

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
June 5, 2024
Part of

EVERGY, INC.,	)	
EVERGY METRO, INC. and	)	
EVERGY KANSAS CENTRAL, INC.	)	
	)	
Complainants,	)	
	)	
v.	)	Docket No. NOR 42180
	)	
BNSF RAILWAY COMPANY	)	
	)	
Defendant.	)	
	)	

COMPLAINANTS' REPLY TO MOTION TO DISMISS

EVERGY, INC.
EVERGY METRO, INC.
EVERGY KANSAS CENTRAL, INC.
1200 Main Street, Suite 29
Kansas City, MO 64105

Kelvin J. Dowd
Andrew B. Kolesar III
Daniel M. Jaffe
Slover & Loftus LLP
1828 L Street, N.W., Suite 1000
Washington, D.C. 20036
202.347.7170
kjd@sloverandloftus.com
abk@sloverandloftus.com

Of Counsel:

Slover & Loftus LLP
1828 L Street, N.W., Suite 1000
Washington, D.C. 20036

Dated: June 5, 2024

*Attorneys for Evergy, Inc.,
Evergy Metro, Inc. and
Evergy Kansas Central, Inc.*

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COMPLAINANT’S REPLY TO MOTION TO DISMISS

Evergy, Inc. (“Evergy”), Evergy Metro, Inc. (“Evergy Metro”) and Evergy Kansas Central, Inc. (“EKC”) (collectively “Evergy”) hereby reply in opposition to the partial Motion to Dismiss (“Motion”) that Defendant BNSF Railway Company (“BNSF”) filed in this proceeding on May 17, 2024. BNSF’s Motion seeks dismissal of the count in Evergy’s Complaint that requests a declaratory order to define BNSF’s current and future statutory service obligations to Evergy. Evaluated against the established standard for motions to dismiss complaints such as Evergy’s, it is clear that BNSF’s Motion is without merit and the Board should deny it.

Beyond ignoring the legal standard applicable to its Motion, BNSF misapplies 5 U.S.C. § 554(e), overlooking Board precedent approving declaratory order requests in order to “remove uncertainty,” even in the absence of a “live” controversy. Such uncertainty plainly is present in this case, as BNSF still clings to the unfounded notion it

asserted in 2022 that it possesses “sole discretion” to determine whether and how it will provide common carrier service to Evergy. BNSF also ignores the specific procedural nature of this case (which combines a Complaint seeking damages for past statutory violations with a forward-looking declaratory order request) and distorts the nature of Evergy’s actual declaratory-order request. That request does not ask the Board to “fix common carrier service levels in the abstract” (Motion at 11), but rather seeks Board clarification of BNSF’s specific future obligations to accept sufficient Evergy trainsets into service to transport properly scheduled shipments of essential coal fuels, consistent with a decades-long pattern and practice establishing what constitutes a “reasonable request” for service under 49 U.S.C. § 11101(a). Under clear Board precedent, BNSF’s Motion should be denied and Evergy’s request for a declaratory order should be allowed to proceed as an accompanying request for relief in this broader case.

BACKGROUND

Evergy’s January 31, 2024 Complaint seeks redress: (a) for BNSF’s failure throughout 2022 to provide reasonable and adequate rail transportation service in violation of BNSF’s statutory obligations as a common carrier railroad; and (b) for BNSF’s unreasonable practices in establishing and implementing the terms for such service. Evergy’s Complaint identifies five (5) specific requests for relief:

- (1) a determination that BNSF breached its statutory obligation to provide adequate common carrier service on reasonable request;
- (2) a determination that BNSF engaged in unreasonable practices in establishing and implementing the terms for such service;

- (3) a determination that BNSF failed to provide adequate car service;
- (4) a declaration of the scope of BNSF's service obligations to Complainants consistent with the applicable statute; and
- (5) an award of monetary damages as compensation to Complainants for the consequences of BNSF's unlawful actions and inactions.

Complaint at 1-2. Evergy's total damages claim amounts to approximately \$55 million, before interest. *See* Complaint at 3 (lost profits and opportunity costs that exceed \$20,000,000 before interest and additional power purchase and other incurred costs in excess of \$35,000,000 before interest). The additional costs incurred by Evergy as a consequence of BNSF's service defaults ultimately are borne by millions of Midwestern electric ratepayers.

