

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42180

EVERGY, INC., EVERGY METRO, INC., and
EVERGY KANSAS CENTRAL, INC.

v.

BNSF RAILWAY COMPANY

COMPLAINT AND PETITION FOR
DECLARATORY ORDER

ANSWER OF BNSF RAILWAY COMPANY

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Dated: May 20, 2024

ANSWER OF BNSF RAILWAY COMPANY

Defendant BNSF Railway Company (“BNSF”) hereby answers the Complaint and Petition for Declaratory Order (“Complaint”) that Evergy, Inc., Evergy Metro, Inc. (“Evergy Metro”), and Evergy Kansas Central, Inc. (“EKC”) (collectively, “Evergy” or “Complainant”) filed on January 31, 2024.¹ The record in this proceeding will show that BNSF met its common carrier obligation and the Complaint is without merit.

BNSF denies the allegations in the Complaint except as specifically admitted, denies any allegations as to which there is no specific response, and denies Complainant’s introductory summary and all titles, headings, footnotes, subheadings, and any other material not contained in numbered paragraphs. Because BNSF complied with its common carrier obligations, Evergy is not entitled to any of the relief it seeks.

BNSF RESPONSES IN ANSWER TO COMPLAINANT’S SPECIFIC ALLEGATIONS

1. BNSF admits only that the rail transportation it provided to Evergy in 2022 is subject to the jurisdiction of the Board. To the extent Paragraph 1 of the Complaint states legal conclusions, no response is required.

2. BNSF does not have sufficient information to admit or deny the allegations in Paragraph 2 to the extent they relate to the corporate background or activities of Complainant and, as such, they are denied.

¹ On February 7, 2024, the Board granted the parties’ joint motion to hold the proceeding in abeyance for 90 days, through May 6, 2024.

3. BNSF does not have sufficient information to admit or deny the allegations in Paragraph 3 to the extent they relate to the corporate background or activities of Complainant and, as such, they are denied.

4. BNSF does not have sufficient information to admit or deny the allegations in Paragraph 4 to the extent they relate to the corporate background or activities of Complainant and, as such, they are denied. BNSF admits that it is the only rail carrier capable of providing direct service to the Iatan and Lawrence stations. BNSF denies that Complainant declared 4,800,000 tons of coal for the Iatan station for 2022. BNSF admits that Complainant declared 1,084,000 tons of coal for the Lawrence station for 2022. BNSF admits that the Complainant declared the listed figures for the Iatan station for 2017 through 2021. BNSF admits that the Complainant declared the listed figures for the Lawrence station for 2017 through 2020. BNSF denies that the Complainant declared 1,204,700 tons for the Lawrence station for 2021.

5. BNSF does not have sufficient information to admit or deny the allegations in Paragraph 5 to the extent they relate to the activities of Complainant and, as such, they are denied.

6. BNSF admits that the fuel requirements of coal-fired electric generating facilities generally vary over the course of the year. BNSF denies the remaining allegations in Paragraph 6.

7. BNSF admits only that it is a common carrier by rail, and that the rail transportation it provided to Evergy in 2022 is subject to the jurisdiction of the Board. To the extent that Paragraph 7 states legal conclusions, no response is required.

8. BNSF admits that it has a longstanding customer relationship with Complainant and has shipped coal to the Iatan and Lawrence stations under various agreements with different terms until December 31, 2020 for Lawrence and until December 31, 2021 for Iatan, after which times Evergy purchased common carrier transportation service from BNSF. BNSF denies the remaining allegations in Paragraph 8.

9. BNSF admits that Complainant generally provided its own railcars that BNSF used to transport coal to the Iatan and Lawrence stations. BNSF further admits that the service rates requested by Evergy for coal transportation were based upon Complainant providing its own railcars in lieu of rates for service that included cars provided by BNSF, but denies that BNSF required Complainant to acquire and provide its own cars. BNSF further admits that demand for coal deliveries can fluctuate during the course of a year based on numerous factors including demand for electric generation and facility unloading and storage capacity, but denies the remaining allegations in Paragraph 9, including that the number of trainsets are determinative of coal delivery volumes.

10. BNSF does not have sufficient information to admit or deny the allegations in Paragraph 10 to the extent they relate to the activities of Complainant; as such, they are denied.

11. BNSF denies the allegations in Paragraph 11, and affirmatively states that Complainant regularly withheld key information from BNSF including coal inventories at its Iatan and Lawrence stations.

12. BNSF denies the allegations in Paragraph 12.

13. BNSF admits that it generally used trainsets supplied by Complainant to transport coal to the Iatan and Lawrence stations, but denies the remaining allegations in Paragraph 13 including those regarding the sufficiency of trainsets or reasonableness of scheduled deliveries previously contracted by Complainant.

14. BNSF admits that it issued Tariff BNSF 60024 on December 4, 2020, and that this tariff set rates and service terms for coal shipments to the Lawrence station. BNSF further admits that the tariff and applicable amendments are attached to the Complaint and the terms and conditions thereof are as contained in said attachments. BNSF denies all remaining allegations of Paragraph 14.

15.² BNSF admits that it issued Tariff BNSF 60029 on October 13, 2021, and that this tariff set rates and service terms for coal shipments to the Iatan station. BNSF further admits that the tariff and applicable amendments are attached to the Complaint and the terms and conditions thereof are as contained in said attachments. BNSF denies all remaining allegations of Paragraph 15.

