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BEFORE THE
SURFACE TRANSPORTATION BOARD

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DOCKET NO. 42060 (SUB. NO. 1)
NORTH AMERICA FREIGHT CAR ASSOCIATION

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

REPLY OF COMPLAINANTS TO DEFENDANT'S MOTION FOR
ADOPTION OF PROCEDURAL SCHEDULE

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Dated: October 15, 2004

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Pursuant to the Board's August 13, 2004 Decision in which the Board directed the parties to confer regarding discovery and procedural matters and propose a joint procedural schedule, Complainants North America Freight Car Association and 11 of its members individually named in the Complaint ("Complainants") conferred with Defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF"), but failed to reach agreement on all matters relevant to a procedural schedule. On September 30, 2004, Complainants and BNSF filed separate motions with the Board, each such

motion containing a different version of a procedural schedule. Complainants hereby reply to the motion of BNSF.¹

Two issues separate the procedural proposals of the parties. The first point of difference is the timeframes to be allocated for each phase of the procedural schedule, with BNSF proposing shorter individual timeframes that result in a total procedural schedule that is 90 days less than the one proposed by Complainants. The second point of difference is with respect to discovery, where BNSF would interpose a separate procedural step for the filing of objections to discovery. Complainants' proposal would consume a total of 11 months through the filing of all evidence and argument; BNSF's a total of 8 months.

BNSF argues that Complainants' procedural proposal compares unfavorably with the Board's rules in a stand-alone cost rate case, where a total of 210 days for all discovery and pleadings are provided in 49 C.F.R. § 1111.8(a). However, Complainants are unaware of any recent stand-alone rate case where discovery has proceeded without deviations from the negotiated procedural schedule or without extensions of time from the prescribed procedural schedule; or has not required extensions of time even where there is a negotiated procedural schedule. Because discovery in SAC cases typically takes far longer than 210 days, 49 C.F.R. § 1111.8(a) does not provide a helpful or apt comparison.

More significantly, a stand-alone rate case as a rule involves no more than two parties, a single complainant and a single defendant, and the information to be developed

¹ On October 1, 2004, Complainants informed the Board by letter that they intended to reply to BNSF's Motion for Adoption of Procedural Schedule. By letter dated October 4, 2004, BNSF urged the Board to act in response to the pending procedural schedule motions without an opportunity for the filing of any replies. On that same date, Complainants advised the Board by letter that Complainants considered BNSF's request to be improper in light of 49 C.F.R. § 1104.13(a) and for other reasons, as well.

through discovery is, for the most part, clearly known to the parties as a result of numerous Board decisions. By contrast, this case involves multiple parties complainant and BNSF's stated intention of serving both written interrogatories and document requests on all such parties, with fewer case law guidelines to provide focus on necessary or relevant facts to be developed through discovery.²

BNSF also attempts a comparison between the procedural schedule proposed by Complainants and the procedural schedule prescribed at 49 C.F.R. § 1180.4(e)(2) for use in certain rail consolidation proceedings. BNSF Motion at 3. Any attempt to draw an analogy between this case and a rail consolidation proceeding is totally inapt. Rail consolidation proceedings of the type referred to by BNSF are governed by a timetable set by statute. See 49 U.S.C. § 11325. In the case of both major and significant merger proceedings, pre-filing notification is required, and, in major transactions, the applicants' traffic tapes are made available by rule, thereby obviating a potentially time-consuming part of the discovery process. See 49 C.F.R. 1180.4(b).³

Complainants' own Motion for Adoption of Procedural Schedule contains reasons in support of the timeframes proposed by Complainants, and those reasons will not be repeated here. What should be emphasized in this Reply, however, is the curious nature of BNSF's demand for short procedural timeframes. While this case was pending before the Board for three years awaiting a determination of whether the Complaint would be

² BNSF states that it is "prepared to devote the resources required to move [the case] forward as expeditiously as possible, and so should the Complainants and Intervenor." Motion at 4. This amounts to a suggestion that the Complainants put all other concerns aside and retain additional lawyers to permit BNSF, represented by one of the country's largest law firms, to pursue its new-found goal of procedural expedition. Such a demand is totally inappropriate, particularly where, as here, there is no disclosed legal emergency that would warrant the expedited procedural approach suggested by BNSF.

³ In negotiations between Complainants and BNSF prior to the filing of the parties' separate procedural schedule motions, counsel for Complainants informed counsel for BNSF that Complainants would seek certain traffic tapes of BNSF.

dismissed or the case could proceed, BNSF failed to urge the Board to act in a "speedy" manner, despite BNSF's current effort to remind the Board to pursue such a policy. Motion at 4. If BNSF's new-found desire for a "speedy" hearing process primarily serves some purpose other than to make discovery unnecessarily difficult for Complainants, BNSF has failed to make that purpose clear. BNSF's burden of preparing discovery requests for service on 11 parties complainant and of answering one set of discovery requests from Complainants is highly likely to be far less than the burden those multiple parties will realize in responding to BNSF's discovery requests. Discovery requests are in large part uniform, regardless of the number of parties on which they are served, while each response requires a considerable amount of defendant-specific legal consultation and internal company effort. A shortened schedule as proposed by BNSF will work a greater hardship on Complainants than on BNSF, and it is inappropriate and unnecessary to do so.

WHEREFORE, Complainants urge the Board to reject the procedural schedule proposed by BNSF and to adopt the procedural schedule proposed by Complainants. Intervenor American Chemistry Council and The National Industrial Transportation League join in this request.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Joint Motion for Adoption of Procedural Schedule was served by first-class mail, postage prepaid, this 15th day of October, 2004.

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