otter Tail's rates. Id.

Moreover, a substantial portion of the requested material is confidential, privileged, and/or subject to protective orders issued by the Board or a court. For example, LEPA prepares forecasts, estimates and projections of rates that are based upon confidential information obtained through discovery in other rate cases, involving other railroads and other movements, such as forecasts contained in the Discounted Cash Flow model used in SAC litigation. Id. at 6-7. The subpoena also would encompass LEPA forecasts submitted for other clients as evidence in prior and pending rate cases. Those forecasts, and related materials, are subject to protective orders in those proceedings. Other forecasts related to a rate case would have been prepared by LEPA at the request of counsel in anticipation, or as part, of the rate litigation. Id. at 3. LEPA also has prepared forecasts for other clients in the context of judicial litigation, in which protective orders preclude LEPA from producing those forecasts and related material. Id. at 6.

LEPA's forecasts and related material in a litigation context likely are subject to the attorney-client privilege and the attorney work product doctrine.³

Even in the instances when counsel is not involved, LEPA's forecasts are prepared in a confidential business relationship with its clients. *Crowley V.S.* at 6. The clients provide commercially sensitive information to LEPA and LEPA uses that information as part of its forecasting. *Id.* at 5. BNSF seeks all of this sensitive information on the speculative reasoning that it might contain impeachment evidence.

BNSF appears to believe that production of this confidential and commercially sensitive information is justified by the protective order in this proceeding. In particular, BNSF inappropriately compares the confidential third-party information requested by its subpoena to the confidential transportation agreements that railroad defendants routinely are required to produce in rate cases. *Petition* at 14. But, there is a key difference. The confidential contracts are essential to a shipper's ability to present a substantive case on the merits, whereas BNSF has requested LEPA's confidential client files solely for their speculative impeachment value.

A protective order is intended to protect confidential information that is essential to a rate case; not to justify discovery of any confidential information no matter how tangential to the core issues in the proceeding. The Board, indeed, has recognized that the disclosure of commercially sensitive and confidential information should correlate directly with the need for such information. *Cf. FMC* at *11 (requiring UP to make a substantial showing of need before allowing discovery of confidential testimony). In addition, the Board has ruled that parties may not use protective orders as swords in discovery. *See CSX Corp. et al. – Control and Operating*

³ Even when not prepared in the context of litigation, many of the forecasts prepared by LEPA are at the request of counsel. LEPA's forecasts in this context are thus attorney-client communications and frequently are in anticipation of litigation. *See Western Resources, Inc. v. Union Pac. R.R. Co.*, 2002 U.S. Dist. Lexis 1911 (D. Kan. Feb. 1, 2002) (finding that LEPA's relationship with Western Resources as an expert consultant in non-litigation matters to be privileged).

Leases/Agreements – Conrail Inc. et al., STB Finance Docket No. 33388, 1997 STB Lexis 186, at *10-11 (served Aug. 5, 1997).

2. BNSF's subpoena would unduly burden LEPA.

The scope and breadth of BNSF's subpoena request would impose a substantial and undue burden upon LEPA. The subpoena request invades virtually every aspect of LEPA's business, and involves a large volume of its current business. *Crowley V.S.* at 4-5. The request is particularly burdensome because it extends to the individual files of each LEPA client and requires an extensive review of confidential material.

In order just to identify responsive material, LEPA would be required to search over 250 project files that occupy approximately 850 linear feet of shelf space. *Id.* at 5-6. In addition, LEPA will have to retrieve and review thousands of computer files (*e.g.* spreadsheets, databases, programs). *Id.* Although BNSF's request begins with January 1, 1999, a number of LEPA's project files created prior to January 1, 1999, straddle this time period, and therefore, also would have to be searched for responsive material generated after the January 1, 1999 beginning date. *Id.* at 4-5. In order to ensure complete responses, LEPA would have to search its client files extending back five years. *Id.*

After identifying these files, LEPA will have to review each one page-by-page, in both electronic and hard copy, to determine whether there are any analyses, or discussions of analyses, of rail rates and whether such documents are responsive to BNSF's request. *Id.* at 5. This review will be particularly complicated and time consuming because LEPA will have to distinguish between its own forecasts, estimates and projections, and related documents, and non-responsive forecasts, estimates and projections prepared by other persons (*e.g.*, clients, government entities, railroads). *Id.*

The burden upon LEPA is compounded by the confidential and/or privileged nature of the vast majority of the documents. LEPA has confidentiality agreements with most of its clients that require it to notify the client if the client's files are subject to production. In addition, documents subject to protective orders will require similar notification of clients, courts or agencies, and/or third parties. Id. at 6-7. Then, there are documents and information that are subject to the attorney-client privilege and/or attorney work product doctrine. LEPA will have to identify such documents, which are not discoverable, and contact the affected client to confirm this determination. Moreover, this will open the door to a multitude of privilege disputes involving numerous non-parties.

The foregoing circumstances demonstrate the significant burden that LEPA will face in time, expense, distraction, and human capital. Beyond this, however, is the damage that producing confidential client files will do to LEPA's good will. There is a significant risk that LEPA's clients may choose not to retain LEPA if they believe that their confidential material could be turned over to BNSF and another utility's outside counsel and consultants in STB proceedings unrelated to that client's project. Crowley V.S. at 6. Thus, BNSF's subpoena has the potential to cause permanent damage to LEPA's business.

