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Office of Proceedings
May 15, 2023
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PUBLIC VERSION

May 15, 2023

VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

**Re: STB Docket NOR 42178, Navajo Transitional Energy Co., LLC v.
BNSF Railway Co.—Ex Parte Application for Section 11123
Emergency Service Order**

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced proceeding is a PUBLIC version of the BNSF Railway Company's Responses to Board Questions, with appropriate redactions that the Board can place in its docket. We are concurrently filing a HIGHLY CONFIDENTIAL version of the filing to be filed under seal.

Respectfully submitted,

/s/ Anthony J. LaRocca

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Enclosures

cc: All parties of record

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BEFORE THE SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42178

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

EX PARTE APPLICATION FOR
SECTION 11123 EMERGENCY SERVICE ORDER

BNSF RAILWAY COMPANY'S RESPONSES TO BOARD QUESTIONS

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Dated: May 15, 2023

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BNSF RAILWAY COMPANY'S RESPONSES TO BOARD QUESTIONS

On May 10, 2023, the Board held an oral argument in response to an *Ex Parte* Application for Section 11123 Emergency Service Order (“Application”) filed by Navajo Transitional Energy Company, LLC (“NTEC”) with the Surface Transportation Board (“Board” or “STB”) on April 14, 2023. In the Application, NTEC asks the Board to enter an emergency service order and an injunction directing BNSF Railway Company (“BNSF”) to increase its shipments of NTEC’s coal to a Canadian terminal for export to Asia. NTEC is also seeking damages from BNSF relating to the same shipments in a complaint filed with the Board on the same day.¹ At the May 10 argument, the Board posed a number of questions to

¹ See NTEC’s Complaint and Petition for Declaratory Order (NOR 42179), filed April 14, 2023. BNSF replied to NTEC’s Complaint and Petition for Declaratory Order on May 4, 2023.

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BNSF, and BNSF appreciates this opportunity to provide responses to those questions.

RESPONSES TO BOARD QUESTIONS

I. Can contract negotiations establish the common carrier obligation?

At the May 10 argument, there was substantial discussion regarding previous contracts between BNSF and NTEC and the contract negotiations between the parties in 2022, suggesting for the first time that annual volume terms offered as part of a package of contract terms could or should be translated into an ongoing common carrier obligation. Such a conclusion, however, would not be consistent with the authority of the STB under 49 U.S.C. § 10709, which does not authorize the STB to judge contract terms or impose contracts on the parties. Moreover, if the STB were to impose on railroads the terms discussed in unsuccessful contract negotiations – without imposing any of the corresponding obligations on the shipper that provide the basis for the railroad’s concessionary terms – that would substantially chill the use of contracts and undermine their utility.

One of the ways Congress sought to promote rail transportation contracts was to remove the agency altogether from the enforcement of contract terms.² The

² The Board has recognized that “Congress in the Staggers Act broadly ‘encouraged’ shippers and carriers to transact their rail transportation service by contract.” *Cent. Power & Light Co. V. S. Pac. Transp. Co.*, 1 S.T.B. 1059, 1070 (1996) (citing H.R. Rep. No. 96-1430 (1980)). As the Board has explained, “contracting provides a much better opportunity than common carriage for a rail carrier to address in detail a shipper’s particular service needs, to provide service tailored to those requirements, and . . . to qualitatively distinguish such service from that offered elsewhere.” *Id.* at 1070; *see also* BNSF Suppl. Reply 18-20, May 5, 2023 (discussing the importance that Congress placed on the contract provisions of the Staggers Act).

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Board has repeatedly recognized that “Congress expressly removed all matters and disputes arising from contracts from the ICC’s (and now the Board’s) jurisdiction.” *See, e.g., Kan. City Power & Light Co. v. Union Pac. R.R. Co.*, NOR 42095, slip op. at 2 (STB served July 27, 2006); *see also Cent. Power & Light Co. v. S. Pac. Transp. Co.*, 2 S.T.B. 235, 247 (1997) (“[U]nder section 10709, contracting between rail carriers and shippers is permissive. Because we cannot direct contracting, railroads’ decisions to enter into contracts must necessarily be driven by market forces and other considerations, not regulation.”).

