

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
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May 4, 2023
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Public Record

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

COMPLAINT AND PETITION FOR
DECLARATORY ORDER

**BNSF RAILWAY COMPANY'S
ANSWER TO NTEC'S COMPLAINT AND PETITION FOR
DECLARATORY ORDER**

Jill K. Mulligan
Tamara R. Middleton
Adam Weiskittel
Jill M. Rugema
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

Anthony J. LaRocca
Timothy J. Strafford
Molly Bruder Fox
Onika K. Williams
Tara A. Woods
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, DC 20036
(202) 429-3000

Counsel for BNSF Railway Company

Dated: May 4, 2023

**DEFENDANT BNSF RAILWAY COMPANY'S ANSWER TO COMPLAINT
AND PETITION FOR DECLARATORY ORDER**

Defendant BNSF Railway Company (“BNSF”) hereby answers Plaintiff Navajo Transitional Energy Company, LLC’s (“NTEC”) Complaint and Petition for Declaratory Order (“Complaint”), filed April 14, 2023. BNSF states at the outset: BNSF did not violate its common carrier obligations in any way. The full record that will be developed in this proceeding, building on the evidence submitted in the emergency service petition docket, will show that BNSF has met its common carrier obligation, having taken reasonable steps to accommodate NTEC and meet its needs.

As the Board has long recognized, whether a rail carrier has satisfied its common carrier obligation is to be determined on a case-by-case basis by reference to the particular circumstances surrounding the complaining shipper and the defendant railroad. While historical service levels provided to a particular shipper alone are not determinative of the common carrier obligation in the present, they can be one relevant part of the inquiry and BNSF believes that is the case here. NTEC is receiving service that is consistent with the service BNSF has provided to NTEC since NTEC entered the export coal market in November 2019. In 2023, NTEC elected to ship traffic on BNSF pursuant to BNSF’s common carrier pricing authority, rather than pursuant to a contract as NTEC had always previously done. Since that election, NTEC’s average monthly volume of coal to Westshore has remained consistent with the monthly average of its movement volumes since 2019.

BNSF denies the allegations in the Complaint except as specifically admitted, denies any allegations as to which there is no specific response, and denies all titles,

headings, footnotes, subheadings, and any other material not contained in numbered paragraphs, including Plaintiff's seven pages of introductory summary. Given BNSF's compliance with its common carrier obligations, NTEC is not entitled to any of the relief it seeks, including the various requests for declaratory orders.

**BNSF RESPONSES IN ANSWER TO PLAINTIFF'S SPECIFIC
ALLEGATIONS**

1. BNSF does not have sufficient information to affirm or deny the allegations in Paragraph 1 of Plaintiff's Complaint to the extent they relate to the corporate background or activities of Plaintiff and, as such, they are denied.

2. BNSF admits the allegations of Paragraph 2.

3. BNSF admits that some of the rail transportation it provides is subject to the jurisdiction of the Board. To the extent that Paragraph 3 states legal conclusions, no response is required.

4. With respect to the last sentence of Paragraph 4, BNSF admits that this Complaint pertains to rail transportation service originating at NTEC's Spring Creek Mine, which is located in Big Horn County, Montana. BNSF does not have sufficient information to affirm or deny the remaining allegations in Paragraph 4 of Plaintiff's Complaint to the extent they relate to the corporate background or activities of Plaintiff and, as such, they are denied.

5. BNSF does not have sufficient information to affirm or deny the allegations in Paragraph 5 of Plaintiff's Complaint to the extent they relate to the corporate background or activities of Plaintiff and, as such, they are denied.

6. BNSF does not have sufficient information to affirm or deny the allegations in Paragraph 6 of Plaintiff's Complaint to the extent they relate to the corporate background or activities of Plaintiff and, as such, they are denied.

7. BNSF admits the allegations of Paragraph 7.

8. BNSF admits the allegations in the first sentence of Paragraph 8. With regard to the second sentence of paragraph 8, BNSF admits that Westshore is located approximately 1,500 miles from Spring Creek by rail if it is a BNSF-direct movement. BNSF does not have sufficient information to affirm or deny the remaining allegations in Paragraph 8 of Plaintiff's Complaint and, as such, they are denied.