In FMC, the Board concluded that UP's limited request for just LEPA's prior testimony was burdensome on its face. FMC at *11. In this proceeding, BNSF's request encompasses not only LEPA's prior testimony for individual clients in SAC cases, but also documents generated in any other circumstance in which LEPA prepared or evaluated rate forecasts at the request of individual clients. Thus, the breadth and burden are far greater in this proceeding than they were in FMC.

B. BNSF Has Not Made a Substantial Showing of Relevance and Need to Outweigh LEPA's Undue Burden.

In FMC, once the Board determined that the discovery was burdensome, it required UP to make a substantial showing of relevance and need to outweigh the burden.⁴ This is similar to the standard applied by federal courts, which limits discovery of material relevant to the impeachment of an expert "to materials possessed by an expert and related to the case at hand." In re Air Crash Disaster at Stapleton Int'l Airport, 720 F. Supp. 1442, 1444 (D. Colo. 1988) [emphasis added] [citation omitted]. This scope of discovery does not encompass conclusions and opinions offered in unrelated matters because such discovery "would unnecessarily burden technical litigation with pre-trial inquiry into facts and issues wholly irrelevant to the case at hand." Id.; see also, Trunk v. Midwest Rubber & Supply Co., 175 F.R.D. 664, 665 (D. Colo. 1997). Since BNSF's subpoena request is far broader and more burdensome than the request in FMC, BNSF also must make a substantial showing of relevance and necessity in this proceeding.

1. BNSF has not made a substantial showing of relevance.

The sole reason given by BNSF to justify its subpoena of LEPA is the possible impeachment of LEPA testimony on future rail rates. BNSF presents no facts to support its supposition that such discovery would yield impeachment evidence, much less evidence that also is relevant to Otter Tail's complaint. Rather, BNSF merely assumes without explanation that all rate forecasts are comparable and therefore relevant to SAC-related forecasts. BNSF then

⁴ This is the key distinction between FMC, which denied the requested expert discovery, and WPL, which granted expert discovery. In WPL, the Board noted that, after UP narrowed its request, LEPA did not present any updated evidence on the burden of complying with the revised requests. WPL at *6. In the absence of such evidence, there was no basis to require UP to make a substantial showing of relevance and need to outweigh the burden. Moreover, because the Board was reviewing a prior ruling of an ALJ, the Board accorded substantial deference to the ALJ's relevance determination. Id. In this proceeding, LEPA has made a showing of substantial burden and the Board must determine, in the first instance, whether BNSF has made a substantial showing of need and relevance, rather than on appeal of an ALJ's determination. In addition, as Mr. Crowley explains at page 4 of his verified statement, BNSF's subpoena request is much broader than the requests made in WPL.

speculates that “the commercial advice L.E. Peabody provides to its clients on the level of future rail rates is inconsistent with the aggressive rate growth assumptions that Mr. Crowley has presented to the Board in past cases.” Petition at 3. Unsubstantiated speculation such as this does not provide a basis to subpoena the files of non-party experts on unrelated matters for unrelated clients.⁵ More importantly, it does not constitute a substantial showing of relevance.

In FMC, the Board rejected UP’s arguments as to the substantial necessity and relevance of LEPA’s prior testimony from other SAC proceedings. It found unavailing UP’s “vague allegations that the prior testimony of LEPA would provide important insights and possible impeachment evidence.” FMC at *14. In addition, the Board considered the prior testimony to be of limited relevance because the analytical approach in any given case may differ from the approach in other cases due to the factual situation presented or the evolutionary refinement of stand-alone theory. Id. at *11.

In this proceeding, the Board’s reasoning applies to the same degree with respect to LEPA’s SAC forecasts and to an even greater degree with respect to its non-SAC related forecasts. First, the Board’s decision in FMC unequivocally holds that LEPA’s prior SAC testimony on future rail rates is not discoverable, in part, because of its limited relevance. Id. Second, if SAC-related prior testimony is of limited relevance in another SAC case, then LEPA’s forecasts, estimates and projections in wholly unrelated contexts are even less relevant to a SAC case.

⁵ E.g., Lemanik, S.A. v. McKinley Allsopp, Inc., 125 F.R.D. 602, 610 (S.D.N.Y. 1989) (“In view of the breadth of the requests, some factual basis for believing that impeaching evidence will be revealed by the discovery sought is necessary [and] [t]he moving papers, which discuss these theories in only the most conclusory terms, do not satisfy that requirement.”) [citations omitted]; Davidson Pipe Co. v. Laventhol & Horvath, 120 F.R.D. 455, 463 (S.D.N.Y. 1988) (To justify an inquiry into facts relevant solely to credibility, the party seeking discovery must have a factual basis for believing that prior acts of deception will be revealed.); Burns v. Phillips, 50 F.R.D. 187, 188 (N.D. Ga. 1970) (“If usefulness for purposes of impeachment were accepted as the criterion of relevancy, the relevancy test would for all practical purposes be worthless.”).

As discussed in Mr. Crowley's Verified Statement, LEPA prepares rail rate forecasts under a wide variety of circumstances. Crowley V.S. at 2-3. Forecasted rates will often differ among various clients and, in some cases, even for the same client, because of the different inputs, information, purposes and assumptions known and used at the time to generate each forecast, estimate or projection. Id. at 8. For example, forecasts made in the context of contract negotiations may be affected by a variety of factors, such as rate floors, rate ceilings, reopeners, the timing and length of the contract, and many others. Id. at 8-9. Therefore, grant of BNSF's Petition would involve the Board in a quagmire of endless disputes as to whether forecasts prepared by LEPA in this case are comparable or relevant to forecasts made in other settings, even for the limited purpose of impeachment.