Evergy's Complaint recounted BNSF's inclusion of a "Service Limitation Notice" in the Tariffs that BNSF unilaterally imposed on Evergy covering coal transportation to Evergy's Iatan and Lawrence generating stations, by which BNSF purported to reserve "sole discretion" to decide whether and how to serve Evergy and under what circumstances it would accept into service the trainsets of private rail cars that Evergy had provided for decades at BNSF's insistence to transport Evergy's coal. That Notice provided as follows:

Service Limitation Notice: The provision of service and acceptance of any tenders for movement under this publication, including the supply of carrier equipment and/or the introduction of shipper train sets on BNSF for the movement of coal pursuant to this Common Carrier Pricing Authority *shall, for the foreseeable future, be subject to BNSF's sole discretion.*

Complaint at 9 (emphasis added). This “sole discretion” language appeared in the Tariffs that BNSF provided to Evergy for service in 2021, 2022 and 2023.

On or about June 5, 2023, BNSF transmitted to Evergy supplements to Tariffs BNSF 60024 and 60029 that did not include the ‘sole discretion’ language” that previously appeared in BNSF’s Tariffs. Complaint at 14. However, BNSF “did not explain the reason for this change, nor did the Tariffs include any new language providing assurances that in the future the acceptance into service of private trainsets would correlate with Iatan’s and Lawrence’s scheduled coal tonnages.” *Id.*

As Evergy explained in its Complaint, BNSF has demonstrated a willingness and intent to unilaterally determine the level of service to Evergy based on its own internal operational convenience, rather than Evergy’s reasonable needs and requests for transportation. Particularly when the allegations in Evergy’s Complaint regarding BNSF’s service failures in 2022 are assumed to be true – as the legal standard for the evaluation of a motion to dismiss requires – there is a very real prospect that unless otherwise constrained, BNSF in the future will repeat the type of actions that it took with respect to service in 2022 that violated 49 U.S.C. §§ 10702(2), 11101(a), and 11121(a). Based upon this observation and pursuant to 5 U.S.C. § 554(e), Evergy pleaded that “BNSF’s apparent belief that it is entitled to limit service to Complainants in the manner described herein presents a circumstance where the Board should act to ‘*remove uncertainty*’ as to future service to Iatan and Lawrence.” Complaint at 16 (emphasis added). In its prayer for relief, Evergy requested that the Board issue a declaratory order

pursuant to 5 U.S.C. § 554(e) clarifying that “so long as coal shipments to Iatan and Lawrence are transported in common carrier service, BNSF’s obligations under 49 U.S.C. §§ 10702(2), 11101(a), and 11121(a)(1) require it to accept into service a sufficient number of private Evergy railcars to transport Iatan’s and Lawrence’s respective nominated coal volumes, consistent with historic volumes and subject to Complainants’ scheduling of shipments using BNSF’s prescribed procedures.” Complaint at 17.

ARGUMENT

Board precedent makes clear that motions to dismiss a case or count before the submission of evidence are strongly disfavored, and rarely granted. *Entergy Ark., Inc., Et Al. v. Union Pac. R.R.*, NOR 42104 (STB served Dec. 30, 2009) at 3; *Alonzo Benton v. CSX Transp., Inc.*, NOR 42166 (STB served Jan. 17, 2020) at 2; *Dairyland Power Coop. v. Union Pac. R.R.*, NOR 42105 (STB served July 29, 2008). Moreover, in considering such a motion the Board views all alleged facts in the light most favorable to the complainant opposing the motion. *Cent. Valley Ag Grinding, Inc. v. Modesto & Empire Traction Co.*, NOR 42159 (STB served July 25, 2018) at 4; *Consumers Energy Co. v. CSX Transp. Co.*, NOR 42142 (STB served June 15, 2015) at 1; *Montana v. BNSF Ry.*, NOR 42124 (STB served Feb. 16, 2011) at 3. Application of that standard is particularly important in this case, as BNSF’s Motion is predicated on a distorted and self-serving version of events in 2022.¹ When the facts set out in Evergy’s Complaint are considered

¹ To give just one example, BNSF states that Evergy sought to place “additional trainsets” into service in 2022 despite what BNSF alleged were congested network

in a light most favorable to Evergy, it is clear that BNSF violated its statutory obligations under 49 U.S.C. §§ 10702(2), 11101(a) and 11121(a)(1) in 2022, and that in the absence of a Board declaration of its responsibilities to Evergy going forward, uncertainty would exist regarding whether BNSF would be free to repeat these violations whenever it would serve the carrier's own interests.

