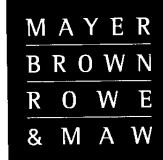


212120



Mayer, Brown, Rowe & Maw LLP  
1909 K Street, N.W.  
Washington, D.C. 20006-1101

Main Tel (202) 263-3000  
Main Fax (202) 263-3300  
www.mayerbrownrowe.com

**Robert M. Jenkins III**  
Direct Tel (202) 263-3261  
Direct Fax (202) 263-5261  
rmjenkins@mayerbrown.com

September 30, 2004

BY HAND DELIVERY

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



Re: STB Finance Docket No. 42060 (Sub-No. 1),  
North American Freight Car Association v.  
The Burlington Northern and Santa Fe Railway  
Company

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of Defendant's Motion for Adoption of Procedural Schedule. Also enclosed for your convenience is a diskette containing the Motion in Word format. Please date stamp the extra copy of the Motion and return it to our representative.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'RMJ', followed by a flourish.  
Robert M. Jenkins III

RMJ/bs

Enclosures

ENTERED  
Office of Proceedings  
OCT 1 - 2004  
Part of  
Public Record

212120

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



\_\_\_\_\_  
**STB DOCKET NO. 42060 (SUB-NO. 1)**  
\_\_\_\_\_

**NORTH AMERICA FREIGHT CAR ASSOCIATION**

**v.**

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

ENTERED  
Office of Proceedings  
OCT 1 - 2004  
Filed  
District Court

\_\_\_\_\_  
**DEFENDANT'S MOTION FOR ADOPTION OF PROCEDURAL SCHEDULE**  
\_\_\_\_\_

Richard E. Weicher  
Sidney L. Strickland, Jr.  
THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY  
2500 Lou Menk Drive  
Fort Worth, TX 76131

Robert M. Jenkins III  
Jill K. McDowell  
MAYER, BROWN, ROWE & MAW LLP  
1909 K Street, NW  
Washington, DC 20006  
202-263-3261

Dated: September 30, 2004

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

---

**STB DOCKET NO. 42060 (SUB-NO. 1)**

---

**NORTH AMERICA FREIGHT CAR ASSOCIATION**

**v.**

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

---

**DEFENDANT'S MOTION FOR ADOPTION OF PROCEDURAL SCHEDULE**

---

In its decision served in this proceeding on August 13, 2004, the Board directed the parties to discuss discovery and procedural matters and propose a joint procedural schedule by September 1, 2004.<sup>1</sup> At the parties' request, the Board by decision served August 30, 2004, extended the date for the parties to propose a joint schedule until September 30, 2004. Counsel for NAFCA and BNSF have negotiated in good faith – and have reached agreement on all but one of the elements of a discovery schedule and on modified procedure for the filing of evidence and argument – but have not been able to reach agreement on the timing of the various events. Regretfully, therefore, the parties are filing separate motions for adoption of a procedural schedule.

---

<sup>1</sup> The remaining parties in this case are (a) North America Freight Car Association ("NAFCA"), on behalf of itself and 11 of its members ("Complainants") listed in Appendix A to NAFCA's Complaint, (b) two intervenors in support of Complainants, the National Industrial Transportation League ("NITL") and the American Chemistry Counsel ("ACC"), and (c) Defendant The Burlington Northern and Santa Fe Railway Company ("BNSF").

---

Attached as Appendix A hereto is BNSF's proposed schedule. The "events" in the schedule are the same as those to which NAFCa and BNSF agreed, except for BNSF's proposal that objections to interrogatories and document requests be made midway through the 60-day response period for those requests. BNSF's view was and is that 30 days provides enough time for a party to determine whether it objects to an interrogatory or document request. If the parties cannot amicably resolve any such objection, then rulings on motions to compel can be obtained without posing the same threat of delay to the entire schedule as postponing objections until the end of the period for responding to interrogatories and document requests. The parties agree that the Board should consider appointing an Administrative Law Judge ("ALJ") to resolve any discovery disputes that arise, and BNSF believes that an ALJ could resolve any such disputes even before interrogatory responses and document production are due. At the very least, any lingering disputes could be resolved during the period set aside for depositions.

