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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



ENTERED
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Public Record

DEFENDANT'S REPLY TO MOTION FOR TECHNICAL CONFERENCE

On July 20, 2004, Otter Tail Power Company ("Otter Tail") filed a motion requesting that the Board hold a technical conference to give Otter Tail an opportunity to demonstrate that the numerous changes it has made in its string program over the course of this proceeding have finally produced a workable model for assessing the operations of its SARR. The Board should reject Otter Tail's motion out of hand. Otter Tail is seeking yet another opportunity to submit evidence in support of its SAC assumptions, this time with a procedural ruse that would be extremely disadvantageous to the defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF"). BNSF respectfully submits that a technical conference to address Otter Tail's discredited string program is not only unnecessary but would undermine the Board's efforts to exclude impermissible rebuttal evidence. The Board should bring the record in this case to a close with the filing of briefs and it should not prolong the case with new evidence on the string program.

Otter Tail has already had more than enough opportunity to submit evidence on its string program. It filed its original Opening Evidence with its original string program on June 13,

2003. A month later it filed an extensive errata to its Opening Evidence which included a new string program analysis and new operating statistics. Otter Tail then filed Supplemental Opening Evidence on January 9, 2004, which also included a new string program that Otter Tail prematurely labeled as its "rebuttal" string program.¹ On April 29, 2004, Otter Tail filed its Rebuttal Evidence, which contained yet another version of the string program. Finally, in response to BNSF's June 8, 2004 Motion to Strike, Otter Tail submitted on July 20, 2004 a lengthy discussion by its operating witness purporting to defend the reasonableness of its final string program, the fourth string program it submitted in this case.

Otter Tail's motion for a technical conference now seeks yet another opportunity to present evidence on its string program analysis and the operating statistics produced by the string program. While Otter Tail's motion is styled as a request for a technical conference, it is in fact a request for a hearing that would allow it to present evidence on its string program for the sixth time in this case. There is no justification for such a proliferation of evidentiary presentations in a SAC case. Otter Tail acknowledges that "BNSF has raised concerns of significance to both parties," Motion at 1, and it seeks the opportunity to present evidence showing that Otter Tail has "corrected the technical errors identified in BNSF's Reply Evidence." *Id.* at 4. But Otter Tail has had ample opportunity to meet its burden of proof in this case -- far more opportunities than the Board's rules envision. The Board should resolve this case on the basis of the record that has already been submitted and it should not impose further litigation costs and burdens on BNSF by extending the proceedings to include another round of evidence on the string program.

¹ Otter Tail's January 2004 Supplemental Opening Evidence actually contained two alternative SAC presentations and two alternative sets of operating statistics based on two alternative traffic networks.

Analysis of the string program is a very labor intensive and lengthy process, normally requiring several weeks. BNSF has already carried out this time-consuming analysis in its preparation of Reply Evidence. The Board's rules do not contemplate multiple analyses of this sort, and BNSF should not have to devote the resources to multiple string program analyses. Otter Tail's own Synopsis of String Model Issues, attached to its motion, makes it clear that the issues that would have to be addressed in any new analysis of its string program are neither discrete nor limited. The Synopsis lists 20 problems that BNSF identified with Otter Tail's *pre-rebuttal* string programs. Without a detailed and searching analysis, it is impossible to know how many additional errors Otter Tail introduced with its *fourth* version of the string program submitted on rebuttal.

One of the persistent problems with the string program in this and other cases is that changes in the string program have unintended effects that are not apparent until the new version of the program has been closely scrutinized. BNSF should not be required to undertake this burdensome analysis multiple times in the same case. Indeed, as BNSF explained in its June 8, 2004 Motion to Strike, an important reason for disallowing a new string program analysis on rebuttal is that a broad and detailed analysis must be done to evaluate the output and statistics generated by the string program, particularly given the complexity of the string program itself. But the Board's rules do not establish any procedure for carrying out such a review. Otter Tail's motion for a technical conference therefore begs the question whether the rebuttal string program is properly in the record of this proceeding to begin with. If the Board accepts BNSF's position that the new string program analysis should be struck from the record because it constitutes improper rebuttal, there would then be no reason to hold a technical conference.

In any event, the Board has already concluded that string program analyses of the type sponsored by Otter Tail in this case are unreliable. There is no reason for the Board or the parties to waste more time or effort in litigation involving the string program. In its recent *Public Service Company of Colorado* decision, the Board unequivocally held that string program analyses are unreliable and chastised complainants for continuing to use the string program:

The same model has been presented in several recent SAC cases. Each time, the defendant railroad has demonstrated that the results produced by the string program were flawed. But despite the existence of at least three proven and commercially available products . . . complainants bringing SAC cases to the Board have continued to use the string program. Given its proven unreliability, as shown in both this case and prior SAC cases, the Board has no reason to believe that it could successfully rewrite and then manipulate the program to obtain reliable results when its proponents have repeatedly failed to do so.²

Otter Tail nevertheless asks the Board to join it in a fantasy world where its string program is “a sophisticated, yet straightforward, user-friendly model,” where the constantly changing code of the string program (which has grown almost too large for the Visual FoxPro programming language to accommodate) is “completely transparent,” and where every error – whether it is failing to accumulate operating statistics, running grades in the wrong direction, or entirely omitting trains from the modeling – is “minor.”³ But every time that a complainant has submitted a string program in the recent cases, it has made similar claims. And every time a complainant has claimed to fix problems that were identified with the string program, new problems were found to exist. There is no reason to expect a different result here.

² *Public Service Co. of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 42057, slip op. at 26-27 (served June 8, 2004).

³ See Verified Statement of Thomas D. Crowley, at 7, 10, 14 (filed July 20, 2004, with Otter Tail’s Reply to Defendant’s Motion to Strike).

Otter Tail's proposal for a technical conference on the issue of its string program also misconceives the purpose of technical conferences. Technical conferences have been used by the Board to narrow the disagreements between parties on a discrete number of issues. But as discussed above, any evaluation of Otter Tail's rebuttal string program would require a broad and complex review of Otter Tail's model and its operating statistics. Moreover, there is no realistic chance that the parties will reach an agreement on the use of the rebuttal string program in this case. BNSF has repeatedly demonstrated that the string program cannot produce competent, reliable evidence upon which the Board can base a decision. Otter Tail's proposal for a technical conference is merely a procedural maneuver intended to give Otter Tail the opportunity to introduce new evidence on the string program even after rebuttal, while depriving BNSF of any meaningful opportunity to respond.

The Board should reject Otter Tail's motion. Otter Tail has had numerous opportunities to submit evidence in this case supporting the SAC operating assumptions that it derived from the string program model. The Board should resolve this case based on the record that has already been created and it should not prolong or complicate these proceedings further by accepting Otter Tail's proposal for a technical conference.

Respectfully submitted,

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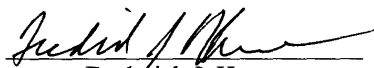
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by messenger on this
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