I. BNSF's Objections to Evergy's Declaratory Order Count are Without Merit

In its Motion, BNSF argues that Evergy's request for a declaratory order has two "fatal flaws that require dismissal." Motion at 1. BNSF first alleges that Evergy seeks an order in the absence of any ongoing dispute or controversy. *Id.* Second, BNSF argues that it is inappropriate to use the Board's declaratory order authority to "establish a common carrier's future service obligations, given that those obligations are fundamentally driven by specific facts and circumstances existing at the time of the future service request." *Id.* at 2. Neither of BNSF's arguments is well-founded, and the Board therefore should deny BNSF's Motion.

A. BNSF Misapplies the Standard for Declaratory Orders

Section 554(e) of Title 5 of the United States Code allows for declaratory relief either to "terminate a controversy or remove uncertainty." In its Motion, BNSF correctly

conditions. Motion at 6. The impression that BNSF apparently hopes to leave is that Evergy's trainset requirements somehow were unusual or unreasonable. In fact, Evergy notified BNSF of the number of trainsets needed – consistent with its nominated coal volumes – in 2021, and thereafter only ever sought to have BNSF accept the same number of trainsets that consistently had been used in previous years to handle similar nominated volumes. *See* Complaint at 10-11. Moreover, Evergy will present evidence that BNSF's available system capacity in 2022 was more than adequate to handle Evergy's reasonable nominated coal volumes, and that any resource limitations that BNSF faced were a consequence of its own internal operating decisions.

quotes this two-pronged standard of 5 U.S.C. § 554(e) (Motion at 7), but nevertheless argues that the Board should dismiss Evergy’s declaratory order request solely on the basis of the first of those two prongs. BNSF argues only that “[d]eclaratory orders are intended to resolve live controversies” *Id.* at 1; *see also id.* at 7 (“There is No Ongoing Controversy that Would Warrant a Declaratory Order”); *id.* at 8 (“The Complaint alleges no active controversy that would justify declaratory relief here”). BNSF asserts that because it is *currently* meeting Evergy’s requests for service to Iatan and Lawrence, no basis exists for the Board to consider declaratory relief in light of the 2022 BNSF service failures described in the Complaint. Significantly, BNSF ignores the second prong of the governing standard.

The Board repeatedly has recognized that it is appropriate to consider a declaratory order request *to remove uncertainty* even in the absence of a pending actual controversy. *See, e.g., Union Pac. R.R. – Pet. for Decl. Order*, FD 35504, at 3-4 (STB served Dec. 12, 2011) (“*Union Pacific*”). In *Union Pacific*, the railroad sought a declaratory order regarding the reasonableness of the indemnification provisions in its tariff relating to the transportation of toxic by inhalation hazardous commodities. *Id.* at 1. The Board elected to institute a declaratory order proceeding over the objections of various shippers and shipper groups, who had argued that there was no concrete dispute or actual controversy. *Id.* at 3.

Rejecting the shippers’ arguments, the Board held that under the Administrative Procedure Act (5 U.S.C. § 554(e)) the Board may issue a declaratory order in the absence

of an actual dispute where its determination would remove uncertainty in a matter related to the Board's subject matter jurisdiction:

According to shippers, this case lacks a sufficiently active controversy to support the institution of a declaratory order proceeding because shippers have declined thus far to bring a complaint challenging UP's tariff provisions. The declaratory order process, though, is not limited to terminating controversies; it is also available to remove uncertainty. Moreover, this procedure is available to carriers as well as shippers. Here, UP has raised uncertainty regarding the reasonableness of its tariff provisions, an issue of significance to the railroad and its shippers. Resolving such an uncertainty is an appropriate use of the declaratory order process. *See* 5 U.S.C. 554(e).

