

NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC,

V.

Defendant.

Docket No. NOR 42178

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Pursuant to 49 C.F.R. § 1115.5, Navajo Transitional Energy Company, LLC (“NTEC”) hereby opposes BNSF’s July 17, 2023, Petition for Partial Stay pending judicial review (“Petition”).

BNSF’s threatened appeal of the Board’s June 23 preliminary-injunction decision (“Decision”), which the Board issued after holding a nearly seven (7)-hour hearing and considering multiple rounds of evidence from BNSF and NTEC, is unlikely to succeed on the merits and fails to satisfy governing stay criteria. BNSF’s Petition amounts to little more than a time-barred and unsupported effort to seek reconsideration (or a thinly-veiled effort to satisfy a required procedural step under Fed. R. App. Proc. 18 before seeking an equally unmerited stay from a Court of Appeals). Ultimately, BNSF presents no evidence sufficient to warrant relief from the one million-ton, conditional service requirement in the Decision.

Indeed, the undisputed record in the case easily could have justified an unconditioned Board order requiring BNSF to move 5.2 million tons (or more) of export coal in 2023. The Board’s decision to make the final one million-ton portion of its injunction requirement conditional – based upon whether crews and railcars actually prove to be available – represented an even-handed concession to BNSF and does not justify BNSF’s request for a stay.¹

¹ The Board issued its preliminary injunction without addressing the substantial record evidence regarding BNSF’s discrimination and retaliation against NTEC. BNSF’s May 5 Supplemental Reply, Lawler V.S. at 16-17 (and chart set forth therein); Transcript of May 10 Hearing (“Tr.”) at 176:18-177:13, 261:7-264:6, 272:13-275:8, 277:18-282:3. This evidence of discrimination and/or retaliation constituted additional support for requiring BNSF to provide service at the full 29-train-per month level.

BACKGROUND AND SUMMARY

In December 2022, BNSF offered – in writing – to transport up to 6.0 million tons of export coal per year for NTEC in 2023 and 2024. BNSF unequivocally and repeatedly conceded at the hearing that it would not have offered to provide such service if it had lacked the capacity to do so.² BNSF further conceded at the May 10 hearing that its capacity had not changed in any meaningful way since December 2022. Decision at 6. In addition, BNSF’s Mr. Garland repudiated his Verified Statement when questioned about capacity, emphasizing that BNSF was in a much better position in terms of service than it had been in 2022 and admitting a lack of knowledge (when preparing his Verified Statement) as to the specific NTEC service level that would be under consideration.³

Nevertheless, in response to: (i) BNSF’s admissions of self-inflicted, long-term crew shortages; and (ii) BNSF’s highly suspect claim regarding the supposed unavailability of rotary-dump railcars, the Board took the measured, deferential step of carving out a one million-ton increment of the overall BNSF service obligation to apply only “to the extent that additional train sets and crews, as described above, become available.” Decision at 14-15.⁴ Rather than recognizing the Board’s flexibility in

² Tr. 196:9-11 (counsel stating “absolutely fair to say that we [BNSF] would not enter into a contract we had not believed we could satisfy the terms of”); Tr. at 202:3-4 (“MS. LAWLER: . . . [W]e wouldn’t have signed a contract that we didn’t think we could fulfill.”); Decision at 6 (identifying the 6.0-million-ton annual maximum volume in BNSF’s 2023 contract offer).

³ Tr. at 214:21-216:15 (colloquy between Chairman Oberman and BNSF operating witness Mr. Garland wherein Mr. Garland confirmed that “*So, I would say one train every five days is not going to tank our system*”) (emphasis added).

⁴ BNSF itself advised the Board that, during the balance of 2023, its capacity to provide

granting this concession, BNSF characterizes the Board action as “exceptionally weak” and “exceptionally unclear.” BNSF’s Petition ignores that the Board has broad authority to craft solutions to problems before it and acted reasonably in relying upon the undisputed record here.

Since the Board’s Decision, BNSF’s service levels have declined. Other than that, no other material facts have changed in this matter, and BNSF presents no evidence that should prompt the Board to reconsider or stay any portion of its Decision or that an appeal has any likelihood of succeeding on the merits.

ARGUMENT

A. BNSF is Unlikely to Succeed on the Merits of its Petition for Review

A Court of Appeals will only “set aside a Board decision if it is ‘arbitrary, capricious, an abuse of discretion, ... otherwise unlawful, or ... unsupported by substantial evidence.’” *PPL Montana, LLC v. S.T.B.*, 437 F.3d 1240, 1244 (D.C. Cir. 2006) (“*PPL Montana*”) (citing 5 U.S.C. § 706(2)(A), (E) and *Burlington N. R.R. v. Surface Transp. Bd.*, 114 F.3d 206, 210 (D.C. Cir.1997)). In determining “complex matters” delegated to the Board’s particular expertise, such as the metes and bounds of the common carrier obligation, “the Board is at the ‘zenith of its powers,’” has “wide discretion in formulating appropriate solutions,” and is entitled to “particular deference”⁵ since the

service would increase relative to then-current levels. *See* Tr. 173:7-12 (“MR. WEISKITTEL: Volumes in July or in August, and then to Farah’s point, and as Mr. Garland put in his verified statement, we do think that for example, our crew issues will improve over the course of the end of the year, and so we think that those numbers will increase.”).

