

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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October 19, 2023
Part of

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC,	)	Public Record
	)	
Complainant,	)	
	)	
v.	)	Docket No. NOR 42179
	)	
BNSF RAILWAY COMPANY,	)	
	)	
Defendant.	)	
	)	

**REPLY TO BNSF RAILWAY COMPANY’S
MOTION FOR PARTIAL DISMISSAL**

– *PUBLIC* –
*CONFIDENTIAL INFORMATION IN
EXHIBITS A & B REDACTED*

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Complainant Navajo Transitional Energy Company, LLC (“NTEC”) hereby replies in opposition to Defendant BNSF Railway Company’s (“BNSF”) Motion for Partial Dismissal (“Motion”). NTEC’s Complaint states reasonable grounds for investigation and action on issues relating to BNSF’s common carrier service obligation. It does not raise any claims or seek any relief arising out of a contract requiring arbitration. The Board, not an arbitrator, has the statutory obligation to determine the scope of BNSF’s common carrier obligation and even a partial dismissal therefore would be inappropriate under 49 U.S.C. § 11701(b).

SUMMARY

The Board unquestionably has the authority to hear all of the issues raised by NTEC’s Complaint. *See* 49 U.S.C. § 10501(b) (the jurisdiction of the Board over

transportation by rail carriers “is exclusive”); 49 U.S.C. §§ 10102(5) & 10102(9).

NTEC’s Complaint alleges that BNSF failed to comply with its common carrier obligation and it seeks damages associated with that failure (and only with that failure).

NTEC does not ask the Board to award damages for any BNSF breach of contract or for any harm stemming from BNSF’s breach of contract, either directly or indirectly. In NOR 42179, NTEC solely seeks damages arising from BNSF’s failure to move trains in 2023 common carrier service.

There is no basis for BNSF’s suggestion that the existence of a separate coal transportation contract (the 2018 “JERA Contract”) prevents the Board from exercising its statutory authority to consider the scope of BNSF’s common carrier obligation and BNSF’s compliance (or non-compliance) with that obligation in the first quarter of 2023. The JERA Contract governed BNSF’s transportation of coal solely for one NTEC customer (JERA) whose limited and easily identifiable 2023 traffic moved exclusively during the first two weeks of the year. NTEC’s Complaint does not “aris[e] out of” the JERA Contract. *Cf.* JERA Contract, § 30. Contrary to BNSF’s claim, NTEC’s 1Q23 common carrier shipments are readily distinguishable from NTEC’s JERA-Contract shipments.

Ultimately, BNSF’s Motion amounts to a transparent effort to prevent the Board from deciding issues associated with BNSF’s poor common carrier service. The Board should reject BNSF’s illogical, factually unsupported, and belated effort to avoid Board review of matters that are properly within the Board’s statutory jurisdiction.

BACKGROUND

BNSF moved a total of only 54 trains of export coal for NTEC in 1Q23. *See* Exhibit A.¹ NTEC tendered coal to BNSF under whichever transportation arrangement corresponded to the reality of the NTEC coal sale. Coal sold to JERA moved to Westshore under the JERA Contract for loading onto a vessel sent to the port by JERA. Coal sold to other entities moved to Westshore under the common carrier tariff for loading onto a given vessel sent to the port by the (non-JERA) coal purchaser.²

The first eight of the 54 1Q23 trains moved coal for sale to JERA. Seven of those eight trains moved under the JERA Contract. One of those eight trains moved JERA coal in agreed-upon, interline BNSF-CPKC service (which, for purposes of NOR 42179, NTEC submits can be credited to BNSF as having moved in common carrier service).

The next 46 trains in 1Q23 moved coal destined for customers other than JERA. Forty-three of those trains moved under BNSF's 90139 common carrier rate. The three additional non-JERA trains moved in BNSF-CPKC interline service (again, to be credited to BNSF as common carrier service for present purposes of evaluating BNSF's 1Q23 service performance).

BNSF transported only 720,356 tons in 1Q23 common carrier service (15.7 trains per month), well below the 1,080,000 tons that NTEC had requested:

¹ Exhibit A to this Reply identifies each of the 54 trains that BNSF moved for NTEC in 1Q23 and also identifies rate data for each of those trains.

² NTEC regularly apprised BNSF of the anticipated arrival schedule of ocean-going vessels at Westshore and of the identity of the customers sending such vessels. *See* Exhibit B hereto.

BNSF 1Q23 Service for NTEC		
	Short Tons	No. of Trains
Common Carrier Service Requested	1,080,000	70
Common Carrier Service:		
BNSF 90139 service provided	665,966	43
BNSF interline service provided (JERA)	14,308	1
BNSF interline service provided (non-JERA)	40,082	3
<i>Total Common Carrier Service Provided</i>	720,356	47
1Q23 Shortfall	359,644	23
Contract service:		
JERA Contract Service Provided	102,471	7
<i>Total Service Provided (common carrier & contract)</i>	822,827	54
1Q23 Shortfall	257,173	16

After tendering coal on a contract basis to fill the one and only JERA vessel available at Westshore for loading in 1Q23, NTEC ceased shipping coal under the JERA Contract, notwithstanding the fact that the JERA Contract rate was *substantially* lower than BNSF's common carrier rate. No additional shipments occurred under the JERA in 2023 Contract because: (i) the JERA Contract applied only to the transportation of JERA-bound coal; and (ii) after early January 2023, JERA did not send any additional vessels to Westshore for loading.