It would not be consistent with the Board’s statutory role regarding contracts to carve out discrete terms proposed and discussed in contract negotiations and impose them as obligations on a common carrier for several reasons. First, it would inject the STB into the contracting process in a way that violates Congress’s clear intent to exclude the STB from private contracting. Second, it would be particularly inappropriate to take the discrete terms of *draft* contracts and enforce them as elements of a common carrier obligation. Third, it would be irrational to make any assumptions about the reasonableness of particular draft contract terms – and reasonableness is the fundamental standard of the common carrier obligation – in isolation from the other inter-connected contract terms because any one term in isolation cannot reflect the totality of the understanding between those parties. In many cases, the contours of a single contract term are reflective of concessions made in other contract terms. Finally, it would substantially discourage contract formation if the parties to contract negotiations knew that their proposals might be

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used by the STB to establish the scope of common carrier obligations in the event the negotiations do not produce an executed contract. Railroads or shippers might be discouraged from offering or accepting terms that are justified by the overall structure of a draft contract but not justified when taken in isolation.

II. Is a proposed contract term regarding annual volume good evidence of available capacity at a particular point in time after the fact?

The bulk of the conversation at the May 10 argument regarding the contract negotiations focused on whether the volume terms contained in draft contracts were evidence of the parties' beliefs at the end of 2022 regarding available capacity that could then be used to evaluate common carrier service over the course of 2023.

While contract proposals reflect the parties' beliefs at the time they are being negotiated into commercial provisions and commitments, volume terms, considered in isolation, do not translate well into an understanding of available capacity at a later time.

A minimum volume term applicable to an entire year of transportation is not valid evidence of the capacity that might be available in a particular month later in time, given the wide variation in circumstances that must be considered in assessing available capacity, including but not limited to physical track, available crews, available power, and other shipper demand on a given route. This is why contracts may involve mechanisms to address increasing and decreasing capacity over time. Remedies, including volume makeup provisions, may be included to address the possibility that events will not develop as expected. The proposed terms for an annual amount of transportation recognized that amounts transported

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would vary over the course of the year and month to month. In any event, despite NTEC's claim of an emergency before the Board, BNSF expects to be able to hit the referenced annual volume amounts this year.

III. Would the BNSF network be harmed by adding one train every five days?

NTEC has asked the STB to require that BNSF provide a level of service (29 trains per month) substantially above historical, current, and expected levels. A suggestion was made at the argument that this level of service could be achieved by adding one NTEC train every five days.³ While such additional service may not create system-wide chaos, it would substantially harm other shippers and would therefore be inappropriate.⁴

BNSF currently has 24 train sets (sets of rail cars that make up unit trains) dedicated to export service.⁵ The current average cycle time for BNSF service from the Powder River Basin to Westshore Terminals is approximately 11 days.⁶ That

³ The questions posed at the argument sought to probe what the effect of an order that increased service from an average monthly train count of 23 to an average monthly train count of 29 would be. The Chairman framed that question as the effect of one train every five days, as six trains a month divided by 30 days in a month, yields 5.

⁴ 49 U.S.C. § 11123(c)(2)(B) prohibits the Board from issuing an emergency service order that would “impair substantially the ability of a rail carrier to serve its own customers adequately, or to fulfill its common carrier obligations.” Similarly, 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).

⁵ When possible, BNSF transitions unused train sets containing the required specialized cars from domestic utility coal service into export service.

⁶ The average cycle time for train sets in service for NTEC can change significantly throughout the year due to impacts from weather, changing traffic mix on the route, and other factors.

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means that in a 30-day period each set can complete approximately 2.7 trips to and from Westshore ($30/11=2.72$). Under those assumptions, BNSF currently has the ability to move roughly 65 trains to Westshore each month to allocate among its three current customers and a potential fourth ($2.7*24=64.8$). That is, NTEC is demanding that the Board order BNSF to allocate approximately 45% of the capacity of the lane to it ($29/65=44.6\%$).

