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SERVICE DATE - JUNE 23, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42178

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC—EX PARTE PETITION FOR EMERGENCY SERVICE ORDER

Digest:[1] The Board issues a preliminary injunction ordering BNSF Railway Company to transport a minimum of 4.2 million tons of coal on an annual basis in 2023—to be reasonably distributed throughout the year—from Navajo Transitional Energy Company, LLC's Spring Creek mine for service destined to Westshore Terminals facility at Roberts Bank, B.C., Canada, and an additional one million annual tons as capacity is available to serve NTEC.

Decided: June 22, 2023

On April 14, 2023, Navajo Transitional Energy Company, LLC (NTEC), filed an ex parte application seeking an emergency service order pursuant to 49 U.S.C. § 11123. In addition, or alternatively, NTEC seeks a preliminary injunction pursuant to 49 U.S.C. § 1321(b)(4). Specifically, NTEC asks the Board to direct BNSF Railway Company (BNSF) to restore and maintain adequate coal transportation service from NTEC's Spring Creek mine in Big Horn County, Mont., (Spring Creek) to the Westshore Terminals facility at Roberts Bank, B.C., Canada (Westshore). BNSF filed a confidential reply opposing the application on April 19, 2023, and a redacted public reply on April 20, 2023. NTEC filed a rebuttal on April 21, 2023. In a separate docket, NTEC also has filed a related complaint and petition for declaratory order alleging that BNSF has breached its common carrier obligation, failed to provide adequate car service, and engaged in unreasonable practices with respect to the transportation at issue. See Docket No. NOR 42179.

On April 24, 2023, the Board announced an oral argument in the instant proceeding, with a pre-argument conference to be held on April 27, 2023. BNSF and NTEC filed supplements on May 5, 2023. The Crow Tribe and Global Coal Sales Group, LLC (Global) filed comments on May 5, 2023. Arch Coal Sales Company, Inc. (Arch) filed a comment on May 9, 2023. The Board held the oral argument on May 10, 2023. At the oral argument, the Board allowed the parties to file supplements to their previous submissions to answer specific questions posed by the Board that the parties were unable to answer at the oral argument, and to "respond to the

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

other side, or just embellish something you said, or clarify." (Tr. 8:2-9:7, 291:6-12.)[2] Pursuant to these directions from the Board, NTEC and BNSF filed supplements on May 11, 2023 and May 15, 2023, respectively. On May 16, 2023, NTEC replied to BNSF's May 15, 2023 filing.

To prevent irreparable harm, the Board will issue an order under § 1321(b)(4) as described below,[3] as well as order reporting by BNSF and NTEC during the pendency of the proceeding.[4]

BACKGROUND

NTEC is organized under the laws of the Navajo Nation, which is NTEC's sole shareholder. (NTEC Appl. 9.) This proceeding concerns rail transportation service for export coal bound for Japan and Korea. (Id. at 1 & V.S. Babcock para. 7.) The movement at issue originates at Spring Creek for shipment of export coal to Westshore. (Id. at 3.) According to NTEC, Spring Creek is solely served by BNSF[5] (id. at 7), and NTEC currently ships export coal from Spring Creek under common carrier service (see id. at 4). NTEC previously had contracts with BNSF for shipment of export coal to Westshore, but the primary contract expired at the end of 2022, while another contract—concerning service related to a single customer in Japan—expired in March 2023. (Id., V.S. Babcock para. 9.)

NTEC states that adequate service from Spring Creek to Westshore requires delivery of approximately 438,625 tons of coal per month in BNSF-supplied railcars (roughly 29 trains per month) for the period from and after May 1, 2023, and ratable train service within each month consistent with a minimum of 29 trains per month. (NTEC Appl. 4.) NTEC states that BNSF had provided that level of service in 2021, and that NTEC requested that same level of service in its November 1, 2022 common carrier service request. (Id.) However, according to NTEC, BNSF's service deteriorated in 2022 and 2023. (Id. at 7.) NTEC explains that it is currently pursuing claims in federal court regarding 2022 service that occurred under contract (id.), but that it is seeking relief from the Board regarding 2023 service under common carriage rates, including an order directing service in this docket and relief in Docket No. NOR 42179 (the related complaint docket).

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[2] All transcript citations are to the May 10, 2023 transcript.

[3] While attempting to avoid references to confidential or highly confidential information in Board decisions, the Board reserves the right to rely upon and disclose such information in decisions when necessary. In this case, the Board determined that it could not adequately present its findings with respect to the issues without disclosing certain information.

[4] In light of this decision issuing an order under § 1321(b)(4), the Board need not address NTEC's request for an emergency service order at this time.

[5] BNSF notes a potential alternative service option by BNSF interchange with Canadian Pacific Kansas City but acknowledges that the option is "imperfect." (BNSF Suppl. 14-15, May 5, 2023.) In addition, BNSF informed NTEC in February that it would no longer permit NTEC to use this option. (See NTEC Suppl., Ex. 6, May 11, 2023.)

NTEC claims that BNSF has not provided adequate service as required by its common carrier obligation under 49 U.S.C. § 11101(a), profoundly hindering NTEC's ability to operate its business, to satisfy its existing contractual obligations, and to market export coal for future sales. (Id. at 6.) According to NTEC, this harms the Navajo Nation by reducing NTEC's contributions to its economy thereby hindering the Navajo Nation's ability to provide government services to its tribal members, including funding education and scholarship programs. (Id. at 11; Tr. 83:3-5, 101:1-4.) NTEC argues that the Treaty Between the United States of America and the Navajo Tribe of Indians (Sept. 9, 1849), 9 Stat. 974 (Treaty), supports the Board granting the relief that NTEC seeks. (See NTEC Appl. 9-12.)

NTEC asks the Board to issue an emergency service order directing BNSF to provide service of at least 29 trains per month pursuant to 49 U.S.C. § 11123. In addition, or alternatively, NTEC seeks a preliminary injunction ordering the same level of service pursuant to 49 U.S.C. § 1321(b)(4).

BNSF opposes issuance of either an emergency service order or a preliminary injunction. BNSF contests NTEC's claims that it has violated its common carrier obligation, arguing that the level of service NTEC is requesting is extraordinary in relation to past service. (BNSF Reply 20.) BNSF states that current resource constraints along this important route—which is used by other export coal shippers as well as a wide range of other shippers—include crew availability at Everett, Wash.; capacity at Westshore; and availability of train sets for unit coal trains. (Id. at 3, 6, 8-9, 21-22.) BNSF claims that providing additional service to NTEC would require reallocating resources from other customers, including NTEC's competitors in the export coal market, putting the Board in the position of picking winners and losers in that market (id. at 22-23), which, according to BNSF, is currently very favorable to exporters (id. at 19).

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 1321(b)(4), the Board may issue an appropriate order, such as a preliminary injunction, when necessary to prevent irreparable harm. Under the Board's precedent, a party seeking a preliminary injunction must generally establish that: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be preliminarily enjoined, (2) it will suffer irreparable harm in the absence of a preliminary injunction, (3) other interested parties will not be substantially harmed by a preliminary injunction, and (4) the public interest supports the granting of the preliminary injunction. See, e.g., Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc. (Holiday Tours), 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958); N. Coast R.R. Auth. & Nw. Pac. R.R. v. Sonoma-Marin Area Rail Transit Dist., NOR 42148, slip op. at 3 (STB served Oct. 21, 2016); Cent. Valley Ag Grinding, Inc. v. Modesto & Empire Traction Co., NOR 42159, slip op. at 4 (STB served June 12, 2018); Am. Chemistry Council v. Ala. Gulf Coast Ry., NOR 42129, slip op. at 4 (STB served May 4, 2012). When analyzing these four factors, some courts apply a "sliding-scale approach," recognizing that an unusually strong showing on one factor can lessen the required strength on another showing. See Changji Esquel Textile Co. v. Raimondo, 40 F.4th 716, 726 (D.C. Cir. 2022) (noting "tension" with Supreme Court decisions and reserving the question whether the sliding-

scale approach remains valid). Here, to varying degrees, both parties agree that a weighing of factors is appropriate. (See Tr. 148:3-150:10, 152:8-153:6.)

As discussed below, the choice of approach does not affect the Board's conclusion here, because the criteria for issuance of a preliminary injunction have been met here under either traditional analysis or a sliding scale approach.

Likelihood of Success on the Merits. NTEC alleges that BNSF's continued failure to provide the level of service NTEC has requested violates the railroad's common carrier obligation under 49 U.S.C. § 11101(a). NTEC argues that it is likely to succeed on the merits of its claim that BNSF has provided inadequate service. (NTEC Appl. 18-21.)

