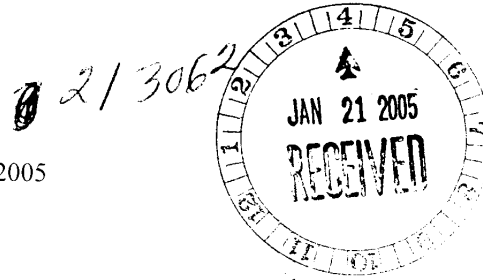


STEPTOE & JOHNSON LLP
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January 21, 2005



via Hand Delivery

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings
JAN 21 2005
Part of
Public Record

Re: STP Docket No. 42088, *Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. v. BNSF Railway Company, f/k/a The Burlington Northern and Santa Fe Railway Company,*

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and ten copies of Defendant's Reply to Complainants' Motion to Compel.

An additional copy of this filing is also enclosed. Please indicate receipt and filing by date stamping the cover letter of this extra copy and returning it to the messenger who delivered this filing.

Sincerely,

A handwritten signature in cursive script, appearing to read "Anthony J. LaRocca".

Anthony J. LaRocca

Enclosures

cc: Counsel for Complainant
Dr. William F. Huneke
Rachel D. Campbell, Esq.

WASHINGTON

PHOENIX

LOS ANGELES

LONDON

BRUSSELS

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

Complainants,

v.

BNSF RAILWAY COMPANY, f/k/a
THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

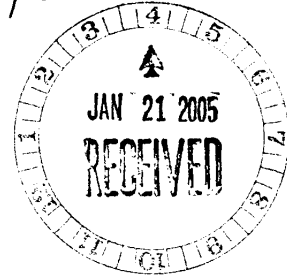
Defendant.

Docket No. 42088

ENTERED
Office of Proceedings

JAN 24 2005

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Public Record



**DEFENDANT'S REPLY TO
COMPLAINANTS' MOTION TO COMPEL**

Defendant, BNSF Railway Company, f/k/a The Burlington Northern and Santa Fe Railway Company ("BNSF"), hereby replies to the Motion to Compel filed by complainants Western Fuels Association, Inc. and Basin Electric Cooperative, Inc. on January 14, 2005. Complainants seek an order from the Board compelling BNSF to produce (1) internal studies of the profitability of coal and non-coal transportation and (2) the results of a study of revenue divisions that BNSF carried out in response to a discovery request in a separate rate reasonableness case. For the reasons explained below, complainants are not entitled to the requested materials.

BNSF's internal profitability studies are not relevant to any issue in this proceeding. BNSF does not intend to raise the issue of the profitability of coal transportation. If complainants intend to raise that issue in the context of an analysis of the Long-Cannon factors, which is highly unlikely, they can do so based on the Board's costed waybill data. Moreover, the

only responsive materials possessed by BNSF are based on BNSF's internal management cost system and reflect BNSF's internal cost assumptions and costing methodologies. The Board has repeatedly found that a defendant's internal management cost data are not relevant in rate reasonableness proceedings and are outside the scope of discovery in SAC litigation.

Similarly, the requested revenue divisions data are not relevant. Complainants indicate that they want the data for purposes of "[s]etting divisions on SAC cross-over traffic." Motion to Compel at 4. However, the Board has made it clear that it does not base cross-over revenue allocations on real-world divisions of revenues between existing interline carriers because, among other things, those real-world divisions "reflect a wide range of commercial considerations" that would not be relevant in the world of the stand-alone railroad. *See Duke Energy Corp. v. Norfolk Southern Railway Co.*, slip op. at 20, note 29 (served February 3, 2004) ("*Duke/NS*"). The Board should deny complainants' Motion to Compel in its entirety.

ARGUMENT

It has been clear since the *Guidelines* were promulgated that the scope of discovery in a SAC case is not governed by the broad relevance standard used in federal court litigation. The *Guidelines* state that SAC discovery should be limited and that complainants should be required to demonstrate a "real, practical need" for information requested that is "reasonably tailored to the particular charges to be proved and reflect the least intrusive means of obtaining the information." *Coal Rate Guidelines*, 1 I.C.C. 520, 548 (1985). These discovery limits have repeatedly been endorsed by the ICC and the Board.

