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January 14, 2005

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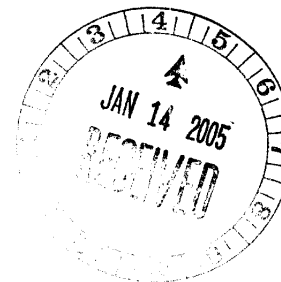
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ENTERED
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JAN 14 2005

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VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, DC 20423-0001

Re: Docket No. 42088, Western Fuels Association, Inc. and
Basin Electric Power Cooperative, Inc. v. The Burlington
Northern and Santa Fe Railway Company

Dear Secretary Williams:

Enclosed for filing please find an executed original and ten (10) copies of
Complainant's Motion to Compel.

Please date stamp the extra copy of this cover letter and the Motion to
Compel and return it to our messenger.

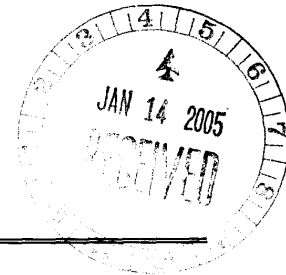
Thank you.

Respectfully submitted,

John H. LeSeur
An Attorney for
Western Fuels Association, Inc. and
Basin Electric Power Cooperative, Inc.

JHL:cef
Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD



WESTERN FUELS ASSOCIATION, INC. and)
BASIN ELECTRIC POWER)
COOPERATIVE, INC.)

Complainants,)

v.)

THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY)

Defendant.)

Docket No. 42088

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MOTION TO COMPEL

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WESTERN FUELS ASSOCIATION, INC., and
BASIN ELECTRIC POWER COOPERATIVE, INC.

OF COUNSEL:

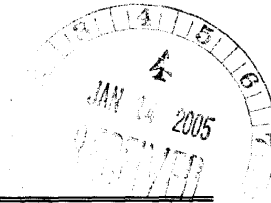
Slover & Loftus
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Dated: January 14, 2005

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Attorneys for Complainants

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



WESTERN FUELS ASSOCIATION, INC. and)
BASIN ELECTRIC POWER)
COOPERATIVE, INC.)

Complainants,)

v.)

THE BURLINGTON NORTHERN AND)
SANTA FE RAILWAY COMPANY)

Defendant.)

Docket No. 42088

MOTION TO COMPEL

Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively "WFA/Basin") move to compel Defendant Burlington Northern and Santa Fe Railway Company ("BNSF") to provide documents responsive to their Requests for Production ("RFP") Numbers ("Nos.") 3 and 104(a), served on October 20, 2004 and November 9, 2004, respectively.¹

I.
**DOCUMENT PRODUCTION
REQUEST NO. 3**

WFA/Basin's RFP No. 3 asks BNSF to provide internal BNSF studies on the profitability of its coal and non-coal traffic. RFP No. 3 states:

Please produce all studies and analyses
conducted by or for BNSF from January 1, 2000 to

¹ A copy of RFP Nos. 3 and 104 are appended in Attachment A. A copy of BNSF's initial responses to these requests is appended in Attachment B.

date related to (a) the profitability of BNSF's coal traffic, and (b) the profitability of BNSF's non-coal traffic.

Id. BNSF objects to providing documents responsive to RFP 3 on grounds of relevance, burden and confidentiality. See Attachment B at 1 (BNSF's Nov. 19, 2004 responses). Each objection is meritless.

- Relevance. The requested material is relevant for two reasons. First, the information is needed to respond to contentions BNSF has made in recent Board proceedings concerning the overall profitability of its coal traffic.² Having injected this issue into Board proceedings, BNSF cannot credibly claim this topic is "irrelevant," nor should BNSF be able to have it both ways, i.e., be able to make profitability claims without opening up its internal profitability records to discovery.

Second, the requested information is relevant under the Long-Cannon Amendment standards. These standards were included in the Staggers Act of 1980 and remain in effect today.³ They are intended to prevent rail carriers from extracting excessive profits on captive coal traffic.⁴ BNSF's internal comparisons of the

² See, e.g., Public Service Company of Colorado D/B/A Xcel Energy v. The Burlington Northern and Santa Fe Ry., STB Docket No. 42057, BNSF Final Brief at 8 (arguing that BNSF is "under financial pressure to increase coal rates"). See Letter from Matthew Rose to Hon. Roger Nober at 2 (dated June 23, 2004)(inferring that BNSF "can not afford to invest" in new coal transportation-related infrastructure due to "declining yields" on coal traffic)(available on the STB website).