49 U.S.C. § 11101(a) requires a rail carrier to provide service "on reasonable request." This common carrier obligation is "fundamental and exceptions are not to be implied." Am. Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397, 407 (1967). "This duty reflects the well-established principle that railroads 'are held to a higher standard of responsibility than most private enterprises.'" G.S. Roofing Prods. Co. v. STB, 143 F.3d 387, 391 (8th Cir. 1998). Therefore, "a railroad may not refuse to provide services merely because to do so would be inconvenient or unprofitable." (Id.) Rather, what is reasonable is based on the circumstances of a particular situation, and it is incumbent upon a carrier to provide a reasonable explanation if that carrier denies a request for service. State of Montana v. BNSF, NOR 42124, slip op. at 7 (STB served Apr. 26, 2013). Thus, absent a satisfactory explanation, a railroad must at the very least provide a requested level of service.[6] As BNSF acknowledged at oral argument, its common carrier obligation requires it "to provide at least [as] much service . . . [as it has] the capacity to handle . . . ." (Tr. 187:15-20.)

Determining whether BNSF's conduct at issue in NTEC's complaint likely violates the common carrier obligation is a fact-specific inquiry. While this proceeding is still young, the record is extensive—both parties have filed multiple pleadings, verified statements, and exhibits, and the Board held an oral argument during which both parties were given the opportunity deliver detailed presentations. As discussed below, the material facts on which the Board's decision turns are largely uncontroverted.

According to NTEC, the 17 trains that BNSF provided in February 2023 and 22 trains in March 2023 are well below the 24 and 30 trains that NTEC requested for those months in November 2022. (NTEC Appl. at 6.) Further, NTEC claims that BNSF's somewhat higher expected service levels for April 2023 (27 trains) and higher-than-previously expected

[6] Because the scope of the common carrier obligation has not yet been fully briefed, at this stage of this proceeding, it would not be appropriate for the Board to consider whether or to what extent the common carrier obligation requires a rail carrier to take reasonable steps to increase capacity in response to a request for service. But the Board notes here that self-imposed capacity constraints, such as voluntary reductions in crew levels, likely would not automatically be considered a justifiable basis for refusing otherwise reasonable requests for service.

anticipated levels for May and June 2023 (27 and 22 trains, respectively) are still inadequate.[7] (Id. at 6 n.9; NTEC Suppl. 1, May 5, 2023.) In addition, NTEC explains, while the increases in expected train counts for May and June are welcome, BNSF's failure to commit to a consistent level of service leaves NTEC unable to plan its business and enter contracts in a market that requires predictability and timeliness. (NTEC Appl. 5, 6 n.9; see also NTEC Suppl. 1, May 5, 2023.)

NTEC states that BNSF has previously provided NTEC with the level of service it seeks, that BNSF demonstrated in 2021 that it could move higher overall levels of traffic to Westshore, and that BNSF's projections of moving 27 trains for NTEC in April and May 2023 indicate BNSF's ability to move higher levels of traffic on a consistent basis. (NTEC Appl. 18; see also NTEC Suppl. 8-9, May 5, 2023 (explaining that in 2017-2019 and in 2021, BNSF transported up to 39 trains per month in the peak summer export months).) According to NTEC, these circumstances show that its request for service is reasonable, and BNSF has failed to fulfill its duty to provide service on reasonable request pursuant to 49 U.S.C. § 11101(a). NTEC further argues that to the extent that BNSF urges that contractual commitments to third parties have deprived BNSF of its ability to provide common carrier service to NTEC, those commitments are not reasonable. (NTEC Appl. 20.) NTEC also argues that service levels should not be at BNSF's sole discretion. (Id. at 16.) NTEC claims that BNSF has favored NTEC's competitors by reducing NTEC's service while increasing service levels overall to Westshore. (Id., V.S. Babcock, paras. 24-25; see also id., V.S. Babcock, paras. 26-28 (claiming that BNSF pressured NTEC to sign a contract for 2023 and that BNSF provides better service to a competitor to NTEC's detriment).)

BNSF replies that it has acted reasonably in allocating constrained capacity in 2023. (BNSF Reply 30.) BNSF further argues that under § 11101(a), a railroad does not violate its common carrier obligation if it satisfies its existing contractual obligations first. (Id.) BNSF claims that a carrier does not have to provide all the service a shipper requests; rather it must provide adequate service. (BNSF Suppl. 13, May 5, 2023 (citing Granite State Concrete Co. v. STB, 417 F.3d 85, 92 & n.10 (1st Cir. 2005).) BNSF contends that railroads must have flexibility to determine how to address common carrier requests and that the Board should not second-guess those decisions. (Id. at 14 (citing, e.g., Sherwin Alumina Co. , NOR 42143, slip op. at 6 n.12.) BNSF also argues that a shipper is not entitled to a particular level of service based on past service, particularly when that level of service would degrade service overall. (Id. at 14 (citing Savannah Port Terminal R.R.—Pet. for Declaratory Order—Certain Rates & Practices as Applied to Cap. Cargo, Inc., FD 34920, slip op. at 8 (STB served May 30, 2008).) BNSF cites the general principle that a railroad is not obligated to have all the capacity necessary to meet peak demand and that NTEC's requests reflect peak demand in relation to past service it has received. (BNSF Suppl. 15-16, May 5, 2023 (citing, e.g., Nat'l Grain & Feed Ass'n v. Burlington N. R.R., 8 I.C.C.2d 421, 427 (1992), aff'd in part and rev'd in part on other grounds

[7] BNSF updated its Spring Creek to Westshore train counts on June 9, 2023, stating that it moved 27 trains in May and that it expects to move 22 trains in June. (BNSF Status Report 1.) BNSF forecasts movement of 23 trains in both July and August. (Id.) NTEC replied to BNSF's update, arguing that a Board order is still needed to ensure adequate service. (NTEC Reply 1-2, June 12, 2023.)

by Nat'l Grain & Feed Ass'n v. ICC, 5 F.3d 306 (8th Cir. 1993)).) More specifically, in its initial pleading, BNSF contends that its capacity to transport the amounts of coal requested by NTEC is constrained by several factors, including a shortage of crews at its Everett location, its contracts with other coal producers (Global and Arch), a request for coal service by the Crow Tribe, and the need to transport other commodities (agricultural and others) on the relevant rail line. (BNSF Reply 22-24; see also id. at 8-9; Global Comment 1; Arch Comment 1; Crow Tribe Comment 1.)

In common carrier cases, the needs of the carrier's other shippers, including its contract shippers, should be considered. Indeed, at oral argument, the Board explored with BNSF whether the level of service requested by NTEC could be achieved while also fulfilling its commitments to its other customers. (See, e.g., Tr. 208:1-210:13, 216:10-218:21.) During that exploration, admissions by BNSF undercut the contention that these alleged "constraints" prevent the railroad from providing additional service to NTEC without harming its service to BNSF's other customers. BNSF conceded that in late 2022, it was willing to enter into a contract with NTEC to transport a minimum of 4.2 million tons of coal (amounting to about 23 trains per month) and a maximum of 6 million tons in 2023 (amounting to about 33 trains per month), and a minimum of 5.5 million tons and maximum of 6 million tons in 2024 (amounting to up to about 33 trains per month).[8] BNSF stated that it would not have been willing to commit to a contract it did not believe it could satisfy. (Tr. 196:9-11 (counsel stating "absolutely fair to say that we [BNSF] would not enter into a contract we had not believed we could satisfy the terms of.").) Significantly, at the time BNSF and NTEC were negotiating this contract, BNSF was aware of the alleged constraints that it now contends prevent it from providing NTEC's requested level of service. Specifically, by the time of its late 2022 contract discussions with NTEC, BNSF knew of the reduced crew levels at Everett (which date back to September 2021), its contracts with Global and Arch, the Crow Tribe's request for new service, and the existence of other commodities requiring service. (See BNSF Suppl., V.S. Garland at 11-13, May 5, 2023 (discussing timeline of crew issues at Everett); Global Comment 1 (stating that it has been shipping coal to Westshore via BNSF for 15 years); Arch Comment 3 (stating that it has been shipping coal to Westshore via BNSF since 2021); Tr. 236:21-237:14 (discussing timing of Crow Tribe request for service); BNSF Reply 8-9 (describing corridor's role in the shipment of various products).) In addition, BNSF explicitly agreed that "nothing has happened since December [2022] to reduce the capacity of the railroad in [2023 or] 2024" (Tr. 204:10-13) and that, even if things had changed somewhat, the circumstances were not "exceedingly different" (id. at 238:13-16). Yet, BNSF maintains its position that it cannot provide the requested level of service to NTEC.

