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__EXPEDITED CONSIDERATION REQUESTED__
__BY APRIL 24, 2023__

BEFORE THE
SURFACE TRANSPORTATION BOARD

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC, Applicant-Petitioner, v. BNSF RAILWAY COMPANY, Defendant.	Docket No. NOR 42178

EX PARTE **APPLICATION FOR**
SECTION 11123 EMERGENCY SERVICE ORDER

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

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TABLE OF CONTENTS

Page

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EX PARTE APPLICATION FOR SECTION 11123 EMERGENCY SERVICE ORDER

Pursuant to 49 U.S.C. § 11123, the Navajo Transitional Energy Company, LLC ("NTEC") hereby petitions the Board to determine that BNSF Railway Company ("BNSF") has failed to transport the traffic offered to it by NTEC in a manner that properly serves the public. Consistent with such a determination, and to promote commerce and service to the public, NTEC requests that the Board issue an emergency service order directing BNSF's handling and movement of NTEC's export coal traffic in a manner sufficient to ensure that NTEC receives its reasonably requested transportation service, particularly as the parties approach the critical summer months in the export coal market. In addition, or alternatively, NTEC petitions the Board to issue a temporary injunction pursuant to 49 U.S.C. § 1321(b)(4) and 49 C.F.R. § 1117.1 requiring BNSF to provide adequate service for NTEC's export coal shipments from Spring Creek to Westshore and to prevent any further reductions in NTEC's service levels.

Significantly, BNSF has interpreted its common carrier service obligation in a self-serving and flawed manner through which BNSF would purport to pick winners and losers in the export coal market. BNSF's actions have harmed – and are continuing to harm – NTEC's export coal business, and by extension the Navajo Nation. Without the remedial measures sought in this Application, NTEC's export coal business may suffer permanent harm and may lose the ability to provide critical support to the Navajo Nation.

BNSF's treatment of NTEC and BNSF's associated service failures are no accident. BNSF has made it clear that, despite its recent claims that its "***common carrier obligations are baked into its DNA***,"[1] and that the common carrier obligation "***is as fundamental to railroads as life, liberty, and the pursuit of happiness is to America***,"[2] BNSF intends to provide common carrier service to NTEC only at BNSF's "sole discretion" and only when doing so suits BNSF's purposes and preferences. As evidenced by BNSF's actions, BNSF is misinterpreting the scope of its discretion and repeatedly using that purported discretion to favor NTEC's competitors in the export coal-sales market to NTEC's detriment. Consistent with its failure to honor the common carrier obligation, BNSF recently advised NTEC that it will substantially reduce its

[1] *Swinomish Indian Tribal Community v. BNSF Railway*, No. 2:15-cv-00543-RSL ("*Swinomish*"), Trial Brief of BNSF Railway, at 2, (W.D. Wash. Mar. 15, 2023) (emphasis added) ("*BNSF Trial Brief*").

[2] *Swinomish*, Op. Trial Statement of BNSF, at 5:20-22 (Mar. 20, 2023) (emphasis added).

already inadequate NTEC common carrier service levels this summer when BNSF's other principal export coal shipper resumes operations at its mine.[3]

BNSF's actions violate statutory common-carrier service standards and are contrary to the rail transportation policy of the United States.[4] NTEC hereby applies to the Surface Transportation Board ("Board" or "STB") for an immediate emergency service order under 49 U.S.C. § 11123 directing BNSF to restore and maintain adequate coal transportation service, as described herein, from NTEC's Spring Creek Mine in Big Horn County, Wyoming ("Spring Creek") to the Westshore Terminals facility at Roberts Bank, British Columbia, Canada ("Westshore").[5]

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[3] BNSF's willingness to pick winners and losers in the export coal market runs contrary to the historic understanding of the common carrier obligation. For example, the Supreme Court explained in *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 133-34 (1915) ("*Pennsylvania R.R.*") that, even in situations in which "unexpected" demand exceeds capacity, carriers are bound to treat their customers "fairly" if not "identically."

[4] *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762, slip op. at 4 (STB served Apr. 22, 2022) ("Pursuant to the rail transportation policy of 49 U.S.C. § 10101, in regulating the railroad industry, it is the policy of the United States Government to promote a safe and efficient rail transportation system, § 10101(3); ensure the development of a sound rail transportation system to meet the needs of the public, § 10101(4); foster sound economic conditions in transportation, § 10101(5); and provide for the expeditious handling and resolution of all proceedings, § 10101(15). Poor rail service can harm productivity in important sectors of the economy and can have significant ripple effects throughout the rail network, both of which undermine sound rail transportation and economic conditions.").

[5] Simultaneously herewith, NTEC is also filing a Complaint with the STB seeking relief for BNSF's breaches of its common carrier obligation and claiming BNSF has engaged in unreasonable practices. NTEC's Complaint also asks that the Board enter a declaratory order invalidating BNSF's illegal "Service Limitation" on its statutory common carrier obligation.

The Board should also require BNSF to provide weekly service data to the Board to ensure compliance with the Board's orders.

RELIEF REQUESTED

As explained in the accompanying Verified Statement of Mr. Matthew D. Babcock ("Babcock VS") at ¶ 3, NTEC's Vice President, Sales & Marketing, minimum adequate rail transportation service from Spring Creek to Westshore requires:

(1) the delivery of approximately 438,625 tons of coal per month in BNSF-supplied railcars, or roughly 29 trains per month (based on 15,125 tons per train), for the period from and after May 1, 2023; and

(2) ratable train service within each month consistent with a minimum of 29 trains per month.

The service levels requested through this Application are consistent with the service levels that BNSF provided to NTEC in 2021 (approximately 29 trains per month). Likewise, the service levels requested in this Application are consistent with common carrier request for service that NTEC identified in its November 1, 2022 request for common carrier service, which estimated a need 450,000 tons per month beginning April 1, 2023. BNSF did not object to NTEC's request in its November 14, 2022 letter providing its common carrier rate. Babcock VS at ¶ 12.[6]

[6] NTEC's November 1 service request corresponded to approximately 24 and 30 trains per month, respectively, for 1Q23 and post-1Q23. Notably, service under the NTEC-BNSF "JERA" contract ended earlier than had been anticipated, with the final JERA train departing from Spring Creek on January 13, 2023. From and after that point in time, NTEC's common-carrier service needs rose to the 30-train per month level.