ARGUMENT

BNSF's Motion constructs fallacy upon fallacy to advance the argument that the Board must refrain from deciding questions about a subject that Congress committed to the Board's exclusive regulatory oversight; *i.e.*, the nature and application of the common carrier service obligation. 49 U.S.C. § 10501(b). While 49 U.S.C. § 11701(c)(1) gives aggrieved persons the right either: (i) to file a complaint with the Board; or (ii) to bring a civil action, neither that statutory enforcement flexibility nor any other legal principle gives BNSF the right to secure what would amount to removal of a portion of a complaint pending before the Board and the transfer of that portion to BNSF's preferred, non-public forum.

The Board can readily distinguish common carrier service from what is manifestly contract service (*i.e.*, service provided pursuant to an agreement which explicitly states that it was "made pursuant to 49 U.S.C. § 10709" – *see* JERA Contract at 1). In fact, Congress has authorized the Board to administer a statute that purposely distinguishes Section 11101 common carrier service and Section 10709 contract service. Although close questions may arise as to whether a given ambiguous arrangement falls within the scope of Section 10709 (*see, e.g.*, Docket Nos. EP 669 & EP 676), there is no dispute here that: (i) BNSF's 1Q23 service under Common Carrier Pricing Authority BNSF 90139 was common carrier service; and that (ii) BNSF's 1Q23 service under the JERA Contract was Section 10709 contract service. The mere presence of two readily-identifiable and readily-distinguishable forms of service within the same calendar quarter

does not require the Board to refrain from carrying out its statutory responsibilities under the Interstate Commerce Act (“ICA”).

BNSF presumes, without explanation, that the JERA Contract’s inclusion of an arbitration provision reverses that principle and completely overturns the Board’s plenary authority to administer the ICA. BNSF presents no authority for that suggestion. The presence of an arbitration provision governing BNSF service *that is not at issue* does not elevate the importance of that contract-based service such that the Federal Arbitration Act (“FAA”) conflicts with or overrides the ICA. In other words, the Board may act in this case, given its exclusive jurisdiction. Indeed, the Board previously has determined that it has the authority under the ICA to consider questions of potential conflicts between different federal statutory schemes. *See, e.g., Ass’n of Am. Railroads – Pet. for Decl. Order*, FD 36369, at 9 & n.11 (STB served Dec. 30, 2020).

In *AAR*, the Board confirmed that it is entitled to “provid[e] guidance with respect to the statutes that [it] administer[s],” even when the harmonization of two conflicting statutes is required. *Id.* In reaching that conclusion, the Board noted the importance of its exclusive statutory jurisdiction under 49 U.S.C. § 10501(b), observing that the absence of such an exclusive-jurisdiction provision had led to a differing result in a case involving a different federal agency. *Id.*³ As BNSF admits in its Motion (at 7), NTEC’s claims

³ “The fact that the NLRA contained no language indicating that it was intended to displace other federal law or that Congress intended to delegate authority to the NLRB to interpret statutes administered by other agencies weighed heavily in the Supreme Court’s determination” *Id.* (citing *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018)).

pertain to “shortfalls in common carrier shipments,” *i.e.*, a matter falling squarely within the Board’s jurisdiction under Section 10501(b) and not implicating any Section 10709 or FAA issues. As such, there is no conflict here between the ICA and the FAA, and there is no basis for BNSF’s claim that the Board must defer to an arbitrator.

As a practical matter, courts regularly hold that referral of common-carrier issues to the Board is appropriate due to the Board’s particular expertise and due to the need for uniformity: “[C]ourts almost invariably defer to the STB’s expertise regarding such [Section 11101-related] disputes.” *Chlorine Institute, Inc. v. Soo Line R.R.*, Case No. 14-CV-1029 (PJS/SER), 2014 WL 2195180, at *2 (D. Minn. May 27, 2014) (collecting cases); *see also Pejepscot Ind. Park, Inc. v. Maine Cent. R.R.*, 215 F.3d 195, 205-06 (1st Cir. 2000) (holding that the district court should defer to the STB on the question of whether the railroad violated its common-carrier obligations under § 11101(b)); *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1365 (9th Cir. 1987) (explaining that the agency is well-suited for referrals because it has “quasi-legislative powers and [is] actively involved in the administration of regulatory statutes”); *United States v. W. Pac. R.R.*, 352 U.S. 59 (1956) (“[I]ssues of transportation policy . . . ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that Act”). Thus, the Board should determine the scope of the common carrier obligation, not an arbitrator.⁴

⁴ BNSF’s observation that the “confidentiality [of arbitration] may promote settlement” (Motion at 17) likewise fails to provide any legitimate basis for dismissal.

A. Legal Standard

The Board may dismiss a complaint only if it “does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b). *Agrium Inc. and Agrium U.S. Inc. v. Canadian Pac. Ry.*, NOR 42145, at 1 (STB served Sept. 15, 2015). Motions to dismiss complaints at the Board are generally disfavored. *Olin Corp. v. Union Pac. R.R.*, NOR 42164, at 2 (STB served Sept. 30, 2019); *Cent. Valley Ag Grinding, Inc. v. Modesto & Empire Traction Co.*, NOR 42159, at 4 (STB served July 25, 2018).

