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September 29, 2023
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PUBLIC VERSION

September 29, 2023

VIA E-FILING

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

Re: **STB Docket NOR 42179, Navajo Transitional Energy Co., LLC v.
BNSF Railway Co.—BNSF Railway Company’s Motion for Partial
Dismissal**

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced proceeding is a PUBLIC version of BNSF Railway Company’s Motion for Partial Dismissal, with appropriate redactions that the Board can place in its docket. We are concurrently filing a CONFIDENTIAL version of the Motion to be filed under seal. On July 18, 2023, the Board approved the parties’ Joint Motion for an Amended Protective Order.

Respectfully submitted,

/s/ Peter W. Denton

Peter W. Denton
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Enclosures

cc: All parties of record

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BEFORE THE SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

BNSF RAILWAY COMPANY’S MOTION FOR PARTIAL DISMISSAL

Pursuant to 49 U.S.C. § 11701(b) and 49 C.F.R. § 1111.6, BNSF Railway Company (“BNSF”) respectfully petitions the Surface Transportation Board (“STB” or the “Board”) for the partial dismissal of claims in this proceeding related to the first quarter of 2023 (“1Q23”) because they are subject to binding arbitration.¹ As explained more fully below, the parties to this proceeding are already engaged in a related arbitration proceeding. Navajo Transitional Energy Company, LLC (“NTEC”) brought a breach of contract lawsuit in federal court regarding BNSF service to Westshore Terminals (“Westshore”) in Roberts Bank, British Columbia, Canada, and BNSF instituted an arbitration based on NTEC’s performance related to that same transportation. The federal district court has already concluded that the parties entered into a contract with a valid arbitration clause that requires an arbitral panel to determine the arbitrability of specific claims related to rail service

¹ BNSF’s requested partial dismissal would not prevent the Board from hearing the remainder of NTEC’s claims that originate after 1Q23.

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to Westshore that runs through 1Q23.² As a result, the Board must dismiss NTEC's claims related to 1Q23.

BACKGROUND

NTEC, owned by the Navajo Nation, is the third largest thermal coal producer in the United States. In 2019, NTEC purchased the assets of Cloud Peak Energy Logistics LLC ("Cloud Peak") out of bankruptcy. This purchase included, among other things, ownership of the Spring Creek mine in Big Horn County, Montana and assumption of Cloud Peak's obligations under multiple transportation contracts with BNSF. NTEC ships sub-bituminous coal on BNSF bound for both domestic and international destinations, with export coal moving from Spring Creek to Westshore for customers in Japan and Korea.³

Upon purchasing the mine, NTEC became party to two contracts with BNSF related to shipments of coal for export: (1) the January 9, 2018 Rail Transportation Agreement, BNSF-C-12828a (the "JERA Contract") and (2) the Coal Unit Train Commitment Base Contract, BNSF 90068-0099 (the "Base Contract").

The JERA Contract, attached as Exhibit 3, governed BNSF's transportation of coal bound for JERA Trading Pte Ltd ("JERA")⁴ in Japan. It ran from

² The magistrate judge's Findings and Recommendations, as well as the federal district judge's order adopting the Findings and Recommendations are attached as Exhibits 1 and 2.

³ NTEC's export coal is loaded onto BNSF trains at the Spring Creek mine and brought by rail to Westshore, where it is loaded onto a vessel and brought to NTEC's customers in Asia.

⁴ NTEC has referred to different JERA entities as its customers at different times. *See, e.g.*, Compl. ¶ 9 (referencing agreement governing coal sale to "a single

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November 1, 2019 through March 31, 2023. The JERA Contract required NTEC to meet an annual minimum volume requirement for the tons of coal it would ship on BNSF each contract year. The last annual term for the calculation of minimum volumes in the JERA Contract ran from April 1, 2022 through March 31, 2023. The JERA Contract includes a provision requiring arbitration for any unresolved disputes arising out of the contract:

{ [REDACTED]

JERA Contract § 30. NTEC's second agreement with BNSF acquired through the bankruptcy, the Base Contract, governed BNSF's transportation of NTEC's coal bound for customers other than JERA. { [REDACTED]

[REDACTED] }

Several times each year, both contracts required NTEC to nominate the tonnage of coal it expected to ship on BNSF. { [REDACTED]

[REDACTED]

[REDACTED] } Once the BNSF trains were loaded and en route to Westshore, NTEC sent BNSF a bill of lading for each train, which stated the governing contract for the shipment (the JERA Contract or

customer in Japan (i.e., JERA Trading Pte Ltd. or 'JERA')); Aug. 9, 2023 Resp. to Interrogatory Nos. 11-12 (referring to "JERA," "JERA Tokyo," and "JERA Singapore").

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the Base Contract), and noted the train numbers, cars loaded, destination, and other pertinent information for each train. When a BNSF train was transporting coal under the JERA contract, NTEC would specify the bill of lading number as “JERA-BNSF-C-” and the P.O. number as “BNSF-C-12828.” When a BNSF train was transporting coal under the Base Contract, those fields were left blank. *Navajo Transitional Energy Co., LLC v. BNSF Ry. Co.*, No. CV 22-146-BLG-SPW-KLD, 2023 WL 4826485, at *2 (D. Mont. July 24, 2023). NTEC alone made the decision whether to allocate coal shipments to the JERA Contract or to the Base Contract and informed BNSF of that decision after the trains were already en route to Westshore.

In 2019 and 2020, both the Base Contract and JERA Contract required that NTEC ship a minimum volume of coal. NTEC failed to meet these minimum volume requirements, resulting in liquidated damages owed to BNSF in each year. BNSF nonetheless chose to forego a significant portion of NTEC’s liquidated damages for each year as parts of larger commercial agreements. Because of NTEC’s difficulty meeting the minimum volume requirements in both 2019 and 2020, NTEC and BNSF agreed to move to a different form of Base Contract in 2021 that had no volume commitments on either party. The JERA Contract remained unchanged. In 2022, NTEC and BNSF again agreed to a Base Contract for the period January 1, 2022 through December 31, 2022 that did not include any minimum volume commitments for NTEC or BNSF. The JERA Contract again remained unchanged.

