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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

COMPLAINT AND PETITION FOR DECLARATORY ORDER

NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC

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COMES NOW Navajo Transitional Energy Company, LLC ("NTEC"), to file this Complaint and Petition for Declaratory Order under 5 U.S.C. § 554(e), 49 U.S.C. §§ 1321, 10702(2), 11101(a), 11121(a), 11701(b), 11704(b), and 11704(c)(1), and 49 C.F.R. § 1111.2, seeking: (1) a determination that Defendant BNSF Railway Company ("BNSF") has breached its obligation to provide adequate common carrier service on reasonable request; (2) a determination that BNSF has engaged in unreasonable practices in establishing and implementing the terms for such service; (3) a determination that BNSF has failed to provide safe and adequate car service; (4) a declaration as to the scope of BNSF's common carrier obligation; (5) injunctive relief as may be necessary to restore adequate service; and (6) an award of monetary damages pertaining to certain BNSF actions, inactions, and practices.[1]

SUMMARY

A. The Subject Service

This Complaint addresses BNSF's failures to transport export coal from NTEC's Spring Creek Mine located in Big Horn County Wyoming to the Westshore Terminal ("Westshore") facility located at Roberts Bank, British Columbia, Canada.[2] Despite NTEC's reasonable requests and despite NTEC's demonstrated need for the subject rail transportation, BNSF has failed to provide – and has advised NTEC that it will continue to fail to provide – adequate common carrier transportation service.[3] Instead, BNSF has treated its common carrier service obligation not as an obligation required by law, but as an entirely optional function subject to BNSF's "sole discretion." BNSF's ongoing service failures constitute violations of BNSF's obligation to provide service upon reasonable request (as required under Section 11101(a)), violations of BNSF's obligation to provide an adequate and safe car supply (as required under Section

[1] Simultaneously herewith, NTEC also is filing an Ex Parte Application for Section 11123 Emergency Service Order.

[2] NTEC sells its export coal to customers in Asia on an f.o.b. ocean-vessel basis at Westshore (or, on rare occasions, at points in Japan or Korea). Accordingly, NTEC is responsible for arranging the rail transportation of that coal from the mine to Westshore.

[3] Prior to 2023, NTEC utilized BNSF contract service to transport its coal to Westshore. BNSF's failure to provide adequate 2022 contract service is the subject of a pending NTEC complaint in the United States District Court for the District of Montana. *See Navajo Transitional Energy Co., LLC v. BNSF Ry.*, CV-22-146-BLG-SPW-KLD (D. Mont. Complaint filed December 19, 2022). The present complaint relates to BNSF's 2023 common carrier service.

11121(a)), and failures to engage in reasonable practices (as required under 49 U.S.C. 10702(2)). In addition, BNSF's ongoing failures to serve NTEC and BNSF's willingness to treat its common carrier obligation solely as a matter of its own self-serving discretion are contrary to the public interest.

BNSF's service failures have caused substantial harm to NTEC, while also causing significant and potentially irreparable harm to the Navajo Nation that NTEC serves and supports through its mining operations. Given the complexity of the multi-modal export coal supply chain, NTEC must market its coal for sale multiple months in advance of the start of actual deliveries to Westshore. This lead time is necessary to give NTEC's customers sufficient time to arrange for the ocean transportation of their coal. BNSF is well aware of the time-based requirements NTEC faces. Indeed, in the past, BNSF Coal Marketing personnel have participated in export-coal sales meetings in Asia with the prior owner of Spring Creek, Cloud Peak, and its customers.

Predictable and reliable rail transportation are critical to NTEC's ability to compete in the export coal market (both in terms of the bidding process and in terms of fulfilling actual coal sales contracts). Any BNSF service failures directly impact NTEC's ability to serve those customers and harm the perception and reputation of NTEC as a reliable supplier in the export market. If BNSF does not provide reasonable rail service consistent with NTEC's historical and current needs and chooses instead to favor other export coal producers relative to NTEC, then NTEC will face significant and perhaps insurmountable impediments to its ability to market coal successfully going forward. Simply put, customers in Japan and Korea may choose to purchase their coal supplies from the entity or entities that BNSF elects to favor with more reliable rail transportation service. Accordingly, BNSF's past service failures (and its anticipated Summer 2023 service failures) have had (and will have) a substantial, adverse effect upon NTEC.

B. BNSF's Contradictory Interpretations of its Common Carrier Obligation in the Context of Ongoing Tribal Disputes

Paradoxically, BNSF's current view that the common carrier obligation imposes virtually no meaningful requirements – and affords BNSF the unfettered discretion to limit NTEC's participation in the export coal market – starkly contradicts the interpretation of the common carrier obligation that BNSF recently offered in federal court litigation in the United States District Court for the Western District of Washington. In that proceeding, BNSF attempted to use the existence of the common carrier obligation to justify its longstanding violations of an easement agreement with another Native American Tribe.[4] Specifically, BNSF suggested that the common carrier obligation is "baked into its DNA" and drove its desire to get to "yes" when providing crude oil transportation service over Swinomish land (to serve nearby crude oil shippers) even when doing so violated the lease agreement between the Tribe and BNSF.[5] Indeed, BNSF's witness went further:

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[4] *Swinomish Indian Tribal Community v. BNSF Ry.*, Cause No. C15-0543RSL, 2023 WL 2646470, at *3 n.3, **4-6 (W.D. Wash, March 27, 2023).

[5] *Id*. at *6 ("It was only when it proved difficult to obtain the necessary approval that BNSF switched gears, asserting not that the Tribe should approve an increase in the number of cars and trains because of BNSF's common carrier obligations and shipper needs, but rather that BNSF did not need the Tribe's approval because its common carrier obligations trumped the negotiated limitations on its right of access.").

> **Q** I think you heard my opening where I described the common carrier obligation and things that are baked in the DNA of BNSF. What's your response to that characterization?
>
> **A** Absolutely agree. As I said, it's our approach to get to "yes." If a customer wants service from us, we're going to find every way possible to provide that service to them because that's part of our DNA and obligation and a core principle, and is also our approach to all of our work with our customers, is to try to get to "yes" and our ability to serve them.
>
> **Q** During your experience with BNSF, have you ever seen BNSF deny a request from a shipper that BNSF could fulfill reasonably?
>
> **A** No, I don't recall a situation that we have.[[6]]

Here, on the other hand, BNSF suggests that it is not required to provide common carrier service to NTEC at all – it supposedly has the discretion to say "no" to NTEC whenever it wants. NTEC respectfully requests that the Board declare, without reservation, that BNSF does *not* have the unilateral authority to redefine, modify, undercut, or nullify its common carrier obligation.

C. <u>The United States-Navajo Treaty</u>

The Navajo Nation and the United States of America are parties to an 1849 Treaty that imposes a trust obligation on behalf of the United States Government and its Federal Agencies in favor of the Nation. *See* Exhibit 1. In Article XI of the Treaty, the United States promised that "the Government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians." Treaty Between

[6] Testimony of C. Hutchings (BNSF) Trial – Day 1 at 28:3-16 (Mar. 20, 2023).

the United States of America and the Navajo Tribe of Indians, art. XI, Sept. 9, 1849, 9 Stat. 974 (“Treaty”). Under Executive Order No. 13175, 3 C.F.R. § 13175 (2000) (“Executive Order”), the federal trust responsibility extends to all federal agencies (as defined under 44 U.S.C. § 3502(1)), and it requires all federal agencies to “respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.” Executive Order at § 3(a).

