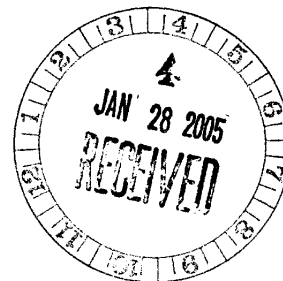


STEPTOE & JOHNSON ^{LLP}
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January 28, 2005

213119

via Hand Delivery

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

Expedited Consideration Requested

Re: 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,
Docket No. 42088

ENTERED
Office of Proceedings
JAN 28 2005
Part of
Public Record

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter is an original and ten copies of Defendant's Motion for an Order Governing The Submission of Stand-Alone Cost Evidence Relating To Rerouted Traffic. Please note that BNSF Railway Company has requested expedited consideration of this Motion. This Motion requests an order that would affect opening evidence that is scheduled to be filed on April 5, 2005. Expedited consideration of this Motion will give the parties time to comply with the order defendant has requested.

Please date stamp the extra copy of this pleading and return it to the messenger who delivered this filing.

Sincerely,



Anthony J. LaRocca

Enclosures

cc: Complainants' Counsel

WASHINGTON

PHOENIX

LOS ANGELES

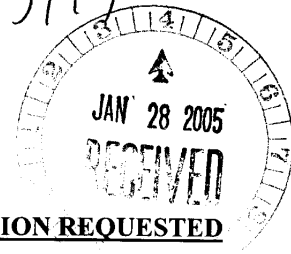
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BRUSSELS

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BEFORE THE
SURFACE TRANSPORTATION BOARD

EXPEDITED CONSIDERATION REQUESTED



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 28 2005

Part of
Public Record

**DEFENDANT'S MOTION FOR AN ORDER GOVERNING
THE SUBMISSION OF STAND-ALONE COST EVIDENCE
RELATING TO REROUTED TRAFFIC**

Pursuant to 49 CFR §1117.1, defendant BNSF Railway Company, f/k/a The Burlington Northern and Santa Fe Railway Company ("BNSF"), hereby requests that the Board issue an order establishing procedures to govern the filing of SAC evidence in this case that will allow the Board and the parties efficiently to address issues that arise from the rerouting of traffic in the complainants' SAC presentation. Specifically, BNSF requests that the Board issue an order requiring that if complainants include rerouted traffic in their SAC presentation, they must posit on opening two stand-alone railroad ("SARR") configurations: one that includes no rerouted traffic and one that includes the rerouted traffic. The requested order will streamline and

simplify the litigation and management of this case by establishing a fair, orderly and expeditious process for submitting evidence related to rerouted traffic.

The order requested by BNSF will enable the parties and the Board to avoid the delays and burdens associated with the filing of supplemental evidence. In several recent cases, the Board has ordered the parties to file supplemental evidence to address disputes over the impact of rerouted traffic in a SAC analysis. These complications can be avoided by establishing alternative frameworks for the SAC analysis from the start and by having the parties submit opening, reply and rebuttal evidence within those alternative frameworks.

The requested order will also minimize disputes over the scope of complainants' rebuttal evidence by eliminating the need for complainants to present evidence addressed to alternative SARR configurations for the first time on rebuttal. The expanded use of rebuttal as complainants' principal evidentiary filing has prolonged and complicated SAC litigation.¹ Establishing alternative frameworks for the SAC analysis before opening evidence is filed should restore rebuttal evidence to its proper scope and reduce the disputes that arise over the misuse of rebuttal.

The requested order should help reconcile the conflict that has become apparent in past cases between the complainants' burden of proof and the Board's desire for a complete record. As the party with the burden of proof, the complainant has the obligation to present a viable case-in-chief *on opening*, and its failure to do so should result in dismissal of its claims. The Board has declined to give effect to this rule in recent cases, choosing instead to have the parties file multiple rounds of evidence to create a complete record. The Board can ensure the creation

¹ In the *AEP Texas* case, complainant's rebuttal evidence was nearly twice the size of its opening evidence. See Defendant's Motion for Extension of Time, *AEP Texas North Company v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 41191 (Sub-No.1) (filed August 9, 2004) ("*AEP Texas*").

of a complete record on issues relating to rerouted traffic without compromising the rule that the complainant has the burden of proof by requiring the complainant to posit alternative SARR configurations in its opening evidence.

Finally, BNSF seeks expedited consideration of this request. Opening evidence is scheduled to be filed in just over two months, on April 5, 2005. To give complainants adequate time to prepare opening evidence without affecting the existing schedule, BNSF requests that the Board expedite its consideration of this request. The grounds for this motion are set out in greater detail below.