Union Pacific at 3; *see also id.* ("It is appropriate here to institute a declaratory order proceeding to remove the uncertainty raised in UP's petition regarding the reasonableness of its tariff provisions under 49 U.S.C. § 10702 and 49 U.S.C. § 11101(a).").

The Board relied on *Union Pacific* in denying a motion to dismiss in Agrium's 2015 complaint proceeding against Canadian Pacific Railway ("CP"). *Agrium Inc. and Agrium U.S. Inc. v. Canadian Pac. Ry.*, NOR 42145 (STB served Sept. 15, 2015). In its motion in that case, CP had argued that the claim should be dismissed because it did not present a live case or controversy and was not ripe for review by the Board. *Id.* at 1; *see also id.* at 1-2 ("CP first argues that there are no reasonable grounds to investigate Agrium's claims because CP has not applied the disputed Tariff provision to Agrium, and, therefore, there is no actual case or controversy for the Board to resolve"). Rejecting CP's motion and noting the relevance of the *Union Pacific* decision, the Board declined

to dismiss the Agrium proceeding “under the narrower discretionary standard applicable to complaints.” *Id.* at 2.

The Board’s decision on a motion to dismiss the claim of Sanimax USA against Union Pacific Railroad also is applicable here. In that case, Sanimax filed a complaint against Union Pacific for failure to meet its common carrier service obligations under 49 U.S.C. § 11101(a) and sought forward-looking injunctive relief. After some preliminary litigation, Union Pacific agreed to temporarily provide Sanimax with the level and frequency of service that it had requested, and then moved to dismiss Sanimax’s complaint as moot. Rejecting Union Pacific’s arguments, the Board held:

Here, UP’s commitment to provide five-days-per-week service was for a finite and relatively short period of time, after which UP could decide to revert to the same practices that prompted Sanimax’s complaint. Moreover, ...UP itself stated that it had not made any further commitments regarding service frequency. Accordingly, the Board finds that Sanimax’s injunctive relief claim is not moot.

Sanimax USA LLC v. Union Pacific R.R. Co., NOR 42171 (STB served Nov. 3, 2023) at

5. In the instant matter, BNSF has not offered any assurances regarding adequate future service to the Iatan and Lawrence stations, much less committed to that service. To the contrary, BNSF has taken the position that its service restrictions in 2022 were a matter of entitlement, which clearly creates uncertainty as to the standard to which BNSF should be held in the future. *See Answer of BNSF Railway Co.*, filed May 20, 2024 at 5-6.

BNSF seeks dismissal of Evergy’s declaratory order count based on an invented scenario that is wholly contradicted by the factual presumptions that the Board’s governing standard adopts.

The case law on which BNSF relies does not even pertain to the specific issue of whether a request for a declaratory order would resolve uncertainty in a matter related to the Board's subject matter jurisdiction. BNSF relies on: (1) a 1985 D.C. Circuit decision (*Hollister*) reaching a split result on review of a FERC order (with a combined concurring/dissenting opinion indicating that the subject FERC ruling did not even involve a declaratory order);² (2) a 1989 ICC *Delegation of Authority* decision rather vaguely commenting that the Commission has exercised "broad discretion" under Section 554(e) "by both granting and denying requests for declaratory order proceedings;"³ (3) the Board's decision in the *CF Industries* proceeding (FD 35517) dismissing a declaratory order request as moot following the withdrawal of the subject tariff provisions more than twenty months after the Board had initiated the proceeding and after the parties had filed three rounds of evidence;⁴ and (4) the Board's FD 35352 and

² *Hollister Ranch Owners' Ass'n v. FERC*, 759 F.2d 898, 903 (D.C. Cir. 1985); *id.* at 904 (MacKinnon, S.J., concurring in part and dissenting in part).

³ *Delegation of Authority – Decl. Order Procs.*, 5 I.C.C.2d 675 (1989).