Independent agencies, as defined in 44 U.S.C. § 3502(5), “are encouraged to comply with the provisions of this order.” *Id*. at § 8. The Executive Order reinforces and underpins all federal exercise of the trust responsibility. In addition, the administration recently reiterated the importance of the trust relationship and the Executive Order. *See* Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 26, 2021) (“It is a priority of my Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy.”). The Board’s evaluation of the present Complaint should consider and should adhere to the trust obligation and various other commitments agreed to in the Treaty, just as the Board has done in other recent proceedings where such interests were directly or indirectly involved.

* * *

As further set forth below, NTEC seeks determinations from the Board that BNSF's service and practices, with respect to NTEC's export coal transportation, constitute (i) violations of BNSF's common carrier service obligation; (ii) violations of BNSF's obligation to provide safe and adequate car supply; and (iii) unreasonable and unlawful practices in violation of 49 U.S.C. §§ 11101(a) and 10702(2). NTEC also seeks an order from the Board directing BNSF to fulfill its common carrier obligation to provide reasonable and adequate service to NTEC, to fulfill its statutory duty to provide safe and adequate car service, to cease and desist from its unlawful practices, and to pay NTEC damages, with interest, pursuant to 49 U.S.C. § 11704(b).

NTEC further requests that the Board impose penalties, under 49 U.S.C. §§ 11901, 11906, and 11907, for BNSF's willful violations of its common-carrier duties. Because of the inadequacy of monetary relief and associated irreparable harm, the adverse effects on the Navajo Nation, and the likelihood of success on the merits, NTEC is separately seeking an emergency service order, and in the alternative, a temporary injunction.

In support hereof, NTEC respectfully states as follows:

I. <u>The Parties</u>

1. Plaintiff NTEC was created by the Navajo Nation in 2013. It is a single-member limited liability company, organized under the laws of the Navajo Nation. The Navajo Nation, itself, is NTEC's sole shareholder. As such, NTEC is an entity of the Navajo Nation. NTEC's corporate offices are located at 385 Interlocken Crescent, Suite 400, Broomfield, Colorado 80021.

2. Defendant BNSF is a Class I rail carrier. It is a Delaware corporation with its principal place of business at 2650 Lou Menk Drive, Fort Worth, Texas 76131. BNSF operates a rail network of 32,500 route miles in twenty-eight states and three Canadian provinces. BNSF is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, which in turn is wholly-owned by Berkshire Hathaway, Inc.

3. BNSF is subject to the jurisdiction of the Board under the ICC Termination Act of 1995, as amended, 49 U.S.C. §§ 10101, *et seq.* (the "ICCTA"). The ICCTA requires that BNSF provide reasonable service and prohibits BNSF from engaging in unreasonable practices. 49 U.S.C. §§ 11101(a), 10702(2).

II. Factual Background

A. The Navajo Nation and NTEC

4. The Navajo Nation created NTEC for the express purpose to "support and improve the economic, financial, tax, and revenue interests of the Navajo People through management and development of the Navajo Nation's resources and new sources of energy, power, transmission, and attendant resources and facilities." NTEC's business includes the mining and sale of coal produced on the Navajo Nation and in Montana and Wyoming. NTEC presently owns four mines. The instant Complaint pertains to rail transportation service originating at NTEC's Spring Creek Mine, which is located in Big Horn County, Montana.

5. NTEC provides roughly $50 million per year in direct economic support for the Navajo Nation, and funds approximately one-third of the Navajo Nation's

$158 million annual General Fund. NTEC's operations also provide indirect support for the Navajo Nation in the form of wages, charitable donations and other contributions to the community. These additional forms of indirect support to the Navajo Nation amount to approximately $75 million per year.

6. In 2019, NTEC purchased substantially all of the assets of Cloud Peak Energy, Inc., a public company that had filed for bankruptcy protection. The primary assets included three coal mines located in the Powder River Basin of Montana and Wyoming: the Spring Creek Mine, the Antelope Mine, and the Cordero Rojo Mine. Each of those three mines produces substantial quantities of sub-bituminous coal. NTEC sells coal from Cordero Rojo and Antelope for domestic use. NTEC sells thermal coal from Spring Creek both for domestic use and for export to Japan and Korea. NTEC produces several million tons of coal per year for export sale and expected to ship approximately 5.5 million tons, in common carrier service, for export in 2023.

B. BNSF Transportation Service from Spring Creek Prior to 2023

7. Since at least 2008, BNSF has provided rail transportation service for the movement of export coal shipments from Spring Creek to Westshore. BNSF is the only rail carrier that serves Spring Creek and therefore is the only rail carrier capable of providing single-line service to the port.

8. At Westshore, coal from Spring Creek is loaded onto vessels for transportation to Asia (Japan and Korea). Westshore is located approximately 1,500 miles from Spring Creek via rail. Approximately 12 trainloads of coal are necessary to

fully load a single Cape-sized export coal vessel. Approximately five train loads of coal are necessary to fully load a single Panamax-sized export coal vessel.

9. Historically, NTEC's export coal shipments from Spring Creek to Westshore have moved pursuant to a series of contractual arrangements with BNSF (some of which NTEC acquired when purchasing the Cloud Peak Energy assets out of bankruptcy). Those contracts have included: (1) a January 1, 2018 agreement with a three-year term (BNSF-C-12820); (2) a January 9, 2018 coal transportation agreement between Cloud Peak and BNSF, as amended on March 29, 2018, solely governing the transportation of roughly one million tons of coal per year for sale to a single customer in Japan (*i.e.*, JERA Trading Pte Ltd. or "JERA");[7] (3) a one-year agreement covering 2021 service for sale to all non-JERA customers (BNSF 90068-0095); and (4) a one-year agreement covering 2022 service for sales to all non-JERA customers (BNSF 90068-0099).

10. In 2021, NTEC shipped an aggregate total of 5.1 million tons of Spring Creek export coal via BNSF to Westshore. That total equates to an average of 28.4 BNSF trains per month for the year. During the latter half of 2021, BNSF transported an even higher monthly volume of Spring Creek trains to Westshore, averaging 29.7 trains per month (or roughly one train per day), which – if annualized – would translate to 5.39 million tons.

[7] The last train moving under the JERA Contract departed from Spring Creek on January 13, 2023, and the JERA Contract expired on March 31, 2023. Since January 13, 2023, all NTEC export coal shipments have moved in BNSF common carrier service.

C. <u>BNSF's 2022 Service</u>

11. In 2022, BNSF's deliveries of NTEC export coal fell far short of NTEC's requirements and of the terms of the 2022 Contract. Beginning in the Spring of 2022, NTEC took issue with BNSF's failures and communicated with BNSF executives regarding NTEC's need for coal transportation service.