In addition, separate and apart from its willingness to contract for specific service levels, BNSF acknowledges that it expects to have the capacity to move NTEC's traffic at a much higher volume level than it did in recent months, or that it was willing to provide prior to the

[8] The terms of the draft contract provided that the parties will transport a minimum of 4.2 million tons and a maximum of 6 million tons in 2023, and a minimum of 5.5 million tons and a maximum of 6 million tons in 2024 and 2025. (NTEC Suppl., Ex. 5, paras. 13 & 14, May 11, 2023.) The minimum train size to be provided was 130 cars. (Id. at para. 8.) This amounts to an average of at least 23 trains per month and a maximum of 33 trains per month.

institution of this proceeding. For example, BNSF has now "commit[ted] that it expects to provide" service to move 4.2 million tons of coal for NTEC to Westshore in 2023 (or approximately 23 trains per month). (BNSF Suppl. 12, May 15, 2023; see also Tr. 198:11-13 ("[F]or the end of the year, we think we're going to hit that 4.2 million ton number"); id. at 240:13-17 ("[4.2 million tons] was our expectation for 2023, and . . . if you look at the path that we're on . . . and then you assume a slight increase based on hopefully improving our crew situation, we'll get there").)[9]

Based on the record currently before the Board, NTEC has made a very strong showing that it is likely to succeed on the merits of its claim that BNSF's failure to provide NTEC with the service NTEC has requested constitutes a failure of BNSF to comply with its common carrier obligation under § 11101. Indeed, NTEC has requested a level of service that BNSF has provided in the past. (NTEC Appl. 18; see also NTEC Suppl. 8-9 (explaining that in 2017-2019 and in 2021, BNSF transported up to 39 trains per month in the peak summer export months).) BNSF has not contested NTEC's description of the export coal market as requiring predictability and timeliness, which NTEC contends BNSF fully understands, and which supports the reasonableness of its request. (See NTEC Appl., V.S. Babcock, para. 20.) In other words, given that BNSF has carried over 4.2 million tons for NTEC in the past, that it was willing to enter into a contract to move up to 6 million tons in 2023, and that it has now stated its commitment to carry at least 4.2 million tons in 2023, BNSF was required to convincingly explain why its failure to agree to provide that level of service to NTEC (4.2 million tons, and more as equipment becomes available) going forward does not amount to a violation of its common carrier obligation.[10] See, e.g., State of Mont., NOR 42124, slip op. at 7; Sherwin Alumina Co., NOR 42143, slip op. at 5. BNSF has made no such showing.

All of this evidence indicates that there is a substantial likelihood that NTEC will succeed on the merits of its claim.

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[9] Given its statements about currently available capacity, many of BNSF's arguments purportedly in support of its position do not appear particularly relevant. This includes the arguments that under § 11101(a), a railroad does not violate its common carrier obligation if it satisfies its existing contractual obligations first, that railroads must have flexibility, that shippers are not entitled to particular service levels where that level would degrade service overall, and that a railroad is not required to maintain capacity to meet peak demand.

[10] BNSF argues that the Board may not "impose [proposed contract terms] as obligations" on BNSF. (See BNSF Suppl. 3, May 15, 2023.) But the Board is not even considering such an approach. To be clear, the Board's determination, here, that NTEC is likely to succeed in its argument that the common carrier obligation requires BNSF to provide these levels of service to NTEC in 2023 and 2024, is not based on any purported contract negotiations between the railroad and NTEC. Rather, it is based on BNSF's numerous statements of fact at the oral argument and in the written record, as detailed above, that the railroad has the capacity to provide those levels of service to NTEC, unqualified by BNSF as to whether the capacity would be different based on whether service was pursuant to contract or tariff. (See, e.g., BNSF Suppl. 12, May 15, 2023.)

Irreparable Harm. NTEC argues that it will be irreparably harmed in the absence of a preliminary injunction requiring BNSF to provide adequate service. (NTEC Appl. 21-23.) According to NTEC, monetary damages may not be available or adequate to address its "additional costs and lost profits on volumes that BNSF's poor service prevent[s] NTEC from selling" and for "harm to NTEC's reputation in the export-coal market." (Id. at 21.) Specifically, NTEC states that without adequate service it will be unable to satisfy its obligations under its existing coal sales contracts, it will incur substantially increased demurrage costs due to delays in filling ocean-going vessels, it will be unable to market its coal to new or existing customers for peak-season sales, its standing in the export coal marketplace will be degraded relative to that of its competitors, and it will be hindered in its effort to provide sufficient financial support to its sole shareholder, the Navajo Nation. (Id. at V.S. Babcock, paras. 2, 5, 20.)

NTEC details the process of selling and shipping export coal:

> We sell export coal for an expected period of delivery, usually a month or quarter, and then fine tune the vessel arrival schedules about 60-90 days prior to vessel arrival. Given the complexity of the export coal supply chain, the arrival schedule of our customers' vessels largely dictates the point in time at which we must ensure delivery of coal to Westshore. And while our customers do not demand that we adhere to a single specific day for delivering coal to the port, we do not have the luxury of telling a customer whose vessel will arrive at Westshore on June 15 that we think that BNSF might be willing to move our trains to Westshore in August or September.

(NTEC Suppl., V.S. Babcock, para. 72, May 5, 2023.) NTEC further explains that while demand for export coal is high, and it has significant prospective sales for July through September 2023, the uncertainty regarding rail transportation means that if NTEC commits to sales for those months, it runs the risk of not being able to meet its contractual obligations. (Id., V.S. Babcock, paras. 73-74.) While NTEC acknowledges that it could wait to sell its coal in the future to the export market, or sell it now domestically, NTEC points out that it cannot be certain regarding the strength of the future export market, and that domestic demand is weaker than export demand. (Id., V.S. Babcock, paras. 76-77.)

NTEC also states that uncertainty regarding its ability to obtain rail transportation has already hurt its reputation with export coal buyers. (See id., V.S. Babcock, paras. 80-81; Tr. 116:9-126:22.) For example, NTEC explains that, on a recent trip to Korea to meet with potential buyers, one prospective customer stated that it had heard from one of NTEC's competitors about NTEC's "railroad problems," while NTEC's largest export customer expressed concerns about the need for reliable rail service, leading to an extended discussion of railroad logistics. (See NTEC Suppl., V.S. Babcock, paras. 80-81, May 5, 2023.) NTEC states that customers raised similar concerns regarding rail service reliability during an earlier trip to Japan and that NTEC has "significantly" fewer tons of coal under contract for the next two months "because [it is] struggling right now in re-establishing [its] credibility in that market because of what took place [with respect to rail service]." (Tr. 116:8-117:9.) In addition, according to NTEC, a customer that was considering entering into a contract with NTEC for

most of its needs raised concerns about the reliability of NTEC's rail service before ultimately deciding not to do so. (See id. at 119:5-122:9.) NTEC notes customer observations that vessels wait at Westshore for loading with NTEC coal, while NTEC's competitors do not have the same issue. (Id. at 135:18-136:13.) NTEC claims that service reliability is an essential consideration for these customers when purchasing coal, given that they rely on that coal to operate their electric generating facilities in a dependable manner, and NTEC's reliability can only be "as good as the BNSF service that [NTEC] receive[s]." (NTEC Suppl. V.S. Babcock, para. 82, May 5, 2023; see also Tr. 124:10-125:16 (explaining that export customers "aren't coming to us on price, they're coming to us on reliability," and "the U.S. and NTEC play such a small percentage in the overall global sea borne market, that if [customers] have a concern on reliability they're going elsewhere.").)

Altogether, NTEC argues, it may be unable to recover its additional costs and lost profits on volumes that BNSF's poor service prevent NTEC from selling, and for harm to NTEC's reputation in the export coal market. (NTEC Appl. 21-22.) NTEC claims that waiting for resolution of its underlying complaint would allow these reputational and business harms to grow, and that many of the harms would be functionally unredressable by the complaint proceeding. (Id. at 22-23.)

BNSF does not controvert any of the facts offered by NTEC concerning the harms it has suffered and will suffer in the future. As noted above, BNSF has not contested NTEC's description of the export coal market as requiring predictability and timeliness. (See NTEC Appl., V.S. Babcock, para. 20.) BNSF argues only that NTEC has not demonstrated that the harms it alleges are imminent and irreparable. (BNSF Reply 26-29; BNSF Suppl. 7-8.) BNSF argues that monetary loss does not constitute irreparable harm and that economic loss only rises to the level of irreparable harm when it "threatens the very existence of the movant's business." (BNSF Reply 26-27.) BNSF also argues that NTEC must show that the harm "will in fact occur." (Id. at 27.) Pointing to the fact that NTEC has requested damages in excess of $10 million in the related complaint proceeding, Docket No. NOR 42179, BNSF argues that NTEC's own complaint shows that its damages are reparable. (Id.) BNSF acknowledges that financial injury may be irreparable when adequate relief is not available through litigation, but argues that NTEC has sufficient recourse absent an injunction. (Id. at 28-29.) BNSF contests NTEC's claim that damages to its reputation are irreparable, claiming that such damages are compensable by monetary damages. (BNSF Suppl. 7-8 (citing Kafka v. Hagener, 176 F. Supp. 2d 1037, 1044 (D. Mont. 2001).)