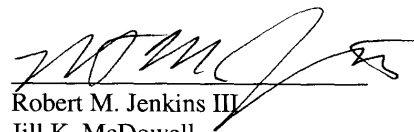
For the most part, NAFCa seeks longer time periods for the various events covered by the proposed schedule. In total, NAFCa proposed a 330-day schedule, while BNSF proposed a 240-day schedule. BNSF believes that the schedule it has proposed is quite reasonable. It provides a total of 150 days (five months) for discovery and 90 days (3 months) for the filing of evidence and argument. By way of comparison with BNSF's proposed 240-day schedule, the Board's rules for a *stand-alone cost rate case* provide a total of **210** days for all discovery and pleadings. 49 CFR § 1111.8 (a). A *significant* merger proceeding must be completely submitted within **180** days, and even a major merger proceeding must be submitted within a year. 49 CFR § 1180.4(e)(2).

Aside from the fact that 240 days should be more than adequate for discovery and evidentiary submissions in this case, the Board always has the ability to modify the schedule if

any of the parties can show good cause for such modification. The Board's fundamental policy, of course, favors the "just, *speedy*, and inexpensive" resolution of cases. 49 CFR § 1100.3 (emphasis added). The Complaint in this case has been pending for over three years, since August 29, 2001. This case should not be permitted to drag on any longer than necessary. BNSF is prepared to devote the resources required to move it forward as expeditiously as possible, and so should the Complainants and intervenors.

For the foregoing reasons, BNSF respectfully requests that the Board adopt the procedural schedule set forth in Appendix A as the schedule in this case.

Respectfully submitted,



Robert M. Jenkins III  
Jill K. McDowell  
MAYER, BROWN, ROWE & MAW LLP  
1909 K Street, NW  
Washington, DC 20006  
202-263-3261

Richard E. Weicher  
Sidney L. Strickland, Jr.  
THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY  
2500 Lou Menk Drive  
Fort Worth, TX 76131

Dated: September 30, 2004

**Appendix A**  
**Proposed Procedural Schedule**

| <b>DAY</b> | <b>EVENT</b>                                                                      |
|------------|-----------------------------------------------------------------------------------|
| 0          | Date on which STB Procedural Order becomes Effective.                             |
| 0+7        | Petition(s) for Confidentiality Order Due.                                        |
| 0+30       | Written Interrogatories and Document Requests Due.                                |
| 0+60       | Objections to Written Interrogatories and Document Requests Due.                  |
| 0+90       | Responses to Written Interrogatories and Document Requests Due.                   |
| 0+105      | Notices of Depositions Due.                                                       |
| 0+150      | Depositions to be Completed.                                                      |
| 0+185      | Opening Statement of Complainants and Intervenors in Support of Complainants Due. |
| 0+220      | Reply Statement of Defendant Due.                                                 |
| 0+240      | Rebuttal Statement of Complainants Due.                                           |

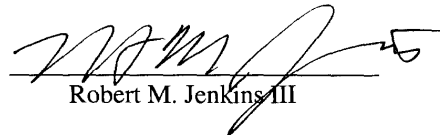
CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendant's Motion for Adoption of Procedural Schedule was served by hand and by United States first-class mail this 30th day of September, 2004, on the following:

Andrew P. Goldstein  
John M. Cutler, Jr.  
McCarthy, Sweeney & Harkaway, P.C.  
Suite 600  
2175 K Street, NW  
Washington, DC 20037

Nicholas J. DiMichael  
Thompson Hine LLP  
1920 N Street, NW  
Suite 800  
Washington, DC 20036

Thomas E. Schick  
The American Chemistry Council  
1300 Wilson Boulevard  
Arlington, VA 22209

  
Robert M. Jenkins III