NTEC's request for 29 trains per month (on a ratable basis within each month) will allow it to load at least one Cape and three Panamax-sized vessels per month. Transportation at the 29 train-per-month level will help to restore stability to NTEC's market position.

NTEC's requested relief is also consistent with the market requirements for export coal. The export coal market is timing-dependent with sales generally requiring multiple months' lead time so that vessels can be scheduled and travel to the port. Babcock VS at ¶ 20. As in the agricultural products context where fertilizer is needed at specific times to yield crops some months later,[7] the export coal market similarly depends upon predictability and timeliness in rail transportation, particularly during the peak demand months of June through September (for which NTEC presently is engaged in marketing efforts). Babcock VS at ¶ 2. Such predictability and timeliness are essential to NTEC's ability to sell into the market. *Id*. at ¶ 20. BNSF is well aware of the role that predictability and timeliness of rail service play in the export coal market, as it has participated directly with NTEC in both the marketing and managing of rail service for this market for many years. *Id.*

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[7] *United States Rail Service Issues*, EP 724 (Sub-No. 1), slip op. at 1 (STB served Apr. 15, 2014) ("Given the immediate need for fertilizer to meet rapidly approaching planting deadlines, and the potential long-lasting and widespread effects of missing those deadlines, the Board, pursuant to 49 U.S.C. § 721(b), will direct the Canadian Pacific Railway Company (CP) and BNSF Railway Company (BNSF) to each report, by April 18, 2014, their plans to ensure delivery of fertilizer shipments for spring planting of U.S. crops.").

BACKGROUND

A. BNSF's Inadequate Common Carrier Service and the Associated Harm to NTEC

BNSF has not provided adequate common carrier service to NTEC. In February, BNSF moved only 17 trains for NTEC (all in common carrier service), and in March, BNSF moved only 22 trains (again, all in common carrier service). Those movement totals are far below the 24- and 30-train per month levels that NTEC had identified in its November 1, 2022 service request.[8] The harm resulting from BNSF's service failures will grow far worse if those service problems continue. And as Mr. Babcock notes in its Verified Statement, BNSF has warned NTEC that monthly service levels actually will fall even further as of June (*i.e.*, 16 trains per month, which equates to only 53% of NTEC's November 1 request). Babcock VS at ¶¶ 2, 18. Service at a 16-train per month level would profoundly hinder NTEC's ability to run its business, to satisfy its existing contractual obligations, and to market export coal for future sales. *Id.* at ¶ 21.[9]

[8] BNSF's movement of 39 trains (combined) in February and March amounted to only 65%-81% of the November 1 request levels, respectively.

[9] In mid-March, BNSF increased its prior estimates for April and May service. Previously, BNSF had estimated that it would move only 18 trains for us in April and 15 trains in May. In mid-March, BNSF increased those estimates to 27 trains per month for each month. Babcock VS at ¶ 19. Similarly, BNSF increased its prior estimate for the June volume from 14 to 16 trains. *Id.* at ¶ 18. NTEC is pleased to see these developments, but upping train counts in-month or within a few weeks of expected shipment dates does not provide a practical benefit to NTEC as it seeks to sell export coal. *Id.* at ¶ 19. As noted above, the export coal market is timing-dependent with sales generally requiring multiple months' lead time so that vessels can be scheduled and travel to the port. *Id.* at ¶ 20. BNSF is familiar with that market dynamic. *Id.*

BNSF's inability (or its refusal) to provide adequate common carrier service places NTEC at substantial risk and compels NTEC to seek the Board's intervention now. The Board's intervention is further required because NTEC has no other options to transport this coal to Westshore. Spring Creek is solely served by BNSF.

BNSF also has discriminated against NTEC in providing and scheduling export coal trains. Upon information and belief, BNSF is providing far higher levels of export-coal service to other coal producers using the same Westshore facility. As such: (1) BNSF is affirmatively discriminating against NTEC relative to BNSF's other customers; or (2) BNSF has failed to maintain staffing levels (and possibly equipment availability) sufficient to allow BNSF to meet the reasonable demand for its common carrier services.

BNSF's 2023 service deficiencies are an extension of its performance in 2022 during which BNSF's contract-based deliveries of NTEC export coal fell well short of NTEC's requirements, even though overall volumes on the lines used to transport export coal from the PRB to Westshore increased for a substantial share of 2022 (relative to 2021). Those 2022 BNSF service deficiencies led NTEC to file a Complaint against BNSF in the United States District Court for the District of Montana on December 19, 2022. *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 troubling nature of BNSF's dereliction of its service obligations goes far beyond BNSF's poor 2022 service. In particular, BNSF threatened at the close of 2022 that – if NTEC were to decline to accept BNSF's onerous terms for post-2022 contract service – BNSF would enter contractual arrangements with other customers, thus precluding BNSF's ability to serve NTEC's needs and leaving NTEC without an adequate common carrier transportation option. Babcock VS at ¶ 27.

Notwithstanding BNSF's attempt to leverage NTEC into waiving a damage claim for tens of millions of dollars, NTEC declined to accept BNSF's contract demand and instead requested that BNSF provide common carrier service consistent with its statutory obligations. In response, BNSF attempted to circumvent its common carrier obligation by including in its Common Carrier Pricing Authority (BNSF 90139) a provision purporting to relieve BNSF of its common carrier obligation through a "Service Limitation Notice" whereby BNSF only provides service at its "sole discretion" – an unreasonable practice which NTEC is challenging in its separate filing of this day.[10]

As Mr. Babcock explains, BNSF and NTEC have communicated regularly throughout 2023 regarding NTEC's common carrier service requirements, but BNSF has continued to refuse to provide adequate service. Babcock VS at ¶ 22. Indeed, as noted above, BNSF now contemplates reducing NTEC's expected service even further to a mere 16 trains in June. *Id.* at ¶ 18.[11]

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[10] By correspondence dated March 21, 2023, BNSF provided notice to NTEC that BNSF would increase its common carrier rate by 4% effective as of April 15, 2023. *See* Babcock Exhibit MDB-5 ("Rate will increase on 4/15/2023 from $5,030.00/car to $5,241.18/car.").