The Board recognizes that economic injury, by itself, may be insufficient to qualify as irreparable harm, but it has also explained that economic losses that are substantial and unredressable can qualify as irreparable injury. Colo. Wheat Admin. Comm. v. V & S Ry., NOR 42140, slip op. at 5 (STB served May 7, 2015). In addition, many courts have recognized that harm to reputation is one type of injury that often is functionally unredressable and therefore can constitute irreparable harm. E.g., Foodcomm Int'l v. Barry, 328 F.3d 300, 304 (7th Cir. 2003) ("Because it is not practicable to calculate damages to remedy this kind of harm, no remedy at law can adequately compensate [plaintiff] for its injury."); GlaxoSmithKline LLC v. Boehringer Ingelheim Pharms., Inc., 484 F. Supp. 3d 207, 226 (E.D. Penn. 2020).

NTEC has shown that it will suffer imminent, certain, and irreparable harm in the absence of a preliminary injunction. Some of the damages NTEC claims are strictly monetary, as shown by NTEC's filing in the complaint proceeding, and NTEC has not shown that those damages are irreparable. However, the injury to NTEC's reputation includes harm that is not redressable by monetary damages. See Foodcomm Int'l, 328 F.3d at 304; GlaxoSmithKline LLC, 484 F. Supp. 3d at 226.

As described above, NTEC has shown that its potential export customers are seriously concerned by the unreliable service NTEC has received from BNSF. NTEC has explained that it took years to build business with customers based on trust and reliability. (Tr. 125:9-21.) If NTEC's reputation is such that it cannot effectively serve customers due to unreliable rail service, NTEC stands a concrete risk of losing both current and future business. While monetary damages may be available to compensate for the financial value of certain specific lost contracts, damages stemming from contracts that are lost at an earlier stage or perhaps never discussed due to a reputation for unreliable transportation would almost certainly not be possible to calculate. This loss of nascent business is further supported by the fact that NTEC's reputation has already been damaged by BNSF's unreliable service. (See NTEC Appl., V.S. Babcock paras. 80-81; Tr. 116:7-126:21).[11] Allowing these circumstances to continue would only compound the impact on NTEC's reputation in a market that highly values reliability, one where reputations take time to develop (see NTEC Appl., V.S. Babcock para. 82; Tr. 124:5-125:16). Further, NTEC is a small company in the global export coal market and customers have many other options if questions arise about NTEC's reliability. (See Tr. 116:17-22.) Moreover, as a company wholly owned by the Navajo Nation, NTEC is not like other private enterprises (id. at 77:18-80:10), and reputational harms to NTEC could in turn have significant impacts on the Navajo Nation (see id. at 82:20-84:1 (describing how harms to NTEC affect the Navajo Nation)). And there could very well be a cumulative impact on NTEC's ability to support the Navajo Nation's government programs for each month BNSF does not reliably deliver the requested trains. (Id. at 112:19-113:17; see also NTEC Suppl. 5, May 5, 2023.) In sum, the severity of the damage and the nature of NTEC's business mean that the reputational injuries it is suffering would be difficult (if not impossible) to quantify, and therefore would not be fully redressable through an award of monetary damages.

The Board finds the showing of irreparable harm by NTEC on this record supports the issuance of the preliminary injunction.

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[11] BNSF contends that, despite NTEC's claims of reputational harm, "NTEC simultaneously claims that it will be able to sell any additional coal that BNSF transports." (BNSF Suppl. 8 n.10, May 15, 2023.) But BNSF does not accurately summarize NTEC's statement. In the passage BNSF cites, NTEC states its "current best estimate of the additional, future coal sales that we could make (*assuming adequate rail transportation service*)." (NTEC Suppl., V.S. Babcock, para. 74, May 5, 2023 (emphasis added).) In other words, adequate rail service would presumably mitigate the reputational harms that NTEC alleges based on customer perceptions of NTEC's rail service reliability problems. But NTEC clearly asserts that, if rail service remains inadequate, it would *not* be able to sell "any" additional coal that BNSF transports. (See id., para. 73.)

Harm to other parties. BNSF argues that NTEC has not met its burden regarding harm to demonstrate that the requested relief would not harm other interested parties, including competitors of NTEC for export sales through Westshore, Westshore itself (given its commercial relationships with its coal exporters and ocean carriers), other shippers using BNSF's transportation to the Pacific Northwest, and other domestic coal shippers. (BNSF Reply 33.) BNSF claims that unavoidable constraints limit the amount of service it can provide and therefore increased service to NTEC would result in decreased service to other shippers, including export coal shippers, domestic coal shippers, and others. (Id. at 21-24.) According to BNSF, these constraints include capacity at Westshore, BNSF's commitments to contract shippers of export coal, a crew shortage at Everett, and the availability of train sets for unit coal trains. (Id.) BNSF states that to serve NTEC at the level it requests would require three additional train sets to be dedicated to NTEC, which would require those train sets to be taken away from another shipper, most likely a shipper in the same lane. (BNSF Suppl. 6, May 15, 2023.) BNSF adds that even if train sets could be added without taking them from other customers, BNSF's ability to move them without reducing service to other shippers will be limited until the crew situation improves. (Id.) BNSF argues that this would result in Board action realigning competitive markets to artificially favor NTEC over other shippers. (BNSF Reply 23.)

Three coal shippers filed comments raising concerns that NTEC's request could impact service for other export coal shippers to Westshore. Global states that it ships export coal from its Signal Peak mine to Westshore pursuant to a long-term contract with BNSF. (Global Comment 1.) Global explains that the BNSF contract, along with a contract with Westshore for guaranteed capacity, is the "backbone" of Global's business, which is 95% export coal. (Id.) Global asks that the Board not favor a competitor at Global's expense. (Id.) Global also explains that a reduction in service to Signal Peak could create significant operational and safety impacts, as its mine must be operated continuously to avoid significantly increased safety risks to personnel; mitigating these risks would require operational changes that could not be done on an emergency basis. (Id. at 2.) Arch, a shipper of export coal to Westshore under a common carrier pricing arrangement with BNSF, is concerned by the potential impact of the sort of Board order sought by NTEC on BNSF service from its Black Thunder mine to Westshore, which it states has been erratic for the past two years and has only recently begun to improve. (Arch Comment 1, 3-4.) The Crow Tribe states that it has been seeking BNSF service to ship export coal to Westshore since July 2022 to replace income lost from declining domestic coal sales, but it has been advised that service will not be available until the second quarter of 2023 at the earliest. (Crow Tribe Comment 1.) The Crow Tribe raises concerns that an order by the Board would further delay the service it has been seeking and urges the Board to consider the competitive impacts of any order on other coal shippers. (Id. at 3.)

The Board recognizes that Global, Arch, and the Crow Tribe require reliable service for their export coal businesses. However, as discussed above, the Board finds, based on the entire record, that this order will hold BNSF to its stated expectation to provide a minimum level of service to NTEC without compromising service to other shippers. As previously noted, BNSF has stated its public commitment that it expects to transport 4.2 million tons of coal for NTEC to Westshore in 2023. (BNSF Suppl. 5, 12, May 15, 2023; Tr. 197:20-198:13.) The issues that BNSF raised regarding Westshore capacity appear to be unsubstantiated. (See Tr. 229:4-

231:21.) Rather, the alleged present constraints on BNSF's ability to increase service to NTEC above 4.2 million tons per year are limited to train set and crew availability. (See BNSF Suppl. 6, May 15, 2023; Tr. 226:5-227:2; see also Tr. 48:8-49:15 (NTEC stated that it is "getting regular calls" offering additional train sets and that its communications with rail car lessors and its customers indicate that "the railcars seem to be available.").) The Board, as described further below, will issue an order that requires BNSF to fulfill its expectation to move 4.2 million tons of coal for NTEC, while also requiring BNSF to provide additional service to NTEC as crew and train sets are available. Given BNSF's representations in this proceeding, such an order will not disadvantage its other customers.

Public interest. NTEC argues that an injunction will promote the public interest in light of the essential role of NTEC in the Navajo Nation's economy. (NTEC Appl. 23-24; see also id. at 11; id., V.S. Babcock, Ex. MDB-13, Letter from then-President of the Navajo Nation, Jonathon Nez to BNSF (NTEC provides critical funding to the Navajo Nation and deficient service risks negatively impacting the Navajo people); Tr. 77:18-80:10, 112:19-113:17; NTEC Suppl. 5, May 5, 2023.) NTEC states that it provides roughly $50 million in annual, direct economic support for the Navajo Nation, and funds approximately one-third of its General Fund. (NTEC Appl. 11.) According to NTEC, its ongoing operations also provide approximately $75 million per year of indirect support for the Navajo Nation in the form of wages, charitable donations, and other contributions to the community. (Id.) As noted above, NTEC states that there is a cumulative impact on its ability to support the Navajo Nation's government programs for each month BNSF does not reliably deliver the requested trains. (Tr. 112:19-113:17; see also NTEC Suppl. 5, May 5, 2023.)