When reviewing a motion to dismiss, the Board will view the alleged facts in the light most favorable to the complainant. *Consumers Energy Co. v. CSX Transp., Inc.*, NOR 24142, at 1 (STB served June 15, 2015); *Montana v. BNSF Ry.*, NOR 42124, at 3 (STB served Feb. 16, 2011); *Grain Land Coop. v. Canadian Pac. Ltd.*, NOR 41687, at 3-4 (STB served Dec. 8, 1999); *Sierra Pacific Pwr. Co. v. Union Pac. R.R.*, NOR 42012, at 4 (STB served Jan. 26, 1998). BNSF’s allegations fail under these standards.

Further, where a claim states a reasonable basis for further Board consideration, a motion to dismiss that claim must be denied as the Board has a “duty to investigate the complaint.” *Brampton Enters., LLC v. Norfolk S. Ry.*, NOR 42118, at 4 (STB served Mar. 16, 2011). To be sustained, the claim does not need to allege enough facts to establish a clear violation by the defendant; it needs only to provide sufficient grounds for further investigation, and the party seeking dismissal must demonstrate that “there is no basis on which [the Board] could grant the relief sought.” *Id.* at 3; *Dairyland Power Coop. v. Union Pac. R.R.*, NOR 42105, at 5 (STB served July 29, 2008).

B. NTEC’s Complaint Challenges BNSF’s Common Carrier Service Only

BNSF argues that NTEC’s Complaint “necessarily implicate[s] the JERA Contract” because those two forms of service were “linked operationally.” Motion at 7, 11. BNSF’s claim is wrong. NTEC’s Complaint alleges that BNSF failed to provide sufficient *common carrier service*, and NTEC’s Complaint manifestly does not seek a Board determination that BNSF breached the parties’ JERA Contract. *See, e.g.*, NTEC Complaint at 1 (BNSF failed to provide adequate “common carrier service”); *id.* at 2 n.3 (“The present complaint relates to BNSF’s 2023 common carrier service”); *id.* at 7 (seeking Board determinations regarding BNSF’s violations of its “common carrier service obligation”); *see also id.* at 21 (“COUNT I – BREACH OF COMMON CARRIER OBLIGATION”); *id.* at 25 (asking in the Prayer for Relief that the Board find that BNSF has “failed to comply with its common carrier obligations”).

The Board accurately described the nature of NTEC’s Complaint in the June 23 preliminary injunction Decision: “NTEC previously had contracts with BNSF for shipment of export coal to Westshore, but the primary contract expired at the end of 2022, while another contract—concerning service related to a single customer in Japan—expired in March 2023. . . . NTEC explains that it is currently pursuing claims in federal court regarding 2022 service that occurred under contract (*id.*), but that it is seeking relief from the Board regarding 2023 service *under common carriage rates*” *See Navajo Transitional Energy Co., LLC – Ex Parte Petition for Emergency Service Order*, NOR 42178, at 2 (STB served June 23, 2023) ((emphasis added); *see also id.*, May 10, 2023

Hearing Transcript at 155:17-18 (“CHAIRMAN OBERMAN: We’re not deciding the contract case.”).

In addition, BNSF itself previously characterized NTEC’s relief request as the “common carrier complaint filed with the Board along with the Application.” BNSF Reply to Application for Emergency Service Order, NOR 42178 at 5 (April 19, 2023); *id.* at 6 n.2 (commenting upon the “related common carrier complaint proceeding”); *id.* at 27 (NTEC seeks damages for “alleged violations of BNSF’s common carrier obligations”).

C. NTEC’s Claims Do Not “Aris[e] Out of” the JERA Contract

Section 30 of the JERA Contract required arbitration only of those disputes “arising out of this Agreement” itself, not to disputes merely “relating” to the contract or to the parties themselves. NTEC’s STB Complaint claims do not “aris[e] out of” the JERA Contract.⁵

Despite its repeated efforts to muddle the relevant facts, BNSF never specifically alleges that NTEC’s claims “aris[e] out of the JERA Contract.” That failure is telling but entirely understandable. Under Title 49, common carrier service is the polar opposite of

⁵ The test for determining whether a dispute “arises out of” a contract is whether the dispute “was an immediate, foreseeable result of the performance of contractual duties.” *Telecom Italia, SpA v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1116 (11th Cir. 2001)). “Disputes that are not related – with at least some directness – to performance of duties specified by the contract do not count as disputes ‘arising out of’ the contract, and are not covered by the standard arbitration clause.” *Id.*; *Hemispherx Biopharma, Inc. v. Johannesburg Consol. Investments*, 553 F.3d 1351, 1367 (11th Cir. 2008) (evaluating the scope of an “arising out of” arbitration clause and holding that “[a]ppplied to this case, the question becomes whether the present dispute was a foreseeable result of the performance of the licensing agreement.”)

Section 10709 contract service, and NTEC limited its Complaint to common carrier issues falling squarely within the Board’s exclusive jurisdiction. Moreover, BNSF has failed to demonstrate that, in January of 2018 (when executing the JERA Contract), the parties intended (or could have foreseen as an immediate “result of the performance of contractual duties”) that their contract’s dispute-resolution provision would require the arbitration of a dispute regarding 2023 common carrier service. *See Telecom Italia*, 248 F.3d at 1116; *Hemispherx*, 555 F.3d at 1367.