[11] NTEC's service concerns were repeatedly communicated to BNSF in 2022 as well, and NTEC also attempted to resolve its concerns through the Board's Rail

B. Treaty with the Navajo Nation

The Navajo Nation created NTEC in 2013 for the express purpose of supporting and improving 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." The Navajo Nation is the sole shareholder of NTEC, and thus a tribal entity at its core.

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 hereto. In Article XI of the Treaty, the United States promises 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 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

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Customer and Public Assistance program at that time, but BNSF declined to make any changes to NTEC's service. NTEC considered a further meeting with BNSF and the STB's Office of Public Assistance, Government Affairs and Compliance, but determined that it could no longer wait to take action, especially since the meetings in June/July 2022 did not yield any results.

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 has repeatedly recognized and complied with this obligation in other contexts. *See*, *e.g.*, *Seven County Infrastructure Coalition—Rail Construction & Operation Exemption—In Utah, Carbon, Duchesne, And Uintah Counties, Utah*, FD 36284, slip op. at 21 (STB served Dec. 15, 2021); *Alaska R.R. – Construction and Operation Exemption – Rail Line Between North Pole and Delta Jct., AK*, slip op. at 87 (STB served Jan. 6, 2010); *Canadian Pac. Ry. – Control – Kansas City Southern Rwy.*, FD 36500, Draft Environmental Impact Statement, at 13, B-6 (Aug. 5, 2022); *Tongue River R.R. – Rail Construction and Operation – In Custer, Powder River and Rosebud Counties, MT*, FD 30816, Draft Environmental Impact Statement, at 1-15 (Apr. 17, 2015). By extension, the United States must ensure that BNSF acts in the beneficial interest of the Navajo Nation. BNSF enjoys the imprimatur of the United States to act as a common carrier and with that status comes a responsibility to the public including

Native American entities. In exchange, BNSF of course enjoys significant counterbalancing benefits and privileges, including a multitude of protections that protect BNSF's franchise and permit it to price traffic at supra-competitive levels.

The harm caused by BNSF's inadequate discretionary service falls not only on NTEC, but also on the Navajo Nation. NTEC provides roughly $50 million in annual, direct economic support for the Navajo Nation, and funds approximately one-third of the Nation's General Fund. NTEC's ongoing operations also provide indirect support for the Navajo Nation in the form of wages, charitable donations, and other contributions to the community. These additional, indirect forms of support to the Navajo Nation amount to approximately $75 million per year. And while the export coal business does solely fund these activities, the sustainability of that business is essential to NTEC as a going concern.

The Board's evaluation of the present Application should consider and should adhere to the trust obligation agreed to in the Treaty. Indeed, NTEC notes for the Board's that BNSF has evinced a troubling pattern of actions contrary to Native American interests – strangely coupled with seemingly irreconcilable positions in each instance. Specifically, in *Swinomish*, BNSF claimed that it violated an easement agreement with the Swinomish Indian Tribal Community because BNSF had a common carrier obligation to carry unit trains of oil for BNSF customers across the Swinomish land and because BNSF had a policy of getting to "yes" in response to its customers due, in part, to its common carrier obligation:[12]

> **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.[[13]]

Yet, here, BNSF repeatedly has acted as if it has no common carrier obligation and no need to get to "yes" with NTEC. In each case, BNSF disadvantaged the Native American interest at stake while making spurious claims in its own defense.

Accordingly, NTEC seeks a § 11123 service order and an injunction directing BNSF to deliver 29 trainloads per month to Westshore through the balance of 2023 and thereafter. Because of the severe consequences of BNSF's failure to provide adequate service, NTEC requests that the Board consider granting NTEC's request for relief on an

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[12] *BNSF Trial Brief* at 2.

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

ex parte basis by April 24, 2023, at least on an interim basis.[14] NTEC further requests that the emergency service order remain in effect until NTEC's Complaint is adjudicated on the merits or BNSF has restored normal operations, whichever occurs first.

ARGUMENT

A. The Board Should Grant a Section 11123 Service Order

The Board has the statutory authority under 49 U.S.C. § 11123 to address "situations requiring immediate action to serve the public." *Id.* NTEC respectfully requests that the Board exercise that authority to issue an order directing BNSF to provide NTEC with reasonable and adequate service as requested herein.[15]

Section 11123 authorizes the Board to issue emergency service orders on an *ex parte* basis, at the Board's discretion, for 30 days, which may then be extended up to an additional 240 days:

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[14] Section 11123(b)(1) authorizes the Board "to act immediately, without observing normal due process procedures" either on its own or on application in situations requiring immediate action to serve the public. *Expedited Relief for Service Inadequacies*, 3 S.T.B. 968, 972 (1998); *see also* 49 U.S.C. § 11123(b)(1) ("[T]he Board may act under this section on its own initiative or on application without regard to subchapter II of chapter 5 of title 5."). The Board can issue injunctive orders on a similar basis to prevent irreparable harm. 49 U.S.C. § 1321(b)(4). Thus, the Board need not wait for a reply from BNSF.

[15] To the extent that the Board's regulations at 49 C.F.R. § 1146.1 require affected shippers to provide a commitment from another available railroad to provide alternative service that would meet current transportation needs (and an explanation of how the alternative service would be provided safely without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service), NTEC respectfully submits that such requirements are not relevant to – and should not be applicable to – the present situation since NTEC does not request service from an alternative carrier. NTEC is not aware of

> (a) [w]hen the Board determines that … [a] failure of traffic movement exists which creates an emergency situation of such magnitude as to have substantial adverse effects on shippers … the Board may, to promote commerce and service to the public, for a period not to exceed 30 days – (1) direct the handling, routing, and movement of traffic and its distribution over its own or other railroad lines;
>
> (b)(1) … the Board may act under this section on its own initiative or on application without regard to subchapter II of chapter 5 of title 5.
>
> (c)(1) The Board may extend any action taken under subsection (a) . . . beyond 30 days if the Board finds that a transportation emergency . . . continues to exist. Action by the Board . . . may not remain in effect for more than 240 days beyond the initial 30-day period.

The Board may thus order BNSF, a rail carrier providing transportation subject to the Board's jurisdiction, *see* 49 U.S.C. § 10102(5), to transport NTEC's shipments of export coal from Spring Creek to Westshore. As the Board noted in its 1998 rulemaking proceeding on expedited service relief, § 11123 gives the Board wide "latitude to craft a variety of measures to remedy any particular service situation." *Expedited Relief for Service Inadequacies*, EP 628, slip op. at 6 (NOPR served May 12, 1998).

