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SURFACE TRANSPORTATION BOARD

Docket No. NOR 42178

VIRTUAL PRE-HEARING CONFERENCE ON NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC-EX PARTE PETITION FOR EMERGENCY
SERVICE ORDER

Thursday, April 27, 2023

9:30 a.m.

via Zoom

STB Board Members:

Martin Oberman - Chairman

Karen Hedlund - Board Member

Michelle Schultz - Board Member

Patrick Fuchs - Board Member

Robert Primus - Board Member

1 Participants:

2 Daniel M. Jaffe-NTEC

3 Frank J. Pergolizzi-NTEC

4 Andrew B. Kolesar III-NTEC

5 Anthony J. LaRocca-BNSF

6 Timothy Strafford-BNSF

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1 P R O C E E D I N G S

2 9:40 a.m.

3 CHAIRMAN OBERMAN: Good morning everyone.
4 Thank you all for joining at very short request by
5 the Board. For the record this is what we have
6 called a pre-argument conference to consider the ex
7 parte petition for emergency service and a temporary
8 injunction filed by NTEC in Docket NOR 42178.

9 This conference is not open to the public,
10 and is not being streamed or recorded, although it is
11 being transcribed by a court reporter. And if
12 necessary to redact any parts because of proprietary
13 material, we will take care of those logistics before
14 making any transcript of this proceeding public. We
15 don't have to spend time on that now. The lawyers
16 and Board staff can figure that out subsequent to
17 today's session.

18 I want to say a few things by way of
19 introduction. The Board will be conducting, I think
20 you know this, a hearing, or oral argument. I'm not
21 wedded to the exact name of it. I don't think
22 that's important. It's what we do there that's

1 important, on May 10th, two weeks from yesterday at
2 9:30 in the morning.

3 We will have a sharp cutoff at 3:30 in the
4 afternoon. Undoubtedly we will have to take a very
5 short break sometime in mid-day for lunch, and
6 obviously other rest breaks as needed during the day,
7 but it is the Board's intention to, excuse me, hear
8 whatever we're going to hear only on that one day as
9 it relates to the request for preliminary, or
10 emergency relief. That has nothing to do with
11 disposition of the underlying case, eventually.

12 So I want counsel for the parties to be
13 very clear that this is not an open-ended proceeding.
14 It is the Board's intent to hear argument from
15 counsel, and to ask -- it won't surprise you that we
16 have a lot of questions. This will not be a session
17 in which there is a trial-like setting with sworn
18 testimony and cross-examination of witnesses by the
19 parties.

20 However, I am going to request that both
21 parties have present at the hearing persons from
22 their clients who have first-hand knowledge of the

1 facts of this case. It may be Mr. Babcock and Ms.
2 Lawler who have already filed verified statements, but
3 depending on matters that we're going to discuss here
4 in a few minutes, you might want to bring others.

5 Because if we have questions on May 10th
6 that will not have yet been covered because we want
7 to get every piece of information that we need by
8 then. We want to have people present who can answer
9 those questions if counsel cannot. So we are
10 requesting that you have people present. The May
11 10th session will be entirely in-person, and it will
12 be open to the public.

13 We're not going to stream it because based
14 on our experience in the Gulf Coast case, when we got
15 to confidential material it was quite cumbersome and
16 time consuming to arrange for those watching through
17 streaming to go into what was it, a confidential room
18 in a different part of the ether, and then to get
19 back to the public session.

20 And we do not have a lot of time on May
21 10th, so I'm going to ask counsel, you may tell us
22 before we leave this morning. I don't want you to

1 respond right now, that you don't see any need to get
2 into confidential material on May 10th. I suspect it
3 will be hard to avoid that.

4 So I'm going to ask counsel, whoever you
5 bring to the hearing in person, to pre-identify those
6 people who are eligible to witness confidential
7 information, and seat them in a very clearly
8 identifiable part of our hearing room. Don't have
9 them scattered all over.

10 So that those members of the public attend
11 we can seat also in an identifiable part of the room,
12 and if and when we get to a confidential part, it
13 should facilitate asking the non-confidential
14 qualified people to step out into the hall, quickly
15 identify them and move on because as I said we're
16 going to have a limited time, and we want to optimize
17 our use of that limited time to get into the details
18 of the issues that the Board is interested in, and
19 that we want further information on.

20 So with that, by the way before we leave
21 here this morning, I'm not going to cut-off counsel,
22 but any questions you have about substance or

1 procedure of what the Board's going to do because I
2 want you all to be as clear as possible in your
3 minds, so you can do your work efficiently.

4 What we're going to do at this point, and
5 before we get there I'm going to see if you have any
6 questions about the procedure I outlined. I have a
7 number of issues that I'm going to ask you to focus
8 on in preparation for this hearing, and I'll talk
9 about that in a minute, and I am sure that the other
10 four Board members have some issues that I may have
11 missed, that they want to direct your attention to.

12 Not for you to answer any of them, but to
13 give you a chance to prepare yourself, and I'll talk
14 a little bit about that in detail in a moment.
15 Before I get into that do counsel for either party
16 have any questions about the procedure I just
17 outlined?

18 MR. STRAFFORD: We do.

19 CHAIRMAN OBERMAN: Go ahead Tim.

20 MR. STRAFFORD: First off, let's go back
21 to the sort of having people present, the first to
22 acknowledge, obviously that makes sense. I just want

1 to explore a little bit how you're thinking about the
2 record in this case. You know, I agree that you
3 said you're not wedded to term oral argument or
4 hearing. It feels like this is actually a little bit
5 of a hybrid exercise, and I just want to make sure I
6 understand, sort of how you're thinking about the
7 record, and how you're thinking about participation.

8 And so, both parties have put in verified
9 statements, so there's sort of a witness on each
10 side. So, obviously, there are factual issues there
11 that the Board is going to want to probe. Are you
12 anticipating participation by folks in addition to
13 those witnesses?

14 CHAIRMAN OBERMAN: All good questions.
15 This Board has a little bit of experience with
16 so-called hybrid procedure, which while very
17 productive at one level, did leave some openness to
18 confusion, and that was the oral argument we had in
19 Patrick's and my first year on the NCA case. And we
20 want to avoid uncertainty about the record, so I'm
21 glad you raised the question Tim.

22 I was going to get to that sort of at the end,

1 but this is as good a time as any. I anticipate the
2 potential that at the hearing a Board member may ask
3 a question of counsel, which you will not know in
4 your own head, and you'll need to consult with your
5 client to answer the question.

6 It may be, depending on the complications
7 of the answer to the question to just move ahead,
8 that it might make sense to ask the client to just
9 address the Board. But we're not going to do it in a
10 sworn session, and if either party is concerned about
11 only having sworn evidentiary matters in the record.

12 If that happens then I have considered the
13 idea that if any party thought that what the client
14 said, if the client were called on, if they thought
15 that was important to be in the record as a basis of
16 our decision, then I would consider the idea of
17 filing a follow-up verified statement, just on the
18 point that was said at the hearing, so there wouldn't
19 be any doubt of was in the record, or not in the
20 record.