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In Summer 2022, the parties began negotiating a new Base Contract that would cover coal shipments for the year 2023. In November of 2022, while contract negotiations were ongoing, NTEC requested a common carrier rate for BNSF shipments beginning in 2023. In December, NTEC pulled out of contract negotiations with BNSF and filed suit in federal court in the District of Montana (“Federal Court”), alleging breach of the 2022 Base Contract and breach of the implied covenant of good faith and fair dealing. *See Navajo Transitional Energy Co., L.L.C. v. BNSF Ry. Co.*, No. 1:22-CV-00146 (D. Montana).

Common carrier shipments for NTEC began in January 2023 while the JERA Contract was still in effect. As before, NTEC remained solely responsible for designating whether particular coal shipments were under the JERA Contract or under the common carrier pricing authority. The JERA Contract expired at the end of first quarter of 2023, at which point NTEC’s compliance with the minimum volume commitment under that contract was determined.

On February 2, 2023, BNSF filed with the Federal Court a motion to compel arbitration, contending that NTEC’s claims under the 2022 Base Contract are related to and necessarily implicate the JERA Contract, and that disputes relating to the JERA Contract must be resolved through binding arbitration. BNSF noted that both contracts involved the same parties, transportation of the same commodity from the same origin to the same destination, and that adjudicating NTEC’s claims and factual allegations requires interpretation of the JERA Contract’s provisions, as well as discovery regarding the parties’ performance under

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both contracts. *Navajo Transitional Energy Co., LLC*, 2023 WL 4826485, at *4.

On April 14, 2023, two weeks after the JERA Contract expired, NTEC filed its Complaint and Petition for Declaratory Order in this proceeding.⁵ On June 20, 2023, BNSF filed a demand for arbitration with the American Arbitration Association (“AAA”) concerning NTEC’s breach of the JERA Contract by failing to meet the minimum volume commitment for the period April 1, 2022 through March 31, 2023. BNSF also demanded arbitration of NTEC’s claims under the 2022 Base Contract. On July 24, 2023, Magistrate Judge Kathleen L. DeSoto of the District of Montana determined that the JERA Contract and Base Contract were “closely intertwined,” recommended that the district court grant BNSF’s February 2, 2023 motion to compel arbitration, and determined that the question of arbitrability of specific disputes must be decided by an arbitrator. *Id.* at *1, 16. On August 8, 2023, the district court adopted in full the magistrate judge’s recommendation and stayed the case pending arbitration. *Navajo Transitional Energy Co. v. BNSF Ry. Co.*, No. CV 22-146-BLG-SPW, 2023 WL 5035800, at *1 (D. Mont. Aug. 8, 2023).

ARGUMENT

Under 49 U.S.C. § 11701(b), the Board may dismiss a complaint when it determines that the complaint does not state reasonable grounds for investigation and action. That is the case here because, as described more fully below, NTEC’s claims for 1Q23 must be adjudicated pursuant to binding arbitration. *See* BNSF

⁵ On the same day, in a related proceeding, NTEC moved for a preliminary injunction, which the Board issued on June 23, 2023. *Navajo Transitional Energy Co.—Ex Parte Pet. for Emerg. Serv. Order*, NOR 42178 (STB served June 23, 2023).

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Answer at 12 (filed May 4, 2023).

The Federal Court has already found that the parties contractually agreed to submit any disputes arising under the JERA Contract to arbitration and that the parties' arbitration agreement potentially extends to claims that are "closely intertwined" with claims under the JERA Contract. *Navajo Transitional Energy Co., LLC*, 2023 WL 4826485, at *5. Like NTEC's claims relating to BNSF's service in 2022, NTEC's claims relating to BNSF's alleged shortfalls in common carrier shipments for 1Q23 necessarily implicate the JERA Contract and are "closely intertwined" with BNSF's claim that NTEC failed to meet its minimum volume commitment under the JERA Contract. During 1Q23, both the JERA Contract and BNSF's common carrier service again involved movements of the same commodity between the same origin and the same destination during that same time period.

In addition, the Federal Court found that the parties' agreement to arbitrate delegates questions of arbitrability to an arbitration panel. As such, the panel, and not the Board, must decide whether the scope of the arbitration agreement encompasses NTEC's claims regarding BNSF's service in the first quarter of 2023. Since the Board lacks authority to override the parties' contractual agreement to submit the question of arbitrability to an arbitral panel, the Board must allow the arbitration panel to consider the portion of NTEC's complaint relating to claims in 1Q23. The proceeding cannot move forward if the litigation covers 1Q23 claims that are outside of the Board's jurisdiction.

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I. The Montana Federal Court Has Already Found That the Parties Agreed to Arbitrate Service Disputes Relating to Export Coal Shipments to Westshore During the Term of the JERA Contract.

A. The Parties Entered into a Valid Agreement to Arbitrate Westshore Service Disputes Through 1Q23

As the Federal Court already concluded, NTEC and BNSF are parties to a valid agreement to arbitrate Westshore service disputes with a term that ran through 1Q23. NTEC does not dispute the validity of the JERA Contract, the validity of the arbitration provision of the JERA Contract, or that the arbitration clause requires arbitration for “JERA issues.” *Navajo Transitional Energy Co., LLC*, 2023 WL 4826485, at *3, 3 n.1; *see also* JERA Contract § 30 (arbitration clause). Thus, the only question remaining was whether the JERA Contract’s arbitration provision applies to disputes relating to movements of coal to Westshore other than the specific movements designated by NTEC to be subject to the JERA Contract.

The Federal Court concluded that the arbitration provision did, in fact, potentially cover disputes regarding those other movements, such that an arbitral panel must decide the arbitrability of disputes related to those movements. In determining that the parties had a valid agreement to arbitrate service disputes involving Westshore movements, the Federal Court concluded that the JERA Contract’s arbitration provision could apply to disputes about service under the 2022 Base Contract because the contracts were “closely intertwined.” *Navajo Transitional Energy Co., LLC*, 2023 WL 4826485, at *5.