BNSF attempts to conceal the absence of any link between: (i) NTEC’s Complaint; and (ii) Section 30’s actual “arising out of this Agreement” language by alleging that NTEC’s NOR 42179 claims “fall within *the parties’ contractual agreement to arbitrate disputes over ‘JERA issues’* and are not subject to the Board’s jurisdiction.” Motion at 13. BNSF’s assertion regarding the supposed scope of the parties’ contractual agreement is wrong. BNSF has concocted its own broad arbitration-provision scope (*i.e.*, any “JERA issues”) even though that ostensible standard is entirely absent from the JERA Contract. The parties never entered into an agreement to arbitrate disputes over any “JERA issues,” and the fact that BNSF elected to invent this supposedly agreed-upon arbitration scope further demonstrates the absence of any valid basis for dismissal.

D. NTEC’s 1Q23 Common-Carrier Shipments are Readily Distinguishable from its 1Q23 JERA-Contract Shipments

BNSF argues that dismissal of NTEC’s 1Q23 common carrier service claims is necessary because the JERA Contract and BNSF’s common carrier service involved movements of the same commodity between the same origin and the same destination.

Motion at 7, 10. BNSF adds that its operating systems assigned the same train symbols to NTEC's various trains (which certainly was not NTEC's fault or responsibility), and BNSF comments vaguely that adjudicating NTEC's claims regarding common carrier service will require interpretation of the JERA Contract and of "NTEC's allocation of coal tonnage between the JERA Contract and BNSF's common carrier service." *Id.* at 10. There is no basis for BNSF's post-hoc attempt to create confusion as to whether particular shipments moved in common carrier or contract service. BNSF has been well-aware of the details of those shipments since long before NTEC filed its Complaint.

1. The Board Has the Authority to Distinguish between Contract and Common Carrier Service

Contrary to BNSF's argument, there is no difficulty distinguishing between: (i) coal that moved in BNSF common carrier service (at the higher common carrier rate); and (ii) the seven trains of coal that moved in BNSF JERA-Contract service (at the lower JERA-Contract rate). *See* Exhibit A. Similarly, there is nothing about NTEC's use of the JERA Contract for JERA-bound coal that would require the Board to take some action outside its jurisdiction. BNSF refers to this process under the sinister-sounding titles of "allocation" or "reallocation" (Motion at 10-13), but in reality, NTEC simply tendered JERA coal under the JERA contract and tendered non-JERA coal under the common carrier pricing authority. NTEC marketed coal to a variety of different customers. The arrival schedule of different vessels (as between vessels sent by JERA for loading its coal and vessels sent by some other customer for loading its coal) dictated the required

approach for BNSF transportation as between contract and common carrier service. *See* Exhibit B.

NTEC stopped tendering coal to BNSF under the JERA Contract because JERA stopped purchasing coal from NTEC. Although the JERA Contract rates were substantially lower than the BNSF common carrier rates, NTEC was not permitted to tender non-JERA coal under the JERA Contract and NTEC did not do so. *See* Exhibit A. Accordingly, the different classification of shipments – as between the first two weeks of 2023 (JERA-Contract service) and the balance of 1Q23 (common carrier service) – had nothing whatsoever to do with any “unilateral” NTEC decision.

Moreover, BNSF is wrong to claim that the existence of very limited 1Q23 contract traffic necessarily would enmesh the Board in an unacceptable form of agency scrutiny. Motion at 10, 12. Section 10709 of Title 49 prohibits the Board from determining whether a party breached a contract (and from providing remedies in response to such a breach), but there is no sense in which Section 10709 prevents the Board from making simple, affirmative determinations: (1) that a given train moving under a common carrier pricing authority (at a common carrier rate) moved in common carrier service; or (2) that a second given train moving under a contract (at contract rate) did not. The Board regularly considers the details of transportation contracts when making determinations regarding maximum reasonable common carrier rates.⁶ Merely

⁶ *See, e.g., Wisc. Pwr. & Light Co. v. Union Pac. R.R.*, NOR 42051, at 25-26 (STB served Sept. 13, 2001) (accepting shipper’s use of contract-specific information to project stand-alone railroad revenues and commenting that “[w]e see no reason to rely on [UP’s]

observing whether a given shipment either did or did not move in common carrier service does not violate Section 10709.

2. BNSF's Claims of Rate-Driven, Strategic Manipulation are Wrong

As part of its effort to confuse the nature of actual 1Q23 service, BNSF claims that NTEC engaged in a nefarious process of “manipulat[ing]” its 1Q23 coal tenders (as between common carrier service and JERA-Contract service) to “take advantage of the differences in rates under the two arrangements.” Motion at 12. BNSF adds that, through this “strategic” manipulation, NTEC allocated either “more or less” coal – BNSF seemingly has not decided which – to common carrier service. *Id.* The record of actual 1Q23 traffic, however, confirms that no such manipulation or rate-chasing actually occurred. *See* Exhibit A hereto.