Here, BNSF's "failure of traffic movement … creates an emergency situation of such magnitude as to have substantial adverse effects" on NTEC, its customers, and the Navajo Nation, as BNSF "cannot transport the traffic offered to it in a manner that

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another rail carrier that could provide service from Spring Creek to Westshore and NTEC does not seek such relief.

properly serves the public." 49 U.S.C. § 11123(a).[16] The circumstances of BNSF's service failure establish a compelling basis for the Board to exercise the authority granted to it in the statutory provision. *See Canexus Chems. Canada L.P. v. BNSF Ry. – Emergency Serv. Order,* NOR 42131, slip op. at 4 (STB served Oct. 14, 2011) ("The lack of any readily available alternative service coupled with the carriers' refusal to provide through service cooperatively after October 15, 2011, constitutes a 'failure of movement' under 49 U.S.C. § 11123.").[17]

As explained in the Babcock VS, BNSF's service has prevented NTEC from receiving (and will prevent NTEC from receiving) the export coal transportation service it needs in order to be able to sell its export coal consistent with market requirements or to load vessels in a timely manner. BNSF's service failures harm not only NTEC and its customers, but also the Navajo Nation.

As part of its November 1, 2022 request for a common carrier rate, NTEC explained its service needs for 2023. The Board and the Commission before it have held that a reasonable request for common carrier service is one that is specific as to the

[16] *See Hasa, Inc. v. Union Pacific R.R.*, NOR 42165, slip op. at 2 (STB served Aug. 21, 2019) ("To preserve the Board's ability to provide meaningful and effective relief on the merits should Hasa prevail on its application or petition, it is necessary to temporarily maintain the status quo while the Board expeditiously considers the application and the petition. Accordingly, the Board will direct UP to maintain five-day per week service to Hasa until the Board has ruled on Hasa's application and petition."); *Foster Poultry Farms – Ex Parte Petition for Emergency Service Order*, FD 36609, slip op. at 2 (STB served June 17, 2022) (finding that an order under § 11123 is warranted).

[17] While BNSF is providing some service to NTEC (unlike in *Canexus*), BNSF's recent (and anticipated future) service levels are still so deficient as to rise to a "failure of traffic movement" that does not "properly serve[] the public." 49 U.S.C. § 11123.

volume, commodity, and time of shipment. *Meyer v. North Coast R.R. Authority*, FD 34337, slip op. at 4 (STB served July 27, 2005) (citing *LI Acquisition Corp. – Abandonment Exemption – In Montgomery County, PA*, Docket No. AB-405 (Sub-No. 1X), slip op. at 9 (ICC served Aug. 23, 1994); *The Atchison, Topeka and Santa Fe Ry. – Abandonment Exemption – In Lyon County, KS*, Docket No. AB-52 (Sub-No. 71X), slip op. at 6 (ICC served June 17, 1991)). NTEC's request for BNSF common carrier service met this standard. Nevertheless, BNSF has fallen far short of this requested service level, and BNSF has informed NTEC that BNSF's export service for NTEC – as of June – will fail to meet NTEC's service needs by an even wider margin.

In short, BNSF's actions have caused and will continue to cause a "failure of traffic movements" that "creates an emergency situation of such magnitude as to have substantial adverse effects on shippers." An emergency service order therefore is appropriate and required.

BNSF cannot avoid its common carrier obligation to NTEC by granting itself the "sole discretion" to decide whether, and the extent to which, it is really bound by that obligation. The Board, not BNSF, has the authority to regulate the extent of BNSF's common carrier obligation. Indeed, long ago, the ICC recognized that a railroad using its unique position to effectively decide the economic fate of its customers is contrary to the purpose of the Interstate Commerce Act and that "[t]his is not regulation of railroads by the nation, but regulation of the industries and commerce of the country by its railroads." *In re: Investigation of Advances in Rates by Carriers in W. Truck Line, Trans-Miss. & Ill. Freight Comm. Territories*, 20 I.C.C. 307, 350-351 (1911). The ICC further noted that the railroad's witness in that case "was unwilling to acknowledge that his judgment of what was proper, reasonable, or just should be subject to review by this Commission or by any other tribunal – a position which may fairly be characterized as a modern extension of the ancient principle of divine right." *Id.*

B. The Board Should Also Grant a Temporary Injunction Requiring BNSF to Provide Adequate Service and Prohibiting BNSF From Further Reducing NTEC's Service Levels

Under 49 U.S.C. § 1321(b)(4), the Board also has the authority to issue a temporary injunction requiring BNSF to provide adequate service for NTEC's export coal shipments from Spring Creek to Westshore and to prevent any further reductions in NTEC's service levels.

The Board exercises this authority where a party meets the four criteria under *Holiday Tours*[18] by showing: (1) it is likely to prevail on the merits; (2) it will be irreparably harmed absent a temporary injunction; (3) issuance of the temporary injunction will not substantially harm other parties; and (4) granting the temporary injunction is in the public interest. *See, e.g., Stagecoach Group PLC & Coach USA, Inc. et al. – Acquisition of Control, Twin America, LLC*, MC-F-21035, slip op. at 2 (STB served Mar. 9, 2011) ("*Stagecoach Group*"); *Railroad Salvage & Restoration, Inc.—Pet. for Investigation & for Emergency Relief Under 49 U.S.C. 721(b)(4)—Sec. Deposit for Demurrage Charges, Mo. & N. Ark. R.R.*, NOR 42107, slip op. at 2 (STB served June 30,

[18] *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977) (citing *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

2008) ("*Railroad Salvage*"). NTEC independently satisfies each element of the *Holiday Tours*[19] criteria.