NTEC argued that BNSF’s service under the JERA Contract was separate

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from service under the Base Contract because coal cannot simultaneously move under both agreements, the agreements were entered into three years apart, and each contained different essential terms. *Id.* at *4. In rejecting these arguments, the Federal Court first credited BNSF's assertions that both contracts involved: (1) the same parties (BNSF and NTEC), (2) transportation of the same material (thermal coal), (3) material from the same origin (Spring Creek), (4) transportation to the same destination (Westshore), and (5) that adjudicating NTEC's claims and factual allegations will require interpretation of the JERA Contract's provisions, as well as discovery regarding the parties' performance under the JERA Contract and Base Contract. *Id.*

Second, the Federal Court concluded that NTEC's own complaints about Westshore service broadly covered BNSF's transportation of JERA and non-JERA coal to Westshore. *Id.* (noting that Complaint referred to BNSF's alleged subpar "service to NTEC" generally and referred to NTEC's historical movement of "an aggregate total of 5.1 million tons of Spring Creek export coal via BNSF to Westshore" under both contracts). Similarly, the Federal Court found that "NTEC pleads damages not clearly limited to BNSF's performance under the [Base Contract]." *Id.* at *5. NTEC did not distinguish between JERA and non-JERA coal transportation in discussing the effect of BNSF's service to Westshore on NTEC. Indeed, NTEC took the position that its performance under the JERA Contract was excused "due to BNSF's service," directly linking the JERA Contract to NTEC's claims involving service under the Base Contract. *Id.*

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Third, the Federal Court observed that service under the two contracts were linked operationally. As Magistrate Judge DeSoto explained, “NTEC’s allegations regarding BNSF’s failure to provide sufficient service under the [Base Contract] almost certainly require an examination of its performance under the [JERA Contract]; because BNSF had no operational ability to allocate shipments between the [Base Contract] and the [JERA Contract], NTEC had complete control over which contract obligations were satisfied. (Doc. 46, at 4).” *Id.*

The Federal Court’s reasoning applies with equal force to NTEC’s claims relating to BNSF’s common carrier service in 1Q23. Like the Base Contract (and JERA Contract), the common carrier pricing authority involves the same parties, transportation of the same commodity from the same origin to the same destination, and the same train symbols in BNSF’s operating systems. Moreover, adjudicating NTEC’s claims and factual allegations relating to common carrier service in 1Q23 will require interpretation of the JERA Contract’s provisions and NTEC’s actions under the JERA Contract, including NTEC’s allocation of coal tonnage between the JERA Contract and BNSF’s common carrier service, and NTEC’s failure to comply with its minimum volume commitment under the JERA contract. *Id.* As the Federal Court concluded for 2022, service under the JERA Contract and the common carrier pricing authority during the first quarter of 2023 are “closely intertwined.”

Further, as in the district court case, NTEC’s claims in this proceeding for 1Q23 do not differentiate between coal bound for JERA and non-JERA destinations.

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See Navajo Transitional Energy Co., LLC, 2023 WL 4826485, at *4. NTEC’s allegations relating to BNSF’s service lump together transportation under the JERA Contract and under the common carrier pricing authority. *See, e.g.*, Compl. ¶¶ 35-36 (referring to “service to NTEC” from Spring Creek to Westshore without differentiating between JERA and non-JERA coal); *id.* ¶ 10 (referring to the historical shipment of “an aggregate total of 5.1 million tons of Spring Creek export coal via BNSF to Westshore” under both the JERA and non-JERA contracts). Also, NTEC alleges that it suffered damage in this case from BNSF’s service that does not distinguish between service under the JERA Contract and common carrier service. *See, e.g.*, Compl. ¶ 29 (stating that “[t]he level of service that BNSF provided to NTEC in the first quarter of 2023 . . . will prevent BNSF from transporting NTEC’s regular annual volume of export coal in 2023”); *id.* ¶ 36 (“BNSF’s inadequate service to NTEC for its Spring Creek to Westshore movements has caused, and will continue to cause, serious harm to NTEC, its immediate customers, and the Navajo Nation.”); Aug. 9, 2023 Resp. to Interrogatory Nos. 11-12 (referring to JERA correspondence in 1Q23, dated January 5, 2023, February 1, 2023, and February 3, 2023, that allegedly provides evidence of reputational harm to NTEC caused by BNSF).

Lastly, the JERA Contract and common carrier pricing authority are linked operationally. NTEC has conceded that it had flexibility to allocate the coal volumes shipped under the JERA Contract and under other shipping arrangements. *Navajo Transitional Energy Co., LLC*, 2023 WL 4826485, at *2. Each month, NTEC

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entered an aggregate volume of coal in BNSF's Coal Forecasting Tool without identifying how much coal NTEC intended to be moved under the JERA Contract or in common carrier service. BNSF's accounting reflected all trains as common carrier trains unless and until NTEC informed BNSF otherwise. BNSF had no visibility into what shipping vessel NTEC assigned a train and thus whether the train was properly billed under the JERA Contract or the common carrier pricing authority.

NTEC's complete control over the allocation of coal between the JERA Contract and the common carrier authority allowed it to take advantage of the differences in rates under the two arrangements, allowed it to manipulate the extent of its exposure to claims relating to compliance with minimum volume requirements under the JERA Contract (by allocating more or less to the JERA Contract), and allowed it to define the scope of its claims that BNSF failed to provide adequate common carrier service (by allocating more or less to the common carrier service). Consideration of NTEC's common carrier claims in the first quarter of 2023, including any damages allegedly suffered during that time period, therefore inevitably requires examination of NTEC's strategic decisions relating to the JERA Contract and the requirements of the JERA Contract.

NTEC may attempt to obscure the relevance of the JERA Contract's term running through the end of 1Q23 by pointing out that NTEC informed BNSF of its intent to cease shipments under the JERA Contract in favor of the common carrier pricing authority. But NTEC's unilateral decision to reallocate its shipments is of

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no consequence. NTEC decided whether to allocate its coal under the JERA Contract or the common carrier pricing authority. Nothing would have prevented NTEC from changing its mind and shipping coal under the JERA Contract. Moreover, NTEC made clear in its April 3, 2023 letter to BNSF that the terms of the JERA Contract applied throughout 1Q23.⁶ Thus, because the JERA Contract ran through the end of 1Q23, only an arbitration panel has authority to decide the applicability of the JERA Contract's arbitration provision to 1Q23 shipments of coal to Westshore.

In short, as with NTEC's 2022 claims relating to BNSF's alleged service shortfalls in 2022, NTEC's claims relating to inadequate common carrier service in the first quarter 2023 fall within the parties' contractual agreement to arbitrate disputes over "JERA issues" and are not subject to the Board's jurisdiction.

