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BEFORE THE SURFACE TRANSPORTATION BOARD

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DOCKET NO. NOR 42178

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

EX PARTE APPLICATION FOR SECTION 11123 EMERGENCY SERVICE ORDER

**ARCH COAL SALES COMPANY’S COMMENTS IN OPPOSITION TO AN
EMERGENCY SERVICE ORDER**

Arch Coal Sales Company, Inc. (“Arch”) respectfully submits these comments to the Surface Transportation Board (“Board” or “STB”) in the above-captioned proceeding as it could be severely impacted by an emergency service order if issued here. Arch is subject to a common carrier pricing authority arrangement with BNSF for the rail movement of its coal from its Black Thunder Mine in the Powder River Basin to the Westshore Terminals in British Columbia, Canada. As such, Arch has experienced impacts similar to the Navajo Transitional Energy Company, LLC (“NTEC”) related to BNSF service deficiencies, and Arch has serious concerns about how an emergency service order could impact its rail service, which has been erratic over the past two years and is only now beginning to show signs of improvement. Consequently, it urges the Board not to issue any emergency service order that would negatively impact its rail service.

1. Introduction.

On April 14, 2023, NTEC filed an Ex Parte Application for Section 11123 Emergency Service Order (“Application”) with the STB. In the Application, NTEC asks the Board to enter an emergency service order and an injunction directing BNSF to increase its shipments of NTEC’s coal to the Westshore Terminals for export to Asia. NTEC is also seeking monetary damages from BNSF relating to the same shipments in a complaint filed with the Board on the same day.¹ BNSF filed a highly confidential reply opposing the Application on April 19, 2023, and a redacted public reply on April 20, 2023. On April 27, 2023, the Board held a pre-argument conference with NTEC’s and BNSF’s outside counsel and posed several factual and legal questions to the parties. On May 5, 2023, the Board ordered that an oral argument be held at the Board’s headquarters on May 10.

2. Arch’s Interest in this Emergency Service Order Proceeding.

Arch operates highly efficient, low-cost thermal mines in the United States — in the Powder River Basin and Colorado. These mines produce highly cost-competitive thermal coal for sale into the domestic and international power generation markets. Arch ships Powder River Basin coal from its Black Thunder Mine to the Westshore Terminals via BNSF. In fact, Arch is specifically discussed in NTEC’s May 5, Supplemental Filing, at 8:

Question: What is the basis for NTEC’s allegation that BNSF is cutting the number of trainsets available to NTEC in order to serve customers with more favorable terms in their contracts, and who are these other customers?

Summary Answer: Signal Peak and **Arch** are the other export coal producers that use BNSF to move coal to Westshore. S.V.S. Babcock at ¶¶ 49-50. During meetings between NTEC and BNSF’s senior executives in the Spring of 2022, BNSF executives mentioned BNSF’s other export coal customers by name and BNSF’s executives told NTEC that its contractual terms were not as favorable

¹ See NTEC’s Complaint and Petition for Declaratory Order (NOR 42179), filed April 14, 2023.

as the contractual terms of one or more of those other customers. Id. at ¶¶ 35-36. On June 24, 2022, Ms. Farmer sent a letter to Navajo Nation President Nez, in which she first stated that, under the parties' 2022 contract, "BNSF is not required to move any specific minimum volume of coal in 2022" and she next referred to BNSF having been "committed to honoring obligations relative to customer contract terms, including any committed volumes." Id. at ¶ 37 & Exhibit MDB-14.

Since July 2021, BNSF has provided rail service for the transportation of Arch export coal shipments from its Black Thunder Mine to the Westshore Terminals. BNSF is the only rail carrier that serves the route from this mine to this terminal and therefore is the only rail carrier capable of providing single-line service to the Westshore Terminals. Coal from Arch is loaded onto vessels at the Westshore Terminals for transportation to Korea. The Westshore Terminals are located approximately 1,600 miles from Arch's mine by rail.

Arch's export coal shipments from the Black Thunder Mine to the Westshore Terminals have moved pursuant to a series of common carrier pricing authority arrangements with BNSF. Arch shipped volumes at a rate of about eleven trains per month of export coal via BNSF to the Westshore Terminals (which is the amount required to load one vessel per month at Westshore) for the last five months of 2021. In 2022, although Arch had sales opportunities to load one vessel per month, BNSF only provided service to load four vessels for the entire year. This year, Arch has sales opportunities to again load one vessel per month.

In 2022, similar to NTEC's complaint, BNSF's deliveries of Arch export coal from the Black Thunder Mine fell significantly short of Arch's requirements and its common carrier pricing authority arrangement in place at that time. This resulted in Arch losing tens of millions of dollars in revenue, incurring millions of dollars in vessel demurrage expense, and suffering a serious loss of credibility. Service has improved enough in 2023 to the point where Arch is beginning to repair these relationships and recover a small portion of the lost revenue. Faced with this recent request by NTEC for an emergency service order, Arch is extremely concerned

that any such order could result in the transfer of already limited BNSF rail service resources in the Powder River Basin from Arch to NTEC. Further decimation of rail service because of an emergency service order could result in even more financial losses for Arch in an environment that is already unfavorable for the coal industry.

3. Adversely Affecting Arch's Rail Service by any NTEC Emergency Service Order Would Clearly Violate 49 U.S.C. § 10101(a).

As a result, Arch seeks to advise the Board that its existing reasonable arrangements with BNSF for export coal rail service should be given careful consideration and not be ignored here. Arch's existing commitments from BNSF are clearly reasonable as they do not provide greater monthly volume requirements than previous arrangements with the railroad when NTEC was under contract with BNSF in 2021 and 2022. Also, even NTEC admits "BNSF's shipping volumes in Spring 2023 have shown a slight improvement relative to the preceding months." NTEC Complaint at Par. 31.