Other than to speculate about possible impeachment value, BNSF has not made any showing of relevance, let alone a substantial showing. Indeed, the Board previously has rejected unsubstantiated assertions that forecasts created in one context are necessarily relevant to those created in another. CSX Corp., et al. – Control and Operating Leases/Agreements – Conrail Inc. et al., STB Finance Docket No. 33388, 1997 STB Lexis 186 (served Aug. 5, 1997) (railroad's traffic projections from merger proceeding were unrelated to its traffic forecasts in a rate case and not useful for impeachment purposes). In this case, BNSF has made the same type of vague allegations that LEPA's client-specific files will provide important insights and possible impeachment evidence that the Board concluded were inadequate to satisfy the substantial need and relevance standard in FMC. See FMC at *7.

The Board's reasoning in FMC persuaded a federal district court to deny a request by UP to discover LEPA's files in Entergy Services, Inc. v. Union Pac. R.R. Co., No. 8:98CV345, (Memorandum and Order) (D. Neb. May 26, 2000), attached hereto as Exhibit "A," which

involved a dispute over a rail contract. In that case, UP contended that LEPA had made “extensive projections” in FMC relating to what traffic could be carried on UP’s “real world” rail lines and that the information was relevant to the issues presented in the Entergy case. Id. at 4. In denying UP’s request, the Court was persuaded by the STB’s conclusion in FMC that the requested prior testimony was “of limited relevance because the analytical approach in any given case may differ from the approach in other cases due to the factual situation presented or the evolutionary refinement of stand-alone theory.” Id. at 4-5. The Court concluded that the requested documents prepared by LEPA in FMC were even less relevant to the Entergy case than they would be in another SAC proceeding and would introduce “purely collateral issues which will not assist the jury or trier of fact.” Id. at 5 (citing Trunk v. Midwest Rubber and Supply Co. and In re Air Crash Disaster at Stapleton Int’l Airport). By that very same reasoning, LEPA’s non-SAC related forecasts for individual clients are irrelevant to its SAC-related forecasts for Otter Tail in this proceeding.

In Eliassen v. Hamilton, 1986 U.S. Dist. Lexis 23604 (N.D. Ill. June 26, 1986), one of the few cases directly on point, a federal court refused to order plaintiff’s expert witness to produce similar analyses performed for clients other than the plaintiff. The expert was engaged by plaintiff to prepare a fair market valuation of certain common stock at the time of a merger. Id. at *1. Defendants sought to discover similar analyses performed by the expert for other clients. In support of their request, Defendants argued that the expert had cited his prior work as the basis for his expertise, and if he used different methods or lower price projections in prior projects, such information would be relevant to test the expert’s credibility. Id. at *3-4.

The Court rejected these arguments, finding that, because the requested material was prepared by the expert for clients other than the plaintiffs, they were not related in any way to the

subject matter of the case. Id. at *6. Such material was simply part of the expert's background, knowledge, and prior experience, which

evolved from projects based on different information, different critical dates, different types of clients, different client instructions, different goals and purposes, and different types of properties and mixes of business than those analyzed in the [instant proceeding].

Id. at *6-7. Since these unrelated projects were not comparable to the project at issue in the case, the Court concluded that "they [were] not appropriate for impeachment purposes." Id. at *7. The Court further observed that, if the defendants wished to challenge the expert's analyses, they could hire their own expert to review the data and to testify as to the soundness of the report and the reliability of the plaintiff's expert's expertise. Id. at *8.

FMC, Entergy, and Eliassen establish that BNSF's conclusory speculation about the impeachment value of LEPA forecasts for individual clients does not constitute a substantial showing of relevance to Otter Tail's rate case. In particular, the Board's own precedent in FMC unequivocally holds that SAC-related forecasts are irrelevant and thus non-discoverable. Because non-SAC related forecasts have an even weaker nexus, it follows that they too are irrelevant and non-discoverable. Furthermore, as demonstrated above and further explained in Mr. Crowley's Verified Statement, LEPA's individual client forecasts are based upon different information, different types of clients, different client instructions, and different goals and purposes. BNSF, therefore, has not made, and cannot make, a substantial showing of relevance.

2. BNSF has not made a substantial showing of need.

BNSF has not made a substantial showing of need to discover LEPA's non-party client files. Indeed, BNSF's own Petition undermines any such claim. For example, BNSF states "An assumption that rail rates will constantly increase, as Mr. Crowley has claimed in past cases, is totally inconsistent with historical trends and the expectations of market participants." Petition at

12. If this is true, then BNSF can use such historical trends in response to LEPA's testimony, if similar claims are made in this proceeding.

In addition, Mr. Crowley identifies several sources of information that BNSF may use to challenge LEPA's forecasts, estimates or projections. These include data that BNSF itself has developed as part of its on-going business activities, analyses prepared by other consulting firms, and publicly available analyses from various agencies such as the Energy Information Administration. Crowley V.S. at 9. These alternative sources belie BNSF's claim that "there is a scarcity of information on future rail rates for PRB coal transportation." Petition at 13.