To add six trains a month to NTEC's service would require three additional train sets to be dedicated to NTEC. Because BNSF does not have any additional train sets to dedicate to NTEC service, it would be necessary for BNSF to take three train sets away from other customers that use the same type of equipment, most likely the other shippers in the lane. This is why the other shippers in the lane, Global, Arch, and the Crow Tribe have all filed letters expressing concerns regarding the relief that NTEC seeks. Even if BNSF and/or NTEC could add three external train sets without taking them from other customers, BNSF's ability to move them without reducing service to other shippers will be limited until the crew situation improves.

IV. Does the Board establish irreparable harm on a sliding scale?

At the May 10 hearing, there was also discussion of whether irreparable harm was a factor to be assessed on a "sliding scale" in consideration with the strength of the movant's showing on the other three factors necessary for a

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preliminary injunction.⁷ Regardless of the vitality of the conception of a sliding scale, the statute under which NTEC seeks relief explicitly dictates that irreparable harm is a necessary finding. *See* 49 U.S.C. § 1321(b)(4) (“The Board may . . . when necessary to prevent irreparable harm, issue an appropriate order without regard to subchapter II of chapter 5 of title 5.”). Under established judicial preliminary injunction standards, a movant must demonstrate a likelihood of irreparable harm.⁸ STB precedent similarly states that if a movant has not demonstrated irreparable harm, the Board need not even consider the remaining factors.⁹

NTEC’s suggestion in its filings and at the hearing that its reputation may be damaged absent an injunction does not satisfy the irreparable harm standard. *See Kafka v. Hagener*, 176 F. Supp. 2d 1037, 1044 (D. Mont. 2001) (“When loss of

⁷ The “sliding scale” approach means that if a “movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor.” *See, e.g., Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009). The Supreme Court’s decision in *Winter, et al. v. Natural Resources Defense Council, Inc., et al.*, 555 U.S. 7, 22 (2008), called that approach into question.

⁸ *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07) (1959) (noting that irreparable harm “always” has been “[t]he basis of injunctive relief in the federal courts.”); *see also Younger v. Harris*, 401 U.S. 37, 46 (1971) (noting that irreparable injury is “the traditional prerequisite to obtaining an injunction”); *Seeger v. United States Dep’t of Def.*, 306 F. Supp. 3d 265, 278 (D.D.C. 2018) (“the likelihood of irreparable injury is also a critical showing before a preliminary injunction will issue.”).

⁹ *See, e.g., N. Coast R.R. Auth. v. Sonoma-Marin Area Rail Transit Dist.*, NOR 42148, slip op. at 4 (STB served Oct. 21, 2016) (“Because Petitioners have failed to satisfy the requirement that they demonstrate irreparable harm in the absence of a preliminary injunction, we need not address their arguments about likelihood of success on the merits, harm to other parties, or public interest considerations here.”); *Seminole Elec. Coop., Inc. v. CSXT Transportation, Inc.*, NOR 42110, slip op. at 3 (STB served Dec. 22, 2008) (“Here, SECI has failed to demonstrate irreparable harm in the absence of injunctive relief. Therefore, its petition will be denied.”); *see also Carabillo v. Ullico Inc.*, 198 F. App’x 1, 3 (D.C. Cir. 2006) (“Because [movant] failed to make a showing of irreparable harm, we need not consider the other elements of the preliminary injunction inquiry.”).

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goodwill and reputation attached to a profitable venture’s [sic] affects the potential revenue of the venture, it is ordinarily considered a monetary injury and not an irreparable injury.”). Notwithstanding the speculative and highly uncertain nature of the evidence presented by NTEC of reputational harm, NTEC has brought a lost revenue case – a quintessential monetary damages claim.¹⁰ NTEC cannot now repackage that as an injury to reputation claim to satisfy the irreparable harm standard.

V. Other Requested Information

A. Crew Data

At the May 10 argument, BNSF discussed the challenges of crew availability in the Pacific Northwest after fully recalling furloughed employees and was asked to provide more information about the ongoing challenge of hiring/training/retaining employees at Everett, WA. From June 25, 2022 until April 15, 2023, BNSF offered Train Yard and Engine (“TYE”) jobs to 117 people at Everett, WA. Fifty-one declined their offer and 56 accepted. Of those 56, four did not show up for training. Eight trainees left during training, leaving 44 that graduated the class. In addition to washout or in-class attrition, new hires also migrate throughout the BNSF network. In the case of Everett, that number is relatively high at 50%. So,

¹⁰ Despite NTEC’s claims of harm to their reputation, NTEC simultaneously claims that it will be able to sell any additional coal that BNSF transports. *See* NTEC Supplemental Filing, *Babcock V.S.* at 31-32, ¶ 74 (filed May 5, 2023) (stating “[o]ur current best estimate of the additional, future coal sales that we could make (assuming adequate rail transportation service)” range from 470,000 tons per month to 560,000 tons per month).

