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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42178

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

PETITION FOR PARTIAL STAY OF PRELIMINARY INJUNCTION

Pursuant to 49 C.F.R. § 1115.5, BNSF Railway Company ("BNSF") respectfully petitions for a partial stay pending judicial review of the preliminary injunction entered by the Surface Transportation Board ("Board" or "STB") in this matter on June 23, 2023. *Navajo Transitional Energy Co., LLC—Ex Parte Pet. for Emergency Service Order*, NOR 42178 (STB served June 23, 2023) ("*Decision*").

I. Introduction and Background

On April 14, 2023, the Navajo Transitional Energy Company, LLC ("NTEC") filed an *ex parte* application seeking an emergency service order under 49 U.S.C. § 11123 and a preliminary injunction under 49 U.S.C. § 1321(b)(4). NTEC sought an order directing BNSF to provide transportation of approximately 29 trains per month from NTEC's Spring Creek coal mine to Westshore Terminals. NTEC filed a common-carrier complaint and request for declaratory order on the same day, and those proceedings are ongoing in a separate docket. *See* Docket No. NOR 42179.

On June 23, 2023, the Board issued a preliminary injunction ordering BNSF "to transport a minimum of 4.2 million tons of coal from Spring Creek for service

destined to Westshore in 2023[,] . . . reasonably distributed through the remainder of the year, i.e., approximately 23 trains per month." *Decision* at 13. The Board also ordered BNSF "to transport an additional one million tons of coal"—"which would result in a total of approximately 29 trains per month to NTEC on average—to the extent that additional train sets and crews . . . become available." *Id.* at 14-15. The Board imposed certain reporting requirements as well. *See id.* at 15. The Board majority expressed its belief that NTEC had satisfied all four of the preliminary injunction factors. *Id.* at 4.

BNSF disagrees with the entirety of the *Decision* and will seek judicial review. *See, e.g.*, *id.* at 38 (Schultz, dissenting) ("[T]he Decision fails to 'articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). But BNSF has stated that it is likely to be able to carry 4.2 million tons of coal for NTEC in 2023 (although a Montana Rail Link bridge outage and slot capacity reductions at Westshore have temporarily lengthened cycle times and reduced BNSF's capacity). And BNSF understands its obligation to carry that volume to be contingent on NTEC's decision to meet that target by reasonably distributing the volumes it tenders over the remainder of the year. BNSF therefore does not seek a stay of that portion of the *Decision*.

The Board should, however, stay the contingent portion of the preliminary injunction—that is, partially stay the injunction to the extent it requires BNSF to transport an additional one million tons. The justification for that extraordinary

order is exceptionally weak, and BNSF's obligations under that order are exceptionally unclear. BNSF is likely to succeed on the merits of its petition in the court of appeals; it will be irreparably harmed in the absence of a stay pending its petition for review; NTEC will not be harmed by such a stay; and a stay would serve the public interest. *See, e.g.*, *Burlington N. Inc. & Burlington N. R.R. Co.—Control & Merger—Santa Fe Pac. Corp. & the Atchison, Topeka & Santa Fe Ry. Co.*, FD 32549, 1995 WL 559653, at *2 (ICC served Sept. 21, 1995) (invoking stay factors from *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977)). Accordingly, pursuant to 49 C.F.R. § 1115.5, the Board should stay the contingent portion of the injunction pending resolution of BNSF's forthcoming appeal.[1]

II. A Stay Should Issue Because All Four Stay Factors Are Met

A. BNSF is likely to succeed on the merits of its petition for review, especially as to the contingent portion of the preliminary injunction

BNSF recognizes that the Board majority has already taken the view that NTEC was entitled to preliminary injunctive relief on the merits. But Members Fuchs and Schultz disagreed, and their dissents cogently explain why the Board majority erred and why BNSF is likely to obtain appellate relief.

[1] Because the Board's preliminary injunction was effective immediately, this petition is being "filed prior to the institution of court action and as close to the service date as practicable," 49 C.F.R. § 1115.5(b), with due regard for the practical uncertainty created by the fact that either party could have first petitioned for reconsideration (which under 49 C.F.R. § 1115.3(e) would have been due July 13, 2023, two business days before this filing).

1. On the merits of the common-carrier issue, the Board majority's analysis was erroneous in several independent respects. For example, BNSF's common-carrier obligation under 49 U.S.C. § 11101(a) was to "provide . . . transportation or service on reasonable request." But it was not reasonable for NTEC to expect BNSF to unilaterally commit to providing long-term high-volume service at virtually unprecedented levels, especially without an obligation from NTEC to actually tender any coal for shipment.