21 It would be best if we could avoid that,
22 but not knowing what we may get into, and you know, I

1 have a penchant, and I think all the Board members
2 do, for getting the information that we think is
3 important, and so I don't want to artificially cut it
4 off because this isn't a formal hearing with
5 testimony under oath.

6 If it's a simple fact, and we ask you the
7 question, and counsel could whisper the answer, and
8 you could say I represent to the Board that the
9 answer is X, that may be sufficient. But if it's a
10 question of how you operate the railroad, and it
11 requires a 10 minute answer, it would probably be
12 more efficient just to have the client explain it,
13 and then if it's really necessary I think I would
14 look to the parties for guidance as to what they are
15 concerned about, as to whether it's in the record or
16 not in the record.

17 But I think we should try to clear it up
18 there. But it is I think hybrid is a good word Tim.
19 You know, we're not a court. We act like a court.
20 In many situations we don't have a custom and
21 practice of how to hold evidentiary hearings, and the
22 one thing that the Board wants to do is to get to the

1 guts of the preliminary relief request quickly, and
2 that's why we scheduled the hearing, and we think
3 this is about the only way we can do it as a
4 practical matter.

5 So is that clear enough, does
6 that answer your query?

7 MR. STRAFFORD: I think it's helpful to
8 me.

9 CHAIRMAN OBERMAN: Dan did?

10 MR. JAFFE: Yeah. I just wanted to say
11 first of all whichever way assists you in getting
12 your questions answered in the most efficient manner,
13 if that's asking our clients to respond to something
14 if they would have more intimate knowledge than we
15 do, I think that that is certainly something that
16 would ease everybody's process, and make this go a
17 lot faster.

18 In fact, I would even say that as I
19 thought about your, you know, availability of six
20 hours, that we are I think hopeful that the Board
21 will not require the full six hours to get to the
22 heart of the matter. I think our folks are happy to

1 answer.

2 But Tim's question about more than one
3 person, I think we do anticipate that we'll probably
4 have two people just in case there's sort of a ground
5 level question, or a 30,000 foot question because
6 they may be coming from different perspectives. But,
7 and we do appreciate the opportunity to have those
8 folks near to answer those questions since you
9 correctly point out that counsel is not on mission.
10 So that's all, and the clarification.

11 CHAIRMAN OBERMAN: Speak for yourself Dan.

12

13 MR. JAFFE: So, and I guess the other
14 thing that we would like to sort of try to address
15 here, at least a little bit, with some of your point
16 about how to deal with the confidentiality. I think
17 our general take here is that there ought not to be
18 the need for any discussions of particular contracts
19 or shippers that would require us to close the
20 hearing.

21 I think to the extent that they insert
22 certain confidential information included in the

1 filing, you know, those could sort of be generically
2 discussed in a manner that wouldn't necessarily
3 implicate anything that would need us to close the
4 hearing room.

5 And our particular concern with that is
6 that in that construct, BNSF could take a position,
7 and I would understand potentially if they did that
8 some of the information they were talking about would
9 be highly confidential, so that no one from NTEC
10 could be in the room, and that might make it very
11 difficult in terms of answering corollary questions
12 that might relate directly to NTEC.

13 So, our strong preference would be to try
14 to avoid that wherever possible, so that the hearing
15 remains open and available to all.

16 CHAIRMAN OBERMAN: I would say, speaking
17 for myself, I'm quite sympathetic to that, as I think
18 everybody knows. This Board has had a penchant -- a
19 particular penchant, not the best word for our
20 transparency and openness. We have had plenty of
21 public sessions, and we've tried to post on our
22 website everything we can when we can.

1 So, the default view in my view is that
2 the hearing should be open to the public. What I am
3 anticipating, and potentially, and can't anticipate
4 with specificity, that whatever the lawyers do to try
5 to keep the discussion within the realm of publicly
6 disclosable information, I can't control the Board
7 members, including myself from posing a question,
8 which in fact asks for -- the answer would require
9 confidential information.

10 And I think the only way to deal with it
11 is at the hearing when that question, or issue
12 arises, it's up to counsel to protect your clients if
13 you think they need protecting on that to tell us,
14 and we'll decide right then and there, you know, if
15 we have the clear the room shortly.

16 But I'd like to keep it to a minimum.
17 It's theoretically possible that if some confidential
18 material comes up we could keep note of what those
19 are, and save them to the end, and then do it all at
20 the same time. That may or may not be more
21 efficient. I think we just have to let it unfold.

22 Let me say this about the timing. I meant

1 to say at the outset of that. I'm going to suggest
2 that NTEC be allotted 45 minutes to start. That BN
3 be allowed in 45 minutes to reply, and that NTEC have
4 a half an hour for the final word. I can say that
5 it's not going to happen that way because as you know
6 you're all going to be interrupted by a lot of
7 questions, which is why, you know, we are saying that
8 we're going to have a hard stop at 3:30.

9 You may be right, it may not go anywhere
10 near that long, but because I am sure there will be a
11 lot of questions and discussions, it's impossible to
12 hold you to the 45 minutes, but just for your
13 preparations as lawyers, I wanted to give you some
14 guidance of how much time if you did speak
15 uninterrupted, we think would be appropriate.

16 But unlike Courts of Appeals, we ask you a
17 question the clock doesn't keep running beyond your
18 45 minutes.

19 MR. JAFFE: Sure. I have one other
20 question -- I'm sorry Tim.

21 MR. STAFFORD: I'll circle back just for a
22 second. I think we're in pretty much the same place.

1 I just want to sort of the Board's benefit, sort of
2 to sort of walk through the potential confidential
3 information issues because they can be somewhat
4 different right?

5 So NTEC's filing was entirely public. We
6 had some highly confidential information in our
7 pleading that went largely to specific shippers and
8 transportation details, and details of contract. I
9 think Dan is exactly right that generally we can talk
10 about those things without getting into the specific,
11 highly confidential details.

12 But there are two sort of separate areas
13 of confidential information. One, things involving
14 NTEC itself, and then two, involving other shippers.
15 I mean so to be clear that we don't object to NTEC
16 participating in things having to do with their own
17 information, even if it's deemed highly confidential.

18 Now, with regards to specific information
19 about other shippers, that's a different situation,
20 and I would imagine with regard to the NTEC
21 information, there may be things that NTEC is
22 entirely comfortable discussing in the proceeding,

1 but doesn't necessarily want public, you know, in a
2 transcript, or things like that, so.

3 CHAIRMAN OBERMAN: Well let me elaborate
4 on what we're going to do at this point today. I'm
5 going to start off by telling you each seriatim
6 issues that I want you to direct your attention to in
7 preparation for the hearing that I find inadequately
8 are not clearly covered in the pleading so far.

9 And from this point on to the extent those
10 questions indicate anything of substance, I'm
11 speaking only for myself. The Board hasn't made any
12 decisions about anything other than we're obviously
13 going to have this hearing on May 10th.

14 And I am going to start off, but the other
15 four members I am sure will then add on issues that I
16 may probably didn't cover that are of particular
17 interest to them today. I'm going to suggest that
18 when we finish that, and I'm not going to ask you to
19 answer anything today because we don't have that much
20 time.

