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April 2, 2004

Via HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

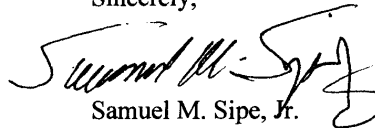
Re: **STB Docket No. 42071, Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company**

Dear Secretary Williams:

Enclosed for filing in the above captioned matter are the original and ten copies of the Reply of The Burlington Northern and Santa Fe Railway Company to Complainant's Motion to Strike Portions of Supplemental Reply Evidence.

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

Sincerely,


Samuel M. Sipe, Jr.

cc: Counsel for Complainant

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



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

Docket No. 42071

**REPLY OF THE BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY TO COMPLAINANT'S
MOTION TO STRIKE PORTIONS OF SUPPLEMENTAL REPLY EVIDENCE**

Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF") hereby replies in opposition to complainant Otter Tail Power Company's ("Otter Tail") Motion to Strike Portions of the Supplemental Reply Evidence of The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42071 (filed March 26, 2004) ("Motion to Strike"). Otter Tail's Motion to Strike is unsupported by any legal authority and is fundamentally illogical. The portions of BNSF's Supplemental Reply Evidence that Otter Tail complains about are relevant and responsive to new precedent contained in recent Board decisions issued since the filing of BNSF's original Reply Evidence on October 8, 2004. Moreover, Otter Tail will experience no prejudice if its Motion to Strike is denied, as it will have an opportunity to address BNSF's Supplemental Reply Evidence in its rebuttal evidence, due on April 29, 2004.

BACKGROUND

The filing of Opening Supplemental Evidence and Supplemental Reply Evidence in this proceeding came about as a result of Otter Tail's request to present supplemental evidence regarding the traffic selected for its SARR and regarding revenue allocation procedures on cross-

over traffic in light of the Board's decision in *Duke Energy Corp. v. Norfolk Southern Railway Co.*, STB Docket No. 42069 (served November 6, 2003) ("*Duke/NS*"). In a November 21, 2003 decision granting Otter Tail's request to supplement its traffic group, the Board stated:

"Allowing the parties here to address new issues raised by recent decisions is reasonable because it will provide the Board with more relevant evidence and allow it to apply recent precedent."

Otter Tail v. BNSF, STB Docket No. 42071, at 1 (served November 21, 2003). On January 9, 2004, Otter Tail filed its Opening Supplemental Evidence in accordance with the Board's decision. Otter Tail's submission included, *inter alia*, a new proposal to allocate cross-over traffic revenue based on the MSP revenue allocation procedure first used by the Board in *Duke/NS*.

Several weeks after the filing of Otter Tail's Opening Supplemental Evidence and prior to the scheduled filing of BNSF's Supplemental Reply Evidence, the Board issued its decision in *Duke Energy Corp. v. CSX Transportation Inc.*, STB Docket No. 42070 (served February 4, 2004) ("*Duke/CSX*"). That decision included a section addressed to "Rerouting of Traffic," which included a sub-section addressed to "General Principles" governing the treatment of rerouted traffic. In this discussion of general principles, the Board clarified and elaborated upon its existing standards governing the inclusion of rerouted traffic in the traffic group of a stand-alone railroad. Referring to its recent decision in *Duke/NS*, the Board stated that "for reroutings that would result in a longer overall haul, the rebuttable presumption is that the longer route is less efficient; and the greater the disparity in distance, the stronger that presumption."

Duke/CSX, slip op. at 16. The Board went on to articulate standards governing the exclusion of rerouted traffic where that traffic does not share facilities used by the issue traffic. *Id.* at 16-17.

On February 6, 2004, BNSF requested a four week extension of time to file its Supplemental Reply Evidence. The Board characterized BNSF's grounds for the requested extension as follows: "BNSF states that the extension of time is needed to allow it to file additional rerouted traffic evidence in light of the Board's recent discussion of standards governing the inclusion of rerouted traffic in [*Duke/CSX*]." *Otter Tail v. BNSF*, STB Docket No. 42071, at 1 (served February 19, 2004). The Board granted BNSF the requested extension. It stated:

In initially granting Otter Tail's request to file supplemental evidence and extend the procedural schedule in this case, the Board Decision served November 21, 2003, stated that allowing the parties to address new issues raised in recent decisions is reasonable because it will provide more relevant evidence and allow the Board to apply recent precedent. The extension of the procedural schedule proposed here will further that end and is reasonable.

Id.

BNSF filed its Supplemental Reply Evidence on March 22, 2004. Otter Tail has since requested and been granted an additional week, until April 29, 2004, to file rebuttal evidence. BNSF consented to that request.