Furthermore, BNSF points out that the Board "rejected Mr. Crowley's evidence" in WPL, despite the fact that UP did not discover LEPA's client-specific files on projected rail rates.⁶ Id. at 11. LEPA, in fact, has presented testimony on future rail rates in every SAC proceeding decided by the Board. Crowley V.S. at 2. The Board, however, has not required, nor indicated it might need, evidence from LEPA's individual client files to make these determinations.⁷ Rather, each party has hired its own expert to review the data and to testify as to the soundness of the other expert's report, just as the court in Eliassen indicated the parties should do. Thus, the history of SAC proceedings belies BNSF's assertion of a compelling need to discover LEPA's confidential client files for impeachment purposes.

C. FMC Prohibits Discovery of Prior Testimony Subject to a Protective Order.

The third factor considered by the Board in FMC is whether the requested information is covered by a protective order. The Board determined that, in addition to a lack of substantial relevance and need, production of LEPA's prior testimony was barred by the protective orders

⁶ BNSF conveniently glosses over the fact that the Board also rejected UP's forecasts in WPL, without recourse to impeachment evidence from the individual client files of UP's expert witness.

⁷ Similarly, the Board also has not needed to review the client files of the railroads' expert witnesses to determine the credibility of their testimony.

under which the testimony in prior SAC cases was rendered. FMC at *12. The same protective orders apply to LEPA's rate forecasts prepared for other SAC cases.

The Board also observed that LEPA's work for other clients may be confidential, privileged, or subject to protective orders in other cases, and indicated that it would consider such objections to specific inquiries. Id. at *8-9. The vast majority of LEPA's forecasts are prepared at the request of counsel and/or in anticipation of litigation, rely upon confidential information, and/or are subject to protective orders in other proceedings. Crowley V.S. at 6-7. In FMC, the Board recognized that LEPA holds these confidential client materials "as a fiduciary for its former clients and is not free to produce them to [other clients, such as Otter Tail]." FMC at *12. There is no rational basis for the Board to treat judicial protective orders or privileged material from other proceedings any less stringently than it treats protective orders and privileged material in Board proceedings.

If granted, the subpoena also would circumvent the Board's decision in Public Service Co. of Colorado d/b/a Xcel Energy v. BNSF, STB Docket No. 42057, 2002 STB Lexis 85 (served Feb. 1, 2002). In that decision, the Board denied BNSF's request to modify the protective order in that case to allow BNSF to use certain confidential information to rebut evidence in another case. The Board found that BNSF had not made the required showing of extraordinary circumstances or compelling need to justify modification of the protective order. In similar cases, where the confidential information is developed by an expert witness, a railroad could circumvent the protective order by issuing a subpoena directly to the expert witness in the second proceeding, thereby obtaining the confidential information without requiring modification of the protective order. This perversion of protective orders for the speculative purpose of impeachment should not be permitted.

D. BNSF Has Not Demonstrated Extraordinary Circumstances.

In FMC, the Board reaffirmed its willingness to modify a protective order upon a showing of “extraordinary circumstances,” such as where a party seeks to use confidential information that it can demonstrate impeaches, as untruthful, evidence submitted in another proceeding. FMC at *13, citing CSX Corp. et al – Control and Operating Leases/Agreements – Conrail Inc. et al., STB Finance Docket No. 33388, 1997 STB Lexis 186 (served Aug. 5, 1997). The Board, however, declared that “vague allegations that [prior testimony] will provide important insights and possible impeachment evidence” does not constitute an extraordinary circumstance. FMC at *14.

Although BNSF has not explicitly sought modification of the protective orders in any proceeding, such a modification would be the direct effect of its subpoena, since the subpoena would encompass LEPA’s testimony in prior rate cases. As demonstrated in Section I.B.2, supra, BNSF has not even made a substantial showing of need for LEPA’s individual client files. It simply has made the same vague allegations of possible impeachment value that the Board rejected in FMC. Therefore, BNSF has not made the requisite showing of extraordinary circumstances to justify modification of existing Board protective orders.

II. BNSF’S SUBPOENA WOULD BE PROCEDURALLY UNFAIR AND PREJUDICIAL TO OTTER TAIL.

Production of the subpoenaed material would be procedurally unfair and prejudicial to Otter Tail. A significant part of the requested information is unrelated to a stand-alone cost proceeding. In addition, it covers different time periods than will be at issue in Otter Tail’s rate case, is based on different information, and is prepared for different clients, based on different client instructions, and with different goals and objectives in mind. See Crowley V.S. at 8. These factors, however, must be known and understood in order to ascertain if any of the

subpoenaed material even is remotely relevant to Otter Tail's complaint against BNSF, and to respond to BNSF's allegations regarding the material. Id. Otter Tail, however, does not possess that knowledge, nor will it have access to this essential information. As a consequence, Otter Tail will be handicapped in its ability to rebut BNSF's attempts to impeach LEPA with prior forecasts that BNSF has taken out of context.

Mr. Crowley illustrates one aspect of this problem in his Verified Statement. See Crowley V.S. at 7-8. For example, LEPA's testimony in Texas Municipal Power Agency v. BNSF, STB Docket No. 42056 ("TMPA"), includes rail rate forecasts that may be responsive to BNSF's subpoena request. To the extent LEPA's forecasts rely upon underlying data provided by others (*e.g.*, TMPA or BNSF), Otter Tail would be unaware of this data. Moreover, the data itself would not be within the scope of BNSF's subpoena. In this circumstance, BNSF would have knowledge of the underlying data, but Otter Tail would not. BNSF could make inappropriate comparisons of LEPA's forecasts in TMPA with its forecasts in this case for impeachment purposes, while Otter Tail would be unable to rebut the comparison, or even have sufficient information to know that BNSF has made inappropriate use of the TMPA forecast.