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in other words, even though BNSF offered 117 positions and hired 56 employees, only 28 of those new hires are now available at Everett. With regard to employees working into Canada, headcount has returned to 86% of the 2021 numbers prior to the Canadian vaccine requirements. That is, there are currently 80 available employees compared to 93 in September of 2021. In addition, there are now 14 employees in various stages of training, with 21 more beginning training on May 15.

At the May 10 argument, BNSF was also asked to explain the timing of incentive programs in the Pacific Northwest. By the end of September 2021, all furloughed employees on the Northwest Division had been recalled, which is a prerequisite to instituting any special hiring initiatives under BNSF's labor agreements. BNSF then began seeking to fill new hire classes using traditional recruitment means. Through Q4 2021 and Q1 2022, the combination of two separate events operated to frustrate our normal hiring efforts: First, response rates to posted positions and ultimate success rate from application to hiring were below what we would typically expect to see, due largely to the very tight labor market in the region and the extensive onboarding process necessary to ensure that new hires will be able to perform service on the railroad (drug testing, background checks, etc.). Second, attrition in the region accelerated, due in part again to the labor market as well as employee anxieties concerning impending vaccine requirements.

However, it was not immediately apparent as of September/October 2021 that attrition was going to outpace hiring to the extent that special incentives would

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be needed to meet hiring goals. As that became apparent late in Q1 2022, BNSF considered and ultimately implemented the hiring incentives that initially became active in early April. Despite these hiring incentives, BNSF experienced the significant washout rate described above.

B. Global Contract Details

At the May 10 argument, Board members also asked BNSF to disclose the chronology of the BNSF Global Contract, including any amendments and to disclose certain rate information. { [REDACTED]

[REDACTED]

[REDACTED]

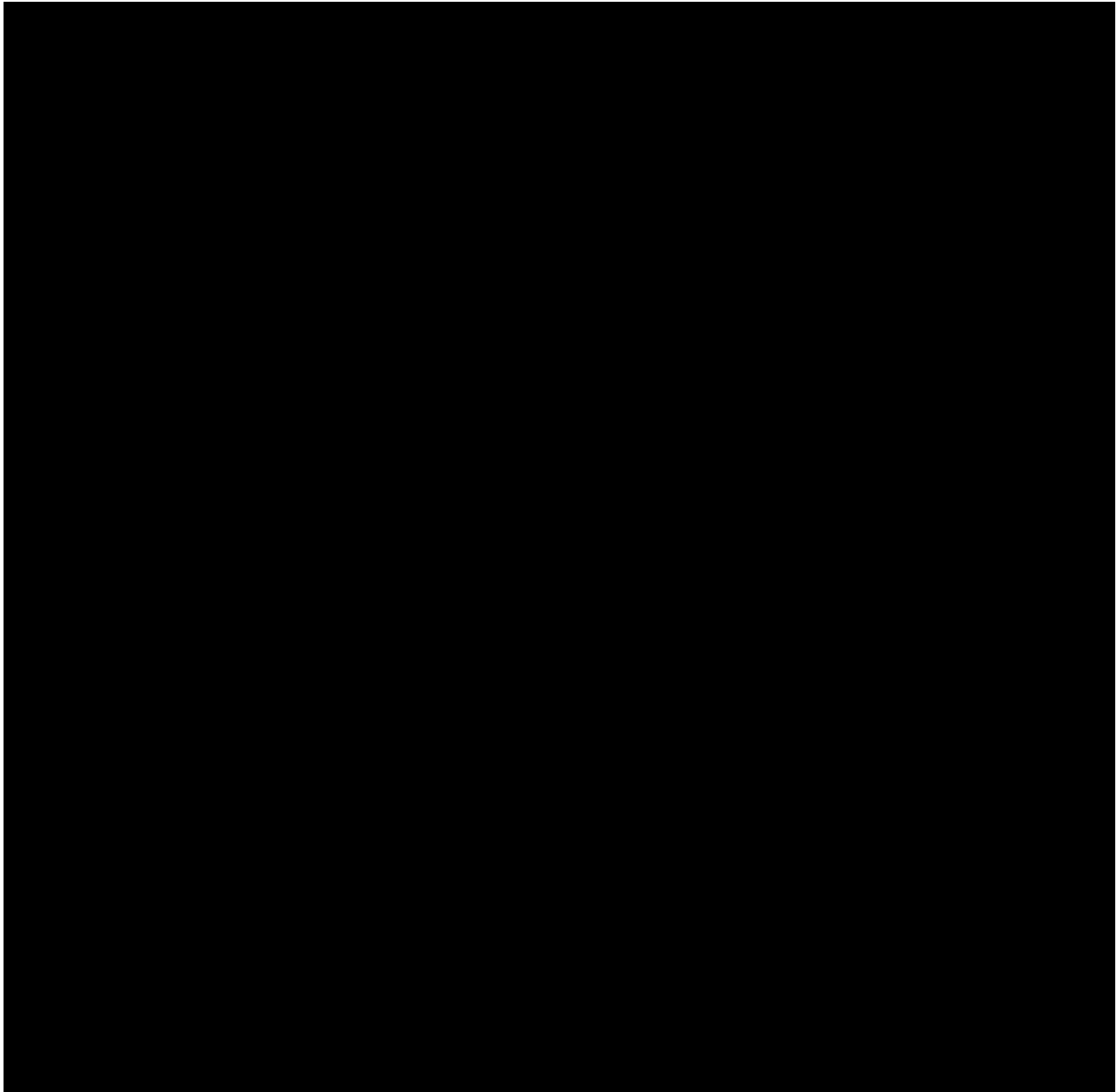
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11 {{ [REDACTED] }}