I. THERE IS NO LEGAL BASIS TO STRIKE THE EVIDENCE IN QUESTION

Otter Tail's Motion to Strike seeks to exclude evidence from the record of this proceeding. Otter Tail provides no legal authority to support its proposed action – no rules of evidence, no Board precedent regarding the exclusion of evidence, nothing. The only rationale for the unprecedented action that Otter Tail asks the Board to take is Otter Tail's home grown theory that BNSF should not be permitted to present evidence in its Supplemental Reply if it could have presented it at the time of its original Reply. There is no legal basis for this theory.

Its flaw as a logical matter is that the evidence in question is relevant in light of intervening developments since the filing of BNSF's Reply Evidence, those intervening developments being new Board decisions and new evidence filed by Otter Tail.

A. BNSF's Supplemental Reply Evidence on Rerouting Is Responsive to Recent Board Decisions Issued Subsequent to BNSF's October 8, 2003 Reply Evidence

In its Supplemental Reply Evidence, BNSF excluded non-coal cross-over traffic that moves in the real world via Minot, North Dakota but that Otter Tail reroutes over a much longer rail line from Snowden, Montana through Glendive, Montana, and Fargo, North Dakota. BNSF explained that

[it] is excluding all of the rerouted traffic in this supplemental reply based upon recent decisions issued by the Board since BNSF filed its October 8, 2003 reply. Those decisions clarify the conditions under which rerouted traffic will be considered in a SAC test. Those decisions make it clear that the rerouting of cross-over traffic over a substantially longer route than the real world route is presumed to be improper. The Board has also made it clear that complainants should not be permitted to reroute traffic to obtain revenues from movements that do not in the real world use the SARR route unless the complainant shows that the real world routing of the rerouted traffic is inefficient.

BNSF Supp. Reply at III.A-3 to 4 (footnotes omitted).

In its Motion to Strike, Otter Tail objects to BNSF's presentation of evidence regarding the presumed impropriety of rerouting traffic over a longer route than the real world route. It contends that BNSF could have presented this evidence in its original Reply. Otter Tail does not seek to strike BNSF's evidence regarding the sharing of facilities. It says that this "is proper because it addresses a new re-routing issue discussed by the Board in Duke/CSX." Motion to Strike at 5.

All of BNSF's evidence in its Supplemental Reply regarding the exclusion of rerouted traffic is relevant to issues addressed by the Board in decisions issued after the filing of BNSF's original Reply Evidence on October 8, 2003. In its November 6, 2003 *Duke/NS* decision, the Board first announced its "logical presumption . . . that longer routes are generally less efficient than shorter ones; and the greater the disparity in distance, the stronger that presumption." *Duke/NS*, slip op. at 26. The Board reiterated this presumption in its February 4, 2004 *Duke/CSX* decision. *Duke/CSX*, slip op. at 16.

Otter Tail asserts that the Board's articulation of a presumption that longer routes are less efficient than shorter ones amounts to an "evidentiary rule" and that the "fundamental legal standard" regarding rerouting preceded the *Duke/NS* and *Duke/CSX* decisions. See Motion to Strike at 6-7. Whatever significance Otter Tail attaches to these labels, there is no doubt that the Board's formulation of the presumption regarding rerouting in *Duke/NS* is different from its formulation of rerouting standards in prior cases, including *TPA*. The treatment of these standards in *Duke/NS* and *Duke/CSX* represents an evolution in the law. Moreover, there is no dispute that BNSF's Supplemental Evidence on the consequences of Otter Tail's rerouting over a longer route is responsive to and makes use of the precedent established in these two intervening cases.

Otter Tail's attempt to exclude portions of BNSF's supplemental evidence on rerouting would make the question of admissibility turn on a subjective inquiry – what did the defendant carrier understand the law on rerouting to be at the time it filed its Reply Evidence. Such an inquiry is not a rational basis on which to make decisions regarding the admissibility of evidence. The rational, objective standard is the one suggested in the Board's decision granting BNSF's request for additional time to address the rerouting issue, *i.e.*, whether the supplemental

evidence is responsive to recent Board precedent. February 19, 2004 Decision at 1. BNSF's evidence on rerouting clearly meets that standard.