12. By responsive letter dated June 24, 2022, BNSF's President and Chief Executive Officer, Ms. Katie Farmer, stated that "BNSF is not required to move any specific minimum volume of coal [for NTEC] in 2022." Exhibit 2 at 1. Ms. Farmer took issue with the suggestion that BNSF was favoring other customers over NTEC, instead suggesting that, during 2022, "BNSF has been committed to honoring obligations relative to customer contract terms, including any committed volumes." *Id*. In other words, BNSF claimed that it was entitled to favor other customers relative to NTEC because those other customers supposedly had obtained more favorable service terms in their BNSF contracts.

13. As noted above, NTEC filed a Complaint against BNSF on December 19, 2022 in the United States District Court for the District of Montana. *See Navajo Transitional Energy Company, LLC v. BNSF Railway Company*, CV 22-146-BLG-SPW-KLD (Complaint filed Dec. 19, 2022). Through its federal-court Complaint, NTEC seeks damages for BNSF's 2022 breach of contract and its 2022 breach of the duty of good faith and fair dealing. The contract-based service that BNSF provided to NTEC in 2022 is not at issue in the instant Complaint.

D. Negotiation Regarding NTEC's 2023 Rail Transportation Requirements

14. In the Fall of 2022, BNSF and NTEC engaged in contract negotiations for an agreement to govern post-2022 service from Spring Creek to Westshore. BNSF insisted upon the inclusion of onerous contractual terms that were unacceptable to NTEC, including, at the 11th hour, a provision calling for the broad waiver of all 2022-related service claims.

15. By letter dated November 1, 2022, and in response to BNSF's strong-arm tactics in the commercial discussions for a 2023 contract, NTEC asked BNSF to "either (a) disclose the existing common carrier rates, charges and service terms applicable to the transportation of export coal from NTEC's [Spring Creek Mine] to [Westshore] as described in Attachment No. 1 to this letter, or (b) establish and disclose reasonable common carrier rates, charges, and service terms for the transportation of export coal from Spring Creek to Westshore, as described in Attachment No. 1." Letter dated November 1, 2022 from Jason Plett (NTEC) to Jessie McCabe (BNSF), a copy of which is attached as Exhibit 3.

16. As detailed in Attachment No. 1 to Exhibit 3, NTEC's common carrier request identified the specifics of its transportation needs, including that the route would be BNSF direct, that BNSF would provide all railcars necessary to support the transportation, and that the estimated annual volume would be 5.0-5.5 million tons. These estimated volume levels were consistent with past volumes of export coal shipped by NTEC to Westshore that BNSF had customarily and ordinarily transported.

17. On November 14, 2022, BNSF responded to NTEC's request and provided a rate set initially at $5,030/car plus the BNSF Rules Book 6100-series, Item 3383 ($2.50 strike price) fuel surcharge program. Letter dated November 14, 2022 from Jessie McCabe (BNSF) to Jason Plett (NTEC), a copy of which is attached as Exhibit 4.

18. Based upon information and belief, BNSF's November 14, 2022 common carrier rate offer, when considered along with BNSF's coal fuel surcharge, was set at a level that was in close proximity to the jurisdictional threshold level for a rate reasonableness challenge.

19. BNSF's November 14, 2022 common carrier response did not identify any limitations on its ability to provide the 5.0-5.5 million tons of common carrier service that NTEC had requested for 2023.

20. On December 19, 2022, NTEC advised BNSF that it could not accept BNSF's unreasonable attempt to require NTEC's waiver of its damages claims as part of the consideration for a new transportation contract to cover 2023 shipments, and that NTEC would instead transport its 2023 requirements (in the stated amounts of 5.0-5.5 million tons) pursuant to the common carrier rate quotation that BNSF had provided on November 14, 2022 in response to NTEC's November 1, 2022 request. Letter dated December 19, 2022 from Matthew Babcock (NTEC) to Farah Lawler (BNSF), attached hereto as Exhibit 5.

21. NTEC's December 19, 2022 letter further advised BNSF of NTEC's common carrier service expectations:

> NTEC expects that BNSF will meet its obligation to provide this service consistent with the volume requirements NTEC provided to BNSF in its November 1, 2022, common carrier rate request letter (and which are also consistent with our historical shipment volumes). We also expect that, consistent with its statutory obligations, BNSF will refrain from entering into any contractual commitments or taking any other actions that interfere with BNSF's ability to provide common carrier service to NTEC in a manner that is consistent with NTEC's historical needs and as communicated to BNSF through our request for common carrier service.

Id.

22. On December 29, 2022, BNSF provided NTEC with "BNSF Railway Company Common Carrier Pricing Authority 90139 Revision 0" ("BNSF 90139"), in which BNSF memorialized the common carrier rate that BNSF had previously quoted on November 14, 2022. Exhibit 6 hereto.

23. BNSF 90139 also included the following statement of the common carrier service terms that BNSF was offering:

> **BNSF Service:** Service provided pursuant to this publication will be common carrier service for the movement of trainloads of Coal as ordinarily and customarily provided by BNSF for such service, and as such, cycle times and schedules may vary from time to time. In the event of a conflict between this publication and another BNSF publication, this publication shall apply.
>
> 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 Authority shall, for the foreseeable future, be subject to BNSF's sole discretion.

Exhibit 6 at 2-3.

24. NTEC immediately objected to BNSF's effort to grant itself the "sole discretion" to determine whether, and how, it would provide the common carrier service requested by NTEC. Letter dated December 30, 2022 from Jason Plett (NTEC) to Jesse McCabe (BNSF), a copy of which is attached as Exhibit 8. NTEC noted it was not agreeable to tendering coal pursuant to a non-statutory "Service Limitation," and that it was "reserving all rights to common carrier service as specified in the relevant statutory provisions and as interpreted under STB or court precedents, and NTEC strongly disagrees that BNSF may unilaterally alter either NTEC's rights or BNSF's obligations." Exhibit 7 at 1.

25. By reply letter dated January 17, 2023, BNSF's Farah Lawler took issue with NTEC's objection and argued that NTEC's letter had over-stated the scope of the common carrier obligation:

> NTEC's expectations do not appear to align what is required of BNSF as a common carrier under 49 U.S.C. §11101.
>
> The common carrier doctrine does not obligate BNSF to move every last shipment of coal that NTEC decides to ship in 2023. It also does not obligate BNSF to refrain from making contractual commitments to other shippers in the manner that NTEC demands.

Id. at 2.

26. In a further effort to restrain NTEC's participation in the export coal market, BNSF informed NTEC on March 21, 2023 that, effective April 15, 2023, NTEC's common carrier rate will increase to $5,241/car plus the BNSF Rules Book 6100-series, Item 3383 ($2.50 strike price) fuel surcharge program.

27. Based upon information and belief, BNSF's currently effective $5,241/car common carrier rate offer, when considered along with BNSF's coal fuel surcharge, is at or exceeds the jurisdictional threshold level for a rate reasonableness challenge.