B. The Agreement to Arbitrate Delegates the Question of Arbitrability to an Arbitrator.

While the Federal Court found that there was a valid agreement to arbitrate disputes "closely intertwined" with the JERA Contract, it did not find that the specific NTEC claims relating to BNSF's service under the 2022 Base Contract were

⁶ After having received notice that NTEC did not anticipate JERA shipments in the remainder of March 2023, BNSF notified NTEC that it owed liquidated damages for not meeting its minimum volume commitments. March 27, 2023 Letter from Farah Lawler to Matt Babcock, attached as Exhibit 4. On April 3, 2023, NTEC responded that BNSF's March 27, 2023 letter was "premature" and that "NTEC will provide its [Volume] Certification to BNSF by no later than 30 days after the end of the subject Shipping Period." April 3, 2023 Letter from Matt Babcock to Farah Lawler, attached as Exhibit 5. Thus, it is clear that NTEC still viewed the JERA Contract as being in full effect despite NTEC no longer intending to ship coal under it.

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arbitrable. Instead, the Federal Court determined that the JERA Contract “clearly and unmistakably” delegates the arbitrability of particular disputes to the arbitrator. *Navajo Transitional Energy Co., LLC*, 2023 WL 4826485, at *6.⁷ In doing so, the Federal Court pointed to the JERA Contract’s incorporation of the AAA Rules, which “constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.” *Id.* (citing *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015)); *see also* JERA Contract § 30 { [REDACTED] [REDACTED] }. Thus, the Federal Court concluded that only the arbitration panel, not a court (or any other body), may determine the agreement’s enforceability or applicability to the instant dispute. *Navajo Transitional Energy Co., LLC*, 2023 WL 4826485, at *6. And because the outcome of that assessment by the arbitration panel could not be determined in advance, the Federal Court stayed the court proceeding.

The Board must defer to the district court’s holding. In particular, there are no “reasonable grounds for investigation and action” unless, and until, an arbitrator rules that NTEC’s claims relating to 1Q23 are not subject to arbitration under the JERA Contract’s arbitration clause. Accordingly, the Board should dismiss NTEC’s 1Q23 claims because there are “no reasonable grounds for investigation and action” on those claims at this time.

⁷ The district court adopted Magistrate Judge DeSoto’s recommendation in full on August 8, 2023. *Navajo Transitional Energy Co., LLC*, 2023 WL 5035800, at *1 (D. Mont. Aug. 8, 2023).

II. The Board Has No Authority to Interpret or Regulate the Agreement to Arbitrate in the JERA Contract

Under 49 U.S.C. § 10709, the Board has no authority to hear claims under a rail transportation contract. Courts have exclusive authority to determine the existence of an enforceable contract and to resolve disputes arising out of that contract. 49 U.S.C. § 10709(c)(2); *see also Rates on Iron Ore, Randville to Escanaba via Iron Mountain*, 367 I.C.C. 506, 510 (1983) (“[T]o entertain and decide questions concerning the existence and validity of contracts . . . is a purely judicial task which is not to be performed by the Commission”); *Rail Transp. Contracts Under 49 U.S.C. 10709*, EP 676, slip op. at 2 (STB served Jan. 6, 2009) (“Congress expressly removed all matters and disputes arising from rail transportation contracts from the Board’s jurisdiction.”); *PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, NOR 42094 (Sub-No. 1), at 3-4 (served Apr. 25, 2008) (“The Act limits the jurisdiction of the Board so as to exclude shipments moving under rail transportation contracts.”); *Rail Fuel Surcharges*, EP 661, slip op. at 13 (STB served Jan. 26, 2007) (“Under 49 U.S.C. 10709, we have no authority to regulate rail rates and services that are governed by a contract.”); *Xcel Energy v. Union Pac. R.R. Co.*, NOR 42059, at 1 n.1 (STB served May 24, 2002) (“[T]he Board has no jurisdiction over the contract portion of the movement, 49 U.S.C. 10709(c).”).

Several circuit courts have also determined that the Board lacks authority over disputes concerning the existence of a valid contract and disputes arising under those contracts. *See, e.g., Kansas Power & Light Co. v. Burlington N. R. Co.*, 740 F.2d 780, 784-85 (10th Cir. 1984) (“The courts, not the ICC, in cases such as

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this, is the appropriate forum for determining the existence of an enforceable contract.”); *Cleveland Cliffs Iron Co. v. I.C.C.*, 664 F. 2d 568, 591 (6th Cir. 1981) (rejecting ICC assertion that it could decide questions concerning the existence and validity of a contract); *Burlington N. R.R. Co v. I.C.C.*, 679 F.2d 934, 942 (D.C. Cir. 1982) (“contract rate disputes arising after October 1, 1980, are to be aired exclusively in court”).

In the context of rate reasonableness complaints, the Board has stated that it will dismiss a complaint if there is a reasonable possibility that a rail transportation contract governs the movement in question. *See Toledo Edison Co. v. Norfolk & Western Ry. Co.*, 367 I.C.C. 869, 871 (1983). Here, there is more than a “reasonable possibility” that a contract exists—a federal district court has already determined that the parties have entered into a valid agreement to arbitrate that runs through 1Q23 and that the parties agreed to submit the question of the arbitrability of particular disputes to an arbitrator. The Board is required to accept the Federal Court’s findings on this issue.

III. The Board Has Repeatedly Stressed Its Preference for Arbitration Over Administrative Litigation.

The Federal Court’s findings on the JERA Contract arbitration provision are fully consistent with the Board’s own preference for arbitration. “The Board favors the resolution of disputes through the use of mediation and arbitration procedures, in lieu of formal Board proceedings, whenever possible.” 49 C.F.R. § 1108.2. To that end, the Board adopted final rules “to increase the use of mediation and arbitration to resolve matters before the Board.” *Assessment of Mediation &*

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Arbitration Procedures, EP 699 (STB served May 13, 2013) (establishing a new arbitration program “[t]o encourage greater use of arbitration”); *Revisions to Arbitration Procedures*, EP 730 (STB served Sept. 30, 2016); *Revisions to Arbitration Procedures*, EP 730 (STB served Mar. 24, 2017). As the Board has realized, “[a]rbitration can often afford advantages in terms of speed and confidentiality.” *Canadian Pac. Ry.—Control—Kan. City S.*, FD 36500, slip op. at 76 (STB served Mar. 15, 2023) (citing *Joint Pet. for Rulemaking to Establish a Voluntary Arb. Program for Small Rate Disps.*, EP 765, slip op. at 11, 54, 57-58 (STB served Dec. 19, 2022) (noting that arbitration can facilitate the expeditious handling of disputes while confidentiality may promote settlement). While the Board has created an arbitration program under its own auspices, both the statute and the Board’s rules contemplate that parties remain free to utilize private arbitration services. 49 U.S.C. § 11708(b)(3) (stating that the Board’s arbitration program “shall not prevent parties from independently seeking or utilizing private arbitration services to resolve any disputes the parties may have”); 49 C.F.R. § 1108.2(a)(2) (“Nothing in these rules shall be construed in a manner to prevent parties from independently seeking or utilizing private arbitration services to resolve any disputes they may have.”).

