

STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

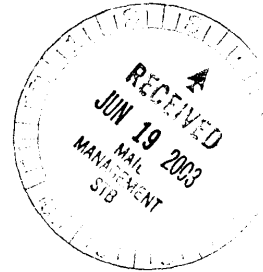
1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Telephone 202.429.3000
Facsimile 202.429.3902
www.steptoelaw.com

Cynthia L. Quarterman
202.429.6272
cquarterm@steptoelaw.com

208130

June 19, 2003



via Hand Delivery

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

OFFICE OF PROCEEDINGS

Part of
Public Record

**Re: Procedures to Expedite Resolution of Rail Rate Challenges to be Considered
Under the Stand-Alone Cost Methodology, STB Ex Parte No. 638**

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and 10 copies of the Reply Comments of The Burlington Northern and Santa Fe Railway Company on Discovery Matters Addressed in the Board's April 3, 2003 Order.

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

Sincerely,

Cynthia L. Quarterman

Enclosures

WASHINGTON

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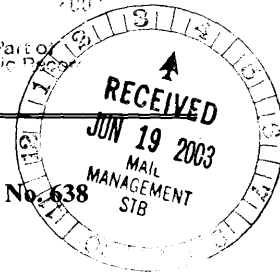
LONDON

BRUSSELS

BEFORE THE
SURFACE TRANSPORTATION BOARD

PROCEDURES TO EXPEDITE RESOLUTION
OF RAIL RATE CHALLENGES TO BE
CONSIDERED UNDER THE STAND-ALONE
COST METHODOLOGY

STB Ex Parte No. 638



REPLY COMMENTS OF THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY ON DISCOVERY MATTERS ADDRESSED IN THE
BOARD'S APRIL 3, 2003 ORDER

Pursuant to the Board's Decision in STB Ex Parte No. 638, *Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology* (served Apr. 3, 2003) ("April 3rd Decision"), The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby submits these reply comments in response to the opening comments of the other parties in this proceeding. BNSF's reply comments are primarily focused on the Joint Opening Comments of the Western Coal Traffic League, Edison Electric Institute and The National Industrial Transportation League ("Shippers").

BNSF supports the Board's efforts to expedite resolution of rail rate challenges under the stand-alone cost ("SAC") methodology. However, the recommendations made by the Shippers in their Joint Opening Comments go in precisely the opposite direction. As is discussed in more detail below, the Shippers' recommendations, if accepted, would greatly complicate and expand the scope of discovery in SAC cases by imposing an overly broad automatic discovery requirement on defendants so early in a proceeding that defendants could not possibly comply with it; by not limiting in any way additional discovery available after the automatic discovery is produced; by requiring production of duplicative data in response to discovery requests; by either requiring a defendant to perform a "special study" or freely permitting a complainant access to a defendant's data and facilities to perform such a study itself; and by requiring constant updating

of discovery responses. None of these proposals is likely to expedite discovery and, in fact, they would inevitably increase discovery disputes. In addition, most of the Shippers' proposals are in direct conflict with the Board's existing rules, precedents, policies and procedures. Indeed, the Shippers' proposals illustrate why discovery in SAC cases has become such a problem. Rather than proposing mechanisms that might expedite resolution of rail rate proceedings, the Shippers have offered suggestions that seek to expand significantly discovery obligations and, consequently, the length of proceedings.

BNSF addresses below each of the Shippers' proposals by the categories set forth in the Board's April 3rd Decision.

I. Standard Discovery Requests

The Shippers urge the Board to require mandatory disclosure of certain standardized categories of data by both parties simultaneous with their filings of the complaint and answer. In addition to that disclosure requirement, Shippers propose that the Board adopt six guidelines: (1) "that if a party has more than one data base or other repository of responsive information, all must be produced"; (2) "that all data be produced in a computer-readable format to the extent available, and that the data itself be accompanied by all codes, field definitions, record layouts, and other documentation needed to interpret and manipulate the data"; (3) "that a party cannot withhold data based on a claim that a 'special study' is required . . . [and] when a 'special study' objection is legitimately raised, . . . the requesting party will be entitled to access to the data or facilities that would be needed for the study, to conduct the study at its own expense"; (4) "that parties will be absolutely precluded from introducing or relying upon any evidence that is based on data responsive to one of the categories . . . that was not produced during the discovery process"; (5) "that all claims of attorney-client or attorney work product privilege are preserved . . . [a]lso . . . that a party withholding standard discovery data on grounds of privilege

must prepare and serve an index”; and (6) “that the Board issue a general order directing parties in SAC cases to produce all relevant, responsive materials containing confidentiality provisions.” Shippers’ Opening Comments at 11-14. As discussed below, BNSF believes that the Shippers’ proposed guidelines are inappropriate, unworkable and unnecessary, that the proposed mandatory disclosure by defendants is overly broad, and that the proposed timing of the defendant’s mandatory disclosure is unreasonable.