16. BNSF admits that during the third quarter of 2021, Complainant provided BNSF with 2022 coal tonnage nominations for the Lawrence and Iatan

² In the Complaint, this paragraph is incorrectly numbered as paragraph 14. BNSF numbers it as paragraph 15.

stations. BNSF further admits that Complainant thereafter advised BNSF of the number of trainsets Complainant requested, but BNSF denies all remaining allegations of Paragraph 16, including that the number of trainsets requested was required for the delivery of the requested tonnage.

17. BNSF denies the allegations in Paragraph 17. To the extent Paragraph 17 states a legal conclusion, no response is required.

18. BNSF admits only that in late 2021 and early 2022, based on several factors including reduced tonnage requests, facility unloading delays due to Evergy equipment breakdowns at Iatan, and BNSF rail network congestion, BNSF reduced the number of trainsets in service for transporting coal to the Iatan and Lawrence stations to four (4) trainsets for the two stations combined. BNSF denies all remaining allegations of Paragraph 18.

19. BNSF denies that it “conditioned its service on Complainant[] scheduling shipments ‘ratably’ throughout the year.” BNSF’s Tariff 60024 and Tariff 60029 both require Complainant to schedule “reasonably even monthly increments,” and BNSF further advised Complainant to use BNSF’s Coal Forecasting Tool to more accurately schedule and notify BNSF of Complainant’s three-month rolling tender forecast by month. BNSF denies the remaining allegations in Paragraph 19.

20. BNSF denies the allegations in Paragraph 20.

21. BNSF does not have sufficient information to admit or deny the allegations in Paragraph 21 because they relate to the activities of Complainant; as such, they are denied. BNSF denies all remaining allegations of Paragraph 21.

22. BNSF admits that it advised Complainant that service to the Iatan and Lawrence stations was being constrained, in part, “by train crew shortages and limited locomotive power availability,” in 2022, but denies that such factors were the sole cause of service limitations, which also included, among other factors, unloading issues caused by Complainant at the Iatan station. BNSF denies the remaining allegations in Paragraph 22.

23. BNSF does not have sufficient information to admit or deny the allegations in Paragraph 23 because they relate to the activities of Complainant; as such, they are denied. BNSF denies the remaining allegations in Paragraph 23.

24. BNSF admits that it sent Complainant supplements to Tariffs BNSF 60024 and 60029 in June 2023 and that the supplements do not contain the referenced language. BNSF denies the remaining allegations in Paragraph 24.

25. BNSF incorporates by reference its responses to the above paragraphs as if they were fully set forth herein.

26. BNSF denies the allegations in Paragraph 26. To the extent Paragraph 26 states a legal conclusion, no response is required.

27. BNSF incorporates by reference its responses to the above paragraphs as if they were fully set forth herein.

28. BNSF denies the allegations in Paragraph 28. To the extent Paragraph 28 states a legal conclusion, no response is required.

29. BNSF incorporates by reference its responses to the above paragraphs as if they were fully set forth herein.

30. BNSF denies the allegations in Paragraph 30. To the extent Paragraph 30 states a legal conclusion, no response is required.

31. BNSF incorporates by reference its responses to the above paragraphs as if they were fully set forth herein.

32. BNSF denies the allegations in Paragraph 32. To the extent Paragraph 32 states a legal conclusion, no response is required.

AFFIRMATIVE DEFENSES AND CERTAIN OTHER DEFENSES

A. The Complaint fails to state a claim under 49 U.S.C. § 11101(a). BNSF's service complied with the requirements of Section 11101(a).

B. The Complaint fails to state a claim under 49 U.S.C. § 11101(a). Complainant's requests for service were not reasonable as required by 49 U.S.C. § 11101(a).

C. The Complainant fails to state a claim under 49 U.S.C. §§ 10702, 11121. The essence of the Complaint, underlying each of the counts, is that BNSF refused or failed to accept a number of Complainant's private railcar trainsets into service in 2022. But a common carrier does not have an unqualified obligation to accept private railcars to provide common carrier service.

D. Complainant has not suffered any injury or damage caused by BNSF.

E. Complainant's damages, if any, are speculative.

F. Complainant's request for a declaratory order, Count IV, must be dismissed because it seeks an order in the absence of any ongoing dispute or controversy. There is no live dispute between Complainant and BNSF over the

acceptance and use of Complainant's trainsets. Count IV must also be dismissed because use of a declaratory order to create common carrier requirements in the future would be inappropriate due to the fact-specific nature of the common carrier obligation.

G. BNSF specifically reserves the right to assert any additional defenses that become apparent during the case. Additional facts may become known during the course of discovery and investigation that will support affirmative defenses that currently are unknown to BNSF. To preserve such affirmative defenses, BNSF hereby reserves the right to assert additional affirmative defenses as discovery proceeds.

PRAYER FOR RELIEF

Wherefore, BNSF respectfully prays for relief as follows:

1. That the Board dismiss the Complaint and Petition with prejudice and enter an order in favor of BNSF and against Complainant;
2. That Complainant recover nothing; and
3. That the Board grant BNSF such other and further relief as the Board deems just and proper.

Respectfully submitted,

/s/ Timothy J. Strafford

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Counsel for BNSF Railway Company

Dated: May 20, 2024

CERTIFICATE OF SERVICE

I hereby certify that I have caused the public version of the foregoing *Answer of BNSF Railway Company* to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Tara A. Woods

Tara A. Woods
Attorney for BNSF Railway Company

May 20, 2024