There are other aspects of this due process problem. For example, forecasts are based upon numerous assumptions that will affect the result. See Crowley V.S. at 8-9. The assumptions will differ among individual clients and with the purpose and objectives behind the forecast. Sometimes the assumptions are dictated by the client and other times LEPA may develop them. Id. at 2-3. Contract negotiation forecasts are based on varying circumstances and may differ depending upon the initial rate, the adjustment mechanism, the existence of rate floors, ceilings and reopeners, and the contract duration, each involving tradeoffs that affect the others. Id. at 8-9. Sometimes multiple forecasts are made for the purpose of comparison. Id.

Without knowledge of these facts, it is impossible to know whether comparisons with a SAC-related forecast are appropriate. Unfortunately, BNSF will be able to make broad claims regarding this material, while Otter Tail may not have the information necessary to respond effectively.

It is no answer to say that, while Otter Tail may not have knowledge, LEPA does, and thus could provide Otter Tail with the information necessary to respond to BNSF's allegations. LEPA may be unable or not permitted to provide Otter Tail with the information and knowledge that would be necessary to respond to any attempts by BNSF to use client-specific forecasts to impeach LEPA's testimony. First, LEPA may not be permitted to share its knowledge of the assumptions, purposes, and circumstances behind each forecast with Otter Tail, either due to protective orders or its fiduciary relationship to its other clients. Id. at 9. Such information is not always included in the documents prepared by LEPA and within the scope of BNSF's subpoena. Id. at 8-9. Second, LEPA itself may not possess all of these essential facts, since LEPA's clients may not always provide LEPA with the basis for all of the information behind a forecast. Id. at 9. Otter Tail, thus, could be placed in the near-impossible position of having to subpoena such information from other utilities, or from LEPA, in order to respond to BNSF's claims.

Otter Tail also will be at a procedural disadvantage to BNSF if the Board expands the scope of expert discovery as requested by BNSF. Clearly, if BNSF is permitted to subpoena Otter Tail's experts, Otter Tail must be permitted comparable discovery of BNSF's experts on the same subject matter. But, the procedural schedule in rate cases does not currently provide for such discovery. In response to Otter Tail's Interrogatory No. 28, which asks BNSF to identify its expert witnesses, BNSF has objected to the request as premature until Otter Tail has filed its opening evidence. See document attached hereto as Exhibit "B." By that date, however,

discovery will be closed. If the Board nevertheless were to permit discovery, the reply evidence would have to be postponed by at least 3-6 months to accommodate the pleading cycle for a subpoena petition, a decision by the Board, and sufficient time for production by BNSF and review by Otter Tail.

Any delay to a rate case is harmful to shippers such as Otter Tail. Until the STB issues a decision on Otter Tail's complaint, Otter Tail must continue to pay BNSF unreasonably high common carrier rates. Furthermore, any delay necessarily comes with additional costs in legal and consulting fees that will discourage shippers from filing rate complaints in the future. Therefore, it is in BNSF's interest to expand and complicate discovery through a variety of means, such as its subpoena petition.

III. BNSF'S SUBPOENA WOULD RADICALLY COMPLICATE AND EXTEND SAC CASES CONTRARY TO CONGRESSIONAL INTENT.

Congress has directed the Board to "establish procedures to ensure expeditious handling of challenges to the reasonableness of railroad rates [that] include appropriate measures for avoiding delay in the discovery and evidentiary phases of such proceedings" 49 U.S.C. § 10704(d). BNSF's subpoena request would only further complicate an already complex

discovery process, which will result in greater delays and costs beyond those that already exist in STB rate reasonableness cases.⁸

The premise of BNSF's subpoena request is its desire to discover information that BNSF believes might provide material to impeach LEPA's testimony on PRB rail rates. If BNSF's request is granted, the logic of this premise necessarily would extend discovery of experts to all subjects addressed by any rail or shipper expert in a rate case. This would extend far beyond the rate forecasts at issue in this subpoena to virtually every component of rail construction costs and variable costs, such as fuel, roadway maintenance, locomotive maintenance, and internal management costs. For example, all rail experts would have to produce their files relating to the work they have performed for both the defending railroad and any other railroads for whom they have provided services related to the scope of their testimony.

The evidentiary pleadings will grow longer and more complex because each side will try to use evidence from experts' consulting files to impeach their SAC testimony. Each side will be forced to respond to those attacks by demonstrating why the impeachment evidence cannot properly be compared with the SAC testimony. As a consequence, the Board will become bogged down in collateral issues surrounding the relevance and appropriateness of each item of

⁸ Under the Board's rules and the statute, 210 days is targeted for discovery and the submittal of evidence (49 C.F.R. §1111.8), and 270 days is required for decision after the close of the record (49 U.S.C. §10704(c)). Allowing 30 days for briefing, a "target" time for decision from the date of the filing of a complaint is 510 days, or about 17 months. There are six western coal cases currently pending at the Board. Their status is as follows.