Federal courts express a similar preference for arbitration. *See, e.g., AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650 (1986) (when a contract “contains an arbitration clause, there is a presumption of arbitrability”); *Dickens on behalf of estate of Dickens v. GC Servs. Ltd. P’ship*, 336 F. Supp. 3d 1369, 1375

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(M.D. Fla. 2018) (citing *Seaboard Coast Line R. Co. v. Trailer Train Co.*, 690 F.2d 1343, 1375 (11th Cir. 1982)) (“[F]ederal policy favor[s] arbitration over litigation[,] . . . requir[ing] that we construe arbitration clauses generously, resolving all doubts in favor of arbitration.”); *Bos. Telecommunications Grp., Inc. v. Deloitte Touche Tohmatsu*, 249 F. App’x 534, 538 (9th Cir. 2007) (“[T]he most minimal indication of the parties’ intent to arbitrate must be given full effect.”) (citation and quotation marks omitted). Dismissing NTEC’s claims related to 1Q23 would allow this dispute to move forward expeditiously in arbitration.

CONCLUSION

For the foregoing reasons, BNSF requests that the Board dismiss NTEC’s claims relating to 1Q23 in their entirety.

Dated: September 29, 2023

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Onika K. Williams

Onika K. Williams

Attorney for BNSF Railway Company

September 29, 2023

EXHIBIT 1

2023 WL 4826485

Only the Westlaw citation is currently available.

United States District Court, D. Montana,
Billings Division.NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC, Plaintiff,

v.

BNSF RAILWAY COMPANY, Defendant.

CV 22-146-BLG-SPW-KLD

|

Signed July 24, 2023

Attorneys and Law Firms

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Anthony Michael Nicastro, Knight Nicastro Mackay, LLC, Billings, MT, Alexander M. Wolf, Justin Waggoner, Smyser Kaplan & Veselka LLP, Houston, TX, for Defendant.

FINDINGS AND RECOMMENDATIONS

Kathleen L. DeSoto, United States Magistrate Judge

*1 Before the Court is Defendant BNSF Railway Company's ("BNSF") Motion to Compel Arbitration and Dismiss all claims asserted by Plaintiff Navajo Transitional Energy Company, LLC ("NTEC") pursuant to the [Federal Rules of Civil Procedure 12\(b\)\(1\) and \(b\)\(6\)](#) and the Federal Arbitration Act ("FAA"), [9 U.S.C. §§ 1–16](#). (Doc. 16). For the reasons discussed below, the Court recommends BNSF's motion to compel arbitration be granted and this matter be stayed pending arbitration pursuant to Section 3 of the FAA, [9 U.S.C. § 3](#).

I. Background

This dispute concerns rail transportation of sub-bituminous coal from the Spring Creek Mine ("Spring Creek") in Big Horn County, Montana, to Westshore Terminals ("Westshore") in Roberts Bank, British Columbia, for export sale to Japan and Korea. (Doc. 1, ¶¶ 10–12).

BNSF, a Class 1 railroad and the only rail carrier capable of providing single-line, direct coal transportation service from Spring Creek to Westshore, has been the sole provider of rail transportation services from Spring Creek to Westshore since 2008. (Doc. 1, ¶¶ 3, 11–12). NTEC, a Navajo Nation-owned energy company, purchased Spring Creek out of bankruptcy in 2019. (Doc. 1, ¶¶ 2, 10). On December 19, 2022, NTEC filed this action against BNSF, alleging claims for breach of contract and breach of the implied covenant of good faith and fair dealing. (Doc. 1). In its complaint, NTEC alleges that "while BNSF transported more coal trains to Westshore for other export coal producers in 2022 than it had transported in 2021, BNSF dramatically reduced the number of movements that it made to transport NTEC's export coal in 2022," causing NTEC to incur direct financial hardship and damage its reputation for the sale of export coal. (Doc. 1, ¶¶ 37, 43–45).

The facts underlying the dispute are as follows:

BNSF shipped 5.1 million tons of Spring Creek export coal in 2021 under two contracts. (Doc. 1, ¶¶ 11–12, 16). The first contract, Rail Transportation Agreement BNSF-C-12828 ("RTA"), which BNSF entered into with Spring Creek's former owner Cloud Peak Energy, Inc. ("Cloud Peak") in 2018, governed the transportation of coal from Spring Creek to Westshore for sale to a single customer in Japan, JERA Trading Pte Ltd. ("JERA") from November 1, 2019, through March 31, 2023. (Doc. 20-1, at 1). In addition to the RTA, BNSF and NTEC entered into Coal Unit Train Commitment Certificate Number BNSF 90068-0095, which commenced on January 1, 2021, and terminated on June 30, 2021, governing "100% of coal shipped to WS at Roberts Bank, BC in the first half of calendar year 2021." (Doc. 35-1, at 1). The parties extended this second agreement through December 31, 2021, by an amendment dated June 21, 2021. (Doc. 35-1, at 5).

On December 1, 2021, NTEC and BNSF entered into Coal Unit Train Commitment Certificate Number BNSF 90068-0099 ("Certificate") to govern "100% of coal shipped to WS at Roberts Bank, BC in calendar year 2022." (Doc. 20-4, at 3). According to affidavit testimony from Matthew D. Babcock, former manager of international sales and logistics at Cloud Peak and current vice president of sales and marketing for NTEC, these certificate agreements, BNSF 90068-0095 and 90068-0099, were part of "a long line of principal transportation contracts between the Spring Creek Mine owners and BNSF." (See Aff. Matthew D. Babcock, Doc. 35, ¶¶ 4–13). The RTA, Babcock asserts, is a "separate

and distinct transportation arrangement” that was negotiated and entered into at JERA's request. (Doc. 35, ¶ 17). Babcock testified that the Certificate and the RTA were “mutually exclusive of each other from an operational and commercial perspective.” (Doc. 35, ¶ 20).