The Board recently summarized the standard applied to requests for orders compelling discovery in a SAC case: "[A] party seeking to compel discovery must show (1) that it needs the information to make its case, (2) that the information cannot be readily obtained through other

means, and (3) that the request is not unduly burdensome.” *Procedures To Expedite Resolution of Rail Rate Challenges To Be Considered Under the Stand-Alone Cost Methodology*, Ex Parte No. 638, slip op. at 4 (served April 3, 2003). Complainants did not even pay lip service to this standard in their Motion to Compel. As demonstrated below, complainants are not entitled to the requested discovery under the Board’s discovery standard.

1. Profitability Studies

Complainants’ first request is that the Board order BNSF to produce internal studies of the profitability of coal and non-coal transportation. Their principal argument in support of such an order is that they need the information to respond to arguments that complainants expect BNSF to make in this case “concerning the overall profitability of coal traffic.” Motion to Compel at 2. Complainants claim that they expect BNSF to address the profitability of coal transportation because BNSF has supposedly “injected this issue into Board proceedings” in the past. *Id.*

The premise of complainants’ request is wrong. BNSF has not raised the issue of the profitability of coal transportation in prior SAC cases and it has no plans to do so here. Complainants refer to a discussion in the *Xcel* case about the “financial pressure to raise rates” as evidence that BNSF can be expected to address the profitability of coal traffic in this case. Motion to Compel at 2, note 2. That discussion, however, did not address the profitability of coal transportation but rather the widespread view among financial analysts that the downward trend in coal rates must be reversed to ensure BNSF’s long-term financial viability. Neither party submitted evidence in that case relating to the profitability of coal transportation. Moreover, the discussion in *Xcel* about financial pressure on BNSF to raise rates related to

evidence introduced by the *complainant*, not BNSF, in support of complainant's claim that coal transportation rates can be expected to increase in the future.

Complainants cannot plausibly claim that a letter from Matthew Rose, BNSF's Chief Executive Officer, to Chairman Nober referring to "declining yields" on coal transportation is evidence that BNSF intends to address the issue of the profitability of coal transportation in this case. *See* Motion to Compel at 2, note 2. That letter was written to Chairman Nober in response to a direct request for information on BNSF's plans for handling an expected surge in demand. The letter was totally unrelated to SAC litigation. In any event, the reference to declining yields on coal transportation in that letter was based on publicly available data, and shippers responded to Mr. Rose's claims using data readily available from the Board. *See Id.* at 3, note 5 (referring to Western Coal Traffic League analysis). In short, complainants' request for internal profitability studies fails to meet the first criteria in the Board's standard governing motions to compel -- a demonstrated need for the requested data.

Complainants' fall-back argument is that they need BNSF's internal profitability studies because the *complainants* may raise the issue of the relative profitability of coal and non-coal transportation in the context of a presentation of evidence relating to the Long-Cannon factors set out in 49 U.S.C. §10701(d)(2). It is highly unlikely that complainants intend to challenge the reasonableness of BNSF's rates based on the Long-Cannon factors. No complainant in recent rate reasonableness cases has undertaken to make such a showing. Moreover, complainants have made it clear in their discovery requests and at the recent technical conference that they intend to pursue their claims under the separate SAC constraint in the *Guidelines*.¹

¹ The reluctance of complainants in past rate reasonableness cases to address the Long-Cannon factors is understandable, since it would be extremely difficult for a complainant to show that BNSF's revenue inadequacy is attributable to its failure to maximize the revenues

Even if complainants did intend to make a Long-Cannon showing in this case, they would not need BNSF's internal profitability studies to do so. The Board collects and publishes costed waybill data that complainants could use to assess the factors set out in 49 U.S.C. §10701(d)(2) if they choose to submit Long-Cannon evidence. As noted above, shippers already used these data to respond to Mr. Rose's reference to the declining yields on coal transportation. Since information relevant to any Long-Cannon showing that complainants might attempt to make is available from other sources, complainants also fail the second prong of the Board's standard for evaluating motions to compel -- *i.e.*, potentially relevant information must not be available from other sources.