ARGUMENT

Complainants have relied increasingly on the rerouting of non-issue traffic in their SAC presentations. This increasing use of rerouted traffic has been responsible for significant delays and complications in recent SAC litigation. Complainants typically posit on opening a SARR configuration that includes rerouted traffic. The defendant, on reply, generally explains why the complainant's SARR configuration and traffic selection are flawed and also presents evidence based on an alternative SARR configuration and traffic group. On rebuttal, complainants generally argue that their original SARR configuration should be used by the Board and they do not generally present SAC evidence based on defendant's alternative SARR configuration. As a result, the Board has been left in several recent cases with a record in which the parties have developed costs and revenues for different SARR traffic groups and SARR configurations.

In the *Xcel* case,² the single largest shipper in the SARR shipper group was a shipper whose traffic is not routed in the real world over the rail lines replicated by the SARR. A major

² *Public Service Company of Colorado d/b/a Xcel Energy v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42057. The June 8, 2004 and January 19, 2005 decisions in that case addressed the rerouted traffic issue.

issue in that case involved the propriety of this reroute. Disputes over the inclusion of this traffic led the parties to submit SAC evidence reflecting significantly different SARR traffic groups. The Board accepted the complainant's inclusion of the rerouted traffic but not the complainant's operating plan or capacity assumptions. BNSF had submitted operating costs and capacity assumptions corresponding to a traffic group that the Board rejected. Accordingly, the record created by the parties did not permit the Board to use the parties' evidence to assess SAC costs. Instead, the Board elected to assess SAC costs using regression analyses and extrapolations from evidence in the record.

In the *Otter Tail* case,³ the complainant assumed that all non-coal traffic moving on BNSF's northernmost line between Snowden, MT, and Fargo, ND, through Minot, ND, would be rerouted onto SARR lines through Glendive, MT, and Bismarck, ND. BNSF challenged the propriety of including that traffic in the SAC analysis and posited an alternative SARR configuration that did not handle the rerouted traffic. Otter Tail insisted on keeping most of the rerouted traffic in its rebuttal evidence, leading to the presentation of SAC evidence by the parties based on different SARR traffic groups and SARR configurations. The Board recently ordered Otter Tail to submit evidence based on a SARR configuration that does not include the rerouted traffic so that the Board has a complete record on which to base its SAC decision.⁴ These new evidentiary filings will be the seventh and eighth SAC presentations in a case that is already over three years old.

In the *AEP Texas* case, the complainant assumed that a large volume of coal traffic originating at southern PRB mines and traveling out of the PRB on BNSF lines through

³ *Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42071 ("*Otter Tail*").

⁴ *Otter Tail*, slip op. at 2 (served December 13, 2004).

Guernsey, WY, would be rerouted over the SARR onto a longer route through Donkey Creek, WY.⁵ After opening, reply and rebuttal evidence were filed, complainant filed new rebuttal evidence purporting to deal with flaws in its prior modeling of the rerouted traffic. (Complainant's original rebuttal model failed, among other things, to include a large volume of the rerouted traffic.) Without addressing the propriety of AEP Texas' submission of new evidence, the Board recently instructed BNSF to reply to it, thus extending the evidentiary phase of the case.

In the three eastern coal cases, the complainants sought to include a substantial volume of rerouted traffic in their SARRs. The defendants challenged complainants' treatment of the rerouted traffic. The Board concluded that an adequate record for addressing the rerouted traffic had not been created on opening, reply and rebuttal, and it ordered the parties to submit supplemental evidence after the records in the cases had initially closed.⁶

In each of these cases, disputes over the inclusion of rerouted traffic have complicated and/or prolonged the litigation of complainants' SAC claims. The Board can avoid or minimize these complications by establishing procedures at the outset of this case that will allow for the expeditious consideration of issues relating to rerouted traffic. Such procedures would advance the Rail Transportation Policy, which requires that the Board "provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this section." 49 U.S.C. §10101(15). Complainants in this case have specifically urged the Board to

⁵ See BNSF Reply Narrative at III.A-24 to 40 in *AEP Texas* (filed May 24, 2004).

⁶ See *Duke Energy Corporation v. Norfolk Southern Railway Company*, STB Docket No. 42069 (served October 10, 2003); *Duke Energy Corporation v. CSX Transportation Inc.*, STB Docket No. 42070 (served October 14, 2003); *Carolina Power & Light Company v. Norfolk Southern Railway Company*, STB Docket No. 42072 (served October 14, 2003).

“do all it can to expedite this case.” Verified Complaint, at ¶12, (filed October 19, 2004).