1. NTEC is Likely to Succeed on the Merits of its Claims Against BNSF for the Inadequate Service

The first element of the temporary injunction test is to demonstrate a "substantial" likelihood of success on the merits.[20] Here, there is a "substantial (perhaps overwhelming) likelihood"[21] that NTEC will prevail on its claim, presented in its separately-filed Complaint, that BNSF has failed to meet its service obligations and should be ordered to restore service to an adequate level. At present, NTEC is seeking the level of service that BNSF can and did provide previously (*i.e.*, 29 trains per month as compared with 28-30 trains per month moved in 2021). Moreover, BNSF demonstrated during the first eight months of 2022 that it could transport even higher volumes of export traffic to Westshore (in the aggregate for all of BNSF's export shippers) than BNSF had transported during those same months of 2021. Babcock VS at ¶¶ 24-26. Similarly, BNSF has estimated that it will transport 27 trains per month for NTEC in April and May, further indicating that BNSF should be able to move such volumes for NTEC on a consistent basis. *Id*. at ¶ 19.

BNSF is a common carrier railroad that provides essential unit train rail transportation services for export coal trains moving from Spring Creek to Westshore.

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[19] *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 3 (D.C. Cir. 2016) ("*League of Women Voters").*

[20] *League of Women Voters*, 838 F.3d at 9.

[21] *Id.*

As such, BNSF is obligated under 49 U.S.C. § 11101(a) to provide rail service "on reasonable request." This common carrier obligation is fundamental. *See*, *e.g.*, *American Trucking Associations, Inc. v. The Atchison, T. & S.F. Ry.*, 387 U.S. 397, 407 (1967)("*American Trucking*") ("[Railroads'] obligation as common carriers is comprehensive and exceptions are not to be implied."); *Winnebago Farmers Elevator Co. v. Chicago and North Western Transp. Co.*, 354 I.C.C. 859, 868 (1978) ("We believe that the power to enforce the duty of adequate service is imperative to our ultimate purposes and responsibilities . . . ."); *G.S. Roofing Prods. Co. v. Surface Transp. Bd.*, 143 F.3d 387, 391 (8th Cir. 1998) (a railroad may not refuse to provide service merely because to do so would be inconvenient or unprofitable). BNSF cannot limit these obligations by conditioning its service on its "sole discretion," as it purports to do through its "Service Limitation Notice."

The core obligation to serve the public provides the foundation for all of the valuable rights, powers, privileges, and immunities that BNSF possesses. BNSF cannot enjoy any of those benefits unless it discharges the obligations that form the statutory and constitutional premise for its valuable franchise. As the Supreme Court has stated, the obligation is "comprehensive and exceptions are not to be implied." *American Trucking*, 387 U.S. at 407. Unless and until a carrier has lawfully abandoned its lines, which BNSF has made no attempt to do, that duty remains absolute. "[U]nder the circumstances here (*i.e.*, the Line had not been embargoed or abandoned), [the carrier has] an absolute duty to provide rates and service over the Line upon reasonable request, and that its failure to perform that duty was a violation of section 11101." *Pejepscot Indus. Park, Inc. d/b/a*

Grimmel Indus. – Pet. for Declaratory Order, FD 33989, slip op. at 14 (STB served May 15, 2003). BNSF is not at liberty to deny or withhold service to NTEC based on its convenience or its preference to serve other customers.

Moreover, to the extent that any BNSF commitments to third parties have deprived BNSF of its ability to respond to NTEC's reasonable request for common carrier service, then those commitments are not reasonable (and therefore do not constitute a legitimate justification for BNSF's failure to service NTEC). 49 U.S.C. § 11101(a). As demonstrated herein, BNSF was well aware of NTEC's needs when it held itself out (in November 2022) to provide common carrier service for 2023. BNSF was also aware of the level of commitments it had made to others when it made that commitment to NTEC. BNSF cannot purport to rely on pre-existing contract commitments (and certainly cannot rely upon contract commitments made *after* NTEC's common carrier service request) as a basis for denying service to NTEC in 2023.

The common carrier obligation would become meaningless if it were to apply only when the carrier finds it convenient to perform.[22] The circumstances that create the need

[22] *E.g., MCM Rail Services LLC—Pet. for Retroactive Exemption—In Sparrows Point, MD*, FD 35707 (STB served June 11, 2013), slip op. at 4 ("Further, should [the carrier's] actions indicate that it is permitting … service over the Line to deteriorate, any party may request emergency service to prevent irreparable harm pursuant to 49 U.S.C. § 721(b)(4). We also note that common carriers have an obligation to provide service to shippers on reasonable request. For example, if a carrier provides inadequate service, shippers have recourse before the Board under 49 U.S.C. § 11101 or, in emergency situations, under § 11123. In short, operating authority exposes rail carriers to a variety of regulatory responsibilities and provides shippers with mechanisms to request remedies from the Board.").

for BNSF's service are the same circumstances that give it its rights and powers, its preemption from other law, and its ability to exercise market power. NTEC respectfully submits that the Board should exercise its authority here to require that BNSF provide common carrier service to the full extent required by law, and not the limited discretionary service that BNSF seeks to provide to NTEC.

2. NTEC Will Suffer Irreparable Harm Without a Temporary injunction.

To show irreparable harm, a party must demonstrate that (1) the harm will be "certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent irreparable harm," and (2) "the harm must be beyond remediation."[23]

Those requirements are easily met here. The harm to NTEC to date in 2023 is on the order of $10 million and will grow substantially larger if BNSF transports only 14 or 16 NTEC export trains in June. Even to the extent certain damages may be available to NTEC, NTEC may be unable to recover: (i) for its additional costs and lost profits on volumes that BNSF's poor service prevent NTEC from selling; and (ii) for harm to NTEC's reputation in the export-coal market. And as noted, NTEC has no other means of transporting this coal.

[23] *League of Women Voters*, 838 F.3d at 7-8 (internal quotations and citations omitted).

Since there is no adequate monetary remedy available, injunctive relief is needed to avoid irreparable harm.[24] Furthermore, monetary damages will not replace the export coal volumes that were not available for sale due to BNSF's refusal to provide common carrier sale on reasonable request.

