

STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

Anthony J. LaRocca
202.429.8119
alarocca@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Telephone 202.429.3000
Facsimile 202.429.3902
www.steptoe.com

November 14, 2003



Via Hand Delivery

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

ENTERED
Office of Proceedings

NOV 14 2003

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Public Record

**Re: *Otter Tail Power Company v. The Burlington Northern
and Santa Fe Railway Company, Docket No. 42071***

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and 10 copies of BNSF's Reply to Otter Tail Power Company's Motion to Modify Procedural Schedule and Petition to Supplement the Evidentiary Record.

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

Sincerely,

Anthony J. LaRocca

Enclosure

cc: Counsel for Complainant

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

BRUSSELS

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

OTTER TAIL POWER COMPANY,

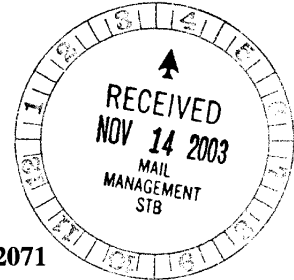
Complainant,

v.

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

Defendant.

Docket No. 42071



ENTERED
Office of Proceedings

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Unit of
Public Record

**BNSF'S REPLY TO OTTER TAIL POWER COMPANY'S
MOTION TO MODIFY PROCEDURAL SCHEDULE AND PETITION
TO SUPPLEMENT THE EVIDENTIARY RECORD**

Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby replies in opposition to Otter Tail Power Company's ("Otter Tail") Motion to Modify Procedural Schedule and Petition to Supplement the Evidentiary Record ("Petition to Supplement"), filed November 10, 2003.

By its petition, Otter Tail seeks permission to modify basic assumptions underlying its SAC presentation for the second time in this case. A month after filing opening SAC evidence on June 13, 2003, Otter Tail concluded that its original SAC assumptions were fundamentally flawed and it filed new SAC evidence under the guise of an errata filing. That new filing required an extension of the procedural schedule and imposed substantial costs and burdens on BNSF. Now, after BNSF has filed its reply evidence, Otter Tail seeks an opportunity to make further changes to its underlying SAC assumptions. There is no basis for permitting yet another round of SAC filings.

Otter Tail claims that it should be allowed to supplement its SAC evidence in light of the Board's recent decision in *Duke Energy Corp. v. Norfolk Southern Railway Co.*, STB Docket

No. 42069 (served November 6, 2003) ("*Duke*"). Otter Tail's argument is that it prepared its opening evidence in reliance on precedent, overturned by *Duke*, that allowed revenues on cross-over traffic to be allocated based on supposed market divisions. According to Otter Tail, its approach to implementing market divisions to determine revenue allocations on cross-over traffic led it to exclude 31.7 million tons of possible SARR traffic because data supporting market divisions on that traffic were unavailable. Now that it appears that the Board will not accept market-based allocations of revenue on cross-over traffic, Otter Tail wants the opportunity to add back the 31.7 million excluded tons.

Otter Tail's reliance on *Duke* is a pretext. The *Duke* case did not even speak to the issue of traffic selection. Otter Tail could have sought to include the 31.7 million tons in question regardless of the availability of supporting divisions data. Indeed, Otter Tail included in its SARR a large amount of non-coal traffic for which no supporting market divisions data were available. For that traffic, Otter Tail simply applied the MMP revenue allocation methodology. Under Otter Tail's own approach, therefore, nothing in the case law in effect at the time of its opening evidence prevented it from seeking to include the 31.7 million tons in its traffic group. Otter Tail has apparently concluded now, in light of BNSF's reply evidence and the *Duke* decision, that it needs the additional revenues that would be generated from the traffic it excluded. But Otter Tail's desire to improve its SAC results cannot justify the filing of another round of SAC evidence. Complainants must be held responsible for the evidentiary choices they make on opening. Perpetual SAC litigation will result if the Board allows a complainant to modify its SAC assumptions simply because an alternative strategic approach is suggested by an intervening Board decision.