The *Decision* also erred in failing to assess the reasonableness of BNSF's response to NTEC's request. Even if NTEC's request had been "reasonable," BNSF's common-carrier obligation is not a mandate to provide all the service a shipper demands; BNSF's obligation is to provide "adequate" service under the circumstances. *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005); *see id.* at 92 n.10. BNSF had, and articulated in this proceeding, well-grounded reasons for not providing the extraordinary service level NTEC demanded. Rather than assessing BNSF's reasonable explanations, the *Decision* focused instead on BNSF's purported "capacity." But as Member Fuchs pointed out, the definition of a common carrier obligation by reference to a railroad's "capacity" is "vague and potentially harmful." *Decision* at 26 (Fuchs, dissenting). "[R]ail capacity for a particular customer is a dynamic concept involving not just resources, like crew or trainsets, but—in this network industry—other shippers' demand and external factors." *Id.* The Board majority ignored these established factors.

These errors are especially acute with respect to the contingent portion of the preliminary injunction. Whatever the reasonableness of a request and service at the 4.2-million-ton level, a request far above that level is plainly unreasonable compared to historical service levels, and the Board majority itself acknowledges (even under its own misplaced and misdefined "capacity" test) that BNSF lacks capacity to serve above that level.

2. The Board majority's finding that NTEC would suffer irreparable harm absent a stay was also in error. Irreparable harm is a statutory prerequisite, 49 U.S.C. § 1321(b)(4), and to justify a preliminary injunction, it "must be both certain and great; it must be actual and not theoretical." *Decision* at 18 (Fuchs, dissenting) (quoting *Wis. Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985)).

NTEC's claimed harms, even on the Board majority's own telling, fail on each of these metrics. As Members Fuchs and Schultz both pointed out, the Board majority's decision "does not show that any harm is certain, imminent, or great." *Decision* at 23 (Fuchs, dissenting); *see id.* at 34-36 (Schultz, dissenting) (noting that NTEC's own witness admitted that its reputational harms were "highly speculative"). NTEC offered virtually no evidence to back up its claims of irreparable harm. *See id.* at 21-22 (Fuchs, dissenting); *see id.* at 35-36 (Schultz, dissenting). Nor did NTEC show that its alleged harms were incalculable. *See id.* at 21-25 (Fuchs, dissenting) (explaining why all the harms on which the majority relied—lost sales, reputational damage, and resulting effects on the Navajo

Nation—are fundamentally economic); *id.* at 35 (Schultz, dissenting) (observing that much of the harm on which the majority relied is "easily quantifiable").

The Board majority did not even attempt to assess irreparable harm with respect to the contingent portion of the injunction. The *Decision* lacks any discussion of how NTEC would suffer irreparable harm without the additional service "to the extent that additional train sets and crews . . . become available." *Id.* at 14-15.

3. The Board majority's analysis of the balance of equities and the public interest is also unlikely to withstand judicial review. The Board majority failed entirely to account for the interests of other shippers in the lane, the larger community of shippers that relies on BNSF, and BNSF's interest in efficiently managing its network. As Member Fuchs points out, NTEC is not unique: All of the shippers of coal to Westshore have in the recent past wanted to ship greater volumes than they currently are. *See id.* at 31 (Fuchs, dissenting). Compelling BNSF to allocate any additional crews and train sets to NTEC alone unaccountably disadvantages specific coal shippers—not to mention shippers of other commodities. *Id.* at 31, 32 ("[T]hese other shippers also have unmet requests. . . . And no doubt other shippers outside of the coal industry would like to see newly available crew allocated to their specific needs."). The contingent portion of the injunction thus runs contrary to settled Board practice of trying "to act in a manner that will not unfairly favor one shipper or group of shippers over another." *Id.* at 20 (quoting

DeBruce Grain v. Union Pac. R.R., NOR 42023, slip op. at 4 (STB served Dec. 22, 1997)).

B. BNSF is likely to suffer irreparable harm without a stay

BNSF's affirmative obligations under the contingent portion of the injunction are unclear, but anything they demand puts BNSF at risk of taking actions that will incur costs or liabilities that it cannot recoup if the injunction is overturned. For example, if train sets were available in the market, acquiring and positioning them would take time and resources from BNSF, but the injunction imposes no obligations on NTEC—not to utilize those train sets, not to pay liquidated damages for failing to meet a minimum-volume commitment, or indeed to do anything. And yet BNSF has been given no avenue by which to recoup its expenditures if NTEC does not put those train sets to use.[2] And if the contingent portion of the preliminary injunction requires BNSF to cut service to other shippers, BNSF may have to breach its contracts, and it may be subject to other shippers' common-carrier complaints. Here, too, the lack of any security or remedy means that BNSF risks being out-of-pocket for complying with the preliminary injunction but bereft of any path to being made whole if that injunction is overturned.