BNSF’s proposed order will advance this objective.

The most effective procedure for ensuring the expeditious development of a complete record involving rerouted traffic is to require that if complainants intend to rely on rerouted traffic in their SAC case, they must file evidence reflecting two alternative SARR configurations, one with and one without rerouted traffic. Defendants would then file reply evidence addressed to both scenarios posited by the complainant. Complainants would respond to defendant’s reply evidence on both scenarios in their rebuttal.

Such an approach would allow the record to be created through the three evidentiary submissions contemplated in the Board’s rules. *See* 49 CFR § 1111.8. Opening, reply and rebuttal evidence would focus on the same SARR configurations, thus ensuring a complete record on the costs and revenues associated with each scenario. Supplemental evidence of the type called for in *Otter Tail* would not be necessary because cost evidence on the alternative configurations would already be in the record. A focused, consistent and usable record would be created by starting out the evidentiary process with alternative SARR configurations.

Disputes over the scope of a complainant’s rebuttal evidence would also be reduced. The Board has focused much attention in recent cases on establishing rules that emphasize the importance of the complainant’s opening evidence in SAC cases and limit the scope of rebuttal evidence. Notwithstanding these efforts, complainants continue to rely on their rebuttal filing as their principal evidence in SAC cases. In both the *Otter Tail* and the *AEP Texas* case, complainants’ rebuttal evidence was far more voluminous and detailed than their opening evidence. One reason for the expansion of rebuttal evidence and for the corresponding disputes over the scope of rebuttal is the need for complainants to address alternative SARR

configurations for the first time on rebuttal. By requiring complainants to posit alternative SARR configurations on opening, the proposed order will limit the scope of evidence that has to be considered for the first time on rebuttal.

An order requiring complainants to posit alternative SARR configurations on opening would also satisfy the Board's interest in having a complete record without undermining the rule that complainants have the burden of proof in a SAC case. The complainant's burden of proof in a SAC case includes the burden of presenting a viable case-in-chief on opening. Failure to meet this burden should result in dismissal of a complainant's claims. The complainant should not have multiple opportunities to submit evidence needed by the Board to conduct the SAC analysis. The Board can satisfy its interest in developing a complete record consistent with the complainant's burden of proof by having the complainant posit alternative frameworks for the SAC analysis on opening, and then having the parties submit reply and rebuttal evidence within those alternative frameworks.

An order requiring complainants to posit alternative SARR configurations on opening would not impose any additional litigation burdens on complainants. The experience in the recent SAC cases indicates that it is reasonable to assume that complainants will eventually need to submit evidence relating to a scenario in which no rerouted traffic is included in the SARR. No additional burden would be imposed by requiring that such evidence be presented at the beginning of the evidentiary period. The only question for the Board should be how to stage the presentation of that evidence in the most fair and expeditious manner possible. BNSF's proposed order accomplishes this objective with the least burden on the Board and the parties.

REQUEST FOR EXPEDITION

BNSF requests that the Board expedite its consideration of BNSF's proposed procedural order. The discovery period in this case has just closed. Opening evidence is scheduled to be

submitted on April 5, 2005. An expeditious decision on this motion will give complainants sufficient time to present opening evidence that sets forth alternative SARR configurations without requiring any extension in the procedural schedule.

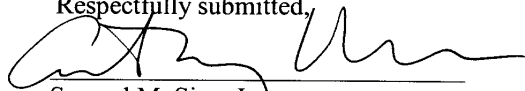
CONCLUSION

For the reasons set out above, BNSF requests that the Board order complainants in this case to present alternative SARR configurations on opening with any rerouted traffic they may choose to include and without rerouted traffic. Such an order will allow the development of a complete record in an efficient and expeditious manner that is consistent with the complainant's burden of proof in a SAC case.

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January 28, 2005

Respectfully submitted,



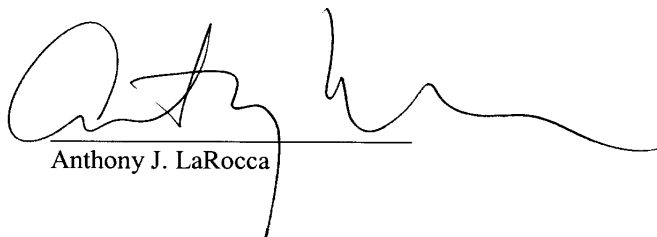
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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2005, I caused a copy of the foregoing Defendant's
Motion For An Order Governing The Submission Of Stand-Alone Cost Evidence Relating To
Rerouted Traffic to be served by hand upon the following counsel:

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