⁵ *Id.* at 1244-45.

“judicial license [is] at its nadir.”⁶ Thus, a Court of Appeals is “not empowered to substitute [its] judgment for that of the Board.” *PPL Montana*, 437 F.3d at 1245 (citing, *inter alia*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). BNSF’s Petition provides no rationale whatsoever for concluding that BNSF will meet or exceed the high hurdle required to compel a Court of Appeals to vacate or remand the Board’s preliminary injunction.

As for the stay request itself, in considering similar motions, the Board has flatly rejected the same approach that BNSF advances here (*i.e.*, rearguing the exact same points it argued only weeks ago):

Petitioners have not offered any information to support these claims that was not presented in their original petition for a declaratory order or their petition to reopen the August 2006 Decision. The Board has already considered and rejected these arguments in its previous decisions in this case. *It is not the purpose [of] the stay provision at 49 CFR 1115.5 to afford yet another bite at the apple.*

Tri-State Brick and Stone of New York, Inc., and Tri-State Transp., Inc. – Pet. for Decl. Order, FD 34824, at 3 (STB served Feb. 12, 2008) (“*Tri-State*”) (emphasis added).

1. The Absence of a Binding Shipper Commitment

BNSF brazenly argues that “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.*” Petition at 4 (emphasis added). Essentially, BNSF argues that there really is no common carrier obligation at all because it asserts that it should be excused

⁶ *Central & S. Motor Freight Tariff Ass’n v. U.S.*, 757 F.2d 301, 314 (D.C. Cir. 1985).

from providing common carrier service at any specific level, even if it has the capacity to do so, unless the shipper agrees to be bound by a contractual minimum volume commitment. The Board has already rejected this proposition. Decision at 4-7.

BNSF's reference to "virtually unprecedented" service levels is also a red herring. The phrase "*virtually* unprecedented" is synonymous, of course, with "*not* unprecedented." BNSF transported export coal for NTEC in 2021 at the same level that NTEC requested for 2023. *See, e.g.*, April 19, 2023 Verified Statement of Farah Lawler at 11-12.

2. BNSF's "Adequate"-Service Theory

BNSF next reiterates its rejected theory that it need not provide requested service, but instead, may excuse itself from providing anything beyond what it regards as "adequate" service. *See* Petition at 4 (citing footnote 10 of *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 n.10 (1st Cir. 2005)); *see also* BNSF May 5 Supp. Reply at 13-14 (presenting BNSF's "adequate"-service argument). The purpose of 49 C.F.R. § 1115.5 is not to give BNSF "yet another bite at the apple." *Tri-State* at 3. In any event, BNSF conceded the irrelevance of the supposed distinction between "adequate" service and "service on reasonable request" at the May 10 hearing, agreeing that: if a carrier has the capacity to provide a requested level of service – the carrier must do so. Tr. at 187:15-20.

BNSF's "adequate service" argument seeks to revive the claim that BNSF has "sole discretion" to manage its capacity and alone has the power to decide whether a request for common carrier service is reasonable. The Decision correctly rejected this

notion, and granting BNSF's stay request on this basis would effectively endorse BNSF's indefensible view that the Board must allow BNSF to regulate itself.

3. BNSF's Objection to the Board's Reliance on Capacity Evidence

BNSF objects to the Board's consideration of capacity when gauging the scope of BNSF's common carrier obligation. *See* Petition at 4. But as Chairman Oberman noted at the May 10 hearing, BNSF's evidentiary submissions endorsed the relevance of BNSF's available capacity to consideration of what is a reasonable common carrier request.⁷ BNSF now backtracks from that position, appearing to suggest that the subject of capacity is fair game for demonstrating that the common carrier obligation does not apply but is manifestly inappropriate for demonstrating that the common carrier obligation does apply. Once again, BNSF's inconsistent arguments do not justify the stay that it requests.

4. BNSF's Claim of a "Plainly Unreasonable" Request

BNSF claims that "[w]hatever the reasonableness of a request and service at the 4.2-million-ton level, a request *far above that* is *plainly unreasonable* compared to historical service levels" Petition at 5 (emphasis added). BNSF's statement is vague and inaccurate. By BNSF's own admission, one extra train trip every five days is

⁷ Tr. at 187:11-20 ("CHAIRMAN OBERMAN: *Well when I say capacity you talk about capacity in your papers. You say there's limited capacity. If there's no limits on your capacity, whether they come from crew, track, other shippers. At the level that's being asked for, then the common carrier obligations says well you have to provide at least that much service if you've got the capacity to handle it. Is that a fair understanding to your sense?* MR. STRAFFORD: *I think that's fair.*") (emphasis added); *see also* BNSF May 5 Supp. Reply at 15-17, 22-23; Lawler V.S. at 14-15, 17, 21; Garland V.S. at 3, 5-6, 8, 14-17, 19 (discussing capacity issues).

not “far above” the 4.2-million-ton level and would not “tank” the BNSF system. Moreover, Mr. Garland admitted that the “parade of horrors” that he had identified in his Verified Statement was based on an (incorrectly) assumed 40% increase in traffic over BNSF’s then-existing service level. Tr. at 214:21-216:15. BNSF also admitted in its Answer that, “[w]hile historical service levels provided to a particular shipper alone are not determinative of the common carrier obligation in the present, *they can be one relevant part of the inquiry and BNSF believes that is the case here.*” BNSF Answer to NTEC Complaint, NOR 42179, at 1 (May 4, 2023) (emphasis added). Accordingly, it is evident that the Board’s injunction requiring BNSF to transport up to 5.2 million tons of export coal was reasonable and proper.