A. Shippers’ Proposed Guidelines

The Shippers’ first guideline requiring defendants to produce *all* responsive data and repositories of information containing responsive data is, on its face, overly broad and unduly burdensome. The Shippers have offered no rational explanation for why a defendant should produce multiple versions of the same data just because they appear in different documents or databases. If a data request is sufficiently focused, the responsive data would be the same regardless of where they are located in a defendant’s files. The complainant may be entitled to certain data, but the defendant should not be required to provide complainant with multiple versions of the data from other databases. The STB has repeatedly held that production of duplicative data is unnecessary.¹

As far as BNSF is concerned, the Shippers’ second guideline is unnecessary. BNSF generally produces its discovery responses in a computer-readable format to the extent

¹ See, e.g., STB Docket No. 42071, *Otter Tail Power Co. v. The Burlington Northern and Santa Fe Ry. Co.*, slip op. at 7 and 10 (served Nov. 15, 2002) (denying certain motions to compel production of all responsive documents as unnecessary and cumulative when the respondents agreed to produce reasonably available information responsive to the requests at issue); STB Docket No. 42057, *Public Service Co. of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Ry. Co.*, slip op. at 3 (served July 2, 2002) (denying complainant’s motion to compel the collection of two different sets of locomotive fuel consumption data as burdensome and unnecessary); see also *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520, 548 (1985) (“The discovery requested must be reasonably tailored to the particular charge to be proved and reflect the least intrusive means of obtaining the information.”)

information is available in that format, and it produces associated explanatory material. Nevertheless, BNSF does not believe that this approach should be imposed on all parties to a SAC case by an STB rule. BNSF believes it is important that the parties maintain a dialogue regarding the format in which available data are produced and the explanatory material that is needed to interpret the data. It has often been BNSF's experience that there is no readily available explanation of the fields, record layouts and codes contained in BNSF databases. That explanatory material is therefore often generated in response to follow-up discovery requests by complainant. Moreover, BNSF is concerned that the Shippers' real objective is for the Board's discovery rules to become a vehicle for requiring a railroad to change its business practices to produce and maintain data in certain formats. If the Board were to adopt any guidelines covering electronic data, which BNSF believes would be inappropriate, it would have to make it clear that the defendant is only required to provide such data to the extent they exist and in the format that they are maintained in the ordinary course of business.

The third proposed guideline is a direct attempt by Shippers to overturn longstanding STB precedent on the discovery of data created through "special studies." In several of the recent SAC cases, the Board has made it clear that a defendant is not obligated to create new evidence through special studies.² Complainants propose that the Board abandon its existing standard and provide complainants with the right to have defendants perform "special studies" if the study requires a defendant to combine information from different databases or, alternatively, a right to perform the study itself by accessing the defendant's data or facilities. This proposed guideline is unworkable and would vastly expand discovery burdens and disputes. The Board need only refer to the delay in the *Xcel* proceeding caused by complainant's request for a

² See, e.g., STB Docket No. 42054, *PPL Montana, LLC v. The Burlington Northern and Santa Fe Ry. Co.*, slip op. at 3 (served Nov. 9, 2000) ("Our discovery rules, however, require parties to furnish information in their possession, not to prepare special studies").

duplicative “special study” relating to fuel consumption to see the complications that arise from complainants’ efforts to have special studies performed on their behalf.³ It is clear that the discovery process would not be expedited by adopting this guideline.

The Shippers’ fourth proposed guideline seeks to handicap defendants’ ability to defend themselves in a SAC case and to do so before the defendant has even seen the complainant’s evidence. Given the broad scope of the data and information complainants request in discovery, the effect of the Shippers’ fourth guideline would be to force defendants to produce in discovery anything that the defendant may want to use to defend itself in a SAC case. Otherwise, the defendant would face the risk that complainants will find a way to construe its discovery requests to cover the information used by a defendant in its defense and then seek that the information be excluded. It is clear that this guideline does nothing to advance the Board’s objective of streamlining discovery and in fact would vastly complicate and expand the discovery process.