If NTEC had “manipulat[ed]” any coal tenders after January 13, 2023, that manipulation necessarily had the effect of *inflating* the level of BNSF’s common carrier service. *See* Exhibit A (showing that all 1Q23 NTEC export traffic moving after January

mathematical machinations when actual contract information is available.”); *Western Fuels Ass’n, Inc. and Basin Elec. Pwr. Coop. v. BNSF Ry.*, NOR 42088, at 39-40 (STB served Sept. 10, 2007) (relying on existing transportation contracts to identify entity with responsibility for supplying railcars and determining the required railcar spare margin); *Ariz. Elec. Pwr. Co. v. BNSF Ry. and Union Pac. R.R.*, NOR 42113, at 24-26 (Nov. 22, 2011) (Defendants BNSF and UP argue for the use a contract-based methodology for determining the proper ratios of total revenues to fuel surcharge revenues for intermodal and automotive traffic); *see also Burlington N. R.R. v. STB*, 114 F.3d 206, 212 (D.C. Cir. 1997) (“Consistent with the Commission’s past practice, the Board assumed, without objection from Burlington Northern, that the hypothetical [stand-alone] carrier would ‘step into Burlington Northern’s shoes’ when it commenced operations in 1995, carrying all eleven utilities’ coal traffic *at Burlington Northern’s contract rates*”) (emphasis added); *id.* at 213-14 (approving the Board’s reliance on rate-escalation clauses contained in Burlington Northern’s “existing contracts”).

13, 2023 was common carrier traffic). In other words, BNSF illogically asks the Board to dismiss NTEC's 1Q23 common carrier service claims based on an entirely hypothetical claim that NTEC manipulated its coal tenders to *improve* the appearance of BNSF's common carrier service, all in a case in which NTEC complains that BNSF did not provide *enough* common carrier service. That accusation is nonsensical.

3. BNSF's Claims about the Effect of Contract Continuation are Wrong

BNSF also seeks to support its Motion by observing that, even after the cessation of shipments under the JERA Contract, "NTEC still viewed the JERA Contract as being in full effect" Motion at 13 n.6. BNSF's observation does not warrant dismissal. Up until March 31, 2023, the JERA Contract remained in effect (albeit inactive), and if JERA had purchased additional coal from NTEC, NTEC would have been obligated to ship that coal under the JERA Contract (absent, for example, BNSF's agreement to participate in interline service with CPKC).

There is nothing unusual or improper about the fact that a contract would continue to bind parties to take certain actions *if* a specific situation would have arisen. But importantly, that basic contract principle does not mandate a finding that the Board lacks the authority to adjudicate NTEC's Complaint.⁷

⁷ BNSF's effort to rely on NTEC's Answers to BNSF Interrogatories (Motion at 11) as a basis for obscuring the nature of NTEC's Complaint is similarly unavailing. Interrogatories seeking: (i) the identity of "customers or potential customers with whom you have had discussions related to the volume of rail service that you receive from BNSF"; and (ii) the substance of those discussions do not define the scope of NTEC's Complaint.

E. The Board is Not Required to Delegate the Question of Arbitrability to an Arbitration Panel

BNSF claims that a decision issued by a magistrate judge in a Montana federal district court “already concluded” that an arbitration panel must determine the arbitrability of specific claims “related to rail service” to Westshore (Motion at 1-2), but BNSF greatly exaggerates the scope and significance of the Montana court’s holding. *Id.* at 16 (claiming that “[t]he Board is required to accept the Federal Court’s findings on this issue”).⁸ The court made no findings whatsoever regarding common carrier service issues or claims. Instead, the court referred (to an arbitration panel) solely the question of the arbitrability of NTEC’s claims *under the parties’ 2022 Contract* (BNSF 90068-0099). The ultimate decision on whether NTEC’s claims under the 2022 Contract will be subject to arbitration (or should be referred back to the Montana District Court) has not yet been made.

When the opportunity arises before the JERA-Contract arbitration panel, NTEC will oppose the arbitration of its claims under the 2022 Contract since the 2022 Contract lacks any arbitration provision and since 2022 Contract claims do not “aris[e] out of” the JERA Contract. Merely referring the question of arbitrability to an arbitration panel does not, as BNSF implies, constitute a conclusive finding that the 2022 Contract is in fact subject to arbitration. Even more importantly, the court’s referral of questions regarding

⁸ *Navajo Transitional Energy Co., LLC v. BNSF Ry.*, Case 1:22-cv-00146-SPW-KLD, Findings and Recommendations, at 15 (D. Mont, July 24, 2023) (DeSoto, M.J.) (relying on *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019) (“*Schein*”)).

the arbitrability of disputes under the 2022 Contract says nothing about NTEC's claims regarding 2023 common carrier service.

1. The Arbitration Clause in the JERA Contract Does Not Divest the Board of the Right to Consider Arbitrability

BNSF argues that the Board must allow an arbitration panel to decide whether NTEC's common carrier Complaint is subject to arbitration. Motion at 14 (relying on the Montana holding and the *Brennan* decision).⁹ BNSF's argument hinges on: (i) the fact that the JERA Contract's dispute-resolution provision incorporates the rules of the American Arbitration Association ("AAA") (*see* JERA Contract at § 30); and in turn (ii) the fact that Rule-7(a) of those rules provides that an arbitrator "shall have the power to rule on his or her own jurisdiction." Motion at 14. The Board should reject BNSF's argument.

Even if the Board were to consider the interplay of Section 10501(b) and caselaw under the FAA referring the question of arbitrability to the arbitrators, courts addressing arbitrability issues have held that only clear and unmistakable evidence of the parties' intent (*e.g.*, through the incorporation of the AAA rules) justifies the delegation of gateway arbitrability questions to an arbitrator. *See, e.g., Schein, supra*, 139 S. Ct. at 531; *Brennan*, 796 F.3d at 1130. BNSF's Motion, however, improperly seeks to extend this arbitrability-delegation principle well beyond its appropriate and recognized limits. There is no basis for requiring the Board to dismiss NTEC's Complaint under 49 U.S.C. §

⁹ *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015) ("*Brennan*").