Because there is no basis for Otter Tail's request to supplement the evidentiary record, its request for modification of the procedural schedule should likewise be denied. The Board should order Otter Tail to submit, without further delay, rebuttal evidence based on the SARR configuration and traffic group it chose on opening.¹ We note that even if the Board had reason to credit Otter Tail's claim that it was prejudiced by the Board's discussion of principles governing revenue allocations on cross-over traffic in *Duke*, the schedule modification requested by Otter Tail would be too open-ended and would prejudice BNSF. This point is discussed further in section III below.

I. OTTER TAIL HAS NOT SHOWN GOOD CAUSE TO SUPPLEMENT THE RECORD ON REBUTTAL WITH EVIDENCE BASED ON MODIFIED SAC ASSUMPTIONS

Otter Tail's Petition to Supplement is based on a spurious claim of "prejudice" caused by the Board's decision in the *Duke* case. Specifically, Otter Tail claims that it prepared its original SAC evidence based on an assumption that the Board would allocate revenues on cross-over traffic between the SARR and the residual incumbent based on some approximation of market-based divisions. Based on this assumption, Otter Tail supposedly excluded 31.7 million tons of potential cross-over traffic from the SARR shipper group because Otter Tail did not have sufficient supporting data as to the market divisions that would apply to that traffic. According to Otter Tail, the *Duke* decision now indicates that revenues on cross-over traffic will not be based on market divisions but rather on the relative on-SARR and off-SARR costs of providing the service. Otter Tail asserts that if it had known that a cost-based revenue division methodology would be applied by the Board, it would not have excluded the 31.7 million tons

¹ Otter Tail states that "[i]f the Board denies Otter Tail's Petition to Supplement the Evidentiary Record, Otter Tail asks the Board at least to defer the filing of final rebuttal evidence until two weeks after the Board serves its decision on this Motion." Petition to Supplement at 8. BNSF does not oppose this request.

from its opening evidence. It claims that it was prejudiced by relying on legal standards that were modified by *Duke*. This argument has three fatal flaws.

First, nothing in the Board's prior decisions regarding the division of revenues on cross-over traffic or in the *Duke* decision dictated the traffic that Otter Tail could select on opening and seek to include in its stand-alone shipper group. The legitimacy of a complainant's traffic selection is a question that is distinct from the proper assignment of revenues to the selected traffic. The two questions involve separate considerations and have been treated separately by the Board. The *Duke* decision did not speak to the issue of traffic selection. If Otter Tail chose for strategic reasons to link the two questions and to make its selection of traffic dependent on its treatment of revenue divisions, that was Otter Tail's decision. But Otter Tail should not be heard now to complain that it was prejudiced in its selection of traffic by any changes in the Board's approach to revenue allocation.

Second, even if Otter Tail were correct that the case law prior to *Duke* favored revenue allocations based on market divisions (a claim that is not correct, as discussed below), Otter Tail does not argue that the prior standard precluded a complainant from including traffic in a stand-alone shipper group where data supporting market divisions are unavailable. Indeed, Otter Tail could not make such an argument because it is clear that the lack of data to support market-based divisions -- the purported reason for excluding the 31.7 million tons -- did not prevent Otter Tail from including a substantial volume of traffic for which it lacked sufficient data to support the development of market divisions. In its opening narrative, Otter Tail specifically noted that "revenue division data provided by BNSF was largely non-applicable to the OTRR non-coal traffic." OTP Opening Nar. at III-A-20. But this did not lead Otter Tail to exclude non-coal traffic from the SARR. Rather, Otter Tail developed a divisions-based regression that it applied

to allocate revenues on a sub-set of non-coal traffic included in its SARR traffic group and it used the MMP methodology to allocate revenue for the majority of non-coal traffic included in its SARR traffic group. There is no reason that Otter Tail could not have applied multiple revenue allocation methods to its coal traffic, using the MMP methodology for the 31.7 million tons in question.² While BNSF does not believe the MMP methodology is appropriate or supported by Otter Tail, prior case law certainly did not preclude Otter Tail from claiming revenues for the 31.7 million tons based on the MMP approach.