Docket Number	Complainant	Complaint Filed	"Target" Decision	Current Status
42054	PPL Montana	7/6/00	12/6/01	Decision due 10/02 (10 months after target)
42056	TMPA	10/3/00	3/2/01	Decision due 3/03 (12 months after target)
42057	PSCo	12/20/00	5/20/02	In discovery, no procedural schedule
42058	AEPCO	12/29/00	5/29/02	In discovery, no procedural schedule
42059	NSP	1/26/01	6/26/02	In discovery, no procedural schedule
42071	Otter Tail	1/2/02	7/2/03	In discovery, no procedural schedule

SAC cases have already reached a point of complexity that none of the pending western coal cases will be decided in the time targeted by the Board's rules. Five of the six are already at or beyond the target date, and most are still in the discovery stage. BNSF's attempted foray into "impeachment" evidence will only exacerbate this situation.

impeachment evidence, which will do very little to help the Board reach a decision in the case at hand.

This extended discovery also will lengthen procedural schedules and complicate the discovery process. Because the discovery will be from the files of non-party expert witnesses, a subpoena will be necessary for each expert. Most of the material will be commercially confidential, subject to protective orders issued by the Board or by courts, and/or subject to the attorney client and work product privileges in other proceedings. Each of these obstacles creates potential for further delay as interested non-parties take steps to prevent or limit disclosure of their confidential, protected, or privileged information. Additional delay will occur in order to notify the interested third parties. Furthermore, there could be extensive corollary discovery disputes over the privilege claims that likely will be raised in connection with the vast majority of documents encompassed by the numerous subpoenas.

Discovery of railroad experts will not be possible until after the filing of opening evidence, since railroads are likely to refuse to identify their experts until after shippers submit their opening evidence. Since it will not be possible to serve a subpoena upon an unidentified expert, a further round of discovery will be necessary between the filing of opening and reply evidence, thus further extending the procedural schedule.

The effect of this additional time and effort will be to make rate cases even longer and more costly than they are today. This is particularly undesirable at a time when shippers are complaining to Congress that the existing procedures and consequent costs discourage most shippers from challenging unreasonable rates. The mere possibility of discovering impeachment evidence in the non-party files of expert witnesses cannot justify the scope of discovery that inevitably would follow from a decision to grant BNSF's subpoena request.

CONCLUSION

WHEREFORE, Otter Tail and LEPA respectfully request that the Board deny BNSF's
Petition for Subpoena Duces Tecum.

Respectfully submitted,



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June 17, 2002

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

2000 MAY 26 10:07

SAF. J. J. FARLAND
CLERK

ENTERGY SERVICES, INC. and
ENTERGY ARKANSAS, INC.,

Plaintiffs,

v.

UNION PACIFIC RAILROAD
COMPANY,

Defendant.

8:98CV345

MEMORANDUM AND ORDER

This matter is before the Court on defendant's motion to compel Crowley documents (Filing No. 177), and on the motion of plaintiffs and Thomas D. Crowley for a protective order barring enforcement of the Union Pacific subpoena (Filing No. 196). Both parties and Mr. Crowley in their respective motions have advised the Court that they have engaged in personal consultation with opposing counsel in an attempt to resolve their discovery differences. Hearing was held on May 19, 2000. After consideration of the parties' briefs, the evidence submitted, including the STB's opinion in *FMC Wyoming Corp. v. Union Pacific Railroad Co.*, STB Docket No. 42022 (May 10, 2000), and the arguments of counsel, the Court finds defendant's motion to compel should be denied, and plaintiffs' and Mr. Crowley's motion for a protective order should be granted.

I. FACTUAL BACKGROUND

Defendant served upon Mr. Thomas D. Crowley, President of L.E. Peabody & Associates, Inc., in the Eastern District of

Virginia a subpoena duces tecum seeking the following information¹:

Request No. 3: All documents that refer, reflect, or relate to the opinions or qualifications of Mr. Crowley in any previous proceeding (including litigation, administrative proceedings, and arbitrations) in which he appeared on behalf of or at the request of any person or entity, including without limitation: documents sufficient to identify such proceedings, the parties, their counsel, and the party that retained him as an expert; any transcripts, affidavits, declarations, expert reports, or other documents that set forth or summarize the opinions (whether tentative or final) of Mr. Crowley or the grounds for his opinions; and any documents in which Mr. Crowley analyzed or critiqued the opinions of any other expert.

Request No. 4: All documents prepared by Mr. Crowley or any other members of L.E. Peabody & Associates, Inc. since 1984 in any previous proceeding relating to railroad track capacity, including but not limited to studies relating to the relationship of passing track requirements to density and studies relating to the number or length of passing trucks required for specific density levels.

Request No. 5: All documents relating to and sufficient to determine the average maximum annual density and average ratio of passing and double track to route miles for each of the stand-alone networks Mr. Crowley or any members of L.E. Peabody & Associates, Inc. have sponsored since 1984 in rate reasonableness proceedings before the Surface Transportation Board and its predecessor the Interstate Commerce Commission.

Request No. 6: All documents relating to the calculation of and methodology for calculating locomotive crew requirements for each of the stand-alone networks Mr. Crowley or any members of L.E. Peabody & Associates, Inc. have sponsored since 1984 in rate reasonableness proceedings before the Surface Transportation Board and its predecessor the Interstate Commerce Commission.