The Shippers’ fifth proposed guideline relating to attorney client and work product information is unnecessary. The parties in SAC cases have generally included provisions relating to these matters in their requests for discovery and they have negotiated the extent to which those provisions will apply. BNSF has not been involved in a dispute relating to this matter and believes its resolution is best left to the parties’ discretion on a case-by-case basis.

Finally, as to the sixth guideline, BNSF has taken the position in the past that the Board should enter an order directing disclosure of sensitive material on a case-by-case basis. BNSF acknowledges that issuing a global order of the type proposed by Shippers could expedite

³ See STB Docket No. 42057, *Public Service Co. of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Ry. Co.*, slip op. at 1-2 (served July 2, 2002) (discussing various fuel study-related petitions filed by complainant over a one-year period); see also STB Ex Parte No. 638, *Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology*, slip op. at 1-2 n.2 (served Sept. 4, 2002) (discussing delay caused by complaining shipper in *Xcel*).

discovery in SAC cases. However, if the Board does issue a blanket order, it should clarify that it would entertain a motion for protective order to limit the disclosure of sensitive information in special circumstances.⁴

B. Shippers' Proposed Mandatory Disclosure Categories for Defendants

Shippers propose that each party produce certain "categories of data" early in a SAC proceeding. BNSF suggested a more limited approach to mandatory disclosure that differs from the Shippers' proposal in three significant respects. First, BNSF limits the categories of data contained in such initial disclosures to certain variable cost data. Second, BNSF proposes that the scope of discovery on SAC issues be limited by identifying the areas within which particularized requests can be made. Third, as is discussed in section I.C below, BNSF proposes that defendant's initial disclosure be required only after sufficient time has passed for it to collect responsive materials.

BNSF believes its proposed approach is far superior to the Shippers' approach. As to initial disclosures, Shippers have proposed that defendants respond to six variable cost discovery requests initially. Although the Shippers call their requests "categories of data," the requests themselves are quite specific and detailed, and in some instances go far beyond what BNSF has previously produced. For example, Shippers' variable cost data requests, Nos. A.1, A.2, A.4 and A.6, require defendants to perform a special study that ties the issue traffic's line-specific data to the R-1. BNSF has never performed such a special study in past SAC cases and objects to Shippers' attempt to require it to do so in future cases through the initial disclosure process. In addition, BNSF has objected in the past to producing both road property investment (A.1) and roadway maintenance expense (A.2) data because it believes its data are unreliable for purposes

⁴ BNSF does not object to Union Pacific's proposal that the Board impose a standard protective order early in a proceeding so long as a party has an opportunity to propose changes to that order.

of determining variable costs and useless in rate cases. The issue of whether BNSF's data in those two areas are usable is being considered in several ongoing SAC cases. BNSF is confident that the Board will find in its favor on those matters and that future discovery in those areas will become unnecessary. BNSF objects to complainants' attempt to use this rulemaking proceeding to resolve those case specific substantive matters in its favor. Given the controversy surrounding those two categories of data, they are not appropriate topics for the Board to include in any mandatory initial disclosures.

Another example of Shippers' attempt to expand the scope of variable cost discovery through their proposed mandatory disclosure involves request A.3, relating to equipment capital costs. BNSF has consistently objected to providing equipment capital costs for the entire pool of locomotives and railcars from which the issue traffic locomotives and railcars are drawn because that information is not relevant and is burdensome to produce. Since the Board does not rely on that data in making its variable cost calculations, a mandatory disclosure would clearly be inappropriate.⁵

As to SAC-related discovery data, BNSF discussed in detail in its initial comments the reasons why mandatory initial disclosures should only cover variable cost data. *See* BNSF Comments at 3-4. The problems described by BNSF with SAC discovery are not resolved by having the complainant provide a "notice" of the "potential geographic and temporal scope" of a complainant's SARR. Shippers' Opening Comments at 9. Indeed, the complainants explicitly reserve the right to modify the scope later and to submit additional discovery requests on the same subjects for the changed scope. *See* Shippers' Opening Comments at 10 note 6. As BNSF explained on opening, the imposition of mandatory disclosures on SAC issues would inevitably

⁵ *See, e.g.,* STB Docket No. 42056, *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry. Co.*, slip op. at 61 (served Mar. 24, 2003).

lead to multiple rounds of discovery and therefore would further complicate SAC discovery and expand the already onerous discovery burdens on defendants.