*2 Several times each year, both the RTA and the Certificate required NTEC to nominate the tonnage of coal it expected to ship under each contract. (Doc. 35, ¶ 22). NTEC entered its forecasted monthly coal shipment volumes in BNSF's coal forecasting tool in an aggregate amount, making no distinction between Spring Creek coal to be shipped to Westshore under the RTA or the Certificate. (Doc. 46-1, ¶ 6). Once the trains were loaded and enroute to Westshore, NTEC sent BNSF a bill of lading for each train, which stated the governing contract for the shipment (the RTA or the Certificate), and noted the train numbers, cars loaded, destination, and other pertinent information for each train. (Doc. 35, ¶ 22). When a train was governed by the RTA, NTEC would specify the bill of lading number as “JERA-BNSF-C-” and the P.O. number as “BNSF-C-12828.” (Doc. 35, ¶ 23). When a train was governed by the Certificate, those fields were left blank. (Doc. 35, ¶ 23). At argument, NTEC conceded it had the sole discretion to allocate the coal volumes shipped under each contract.

The RTA contains a “Dispute Resolution” provision, which provides in relevant part as follows:

If a question or controversy arises between the Parties concerning the observance, performance, interpretation or implementation of the terms, provisions, or conditions herein or the rights or obligations of either Party under this Agreement, such question or controversy shall in the first instance be the subject of a meeting between the Parties to negotiate a resolution of such dispute.... The Parties intend that any dispute arising out of this Agreement that cannot be resolved through negotiation as provided above must be resolved through binding arbitration as provided herein.

(Doc. 20-1, ¶ 30). Specifically, “[t]he arbitration proceeding shall be conducted in accordance with the Commercial Arbitration Rules of the AAA.” (Doc. 20-1, ¶ 30). The Certificate neither contains an arbitration provision nor any reference to the RTA. (*See* Doc. 20-4).

On February 2, 2023, BNSF filed the instant motion to compel arbitration and dismiss all claims or, in the alternative, to compel arbitration and stay the proceedings. (Doc. 20). In support of its motion, BNSF argues this case must be adjudicated pursuant to binding arbitration because the parties agreed to submit any disputes arising under the RTA to arbitration and NTEC's allegations necessarily implicate the RTA and aggregate tons of Spring Creek coal moved under both contracts. (Doc. 20, at 6). Additionally, BNSF argues that because the RTA's arbitration agreement delegates arbitrability to an arbitration panel, the panel, and not the Court, should decide whether the scope of the arbitration agreement encompasses the parties' dispute. (Doc. 20, at 14). NTEC argues the dispute does not implicate the RTA because its claims arise solely under the terms of the Certificate, which does not contain an arbitration provision. (Doc. 36, at 12). The Court held oral argument on June 28, 2023. (Doc. 47).

II. Legal Standards

When considering motions to compel arbitration, the court applies the summary judgment standard of [Federal Rule of Civil Procedure 56](#). *Theis v. AFLAC Inc.*, 2020 WL 9172984, CV 20-11-BLG-SPW-TJC, *2 (D. Mont. Dec. 28, 2020), *findings and recommendations adopted in full in* 2021 WL 1040588 (D. Mont. 2021). Summary judgment is proper where the pleadings, discovery, and affidavits show there is “no genuine issue of material fact and the movant is entitled to judgment as a matter of law.” [Fed. R. Civ. P. 56\(c\)](#). The Court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in the non-moving party's favor.  *Anderson v. Liberty Lobby*, 477 U.S. at 255;  *Betz v. Trainer Wortham & Co., Inc.*, 504 F.3d 1017, 1020–21 (9th Cir. 2007).

Courts may consider evidence outside the pleadings for purposes of a motion to compel arbitration because it is “in effect a summary disposition of the issue of whether or not there has been a meeting of the minds on the agreement to arbitrate.”  *In re Checking Acct. Overdraft Litig.*, 754 F.3d 1290, 1294 (11th Cir. 2014). The party seeking to compel arbitration has the burden of proving the existence of an

agreement to arbitrate by a preponderance of the evidence.”

 *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014).

III. Discussion

A. The Federal Arbitration Act

*3 The FAA governs the enforceability of arbitration agreements in contracts involving commerce, “plac[ing] arbitration agreements on an equal footing with other contracts and require[ing] courts to enforce them according to their terms.” *Theis*, 2020 WL 9172984, at *2 (citing  *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)). Section 2, the “primary substantive provision” of the FAA, provides:

A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation contract.

Rent-A-Center, 561 U.S. at 37 (quoting 9 U.S.C. § 2). Section 4 permits a party to petition federal district court to compel arbitration “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.” 9 U.S.C. § 4.

The Ninth Circuit has explained that the court's role under the FAA “is limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue.”  *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). Because arbitration is “strictly a matter of consent,”  *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010), courts apply state contract law to determine whether the parties agreed to arbitrate.  *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Additionally, “while doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration, the presumption does not apply to disputes

concerning whether an agreement to arbitrate has been made.”

 *Johnson v. Walmart*, 57 F.4th 677, 680–81 (9th Cir. 2023) (citing  *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 743 (9th Cir. 2014)).

1. Whether an Agreement to Arbitrate Exists

The issue before the Court is whether NTEC's claims against BNSF for breach of the Certificate and breach of the implied covenant of good faith and fair dealing are subject to arbitration. The parties do not dispute the validity of either contract, or the existence of a valid arbitration clause in the RTA.¹ (See Doc. 36, at 30–31). But while BNSF frames the instant dispute as whether the *scope* of the arbitration clause in the RTA encompasses NTEC's claims (see Doc. 20, at 6), NTEC insists that because its Complaint only asserts violations of the Certificate, which undisputedly does not include an arbitration provision, the parties' prior agreement to arbitrate claims arising out of the RTA is irrelevant (see Doc. 36, at 8). In other words, NTEC argues that an agreement to arbitrate its claims in this case *does not exist*. As a threshold issue, since the existence of an arbitration agreement is disputed, BNSF is not entitled to a presumption of arbitrability at this stage of the inquiry.  *Johnson*, 57 F.4th at 680–81.