BNSF argues that the public interest does not support an injunction. BNSF claims that NTEC is seeking the level of service it received while under contract without the commitments required by a contract and that other shippers under contract would be harmed by an injunction, contrary to the Board's policy of promoting contracts pursuant to 49 U.S.C. § 10709. (BNSF Reply 33-34.) BNSF also suggests that an injunction would improperly prioritize NTEC's shipments at Westshore (id. at 34) and argues that these circumstances, where NTEC seeks additional service to take advantage of market opportunities, can be distinguished from a loss of rail service altogether that threatens public access to the rail network. (BNSF Suppl. 8, May 5, 2023).

The public interest supports issuance of an injunction. NTEC has shown that it plays a critical role in the Navajo Nation's economy. (See NTEC Appl. 23-24; id. at 11; id., V.S. Babcock, Ex. MDB-13, Letter from then-President of the Navajo Nation, Jonathon Nez to BNSF (NTEC provides critical funding to the Navajo Nation and deficient service risks negatively impacting the Navajo people); Tr. 77:18-80:10, 112:19-113:17; NTEC Suppl. 5, May 5, 2023.) While export coal sales are not NTEC's only source of income, incremental losses of revenue affect NTEC's ability to contribute to the Navajo Nation's economy, and continuing damage to NTEC's reputation will only further undermine that ability (as discussed above). The Board has also explained that the order it will issue here is based on BNSF's statements regarding its ability to move at least 4.2 million tons of coal for NTEC this year without degrading service to other shippers. Therefore, this order in no way discourages contracts between shippers and rail

carriers or improperly prioritizes NTEC shipments, as BNSF's representations indicate that it already has existing capacity to provide the level of service the Board is requiring at this time.

In addition, BNSF acknowledges the public interest in access to the rail network. (BNSF Suppl. 8, May 5, 2023.) The Board is concerned that allowing this situation to continue while the complaint proceeding is litigated would harm that public interest. The Board therefore takes that public interest into account in its conclusion that an injunction is necessary to prevent irreparable harms.[12]

Order. "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." Trump v. Int'l Refugee Assistance Project, 582 U.S. 571, 579 (2017). "The purpose of such interim equitable relief is not to conclusively determine the rights of the parties but to balance the equities as the litigation moves forward." Id. at 580 (citations omitted). The Board must "conside[r] ... the overall public interest" when ordering a preliminary injunction. Id. (quoting Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 26 (2008)). And the Board is not limited by the relief sought by the petitioner "but may mold its decree to meet the exigencies of the particular case." Id. (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2947, at 115 (3d ed. 2013)).

As discussed above, at a minimum, BNSF has a common carrier obligation to transport a shipper's goods to the extent it has capacity to do so. Based on the current record, the Board finds that BNSF has the capacity to move at least 4.2 million tons of coal from Spring Creek to Westshore in 2023.

Therefore, to limit the irreparable harm that NTEC would otherwise suffer during the pendency of the complaint proceeding in NOR 42179, the Board will order BNSF to transport a minimum of 4.2 million tons of coal from Spring Creek for service destined to Westshore in 2023. (See BNSF Suppl. 5, 12, May 15, 2023; Tr. 197:20-198:13.) That service must be reasonably distributed through the remainder of the year, i.e., approximately 23 trains per month.

As to NTEC's request for a preliminary injunction ordering BNSF to provide a total of 29 trains per month, BNSF executives identified only two constraints it now claims prevent it from providing an additional six trains. First, despite its willingness in late 2022 to commit to a maximum level of 6 million tons during 2023—or an average of 33 trains per month—BNSF

[12] NTEC argues that that the Treaty further supports the Board granting its requested relief. (See NTEC Appl. 9-12.) Again, because the scope of the common carrier obligation has not been fully briefed by the parties, it would be premature at this stage of this proceeding to opine on the interplay between any Treaty-related obligations and the common carrier obligation—in particular, whether a rail carrier must take reasonable steps to increase capacity in response to a request for service. Because in this preliminary injunction proceeding, the Board will order BNSF to provide the requested service, taking into account crew and train set availability, as required by the common carrier obligation—49 U.S.C. § 11101(a)—and under 49 U.S.C. § 1321(b)(4), it is not necessary for the Board, at this juncture, to reach the issues raised by NTEC's request under the Treaty.

now says continuing crew shortages prevent the addition of the six trains per month for NTEC. Nevertheless, while claiming "some crew constraint in the near term" (Tr. 226:10-11), BNSF is "confident the third and fourth quarter [of 2023] that [it's] going to have the right amount of crews [to] continue to increase the amount of business that we can put through this portion of the network."[13] (Tr. 210:5-10.) Thus, crew availability should not impact its ability to provide the requested level of service to NTEC. [14] Second, BNSF identified a shortage of train sets as a constraint on providing the additional trains to NTEC without disadvantaging BNSF's other customers, but BNSF admits it would need only "two to three" additional train sets to provide the requested additional six trains per month. (Tr. 226:18-227:6.) While the Board is skeptical of BNSF's claimed inability to transport the full amount requested by NTEC,[15] the Board will accord BNSF the benefit of the doubt and accept for purposes of this preliminary injunction proceeding that it currently does not have sufficient crews and train sets to provide the additional six trains per month that would allow NTEC to export an additional one million tons. However, the Board holds that if BNSF is able to obtain the additional crews it contends it needs and the "two to three" additional train sets—either through its own efforts or the efforts of NTEC—thereby increasing its capacity to provide the additional requested trains to NTEC s, then the common carrier obligation would accordingly require this additional service to NTEC.

In light of these facts, in addition to transporting at least 4.2 million tons of coal for NTEC, with an average of 23 trains per month, the Board is ordering BNSF to transport an additional one million tons of coal from Spring Creek for service destined to Westshore in 2023—which would result in a total of approximately 29 trains per month to NTEC on average—to the extent that additional train sets and crews, as described by above, become

[13] As a positive development, BNSF now states in its latest filing that, based on recent hiring efforts, it already has increased the crew availability at Everett, having only 13 fewer employees than it did in September 2021 (BNSF Suppl. 9, May 15, 2023), compared to the initial loss of 21 employees it stated in its May 5 filing (BNSF Suppl., V.S. Garland at 11-13, May 5, 2023).

[14] During oral argument, BNSF stated that it had instituted incentive plans to increase the number of crew members in Everett and that those incentive plans were not as effective as it had anticipated. (Tr. 248:17-249:2, 250:4-251:4.) The Board recognizes that despite its confidence that it will have the "right amount of crews" the latter half of this year, if BNSF is not successful in hiring and retraining sufficient crew members, it may continue to struggle.

[15] The Board notes that BNSF's briefs, verified statements, and statements at oral argument were in significant part inconsistent, and in some cases self-contradictory, which undermine the credibility of BNSF's contentions. In addition to the contradiction noted above, significantly, in her second verified statement, Ms. Lawler states that BNSF transported an average of 79 coal trains per month to the port at Westshore from January through April of 2023. (BNSF Suppl., V.S. Lawler 19, May 5, 2023.) Yet, in its May 15 filing, BNSF appears to contradict the verified statement by asserting that, based on its current number of train sets and their average cycle time, "BNSF currently has the ability to move roughly 65 trains to Westshore each month to allocate to its three current customers and a potential fourth." (BNSF Suppl. 6, May 15, 2023.) BNSF provides no explanation for the 20-plus percent discrepancy between what it says it can move and what it actually moved.

available.[16] While it appears that capacity at Westshore is not an issue (see Tr. 229:11-231:20), the Board recognizes that coordination with Westshore will be necessary.

BNSF will file weekly status reports on implementation of this order beginning June 30, 2023. Those reports will include BNSF trains by train ID from Spring Creek to Westshore and tons per train delivered in the previous week, as well as expected service levels for the current week. BNSF must report all other traffic originating at Spring Creek by train ID and destination or utility with tons per train and the daily number of BNSF trainsets deployed for Spring Creek service. BNSF must also report all other BNSF trains to Westshore by train ID and mine origin with tons per train. The June 30, 2023 report should include this information for all previous weeks in 2023. BNSF must also report bi-weekly on its stated efforts to hire additional crew, including how many crew are added to Everett, Wash. Further, both BNSF and NTEC are ordered to report on efforts to locate additional train sets to enable BNSF to transport a total of 29 trains per month (reflecting the additional resources that BNSF anticipates could become available) as discussed above.