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13 {{ [REDACTED] }}

14 {{ [REDACTED] }}

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VI. Conclusion

Based on the arguments and facts above, the arguments made during the May 10, 2023 oral argument, BNSF's May 5 Supplemental Reply, and BNSF's April 19 Reply, as well as the concerns expressed by the Crow Tribe, Arch, and Global, the Board should deny NTEC's request for an emergency service order and request for a preliminary injunction. Even if the Board believes that any volume of service below levels contained in contract negotiations between the parties would warrant immediate intervention, BNSF has publicly affirmed that it expects that it is on pace to move those volumes of coal to Westshore Terminals for NTEC by the end of the year. Through April, BNSF has moved more than 1.2 million tons of coal for NTEC, which amounts to a pace to reach 89% of the 4.2 million annualized tons considered by the parties. With the June and July forecasts and expected May service, BNSF will be providing NTEC with service at approximately 95% of that amount.¹⁵

BNSF's public commitment that it expects to provide this service makes it unnecessary for the Board to issue an emergency service order or preliminary injunction. *See, e.g., Foster Poultry Farms—Ex Parte Petition for Emergency Service Order (Foster Farms)*, FD 36609, slip op. at 3 (STB served Feb. 14, 2023). In addition, as BNSF stated above, during the May 10 oral argument, and BNSF's May 5, April 19, and April 17 filing, BNSF would be happy to engage with NTEC

¹⁵ BNSF's expectation assumes that Westshore Terminals will make sufficient capacity available and that other unexpected changes in circumstances do not impact BNSF's ability to provide the service.

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and the Board and its staff in further dialogue regarding this dispute, should the Board believe that to be productive.

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Counsel for BNSF Railway Company

Dated: May 15, 2023

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VERIFICATION

I, Adam Weiskittel, declare under penalty of perjury that I am AVP and Associate General Counsel, Operations of BNSF Railway Company, that I am authorized to make this verification, and that I have read the foregoing *BNSF Railway Company's Responses to Board Questions* and know the facts asserted therein are true and accurate as stated to the best of my knowledge, information, and belief.

/s/ Adam Weiskittel

Adam Weiskittel

May 15, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *BNSF Railway Company's Responses to Board Questions* 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 15, 2023