³ See 49 U.S.C. §10701(d)(2). These standards are also included in the Coal Rate Guidelines. See Coal Rate Guidelines, Nationwide, 1 I.C.C. 2d 520, 540 (1985).

⁴ See Arkansas Power & Light Co. – Petition to Institute Rulemaking Proceeding – Implementation of Long-Cannon Amendment to the Staggers Rail Act, 365 I.C.C. 983, 988 (1982) ("Arkansas Power") ("[t]he drafters of the Long-Cannon amendment were primarily concerned about shippers of coal ... and the amendment sought to assure that rail rate flexibility would not result in such shippers bearing a disproportionate share of responsibility for the needed improvement in the railroads' financial position").

profitability of its coal traffic with its non-coal traffic are relevant in addressing BNSF's compliance with the Long-Cannon Amendment directives.⁵

- Burden. This appears to be a boilerplate objection. BNSF has offered no explanation as to why it would be burdensome for BNSF to respond to this request.
- Confidentiality. At the December 7, 2004 staff-supervised discovery conference, BNSF argued that its profitability studies were exempt from discovery because they contained "management cost" information. Contrary to BNSF's assertions, ICC/STB discovery precedents do not preclude discovery of so-called "management cost" data where, as here, the information is relevant.⁶ BNSF's confidentiality concerns can be fully protected under the governing protective order in this case.

⁵ See WFA/Basin Complaint at ¶ 9 (filed Oct. 19, 2004)(alleging BNSF's rates violate §10701(d)(1) standards, which include the Long-Cannon Amendment directives codified at 49 U.S.C. § 10701(d)(2)). Publicly available information recently submitted to the STB by the Western Coal Traffic League indicates that BNSF's coal traffic is highly profitable. See Powder River Site Visit, STB Ex Parte No. 655, Letter from M. Schwartz to Hon. Roger Nober (dated Aug. 27, 2004).

⁶ See, e.g., Arkansas Power at 997 (holding that if a Long-Cannon discovery request "is reasonable, the railroads may not generally refuse to provide information about their costs of providing service on the ground that cost information is proprietary"); San Antonio, Texas v. Burlington Northern R.R., ICC Docket No. 36180, slip op. at 7 (ICC served Dec. 5, 1986)(directing production of relevant internal management cost documents); Arizona Electric Power Cooperative, Inc. v. The Atchison, Topeka and Santa Fe Ry., ICC Docket No. 37437, 1986 ICC LEXIS 104, *5-*10 (ICC served Oct. 23, 1986)(same). The ICC, and STB, have ruled that in instances where, unlike the instant one, internal management cost data is not relevant, it need not be produced. See, e.g., Potomac Electric Power Co. v. CSX Transp., Inc., STB Docket No. 41989, slip op. at 4 (STB served May 27, 1997)("[w]e conclude that the railroads' internal management costing methodologies have not been shown to be relevant to the issues in these proceedings").

II.
DOCUMENT PRODUCTION
REQUEST NO. 104

WFA/Basin's RFP No. 104 asks BNSF to produce interline divisions data:

Please produce (a) the BNSF system-wide interline divisions data for the year 2001 which BNSF produced to the complainant during discovery in the Otter Tail case... (referenced on page III-A-17 of Volume I of the complainant's Opening Evidence (Public Version) filed June 13, 2003 in Otter Tail); and (b) any interline divisions data in BNSF's possession for coal traffic for a period or periods subsequent to 2001.

Id. BNSF objects to producing the requested documents on grounds of burden and relevance. See Attachment B at 1 (BNSF's November 30, 2004 responses).

WFA/Basin is limiting its request to documents that BNSF produced in the Otter Tail⁷ case (i.e., subparagraph (a) above). This limitation moots BNSF's burden objection since BNSF simply needs to copy – or authorize one of WFA/Basin's consultants to copy – the divisions information BNSF produced in Otter Tail.