11701(b) in response to BNSF’s claim regarding the delegation of the “gateway” arbitrability issue.

Courts repeatedly have held that the context of any given “delegation-of-arbitrability” clause is significant, and those contexts can vary greatly. For example, the Eastern District of New York recently observed that provisions incorporating the AAA rules “do not exist in a vacuum,” but instead, “must be read in the contexts in which they appear.” *DDK Hotels, LLC v. Williams-Sonoma, Inc.*, No. 19-CV-00226, 2020 WL 4194195, at *12 (E.D.N.Y. July 20, 2020) (“*DDK Hotels*”) (relying on the scope of the subject arbitration provision to deny any suggestion of clear and unmistakable intent to delegate questions of arbitrability).

Importantly, courts do not “require parties to arbitrate when they have not agreed to do so.” *Volt Info. Scis., Inc. v. Bd. Of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). “Arbitration is strictly a matter of consent, . . . and thus is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration.” *Granite Rock Co. v. Int’l B’hd of Teamsters*, 561 U.S. 287, 299 (2010). A court may order arbitration of a particular dispute “only where the court is satisfied that the parties agreed to arbitrate *that dispute*.” *Id.* at 297 (emphasis in original).¹⁰

¹⁰ “[N]o matter how strong the federal policy favors arbitration, arbitration is a matter of consent between the parties, and one cannot be required to submit to arbitration a dispute which it has not agreed to submit to arbitration.” *Simon v. Pfizer, Inc.*, 398 F.3d 765, 775 (6th Cir. 2005).

““The presumption in favor of arbitration . . . does not apply if contractual language is plain that arbitration of a particular controversy is not within the scope of the arbitration provision.”” *Johnson v. Walmart, Inc.*, 57 F.4th 677, 681 (9th Cir. 2023) (quoting *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1044-45 (9th Cir. 2009) and rejecting an effort to require the arbitration of a contractual dispute on the basis of an arbitration provision in a separate agreement between the parties); *see also id.* at 683 (“The two contracts—though they involve the same parties and the same tires—are separate and not interrelated. Therefore, the arbitration agreement in the first does not encompass disputes arising from the second.”).

In the instant matter, BNSF seeks to require delegation under an arbitration provision in a separate contract that expressly is limited to claims “arising out of” that contract. Section 30, however, contains no stated (or even implied) intent to require the arbitration of claims relating to non-contractual common carrier service.

2. Abundant Recent Case Law Confirms the Absence of Any Need to Delegate Arbitrability Questions

As noted above, the 2019 *Schein* case supports the delegation of arbitrability questions (in certain circumstances) where “clear and unmistakable evidence” supports that delegation. *Schein*, 139 S. Ct. at 531. Even more recently, however, many courts have identified limitations that exist with respect to delegation-of-arbitrability questions in matters in which the subject dispute varies from the scope of the agreement containing the arbitration clause. The instant matter falls entirely outside the limited scope of *Schein* (and *Brennan*).

For example, in *Moritz v. Universal City Studios LLC*, 54 Cal.App.5th 238 (Cal. Ct. App. 2020), the California court held that “[a]n arbitration agreement is tied to the underlying contract containing it, and applies ‘only where a dispute has its real source in the contract. The object of an arbitration clause is to implement a contract, not to transcend it.’ No authority permits sending a matter to arbitration simply because the same parties agreed to arbitrate a different matter.” *Id.* at 246 (quoting *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 205 (1991)). Rejecting the suggestion that “clear and unmistakable” proof existed for delegation, the *Moritz* court emphasized that “[t]here is no reasonable probability that when the parties agreed to arbitrate any dispute relating to the FF6 and FF7 contracts that they meant every dispute in which a party mentions the contracts, no matter how tangentially” and that “no reasonable person . . . would have understood the F6 and F7 arbitration provisions to require arbitration of any future claim of whatever nature or type, *no matter how unrelated to the agreements nor how distant in the future the claim arose.*” *Id.* at 246-47 (emphasis added).¹¹

¹¹ “[I]f two small business owners execute a sales contract including a general arbitration clause, and one assaults the other, we would think it elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract. In other words, with respect to the alleged wrong, it is simply fortuitous that the parties happened to have a contractual relationship.” *Moritz*, 54 Cal.App.5th at 247 (quoting *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1516 (10th Cir. 1995)). Moreover, when an arbitration provision is “read as standing free from any [underlying] agreement,” “absurd results ensue.” *Id.* (quoting *Smith v. Steinkamp*, 318 F.3d 775, 777 (7th Cir. 2003)).

In addressing the specific question of delegation in light of *Schein*, the *Moritz* court clarified the presumptions underlying the *Schein* opinion itself, and in particular, the court emphasized the fundamental premise of the Federal Arbitration Act:

Schein presupposes a dispute arising out of the contract or transaction, i.e., some minimal connection between the contract and the dispute. That is so because under the FAA, contractual arbitration clauses are “valid, irrevocable, and enforceable” if they purport to require arbitration of any “controversy thereafter *arising out of such contract*.” (9 U.S.C. § 2.) *Schein* expressly understood that the act requires enforcement of arbitration clauses with respect to disputes ““thereafter arising out of such contract.”” (*Schein, supra*, 139 S.Ct. at p. 529 (quoting 9 U.S.C. § 2).) *The FAA requires no enforcement of an arbitration provision with respect to disputes unrelated to the contract in which the provision appears. Appellants’ argument that an arbitration provision creates a perpetual obligation to arbitrate any conceivable claim that Moritz might ever have against them is plainly inconsistent with the FAA’s explicit relatedness requirement.*

Id. at 248 (emphasis added); see 9 U.S.C. § 2 (“**Validity, irrevocability, and enforcement of agreements to arbitrate** – A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter *arising out of such contract* or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy *arising out of such a contract*, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.”) (emphasis added).