21 Today I'm just giving you a heads up. I'm
22 going to suggest both for the purpose of having a

1 complete record, and to facilitate a more efficient
2 hearing on May 10th, that at the end of today if
3 either side, or both sides feel that they can
4 enlighten the Board based on the questions we posed
5 to you today, by filing additional verified
6 statements.

7 I'm going to ask you to do that by Friday,
8 May 5th at four o'clock. That's a week from
9 tomorrow, so that we will -- if you do file them,
10 both the Board and staff will have time to digest
11 it, and make the hearing on Thursday go more
12 smoothly. You may feel you've got an adequate record
13 now. These are your decisions, they're not ours.

14 But it may be that you can cover matters
15 that are -- could be confidential in a subsequent
16 verified statement, which could be filed under the
17 usual protections, and that would obviate the need to
18 clear the room on May 10th. I don't want to
19 artificially restrict you because who knows what
20 might come out with any further materials.

21 But as you'll see when I go through the
22 concerns I have, there's a lot of stuff that you may

1 feel it would be better for your position in the case
2 to get it submitted to us in detail, and under oath,
3 and in advance of the hearing, and I want to give you
4 that opportunity to do it, but we don't have a lot of
5 time.

6 So, if you want us to fully digest what
7 you have to say, we've got to have it by next Friday.
8 And I say four o'clock because under our filing
9 system, which I do not understand myself, if it
10 doesn't come in by four, I don't think I'll get it
11 before the weekend.

12 And I'm sure the other Board members, too,
13 will want to have a full amount of time to read your
14 materials before the May 10th hearing. Before I get
15 into the questions I have, do any of the other Board
16 members, either want to object to the procedure I've
17 outlined, or add their own thoughts about it, or
18 should we just proceed?

19 BOARD MEMBER FUCHS: Marty?

20 CHAIRMAN OBERMAN: Yeah. Patrick?

21 BOARD MEMBER FUCHS: I'm wondering if it's
22 helpful to talk through the thinking on any replies

1 that may or may not be desired after the information
2 that could be filed on the 5th?

3 CHAIRMAN OBERMAN: I'm sorry. Say that
4 again Patrick?

5 BOARD MEMBER FUCHS: I'm wondering if you
6 could talk through your perspective on replies to any
7 information that may be filed on the 5th?

8 CHAIRMAN OBERMAN: Well that's a good
9 question. I mean we would like to -- I would hope
10 that we could draw the record on the preliminary
11 relief question to a close by the end of May 10th.
12 Not knowing what any of you may file on the 5th, I
13 think I will leave it to counsel if you see something
14 that gets filed, maybe this is what you're eluding
15 to, Patrick, but if not, why don't you elaborate.

16 If either side files something by May 5th
17 that the other side feels must be responded to, I'd
18 prefer you just respond orally at the hearing. There
19 will be an opportunity to respond to us then, or
20 clear it up if you want. I hesitate to say the
21 following because I don't want to invite people to
22 think that the record will be open after May 10th.

1 But knowing the uncertainty of litigation,
2 at the end of May 10th if either party feels
3 prejudice if they don't get a chance to do something
4 in response to something that happened at the
5 hearing you can ask us, but I think I would try to
6 make that decision on May 10th, and it would be my
7 very strong leaning to not allow any further
8 submissions after the May 10th hearing.

9 So I think Patrick, if that's what you
10 were alluding to, I think further replies to the
11 materials that may come in by May 5th could be made
12 at the hearing. Is that where you were headed,
13 Patrick, or did I?

14 BOARD MEMBER FUCHS: It was, I'm just
15 thinking through if because you had previously talked
16 about a verified statement that could be filed, based
17 on the matters that were discussed just at the
18 hearing, that maybe wouldn't have been in the record.
19 And to the response of the oral argument then be
20 expected to also be a verified statement, you know,
21 to be clear that that is also on the record.

22 CHAIRMAN OBERMAN: But let me say this.

1 If you want factual material in the record it's going
2 to -- I think it has to be a verified statement. So,
3 if you see something on the 5th that you think needs
4 factual response to, I would say get it to us as
5 soon as possible, but you can bring us something at
6 the hearing.

7 I do think, as I said earlier, if a client
8 answers a Board inquiry at the hearing, and either
9 side thinks that that should not be in the record
10 unless it's a verified statement, I think I would
11 give you the opportunity to submit one, but only on
12 what was said.

13 We're not going to have new arguments, new
14 factual material beyond May 10th unless somebody
15 could convince the Board that they will be unduly
16 prejudiced if they don't have that chance. But I
17 think what I'm trying to do here is to give both
18 sides every chance to tell us what they need to tell
19 us on a preliminary stage.

20 Remember, regardless of whether
21 preliminary relief is granted, the underlying case is
22 still pending, and the factual record has not ended on

1 the underlying case. Everything we're talking about
2 now only goes to whether the requested preliminary
3 relief is going to be granted or not.

4 BOARD MEMBER FUCHS: Thank you.

5 CHAIRMAN OBERMAN: Okay. Anything else
6 from the Board members, or should we proceed here?

7 MR. JAFFE: I'm afraid Mr. Chairman, now
8 I'm a little uncertain on what you're proposing
9 because --

10 CHAIRMAN OBERMAN: I can't see -- who's
11 speaking?

12 MR. JAFFE: This is Dan. This is Dan
13 Jaffe on behalf of NTEC.

14 CHAIRMAN OBERMAN: Your connection is
15 going in and out, I can't -- I'm raising a --

16 MR. JAFFE: Is this a little better?

17 CHAIRMAN OBERMAN: Not really. Try again.
18 You were perfectly clear before, but right now it's
19 in and out. Try it again.

20 (IT issues.)

21 CHAIRMAN OBERMAN: Dan do you want to try
22 again?

1 MR. JAFFE: Sure. Can you hear me better
2 now?

3 CHAIRMAN OBERMAN: Much better.

4 MR. JAFFE: Oh excellent, okay. So I'm
5 afraid after the colloquy between you and Mr. Fuchs I
6 am now not 100 percent clear what our procedure is.

7 CHAIRMAN OBERMAN: Okay.

8 MR. JAFFE: Because if we are going to
9 potentially file verified statements on Friday, and
10 my instinct is both sides probably will, given that
11 it sounds like you have a good number of questions.
12 It then sounded like if you wanted to get something
13 back to the Board, get it back as soon as possible,
14 or address it at the hearing.

15 And I just want to make sure that you're
16 hopefully just one methodology we're going to use,
17 which I could see that the hearing might be the
18 easiest place to tackle that, even with the time
19 constraints.

20 CHAIRMAN OBERMAN: That's an excellent
21 question, and I realize that what I said may have
22 sounded a little confusing. Here's the way I see it.

1 I want to give both sides an opportunity to answer
2 any questions we ask today with verified statements,
3 if you think that's the only way you can get your
4 positions into the record. And that deadline is four
5 o'clock on May 5th. I don't know what you're going
6 to file.