It is ordered:

1. NTEC's request for a preliminary injunction is granted.

2. BNSF is ordered to transport a minimum of 4.2 million tons of coal from Spring Creek for service destined to Westshore in 2023. BNSF is ordered to transport an additional one million tons of coal from Spring Creek for service destined to Westshore in 2023 to the extent that additional train sets and crews are available to serve NTEC, as discussed above.

3. BNSF and NTEC are directed to file status reports as described above, beginning on June 30, 2023.

4. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Members Fuchs and Schultz dissented with separate expressions.

BOARD MEMBER FUCHS, dissenting:

I respectfully dissent from today's preliminary injunction decision (Decision) because it is not necessary to prevent irreparable harm, it is not substantiated by the record, and it risks harm to the broader rail network. I have been deeply concerned with the well-documented rail service problems that shippers have experienced for more than a year, and I have found reason

[16] While NTEC does not limit its request for relief to 2023, for purposes of this preliminary injunction order, the Board will not rule on what relief, if any, will be available to NTEC for 2024. Nevertheless, to the extent the factual situation for 2024 mirrors the record established for 2023, the Board expects it would apply the same analytical framework applied here to any further claims by NTEC under the common carrier obligation.

for the Board to intervene on multiple occasions.[1] While rail service has recently improved significantly on many lanes, I understand why my colleagues may consider an aggressive use of the Board's authorities in an attempt to instigate additional rail service improvement, and this docket implicates a foundational service-related authority—the common carrier obligation. However, drawing on an incomplete record, the Decision accomplishes little while both degrading well-established protections against premature, unfair decision-making and undermining long-term commercial relationships between rail carriers and shippers. The Decision is an attempt at a short cut that instead takes the Board in the wrong direction. Rather than impose an unjustified and unneeded preliminary injunction that sets harmful precedent and invites broad unintended consequences, I would expeditiously proceed to fully and fairly consider NTEC's underlying complaint.

Background. From 2008 through 2019, NTEC's predecessor shipped coal from the Spring Creek mine to the Westshore export facility via long-term contract on BNSF. (BNSF Reply 9.) Following NTEC's acquisition of the company, NTEC became responsible for substantial liquidated damages owed to BNSF for its predecessor's failure to meet contractual minimum volume requirements in both 2018 and 2019. (Id.) According to BNSF, NTEC again failed to meet contractual minimum volume requirements in 2020, owing additional liquidated damages and, as a result, NTEC desired to move to a different contract for 2021 that did not include tonnage requirements. (BNSF Reply 10; id. at V.S. Lawler Ex. FL-01 at 9.) The 2022 contract, currently the subject of litigation in federal court in Montana, contained no minimum volume requirement, and it contained a percentage commitment and maximum annual volume figure of 5.5 million tons.[2] (NTEC Suppl., V.S. Lund, Ex. MDB-16 at 17-18, May 5, 2023; BNSF Reply, V.S. Lawler Ex. FL-01 at 1.)

The parties could not successfully negotiate a contract for 2023 and beyond. In negotiations, the parties exchanged revisions of a draft contract, reflecting discussions of minimum volume requirements, contract terms, and the release of certain legal claims between the parties; the last version exchanged included for 2023 a minimum annual volume figure of 4.2 million tons and a maximum annual volume figure of 6 million tons. (Tr. 68:9-68:19.) In November 2022, as negotiations failed, NTEC requested common carrier service between Spring Creek and Westshore, and the shipper indicated that it planned to ship more than 5 million tons on this lane in 2023—360,000 tons per month from January to April (roughly 24 trains per month) and 450,000 tons per month from May to December (roughly 30 trains per month), (Appl., V.S. Babcock 4-5; id. at V.S. Babcock, Ex. MDB-1). Unlike the minimums in its earlier contract and in the draft 2023 contract, this request would neither obligate NTEC to ship a certain amount nor require the shipper to pay liquidated damages if it fails to meet the minimum.

[1] See, e.g., Urgent Issues in Freight Rail Serv.—R.R. Reporting (Urgent Issues June Order), EP 770 (Sub-No. 1), slip op. at 1-6 (STB served June 13, 2022).

[2] NTEC claims the agreement was a requirements contract that obligated BNSF to move the shipper's full demand up to 5.5 million tons, (NTEC Suppl., V.S. Lund, Ex. MDB-16 at 17-18, May 5, 2023), and BNSF states that the terms of the contract did not require the carrier to haul any specific minimum tonnage and explains that the requirement pertained to the percentage commitment from NTEC. (BNSF Reply, V.S. Lawler Ex. FL-01 at 1.)

NTEC, the third largest coal producer in the United States, ships mostly to domestic locations on BNSF, but—as reflected in its request for 2023—its demand for the movement of export coal has increased in recent years. (NTEC Reply 21; BNSF Reply 10-11.) Over the past 12 years, NTEC and its predecessor have generally shipped between 3 million and 5 million tons per year on this export lane. (NTEC Suppl., V.S. Babcock 3-5, May 5, 2023.)[3] In 2021 BNSF moved 4,996,023 tons of export coal on this lane for NTEC. The shipper claims that this peak level of service shows BNSF's capacity to meet its current request, (Appl. 4), whereas the carrier claims the peak level resulted from a confluence of favorable factors, including a decrease in the number of export coal shippers, an increase in capacity from the reduction in passenger services during the pandemic, and a relatively mild winter. (BNSF Suppl., V.S. Garland 14, May 5, 2023). However, in 2022, BNSF moved substantially less than NTEC sought to move under the 2022 contract, (BNSF Reply, Attach. A at 7), and the carrier explains that it has faced capacity-related problems, particularly with the availability of crew in the Pacific Northwest and of a particular type of trainsets, (NTEC Suppl., V.S. Babcock 3, May 5, 2023). Some of NTEC's competitors, namely Arch and the Crow Tribe, have also reported difficulty with BNSF's service. (See Arch Comment; Crow Tribe Comment.)

As a common carrier for NTEC, from January to April 2023, BNSF moved more than 1.2 million tons of export coal on this lane. The carrier moved 27 trains per month in April and May, (BNSF Status Update 1), consistent with its expected totals, (Appl. 18). BNSF previously communicated to NTEC lower expected totals for those months, but in mid-March, prior to NTEC filing its case, the carrier substantially revised its expectations upward. (Appl. 6 n.9, V.S. Babcock at 7.) For June, the carrier is on track to move 23 trains, following additional upward revisions from the carrier's initial estimates.[4] (BNSF Status Update 1.)

On April 14, 2023, NTEC asked the Board to require—via either a preliminary injunction or emergency service order[5]—BNSF to move a minimum of 29 trains per month on a reasonably consistent cadence, known as a ratable basis. NTEC's competitors ask the Board to reject NTEC's requests because of the potential negative economic, safety, and operational-level impacts that such an order would have on the service BNSF provides to Arch, Global, and the Crow Tribe. (See Arch Comment 5-6; Global Comment 2-3; Crow Tribe Comment 1-2.) NTEC concurrently filed a complaint with the Board, and alleged, among other things, that BNSF's

[3] NTEC states that 2016, an unusually low year, was an aberration. (NTEC Suppl., V.S. Babcock 3, May 5, 2023.)

[4] The first June upward revision, increasing its estimate from 16 to 22 trains, came after NTEC filed, but—like April and May—the revised estimate came more than a month prior to transportation for the relevant month.

[5] The Decision addresses the emergency service order in a footnote, saying "[i]n light of this decision issuing an order under § 1321(b)(4), the Board need not address NTEC's request for an emergency service order at this time." Decision 2. I would deny this request because NTEC has not shown that there is an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States, or that a rail carrier providing transportation subject to the jurisdiction of the Board . . . cannot transport the traffic offered to it in a manner that properly serves the public. See 49 U.S.C. § 11123.

service levels violate the common carrier obligation. Compl. 2-3, NOR 42179. Unlike NTEC's previous contracts, and the contracts of some of its competition, a Board-imposed order in either docket would not involve NTEC guaranteeing BNSF a minimum volume, subject to liquidated damages.

Standard. Under 49 U.S.C. § 1321(b)(4), the Board may issue an appropriate order, such as a preliminary injunction, when necessary to prevent irreparable harm. "A preliminary injunction is an extraordinary remedy and will generally not be granted unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by an injunction."[6] A party seeking a preliminary injunction must establish all four of the following factors: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be preliminarily enjoined; (2) it will suffer irreparable harm in the absence of a preliminary injunction; (3) other interested parties will not be substantially harmed by a preliminary injunction; and (4) the public interest supports the granting of the preliminary injunction.[7]

The party seeking a preliminary injunction "carries the burden of persuasion on all of the elements required for [such] extraordinary relief."[8] Failure to establish any one of the four factors ends the inquiry. See Seminole Elec. Coop., Inc. v. CSXT Transportation, Inc., NOR 42110, slip op. at 4 (STB served Dec. 22, 2008) ("some showing of each of the Holiday Tours factors is necessary" to grant an injunction); Union Pac. R.R.—Pet. for Declaratory Order & Prelim. Inj., FD 36197, slip op. at 5 (finding that petitioner failed to demonstrate it would suffer irreparable harm and consequently declining to address the other preliminary injunction requirements).