9. BNSF states that the referenced contracts in Paragraph 9 are the best evidence of their contents. To the extent a response is required, BNSF denies the allegations in Paragraph 9.

10. BNSF denies the allegations in Paragraph 10.

11. With respect to the second sentence in Paragraph 11, BNSF admits that beginning in the Spring of 2022, NTEC communicated with BNSF regarding NTEC's need for coal transportation service. BNSF denies the remaining allegations of Paragraph 11.

12. BNSF admits that Paragraph 12 partially quotes from the letter dated June 24, 2022. The letter is the best evidence of its contents and BNSF denies Plaintiff's characterization of the letter. BNSF denies the remaining allegations of Paragraph 12.

13. BNSF admits that NTEC filed a Complaint against BNSF on December 19, 2022 in the United States District Court for the District of Montana. *See Navajo Transitional Energy Company, LLC v. BNSF Railway Company*, CV 22-146-BLG-SPW-KLD (Complaint filed Dec. 19, 2022). The Complaint is the best evidence of its contents and BNSF denies Plaintiff's characterization of the Complaint. BNSF denies the remaining allegations of Paragraph 13.

14. BNSF admits that BNSF and NTEC engaged in contract negotiations for an agreement to govern post-2022 service from Spring Creek to Westshore beginning in the Summer of 2022. BNSF denies the remaining allegations of Paragraph 14.

15. BNSF admits that Paragraph 15 partially quotes from the letter dated November 1, 2022. The letter is the best evidence of its contents and BNSF denies Plaintiff's characterization of the letter. BNSF denies the remaining allegations of Paragraph 15.

16. BNSF admits that in NTEC's Attachment No. 1 to Exhibit 3, NTEC identified some information regarding the requested transportation services. The Attachment is the best evidence of its contents and BNSF denies Plaintiff's characterization of the Attachment. BNSF denies the remaining allegations of Paragraph 16.

17. BNSF admits to the allegations in Paragraph 17.

18. Paragraph 18 states legal conclusions to which no response is required. To the extent a response is required, BNSF denies the allegations of Paragraph 18.

19. BNSF states that the November 14, 2022 letter is the best evidence of its contents and BNSF denies Plaintiff's characterization of the letter.

20. BNSF admits that NTEC sent BNSF a letter on December 19, 2022. The letter is the best evidence of its contents and BNSF denies Plaintiff's characterization of the letter. BNSF denies the remaining allegations of Paragraph 20.

21. BNSF admits that Paragraph 21 partially quotes from the letter dated December 19, 2022. The letter is the best evidence of its contents and BNSF denies Plaintiff's characterization of the letter. BNSF denies the remaining allegations of Paragraph 21.

22. BNSF admits that BNSF sent NTEC "BNSF Railway Company Common Carrier Pricing Authority 90139 Revision 0" ("BNSF 90139") on December 29, 2022. The source document is the best evidence of its contents and BNSF denies Plaintiff's characterization of the document. BNSF denies the remaining allegations of Paragraph 22.

23. BNSF admits that Paragraph 23 partially quotes from a version of BNSF 90139 that was sent to NTEC in December 2022 but which no longer applies to any NTEC traffic. The current version of BNSF 90139, which does not contain the "sole discretion" Service Limitation Notice, was provided by BNSF to NTEC on March 27, 2023, over two weeks prior to NTEC filing its Complaint and Petition for Declaratory Order. BNSF further states that the source document is the best

evidence of its contents and BNSF denies Plaintiff's characterization of the document. BNSF denies the remaining allegations of Paragraph 23.

24. BNSF admits that Paragraph 24 partially quotes from the letter dated December 30, 2022. The letter is the best evidence of its contents and BNSF denies Plaintiff's characterization of the letter. BNSF denies the remaining allegations of Paragraph 24.

25. BNSF admits that it sent NTEC a letter dated January 17, 2023. The letter is the best evidence of its contents and BNSF denies Plaintiff's characterization of the letter. BNSF denies the remaining allegations of Paragraph 25.

26. BNSF admits that it provided a rate of \$5,241.18/car subject to the BNSF Rules Book 6100-series, Item 3383 (\$2.50 strike price) fuel surcharge program effective April 15, 2023. The quote is the best evidence of its contents and BNSF denies Plaintiff's characterization of the quote. BNSF denies the remaining allegations of Paragraph 26.