C. Shippers' Proposed Mandatory Disclosure Timeline for Defendants

Shippers propose that defendants provide mandatory disclosure materials 20 days after the complaint, upon the filing of an answer. Quite simply, it would not be possible for BNSF to make such disclosures in that timeframe. As BNSF, Union Pacific, CSX and Norfolk Southern pointed out in their comments, during the 20 days between the filing of the complaint and the answer the defendant would not only be answering the complaint, but also investigating the facts, engaging counsel and consultants, and participating in mandatory mediation and a procedural conference. Even if a 20-day period were sufficient for a defendant to search for responsive data (which it is not), the defendant is engaged in other necessary activities during this period.

Shippers' explanation for their proposed timeframe does not support their position that such a short period of time would be sufficient for defendants to respond. Complainants acknowledge that they control the initiation of a rate proceeding. Shippers' Opening Comments at 9-10. Since they determine when the case will start, it is not unreasonable to require them to prepare initial disclosures with the complaint. *Id.* The defendant, on the other hand, has no control over when a complaint gets filed. Complainants contend that a complaint always follows an extended period of unsuccessful rate negotiations, but that is not always the case. *See* Initial Comments of Union Pacific Railroad Company in Response to April 3 Decision at 5 & notes 4-6, *citing* complaints filed against it without prior negotiations, covering limited rates and commodities and post-interim agreements. And even if the Shippers' assertion were true, BNSF should not be expected to engage in rate negotiations and simultaneously prepare discovery disclosures in case of litigation. Preparing to litigate while negotiating is not conducive to private sector resolution of disputes.

II. Additional Discovery

Shippers propose mandatory initial disclosures of certain discovery data, including SAC data, but do not propose any offsetting limitation to compensate for the fact that an initial disclosure has occurred. Under the Shippers' proposal, a complainant would receive most of the discovery information it now receives within a few weeks of filing its complaint and it would then be left with the balance of the discovery period to ask follow-up discovery questions that are unlimited in scope or volume. This proposal is obviously one-sided, and it would do nothing to streamline discovery. The Shippers' proposal would produce waves of discovery that would compound the burden on defendants and increase the likelihood of discovery disputes and delay.

III. Time Periods

The Board also sought comments on possible limitations on the time periods that would be covered by discovery. April 3rd Decision at 7. BNSF proposed time limitations for variable cost, SAC and market dominance materials and suggested that exceptions to the standard time periods could be negotiated at initial discovery conferences. The Shippers propose a complicated system involving different production periods for three different categories of documents that they do not define but call "base," "data," and "study" documents, with further exceptions for certain other data. Shippers' Opening Comments at 19-20. Shippers' proposal is so complicated that it is not even possible to ascertain how it would work or what requirement would apply to which documents. BNSF urges the Board to adopt its far simpler and more flexible proposal.

Shippers also propose a production cut-off date that requires parties to supplement their discovery production with documents created within 90 days of the filing of opening evidence. Shippers' Opening Comments at 21. Shippers' proposed production cut-off is a thinly veiled mechanism to require defendants to update constantly its discovery responses. Under the

Board's rule 49 C.F.R. §1114.29, parties are only required to supplement discovery responses without a Board order or mutual agreement in order to correct errors or to identify additional people having knowledge of discoverable matters or additional experts expected to testify. Under the Shippers' proposal, defendants could be faced with multiple rounds of discovery, supplementing initial disclosures with follow-up discovery, then updating prior responses during the time that opening evidence is being prepared. BNSF's proposal that the parties negotiate the extent to which supplementation of prior discovery is appropriate, if at all, in a given proceeding is far more reasonable, particularly since the parties currently have no obligation to update most of their discovery responses.

Finally, Shippers propose that updated data that is not produced in discovery should not be permitted in evidence. *Id.* at 22. There is no reason to adopt such a rule. In some prior cases where there had been a significant delay between the time that discovery was conducted and when evidence was presented, BNSF used current data in its opening and reply evidence. However, BNSF produced that information in workpapers, giving the complainant an opportunity to respond to the updated data. Complainants have not been prejudiced by the use of current data under these limited circumstances. As long as a defendant produces its updated data on reply, the complainant can meet that evidence on rebuttal.