7 I would anticipate that each side might
8 want to have something to say about what the other
9 side files on May 5th. I think that should be done
10 at the May 10th hearing, but if you see something
11 that's filed on May 10th that you -- May 5th, I'm
12 sorry, that is so extreme that needs an immediate
13 denial or something, I don't want to cut you off if
14 you think you have to file it.

15 I would prefer that you don't. I would
16 prefer that both sides deal with whatever additional
17 material is filed on May 5th at the hearing on May
18 10th and that's one reason to bring your factual --
19 when you see what questions we ask, and what the
20 other side files that may also enlighten you on the
21 people you want to bring to the hearing.

22 MR. JAFFE: Okay. That's very helpful.

1 Thank you.

2 CHAIRMAN OBERMAN: Does that make it a
3 little more clear?

4 MR. JAFFE: It does. Thank you.

5 CHAIRMAN OBERMAN: You know because we are
6 somewhat hybrid and informal, you know, it's my
7 penchant not to cut people off of things that they
8 think are crucial. I don't need stuff that's
9 repetitive. And I do want to insist that we're not
10 even as a result of today, opening the door to new
11 arguments, new legal theories.

12 The question really is to elaborate on
13 matters that are in the papers that are before us
14 that we think need elaboration. So we're not -- I do
15 not anticipate allowing any kind of a change in the
16 nature of the case, at least on the preliminary
17 relief part at this stage, and at least for May 10th
18 hearing.

19 What happens after May 10th, you know,
20 we're not making any determinations at this point.
21 So with that, I'm going to turn my video back on if
22 people can hear. Michelle, you've got your hand up I

1 see .

2 BOARD MEMBER SCHULTZ: Yes. Marty, I was
3 actually frozen for a couple of minutes where I not
4 only couldn't see video, but couldn't hear the live
5 feed, so this question might be repetitive, and I'll
6 apologize if it was covered.

7 CHAIRMAN OBERMAN: No problem.

8 BOARD MEMBER SCHULTZ: Just seeking
9 clarification, and again if you've covered this, is
10 your intent to just limit the filings to verified
11 statements only, or would you be, you know,
12 permitting any additional briefs?

13 CHAIRMAN OBERMAN: Well it's a good point.
14 One of the questions I have does relate to some legal
15 standards, and so yes, if in order to respond to at
16 least the questions I have, and other Board members
17 may have them, it's still in the nature of legal
18 argument, then I'd like to get -- that should come in
19 by May 5th as well, and it's a good point, I'm glad
20 you clarified it. No, it did not come up.

21 BOARD MEMBER SCHULTZ: Thank you.

22 CHAIRMAN OBERMAN: Okay. If we are ready

1 let's -- I'm going to proceed with the issues that I
2 have noted. And let me say this, this is -- I'm not
3 limiting myself or Board members to issues they may
4 want to ask you to address at the hearing. We've
5 all --

6 BOARD MEMBER FUCHS: Marty?

7 CHAIRMAN OBERMAN: Yeah.

8 BOARD MEMBER FUCHS: One more just to make
9 sure that we're absolutely crystal on this.

10 CHAIRMAN OBERMAN: All right.

11 BOARD MEMBER FUCHS: And I appreciate the
12 explanation as how you see it. You know, you advised
13 counsel that if something comes in May 5th, the best
14 plan would be to respond on May 10th unless they
15 absolutely need to respond sooner. And when they
16 respond on May 10 if it involves something factual
17 that ought be in the record, and they're addressing
18 it at the hearing, are we advising them to
19 simultaneously have a verified statement submitted,
20 or have a verified statement submitted that day that
21 makes sure that whatever information is presented on
22 May 10th in response to the May 5th information is in

1 the record?

2 CHAIRMAN OBERMAN: That would be
3 preferable, because otherwise we'll have to wait
4 until after May 10th to get it. So if you know that
5 there's -- I think it's a good point, Patrick. If
6 you see something in a May 5th filing that you want
7 to counter, bring a verified statement to the
8 hearing. I mean after May 5th I'm anticipating that
9 we're going to have 99 percent of the factual
10 material that we want, but I may be wrong, so I don't
11 want to artificially restrict people.

12 BOARD MEMBER FUCHS: Okay. Thank you.

13 CHAIRMAN OBERMAN: Okay. So with that I'm
14 going to start first with some of the issues I have,
15 or questions I have for NTEC. And as I said, I
16 started to say that what we do here today is not
17 intended to tell the parties that neither I, or other
18 Board members will not have questions on other
19 aspects of the pleadings when we get to the May 10th
20 hearing.

21 These are the ones that stuck out at me
22 so far. And I actually have more than I'm going to

1 talk about today, but that would take most of the
2 day, so I'm limiting myself to what I think are major
3 questions that I have for the purposes of giving you
4 this heads up and the chance to respond to it.

5 So let me address NTEC first, Dan. I want
6 you to be very clear as to the basis of the
7 preliminary relief you are asking for. You cite
8 11123, which is a statute of general application
9 about emergency relief. But also in the papers
10 either you or BN cited 1146, which has to do with
11 alternative service, and the standards under it.

12 As I understand it, you are not asking for
13 alternative service under 1146. So, we've spent a
14 lot of time on preliminary injunction criteria, and I
15 have some questions about that. But I'd like you to
16 clarify if you are simply asking for relief, at least
17 in the alternative under the general provisions of
18 11123, and if you are to tell us whether you have to
19 show irreparable harm to obtain relief under 11123,
20 or is it some other standard because the statute
21 doesn't talk about irreparable harm?

22 So, turning to the issue of irreparable

1 harm under the preliminary injunction request for
2 relief, I noted some parts of Mr. Babcock's verified
3 statement, particularly paragraphs 20 and 21, and I
4 think this may appear in some other areas where as
5 well we talk about the fact that you have to,
6 in order to sell coal you have to negotiate and
7 market it months in advance.

8 What I'm unclear about is what the
9 situation is now because he says in paragraphs 20 and
10 21, that if you don't get the relief you are seeking
11 there will be "significant problems meeting our
12 existing obligations and marketing for future sales."
13 And he further says in paragraph 5 that if you don't
14 get this relief your standing, I guess in the market,
15 will be downgraded.

16 I don't know what these things mean. What
17 are your existing contracts? It sounds like you have
18 some for the sale of coal, but you also are trying to
19 enter into new contracts beginning in June. So I
20 would like you to be very specific on what
21 obligations you have now, and what sales you are
22 seeking to get, and then very specifically on the

1 question of irreparable harm.

2 I'd like to hear something
3 more specific about this allegation of reputational
4 damage, and this phrase that Mr. Babcock uses that
5 your standing will be degraded. And in that context
6 I think it would be helpful to educate the Board on
7 how the market, the international market, the export
8 market that you're focused on here from West Shore,
9 how it actually functions.

10 Just to give you an example. I mean coal
11 is a commodity. Are we to not understand that if you
12 have coal for sale at some point in the future and
13 somebody needs it, you can sell it at whatever the
14 going rate is. Or is there something more to it that
15 is going to cause you a loss of sales in the future
16 if your standing is degraded.