Establishing irreparable harm requires that the alleged harm "must be both certain and great; it must be actual and not theoretical." Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting Conn. v. Mass., 282 U.S. 660, 674 (1931)); see also DeBruce Grain v. U. Pac. R.R. (DeBruce 1998 Decision), NOR 42023, slip op. at 4 (STB served Apr. 27, 1998) (concluding that petitioner's "more remote justification for an emergency service order now—to provide a reasonable degree of certainty for planning—[was] too speculative a reason for finding

[6] Richard Best Transfer, Inc. v Union Pac. R.R., NOR 42149, slip op. at 4 (STB served Dec. 22, 2016) (citing Am. Chemistry Council v. Ala. Gulf Coast Ry., NOR 42129, slip op. at 4 (STB served May 4, 2012)).

[7] See, e.g., Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc. (Holiday Tours), 559 F.2d 841, 843 (D.C. Cir. 1977); Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958); N. Coast R.R. Auth. & Nw. Pac. R.R. v. Sonoma-Marin Area Rail Transit Dist., NOR 42148, slip op. at 3 (STB served Oct. 21, 2016); Cent. Valley Ag Grinding, Inc. v. Modesto & Empire Traction Co., NOR 42159, slip op. at 4 (STB served June 12, 2018); Am. Chemistry Council v. Ala. Gulf Coast Ry., NOR 42129, slip op. at 4 (STB served May 4, 2012).

[8] BP Amoco Chem. Co. v. Norfolk S. Ry., NOR 42093, slip op. at 4 (STB served June 6, 2005) (quoting San Joaquin Valley R.R.—Aban. Exemption—in Tulare & Kern Ctys., Cal., AB 398 (Sub-No. 5X), slip op. at 4 (STB served Apr. 3, 1998)).

irreparable harm"). "[S]imply showing some possibility of irreparable injury fails to satisfy the second factor." Nken v. Holder, 556 U.S. 418, 434-35 (2009); see also Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008) (establishing that a plaintiff must be "likely" to suffer irreparable harm). "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur." Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985).

"The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Va. Petroleum Jobbers, 259 F.2d at 925; see also Ballard Term. R.R.—Acquis & Operation Exemption—Woodinville Subdivision, FD 35731 et al., slip op. at 6 (STB served Aug. 1, 2013) (denying motion for preliminary injunction because alleged irreparable harm in the absence of an injunction was "remote, speculative, and uncertain"). The Board has consistently held that monetary or economic loss by itself does not constitute irreparable harm. See, e.g., Union Pac. R.R.—Pet. for Declaratory Ord. & Preliminary Injunction, FD 36197, slip op. at 4 (STB served June 29, 2018) (citing Kessler—Pet. for Injunctive Relief, FD 35206, slip op. at 5 (STB served June 12, 2009).[9] Economic loss is not generally considered irreparable harm, although where it "threatens the very existence of the movant's business," such a loss may be considered irreparable. Wis. Gas Co., 758 F.2d at 674; see also N. Coast R.R. Auth., NOR 42148, slip op. at 4 (concluding petitioners did not establish irreparable harm because they showed only inconvenience and associated monetary or economic loss); Seminole Elec. Coop., NOR 42110, slip op. at 4 (showing only monetary loss and thus not reaching the threshold for irreparable harm).

In considering certain prospective harms like reputational damage that, in some cases, may be difficult to show, we "still must look at the specific facts of each case to determine whether the harm to goodwill makes damages difficult to ascertain."[10] Depending on the specific facts of a case, "goodwill can often be valued in monetary terms." Martin, No. 5:14–CV–17–BR. Courts have noted that lost revenue and reputational damage may be easier to calculate in markets with a known market price or history. See Caballo Coal Co. v. Ind. Mich. Power Co., 305 F.3d 796, 801 & n.4 (8th Cir. 2002) (upholding the district court's conclusion that the coal company did not show a threat of irreparable harm considering damages would be a simple calculation based, in part, on plaintiff's ability to sell coal on the spot market); see also

[9] See also N. Coast R.R. Auth. v. Sonoma-Marin Area Rail Transit Dist., NOR 42148, slip op. at 4 (STB served Oct. 21, 2016) (citing Seminole Elec. Coop. v. CSX Transp., Inc., NOR 42110, slip op. at 4 (STB served Dec. 22, 2008); Am. Chemistry Council, NOR 42129, slip op. at 4 (additional costs and disruption of business operations caused by carrier's newly imposed requirements were not irreparable harms because they constituted "[i]njuries in terms of money, time, and energy," which are "economic in nature").)

[10] Martin v. Bimbo Foods Bakeries Distribution, Inc., No. 5:14–CV–17–BR (E.D.N.C. May 30, 2014); see also TitleBar v. Glazzio Tiles, No. 22-CV-3823 (PKC) (RML) (E.D.N.Y. July 22, 2022) (explaining that conclusory statements merely pointing to a concern of lost business are insufficient to show a threat of irreparable harm); Cayuga Nation v. Parker, No. 5:22-CV-00128 (BKS/ATB) (N.D.N.Y. Aug. 12, 2022) (concluding that a conclusory statement, not supported by evidence, is insufficient to show irreparable harm to goodwill and reputation).

Dexter 345 Inc. v. Cuomo, 663 F.3d 59, 63 (2d Cir. 2011) ("The long history of operation by both Appellants ensures that they will be able to calculate money damages for any loss of goodwill they may have suffered if a taking is found.")

Establishing likelihood of success on the merits requires more than a mere possibility that relief is required.[11] Without a "substantial indication of probable success, there would be no justification for . . . intrusion into the ordinary processes of administration and judicial review." Va. Petroleum Jobbers, 259 F.2d at 925. The standard pertinent to the merits of NTEC's claim is whether BNSF violated its common carrier obligation to provide service "on reasonable request" pursuant to 49 U.S.C. § 11101 by BNSF's failure to provide the level of common carrier service NTEC requested.

When evaluating a carrier's explanation for denying service, the Board has broad discretion to conduct case-by-case fact-specific inquiries. See Montana v. BNSF Ry., NOR 42124, slip op. at 7 (STB served Apr. 26, 2013) ("What constitutes a reasonable request for service is not statutorily defined but depends upon all the relevant facts and circumstances" and noting that in general "[t]he Board tries to avoid micromanaging a carrier's operational decisions."). "[H]ow a railroad satisfies its common carrier obligation is left to the railroad to decide in the first instance. So long as the railroad offers service that satisfies its common carrier obligations (the critical inquiry), it need not provide the particular service that the shipper would prefer." Texas Mun. Power Agency v. Burlington N. & S.F. Ry., NOR 42056, slip op. at 6 (STB served Sept. 27, 2004); see also Nat'l Grain & Feed Ass'n v. Burlington N. R.R., 8 I.C.C.2d 421, 427 (1992), aff'd in part and rev'd in part on other grounds by Nat'l Grain & Feed Ass'n v. ICC, 5 F.3d 306 (8th Cir. 1993). "[T]he common carrier obligation does not require a carrier to maintain service levels for one shipper that will degrade service overall." Savannah Port Term. R.R.—Pet. for Declaratory Order—Certain Rates & Practices as Applied to Cap. Cargo, Inc., FD 34920, slip op. at 8 (STB served May 30, 2008) (citing DeBruce Grain v. Union Pac. R.R. (DeBruce 1997 Decision), NOR 42023 (STB served Dec. 22, 1997)). Railroads must maintain the flexibility to respond to changes in demand and market conditions. Major Rail Consol. Procs., 5 S.T.B. 539, 578 (2001); see also Sherwin Alumina Co. v. Union Pac. R.R., NOR 42143, slip op. at 6 n.12 (STB served Sept. 29, 2015) (noting that the agency may prefer to avoid bright line rules regarding the common carrier obligation).

Establishing harm to others requires that the Board finds the issuance of an injunction will not substantially harm other interested parties. See Union Pac. R.R.—Pet. for Declaratory Order & Preliminary Injunction, FD 36197, slip op. at 3 (STB served June 29, 2018); see also Ballard Term. R.R., FD 35731, slip op. at 6 (denying request for injunction because, among other things, other interested parties would be harmed by its issuance). The Board has stated that it has "always tried to act in a manner that will not unfairly favor one shipper or group of shippers over another." DeBruce 1997 Decision, NOR 42023, slip op. at 4.[12]

[11] Nken, 556 U.S. at 434 (2009).