Finally, the only materials responsive to complainants' request for profitability studies are reports that are based on and that reflect BNSF's internal management cost assumptions. But the Board has repeatedly held that a defendant's internal cost data are not discoverable in a SAC proceeding.² The reason for such a bright-line rule is clear. To the extent that a defendant's costs are relevant to issues in a rate reasonableness proceeding, the Board uses the Uniform Railroad Costing System (URCS) to assess those costs. As the Board has previously noted, BNSF's internal costing system "is not URCS-based and is not URCS-compatible."³ Cost

available from non-coal traffic. If complainants in this case had chosen to pursue their claims based on the Long-Cannon factors, BNSF would show that its revenue inadequacy is due in large part to inappropriate regulatory constraints on its ability to engage in differential pricing.

² *Potomac Electric Power Co. v. CSX Transportation, Inc.*, 2 S.T.B. 290, 294 (1997); *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Rwy. Co.*, STB Docket No. 42038, slip op. at 3 (served July 8, 1999); *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 42056, slip op. at 4 (served February 9, 2001) ("*TMPA*"); *Northern States Power Co. v. Union Pacific Railroad Co.*, STB Docket No. 42059, slip op. at 8 (served May 24, 2002).

³ *TMPA*, at 4, note 9.

assessments using BNSF's internal cost methodology are therefore not relevant to any regulatory analysis and they are beyond the scope of discovery in SAC litigation.

2. Otter Tail Revenue Division Study

Complainants' second request is that the Board order BNSF to produce the results of a study of interline divisions that BNSF carried out in response to a discovery request in the pending *Otter Tail* litigation.⁴ Complainants argue that they are entitled to the data because those data are relevant to the setting of divisions on cross-over traffic. Motion to Compel at 4. To the contrary: The Board has made it clear that real world interline divisions are not relevant to the setting of divisions on cross-over traffic in a SAC case.

In the Board's recent *Duke/NS* decision, the Board specifically addressed the relevance of real-world interline divisions to the allocation of revenues on cross-over traffic. There, the Board "considered the more general question posed by NS whether divisions should be based on a market-based or a cost-based inquiry, and concluded that a market-based inquiry is not appropriate for a SAC analysis."⁵ For this reason, the Board concluded that "information about NS's actual divisions with other carriers (which Duke requested in discovery but did not receive) [would not] be particularly instructive, as those divisions presumably reflect a wide range of commercial considerations across a spectrum of traffic and gateways."⁶

Complainants suggest that these statements in the *Duke/NS* decision might be limited to the facts of that case. But the Board's language leaves no doubt that it was articulating a

⁴ *Otter Tail Power Co. v. The Burlington Northern and Santa Fe Railway Co.*, STB Docket No. 42071.

⁵ *Duke/NS*, at 17.

⁶ *Id.* at 20, note 29.

standard to be applied in future cases. The Board expressly stated that “a market-based inquiry is not appropriate for a SAC analysis.”⁷ The Board was clearly not ruling on a dispute limited to the facts of the *Duke/NS* case. The Board broadly stated that “the revenue allocation [on cross-over traffic] should reflect, to the extent practicable, the defendant carrier’s relative costs of providing service over the two segments.”⁸ The data requested by complainants relating to BNSF’s interline divisions in the real world are not relevant to this cost-based inquiry. Accordingly, there is no basis for ordering the production of those data in this case.

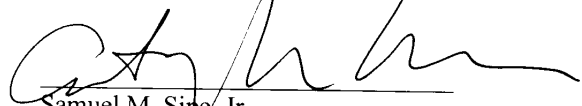
CONCLUSION

For the reasons set out above, the Board should deny complainants’ Motion to Compel.

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January 21, 2005

Respectfully submitted,



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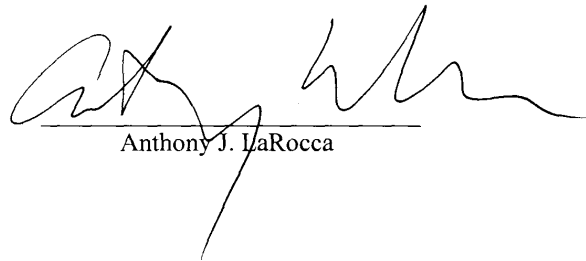
⁷ *Id.* at 17.

⁸ *Id.* at 20.

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2005, I caused a copy of the foregoing "Defendant's
Reply to Complainants' Motion to Compel" to be served by hand upon the following counsel:

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