III. BNSF's Service Failures

A. BNSF's Inadequate 2023 Common-Carrier Service

28. Effective as of January 1, 2023, NTEC began shipping its Spring Creek export coal to Westshore pursuant to BNSF 90139, with the exception of a limited volume of export coal that BNSF transported to Westshore during January 2023 under BNSF-C-12828 prior to that contract's expiration. At present, there are no contractual arrangements in effect between NTEC and BNSF and all coal moves via common carrier service.

29. BNSF's 2023 common-carrier service has fallen far short of NTEC's historical needs and of NTEC's 2023 needs. The level of service that BNSF provided to NTEC in the first quarter of 2023 and the level of service that BNSF has suggested that it will provide to NTEC in the foreseeable future (*e.g.*, only 16 trains per month in June 2023 and currently undisclosed by BNSF beyond June 2023) are substantially below historic levels and will prevent BNSF from transporting NTEC's regular annual volume of export coal in 2023. Instead, it is likely that BNSF will fall far short of transporting NTEC's regular annual volume this year.

30. Upon information and belief, BNSF has provided (and plans to continue providing) far higher levels of export-coal service to other coal producers using the same Westshore facility. As such, it appears as though: (1) BNSF is affirmatively discriminating against NTEC relative to BNSF's other customers; or (2) BNSF has failed to invest in its system (and in its staffing levels) in a manner that is sufficient to allow BNSF to meet the reasonable demand for its common carrier services.

31. BNSF's shipping volumes in Spring 2023 have shown a slight improvement relative to the preceding months, but that improvement appears to have coincided with a temporary reduction in demand by NTEC's largest export-coal competitor. Nevertheless, even with that slight improvement, BNSF's shipment levels for NTEC remain below the volumes that NTEC's identified in its common carrier rate/service request and have prevented NTEC from selling its anticipated volume of export coal.

32. As NTEC explains in its accompanying Ex Parte Application for Section 11123 Emergency Service Order, NTEC is particularly concerned regarding Summer volume levels and BNSF's already announced plan to cut NTEC volumes. Based upon information and belief, BNSF intends to cut NTEC's volumes when BNSF's other export coal customer resumes its normal shipping levels.

33. Consistent with observations that the STB and Chairman Oberman have made in recent months regarding the railroad industry, BNSF has failed to ensure that its staffing levels are sufficient to allow BNSF to provide adequate rail transportation service. *See*, *e.g.*, Chairman Martin J. Oberman, Rail Trends, November 16, 2022

("These problems were amply documented in the emergency hearings we conducted at the Board last April, and *it is beyond question that they were the direct result of the intentional reductions in work forces*.") (emphasis added);[8] *see also* Martin J. Oberman May 12, 2022 Testimony before the United States House of Representatives Committee on Transportation and Infrastructure, Subcommittee on Railroads, Pipelines, and Hazardous Materials of the Hearing On "Board Member Views on Surface Transportation Board Reauthorization," at 5 ("Railroads must maintain a buffer to protect their operations against external shocks, and if they fail to do so, then ultimately, they will suffer—but even worse, their customers and the public will suffer more. *What could not be more clear is that, at present—and for the past several years—the major railroads do not have sufficient redundancy to keep pace with rapid shifts in demand*.") (emphasis added).

34. Rather than protecting its staffing levels to allow it to meet all of its customers' reasonable service needs, BNSF instead has allowed its service capacity to degrade over time relative to the overall demand for such services. As the Board has recognized, rail carriers face an incentive to show ever-increasing levels of profitability, notwithstanding the effect that cost reduction necessarily will have during periods of increasing demand for services.

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[8] *Id*. ("What did those short-sighted COVID furloughs actually save the carriers? While costing the U.S. economy possibly hundreds of billions of dollars, the Class Is, over the last two-and-a half years, saved roughly $4.8 billion in payroll. . . . The $4.8 billion in saved payroll would have been a drop in the bucket, but the Operating Ratio had to be met!").

35. Until the onset of a strike at Westshore in September of 2022, BNSF actually had increased its export coal service over the lines used to provide service to Westshore in 2022 versus 2021, even while it drastically reduced, and continued to withhold, service to NTEC to that same destination. Upon information and belief, during the first eight (8) months of 2022, BNSF delivered an average of 71.3 trains per month to Westshore versus 70.1 trains per month in 2021.

B. Adverse Impacts of BNSF's Inadequate 2023 Service

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.

37. As noted above, NTEC's export coal shipments are an important component of the NTEC business portfolio and Spring Creek is an important facility in the local and regional communities that it serves.

38. As noted above, the complexity of the multi-modal export coal supply chain requires NTEC to market its coal multiple months in advance of an actual coal delivery at Westshore. The ability to make regular deliveries of coal to Westshore for loading into ocean-going vessels is critical because of: (1) the costs associated with delaying the departures of such vessels while awaiting a full load of coal; and (2) the impact on NTEC's business reputation when railroad deliveries are inconsistent or non-existent. To reiterate, if BNSF favors other export coal producers relative to NTEC, then NTEC will face significant and perhaps insurmountable impediments to its ability to market coal successfully.

39. The Navajo Nation relies upon the revenues generated through NTEC's operations and its contributions to its General Fund, which in turn is relied upon by the Nation to support essential services and functions.

40. BNSF's service failures, without change, will continue to put the Navajo Nation at risk for further funding shortages in 2023, and ultimately risks NTEC's export coal business on a permanent basis.

IV. Statutory Requirements for Common Carriers by Rail

41. Under 49 U.S.C. § 11101(a), a rail carrier "shall provide the transportation or service on reasonable request."

42. Under 49 U.S.C. § 11101(a), any "[c]ommitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable."

43. Under 49 U.S.C. § 10702, "[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall establish reasonable . . . rules and practices on matters related to that transportation or service."

44. BNSF's statutory obligations do not give it "sole discretion" to decide who it will, or will not, serve.

45. BNSF is not permitted to rewrite its common carrier service obligation by including a "Service Limitation" in its tariff publication that effectively would eliminate the foregoing statutory obligations.

COUNT I

BREACH OF COMMON CARRIER OBLIGATION TO PROVIDE ADEQUATE RAIL TRANSPORTATION SERVICE ON REASONABLE REQUEST

46. NTEC realleges and incorporates paragraphs 1 through 45 of this Complaint as though set forth in full.

47. BNSF unreasonably reduced its level of rail service from NTEC's Spring Creek Mine to Westshore and failed to provide all of the common carrier service that NTEC requested during 2023.

48. BNSF threatens, in the coming months, to further reduce its already inadequate service levels thereby further depriving NTEC of its reasonable request for common carrier service.

49. On November 1, 2022, NTEC notified BNSF of its anticipated volume of 2023 export coal traffic. *See* Exhibit 4 (November 1, 2023 Letter from NTEC's Mr. Jason Plett to BNSF's Ms. Jessie L. McCabe requesting a common carrier rate for the movement of approximately 360,000 tons per month beginning on January 1, 2023 and approximately 450,000 tons per month beginning on April 1, 2023).[9]

50. NTEC's 2023 request for transportation from Spring Creek to Westshore is reasonable and consistent with NTEC's historical transportation and business requirements.

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[9] NTEC's estimate of its post-March 2023, common-carrier monthly volumes exceeded its estimate of its 1Q2023 common-carrier monthly volumes due to the March 31, 2023 expiration of Contract BNSF-C-12828.

