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BEFORE THE
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 22218

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
—OPERATING RIGHTS—
SOUTHERN PACIFIC TRANSPORTATION COMPANY

**BNSF RAILWAY COMPANY'S
MOTION TO MODIFY THE PROCEDURAL SCHEDULE**

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Dated: July 5, 2024

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BNSF¹ respectfully requests that the Board modify the procedural schedule in this matter pursuant to 49 C.F.R. § 1104.7(b). BNSF seeks a limited 30-day extension of the filing deadlines remaining in this proceeding in order to allow the Board to rule on BNSF's First Motion to Compel and Request for Expedited Relief filed on June 26, 2024.² As explained below, good cause exists for granting this necessary extension.

BNSF has attempted to obtain the documents requested through the Motion to Compel in an expedited manner, in order to allow BNSF to analyze the documents in advance of submitting its Reply Statement and Evidence on July 17, 2024. But because today is the deadline set by the Board's rules for seeking an

¹ Unless otherwise defined in this Motion, the acronyms and defined terms used in this filing are the same as those used by the Board in its May 15, 2023 decision. *See Atchison, Topeka & Santa Fe Ry.—Operating Rts.—S. Pac. Transp. Co.*, FD 22218 (STB served May 15, 2023).

² In its May 15, 2023 order, the Board, in part, assigned and authorized Administrative Law Judge Thomas McCarthy to “entertain and rule upon discovery matters and to resolve initially any disputes concerning discovery in this proceeding.” *See Atchison, Topeka & Santa Fe Ry.—Operating Rts.—S. Pac. Transp. Co.*, FD 22218, slip op. at 3 (STB served May 15, 2023).

extension of the July 17 deadline, and because BNSF's Motion to Compel is still pending, BNSF now must file this Motion to Modify the Procedural Schedule in order to preserve BNSF's ability to obtain relevant discovery from UP and to use that information in BNSF's Reply Statement and Evidence. BNSF is otherwise fully prepared to submit its Reply Statement and Evidence on July 17.

I. Background

This dispute relates to the compensation terms for BNSF's continued trackage rights use of the Kern-Mojave Line, an approximately 67.8-mile rail line owned by UP that extends between Kern Junction and Mojave, California. UP's predecessor constructed the Line in 1876 and subsequently invited BNSF's predecessor to use the Line. The terms and conditions for use of the Line were initially agreed to by the parties in 1899, renegotiated in 1912, set by the Board's predecessor, the Interstate Commerce Commission ("ICC"), in 1967, modified by the ICC in 1968, and then renegotiated by the parties in 1993.

In January 2023, UP filed a petition to reopen this proceeding and revise the conditions to be applied to BNSF's trackage rights use of the Line. On May 15, 2023, the Board granted UP's unopposed petition, provided a period for discovery, assigned and authorized an administrative law judge to address any discovery disputes, directed the parties to participate in Board-sponsored mediation, and directed the parties to propose a procedural schedule if mediation was unsuccessful.

After conducting discovery in the summer of 2023, the parties entered a Board-sponsored mediation period in the fall of 2023, which was unsuccessful at resolving the parties' dispute. Thereafter, on December 5, 2023, the Board entered the procedural schedule proposed by the parties.

In accordance with the procedural schedule, the parties filed their Opening Statements and Evidence on May 3, 2024. Following submission of their Opening Statements and Evidence, the parties each served discovery requests on May 23, 2024, pursuant to the procedural schedule. On June 7, 2024, UP served its Responses and Objections to BNSF's Third Set of Discovery Requests. On June 14 and June 21, 2024, counsel for BNSF conferred in good faith with counsel for UP in an attempt to obtain the discovery without Board intervention. On June 26, 2024, counsel for BNSF exchanged emails with counsel for UP in a final attempt to resolve the issues. When it became clear that the parties were at an impasse, BNSF filed its pending Motion to Compel and Request for Expedited Relief later on June 26, 2024. In an effort to not disturb the procedural schedule, BNSF requested expedited relief, including a request that UP respond in five days to the motion and that the Board require UP to produce responsive documents no later than July 9, 2024. *See* BNSF Mtn. to Compel at 11.

As explained more fully in BNSF's Motion to Compel, UP has failed to produce: (A) trackage rights agreements currently in effect with other Class I railroads and their corresponding rates; (B) traffic forecast data for the Line for the period from 2013 to 2018; and (C) UP's appraisals or valuations of intangible assets since 2019. *See* BNSF's Mot. to Compel at 4-10. As described in the Motion to Compel, the information BNSF seeks is relevant to specific facts that UP has put at issue in this proceeding and discussed in its Opening Statement. *See* BNSF Mot. to Compel at 6, 7, 9 & 10.