With respect to a railroad's commitments to other shippers in relation to the common carrier obligation, the Board asked BNSF for comment regarding the meaning of 49 U.S.C. § 11101(a), addressing specifically the final sentence which provides "[c]ommitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable." Hr'g Tr. 45:17-47:5. This section provides:

A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request. ["Sentence 1"] A rail carrier shall not be found to have violated this section because it fulfills its reasonable commitments under contracts authorized under section 10709 of this title before responding to reasonable requests for service. ["Sentence 2"] Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable. ["Sentence 3"]

49 U.S.C. § 11101(a).

Sentence 2 expressly allows railroads to comply with “reasonable commitments under contracts.” This provision flowed from and was consistent with Congress’s important new policy at the time in the Staggers Act of allowing railroads and shippers to enter into rail transportation contracts. As BNSF noted in its Supplemental Reply, at 18-19, the rationale of Sentence 2 is clear – contracts would be of little value if railroads and shippers could not rely on them being effective over the term of the contract and were subject to being overridden without restraint by a common carrier request for service.

Arch is not aware of any case law discussing the interplay between Sentences 2 and 3. However, the Committee on Transportation and Infrastructure provided an explanation of Congress’s intent in adding Sentence 3 to the statute. The Committee explained that Sentence 3 should be interpreted as follows:

[T]he focus on “reasonable” contractual commitments is intended to clarify that, although a casual requester of service cannot legally demand equal treatment with another shipper who has made a prior contract for service, the carrier may not render itself incapable of reasonably responding to such casual requests for common carrier service, such as by effectively divesting itself of control of its car fleet through committing all or virtually all of the fleet under prior contracts.

Committee on Transportation and Infrastructure, H.R. Rep. No. 104-311 at 103 (1995).

The Committee provided that a common carrier shipper “cannot legally demand equal treatment with another shipper who has made a prior contract for service.” *Id.* Also, while the carrier may enter into contractual commitments that are enforceable, a common carrier “may not render itself incapable of reasonably responding to . . . casual requests for common carrier service.” *Id.* Thus, a carrier cannot disregard reasonable prospects of future common carrier service requests, but a reasonable contract – at the time it was executed – cannot become unreasonable simply because unexpected requests for common carrier service are made in the

future. Such an approach would dramatically undermine the value of contracts because the contract parties could never know what future conditions will prevent the implementation of the contract terms. The Committee's other point was to describe the type of contract commitment that could raise concerns, noting that it could be a problem for a carrier to "effectively divest[] itself of control of its car fleet through committing all or virtually all of the fleet under prior contracts." *Id.*

BNSF did not enter into any unreasonable contract commitments with other shippers, especially Arch, that committed its entire fleet with respect to the route at issue here as noted by BNSF.² In fact, BNSF's monthly commitments to Arch have not increased from 2022 to 2023. As a result, BNSF is entitled to move coal pursuant to its commitments to Arch in accordance with § 10101(a), and an emergency service order should not affect Arch's arrangements to move its coal as it has to date in 2023. This result would simply run counter to Congressional intent in §§ 10101(a) and 11123.

4. An Emergency Order Is Not Justified That Will Hurt Arch Just to Benefit NTEC.

As noted by BNSF in its Supplemental Reply, at 9, an explicit requirement for the issuance of injunctive relief is that the "issuance of the injunction will not substantially harm other parties." *Union Pac. R.R.—Pet. for Declaratory Order & Preliminary Injunction*, FD 36197, slip op. at 3 (STB served June 29, 2018). As such, the Board has recognized that when railroads are having difficulty meeting total demand, or otherwise are having service problems that restrict overall service, it would be inappropriate and potentially counterproductive to issue

² Arch does not believe a rail carrier can determine which shipper is entitled to priority to rail service willy nilly pursuant to this language. Arch believes that the rail carrier must comply with the reasonableness standard enacted by Congress in determining how it will provide service to its shippers whether under contract or tariff.

emergency service orders favoring particular shippers over others, since it could interfere with the railroad's efforts to emerge from the service problems. *See id.*, slip op. at 3-4. Any emergency order here would negatively impact Arch's rail service as it is evident that BNSF has limited capacity to serve export coal shippers on this route.

Moreover, it is clear that there is no emergency here by any definition. NTEC has filed a complaint seeking monetary damages and can be made whole if it is successful in that litigation. Also, as noted, its recent service has in fact improved. NTEC's emergency service order request seems to be an attempt to jump the line and get ahead of the other shippers in the Powder River Basin which is clearly not a proper use of this remedy.

5. Conclusion.

Arch asks the Board to carefully consider its rights under its rail service arrangements with BNSF as it rules on this request for an emergency service order. Congress clearly requires this type of consideration in § 10101(a) as discussed herein. Without proper consideration of these market-based agreements, shippers will be deterred from entering into contracts which would run counter to the intent of the Staggers Act and would unfairly harm Arch to the benefit of NTEC just because NTEC moves coal by tariff. This should not be allowed to happen.³

³ Arch stands ready to assist the Board if it in fact requires further information regarding its rail service commitments with BNSF and how an emergency service order would adversely affect such rail service.

Respectfully submitted,

/s/ Daniel R. Elliott

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Dated: May 9, 2023

Certificate of Service

I certify that I have, on this 9th day of May 2023, served by the most expeditious manner copies of the foregoing document on all parties of record in this proceeding.

/s/ Daniel R Elliott
Daniel R. Elliott