B. BNSF's Supplemental Reply Evidence on the MSP Methodology Is Responsive to OTP's Opening Supplemental Evidence, in which MSP Was First Presented as a Revenue Allocation Method

Otter Tail seeks to strike from BNSF's Supplemental Reply those portions of evidence that address the correctness of the 100-mile credit for originating and terminating traffic under the Board's recently adopted MSP method for allocating revenue on cross-over traffic. Otter Tail contends that BNSF could and should have addressed the issue of the 100-mile credit in its Reply Evidence because the alternative MMP revenue allocation method, which BNSF addressed in its Reply, also makes use of 100-mile credits. This claim is entirely spurious.

The Board's adoption of MSP in *Duke/NS* was a principal reason that Otter Tail itself sought to supplement is Opening Evidence. Indeed, the MSP methodology features prominently in OTP's Opening Supplemental Evidence. BNSF had every right to respond fully to the newly espoused MSP methodology, particularly in light of the Board's announcement in *Duke/NS* that revenue allocation on cross-over traffic should be based on the relative costs of the respective segments of cross-over movements. *Duke/NS*, slip op. at 17-20. The use of 100-mile block credits as a proxy for the costs of originating and terminating cross-over traffic is an issue that took on major significance as a result of the Board's *Duke/NS* decision and Otter Tail's reliance on the MSP approach in its Opening Supplemental Evidence.

Otter Tail states that its use of MSP in its Opening Supplemental Evidence "does not justify BNSF's attempt to modify the MSP methodology in its Supplemental Reply Evidence." Motion to Strike at 9. It contends that BNSF could have sought to modify the origination/termination mileage credit used in the MMP methodology which BNSF addressed on

reopening. There is no reason in law or logic why the evidence BNSF presented regarding MSP in its Supplemental Reply should be limited to the evidence that it previously presented regarding MMP. In addition to being different methodologies, the role that MMP played in Otter Tail's Opening Evidence was far different and more limited than the role MSP played in its Opening Supplemental Evidence. In its original Opening Evidence, OTP relied on its so-called market based divisions to allocate revenue on the vast majority of its traffic, including all of its coal traffic. It used MMP for only a portion of its non-coal traffic. MSP was the centerpiece of a fundamentally different, alternate case that Otter Tail presented in its Opening Supplemental Evidence.

The issue of admissibility should turn on a straightforward, objective inquiry – whether the evidence in question is responsive to issues raised in recent Board precedent and/or the complainant's Opening Supplemental Evidence. The answer is yes.

II. OTTER TAIL WILL NOT BE PREJUDICED BY A DENIAL OF ITS MOTION TO STRIKE

The Board has devoted considerable effort to the development of standards governing the proper scope of rebuttal evidence. Motions to strike are recognized as appropriate in connection with rebuttal evidence when the moving party has been deprived of an opportunity to address new evidence tendered by its opponent. *See Duke Energy v. CSX Transportation Inc.*, STB Docket No. 42070, slip op. at 4 (served March 25, 2003). This rationale for granting a motion to strike in the case of impermissible rebuttal does not apply here. Otter Tail has the opportunity to attempt to rebut the evidence contained in BNSF's Supplemental Reply. It simply would prefer to avoid "the time, effort and expense, in just the brief 30-day period between BNSF's

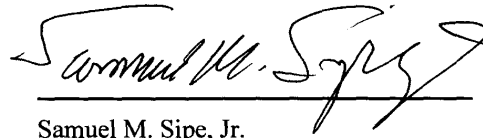
Supplemental Reply Evidence and the filing of full Rebuttal Evidence” of addressing BNSF’s Supplemental Reply. Motion to Strike at 10.¹ There is no genuine claim of prejudice.

In contrast, granting Otter Tail’s Motion to Strike would seriously prejudice BNSF because it would deprive BNSF of the opportunity to reply fullt to Otter Tail’s Opening Supplemental Evidence and to present evidence that takes account of recent Board precedent on important SAC issues in this case.

CONCLUSION

For the foregoing reasons, Otter Tail’s Motion to Strike should be denied.

Respectfully submitted,



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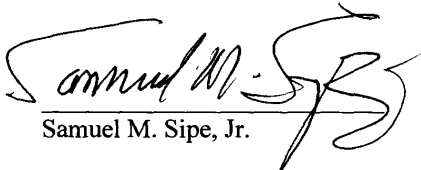
April 2, 2004

¹ Otter Tail’s 30-day period to file rebuttal evidence has been extended from April 22, 2004 to April 29, 2004. *Otter Tail v. BNSF*, STB Docket No. 42071 (served March 26, 2004).

CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2004, I caused the foregoing Reply of The Burlington Northern and Santa Fe Railway Company to Complainant's Motion to Strike Portions of Supplemental Reply Evidence to be served by hand upon the following counsel for Otter Tail Power Company.

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