27. Paragraph 27 states legal conclusions to which no response is required. To the extent a response is required, BNSF denies the allegations of Paragraph 27.

28. BNSF denies the allegations in the first sentence of Paragraph 28. BNSF admits the allegations in the second sentence of Paragraph 28, with respect to export coal.

29. BNSF denies the allegations in the first sentence of Paragraph 29. BNSF denies the allegation in the second sentence of Paragraph 29, and specifically

states that it has provided NTEC a forecast of 22 trains for the month of June and 20 trains for the month of July. BNSF denies the allegations in the third sentence of Paragraph 29.

30. BNSF denies the allegations in Paragraph 30.

31. BNSF admits that its shipping volumes for NTEC have increased each month from January to April 2023. BNSF denies the remaining allegations in Paragraph 31.

32. BNSF states that NTEC's *Ex Parte* Application for Section 11123 Emergency Service Order is the best evidence of its contents and BNSF denies Plaintiff's characterization of the Application. BNSF denies the remaining allegations of Paragraph 32.

33. BNSF admits that Paragraph 33 partially quotes from Chairman Martin J. Oberman, Rail Trends, November 16, 2022 and Martin J. Oberman May 12, 2022 Testimony before the United States House of Representatives Committee on Transportation and Infrastructure, Subcommittee on Railroads, Pipelines, and Hazardous Materials of the Hearing On "Board Member Views on Surface Transportation Board Reauthorization." BNSF states that the source documents are the best evidence of their contents and BNSF denies Plaintiff's characterization of the documents. BNSF denies the remaining allegations of Paragraph 33.

34. BNSF denies the first sentence of Paragraph 34. The allegations in the second sentence concerning the Board are too vague to require an answer from BNSF and if an answer is required, the allegations are denied.

35. BNSF denies the allegations in Paragraph 35.

36. BNSF denies the allegations in Paragraph 36.

37. BNSF does not have sufficient information to affirm or deny the allegations in Paragraph 37 of Plaintiff's Complaint and, as such, they are denied.

38. BNSF does not have sufficient information to affirm or deny the allegations in Paragraph 38 of Plaintiff's Complaint and, as such, they are denied.

39. BNSF does not have sufficient information to affirm or deny the allegations in Paragraph 39 of Plaintiff's Complaint and, as such, they are denied.

40. BNSF denies the allegations in Paragraph 40.

41. BNSF admits that Paragraph 41 partially quotes from 49 U.S.C. § 11101(a). BNSF further states that the statute is the best evidence of its contents. To the extent Paragraph 41 states a legal conclusion, no response is required.

42. BNSF admits that Paragraph 42 partially quotes from 49 U.S.C. § 11101(a). BNSF further states that the statute is the best evidence of its contents. To the extent Paragraph 42 states a legal conclusion, no response is required.

43. BNSF admits that Paragraph 43 partially quotes from 49 U.S.C. § 10702. BNSF further states that the statute is the best evidence of its contents. To the extent Paragraph 43 states a legal conclusion, no response is required.

44. Paragraph 44 states legal conclusions to which no response is required. To the extent a response is required, BNSF denies the allegations of Paragraph 44.

45. Paragraph 45 states legal conclusions to which no response is required. To the extent a response is required, BNSF denies the allegations of Paragraph 45.

46. BNSF incorporates by reference its responses to the above paragraphs as if they were fully set forth herein.

47. BNSF denies the allegations in Paragraph 47.

48. BNSF denies the allegations in Paragraph 48.

49. BNSF states that the letter is the best evidence of its contents and BNSF denies Plaintiff's characterization of the letter. BNSF denies the remaining allegations of Paragraph 49.

50. BNSF denies the allegations in Paragraph 50. To the extent Paragraph 50 states a legal conclusion, no response is required.

51. BNSF denies the allegations in Paragraph 51. To the extent Paragraph 51 states a legal conclusion, no response is required.

52. BNSF denies the allegations in Paragraph 52. To the extent Paragraph 52 states a legal conclusion, no response is required.

53. BNSF denies the allegations in Paragraph 53. To the extent Paragraph 52 states a legal conclusion, no response is required.

54. BNSF denies the allegations in Paragraph 54. To the extent Paragraph 54 states a legal conclusion, no response is required.