51. By failing and refusing to provide the service that NTEC reasonably requested, BNSF has violated and failed to comply with its obligations under 49 U.S.C. § 11101(a) to provide transportation on reasonable request.

52. NTEC has suffered substantial injury and damages as a direct and proximate result of BNSF's failure and refusal to comply with its obligations under 49 U.S.C. §§ 11101(a) and 11101(e) by providing NTEC with inadequate common carrier service.

53. BNSF's ongoing failures to provide common carrier service from NTEC's Spring Creek mine on NTEC's reasonable request have caused NTEC to lose significant loadings at Spring Creek, to miss vessel loadings at Westshore, and to be unable to operate Spring Creek at levels sufficient to meet demand.

54. BNSF's ongoing common carrier service failures also have caused NTEC to lose sales and incur increased demurrage costs at Westshore as vessels waited for trains to arrive for transloading.

55. These common carrier service failures, in combination with BNSF's failures to engage in reasonable practices and to provide uninterrupted, continuous carriage of freight, have resulted in, and are continuing to result in, significant actual and consequential harm and damages to NTEC in excess of ten million dollars to date.

COUNT II

FAILURE TO PROVIDE ADEQUATE CAR SERVICE

56. NTEC incorporates the averments in Paragraphs 1 through 45, as though restated here in full.

57. BNSF's reservation to itself in BNSF 90139 of a right to introduce private railcars into export coal service to NTEC in its "sole discretion," and its use of that reservation to refuse to accept into service sufficient railcars to meet NTEC's reasonable transportation needs, constitute failures to furnish adequate car service and to establish reasonable rules and practices on car service, in violation of 49 U.S.C. Section 11121(a)(1). Pursuant to 49 U.S.C. § 11704(b), BNSF is liable to NTEC for damages sustained as a result of BNSF's violation.

COUNT III

UNREASONABLE PRACTICE

58. NTEC hereby realleges and incorporates paragraphs 1 through 45 of this Complaint as though set forth in full.

59. In failing to carry out its common carrier obligations and responsibilities for serving NTEC on export coal shipments to Westshore, BNSF also engaged in a series of unreasonable practices including, but not limited to, the following:

a. Including a "Service Limitation" in BNSF 90139 that is inconsistent with, and contradictory to, BNSF's statutory duties to provide common carrier service on reasonable request;

b. Entering into contract commitments that interfere with BNSF's ability to provide common carrier service to NTEC, even after it became aware of NTEC's service needs and requirements for 2023;

c. Engaging in improper and imprudent cost-cutting initiatives (*e.g.,* excessive reductions in operating and railway personnel, locomotives, and other equipment);

d. Failing to adopt and implement reasonable operating plans to meet shipper demands;

e. Engaging in unreasonable and arbitrary reductions and allocations of BNSF's resources (*e.g.,* crews, trainmasters, yardmasters, locomotives and other equipment) among traffic groups and customers;

f. Failing to take reasonable measures and initiatives to address its service shortfalls and improve service for NTEC (*e.g.,* not supplementing the available resources such as to enable BNSF to provide service upon reasonable request); and

g. Failing to provide service within the service windows and schedules assigned and agreed to using its own Coal Forecasting Tool.

60. NTEC has suffered substantial injury and damages as a direct and proximate result of BNSF's failure and refusal to comply with its obligations under 49 U.S.C. § 10702 by engaging in unreasonable practices with respect to its transportation service originating at Spring Creek.

61. BNSF's unreasonable practices also have caused NTEC to lose export coal sales.

62. BNSF's unreasonable practices, in combination with its failures to provide reasonable common carrier service and to provide uninterrupted, continuous carriage of freight, have caused significant actual and consequential harm and damages to NTEC in excess of $10 million dollars, to date.

PRAYER FOR RELIEF

WHEREFORE, Complainant NTEC requests that Defendant BNSF be required to answer the charges herein; that after a hearing and investigation conducted pursuant to 49 U.S.C. § 10704(a)(1) and the Board's implementing regulations, the Board:

(a) order and/or find that BNSF has failed to comply with its common carrier obligations and has engaged in unreasonable and unlawful practices in violation of 49 U.S.C. §§ 11101 and 10702;

(b) enter an injunctive relief order to require BNSF to cease and desist with its violations of 49 U.S.C. §§ 11101 and 10702 and to provide adequate service to NTEC relating to its export coal shipments to the Westshore Terminal;

(c) direct its Office of Public Affairs, Government Assistance, and Compliance to monitor BNSF's service to NTEC, and to assist NTEC in obtaining reasonable and adequate service for its export coal shipments to the Westshore Terminal;

(d) award NTEC damages, with interest, pursuant to 49 U.S.C. § 11704(b);

(e) impose penalties under 49 U.S.C. §§ 11901, 11906, and 11907 for BNSF's willful violations of its duties; and

(f) grant to NTEC such other and further relief as the Board may deem proper on the record presented.

Respectfully submitted,

NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC

By: */s/ Daniel M. Jaffe*
Daniel M. Jaffe
Frank J. Pergolizzi
Andrew B. Kolesar III
SLOVER & LOFTUS LLP
1224 Seventeenth St., N.W.
Washington, D.C. 20036
(202) 347-7170

Dated: April 14, 2023

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify that I have this 14th day of April 2023 caused a copy of the foregoing to be served via email and by overnight express courier upon Defendant BNSF, as follows:

Jill K. Mulligan, Esq.
Executive Vice President, Law and Corporate
Affairs, Chief Legal Officer
BNSF Railway Company
2650 Lou Menk Drive
Fort Worth, Texas 76131

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

9 Stat 974 (U.S. Treaty), 1850 WL 6686 (U.S. Treaty)

UNITED STATES OF AMERICA

Native American

Treaty Between the United States of America and the Navajo Tribe of Indians.

September 9, 1849.
Consent of Senate Sept. 9, 1850.
Proclamation made Sept. 24, 1850.

***1** THE following acknowledgements, declarations, and stipulations, have been duly considered, and are now solemnly adopted and proclaimed by the undersigned: that is to say, John M. Washington, Governor of New Mexico, and Lieutenant-Colonel commanding the troops of the United States in New Mexico, and James S. Calhoun, Indian agent, residing at Santa Fé, in New Mexico, representing the United States of America, and Mariano Martinez, Head Chief, and Chapitone, second Chief, on the part of the Navajo tribe of Indians.

I. The said Indians do hereby acknowledge that, by virtue of a treaty entered into by the United States of America and the United Mexican States, signed on the second day of February, in the year of our Lord eighteen hundred and forty-eight, at the city of Guadalupe Hidalgo, by N. P. Trist, of the first part, and Luis G. Cuevas, Bernardo Couto, and Mgl Atristain, of the second part, the said tribe was lawfully placed under the exclusive jurisdiction and protection of the government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection.