Third, the Board's decisions in the *PPL* case make it clear that the relevant question in assessing Otter Tail's claim of prejudice is not *why* Otter Tail chose to exclude the 31.7 million tons but whether Otter Tail had an incentive originally to include that traffic and chose, for strategic reasons, not to act on that incentive. In *PPL*, the Board ruled that a complainant cannot change its opening SAC assumptions simply because it determines in light of subsequent developments that some assumptions other than those posited on opening would be more favorable to its SAC showing. "A party that does not put forward its best case as to all elements of its case assumes the risk of that strategic choice." *PPL Montana, LLC v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 42054, slip op. at 2 (served June 30, 2003). Therefore, if Otter Tail had an incentive at the time of its opening evidence to include the 31.7 million tons, it should have done so then and it must live with the decision not to include that traffic.

² Otter Tail's opening evidence included an electronic workpaper identifying the 31.7 million tons that Otter Tail excluded from its SARR traffic group. This workpaper shows the revenues attributable to this traffic based on the MMP methodology. See OTP Opening electronic workpapers at "Otter Tail Railroad Coal Traffic Forecast.xls," worksheet "2002 Non-SAC Moves."

It is clear that the incentive to include that traffic existed when Otter Tail filed its opening evidence. Indeed, if anything, that incentive was stronger at that time than it is now. Under the MMP methodology, which Otter Tail used to establish revenues for non-coal traffic where market divisions were unavailable, the 31.7 million tons of traffic would have been allocated at least two 100 mile revenue blocks -- an enormous amount of revenue for the miniscule service performed by the SARR. To the extent Otter Tail has any incentive now to include the 31.7 million tons in its SARR, that incentive existed at the time Otter Tail filed opening evidence but Otter Tail nevertheless chose for strategic reasons to exclude that traffic.

Otter Tail is asking for a second bite at the apple because it has apparently concluded that its prior traffic selection was sub-optimal. But if that is true, it is the result of Otter Tail's own conscious traffic selection decisions. Its reliance on the *Duke* decision is just a pretext to avoid the consequences of those decisions.

II. THE BOARD CANNOT PERMIT EVERY NEW SAC DECISION TO BECOME THE OCCASION FOR REWORKING A COMPLAINANT'S SAC EVIDENCE

The predicate of Otter Tail's Petition to Supplement is that the *Duke* decision announced new legal standards relating to revenue allocations on cross-over movements and that Otter Tail should have an opportunity to present evidence based on the new legal standards. This position, if accepted, would result in enormous administrative difficulties for SAC litigants and for the Board. Like any litigant, Otter Tail must bear the risk that intervening developments in other cases will alter the landscape of the Board's SAC jurisprudence to a greater or lesser degree. Endless SAC litigation would result if every new SAC decision gave rise to additional rounds of evidence in other pending cases.

There might be circumstances in which a substantial change in established legal standards would justify supplementation of evidence that has already been filed, but those circumstances

are not present here. On the issue of the preferred method of allocating revenue on cross-over traffic, Otter Tail clearly faced the risk that its market-based approach would fail regardless of any impact of intervening decisions. The law regarding revenue allocations on cross-over traffic was plainly unsettled when Otter Tail filed its opening evidence. The Board had made it clear in the two SAC decisions immediately preceding the *Duke* decision -- *PPL* and *TMPA* -- that it had not adopted a preferred method for allocating revenue on cross-over traffic and that costs were relevant to the issue of revenue allocation.³ While those decisions did not preclude Otter Tail from attempting to justify the use of market divisions to allocate revenue on cross-over movements, they did not give Otter Tail any basis for concluding that a market-based approach would necessarily be accepted over a cost-based approach or that its particular approach to market-based divisions would be accepted. Otter Tail therefore clearly faced the risk when it filed opening evidence that its market-based approach would be rejected by the Board. If that is the conclusion that the Board eventually reaches based on the record in this case, it is amply supported by BNSF's reply evidence which addresses at length both the conceptual errors and the numerous defects in implementation of Otter Tail's regressions used to estimate market divisions.

Otter Tail has already caused a major delay in the processing of this case through the filing of its extensive errata in June 2003. That filing effectively constituted a new SAC case involving new track capacity, new equipment and crew requirements, and new transit time assumptions, among other things. Much of the work done by BNSF's experts in the interval between Otter Tail's first and second SAC filings had to be redone. If Otter Tail is permitted to

³ *PPL Montana, LLC v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 42054, slip op. at 7, n.14 (served August 20, 2002); *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 42056, slip op. at 31 (served March 24, 2003).

file supplemental evidence now based on developments in a different case, it will further thwart the Board's efforts to bring this case to a conclusion in a timely manner.