In determining whether a valid agreement to arbitrate exists in this case, the Court must decide whether the RTA and the Certificate are “‘merely interrelated contracts in an ongoing series of transactions’ such that the arbitration agreement of the first necessarily applies to the second”; or rather, “the two agreements are separate, each subject to individual interpretation.”  *Johnson*, 57 F.4th at 682 (holding that because two contracts were separate, independent agreements, an arbitration provision in the first did not encompass disputes arising from the second);  *Int'l Ambassador Programs, Inc. v. Archexpo*, 68 F.3d 337, 340 (9th Cir. 1995) (same). As the Ninth Circuit explained in *Johnson*, where two contracts are “separate,” the lack of an arbitration clause means disputes over the agreement are not subject to arbitration; but where two contracts are “merely interrelated contracts in an ongoing series of transactions,” an arbitration provision in one contract could apply to subsequent contracts.”  *Johnson*, 57 F.4th at 682–83.

*4 NTEC relies primarily on *Johnson* to support its argument that the RTA and the Certificate are separate agreements. In *Johnson*, the Ninth Circuit examined whether Johnson's claims concerning his in-store purchase of a tire service agreement were subject to an arbitration provision in Walmart's online terms of use, to which Johnson consented when he purchased a set of tires from Walmart.com.

 *Johnson*, 57 F.4th at 680. The court determined the following evidence supported holding that Johnson's service-related claims did not arise out of, or relate to, the online contract containing the arbitration provision: the service agreement was negotiated and entered into separately from the initial tire purchase; the contracts involved separate consideration; and the proof required to establish Johnson's underlying claim for breach of contract depended exclusively on the terms of the service agreement, not the online terms of use.  *Johnson*, 57 F.4th at 683. Even though Johnson referenced the original cost of the tires to calculate damages, the fact that he purchased the tires at Walmart.com was merely coincidental to the service agreement he later purchased at the Walmart store; “Johnson would rely on the original value of his tires before he was denied the rotation and balancing services regardless of whether he purchased the tires from Walmart or another retailer.”  *Johnson*, 57 F.4th at 683.

Likewise, in *International Ambassador Programs*, the Ninth Circuit found two contracts related to travel exchange programs between the United States and Russia were separate agreements because they concerned different types of tours, completely different groups of tourists, and the proof necessary to establish the plaintiff's claims that arose under the contract containing the arbitration agreement had “nothing to do with” a second dispute, which arose under a later agreement.  *Int'l Ambassador Programs*, 68 F.3d at 340.

Here, NTEC points to the plain language of the Certificate and the RTA, which establishes that each contract is, for the most part, mutually exclusive—coal shipments from Spring Creek to Westshore either move under the Certificate or the RTA, but not both; the plain language of the contract provides that the RTA is limited only to JERA coal shipments; the agreements were negotiated separately three years apart; and each contains different essential terms, including different rates and rate adjustment provisions, effective dates, termination dates, minimum and maximum volumes, processes for NTEC's nominations, and consequences for volume shortfalls. (Doc. 36, at 21–22).

However, BNSF counters that unlike in *Johnson*, the two contracts are “closely intertwined” for legal and practical purposes—both involve the same parties, transportation of the same material from the same origin to the same destination, and critically, “adjudicating NTEC's claims and factual allegations will require interpretation of the RTA's provisions” as well as “detailed discovery regarding the parties’ performance” under the RTA and the Certificate. (Doc. 46, at 1). The Court agrees with BNSF.

The parties do not dispute that the RTA is a valid contract, or that NTEC is a party to the RTA and bound by the RTA's terms; thus, it is undisputed that the parties formed a valid agreement to arbitrate any disputes “arising out of” the terms of the RTA. Although NTEC argues it does not seek relief in this case based on any provisions, rights, or obligations set forth in the RTA, the allegations in the Complaint are broad.

While it is true that neither contract had any provisions linking it to the other, (Doc. 35, ¶ 25), the Complaint includes factual allegations and damages allegedly linked to BNSF's failure to provide adequate transportation services for all Spring Creek export coal, including shipments ultimately bound for the JERA facility under the terms of the RTA. Repeatedly framing its factual allegations as BNSF's subpar “service to NTEC” regarding “NTEC coal,” the underlying facts set forth in the Complaint do not differentiate between JERA and non-JERA coal. For example, the Complaint asserts that “[i]n 2021, NTEC shipped an aggregate total of 5.1 million tons of Spring Creek export coal via BNSF to Westshore (under BNSF-C-12828 and the 2021 Contract).” (Doc. 1, ¶ 16 (emphasis added)). Later in the Complaint, NTEC states that “[i]n the 2022 Contract, NTEC committed to the exclusive use of BNSF to ship *all its Spring Creek export coal* to Westshore.” (Doc. 1, ¶ 21 (emphasis added)). See also Doc. 1, ¶¶ 27–33, stating the number of aggregate trains per month BNSF transported from Spring Creek to Westshore and claiming, “BNSF's 2022 service to NTEC became substantially more erratic than under predecessor arrangements.”).

*5 Finally, though NTEC asserts it is only seeking damages incurred as a result of BNSF's breach of the Certificate, NTEC pleads damages not clearly limited to BNSF's performance under the Certificate, including allegations that because of “BNSF's failure to provide NTEC transportation service,” NTEC incurred demurrage charges and “crippling financial hardships,” causing it to declare force majeure “under its export coal sales *contracts*.” (Doc. 1, ¶¶ 43–46 (emphasis

added)). At argument, counsel for NTEC verified that the company's force majeure argument is that NTEC's performance under the RTA is excused due to BNSF's service, and the same service failures that affected NTEC under the Certificate affected NTEC under the RTA.

Operationally, the two contracts are further linked. The undisputed evidence confirmed at oral argument establishes that NTEC's allegations regarding BNSF's failure to provide sufficient service under the Certificate almost certainly require an examination of its performance under the RTA; because BNSF had no operational ability to allocate shipments between the Certificate and the RTA, NTEC had complete control over which contract obligations were satisfied. (Doc. 46, at 4). Further, BNSF initially transported all NTEC shipments under the Certificate as a default, and only after trains departed Spring Creek did NTEC assign particular shipments to the RTA. Despite NTEC's characterization of BNSF's stated lack of control as an attempt to elevate a simple ministerial problem into one that they claim attaches arbitrability to a contract that does not contain an arbitration clause, NTEC is nonetheless seeking reputational injury and demurrage damages based on general allegations of poor service, which allegedly required NTEC to declare force majeure under both of its Spring Creek contracts without specifying customers or excluding JERA trains from its calculations. Thus, unlike in *Johnson* and *International Ambassador Programs*, the facts alleged and proof required to establish NTEC's claims likely require an interpretation of both contracts and discovery related to all shipments of NTEC coal, including JERA coal, from Spring Creek to Westshore in 2022.

