

August 2, 2004

By Messenger

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

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

Dear Secretary Williams:

On July 29, 2004, The Burlington Northern and Santa Fe Railway Company ("BNSF") submitted its Reply to a Motion for Technical Conference, filed by Otter Tail Power Company ("Otter Tail") on July 20, 2004. BNSF's Reply characterizes Otter Tail's Motion as a "procedural ruse" designed to permit Otter Tail to submit new evidence in support of its string program. Reply at 1 and 5. Otter Tail takes strong exception to BNSF's gross misrepresentation of its motives and its Motion.

Rather than seeking to introduce new evidence, Otter Tail's Motion suggests a process by which the Board can fully and accurately assess the evidence already submitted by both parties. This responds directly to concerns expressed by BNSF that it could be difficult for the Board to review Otter Tail's rebuttal string program evidence without the assistance of the parties. BNSF suggests that, because "the Board's rules do not establish any procedure for carrying out such a review," the Board should disregard Otter Tail's string program rebuttal evidence entirely. Reply at 3. Otter Tail submits that the Board's Technical Conference procedures are well-adapted to carrying out such a review.

BNSF further claims that Otter Tail's proposal "misconceives the purpose of technical conferences," which is to narrow disagreements between the parties. Reply at 5. But, Otter Tail's proposal would do precisely that, by requiring BNSF to identify which of its Reply Evidence issues pertaining to the string program, if any, BNSF agrees that Otter Tail has adequately addressed in Rebuttal Evidence. For example, BNSF easily should be able to state whether or not Otter Tail has used the correct formulas for locomotive tractive effort and resistance factors, or has used correct grades. Any remaining disagreements would be discussed at the Technical Conference and, even if no further agreements are reached, the Board would gain the benefit of the parties' familiarity and expertise with the evidence, which directly responds to BNSF's concern that the Board cannot effectively evaluate the rebuttal string program evidence without input from the parties.

Jeff.Moreno@ThompsonHine.com Phone 202.263.4107 Fax 202.331.8330

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Although BNSF complains that the Board cannot be expected to evaluate Otter Tail's rebuttal string program evidence without assistance from the parties, it is unwilling to provide that assistance. Instead, BNSF urges the Board to strike Otter Tail's rebuttal evidence, despite the procedural prejudice of denying Otter Tail its right of rebuttal. BNSF's Reply is full of the same flowery rhetoric, gross misrepresentations, and indiscreet mud-slinging that has pervaded each of its evidentiary filings on the string program.¹ Rather than addressing the substantive and procedural points in Otter Tail's Motion, BNSF falls back upon its Motion to Strike. Clearly, BNSF does not want a Technical Conference to shine a spotlight upon the string program issues because BNSF knows that its criticisms will not stand up to such scrutiny. BNSF seeks to avoid this scrutiny by hiding behind the blatantly false premise that Otter Tail has engaged in a "procedural ruse" to submit new evidence.

Sincerely,



Nicholas J. DiMichael

Jeffrey O. Moreno

cc: Samuel M. Sipe, Counsel for BNSF
Anthony J. LaRocca, Counsel for BNSF

¹ For example, at page 3, BNSF refers to Exhibit 1 of Otter Tail's Motion, which summarized the 20 problems that BNSF has identified with the string program. BNSF fails to mention, however, that Otter Tail has rejected BNSF's criticisms entirely for over half of those alleged problems. Just because BNSF says there are 20, 30, or even 40 problems does not make it true. The proposed Technical Conference would expose these misrepresentations by BNSF.