55. BNSF denies the allegations in Paragraph 55. To the extent Paragraph 55 states a legal conclusion, no response is required.

56. BNSF incorporates by reference its responses to the above paragraphs as if they were fully set forth herein.

57. Paragraph 57 states legal conclusions to which no response is required. To the extent a response is required, BNSF denies the allegations of Paragraph 57.

58. BNSF incorporates by reference its responses to the above paragraphs as if they were fully set forth herein.

59. To the extent Paragraph 59 states legal conclusions, no response is required. To the extent a response is required, BNSF denies the allegations in Paragraph 59.

60. BNSF denies the allegation that it failed or refused to comply with its obligations under 49 U.S.C. § 10702. Further, BNSF does not have sufficient information to affirm or deny the remaining allegations in Paragraph 60 of Plaintiff's Complaint to the extent they relate to the corporate background or activities of Plaintiff and, as such, they are denied. To the extent Paragraph 60 states a legal conclusion, no response is required.

61. BNSF denies the allegation that its practices were unreasonable. BNSF does not have sufficient information to affirm or deny the allegations in Paragraph 61 of Plaintiff's Complaint to the extent they relate to the corporate background or activities of Plaintiff and, as such, they are denied. To the extent Paragraph 61 states a legal conclusion, no response is required.

62. BNSF denies the allegation that its practices were unreasonable and that it failed to provide reasonable common carrier service and to provide

uninterrupted, continuous carriage of freight. Further, BNSF does not have sufficient information to affirm or deny the remaining allegations in Paragraph 62 of Plaintiff's Complaint to the extent they relate to the corporate background or activities of Plaintiff and, as such, they are denied. To the extent Paragraph 62 states a legal conclusion, no response is required.

63. BNSF denies that NTEC is entitled to any of the relief it requests in its Prayer for Relief.

AFFIRMATIVE DEFENSES AND CERTAIN OTHER DEFENSES

A. The Complaint fails to state a claim under 49 U.S.C. § 11101(a). BNSF's service has complied with the requirements of 11101(a).

B. The Complaint fails to state a claim under 49 U.S.C. § 11101(a). NTEC's requests for service have not been reasonable as required under 49 U.S.C. § 11101(a).

C. The Complaint fails to state a claim under 49 U.S.C. § 11101(a). To the extent BNSF has not provided the volume of service Plaintiff demands, it is due in part to BNSF's reasonable commitments to serve contracts authorized under 49 U.S.C. § 10709.

D. Plaintiff has not suffered any injury or damage caused by BNSF.

E. Plaintiff's damages, if any, are speculative.

F. The STB lacks the jurisdiction to interfere with BNSF's contractual obligations to other shippers.

G. The STB lacks the jurisdiction to enjoin conduct occurring outside the United States.

H. To the extent that NTEC asserts claims or seeks damages related to service provided by BNSF for the period from January 1, 2023 through March 31, 2023, those disputes must be resolved through binding arbitration in accordance with the parties' contractual agreements.

I. BNSF specifically reserves the right to assert any additional defenses that become apparent during the course of the case. Additional facts may become known during the course of discovery and investigation which will support affirmative defenses that currently are unknown to BNSF. To preserve such affirmative defenses, BNSF hereby reserves the right to assert additional affirmative defenses as discovery proceeds.

PRAYER FOR RELIEF

WHEREFORE, BNSF respectfully prays for relief as follows:

1. That the Board dismiss the Complaint and Petition with prejudice and enter an order in favor of BNSF and against Plaintiff;
2. That the Plaintiff recover nothing; and
4. That the Board grant BNSF such other and further relief as the Board deems just and proper.

Respectfully submitted,

/s/ Anthony J. LaRocca

Anthony J. LaRocca

Timothy J. Strafford

Molly Bruder Fox

Onika K. Williams

Tara A. Woods

Steptoe & Johnson LLP

1330 Connecticut Ave., NW

Washington, DC 20036

(202) 429-3000

Jill K. Mulligan
Tamara R. Middleton
Adam Weiskittel
Jill M. Rugema
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

Counsel for BNSF Railway Company

Dated: May 4, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *BNSF Railway Company's Answer to NTEC's Complaint and Petition for Declaratory Order* to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Tara A. Woods
Tara A. Woods

Attorney for BNSF Railway Company

May 4, 2023