II. That from and after the signing of this treaty, hostilities between the contracing parties shall cease, and perpetual peace and friendship shall exist; the said tribe hereby solemnly covenanting that they will not associate with, or give countenance or aid to, any tribe or band of Indians, or other persons or powers, who may be at any time at enmity with the people of the said United States; that they will remain at peace, and treat honestly and humanely all persons and powers at peace with the said States; and all cases of aggression against said Navajoes by citizens or others of the United States, or by other persons or powers in amity with the said States, shall be referred to the government of said States for adjustment and settlement.

III. The government of the said States having the sole and exclusive right of regulating the trade and intercourse with the said Navajoes, it is agreed that the laws now in force regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the aforesaid government, shall have the same force and efficiency, and shall be as binding and as obligatory upon the said Navajoes, and executed in the same manner, as if said laws had been passed for their sole benefit and protection; and to this end, and for all other useful purposes, the government of New Mexico, as now organized, or as it may be by the government of the United States, or by the legally constituted authorities of the people of New Mexico, is recognized and acknowledged by the said Navajoes; and for the due enforcement of the aforesaid laws, until the government of the United States shall otherwise order, the territory of the Navajoes is hereby annexed to New Mexico.

IV. The Navajo Indians hereby bind themselves to deliver to the military authority of the United States in New Mexico, at Santa Fe, New Mexico, as soon as he or they can be apprehended, the murderer or murderers of Micente Garcia, that said fugitive or fugitives from justice may be dealt with as justice may decree.

***2** V. All American and Mexican captives, and all stolen property taken from Americans or Mexicans, or other persons or powers in amity with the United States, shall be delivered by the Navajo Indians to the aforesaid military authority at Jemez, New Mexico, on or before the 9th day of October next ensuing, that justice may be meted out to all whom it may concern; and also all Indian captives and stolen property of such tribe or tribes of Indians as shall enter into a similar reciprocal treaty, shall, in like manner, and for the same purposes, be turned over to an authorized officer or agent of the said States by the aforesaid Navajoes.

VI. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Navajo Indian or Indians, he or they shall be arrested and tried and, upon conviction, shall be subjected to all the penalties provided by law for the protection of the persons and property of the people of the said States.

VII. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

VIII. In order to preserve tranquility, and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading-houses, at such time and in such places as the said government may designate.

IX. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Navajoes that the government of the United States shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

X. For and in consideration of the faithful performance of all the stipulations herein contained, by the said Navajo Indians, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures, as said government may deem meet and proper.

XI. This treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction, at all times and in all places, to the end that the said Navajo Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

In faith whereof, we, the undersigned, have signed this treaty, and affixed thereunto our seals, in the valley of Cheille, this the ninth day of September, in the year of our Lord one thousand eight hundred and forty-nine.

J. M. WASHINGTON,
Brevet Lieutenant-Colonel Commanding.
[L. S.]
JAMES S. CALHOUN,
Indian Agent, residing at Santa Fe.
[L. S.]

Mariano Martinez, his x mark, [L. S.]

Head Chief.

Chapitone, his x mark, [L. S.]

Second Chief.

J. L. Collins.

James Conklin.

Lorenzo Force.

Antonio Sandoval, his x mark.

Francisco Josto, his x mark.

Governor of Jemez.

Witnesses-

H. L. Kendrick, *Brevet Major U. S. A.*

J. N. Ward, *Brevet* 1*st Lieut*. 3*d Inf'ry*.

John Peck, *Brevet Major U. S. A.*

J. F. Hammond, *Assistant Surg'n U. S. A.*

H. L. Dodge, *Capt. comd'g Eut. Rg's*.

Richard H. Kern.

J. H. Nones, *Second Lieut*. 2*d Artillery*.

Cyrus Choice.

John H. Dickerson, *Second Lieut*. 1*st Art*.

W. E. Love.

John G. Jones.

J. H. Simpson, *First Lieut. Corps Top. Engrs*.

9 Stat 974

End of Document

Katie Farmer
President and
Chief Executive Officer

BNSF Railway Company
P.O. Box 961052
Fort Worth, TX 76161-0052

2650 Lou Menk Drive
Fort Worth, TX 76131-2830
(817) 352-1215
(817) 352-7488 fax
katie.farmer@bnsf.com

June 24, 2022

The Honorable Jonathan Nez
President
The Navajo Nation
P.O. Box 7440
Window Rock, AZ 86515

Dear President Nez:

Thank you for your letter dated June 16, 2022 regarding BNSF's coal transportation agreement with Navajo Transitional Energy Company ("NTEC"), which we received on June 22. I only note those different dates to underscore that BNSF highly values our operational and commercial relationships with NTEC and the Navajo Nation and I am responding to your outreach as promptly as possible.

BNSF has acknowledged in many settings over recent months that we are not meeting the service expectations of our broad customer base. As part of that, we acknowledge that BNSF has not met NTEC's requested volume of coal shipments this year, and we understand that NTEC anticipates missing some opportunities to sell its coal in the export markets as a result. As you know, the terms of our contract align BNSF's and NTEC's interests in maximizing NTEC's market opportunities, and I assure you that we remain committed to working closely with NTEC as BNSF focuses on improving service levels to all BNSF customers.

With that in mind, on June 6, 2022 BNSF offered NTEC a significant commercial concession to help offset the financial impact on NTEC of thus far receiving fewer coal deliveries in 2022 than desired. NTEC did not accept that offer, but we remain hopeful that NTEC will continue to engage with us in those commercial discussions going forward. Unfortunately, NTEC continues to make incorrect assertions about the nature of BNSF's contractual obligations, which, respectfully, makes it more difficult to commercially resolve our contractual disagreements to the benefit of both parties. I understand that we may have different views on the nature of BNSF's service obligations under our contract, but the contract and our recent commercial history make clear that BNSF is not required to move any specific minimum volume of coal in 2022.

The structure of our current contract is an outgrowth of the history of prior dealings between the parties, which almost exclusively reflects BNSF making commercial concessions to the benefit of NTEC. In the past, NTEC tendered coal shipments to BNSF pursuant to an agreement that included minimum annual volume commitments and compensation owed to BNSF if NTEC failed to do so. In 2020, NTEC indeed failed to meet its commitment, resulting in NTEC owing BNSF a significant amount of liquidated damages. Because BNSF highly values its relationship with NTEC, BNSF agreed to settle its liquidated damages claim against NTEC for a fraction of the total amount owed by NTEC. This commercial concession came after BNSF had previously waived other contract entitlements and agreed to below market rates to help make NTEC's purchase of Cloud Peak's assets out of bankruptcy a financially viable endeavor.

June 24, 2022
The Honorable Jonathan Nez
The Navajo Nation

Beginning in 2021, BNSF and NTEC changed the structure of our contract to give the parties more flexibility as coal volumes fluctuate, eliminating NTEC's potential exposure to liquidated damages. I disagree with your characterization that BNSF is favoring other customers over NTEC. During this period of service challenges, BNSF has been committed to honoring obligations relative to customer contract terms, including any committed volumes.