Similarly, in *Slaughter v. Nat'l Railroad Passenger Corp.*, 460 F. Supp. 3d 1, 8 (D.D.C. 2020), the D.D.C. explained that even after *Schein*, it still remains necessary (before any potential referral to an arbitrator) to “determine whether the parties agreed to arbitrate *this* dispute” (Emphasis in original). When making that determination, the *Slaughter* court relied upon the principle that “[n]o one can seriously argue that clauses can be plucked at random from one agreement and inserted into the other.” *Id.* (quoting *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 10 (1st Cir. 2004)).

It also is important to recognize that “*Schein* did not address [whether . . .] the contract in which the arbitration provision appeared . . . was ‘the relevant contract between the parties and generally governed the subject matter of the parties’ dispute.” *Smorowski v. Domino’s Pizza LLC*, CV 20-10739-MWF, 2021 WL 4440167, at *4 (C.D. Cal. July 23, 2021); *see also Portier v. NEO Technology Solutions*, No. 3:17-cv-30111-TSH, 2019 WL 7945683, at *8 (D. Mass. Dec. 31, 2019) (“*Schein* does not compel a different result. . . Here, . . . the Agreements by their terms do not apply to claims arising from a serious data breach that occurred after the termination of an employee’s employment and execution of an Agreement. Consequently, in the court’s view, the arbitration provisions in the Agreements do not apply to the data breach claims of employees who signed Agreements before the data breach occurred.”).

The Ninth Circuit recently distinguished *Schein* as well, and in so doing, demonstrated that there is no basis for BNSF’s request for partial dismissal:

Because Perez and Discover never formed an agreement to arbitrate her discrimination claims via the Citibank Agreement, . . . that agreement does not require Perez to

arbitrate her discrimination claims.[¹¹] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, – U.S. –, 139 S. Ct. 524 . . . is not to the contrary. There, the Supreme Court held that Circuit Courts cannot decide arbitrarily when a valid contract’s arbitration clause delegates that decision to the arbitrator “[even] if, under the contract, the argument for arbitration is wholly groundless.” *Id.* at 529. But here, Perez argues that Discover unlawfully discriminated against her in denying her consolidation loan application, and Perez and Discover did not form an agreement to arbitrate her discrimination claims via the Citibank agreement. *Put another way, this case lacks what Schein presupposes – a controversy thereafter arising out of [a] contract [to arbitrate].*

Perez v. Discover Bank, 74 F.4th 1003, 1011 (9th Cir. 2023) (internal quotation marks omitted) (emphasis added).

In the present Complaint case, there is no agreement between the parties to arbitrate disputes regarding common carrier service. Section 30 of the JERA Contract requires arbitration only of claims arising out of that contract and has no relevance to the common carrier dispute before the Board. In fact, the critical characteristic of common carrier service under Title 49 is the *absence* of any transportation agreement. Like the Ninth Circuit in its July 24, 2023 *Perez* decision, the Board is entitled to consider whether Docket No. NOR 42179 involves a controversy “arising out of a contract to arbitrate.” It does not.¹²

¹² See also *Johnson v. Walmart*, *supra*, 57 F.4th at 681 (“Johnson’s claim against Walmart does not arise out of the contract containing the arbitration agreement; it arises out of an entirely separate transaction at a Walmart store.”).

F. Granting BNSF's Motion Would Create Procedural Chaos

BNSF's Motion would create procedural chaos regarding the litigation of NTEC's Complaint. BNSF states in its Motion that it seeks dismissal solely with respect to 1Q23. Motion at 1. BNSF adds, somewhat vaguely, that "BNSF's requested partial dismissal would not prevent the Board from hearing the remainder of NTEC's claims that originate after 1Q23." *Id.*

Reading between the lines, however, it is not unreasonable to infer that – if the Board were to dismiss NTEC's claims as to 1Q23 – BNSF subsequently would seek a stay of the present STB case pending the completion of arbitration. And it is likewise reasonable to anticipate that in such a scenario, BNSF would argue that the Board would be bound to apply (for all of 2023 and thereafter) whatever conclusions an arbitration panel might happen to reach regarding the scope of the common carrier obligation and regarding the question of whether BNSF complied with that obligation.

Ultimately, BNSF's Motion appears to be directed toward avoiding any Board evaluation of BNSF's service and ensuring that such evaluation occur only in a non-public forum. BNSF's preference of avoiding Board decision-making does not constitute a legitimate basis for the partial dismissal that BNSF seeks.¹³

¹³ BNSF's reliance on the ICC's decision in *Toledo Edison Co. v. Norfolk & Western Ry.*, 367 I.C.C. 869, 871 (1983) ("*Toledo Edison*") is misplaced. *Toledo Edison* pertained to specialized questions regarding the Staggers Act date cut-off for the review of rates. Also, the Commission emphasized in *Toledo Edison* that defendant's evidence was "largely circumstantial and does not convince us of the possibility that a contract exists," adding that "[s]ome greater showing is necessary in order *for the Commission to*

CONCLUSION

For the foregoing reasons, NTEC respectfully requests that the Board deny BNSF's Motion.