5. BNSF Sets Up a False Distinction Regarding Irreparable Harm

BNSF attempts to set up a false distinction regarding the Board’s consideration of irreparable harm, claiming that the Board “did not even attempt to assess irreparable harm with respect to the contingent portion of the injunction.” Petition at 6. The Board addressed the subject of irreparable harm on pages 8-10 of its Decision. There was no need for the Board to split this discussion into two separate parts.

6. The Preliminary Injunction Will Not Harm Other Shippers

BNSF also argues incorrectly that the Board “failed entirely to account for the interests of other shippers in the lane.” Petition at 6. The Board expressly held that, “[g]iven its statements about currently available capacity,” BNSF’s various arguments – including the argument that “shippers are not entitled to particular service levels where that level would degrade service overall” – “do not appear particularly relevant.”

Decision at 7 n.9. The base-level amount and the additional, conditional amount of the Board’s preliminary injunction each fall within BNSF’s documented capacity level. Since BNSF has the capacity to serve NTEC, there will be no adverse impacts on other shippers. In its Petition, BNSF does not present any actual evidence that it will be unable to serve its other shippers while, at the same time, complying with the Board’s Decision.

B. BNSF Will Not Suffer Irreparable Harm Absent a Stay

BNSF constructs another straw man argument claiming that “anything” the conditional portion of the Decision demands “puts BNSF at risk of taking actions that will incur costs of liability that it cannot recoup if the injunction is overturned.” Petition at 7-8. Again, BNSF ignores the fact that, by its own admissions and on the basis of the commitments it offered to make to NTEC (plus BNSF’s silence in response to NTEC’s request for equivalent volumes of common carrier service), BNSF has sufficient capacity to serve NTEC *and* its other customers.⁸ BNSF’s present claim of anticipated harm to other shippers implicitly suggests that BNSF acted in bad faith when it made its December 2022 offers to NTEC.

⁸ BNSF also raises an argument in this portion of its Petition to the effect that it “does not believe that the contingent portion of the injunction requires BNSF itself to acquire additional train sets.” Petition at 7 n.2 (claiming that the Board would have been required to make findings under 49 U.S.C. § 11121(a)(1) in order to require such action). BNSF’s effort to disassociate its common carrier obligation from its obligation to maintain the instrumentalities needed to provide actual service is unavailing and would turn the Board’s authority to enforce § 11101(a) into an empty letter. BNSF’s form-over-substance argument also provides a stark reminder of BNSF’s willingness to attempt to frustrate any regulatory oversight regarding its service quality or its practices.

Moreover, BNSF's irreparable-harm assertion is particularly inappropriate where, as here, the Board has conditioned the separate one million-ton obligation on the additional train sets and crews *actually* becoming available. Decision at 14-15. Thus, far from causing irreparable harm to BNSF, the Board designed its preliminary injunction in a manner that only requires BNSF to comply with the injunction's conditional volume amount if BNSF, in fact, has the capacity available.

C. BNSF's Speculation Regarding the Export Market Counsels Against a Stay

BNSF also argues that staying the conditional portion of the Decision will not irreparably harm NTEC because prices in the export-coal market have declined. Petition at 8. Rather than justifying a stay, however, this movement in the export-coal market militates *against* a stay (and undermines BNSF's claim that it will suffer irreparable harm in the absence of a stay). As demand for export coal falls, BNSF is less likely to be called upon by its various export customers to transport the full measure of their previously anticipated volumes.

D. BNSF's Public Interest Argument Demonstrates the Need to Preserve the Status Quo Under the Preliminary Injunction

Finally, BNSF claims that the public interest favors a stay. Decision at 9. BNSF's interpretation of the term "public," however, appears to be limited in scope to BNSF itself (*i.e.*, that the Board refrain from meddling in a railroad's business). Under BNSF's view of the public interest standard, the public is best served by allowing BNSF to treat contract service standards as optional, to pick winners and losers in the marketplace, and to face no scrutiny whatsoever from the Board with respect to common carrier service.

The Board effectively and correctly has weighed the public interests at issue in this proceeding and once again should reject BNSF's suggestion that the public would be better served if the Board were to abandon the reasonable enforcement of BNSF's common carrier obligation by allowing BNSF to regulate itself.

CONCLUSION

For the reasons stated above, NTEC respectfully requests that the Board deny BNSF's Petition.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of July 2023, caused copies of the foregoing to be served on all parties of record.

/s/ Andrew B. Kolesar III
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