Waiting for a full decision on the merits is also not a viable option. Cases at the Board regarding § 11101 and/or unreasonable practice-type disputes may take a substantial period of time to complete.[25] Harm and injury to NTEC and to the Nation would only grow during such a time period, for which NTEC and the Nation likely would not receive adequate compensation. BNSF's service failures thus represent a "certain and

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[24] *See*, *e.g.*, *Stagecoach* at 2 ("Unlike many cases, monetary damages would not be available to compensate for losses that could result. Applicants have made a sufficient showing that there is a possibility of irreparable harm to warrant a stay here."); *Colorado Wheat Admin. Comm*. *v. V & S Ry., LLC*, NOR 42140, slip op. at 5 (STB served May 7, 2015) ("economic losses that are substantial and unredressable can qualify as irreparable injury") (original emphasis; footnoted citations omitted); *West Texas Utilis. Co. v. Burlington N. R.R. Co.,* NOR 41191 (STB served June 25, 1996) (finding irreparable harm to support stay where BN faced potential loss of additional revenues, but no risk of out-of-pocket loss); *Mexichem Specialty Resins, Inc. v. EPA,* 787 F.3d 544, 555 (D.C. Cir. 2015) (finding financial injury becomes "irreparable where 'no adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation'" (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)); *Texas v. EPA,* 829 F.3d 405, 434 (5th Cir. 2016) (quoting *Mexichem*).

[25] *See*, *e.g.*, *N. Am. Freight Car Assoc. v. Union Pac. R.R.*, NOR 42144 (complaint filed Mar. 31, 2015, and no decision almost eight years later); *Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, FD 35557 (taking over 4 years from final complaint to decision on the merits); *State of Montana v. BNSF Ry. Co.*, NOR 42124 (over 2 years and 9 months from filing of complaint to merits decision); *N. Am. Freight Car Assoc. v. Union Pac. R.R.*, NOR 42119 (over 4 years and 10 months from filing of complaint to merits decision).

great" "irreparable harm" that will "be beyond remediation."[26] Moreover, BNSF will continue to enjoy the full benefit of its common carrier franchise and associated benefits during this period of continuingly inadequate service.

3. Issuance of a Temporary injunction Will Benefit BNSF, Not Injure it

A temporary injunction maintaining adequate service levels to NTEC will not "substantially harm" BNSF.[27] To the contrary, BNSF will benefit by receiving the very same revenues, and earning the same profits and margins, by rendering the services that it held out to provide in the Common Carrier Pricing Authority (BNSF 90139, as updated) that it established for NTEC. Holding out and providing that service is the *sine quo non* of BNSF's status as a common carrier, and a party cannot be said to be injured by carrying out the obligations that are fundamental to its existence, on terms that it unilaterally established.

4. Issuance of a Temporary injunction Will Promote the Public Interest

The requested relief will promote the public interest in multiple respects. The Navajo Nation benefits both directly through the funding of the General Fund, and indirectly through the jobs and other benefits that NTEC provides. Granting the requested relief also would advance the public interests that the United States committed to advance in the Navajo Treaty. *See* Treaty, at Article XI (promising that "the

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[26] *League of Women Voters*, 838 F.3d at 8 (internal quotations and citations omitted).

[27] *Stagecoach Group* at 2.

Government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians").

The balance of interests strongly favors issuance of the requested injunctive relief, as do the other *Holiday Tours* factors.

C. Additional Board Oversight is Warranted

Under the circumstances, NTEC respectfully submits that additional Board oversight is warranted and necessary. In particular, the STB should assign appropriate Board staff to monitor and help ensure compliance with its orders and to conduct reasonable service delivery oversight during the pendency of the Complaint proceeding.

CONCLUSION

For the reasons stated above, NTEC respectfully requests that the Board issue an emergency order and a temporary injunction and related relief in the form requested above as soon as possible. NTEC respectfully submits that the Board should issue a directed service order under 49 U.S.C. § 11123 immediately.

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

By: */s/ Daniel M. Jaffe*
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Frank J. Pergolizzi
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Washington, D.C. 20036
(202) 347-7170

April 14, 2023

Attorneys for Applicant-Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this 14th day of April 2023, caused copies of the foregoing to be served as follows:

By email and overnight delivery upon BNSF Railway Company, 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

By overnight delivery upon:

Federal Railroad Administration
1200 New Jersey Avenue, SE
Washington, D.C. 20590

/s/ Andrew B. Kolesar III
Andrew B. Kolesar III
An Attorney for Applicant-Petitioner

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

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BEFORE THE
SURFACE TRANSPORTATION BOARD

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC, Applicant-Petitioner, v. BNSF RAILWAY COMPANY, Defendant.	Docket No. NOR 42178

VERIFIED STATEMENT OF MATTHEW D. BABCOCK

1. My name is Matthew D. Babcock. I am the Vice President, Sales & Marketing of Navajo Transitional Energy Company, LLC ("NTEC"). I am submitting this Statement in support of NTEC's application for a Section 11123 Service Order and our related request for a temporary injunction. The purpose of this Statement is to provide details to the Board regarding: (i) NTEC's history of transporting export coal from its Spring Creek, MT Mine to Westshore Terminals at Roberts Bank, BC ("Westshore"); (ii) NTEC's current transportation needs; and (iii) the extent to which BNSF is failing (and expects to continue to fail) to meet those needs.

2. As I describe in greater detail below, BNSF recently informed us that it expects to move only 14 (or perhaps 16) NTEC export trains during the month of June. Service at such a drastically limited level would create profound difficulties for NTEC. The peak season for export-coal sales to customers in the Japanese and Korean markets

runs from June through September. We currently are engaged in efforts to market export coal sales for delivery during those peak-season months, and the prospect that BNSF will provide only half of our requested service in June (or in any other future month, especially during peak season) would greatly impede those marketing efforts and would threaten our ability to fulfill our existing coal sales obligations.

3. It is critical to NTEC that BNSF immediately restore and maintain adequate rail transportation service. Adequate rail transportation service for 2023 from Spring Creek to Westshore requires: (1) the delivery of approximately 438,625 tons of coal per month in BNSF-supplied railcars, or roughly 29 trains per month (based on 15,125 tons per train), for the period from and after April 1, 2023; and (2) ratable train service within each month consistent with a minimum of 29 trains per month. This level of "adequate" service that we are asking the Board to require is consistent with what we historically have shipped via BNSF (and/or asked BNSF to ship) and is consistent with (and, in fact, slightly lower than) what we told BNSF on November 1, 2022 that we would ship in 2023. This level of regular, dependable service would constitute a significant improvement upon what BNSF actually has provided thus far in 2023 and upon what BNSF has told us to expect in the near-term, peak-season future.