Again, BNSF understands that we have not delivered all the coal requested by NTEC in 2022 but we are making significant efforts to improve our service. Currently, service interruptions as a result of significant weather events and resource challenges are significantly impacting BNSF's service, including from NTEC's mines to Westshore Terminal in British Columbia. We are increasing our crew hiring efforts and temporarily redeploying available crew to address crew shortages. In addition, we are incentivizing temporary personnel transfers to address crew shortages where crews are particularly short. We are offering new hire incentives in those markets as well. We have increased the size of our locomotive fleet by 350 units since the start of winter, and have more coming online. We will continue to take steps to drive improvements and hope to build on some initial progress we are seeing on our Northern Region, which includes our critical coal network. As the situation evolves, BNSF is committed to communicating regularly with NTEC on service and delivery volume and schedules.

Again, we appreciate your outreach, and we value deeply our relationship with NTEC and the Navajo Nation. The commercial offer we recently extended reflects our ongoing commitment to that relationship, and we remain open to continuing those commercial discussions. BNSF also looks forward to a continued dialogue with NTEC about NTEC's coal needs and BNSF's service and performance.

Sincerely,

Katie Farmer

Katie Farmer
President and Chief Executive Officer

cc: Concetta Tsosie de Haro, Senate Committee on Indian Affairs
Alanna Purdy Montesinos, Office of U.S. Senator Ben Ray Luján
Holt Edwards, Office of U.S. Senator Cynthia Lummis
Greg Abel, Chairman and CEO, Berkshire Hathaway Energy
Warren Buffett, CEO, Berkshire Hathaway Inc.

Navajo Transitional
Energy Company

November 1, 2022

Via Email and First-Class Mail

Ms. Jessie L. McCabe
Director Coal Marketing
BNSF Railway Company
2650 Lou Menk Drive
Fort Worth, TX 76131
jessie.mccabe@bnsf.com

Re: Request for Common Carrier Rate – Spring Creek Mine, MT to Westshore Terminals at Roberts Bank, BC

Dear Jessie:

Pursuant to 49 U.S.C. § 11101 and 49 C.F.R. Part 1300, Navajo Transitional Energy Company, LLC ("NTEC") requests that BNSF Railway Company ("BNSF") either (a) disclose the existing common carrier rates, charges and service terms applicable to the transportation of export coal from NTEC's Spring Creek Mine, MT ("Spring Creek") to Westshore Terminals at Roberts Bank, British Columbia ("Westshore") as described in Attachment No. 1 to this letter, or (b) establish and disclose reasonable common carrier rates, charges, and service terms for the transportation of export coal from Spring Creek to Westshore, as described in Attachment No. 1. We also request that BNSF notify NTEC of any future increases in the rates and charges involved or changes in the pertinent service terms.

In accordance with 49 C.F.R. § 1300.3, please provide BNSF's response to this request in writing to the undersigned no later than November 14, 2022.

Beginning January 1, 2023, NTEC anticipates shipping approximately 360,000 tons of export coal per month in BNSF common carrier service. Beginning April 1, 2023, NTEC expects to ship approximately 450,000 tons of export coal per month in BNSF common carrier service.

NTEC is prepared to assist BNSF in any way we can to facilitate your timely response to this request.

Sincerely,

Jason Plett
Manager of Logistics

Attachment No. 1

REQUESTED TRANSPORTATION SERVICES

Origin:	Spring Creek Mine, Montana.
Destination:	Westshore Terminals at Roberts Bank, British Columbia.
Route:	BNSF Direct.
Equipment:	Carrier supplied open top hoppers with rotary coupler
Commodity:	Coal, STCC 11-212-xx.
Minimum Lading Weight Per Car:	121 net short tons per car.
Minimum Train Size:	130 cars per train.
Estimated Annual Volume:	5.0-5.5 million tons.
Loading Free Time:	Per BNSF Price List 6041-Series.
Unloading Free Time:	Per BNSF Price List 6041-Series.

BNSF RAILWAY

Jessie L. McCabe
Director
Coal Marketing

BNSF Railway Company
P.O. Box 961051
Fort Worth, Texas 76161-0051
2650 Lou Menk Drive
Fort Worth, Texas 76131-2830
Tel: (817) 867-6248
Fax: (817) 352-7940
Jessie.Mccabe@bnsf.com

November 14, 2022

Via Email

Mr. Jason Plett
Manager Logistics
Navajo Transitional Energy Company
385 Interlocken Crescent, Suite 400
Broomfield, CO 80021

Re: Request for Common Carrier Rate

Dear Jason:

The Common Carrier rate you requested November 1, 2022 from Spring Creek Mine MT to Westshore Terminals at Roberts Bank, BC is $5,030/car plus the BNSF Rules Book BNSF 6100-series, Item 3383 ($2.50 strike price) fuel surcharge program. This rate is governed by all applicable BNSF tariffs including but not limited to BNSF 6100 series and BNSF 6041 series as examples.

Please let me know how you would like to proceed.

Kind regards,

Jessie L. McCabe

Jessie McCabe

Cc: Matthew White, General Director Coal Marketing

Navajo Transitional Energy Company

December 19, 2022

Via Email and First-Class Mail

Ms. Farah Lawler
Vice President – Energy
BNSF Railway Company
2650 Lou Menk Drive
Fort Worth, TX 76131
farah.lawler@bnsf.com

Re: NTEC Common Carrier Service and Draft BNSF-C-13468

Dear Farah:

During the week of December 12, 2022, BNSF declined to counter sign NTEC's proposed version of BNSF-C-13468, and instead proposed revisions on substantially the same basis that BNSF had proposed on December 8, 2022, and which NTEC had then modified and signed on December 9, 2022. While NTEC appreciates BNSF's continued communications, NTEC cannot agree to waive any claims that may relate to 2022 as a condition on moving forward with a contract commitment from BNSF for 2023. BNSF's actions and inactions in 2022 have caused substantial damage to NTEC and the Navajo Nation. We consider BNSF's last-minute attempt to condition a 2023 agreement upon the release of 2022 claims as completely unreasonable and not in good faith.

Accordingly, beginning on January 1, 2023, NTEC will transport coal from the Spring Creek Mine to the Westshore Terminal pursuant to the common carrier rate that BNSF provided to NTEC on November 16, 2022. NTEC expects that BNSF will meet its obligation to provide this service consistent with the volume requirements NTEC provided to BNSF in its November 1, 2022, common carrier rate request letter (and which also are consistent with our historical shipment volumes). We also expect that, consistent with its statutory obligations, BNSF will refrain from entering into any contractual commitments or taking any other actions that interfere with BNSF's ability to provide common carrier service to NTEC in a manner that is consistent with NTEC's historical needs and as communicated to BNSF through our request for common carrier service.

Navajo Transitional Energy Company

Thank you for your continued attention this matter.

Sincerely,

Matt Babcock

Matthew D. Babcock
VP, Sales & Marketing
Navajo Transitional Energy Company

BNSF RAILWAY COMPANY
COMMON CARRIER PRICING AUTHORITY BNSF 90139
Revision 0

Effective Date: January 1, 2023

Expiration Date: March 31, 2023

Commodity: Raw sub-bituminous Coal, STCC 11-21-Series (excluding artificially dried or processed coal).

Origin: Spring Creek Mine, MT

Destination: **Westshore Terminals at Roberts Bank, BC**

Route: BNSF Direct

Rate(s): **$5,030/car** In U.S. Dollars per railcar load of coal in carrier provided railcars.