[2] To be clear, BNSF does not believe that the contingent portion of the injunction requires BNSF itself to acquire additional train sets. Any such requirement would arise not from the common carrier obligation but from the Board's statutory power to "require a rail carrier to provide facilities and equipment that are reasonably necessary to furnish safe and adequate car service." 49 U.S.C. § 11121(a)(1). Such an order demands comprehensive operational and economic findings, *see id.*, which NTEC did not brief and the Board majority's *Decision* never mentions.

The Board majority accounted for none of this. The *Decision* explained the contingent portion of the injunction as being rooted in "the benefit of the doubt" accorded to BNSF, *Decision* at 14, and reasoned that, based on BNSF's statements, BNSF could be expected to have the capacity to move 1 million additional tons, *see, e.g.*, *id.* at 6-7, 7 nn.9-10. But Member Fuchs's dissent correctly understood the record of BNSF's statements as *at most* establishing that BNSF believed at the time it could move 4.2 million tons. *Id.* at 26-29. And Member Schultz pointed out that BNSF's arguments about constraints on its capacity were "valid." *Id.* at 37.

C. Staying the contingent portion of the preliminary injunction will not irreparably harm NTEC

BNSF recognizes that the Board majority stated that, without the full injunction, NTEC would face irreparable harm in the form of loss of business, reputational damage, and harm to the Navajo Nation. *See id.* at 10. But the dissents strongly disagreed: Members Fuchs and Schultz explained why NTEC would not suffer *any* irreparable harm without injunctive relief. *Id.* at 21-25 (Fuchs, dissenting); *id.* at 34-36 (Schultz, dissenting); *see also* Part II.A, *supra.* For the reasons articulated in the dissents and above, there is no irreparable harm threatened to NTEC—especially not from the contingent portion of the preliminary injunction—so a stay of that portion is appropriate. Indeed, the very fact that the additional one million tons is *contingent* suggests it is not at all *necessary* to avoid irreparable harm.

Moreover, the likelihood of irreparable harm to NTEC grows more remote by the day, as prices in the export-coal market decline. (*See* BNSF Reply, V.S. Lawler

8, Apr. 19, 2023). As prices decline, NTEC may not even want to sell on the spot market the 4.2 million tons contemplated by the Board's decision, much less the additional tonnage contemplated by the contingent portion of the injunction.

D. The public interest favors a stay

BNSF recognizes that a majority of the Board has already stated that the public interest supported injunctive relief. *See Decision* at 12-13. But, as Member Fuchs cogently explained, that is not the case: The Board's injunction "undermines commercial collaboration between rail carriers and shippers," *id.* at 32, and it warps the incentives to negotiate contracts, *id.* at 33, both of which harm the public and run counter to Congress's direction to the Board. The adverse effect on the public interest supports a stay pending judicial review.

Other public-interest considerations further counsel strongly in favor of a stay. *First*, absent a stay, BNSF may be forced to divert resources from serving other shippers. Upsetting other shippers' expectations would negatively affect not only those shippers, but also others in the supply chain, and, ultimately, consumers of all the goods that travel by railroad.

Second, and more broadly, modern federal railroad law and policy rest on a foundational recognition that the railroad—not its regulator—will be the most efficient decisionmaker with respect to allocation of its resources because it has the best information about its network's capabilities. *See, e.g.*, *id.* at 20 (Fuchs, dissenting) (noting that "[r]ailroads must maintain the flexibility to respond to changes in demand and market conditions" (citing *Major Rail Consol. Procs.*, 5

S.T.B. 539, 578 (2001)); *id.* ("[T]he Board tries to avoid micromanaging a carrier's operational decisions." (quoting *Montana v. BNSF Ry.*, NOR 42124, slip op. at 7 (STB served Apr. 26, 2013)). The flexible and efficient use of the rail network is, indeed, expressly declared as sound public policy. *See* 49 U.S.C. § 10101(2), (3), (9) (articulating federal policy "to promote a safe and efficient rail transportation system," to encourage "efficient management of railroads," and "to minimize the need for Federal regulatory control over the rail transportation system"). The contingent portion of the preliminary injunction disserves those principles, and staying it pending judicial review would promote them.

III. Conclusion

For the foregoing reasons, the Board should stay the contingent portion of its June 23, 2023 preliminary injunction pending judicial review.

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *Petition for Partial Stay of Preliminary Injunction* be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Onika K. Williams

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