17 I think you have to put that all together
18 for us in a much more concrete way. And most
19 importantly for purposes of at least the preliminary
20 injunction part of the relief, why is any lost
21 business that results from insufficient trains
22 assuming you ultimately approved a common carrier

1 violation, why is that not compensable in money
2 damages?

3 What is it about your situation that makes
4 it irreparable? I've read your cases. And I've
5 tried to figure out what is the difference here, and
6 I want to ask you to be very, very specific and
7 concrete about how this meets the, if it does, the
8 irreparable harm standard.

9 On the question of retaliation, there is
10 some information in Mr. Babcock's statement about
11 conversations he had with Miss Lawler, but it's a
12 pretty serious charge, and I would like to have more
13 detail about the who, what, when and where of any
14 conversations that you contend constitute
15 retaliation, or threats of retaliation.

16 In that vein there is also an allegation
17 in your papers about BN cutting the number of trains.
18 I think both in the past, and I take it that you
19 imply as to what their future offers to you are, are
20 based on BN's planning to serve customers with more
21 favorable terms in their contracts, I think is your
22 language.

1 I don't know what customers you're talking
2 about, and I don't know what terms are more
3 favorable. So I think you need to elaborate on that,
4 or tell us if you don't know at this point without
5 discovery. I couldn't tell what more information is
6 available on that allegation.

7 I want to get into the volume of coal.
8 The only hard numbers that I have seen on a monthly
9 basis are the ones that were in Miss Lawler's
10 verified statements, and she goes through the
11 volumes by telling us tonnage. Let me get it in
12 front of me.

13 Too much paper. Here it is. So, Miss
14 Lawler's verified statement at page 11 has a chart or
15 a spreadsheet of NTEC export times by months
16 beginning in November of 19 and going up through
17 December 22. And I'm gong to get to this a little
18 bit more with BN, but I took NTEC's assertion that a
19 train carries approximately 15,000 tons and divided
20 those numbers by 15,000 to get at the number of
21 actual trains moved during those months in Miss
22 Lawler's chart.

1 So Dan, I'd like NTEC's account, at least
2 for the months in that chart, of the number of trains
3 that your records show were actually moved to see if
4 they coincide. And from both sides, by the way, but
5 I'll get at this point specifically with BN. It's
6 not clear to me how long, how many years BN has been
7 moving coal from this area to West Shore.

8 There's some reference to -- this goes
9 back to 2008, since one of the issues in this matter
10 appears to be BN's capacity to provide these trains.
11 I would ask you to provide us with more history as
12 far back as you can go. I don't think you have to go
13 to the beginning of time. I don't know when the mine
14 opened. I don't know when BN started serving it, but
15 I'd like to know how these quantities of coal,
16 preferably a number of trains, unless it moved in
17 some other fashion. I doubt if it moved to manifest,
18 maybe it did.

19 Going back historically before November 19
20 because issues have been raised about what was the
21 expected level of service that was needed and so
22 forth. So if you have the data, if NTEC has the

1 data from its predecessor, and maybe it doesn't, I'd
2 like you to supply that with us.

3 What I am suggesting is monthly number of
4 trains moved, actually moved. The other question for
5 you, Dan, but I'm also going to direct this to BN is
6 that if I look at Miss Lawler's chart the amount of
7 coal moved in beginning at around April of 2022 began
8 to decrease dramatically, and BN has said that the
9 amount of trains you're asking for now is a vast
10 increase over what was done, at least in 2022, or
11 somewhere -- I don't know if they used the word
12 vast, but significant increase.

13 My question is how much coal did NTEC
14 tender to BN, as I gather from the papers that NTEC
15 in its lawsuit against BN is alleging that it asked
16 to move more coal in 2022, and BN didn't provide it.
17 Let me be clear by the way. We're not going to
18 litigate the contract case here, but both sides have
19 raised issues involved in the contract situation at
20 least in terms of factual data, and that's what I'm
21 aiming at here.

22 So I would like to know from both sides if

1 there is a way to tell us how much coal did NTEC
2 tender during 2022 monthly, or however you calculate
3 it because I can't tell from BN's papers whether BN
4 is going to contend that you simply didn't try to
5 move more coal, and now you want to move more.

6 Or from your papers, Dan, that you wanted
7 to move a lot more coal in 2022, and they didn't move
8 it for you. So I just want the facts on that
9 question. So, to be clear Dan, I want you to -- I
10 guess it's in this context of how much you have
11 moved, and what I said earlier about what is the
12 current status, and explain the market to us. I
13 really want to understand more about your losses
14 going into the future.

15 How far out can you even measure the
16 losses? How far out are you going to contend you
17 will suffer losses if you don't get the preliminary
18 relief you need now, and why are they not
19 quantifiable in terms of the damage claim? So let me
20 shift over to BN, and then I'm going to hand this off
21 to my fellow Board members.

22 Tim, I'm going to pose the same question

1 to you about whether 11123 requires a showing of
2 irreparable harm. And I guess this is a question for
3 both of you, 11123(a) talks about moving traffic in a
4 manner that properly serves the public, and the Board
5 may to promote commerce and service to the public,
6 for a period not to exceed 30 days, give certain
7 kinds of directions.

8 I really should have elaborated on that
9 for you Dan, as well. Is that the standard that
10 you're asking us to beat on the emergency service
11 part, or is there case law you think guides us on
12 what has to be shown to get relief under 11123 as
13 distinguished from the alternate basis of the
14 preliminary injunction standard?

15 On the question of the quantity of trains,
16 Tim, and on a couple other aspects, there are a
17 couple aspects of BN's brief which I found to be a
18 little disingenuous. You argue because Ms. Lawler
19 states it in her verified statement that NTEC only
20 moved 29 trains a month, which is what they're asking
21 for in their relief, four months out of the last 38,
22 and you highlighted those four. She highlighted

1 those four months on page 11.

2 But using my trusty iPhone calculator, and
3 dividing the tonnage by 15,000 tons I found that in
4 those same 38 months there were six months at 28
5 trains a month, and five months at 25 or 26, so that
6 there were a total of 15 out of the 38 months at
7 which BN moved at least 25 trains. I think that
8 would have been a little more candid with the Board
9 as to the level of service because the allegation is
10 that you're only going to move 16 trains in June, and
11 there's a big difference between 25 and 16.

12 And I think one of the issues I want to
13 think about in this case is how the common carrier --
14 and I'm going to get into that in a moment a little
15 more deep, Tim, how the common carrier obligation
16 applies here. Is there some number between 16 and 29
17 which should guide the Board?

18 And it's hard for me to do that if I don't
19 get an accurate account of the amount of coal that
20 was offered, and the actual trains that were moved,
21 and it's not just 29 or nothing. I don't think
22 that's what NTEC was saying. So I'd like your people

1 to be more clear on the number of trains moved.

2 And I would say the same thing to you,
3 Tim, if you could enlighten us historically on the
4 capacity of this line historically going back beyond
5 2019 to sometime. If it really started in 2008 I'd
6 like to see the whole history, but if it started at
7 the beginning of time, I don't want to burden you
8 with going back decades. That's not going to be
9 relevant, but certainly for at least a few years
10 before 2019.