Fuel Surcharge: In addition to the Rate(s), coal shipments moving under this Agreement shall be subject to the BNSF mileage-based fuel surcharge provisions of BNSF Rules Book 6100-Series, Item 3383, which applies a fuel surcharge based on a $2.50 per gallon U.S. Average Price of Retail On-Highway Diesel Fuel (HDF) strike price.

Minimum Basis for Freight Charges and Weights:

The minimum tender per shipment is 130 cars ("Minimum Tender"). The minimum basis for the assessment of freight charges per shipment shall be THE GREATER OF 1) the Minimum Tender per shipment multiplied by the then current applicable rate, OR 2) the actual number of car loads in the train multiplied by the then current applicable rate. Shipper shall be granted relief from Minimum Tender due to BNSF's failure to fill out the train to 130 cars, as applicable.

Weights shall be ascertained at Origin Mine by shipper, its agent, or the coal mine operator, at no charge to BNSF, and will be provided to BNSF via either electronic data interchange or facsimile upon release of a loaded train. BNSF shall have the right to inspect and certify the Origin Mine scales. The maximum gross weight per rail car load is 286,000 pounds.

Loading:

Shipper or its agent shall be responsible for the provision of appropriate loading facilities. All cars in each shipment shall be tendered to BNSF (or its agent or contractor) for loaded movement within four (4) hours of actual or constructive placement for loading at Origin Mine ("Loading Free Time"). Shipper shall pay a charge per hour or fraction thereof that a train is held in excess of loading free time as published in Tariff BNSF 6041-series.

Unloading:

Shipper or its agent shall be responsible for the provision of appropriate unloading facilities. All cars in each shipment shall be tendered to BNSF (or its agent or contractor) for empty movement within seven (6) hours of actual or constructive placement for unloading at Destination ("Unloading Free Time"). Shipper shall pay a charge per hour or fraction thereof that a train is held in excess of loading free time as published in Tariff BNSF 6041-series.

Accessorial Services:

Coal unit train accessorial services and charges therefore, other than specified in this common carrier authority, shall be as described in BNSF Authority 6041-Series or successors thereto, except that no change in destination shall be permitted.

Coal Dust Mitigation:

In addition to the measures required to be taken by Shipper in the loading of Coal at the Origin, Railroad and Shipper recognize that it may be necessary to apply a topper agent to the loaded Coal at an intermediate location between the Origin and the Destination as an additional coal dust mitigation measure. As to this additional coal dust mitigation measure:

- On behalf of Shipper, Railroad will arrange for the application of the topper agent to Shipper's loaded Coal at the intermediate location. The Parties anticipate that the topper agent will be one of the topper agents that have been approved for use in Railroad's loading rules set out in BNSF Price List 6041-Series.

- Railroad reserves the right to charge Shipper for the reasonable costs of the actual application of the topper agent at the intermediate location. Such costs will be mutually agreed to by the Parties and it is expected that such costs will not exceed the cost of comparable topper agent application at the Origin

Billing and Payment:

BNSF will bill each shipment under the terms of the Uniform Straight Bill of Lading. All railcars for each shipment are to be billed on one (1) Bill of Lading. This Common Carrier Authority BNSF 90139, correct address and patron code must be shown on the bill of lading to insure accurate billing. Freight charges will be billed by BNSF and paid by shipper within fifteen (15) days of receipt of invoice by wire transfer. In the event that shipper does not make timely payment, or if adverse credit conditions occur, which in BNSF's judgment could affect shipper's ability to meet payment terms, BNSF may require shipper to pay cash in advance of service for all amounts for which shipper is liable under this Common Carrier Authority.

BNSF Service: Service provided pursuant to this publication will be common carrier service for movement of trainloads of Coal as ordinarily and customarily provided by BNSF for such service, and as such, cycle times and schedules may vary from time to time. In the event of a conflict between this publication and another BNSF publication, this publication shall apply.

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

BNSF RAILWAY COMPANY
COMMON CARRIER PRICING AUTHORITY BNSF 90139
Revision 0

Common Carrier Price Authority shall, for the foreseeable future, be subject to BNSF's sole discretion.

Other Provisions:

Shipments made under the provisions of this Common Carrier Authority are subject to the Uniform Freight Classification 6000-Series or its successor, BNSF 6100-Series, BNSF 6041-Series, applicable tariffs, statutes, federal regulatory rules and regulations, AAR rules, and other accepted practices within the railroad industry as may be amended from time-to-time.

Navajo Transitional Energy Company

December 30, 2022

Via Email and First-Class Mail

Ms. Jessie L. McCabe
Director Coal Marketing
BNSF Railway Company
2650 Lou Menk Drive
Fort Worth, TX 76131

Re: BNSF Common Carrier Pricing Authority BNSF 90139

Dear Jessie:

Yesterday, NTEC received BNSF's Common Carrier Pricing Authority BNSF 90139 covering the transportation of coal from Spring Creek Mine, MT to Westshore Terminals at Roberts Bank, BC. We are writing to address two aspects of BNSF 90139.

First, BNSF 90139 includes a "Service Limitation Notice" indicating that "the provision of service and acceptance of any tenders for movement under this publication . . . shall, for the foreseeable future, be subject to BNSF's sole discretion." NTEC objects to BNSF's Service Limitation Notice: (1) to the extent that it contemplates any level of service that falls below the level required under 49 U.S.C. § 11101; and (2) to the extent that it asserts any level of BNSF discretion that exceeds whatever discretion may be allowed under 49 U.S.C. § 11101. Accordingly, NTEC's tender of coal for transportation pursuant to BNSF 90139 should not be interpreted as agreement with BNSF's Service Limitation Notice or as a waiver of NTEC's continuing objection thereto. NTEC hereby reserves all rights to common carrier service as specified in the relevant statutory provisions and as interpreted under STB or court precedents, and NTEC strongly disagrees that BNSF may unilaterally alter either NTEC's rights or BNSF's obligations.

Second, BNSF 90139 includes a stated expiration date of March 31, 2023. As we indicated in our November 1, 2022, common-carrier rate request letter, NTEC anticipates shipping: (1) approximately 360,000 tons of export coal per month in BNSF common carrier service during the January 1, 2023 through March 31, 2023 time period; and (2) approximately 450,000 tons of export coal per month in BNSF common carrier service beginning on April 1, 2023. In order to eliminate any uncertainty or ambiguity and to facilitate planning for both parties, NTEC reiterates its request for BNSF to disclose – or to establish and disclose as soon as possible – its common carrier rate governing the referenced movement beginning as of April 1, 2023.

Navajo Transitional Energy Company

Please do not hesitate to let us know if you have any questions regarding this letter.

Sincerely,

DocuSigned by:
Jason Plett
6A1177D05313433...

Jason Plett
Manager of Logistics
Navajo Transitional Energy Company

NAVAJO TRANSITIONAL ENERGY COMPANY / 385 Interlocken Crescent, Suite 400 / Broomfield, CO 80021
T +1 720 566 2900 / F +1 720 566 3090 / www.NavEnergy.com