BNSF's relevance objection is also misplaced. Under the STB's rules, WFA/Basin is entitled to discovery on "any matter ... which is relevant to the subject matter involved in a proceeding...." 49 C.F.R. §1114.21. Setting divisions on SAC cross-over traffic is a "subject matter involved in a [SAC] proceeding" and WFA/Basin's RFP No. 104(a) seeks discoverable divisions data. See e.g., Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Ry., STB Docket No. 42056, slip op. at 31 (STB

⁷ Otter Tail Power Co. v. The Burlington Northern and Santa Fe Ry., STB Docket No. 42071 ("Otter Tail").

served March 24, 2003)(citing relevance, in determining SAC cross-over traffic divisions, of "BNSF's typical percentage division in various market-driven situations"); Bituminous Coal – Hiawatha, Utah to Moapa, Nevada, 10 I.C.C. 2d 259, 280 (1994)(citing relevance, in determining SAC cross-over traffic divisions, of "market-based divisions").

At the December 7, 2004 staff-supervised discovery conference, BNSF maintained that one of the Board's Duke decisions⁸ precluded discovery of actual divisions data in STB rate cases. BNSF's reliance is misplaced. In Duke, the STB held that production of actual carrier division data would not "be particularly instructive" in that case. Id. at 20 fn. 29. The same may not be true in this case.

CONCLUSION

For the reasons set forth above, WFA/Basin request that the Board order BNSF to provide all documents responsive to WFA/Basin's RFP Nos. 3 and 104(a).

Respectfully submitted,

WESTERN FUELS ASSOCIATION, INC., and
BASIN ELECTRIC POWER COOPERATIVE, INC.

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OF COUNSEL:

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1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Dated: January 14, 2005

Attorneys for Complainants

⁸ Duke Energy Corp. v. Norfolk Southern Ry., STB Docket 42069, slip op. at 19-20 (STB served Nov. 6, 2003)("Duke").

WFA/Basin's RFP Nos. 3 and 104¹

Request for Production No. 3:

Please produce all studies and analyses conducted by or for BNSF from January 1, 2000 to date related to (a) the profitability of BNSF's coal traffic, and (b) the profitability of BNSF's non-coal traffic.

Request for Production No. 104:

Please produce (a) the BNSF system-wide interline divisions data for the year 2001 which BNSF produced to the complainant during discovery in the Otter Tail case as part of the BNSF (referenced on page III-A-17 of Volume I of the complainant's Opening Evidence (Public Version) filed June 13, 2003 in Otter Tail); and (b) any interline divisions data in BNSF's possession for coal traffic for a period or periods subsequent to 2001.

¹ RFP No. 3 is set forth at page 9 of Complainant's First Request for Production of Documents (served October 20, 2004). RFP 104 is set forth at page 4 of Complainant's Second Request For Production of Documents (served on November 9, 2004). The word "production" was inadvertently omitted after the term "BNSF" on line 3 of WFA/Basin's RFP No. 104.

**BNSF's Initial Responses to
WFA/Basin's RFP Nos. 3 and 104¹**

Request for Production No. 3:

Please produce all studies and analyses conducted by or for BNSF from January 1, 2000 to date related to (a) the profitability of BNSF's coal traffic, and (b) the profitability of BNSF's non-coal traffic.

BNSF Response: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome and seeks information that is neither relevant nor reasonably calculated to lead to discovery of admissible evidence.

Request for Production No. 104:

Please produce (a) the BNSF system-wide interline divisions data for the year 2001 which BNSF produced to the complainant during discovery in the Otter Tail case as part of the BNSF (referenced on page III-A-17 of Volume I of the complainant's Opening Evidence (Public Version) filed June 13, 2003 in Otter Tail); and (b) any interline divisions data in BNSF's possession for coal traffic for a period or periods subsequent to 2001.

BNSF Response: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome and seeks information that is neither relevant nor reasonably calculated to the discovery of admissible evidence. See Duke Energy Corp. v. Norfolk Southern Ry. Co., slip op. at 19-20 (STB served No. 6, 2003).

¹ BNSF's initial response to RFP No. 3 is set forth in Defendant's Responses and Objections to Complaint's First Set of Requests for Production at 6 (served November 19, 2004). BNSF's initial response to RFP No. 104 is set forth in Defendant's Responses and Objections to Complainant's Second Set of Requests For Production at 4 (served on November 30, 2004).

CERTIFICATE OF SERVICE

I hereby certify I have served a copy of the Motion to Compel on the following Washington counsel for the Defendant by hand-delivery:

Samuel M. Sipe, Jr., Esq.
Anthony J. LaRocco, Esq.
Steptoe & Johnson
1330 Connecticut Avenue, N.W.
Washington, DC 20036

Dated this 14th day of January, 2005.



John H. LeSeur
An Attorney for WFA/Basin