⁴ *CF Indus., Inc. v. Indiana & Ohio Ry., Point Comfort and Northern Ry., and the Michigan Shore R.R. – Pet. for Decl. Order*, FD 35517, at 2 (STB served June 21, 2013) ("In a decision served on September 30, 2011, in both dockets, the Board instituted a declaratory order proceeding in Docket No. FD 35517 to develop a single record on all the substantive issues presented in these cases other than complainants' injunction request. . . . In Docket No. FD 35517, the parties filed opening evidence and argument on January 13, 2012, replies on February 27, 2012, and rebuttal on March 13, 2012."). Moreover, when dismissing the proceeding as moot (in response to the withdrawal of the challenged tariff provisions), the Board acknowledged that it shared CF's expressed concerns about wasted litigation efforts in the event that respondents "decide[d] to adopt the same or similar provisions again." *Id.* at 4. Accordingly, the Board held that it would allow the existing record to be "incorporated to the degree relevant" in the event of such adoption. *Id.*

FD 35740 decisions each finding that there was “no longer” an active controversy between the parties, in part because the petitioner had withdrawn its request for relief.⁵

None of the cases cited by BNSF undermines the principle recognized in *Union Pacific* and in *Agrium* that the Board has the authority to consider requests for declaratory orders to remove uncertainty. Here, uncertainty exists regarding the question whether BNSF may exercise “sole discretion” in deciding whether to provide service to Evergy in the future, or whether BNSF’s actions will be subject to standard common carrier service principles.

B. BNSF Mischaracterizes the Nature of Evergy’s Declaratory Order Request

BNSF also mischaracterizes the nature of Evergy’s declaratory order request, wrongly asserting that Evergy has asked the Board to “fix common carrier *service levels*.” Motion at 11 (emphasis added); *id.* (“If the Board were to *establish forward-looking service level obligations* for specific shippers regardless of current circumstances, railroads would have little flexibility to deal with changing conditions”) (emphasis added). Evergy has not asked the Board to set a specific number of required trainsets in advance or otherwise to “fix common carrier service levels” without regard to relevant

⁵ *Petition of Nebkota Ry. and West Plains Co. for Decl. Order*, FD 35352, at 3 (STB served April 28, 2010) (“The grounds petitioners cited for declaratory relief while STB Finance Docket No. 35346 was pending before the Board ceased to exist when they withdrew their petition in that proceeding”); *BNSF Ry. and Mustket Corp. v. Union Pac. R.R.*, FD 35740, at 3 (STB served Dec. 31, 2013) (“Petitioners have acknowledged that switching operations at TXIT have improved since the Petition was filed, and that they believe that BNSF and UP ultimately should be able to arrive at a negotiated solution that will ensure satisfactory service”).

circumstances, but rather has asked the Board to clarify the *standard* that should be used in the future to gauge whether BNSF is meeting its obligations under the facts as they exist at the time.

A significant issue that exists with respect to that future service pertains to BNSF's practice of invoking a right to determine the number of trainsets that can be deployed to transport coal to Iatan and Lawrence and otherwise set service levels in its "sole discretion," without regard to Evergy's needs or reasonable requests. Evergy respectfully submits that substantial uncertainty exists with respect to: (1) the service that BNSF has held itself out to provide; and (2) the legal standard to which BNSF contends it should be held. As noted above, BNSF removed the specific "sole discretion" language from its Evergy tariffs on or about June 5, 2023. Complaint at 14. That timeframe corresponds generally to activity in the *NTEC* case, which also involved BNSF's "sole discretion" language and the removal of that language from the tariff at issue there. *Navajo Transitional Energy Co., Ex Parte Pet. for Emergency Service Order*, NOR 42178, at 5 (STB served June 23, 2023) ("NTEC also argues that service levels should not be at BNSF's sole discretion."). However, removing a phrase from a tariff item does not equate to making a commitment to provide adequate service on reasonable request.

Significantly, BNSF conceded at the May 10, 2023 hearing in the *NTEC* proceeding that there was *no substantive difference* in BNSF's tariffs between the versions that include the declaration of "sole discretion" as to service and car supply and the versions that did not include such language. *See* Transcript of May 10, 2023 Hearing, *Navajo Transitional Energy Co., Ex Parte Pet. for Emergency Service Order*, NOR

42178 at 192:10-22 (“CHAIRMAN OBERMAN: You had this word sole discretion in your original tariff, and then you took it out. Is there any difference in BN’s obligation to provide service to NTEC between the one that had the word sole discretion in it, and the ones that don’t – the one that doesn’t have the word sole discretion in it. What’s the significance of taking the words out? MR. STRAFFORD: No. There’s no difference. CHAIRMAN OBERMAN: No difference. All right.”).