11 The same question on 2022. As I read Miss
12 Lawler's chart there were only two months in 2022,
13 January and March in which BN moved 28 trains. And
14 after March the number of trains went steadily down,
15 and you used those numbers to argue that what
16 they're asking for now greatly exceeds, you
17 know, some historical level of service here.

18 Same question I asked Dan, how much coal
19 did NTEC tender you during the rest of 2022, and was
20 it there to move? And you simply declined, or were
21 unable, or didn't move it for whatever the reasons
22 were it wasn't moved. Or what do you contend in that

1 respect? You don't have to assume anything from my
2 question. I want to know what the facts are.

3 NTEC in its papers says that for most of
4 2021 and 2022 you moved 70 trains a month. I want to
5 know if that's consistent with your -- on this line
6 up to West Shore. I want to know if you agree with
7 those numbers. NTEC then says if you look at 2022
8 their total number of trains went down from 232
9 trains in 2021, to 162 in 2022.

10 Do you agree? And who got the other
11 trains, and why? The record is really very
12 conclusory on that. Other customers, other people
13 with contracts and so forth. Further, on BN you
14 argue, and Ms. Lawler says in her verified statement
15 that there are constrained resources, in particular,
16 she says that in late 2021 and 2022 there were system
17 wide performance issues with BN involving, among
18 other things, drivers, chassis, and warehouses.

19 We're all familiar with the supply chain
20 problems back in that era. I'd like somebody to
21 explain what drivers, chassis and warehouse issues
22 have to do with moving coal from this mine to West

1 Shore. I don't think they use drivers, chassis and
2 warehouses, so I don't know why that's in the
3 verified statement, or what it has to do with the
4 case.

5 She does talk about crew shortages in
6 Everett, several places on page 13 of her statement
7 for one. I really would like to know, and I would
8 say by the way if NTEC has any information on this,
9 you could supply it to us. I assume you don't,
10 that's in the possession of BN. I need to know more
11 detail about the crew shortages. When did the crew
12 shortages happen? You know, our data shows that the
13 railroads reduced crews going back way before 2021,
14 and yet you averaged close to 28 trains or a number
15 near there all through 2021.

16 Why did you have crews to move that number
17 of trains in 2021, and then you didn't have them in
18 2022? I'm not aware of any crew reductions at BN
19 that started in late 2021. I think they started
20 before that, but I may be wrong. I don't want to
21 make any assumptions. I want you to provide us with
22 crew data if you can. Make it granular as to Everett

1 if that's the place for us to know how crew shortages
2 are affecting capacity on this line.

3 That would be most helpful. And if you
4 want to add crew levels systemwide, if it relates to
5 this issue, then I want you to supply that data, but
6 I can't make heads or tails out of a conclusory
7 statement that you have systemwide performance
8 issues. And why that -- how that is causally
9 connected to whatever constraint that you have?

10 Ms. Lawler also says that this line moves
11 substantial amounts of other commodities. What are
12 those commodities? How would 13 more trains a month,
13 I guess that's what NTEC is asking for, affect other
14 commodities. Be specific. How Ms. Lawler says at
15 page 12 that in 2022 NTEC averaged 261,000 tons per
16 month. Excuse me, that may be by the way, but the
17 numbers are widely different. A couple of months
18 they were down, you know, around 100,000, and then
19 other months they were three and four hundred
20 thousand.

21 And by the way, NTEC may want to comment
22 on how that affects their business -- the unevenness.

1 Maybe it doesn't, I don't know. But Ms. Lawler says
2 the average of 261, she says at page 12, which I
3 calculated to be 17 trains at 15,000 per train, is
4 similar to other coal shippers. But she doesn't
5 identify the coal shippers.

6 She doesn't say how much other coal
7 shippers actually moved. I can't evaluate just the
8 generalized statement. There's a lot of discussion
9 in your papers, Tim, about your obligations to
10 [REDACTED] and potential obligations to other shippers,
11 but apparently they aren't your customers yet. I am
12 unclear. You mentioned the [REDACTED] perhaps
13 seeking service, but I don't know if they have yet,
14 or not. It's all pretty generally stated.

15 What I can't tell is how many trains will
16 be available to your other customers if NTEC gets 29
17 per month? You just say, you know, you won't be able
18 to give us how many trains, but I don't know what the
19 numbers are. So I'd like you to be more specific on
20 if you think this is an issue, which is a defense to
21 the request, I need to have more detail on it.

22 By the way on the crew issue, and you know

1 the Board doesn't approach this hearing completely
2 ignorant of what's been happening about labor
3 shortages in the Class 1 area, including BN because
4 we've been getting your reports under our 770 docket.
5 But for this case I would request more granularity on
6 the hiring effort, you know, the crew shortages have
7 been around for a long time.

8 What efforts has BN made to eliminate that
9 crew shortage so it can meet its common carrier
10 obligations, whatever you think those obligations
11 are? Just to say it's a tight labor market doesn't
12 tell me how to balance the decision. In this case I
13 would like more detail on that. So on the common
14 carrier question I have to say, Tim, that I also
15 found your brief a little bit disingenuous on that
16 score.

17 At page 31 you say -- let me get it in
18 front of me so I don't misstate it. At page 31, Tim,
19 you quote from 1-1101(a) that, "A rail carrier shall
20 not be found to have violated this section because it
21 fulfills its reasonable commitments under contracts
22 authorized under 10709." But then you don't quote the

1 very next sentence, which says "commitments which
2 deprive a carrier of its ability to respond to
3 reasonable requests for common carrier service are
4 not reasonable."

5 I think Board members, or at least I know
6 what the full paragraph says. It's not helpful to
7 the Board and to the legal argument to quote half of
8 a statute. But then more problematic for me is that
9 all you say is that commitments to [REDACTED] have existed
10 for nearly a decade. I don't know what those
11 commitments are. And then you just say those
12 commitments are clearly reasonable.

13 That's not enough for me to decide whether
14 a commitment, which deprived you of your ability to
15 serve NTEC is or is not reasonable. So if you want
16 me, anyway, as I said, on all these issues I'm
17 speaking only for myself, but if you want me to
18 consider that somehow your commitments to [REDACTED]
19 excuse you from providing the service to NTEC, which
20 is what the argument seems to be.

21 I need -- and this is an area where I want
22 to invite you to give me more legal argument about

1 what the sentence means that you left out of your
2 quote, and what facts do you have for us to determine
3 that your commitment you've made to [REDACTED] and perhaps
4 others legitimizes your inability to provide NTEC at
5 the level that it is now requesting.

6 In that same vein I'd like you to be
7 specific on whether it's [REDACTED] that is getting the
8 trains. Part of those 70 trains a month that we're
9 allowing 29 to go to NTEC, or 28 or 25, at some
10 prior time, and now more of those are going to
11 [REDACTED]. Is that what you're talking about? Or are
12 they going someplace else?

13 You could imagine in my mind, Tim, from
14 everything that I have observed -- I think that the
15 Board has observed the reporting on crews, that I
16 have a high concern in this case that the real
17 problem here is crew shortages, and not your
18 commitments to everybody else.