4. Ratable service is also critical to meeting NTEC's requirements because storage at Westshore is limited to a maximum of 180,000 tons. Thus, if BNSF bunches trains or there are long droughts with no trains, timely vessel loading becomes extremely difficult.

5. Without such adequate service: (a) we will be unable to satisfy our obligations under our existing coal sales contracts; (b) we will incur substantially increased demurrage costs due to delays in filling ocean-going vessels; (c) we will be unable to market our coal to new or existing customers for peak-season sales; (d) our standing in the export coal marketplace will be degraded relative to that of our competitors; and (e) we will be hindered in our effort to provide sufficient financial support to our sole shareholder, the Navajo Nation.

A. Background

6. I have worked at NTEC and at the predecessor owner of Spring Creek (*i.e.*, Cloud Peak Energy) in various sales and logistics-related capacities since 2013. Prior to that time, I spent five years working for Norfolk Southern Railway Company in various commercial roles within the Coal Business Group.

7. In my role as Vice President, Sales & Marketing, I am responsible for overseeing all elements of the sale and transportation of coal from Spring Creek. We sell approximately 13.0 million tons (or more) of Spring Creek coal per year, with approximately 5+ million tons of such sales made into the export market. Our customers are located in Japan and Korea. We sell most of our export coal on an f.o.b. ocean-going vessel basis at Westshore, with the few remaining export sales all occurring at locations in Asia. As such, we are responsible for coordinating the transportation of all of our export coal from Spring Creek to Westshore. Rail transportation is a critical component in bringing our coal to market.

8. BNSF is the only rail carrier with the ability to originate coal transportation service at Spring Creek. The one-way trip via BNSF from Spring Creek to Westshore is approximately 1,500 miles long. All of our export coal currently moves in BNSF common carrier service.

B. Historic Contract Service and NTEC's Request for BNSF Common Carrier Service

9. Historically, Spring Creek coal moved to Westshore via BNSF contract service. Our principal rail transportation contract with BNSF expired on December 31, 2022 and our separate contract for the transportation of export coal for sale to a single customer in Japan (*i.e.*, JERA Trading Pte Ltd. or "JERA") expired on March 31, 2023.

10. On November 1, 2022, one of my staff members (*i.e.*, Jason Plett, Manager of Logistics) submitted a formal common-carrier rate request to BNSF identifying our anticipated transportation needs for 2023. Exhibit No. MDB-1.

11. Consistent with our historic shipment levels (and the expiration of the JERA contract as of March 31, 2023), we advised BNSF in our November 1 letter that NTEC would require rail transportation service from Spring Creek to Westshore at the following levels:

- approximately 360,000 tons of coal per month in BNSF-supplied railcars, or roughly 24 trains per month (based on 15,125 tons per train), for the period from January 1, 2023 through March 31, 2023; and

- approximately 450,000 tons of coal per month in BNSF-supplied railcars, or roughly 30 trains per month, for the period from April 1, 2023 (*i.e.*, following the end of service under the JERA contract) through December 31, 2023.

12. BNSF provided a common carrier rate to us by letter dated November 14, 2022. Exhibit MDB-2. BNSF did not provide any indication that it objected to the volume levels that we identified in our November 1, 2022 request.

13. On December 29, 2022, BNSF incorporated its new common carrier rate into a tariff document that BNSF identified as BNSF 90139. Exhibit MDB-3. By letter dated December 30, 2022, we took issue with two aspects of BNSF 90139. Exhibit MDB-4. First, we objected to BNSF's "Service Limitation Notice," in which BNSF claimed to have the right – in its "sole discretion" – to decide whether to provide service or to accept tenders of export coal. Second, we objected to BNSF's indication that the common carrier rate would expire on March 31, 2023.

14. BNSF responded, in part, to our letter on January 17, 2023. In particular, BNSF's Vice President of Industrial Products, Ms. Farah Lawler, informed us of BNSF's position that "[t]he common carrier doctrine does not obligate BNSF to move every last shipment of coal that NTEC decides to ship in 2023," and it does not stop BNSF "from making contractual commitments to other shippers . . . ." Lawler January 17, 2023 Letter at 2. BNSF did not specifically respond to our objection to BNSF's "Service Limitation Notice."

15. Ms. Lawler added a final note, however, regarding Jason Plett's request that BNSF provide rates as soon as possible for traffic that will begin moving April 1, 2023. Specifically, Ms. Lawler commented that "BNSF is reviewing that request and will provide the updated rates as soon as those are available." *Id*. Ultimately, BNSF's Patrick Moynihan informed us by email dated March 21, 2023 (Exhibit MDB-5) that BNSF was extending the rate in BNSF 90139 through April 14 and that BNSF was increasing that rate by 4% effective as of April 15, 2023:

> BNSF will publish an adjustment to your Coal tariff BNSF 90139 to be effective as of 4/15/2023:
>
> - Current rate has been extended from 3/31/2023 to 4/14/2023.
> - Rate will increase on 4/15/2023 from $5,030.00/car to $5,241.18/car.

16. The last shipment under the JERA contract departed from Spring Creek as of January 13, 2023. Since that date, all BNSF shipments of Spring Creek export coal have moved in BNSF common carrier service.

C. 2023 BNSF Service and its Warning of Future Volume Cuts

17. The movement of 5.5 million tons of coal per year equates to approximately 458,000 tons – or 30 trains – per month. To date in 2023, and despite our request for substantially higher levels of service, BNSF's pace of transporting our coal is far below the 458,000-ton per month level, with BNSF moving only 17 NTEC export trains in February (258,545 tons) and only 22 NTEC trains in March (349,747 tons).

18. Troublingly, BNSF has advised us that it anticipates reducing our monthly volumes even further as we head towards the critical Summer peak season. Specifically,

BNSF has indicated in our scheduled, weekly Wednesday morning logistics-coordination calls that it will ship only 16 NTEC export trains in June. (Prior to the second week of April 2023, BNSF actually had estimated that it would ship only 14 NTEC export trains in June.) That low volume of service – either at the 14-train or the 16-train level – would create significant problems for NTEC.

19. In addition, BNSF recently increased its estimates for April and May volumes to 27 trains per month. Up until mid-March, BNSF had estimated that it would move only 18 trains for us in April and 15 trains in May. NTEC is pleased to see forecast increases rather than decreases, but upping train counts in-month or within only a few weeks of expected shipment dates does not provide a practical benefit to NTEC as it seeks to sell export coal.