If BNSF is of the view that it has sole discretion with respect to the nature and quality of the service that it provides even in the absence of explicit tariff language claiming such discretion, then there are grounds for uncertainty regarding the level of service that Evergy should expect to receive in the future and BNSF’s own version of its obligations under the governing statutes. Service-related case law rejects the notion that a rail carrier simply may elect whether or not to satisfy reasonable requests for common carrier service. *See, e.g., V.L. Johnson v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 400 F.2d 968, 972 (9th Cir. 1968) (“The carrier is not excused [from providing adequate service] if the interference with its service could have been avoided by forethought. . . . A carrier must anticipate problems and provide against them.”). *See also, Am. Trucking Ass’n, Inc. v. A.T. & S.F. Ry. Co., Et Al.*, 387 U.S. 397, 406 (1967); *Pennsylvania R.R. Co. v. Sonman Shaft Coal Co.*, 242 U.S. 120, 126 (1916); *Nat. Grain & Feed Ass’n v. U.S.*, 5 F. 3d 306, 311-12 (8th Cir. 1993). Board clarification of BNSF’s obligations in the form of a declaratory order would remove the uncertainty associated with BNSF’s various statements and its claims on the record in this case.

II. The Procedural Context of this Case Militates Against Dismissal

Finally, the procedural context of the instant case militates against the action that BNSF seeks. Evergy has requested a declaratory order as an additional form of relief in a much broader Complaint proceeding. This case does not fall into the category of “standard” declaratory order proceedings in which the Board’s decision whether or not to initiate a proceeding impacts whether any future litigation will occur. Here, the parties will litigate Evergy’s Complaint and its claim for compensatory damages regardless of what action the Board takes on BNSF’s Motion.

Declaratory orders, of course, are necessarily discretionary. If the Board denies BNSF’s Motion, as applicable law shows it should, the Board still will have the opportunity to exercise its discretion to determine whether declaratory relief is appropriate. That consideration can take place on the basis of a review of the entire evidentiary record to be developed in this proceeding. Evergy submits that it would be more appropriate for the Board to refrain from acting on the declaratory order component of Evergy’s Complaint until the Board has heard all of the evidence associated with BNSF’s common carrier service to Evergy and its tariff practices. The Board will not have restricted its discretion in any way by deferring the question whether to issue a declaratory order until it issues its final merits decision in this case.

BNSF’s Motion essentially asks the Board to rule on Evergy’s request for a declaratory order before hearing evidence on the question whether uncertainty exists as to

a matter within the Board's jurisdiction, and on the question whether a Board order could help to resolve that uncertainty. The Board should decline to do so.

CONCLUSION

For the foregoing reasons and on the basis of the authorities cited herein, BNSF's Motion to Dismiss should be denied.

Respectfully submitted,

EVERGY, INC.
EVERGY METRO, INC.
EVERGY KANSAS CENTRAL, INC.
1200 Main Street, Suite 29
Kansas City, MO 64105

By: /s/ Kelvin J. Dowd
Kelvin J. Dowd
Andrew B. Kolesar III
Daniel M. Jaffe
Slover & Loftus LLP
1828 L Street, N.W., Suite 1000
Washington, D.C. 20036
202.347.7170
kjd@sloverandloftus.com
abk@sloverandloftus.com

Of Counsel:

Slover & Loftus LLP
1828 L Street, N.W., Suite 1000
Washington, D.C. 20036

Dated: June 5, 2024

*Attorneys for Evergy, Inc.,
Evergy Metro, Inc. and
Evergy Kansas Central, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that this 5th day of June 2024, I have caused a copy of the foregoing to be served via email upon counsel of record for BNSF Railway Company.

/s/ Andrew B. Kolesar III
Andrew B. Kolesar III
An Attorney for Complainants