Accordingly, because the Court has determined the RTA and the Certificate are “closely intertwined,” a valid arbitration agreement exists between the parties. The Court now turns to the question of who should decide the issue of arbitrability.

2. Whether the Agreement Encompasses the Dispute

Federal law governs the arbitrability question because the dispute is covered by the FAA and the parties have not clearly and unmistakably designated that nonfederal arbitrability law applies. *Brennan v. Opus Bank*, 796 F.3d 1125, 1129 (9th Cir. 2015) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Cape*

Flattery Ltd. v. Titan Maritime, 647 F.3d 914, 921 (9th Cir. 2011)).

As a general rule, the question of arbitrability is “an issue for judicial determination.” *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). However, the FAA “allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes.” *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019). Threshold arbitrability questions can include “whether the parties have a valid arbitration agreement at all, whether the parties are bound by a given arbitration clause, and whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.” *Rent-A-Center*, 561 U.S. at 68–69 (J. Stevens, dissenting) (internal citations and quotation marks omitted). If there is a valid arbitration agreement, “and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.” *Henry Schein*, 139 S. Ct. at 529.

*6 The question of who has the power to decide arbitrability requires “clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.” *Caremark, LLC v. Chickasaw Nation*, 43 F.4th 1021, 1029 (9th Cir. 2022) (citing *First Options of Chicago*, 514 U.S. at 944 (noting that “the law treats silence or ambiguity about the question ‘who (primarily) should decide arbitrability’ differently from the way it treats silence or ambiguity about the question ‘whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement’—for in respect to this latter question the law reverses the presumption”)).

In the Ninth Circuit, incorporation of the AAA Rules “constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.” *Brennan*, 796 F.3d at 1130 (“under federal arbitrability law, the Delegation Provision ‘clearly and unmistakably’ delegated to an arbitrator the question whether the Arbitration Clause was enforceable by expressly incorporating the AAA arbitration rules, one of which provides that the ‘arbitrator shall have the power to rule on his or her own jurisdiction’ ”). A court should compel arbitration of a dispute “only where the court is satisfied that neither the formation of the parties’ arbitration agreement nor (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to

the dispute is in issue.” *Caremark*, 43 F.4th at 1030 (quoting  *Granite Rock*, 561 U.S. at 299).

Here, the Court is satisfied that a valid agreement to arbitrate exists between the parties. *See* § III(A)(1), *supra*. Additionally, by incorporating the AAA Rules, the RTA “clearly and unmistakably” delegates arbitrability to the arbitrator.  *Brennan*, 796 F.3d at 1130. Therefore, the Court concludes the question of scope, including the agreement’s enforceability or applicability to the instant dispute, is for the arbitrator, not the Court, to decide.  *Henry Schein*, 139 S. Ct. at 529.

B. Stay of Proceedings

Under the FAA, “a party may apply to a federal court for a stay of the trial of an action ‘upon any issue referable to arbitration under an agreement in writing for such arbitration.’

” *Rent-A-Center*, 561 U.S. at 689 (quoting 9 U.S.C. § 3). The court may also dismiss an action under the FAA where “[t]he language contained in the arbitration provision is sufficiently broad to bar all of the plaintiff’s claims.”

 *Sparling v. Hoffman Const. Co. Inc.*, 864 F.2d 635, 638 (9th Cir. 1988) (quoting  *Martin Marietta Aluminum, Inc. v. General Electric Co.*, 586 F.2d 143, 147–48 (9th Cir. 1978)).

Having determined that threshold questions of arbitrability must be addressed by the arbitrator, the Court concludes a stay pending the arbitrator’s decision on arbitrability is appropriate in this case. Should the arbitrator determine that NTEC’s claims are arbitrable, the parties may move to dismiss this action upon completion of the arbitration process. *See Theis*, 2020 WL 9172984 at *6.

IV. Conclusion

Accordingly,

IT IS RECOMMENDED that Plaintiff’s motion to compel arbitration on the threshold issue of arbitrability be GRANTED and the proceedings STAYED until the arbitrability issue is resolved.

*7 NOW, THEREFORE, IT IS ORDERED that the Clerk shall serve a copy of the Findings and Recommendations of United States Magistrate Judge upon the parties. The parties are advised that pursuant to  28 U.S.C. § 636, any objections to the findings and recommendations must be filed with the Clerk of Court and copies served on opposing counsel within fourteen (14) days after service hereof, or objection is waived.

All Citations

Slip Copy, 2023 WL 4826485

Footnotes

- 1 The parties agree that the RTA is a valid contract to arbitrate “JERA issues.” (Docs. 20, at 19 n.5; 35-7, ¶¶ 1–9).

EXHIBIT 2

2023 WL 5035800

Only the Westlaw citation is currently available.

United States District Court, D. Montana,
Billings Division.

NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC, Plaintiff,

v.

BNSF RAILWAY COMPANY, Defendant.

CV 22-146-BLG-SPW

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Signed August 8, 2023

Attorneys and Law Firms

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ORDER

SUSAN P. WATTERS, United States District Judge

*1 United States Magistrate Judge Kathleen DeSoto filed Findings and Recommendations on July 24, 2023. (Doc. 55). Judge DeSoto recommended that the Court grant Defendant BNSF Railway Company's Motion to Compel Arbitration (Doc. 16) and stay the case pending arbitration. (Doc. 55 at 1).

Pursuant to  28 U.S.C. § 636(b)(1), parties are required to file written objections within 14 days of the filing of the Magistrate's Findings and Recommendation. No objections were filed. When neither party objects, this Court reviews the Magistrate's Findings and Recommendation for clear error.

 *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a “definite and firm conviction that a mistake has been committed.”  *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000). After reviewing the Findings and Recommendation, this Court does not find Judge DeSoto committed clear error.

IT IS ORDERED that the proposed Findings and Recommendations entered by Judge DeSoto (Doc. 55) are ADOPTED IN FULL. Defendant BNSF Railway Company's Motion to Compel Arbitration (Doc. 16) is GRANTED.

IT IS FURTHER ORDERED that this case is STAYED pending arbitration.

All Citations

Slip Copy, 2023 WL 5035800

EXHIBITS 3-5

REDACTED