19 I am having a hard time figuring out how
20 you provided all this service to NTEC in 2021, and
21 now since sometime in mid-2022 and going forward you
22 don't have enough crews, or you have contracts that

1 are ten years old that prevent you from doing it.
2 There's something here that is not jiving in my mind,
3 so I want to invite you to clear that up.

4 And then I will conclude with this
5 question for the moment. NTEC attaches your -- I
6 would call it a tariff. I think it's referred to as
7 a circular under which you're now moving their
8 traffic. This is their Exhibit MDB-3. Your common
9 carrier pricing authority dated January 1, 2023, and
10 it expired March 31, 2023.

11 I assume it's been replaced, but I don't
12 know that. Not might, I think both sides need to
13 enlighten us on whether this same tariff continues in
14 effect, or has been reissued. But they cite, and it
15 has caught my attention, your disclaimer at the very
16 end of the tariff which says the provision of
17 services, and acceptance of any tenders, and then
18 I'll skip to the key language here is subject to
19 BNSF's sole discretion.

20 There's a suggestion in the papers, and I
21 don't have the statements in front of me, but BN has
22 taken the position that whether it moves any trains

1 at all is subject to its discretion, so I would like
2 to know, and I assume that NTEC may want to weigh in
3 on this too, I'm sure they will. But I want to know
4 BN's position on whether under the common carrier
5 doctrine, and under this tariff BN has an obligation
6 to move any of NTEC's trains.

7 If you have sole discretion, whether to
8 accept any tenders, it would imply that you're free
9 to say you're not going to move any. I don't know
10 that that's your position. I don't want to prejudge
11 it. I want you to address it. And I'd like you to
12 address that if you don't, if you aren't free to move
13 no trains, how many trains are you obligated to move
14 under the common carrier obligation given the facts
15 here.

16 And if you have a number I want you to
17 explain how you got there. You know, this issue has
18 puzzled the Board for decades. There's some case law
19 on the common carrier obligation. I personally, and
20 I'm only speaking for myself, have never seen a
21 common carrier tariff with a disclaimer that says
22 whether we do anything is at our sole discretion, so

1 I'd invite you to comment or enlighten the Board on
2 why that language is even in there, what it means,
3 and how it affects your -- how it relates to your
4 common carrier obligation.

5 I think for the moment that is -- I've
6 taken up enough time. I would say before the others,
7 if either counsel is unclear on any of the things I
8 want you to address maybe we should clear it up now,
9 so you don't lose it, and I don't forget what I was
10 talking about.

11 But if not, we'll move on to the other
12 Board members. Dan? Tim?

13 MR. STAFFORD: Dan if you want to go
14 first.

15 MR. JAFFE: No. Chairman Oberman I think
16 I'd rather take copious notes. I'm sure my
17 co-counsel will have too. It does sound as though we
18 have a mix of a couple of legal points that you want
19 clarification on.

20 CHAIRMAN OBERMAN: Yeah.

21 MR. JAFFE: Discrete points, so we'll try
22 to provide you with discrete answers with sufficient

1 information, or more details that you ask for. And
2 it does sound like we'll need a verified statement to
3 provide you the additional details. I'm pretty
4 hopeful that we have most, or all of the old data
5 that you are looking for, so we'll try to get that to
6 you as soon as we can.

7 CHAIRMAN OBERMAN: All right. By the way
8 on the clarity issue since there is a court reporter
9 here, I'm sure either of you could get overnight, or
10 you know, preliminary rough transcripts if you say
11 what the hell did he say.

12 MR. JAFFE: Right. To have it in front of
13 us. I appreciate that Mr. Chairman, thank you.

14 CHAIRMAN OBERMAN: Yeah. Tim?

15 MR. STRAFFORD: Yeah. I appreciate that
16 as well, and I'd appreciate all of the very good and
17 helpful feedback. I guess my question is trying to
18 reconcile where we started, where we talked about the
19 hearing, or the oral argument being about the request
20 for emergency service, and preliminary a lot of these
21 detailed questions about common carrier obligations.

22 We do understand the proceeding. We

1 certainly intend to address a lot of those points in
2 that proceeding, so I just wanted to get your feeling
3 on what's appropriate now, and what's appropriate in
4 that proceeding.

5 CHAIRMAN OBERMAN: Well it's an
6 appropriate question, but remember at least -- well I
7 think even for 11123, I don't think we can consider a
8 request for emergency service in a vacuum without
9 having some legal basis of why the carrier is
10 required to provide the service.

11 But clearly, under the preliminary
12 injunction prong, probability of success is a standard
13 requirement, and the success would be whether you've
14 got -- in other words, if you haven't violated the
15 common carrier obligation, I'm not sure they have a
16 cause of action for any wrong under that theory.

17 So, we are required to measure the
18 probability of success, and I will tell you that, and
19 you can disabuse me of this, that the clearer -- that
20 the probability of success is a sliding scale. It's
21 not just well if you get to 51 percent then the
22 Plaintiff wins their injunction. It's how strong is

1 that probability?

2 The more certain the probability of
3 success is, I think the more likely the Plaintiff
4 will be entitled to preliminary relief, even weighing
5 all the other factors. I'm speaking for myself now,
6 and the Board hasn't entertained such a concept, and
7 you can both feel free to argue that point with us.

8 So the issue of the violation of the
9 common carrier obligation, or the alleged violation,
10 I'm sorry, and what the obligation requires must be
11 considered by us. Even if we found irreparable harm,
12 if there's no likelihood of proving a common carrier
13 violation, then that will relate to whether relief is
14 warranted. So you've got to deal with it.

15 MR. STRAFFORD: Sure. And then of course
16 if there's no irreparable harm then to the problems
17 on the --

18 CHAIRMAN OBERMAN: There is, but I
19 don't --

20 MR. STRAFFORD: I freely take your point
21 that it's before the Board in some fashion now.

22 CHAIRMAN OBERMAN: I don't want to have a

1 hearing, have the Board conclude that there's
2 irreparable harm, but we have no idea if the common
3 carrier obligation was violated. We want to dispose
4 of all of the issues. Yes. We may decide the case
5 on one way or the other, but I can't tell you that
6 now until we've heard everything both sides have to
7 say.

8 So it's essential that you deal with it,
9 and I am sure that the lawyers who tried cases before
10 know that in preliminary injunction hearings it is
11 not uncommon for basically the full case to end up
12 getting aired, and either the court resolving it, or
13 the parties resolving it themselves. So it is
14 useful, and I think essential for us to at least
15 explore these issues.

16 Now that's not to say that if we do not
17 grant preliminary relief that you'll be precluded
18 from more fully litigating any of the other issues
19 like the common carrier obligation, but you've got
20 to address it to some degree now, at least to the
21 extent that I've phrased it, and as fully as you want
22 to. I'm not going to cut you off on that.

1 MR. STRAFFORD: Sure. Appreciate it.

2 CHAIRMAN OBERMAN: Okay. That for the
3 moment were all the questions I have. Let me -- oh,
4 Ellen is telling me that I don't know what this is.
5 There's something called a Zoom transcript that you
6 ought to be able to download at the end of this
7 hearing, so you may be able to get at least some
8 electronic version almost instantly. She's quite
9 confident of that.