IV. Costs

Although Shippers recognize that they make the vast majority of discovery requests, they oppose sharing defendant's costs of responding to that discovery under most circumstances on grounds that it would be disproportionate and unfair for them to pay those costs. Shippers' Opening Comments at 25. In light of the aggressive position taken by Shippers in their discovery proposals, their appeal to fair play on the cost-sharing front rings particularly hollow. Nevertheless, BNSF is not in favor of extensive cost sharing in discovery. It does, however, urge

the Board to consider its proposal that complainants bear the costs associated with providing discovery responses in electronic format. Given the Shippers' stated preference to receive data in that manner, they should be more than willing to bear the costs associated with generating that material.

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
Cynthia L. Quarterman
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

Attorneys for The Burlington Northern
and Santa Fe Railway Company

June 19, 2003

CERTIFICATE OF SERVICE

I hereby certify that this 19th day of June 2003, a copy of the Reply Comments of The Burlington Northern and Santa Fe Railway Company On Discovery Matters Addressed In The Board's April 3, 2003 Order was served by hand delivery or overnight mail on:

Gordon P. MacDougall
1025 Connecticut Avenue, N.W.
Suite 410
Washington, DC 20036

*Attorney for John D. Fitzgerald and the United
Transportation Union-General Committee of
Adjustment*

Steven D. Strege
Executive Vice President
North Dakota Grain Dealers Association
118 Broadway
606 Black Building
Fargo, ND 58102

North Dakota Grain Dealers Association

Rosalind A. Knapp
Kirk K. Van Tine
Paul Samuel Smith
The United States Department
of Transportation
400 7th Street, S.W.
Washington, DC 20590

*The United States Department
of Transportation*

Jon H. Mielke
Executive Secretary
North Dakota Public Service Commission
600 E. Blvd. Ave., Dept. 408, 12th Floor
Bismarck, ND 58505-0480

North Dakota Public Service Commission

Louis P. Warchot
Dennis J. Starks
Association of American Railroads
50 F Street, N.W.
Washington, D.C. 20001

*Attorneys for the Association of American
Railroads*

William L. Slover
C. Michael Loftus
John H. LeSeur
Kelvin J. Dowd
Christopher A. Mills
Slover & Loftus
1224 17th Street, N.W.
Washington, DC 20036

*Attorneys for The Western Coal
Traffic League*

Ray Hickman
OptionsNet
10435 S. Sandusky Ave.
Tulsa, OK 74137

OptionsNet

Thomas C. Canter
Executive Director
The National Coal Transportation Association
4 Meadow Lark Lane, Suite 100
Littleton, CO 80127-5718

*The National Coal Transportation
Association*

Nicholas J. DiMichael
Michael H. Higgins
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036

*Attorneys for The National
Industrial Transportation League*

Nicholas J. DiMichael
Jeffrey O. Moreno
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, DC 20036

George Koeck
Otter Tail Corporation
4344 18th Avenue, S.W.
Suite 200
Fargo, ND 58103

Attorneys for Otter Tail Power Company

G. Paul Moates
Paul A. Hemmersbaugh
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, DC 20005

Of Counsel for CSX and Norfolk Southern

James A. Squires
George A. Aspatore
Norfolk Southern Railway Company
3 Commercial Place
Norfolk, VA 23510-9241

Attorney for Norfolk Southern Railway Co.

Peter J. Shudtz
CSX Corporation
1331 Pennsylvania Avenue, NW
Suite 560
Washington, DC 20004

Paul R. Hitchcock
500 Water Street
Jacksonville, FL 32202

*Attorneys for CSX Corporation &
Transportation Inc.*

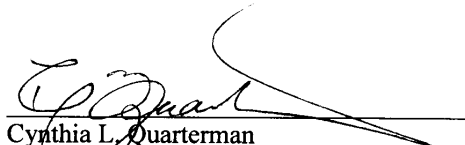
Michael F. McBride
LeBoeuf, Lamb, Greene & MacRae, LLP
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, DC 20009-5728

Attorneys for Edison Electric Institute

Carolyn F. Corwin
Elizabeth Martell Walsh
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004

J. Michael Hemmer
Louise A. Rinn
Union Pacific Railroad Company
1416 Dodge Street, Room 803
Omaha, NE 68179

Attorneys for Union Pacific Railroad Company


Cynthia L. Quarterman