Allowing Otter Tail to supplement the record here would also be dangerous precedent for other pending SAC cases. Indeed, since the current round of cases was initiated in mid-summer 2000, none has been finally decided by the Board. If granted, Otter Tail's request for supplementation would increase the likelihood that the cases will continue on in a cycle of perpetual litigation.

III. OTTER TAIL'S REQUEST TO MODIFY THE PROCEDURAL SCHEDULE IS INAPPROPRIATE AND PREJUDICIAL TO BNSF

There is no need for the Board to reach Otter Tail's request to modify the procedural schedule because Otter Tail has not justified its request to supplement the evidentiary record. In any event, Otter Tail's proposed modification of the procedural schedule is defective in itself. It would disrupt this proceeding and would prejudice BNSF.

The first problem with Otter Tail's proposed modification is that it contemplates the filing of open-ended supplemental evidence on January 9, 2004:

In order to present an optimally efficient SARR using the new MSP methodology, Otter Tail will need to add the excluded traffic to its stand-alone system. This additional traffic likely will impact the operating plan and investment base that Otter Tail presented in its Opening Evidence, *and may suggest other modifications that would be necessary to design an optimally efficient SARR to handle this larger traffic group and to maximize revenue contribution to the SARR.*

Petition to Supplement at 6 (emphasis added). Such potentially expansive modifications to Otter Tail's SAC evidence would go far beyond the issues that Otter Tail has actually alleged as a basis for supplementing the evidentiary record. If Otter Tail had justified supplementation – and it has not – supplementation of the record would properly be limited to (1) the implementation of a cost-based approach to revenue allocation and (2) the costs and revenues associated with the

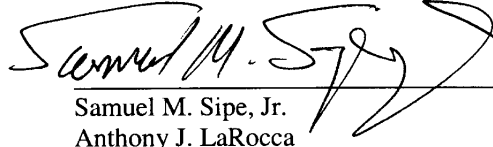
31.7 million tons of traffic that Otter Tail supposedly excluded from its opening evidence based on an assumption that market divisions would be used to allocate revenues on cross-over traffic. Otter Tail's clear intent to present SAC evidence beyond the scope of these issues underscores the point that Otter Tail has seized upon the *Duke* decision as a pretext to reformulate its SAC case.

Otter Tail's proposal to file supplemental evidence on January 9, 2004 and to defer the filing of its final rebuttal evidence until March 11, 2004, is also egregiously one-sided. Although Otter Tail proposes a one month period for BNSF to reply to Otter Tail's proposed supplemental evidence, the net effect of its proposal would be to give itself fully five months (from October 10, 2003 until March 4, 2004) for Otter Tail to prepare its rebuttal evidence. If supplementation of the evidentiary record were justified – and it is not – the supplemental evidence should be presented as part of Otter Tail's rebuttal evidence, with BNSF being given six weeks thereafter to reply to Otter Tail's supplemental evidence, and no further filings (except final briefs) by either party.

IV. CONCLUSION

The Board should deny Otter Tail's Petition to Supplement and should order Otter Tail to submit, without further delay, rebuttal evidence based on the SARR configuration and traffic group it chose on opening.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Samuel M. Sipe, Jr.", written over a horizontal line.

Samuel M. Sipe, Jr.
Anthony J. LaRocca
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-3000

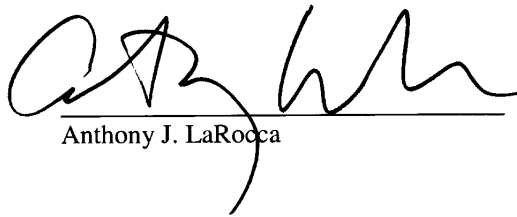
Richard E. Weicher
Michael E. Roper
David M. Pryor
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

Dated: November 14, 2003

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2003, a true and correct copy of the foregoing document was served by hand on:

Nicholas J. DiMichael, Esq.
Jeffrey O. Moreno, Esq.
THOMPSON HINE LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036



Anthony J. LaRocca