Respectfully submitted,

NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC

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Dated: October 19, 2023

separate genuine from frivolous contract rate defenses.” 367 I.C.C. at 872 (emphasis added).

CERTIFICATE OF SERVICE

I hereby certify that this 19th day of October, 2023, I have caused copies of the foregoing to be served via email upon counsel of record for BNSF Railway Company.

/s/ Daniel M. Jaffe
Daniel M. Jaffe

Exhibit A (Redacted)

	Ship Date	Nature of Shipment	Total Tons	# Cars	BNSF Freight Rate (per Car)*	
1	01/05/2023	JERA Contract	15,726.300	130		
2	01/08/2023	JERA Contract	14,918.400	126		
3	01/08/2023	JERA Contract	14,102.875	119		
4	01/08/2023	JERA Contract	12,682.425	111		
5	01/10/2023	JERA Contract	14,499.575	120		
6	01/12/2023	JERA Contract	15,688.575	130		
7	01/12/2023	BNSF-CPKC (JERA)	14,308.300	119		
8	01/13/2023	JERA Contract	14,852.625	123		
9	01/21/2023	BNSF 90139	15,659.800	130	\$	5,030.00
10	01/22/2023	BNSF-CPKC (non-JERA)	13,787.750	114		
11	01/23/2023	BNSF 90139	15,746.275	130	\$	5,030.00
12	01/23/2023	BNSF 90139	15,700.475	130	\$	5,030.00
13	01/27/2023	BNSF 90139	15,707.000	130	\$	5,030.00
14	01/28/2023	BNSF 90139	15,599.750	130	\$	5,030.00
15	01/30/2023	BNSF 90139	15,645.325	130	\$	5,030.00
16	02/03/2023	BNSF 90139	15,741.375	130	\$	5,030.00
17	02/03/2023	BNSF-CPKC (non-JERA)	12,184.675	119		
18	02/04/2023	BNSF 90139	15,751.325	131	\$	5,030.00
19	02/05/2023	BNSF 90139	15,441.100	128	\$	5,030.00
20	02/09/2023	BNSF 90139	15,241.075	128	\$	5,030.00
21	02/10/2023	BNSF 90139	15,828.375	132	\$	5,030.00
22	02/15/2023	BNSF 90139	15,194.500	127	\$	5,030.00
23	02/16/2023	BNSF 90139	15,684.750	130	\$	5,030.00
24	02/16/2023	BNSF-CPKC (non-JERA)	14,109.150	117		
25	02/17/2023	BNSF 90139	15,423.500	128	\$	5,030.00
26	02/18/2023	BNSF 90139	15,327.100	128	\$	5,030.00
27	02/25/2023	BNSF 90139	16,176.750	134	\$	5,030.00
28	02/25/2023	BNSF 90139	14,227.950	120	\$	5,030.00
29	02/26/2023	BNSF 90139	15,553.750	130	\$	5,030.00
30	02/27/2023	BNSF 90139	15,480.500	130	\$	5,030.00
31	02/28/2023	BNSF 90139	15,490.175	130	\$	5,030.00
32	02/28/2023	BNSF 90139	15,597.875	130	\$	5,030.00
33	03/04/2023	BNSF 90139	14,969.075	124	\$	5,030.00
34	03/05/2023	BNSF 90139	15,698.475	130	\$	5,030.00
35	03/06/2023	BNSF 90139	15,708.925	130	\$	5,030.00
36	03/07/2023	BNSF 90139	15,597.575	130	\$	5,030.00
37	03/07/2023	BNSF 90139	15,581.700	129	\$	5,030.00
38	03/09/2023	BNSF 90139	15,406.300	128	\$	5,030.00
39	03/12/2023	BNSF 90139	15,380.650	128	\$	5,030.00
40	03/13/2023	BNSF 90139	14,360.325	119	\$	5,030.00
41	03/15/2023	BNSF 90139	15,683.925	130	\$	5,030.00

* Not including fuel surcharge

42	03/16/2023	BNSF 90139	15,573.950	129	\$	5,030.00
43	03/17/2023	BNSF 90139	15,645.275	130	\$	5,030.00
44	03/20/2023	BNSF 90139	15,687.725	130	\$	5,030.00
45	03/20/2023	BNSF 90139	15,702.525	130	\$	5,030.00
46	03/20/2023	BNSF 90139	15,669.825	130	\$	5,030.00
47	03/24/2023	BNSF 90139	15,694.950	130	\$	5,030.00
48	03/25/2023	BNSF 90139	15,625.750	130	\$	5,030.00
49	03/25/2023	BNSF 90139	13,638.850	123	\$	5,030.00
50	03/26/2023	BNSF 90139	15,640.275	130	\$	5,030.00
51	03/27/2023	BNSF 90139	15,477.750	130	\$	5,030.00
52	03/29/2023	BNSF 90139	15,650.725	130	\$	5,030.00
53	03/29/2023	BNSF 90139	15,646.500	130	\$	5,030.00
54	03/31/2023	BNSF 90139	15,706.300	130	\$	5,030.00

Exhibit B

Redacted