(Filing No.197, Exhibit A, hereinafter "Subpoena"). Defendant also filed a motion to compel, which contained a request for

¹ At the hearing before the Court on May 19, 2000, the parties agreed that paragraphs one and two of the Subpoena and similar requests in Request Nos. 1 and 2 of the Motion to Compel were no longer at issue.

production nearly identical to paragraph three of the subpoena. Pursuant to Fed.R.Civ.P. 26(c), Mr. Crowley and plaintiffs filed with the Court a motion for a protective order. The Court was advised at the hearing that paragraphs four, five and six of the subpoena were intended as subsets of paragraph three of the subpoena. At the hearing before the Court on May 19, 2000, defendant further narrowed its request for production, stating that it was only seeking documents described in paragraphs four, five and six of the subpoena which were prepared or sponsored by Mr. Crowley or any member of the L.E. Peabody firm, restricted to the proceedings before the Surface Transportation Board (STB) in *FMC Wyoming Corp. v. Union Pacific Railroad Co.*, STB Docket No. 42022 (May 10, 2000).

II. DISCUSSION

Rule 26 allows discovery where "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.Pro. 26(b)(1). Entergy argues that Mr. Crowley's (or his associates') opinions and reports from other litigation is not relevant to the current litigation because much of that previous testimony, including the FMC proceeding, has involved the development of a hypothetical stand-alone rail network for the purpose of testifying as to what rates complaining captive shippers should be paying. Entergy contends that in this case, Mr. Crowley will testify about the "real world" capacities of the UP rail network with its heterogenous mix of traffic and other actual factors which have affected

traffic over UP's rail lines, and therefore, any testimony relating to hypothetical rail networks is not relevant to the issues in this case. On the other hand, UP contends that Mr. Crowley and his associates made "extensive projections" in the FMC proceeding relating to what traffic could be carried on UP's "real world" rail lines, and that such information is relevant to the issues presented in this case.

The Court concludes that the information sought by defendant is simply not relevant to the issues in this case. The opinions given by Mr. Crowley and/or his associates in FMC related to a stand-alone railroad which is a hypothetical railroad designed specifically to address whether rates charged by railroads are reasonable. The Court notes that in contrast to the FMC proceeding, the basic issues in this case appear to involve whether UP has, in the past, oversold its capacity to transport coal while under-investing in rail infrastructure to keep up with its growing traffic, resulting in an alleged breach of contract. The Court finds persuasive the STB's opinion in FMC denying UP's discovery request for all of the written testimony submitted by Mr. Crowley's firm in other stand-alone cost proceedings before the STB, including all work papers generated in connection with such testimony. *FMC Wyoming Corp. v. Union Pacific Railroad Co.*, Docket No. 42022 (February 4, 1998) (see Attachment "A" to Brief in Support of Protective Order). The STB ruled that the requested "prior testimony [was] of limited relevance because the analytical approach in any given case may

differ from the approach in other cases due to the factual situation presented or the evolutionary refinement of stand-alone theory." *Id.* at 5-6. See also *id.* at 4 (stating that "it has been our experience that every case brings new theoretical arguments."). This Court concurs and finds that documents prepared by Mr. Crowley's firm in the FMC proceedings are even less relevant to the present case, involving an analysis of UP's actual track capacity, than they would be in other rate reasonableness proceedings. The Court does not intend to introduce into this case purely collateral issues which will not assist the jury or trier of fact. See *Trunk v. Midwest Rubber and Supply Co.*, 175 F.R.D. 664 (D.Colo. 1997); *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F.Supp 1442 (D.Colo. 1988). Having considered the FMC opinion, the Court finds that defendant's motion to compel should be denied and the protective order should be granted. Accordingly,

IT IS ORDERED:

- 1) Defendant's motion to compel (Filing No. 177) is denied;
- 2) Mr. Crowley's and plaintiffs' motion for a protective order (Filing No. 196) is granted; and
- 3) Defendant shall not seek for purposes of this litigation the documents, described in paragraphs three through six of the subpoena, which were prepared or sponsored by Mr.

Crowley or the L.E. Peabody & Associates, Inc. in the FMC Wyoming
Corp. v. Union Pacific Railroad Co. proceeding.

DATED this 26th day of May, 2000.

BY THE COURT:

A handwritten signature in dark ink, appearing to read "Lyle E. Strom", is written over a horizontal line.

LYLE E. STROM, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA
MAY 25 2000

DAVID L. HANLAND
CLERK

ENTERGY SERVICES, INC. and)
ENTERGY ARKANSAS, INC.,)

Plaintiffs,)

8:98CV345

v.)

UNION PACIFIC RAILROAD)
COMPANY,)

ORDER

Defendant.)

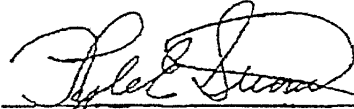
This matter is before the Court on defendant's motion to compel compliance with Court order and for other relief (Filing No. 188). On March 30, 2000, the Court granted UP's motion to compel Entergy's expert, Mr. Louiselle, to provide a more thorough expert report pursuant to Rule 26(a)(2)(B), and to produce documents and/or electronic data which Mr. Louiselle reviewed, considered, or relied upon in reaching his expert opinions in this case, including the Delaney study if Mr. Louiselle used that in preparing his expert opinion (Filing No. 162).

UP contends that Entergy has still not complied with this Court's March 30, 2000, order. In response, Entergy filed an opposition to UP's motion, including a certification that all documents and data called for by the Court's March 30, 2000, order have been produced. At the hearing held before the Court on May 19, 2000, the parties agreed that this motion was no longer at issue at this time. Accordingly,

IT IS ORDERED that defendant's motion to compel compliance with Court order and for other relief (Filing No. 188) is denied without prejudice as moot.

