

BEFORE THE
SURFACE TRANSPORTATION BOARD

OTTER TAIL POWER COMPANY,)

Complainant,)

v.)

THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY,)

Defendant.)



ENTERED
Office of Proceedings

MAY 14 2004

Part of
Public Record

COMPLAINANT'S OPPOSITION TO
DEFENDANT'S MOTION FOR EXTENSION OF TIME

Otter Tail Power Company ("Otter Tail") hereby responds in opposition to the "Motion for Extension of Time" filed on May 12, 2004 by defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF"). BNSF requests a 20-day extension of the time period established in 49 C.F.R. § 1104.13(a), until June 8, 2004, in order to file a surrebuttal, also known as a "reply to a reply," to Otter Tail's April 29, 2004 Rebuttal Evidence in this proceeding. BNSF's Motion should be denied because it is both procedurally improper and without proper justification.

BNSF wrongly contends that 49 C.F.R. § 1104.13(a) gives it an automatic right to reply to Otter Tail's rebuttal evidence within 20 days. This rule states:

A party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board, *unless otherwise provided*.

[emphasis added] In its Motion, BNSF omits the italicized phrase. That phrase is important, however, because this same rule *otherwise provides*, in subsection (c), that "A reply to a reply is not permitted." 49 C.F.R. 1104.13(c). In other words, BNSF's Motion requests an extension of

time to file a surrebuttal pleading that is prohibited by the very same rule. Therefore, BNSF is seeking an extension of time to submit a pleading that it has no right to file.

The proper procedure is for BNSF to petition the Board, pursuant to 49 C.F.R. § 1110.9, to waive the prohibition against surrebuttals in 49 C.F.R. § 1104.13(c).¹ BNSF has not done this. Nor does BNSF's Motion present any facts to show good cause for waiving that rule.² BNSF's Motion states merely that "The Board has articulated strict limits on the type of evidence that can be presented on rebuttal in a SAC case in order to eliminate these abuses of rebuttal evidence, but Otter Tail's Rebuttal Evidence ignores those rules in several areas." At no point, however, does BNSF even identify those "areas," much less attempt to explain how Otter Tail's Rebuttal Evidence in those unidentified areas ignores the Board's standards for proper rebuttal evidence. Thus, BNSF's "Motion for Extension of Time" cannot be a surrogate for a waiver petition.

A Petition for Waiver is what BNSF must file within 20 days, pursuant to 49 C.F.R. § 1104.13(a). That petition, however, does not require an extension of time. BNSF's "Motion for Extension of Time" is predicated upon "not hav[ing] a sufficient opportunity to prepare a response [sic] Otter Tail's Rebuttal Evidence by May 19, 2004" because BNSF otherwise is engaged in the preparation of reply evidence in *AEP Texas North Co. v. The Burlington Northern and Santa Fe Ry. Co.*, Docket No. 41191 (Sub-No. 1) ("*AEP Texas*"). But, BNSF does not need to prepare and file its surrebuttal evidence in order to support a Petition for Waiver. Rather, BNSF must demonstrate that Otter Tail's Rebuttal Evidence ignores the Board's standards for proper rebuttal and constitutes good cause to permit surrebuttal evidence. Clearly, BNSF already

¹ See *Ocean Logistics Management, Inc. v. NPR, Inc., and Holt Cargo Systems, Inc.*, STB Docket No. WCC-102, Slip Op. at 3 (served Jan. 14, 2000); *Missouri Pac. R.R. Co. – Abandonment in Douglas, Champaign and Vermilion Counties, IL*, Docket No. AB-3 (Sub-No. 103), 1993 ICC Lexis 110, *2, note 1 (served June 4, 1993); *Delaware and Hudson Ry. Co. v. Consolidated Rail Corp.–Reciprocal Switching Agreement*, 9 I.C.C. 2d 989 (1993).

² *Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor and Aroostook R.R. Co. et al.*, STB Docket No. AB-124 (Sub-No. 2), Slip Op. at 3 (served May 6, 2003).

knows its reasons for believing that Otter Tail's Rebuttal Evidence ignores the Board's standards; otherwise, it could not make that allegation in its Motion. Therefore, BNSF should be able to file a timely Petition for Waiver, and no extension of time is necessary.

BNSF apparently would prefer to file surrebuttal evidence without waiting for the Board to grant it leave to do so. However, because the time frame for doing so overlaps its submission of Reply Evidence in *AEP Texas*, BNSF finds itself unable to prepare evidence in both cases simultaneously. The Board, however, should not waive its procedural rules simply to accommodate BNSF's desire to file surrebuttal evidence even before the Board decides whether such evidence is permissible. Instead, the Board should adhere to the May 19, 2004 due date for BNSF to submit a Petition for Waiver, and BNSF should await the Board's decision on that Petition before filing any surrebuttal evidence.³

For the foregoing reasons, Otter Tail requests that the Board deny BNSF's Motion for Extension of Time.⁴

Respectfully submitted,



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Dated: May 13, 2004

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³ Otter Tail properly followed this procedure when it filed a Petition to Supplement the Evidentiary Record on November 10, 2003. BNSF should follow the same rules.

⁴ Otter Tail is filing this Opposition only one day after BNSF filed its Motion so that the Board can rule on BNSF's Motion at least a few days before the May 19th deadline, even though BNSF itself has not requested expedited consideration. BNSF, and its counsel, are well-acquainted with the Board's procedures, and their failure to follow proper Board procedures should not excuse them from meeting the May 19th deadline.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2004, I served a copy of "Complainant's Opposition to Defendant's Motion for Extension of Time" by hand delivery to counsel for Defendant at the following address:

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