D. NTEC's Dire Need for Consistent and Adequate Service

20. The complex nature of the multi-modal export coal supply chain requires NTEC to 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 and is well aware of the role that predictability and timeliness of rail service play in the export coal market. BNSF has participated directly with NTEC in both the marketing and managing of rail service for this market for many years. Indeed, in the past, BNSF Coal Marketing personnel have participated in export-coal sales meetings in Asia with NTEC's predecessor, Cloud Peak, and its customers.

21. If we were to receive transportation service for only 16 export trains in a given month (or in multiple months), we would encounter significant problems meeting our existing coal sales obligations and/or marketing coal for future sales.

E. NTEC's Repeated Requests to BNSF to Restore Adequate Service

22. In 2023, NTEC has communicated regularly with BNSF regarding our need for adequate coal transportation service, but BNSF has continued to fall short of providing adequate service.

23. NTEC's efforts in 2023 are a continuation of its 2022 efforts. These included multiple in-person meetings with BNSF in the Spring and Summer of 2022. NTEC also participated in calls with the STB's Office of Public Assistance, including calls directly with BNSF in June and July, 2022. BNSF did not make any changes or improvements in NTEC's service as a result of those efforts.

F. BNSF's Practice of Favoring NTEC Competitors

24. One of the most problematic aspects of BNSF's recent service for NTEC has been the disparity between the quality of service that we have received and the quality of service that BNSF has provided to our competitors. There have been long periods of time over the past fifteen months in which BNSF has increased its overall level of coal transportation to Westshore but has cut its transportation on behalf of NTEC. For example, BNSF moved 71.3 export coal trains per month to Westshore between January and August of 2022. That figure was slightly higher than the number of export coal trains per month that BNSF moved to Westshore between January and August of 2021 (70.1 per month). Nevertheless, BNSF's transportation of coal trains to Westshore for

NTEC fell from 29 per month over that eight-month time period in 2021 to only 20 per month over that same eight-month time period in 2022.

25. To reiterate, BNSF moved seventy fewer trains for NTEC in this 2022 time period as compared with 2021 (*i.e.*, 232-162 = 70 trains) despite the fact that BNSF increased its overall transportation of coal trains to Westshore in 2022. On a percentage basis, BNSF's 2022 NTEC service *fell* by thirty percent (*i.e.*, 162 vs. 232 trains) at the same time that BNSF's 2022 non-NTEC service to Westshore *increased* by thirty percent (*i.e.*, 329 vs. 430 trains).

26. In discussions that we had with BNSF about that disparity, BNSF claimed that it was entitled to provide high-quality service to other customers because those customers supposedly had more favorable terms in their contracts.

27. Of even greater concern, BNSF recently cast doubt on its ability or willingness to move future NTEC export shipments. Specifically, BNSF's Ms. Lawler told us during a December 17, 2022 phone conversation – which had been scheduled to discuss NTEC's objections to BNSF's proposed 2023 contract terms – that if we were to decline BNSF's onerous contract terms for 2023 (which, among other things, included the eleventh-hour addition of a provision that would have required NTEC to waive all claims regarding poor 2022 BNSF service), BNSF might not be able to continue serving NTEC. In such a circumstance, Ms. Lawler told us that BNSF may elect to sign up other shippers for coal export service, and thus, may render itself incapable (or at least potentially incapable) of providing rail service to NTEC.

28. Significantly, due to operational challenges at one of our competitor's mines, BNSF is currently shipping somewhat lower volumes of export coal this Spring (*i.e.*, lower volumes than it regularly ships) but anticipates increasing its BNSF export coal movements by June. This ramping up of service on behalf of our competitor appears to be the basis for BNSF's most-recent estimate that it would move only 16 export trains for NTEC in June.

G. Conclusion

29. BNSF's service has prevented NTEC from receiving the export coal transportation service it needs in order to be able to sell its export coal consistent with market requirements or to predictably plan for and load vessels in a timely manner. BNSF's current and anticipated service failures harm not only NTEC and its customers, but also the Navajo Nation.

30. We have reached a point at which all of our direct efforts to request consistent, improved transportation service from BNSF have proven unsuccessful. BNSF would not provide adequate service for NTEC on a contract basis, and now BNSF is failing to provide adequate transportation for NTEC on a common-carrier basis. We have worked informally with the Board's Office of Public Assistance, but despite the substantial efforts of the Board's staff, BNSF still did not improve its service. We need the Board's formal assistance to motivate BNSF to immediately take whatever actions are necessary to restore our transportation service to the levels that we need.

VERIFICATION

I, Matthew D. Babcock, verify under penalty of perjury that I have read the foregoing Verified Statement and know the contents thereof and that the same are true and correct to the best of my knowledge, information, and belief. Further, I certify that I am qualified and authorized to file this statement.

Matt Babcock
Matthew D. Babcock

April 13, 2023

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

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.

385 Interlocken Crescent, Suite 400 | Broomfield, CO 80021
T +1 720 566 2945

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

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)

BNSF RAILWAY COMPANY
COMMON CARRIER PRICING AUTHORITY BNSF 90139
Revision 0

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

From: Jason Plett <Jason.Plett@NavEnergy.com>
Sent: Wednesday, March 22, 2023 9:58 AM
To: Matthew D. Babcock <Matthew.Babcock@NavEnergy.com>
Subject: FW: NTEC Coal Tariff BNSF 90139

From: Moynihan, Patrick J <Patrick.Moynihan@BNSF.com>
Sent: Tuesday, March 21, 2023 4:21 PM
To: Jason Plett <Jason.Plett@NavEnergy.com>
Cc: Moynihan, Patrick J <Patrick.Moynihan@BNSF.com>
Subject: NTEC Coal Tariff BNSF 90139

Good afternoon, Jason:

BNSF will publish an adjustment to your Coal tariff BNSF 90139 to be effective as of 4/15/2023:
- Current rate has been extended from 3/31/2023 to 4/14/2023.
- Rate will increase on 4/15/2023 from $5,030.00/car to $5,241.18/car.

Please let me know if you have any questions.

Best regards, Pat

Patrick Moynihan | Director, Coal Marketing | BNSF Railway Company | 817-867-6274