DATED this 26th day of May, 2000.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Kyle E. Strom', written over a horizontal line.

KYLE E. STROM, Senior Judge
United States District Court

EXHIBIT B

OTTER TAIL POWER COMPANY,
Complainant,
v.
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,
Defendant.

Defendant The Burlington Northern and Santa Fe Railway Company (“BNSF”) hereby objects and responds to Otter Tail Power Company’s Third Set of Interrogatories and Fourth Set of Requests for Production of Documents (“Otter Tail’s Discovery Requests”).

GENERAL OBJECTIONS AND OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

BNSF hereby incorporates by reference its general objections to definitions and instructions set forth in BNSF'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 served on February 19, 2002.

Identify and describe any studies or analysis of Otter Tail's ability to obtain direct rail access to the Big Stone facility for a rail carrier other than BNSF, by lease, build-in, build-out, or other means.

BNSF RESPONSE: BNSF objects to this Interrogatory as overly broad and unduly burdensome to the extent it requests information about matters occurring prior to January 1, 1999. BNSF further objects to this Interrogatory to the extent it seeks information relating to litigation involving State of Minnesota v. Burlington Northern Railroad Company v. Big Stone-Grant Industrial Development and Transportation, LLC, 990 F. Supp. 731 (D. Minn. 1997), aff'd, 131 F.3d 144 (8th Cir. 1997), on grounds that such information is privileged, subject to the work product doctrine and that the production of such information would be unduly burdensome. Subject to these objections, BNSF will produce or make available documents generated after January 1, 1999, that are unrelated to the litigation involving Twin Cities & Western Railroad and that may contain information responsive to this request, to the extent such documents exist.

INTERROGATORY NO. 28

Identify all consultants or experts that BNSF has retained to provide expert testimony or that BNSF intends to retain to provide expert testimony in this case, and, if BNSF has retained a consultant or expert, when it retained that consultant or expert.

BNSF RESPONSE: BNSF objects to this request to the extent it seeks information regarding stand-alone cost ("SAC") consultants or experts on grounds that the Interrogatory is premature. Since BNSF submits evidence in response to Otter Tail's opening evidence, it would be premature to identify experts that will submit testimony until Otter Tail has filed its opening evidence. BNSF further objects to this Interrogatory on grounds that it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence to the extent it seeks information regarding the date that BNSF retained a consultant or expert. Subject to these

objections, BNSF states that it has retained FTI Consulting to provide expert testimony on variable cost issues in this case.

INTERROGATORY NO. 29

For each consultant or expert identified in response to Interrogatory No. 28, please provide:

- (a) the qualifications of the witness, including a list of publications authored and speeches given by the witness within the preceding ten years;
- (b) a list of any other cases in which the witness has testified as an expert at trial, by deposition or in writing.

BNSF RESPONSE: BNSF hereby incorporates by reference its objections to Interrogatory No.

28. As to FTI Consulting, BNSF states that it is in the process of collecting this information.

INTERROGATORY NO. 30

Identify any abandonment or discontinuance of service proceeding before the STB to which BNSF has been a party and that involves or involved any line traversing any of SARR states in whole or in part.

BNSF RESPONSE: BNSF objects to this Interrogatory as overly broad and unduly

burdensome to the extent it seeks information about any line traversing any of the SARR states.

BNSF further objects to this Interrogatory on grounds that it seeks information that is available from public sources.

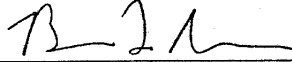
INTERROGATORY NO. 31

Identify by name, title, and office, the BNSF employees who are primarily responsible for making or producing forecasts or projections for coal and non-coal traffic transported by BNSF in or through the SARR states.

BNSF RESPONSE: BNSF is in the process of collecting this information and will provide a response shortly.

INTERROGATORY NO. 32

Respectfully submitted,



Richard E. Weicher
Michael E. Roper
The Burlington Northern and Santa Fe
Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

Samuel M. Sipe, Jr.
Anthony J. LaRocca
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Brooke L. Gaede
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

Attorneys for Defendant

April 17, 2002

CERTIFICATE OF SERVICE

I hereby certify that this 17th day of April 2002, I served a copy of the foregoing BNSF's Responses and Objections to Complainant's Third Set of Interrogatories and Fourth Set of Requests for Production of Documents to the following by first class mail, postage prepaid:

George Koeck, Esq.
General Counsel
OTTER TAIL POWER COMPANY
215 South Cascade Street
P.O. Box 496
Fergus Falls, MN 56538-0496

And by hand delivery to the following:

Nicholas J. DiMichael, Esq.
Jeffrey O. Moreno, Esq.
Michael H. Higgins, Esq.
THOMPSON HINE, LLP
1920 N Street N.W., Suite 800
Washington, DC 20036
(202) 331-8800



Brooke L. Gaede

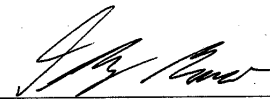
CERTIFICATE OF SERVICE

I hereby certify that this 17th day of June, 2002, I served a copy of the foregoing Joint Opposition of Otter Tail Power Company and L.E. Peabody & Associates, Inc. to Defendant's Petition for Subpoena Duces Tecum 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