10 Before I call on the other board members,
11 does anybody feel the need for a five minute break?
12 If not, we'll keep going. Just tell me. Okay. I
13 see that Michelle, you have your hand up Michelle,
14 and then Karen, and I assume the other Board members
15 want to talk too. Go ahead Michelle.

16 BOARD MEMBER SCHULTZ: Thanks Marty. And
17 just kind of raising a question for your thoughts.
18 Do you think there might be value in actually issuing
19 the questions that you just presented in writing to
20 the party for purposes of clarity?

21 And I know you mentioned the transcript,
22 but I'm wondering if there might be value to have

1 those questions set forth in writing?

2 CHAIRMAN OBERMAN: Well my answer is there
3 would be value to it if there was time to get it
4 done. I'd rather the parties rely on the transcript,
5 and all of us to rely on it because we are all
6 traveling. We're going to be out of town next week.
7 I'm traveling today. The notion of drafting those in
8 a more precise way than I articulated it here is a
9 good one, but I don't think there's time, so I think
10 we're just going to have to rely on the transcript at
11 this point.

12 And that's why I wanted Tim and Dan to
13 tell me if they had a lack of clarity there, and if
14 they still think, you know, as this session goes on
15 this morning, that they think of something they want
16 clarified they can tell us.

17 BOARD MEMBER SCHULTZ: Thank you.

18 CHAIRMAN OBERMAN: Okay. Karen?

19 BOARD MEMBER HEDLUND: Thank you. I have
20 one question for Dan, and then one question for Tim.
21 Dan, if you have anything other to present on your
22 allegation that BNSF has discriminated against NTEC,

1 other than the one statistic that I think you had in
2 your papers about the total number of tons shipped,
3 that would be -- I think that would be helpful to me.

4 I'm concerned about deliberate
5 discrimination. And then Tim, my question for you is
6 with respect to the contract that was under
7 negotiation for 2023, you state that you had asked
8 for a reciprocal release of claims, which would
9 include of course the 10 million dollar claim by NTEC
10 against BNSF, but that would imply there was also a
11 claim by BNSF against NTEC.

12 What confuses me is that under the prior
13 contracts they had volume commitments on both sides,
14 and there were claims by BNSF against NTEC or its
15 predecessor for failure to meet their minimum volume
16 commitments, but those were settled through 2020.
17 That's what your papers say, or I understood them to
18 say.

19 But then for 21 and 22, the contracts were
20 amended, so there were no volume commitments. So
21 what claims that were not settled through 2020 did
22 BNSF have against NTEC? And that's all I have.

1 CHAIRMAN OBERMAN: Do Tim or Dan have any
2 questions about Karen's inquiry?

3 MR. JAFFE: I do not, Chairman Oberman.
4 This is Dan Jaffe.

5 CHAIRMAN OBERMAN: Okay. Other Board
6 members?

7 MR. LAROCCA: May I -- I'm sorry, this is
8 Tony LaRocca. Very quickly on that question there
9 are some confidentiality restrictions in various
10 agreements, settlement agreements between us and
11 NTEC, and in the discussions relating to
12 renegotiation of contracts. And we would ask if NTEC
13 would agree that we can discuss the details that
14 would otherwise be subject to the confidentiality
15 provisions in those arrangements, subject of course,
16 to the protective order.

17 But we would need NTEC's permission to be
18 fully able to discuss the detail there, and we would
19 just ask if NTEC would agree to allow that.

20 CHAIRMAN OBERMAN: Dan, if you feel you
21 can answer that today, fine. Otherwise I would
22 suggest Tony, that the parties confer after this

1 session to see if you could work it out.

2 MR. LAROCCA: That would be fine.

3 CHAIRMAN OBERMAN: Yeah.

4 MR. JAFFE: Yeah. That's fine with me
5 too, especially since I'm not exactly sure what the
6 scope of what Tony is trying to establish here, so it
7 would be helpful if we talked offline.

8 CHAIRMAN OBERMAN: I do want to say I'd
9 like echo, it wasn't on my list of things to ask you
10 about today, but I would echo Karen's inquiry in this
11 area because the allegation that NTEC has made about
12 the way BN has handled the contract negotiations was
13 in fact retaliatory.

14 BN said well, it was a mutual release, and
15 of course I can't evaluate if it was really mutual.
16 I don't know what BN's plans were, how strong they
17 were. I assume that was what was Karen's interest.
18 It caught mine, so I think enlightening us on that
19 would be helpful if the two of you feel you can do it
20 in a way that preserves your confidentiality under
21 the protective order.

22 Get together. If you can do it, supply

1 that information great. If you can't supply it let
2 us know that too, so we'll at least know what kind of
3 record we're going to have. Other Board members?

4 BOARD MEMBER PRIMUS: I'm good Marty.

5 CHAIRMAN OBERMAN: All right. Patrick?

6 BOARD MEMBER FUCHS: Same.

7 CHAIRMAN OBERMAN: Michelle?

8 BOARD MEMBER SCHULTZ: I'm good Marty,
9 thanks.

10 CHAIRMAN OBERMAN: Well I guess I know my
11 Board members pretty well. Well I'm glad we had
12 this. Let me -- does counsel want to say anything
13 further before we end?

14 MR. JAFFE: I have nothing to add Mr.
15 Chairman.

16 CHAIRMAN OBERMAN: All right Dan, thank
17 you. Tim?

18 MR. STAFFORD: Nothing from me, other than
19 appreciation for your time.

20 CHAIRMAN OBERMAN: That's okay. I'm very
21 envious of you being able to practice law outside on
22 your patio. I will just close with this. As

1 everybody knows, this Board encourages settlement.

2 And I think this case has raised serious enough
3 issues that the outcome cannot be predicted by
4 anybody, including me and this Board.

5 And I believe the area of contested,
6 litigated matters, it's better to put aside
7 uncertainty and risk. So as soon as you parties can
8 get together and settle the case, the Board would be
9 delighted, so I, as always, will encourage you to try
10 to work this out by next Friday, by May 10th, after
11 May 10th, whenever you can do it.

12 But it would always be better for
13 railroads and shippers to work out the logistics of
14 providing service, and helping commerce, than for the
15 Board to tell you how to do it. So I will just leave
16 it at that. Anything else staff? No. Okay. Thank
17 you all for participating, we'll look for your
18 filings, and remember four o'clock get them in,
19 otherwise I won't get them for the weekend next
20 Friday, and we will see you all in person on May
21 10th, 9:30.

22 MR. JAFFE: Thank you Mr. Chairman.

1 CHAIRMAN OBERMAN: Thank you all.
2 (Whereupon the argument conference
3 adjourned at 11:02 a.m.)
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CERTIFICATE OF COURT REPORTER

I, LARRY FLOWERS, Court Reporter, do hereby certify that that the testimony contained herein is a true record of the testimony given by said witness, and I further certify that I am neither attorney nor counsel for, related to, or employed by any of the parties to the action in which this statment is taken; and, further, that I am not a relative or an employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

LARRY FLOWERS

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