As of today, UP has not yet responded to the BNSF Motion to Compel, and it seems clear that BNSF's requested production deadline of July 9, 2024 will not be met. With BNSF's Motion to Compel still pending, the due date of July 17, 2024, for

the parties' simultaneous filing of Reply Statements and Evidence, and the due date of August 16, 2024, for the parties' simultaneous filing of Final Briefs, still stands.

II. Argument

Under the existing procedural schedule, the parties' Reply Statements and Evidence are due July 17, 2024, and the due date for parties' Final Briefs is August 16, 2024. UP has refused to produce certain documents that could be relevant to arguments and evidence that BNSF will provide on July 17. As of the filing of this Motion to Modify the Procedural Schedule, 12 days remain before the parties are to simultaneously file their reply statements on July 17, 2024. Notwithstanding BNSF's efforts to expedite resolution of this discovery dispute in order to avoid disrupting the procedural schedule, it appears now that a brief 30-day extension of the filing deadlines is necessary in order to ensure that BNSF's Motion to Compel can be resolved prior to submission of Reply Statements and Evidence.

49 C.F.R. § 1104.7(b) provides that “[a]ny time period . . . may be extended by the Board in its discretion, upon request and for good cause.” In past cases, the Board has found good cause for extending procedural schedules in a wide variety of situations, including to allow additional time to complete discovery.³ The Board has declined to find good cause in cases where the moving party has made no effort to

³ *E.g.*, *N. Am. Freight Car Ass'n v. BNSF Ry. Co.*, NOR 42137, slip op. at 1 (STB served June 26, 2013) (extending discovery period where “timely completion . . . has been unavoidably delayed” due to counsel’s health issues and technical issues with document production); *Cap. Materials, Inc.—Pet. for Dec. Order—Certain Rates and Pracs. of Norfolk So. Ry. Co.*, NOR 42068, slip op. at 6 (STB served Apr. 19, 2002) (granting an extension of the procedural schedule to allow sufficient time to comply with a new protective order); *SCIO Pottery Co. v. Consol. Rail Corp.*, NOR 40330, 1990 WL 287229, at *1 n.1 (ICC served Jan. 18, 1990) (finding “a sufficient basis” for extending discovery based on movant’s assertion “that it needs additional time to complete desired discovery[.]”).

justify its request for modification.⁴ BNSF has provided ample justification in this Motion, thus showing good cause for the granting of a brief 30-day extension of the existing procedural schedule.

BNSF's request for an extension is narrow and focused. BNSF seeks an extension solely for the purpose of awaiting a ruling on its pending Motion to Compel and, if necessary, so that the production and analyses of the documents at issue in the BNSF Motion to Compel can be completed. BNSF made its discovery requests in good faith in order to reply to UP's Opening Statement claims. Far from being irrelevant, an undue burden, or an effort to improperly expand discovery, BNSF's pursuit of these discovery documents is necessary to assist in addressing UP's claims regarding BNSF's rental payment rate to use the Kern Mojave Line. The Board must give BNSF an opportunity to pursue that discovery.

Accordingly, BNSF now moves for a 30-day extension of all remaining deadlines in the procedural schedule in order to allow (1) the Board time to rule on BNSF's Motion to Compel, (2) UP to produce any documents, and (3) BNSF the opportunity to analyze any documents produced by UP.⁵ UP will not be prejudiced by the requested modification. Good cause accordingly exists to modify the procedural schedule, and the Board should exercise its discretion to grant BNSF's Motion.

⁴ *E.g., CSX Trans., Inc.—Aban. Exemption—in Clark, Floyd, Lawrence, Orange & Washington Cntys., Ind.*, No. AB 55 (Sub-No 775X), slip op. at 1 (STB served Feb. 6, 2018) (noting that the movant made “no attempt to explain why it [was] unable to comply with the regulations in the extended time it ha[d] already been given.”).

⁵ BNSF believes that 30 days is sufficient to allow these actions to occur. But if the dispute takes longer to resolve, or if UP fails to produce documents in a timely manner, BNSF reserves the right to seek an additional limited extension of the procedural schedule.

Proposed Modified Procedural Schedule for Remaining Filing Dates

Simultaneous filing of Reply
Statements and Evidence:

August 16, 2024

Simultaneous filing of Final
Briefs (no new evidence, 30-page
limit inclusive of exhibits):

September 16, 2024⁶

Respectfully submitted,

/s/ Peter W. Denton

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Counsel for BNSF Railway Company

Dated: July 5, 2024

⁶ The existing deadline for the simultaneous filing of Final Briefs is August 16, 2024. An exact 30-day extension from that date would place the new deadline on Sunday, September 15, 2024. To avoid a weekend filing deadline, BNSF proposes Monday, September 16, 2024.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2024, I have caused the foregoing BNSF Railway Company's Motion to Modify the Procedural Schedule to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Onika K. Williams

Onika K. Williams

Attorney for BNSF Railway Company