[12] More recently, in the context of its proposed emergency service regulations, this Board noted that in awarding relief, it must ensure that "that it will not have an overall negative effect on shippers and that it will avoid any risk of placing other shippers in similar circumstances as

Establishing the remaining factor, the Board must look at whether the public interest would be injured were an injunction to be issued. See 11A Wright & Miller, Federal Practice and Procedure § 2948.4 (3d ed. 2023); see also Winter, 555 U.S. at 26. "Focusing on this factor is another way of inquiring whether there are policy considerations that bear on whether the order should issue." 11A Wright & Miller, Federal Practice and Procedure § 2948.4 (3d ed. 2023). The Board has found that an order is not in the public interest where it would result in the Board, "rather than the railroads and the shippers, prioritiz[ing] among . . . shipments" and because such an order would conflict "with the efforts of the Board and railroads to solve [broader] rail service problems." DeBruce 1997 Decision, NOR 42023, slip op. at 4 (denying an emergency order).

Discussion.

Irreparable harm. NTEC fails to show the Board could not impose an adequate remedy if the shipper were to prevail on its underlying case, and the failure to establish irreparable harm alone ends the case for a preliminary injunction. See Seminole Elec., NOR 42110, slip op. at 4. Indeed, under the statute, an order of this type must be necessary to prevent irreparable harm. 49 U.S.C. § 1321(b)(4). In finding that NTEC has proven irreparable harm, the Decision does not rely on the first two of the five harms alleged by NTEC—the shipper's failure to satisfy existing coal sales contracts and its increased vessel demurrage cost, both of which are clearly calculable and redressable—but instead cites the lost sales, reputational damage, and the resulting effects on the Navajo Nation. The lost sales and reputational harm in this case relate closely to one another and are economic in nature, and—as explained below—NTEC does not establish any near-term effects on the Navajo Nation beyond possible foregone investment in helium manufacturing, an economic consideration also closely related to the other harms. (Tr. 83:12-83:15; 113:3-113:10.) As a threshold matter, the Board has repeatedly declined to declare economic loss to be irreparable harm if that loss does not threaten the very existence of the movant's business. The Decision understates the consistency with which the Board has made this declaration and unconvincingly addresses its deviation from that precedent.[13] NTEC—

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petitioner." Revisions to Reguls. for Expedited Relief for Serv. Emergencies, EP 762, slip op. at 9 (STB served Apr. 22, 2022).

[13] The Decision relies on three cases, two from outside the Board, that are readily distinguishable. In Colo. Wheat Admin. Comm. v. V & S Ry., NOR 42140, slip op. at 5 (STB served May 7, 2015), the Colorado Interests had no legal alternative in the offer of financial assistance process that allowed them to be compensated for repairing removed track if a preliminary injunction were not granted. Here, NTEC has a legal alternative, damages. The Decision relies on GlaxoSmithKline LLC v. Boehringer Ingelheim Pharms., Inc., 484 F. Supp. 3d 207, 226 (E.D. Penn. 2020), and Foodcomm Int'l v. Barry, 328 F.3d 300, 304 (7th Cir. 2003), to support their conclusion that lost sales and reputational damage may demonstrate irreparable harm. In the former case, GlaxoSmithKline LLC—arguing about effects in a market much different than export coal, which is a global commodity—provided evidence in the form of a "comprehensive and compelling" survey data to demonstrate, among other things, that 34% of physicians were already questioning the efficacy of its treatment due to a competitor's adverse

predominantly a shipper to domestic locations, (BNSF Reply 7)—has not claimed its business is in jeopardy as a result of BNSF's service. More broadly, I would expect the harms alleged by NTEC—lost sales, reputational damage, and foregone investment—to be routinely claimed in any rail service dispute. Considering these types of economic losses as irreparable transforms this heretofore extraordinary remedy. The Decision positions the Board for much more frequent intervention before it has a complete record, and in this case, as would be typical if the Board were to follow the Decision's view of irreparable harm, the Decision leaves many facts and arguments unexplored, compromising the fairness of the Board's adjudications.

Even assuming the Board should consider economic loss as irreparable harm, NTEC does not show its economic losses are certain, great, and imminent or beyond calculation and remedy. To the extent that lost sales, reputational harm (which, here, mainly relate to lost sales), and other prospective economic losses are difficult to quantify, the Board must conduct a fact-specific inquiry. NTEC makes almost no attempt to prove these losses cannot be calculated, despite its own commercial history, its own previous damages calculations, and the characteristics of the export coal market. The Decision offers few facts to judge the likelihood, timing, and magnitude of the harm because NTEC offers almost no name, price, or quantity information about any of its potential commercial prospects and provides little evidence to support its claims about its reputation in the marketplace.

Not only does the Decision fail to show the losses cannot be calculated, it ignores that NTEC itself appears to have been able to previously calculate similar damages, including from lost sales and reputational harm. In a March filing in the federal district court case concerning BNSF's service levels in 2022, NTEC stated that it

> will submit its calculation of damages in this case on the basis of the following…(2) the additional revenue (less avoided costs) that NTEC was deprived of under spot coal sales agreements that NTEC otherwise could have entered (at then- prevailing prices) but for BNSF's failure to transport the full volume of coal required under the 2022 Contract…(4) loss of customer goodwill for failure to ship contracted for coal volumes that was required to be transported under the 2022 Contract and for damage to NTEC's reputation as a reliable coal seller in a highly competitive export coal market.

(BNSF Reply, Attach. A at 9, Apr. 19, 2023.) These appear to be closely related to the type of damages that the Decision finds could not be calculated or adequately remedied. In its court filing, NTEC then assigns an estimated dollar value for its damages in total. The shipper does not explain why it could apparently estimate these harms for its 2022 service when before a

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marketing campaign. GlaxoSmithKline, 484 F. Supp. 3d at 225, 227. Here, NTEC has mainly described their inferences from conversations with export customers and has provided almost no evidence beyond limited tonnage totals. In the latter case, Foodcomm experienced a complete loss of a specific business relationship following the actions of two of its employees to establish their own business partnership directly with a customer (indeed becoming employees of that customer). NTEC has not shown a complete deterioration of business relations with any of their customers. It hardly names a customer.

federal court but not for its 2023 service when before the Board. Considering NTEC had recently calculated similar damages in another case, as shown in a filing submitted to this docket, at a minimum it should have explained to the Board in detail its methodology and insurmountable difficulties, if any.[14]

The Decision hardly engages with the possibility of calculation and does not explain why NTEC could not draw upon its commercial history, spot prices, and other price indices, (BNSF Reply, V.S. Lawler 7-8), to formulate a damages estimate. NTEC is not only actively participating in the spot market,[15] but it has a history of selling both via contract and spot, including in the same quarter.[16] The shipper appears to have data concerning its previous percentages under contract, its current assessment of the contract market, and price differences depending on time and type of sale. As noted, courts have found the vastness of a global commodity market—NTEC states the seaborne export coal market is over 1 billion tons, (Tr. 36:14-36:17)—and its relatively transparent pricing make it easier to estimate and prove prospective damages. See e.g., Caballo Coal, 305 F.3d at 801. Moreover, given NTEC's disclosure of its trip to Asia in February that involved some commercial contract discussions,[17] the shipper's recent and ongoing commercial discussions may provide additional facts that might inform estimation, including by verifying pricing claims. In the underlying merits case, NTEC may also be able to acquire through discovery additional market information that BNSF has in its possession, as the shipper suggests in its court case.[18]

Not only does the Decision fail to show that the damages are incalculable and unredressable, it also does not show that any harm is certain, imminent, or great. To the extent the Decision has any evidence of a past or future market change, it appears to involve the shift from contract to the spot market, but the causation and magnitude of this shift are uncertain and largely speculative. The Decision cites NTEC's statement that its contract tonnage has significantly decreased, (Tr. 117:4-117:5.), but it appears to simply accept the implication that this shift is entirely because of BNSF. However, BNSF is providing service to fulfill most of NTEC's request—indeed, the carrier is currently tracking nearly 95% of 4.2 million tons and nearly 80% of NTEC's full year request—so the shipper seems to have reason to continue to contract out for a substantial portion of its traffic, even if it has uncertainty as to timing. Moreover, the Decision extensively recounts NTEC's summary of recent discussions with unnamed customers in Asia, who apparently inquired about the shipper's "train problem," but the Decision overlooks that NTEC stated that it could not establish a causal connection between the customer's concern and its customer's decision not to sign a long-term contract. (Tr. 119:20-

[14] Moreover, when it submitted its $10 million damages estimate in its underlying common carrier currently before the Board, NTEC concurrently stated in this docket that it "may" not be able to recover lost sales and reputational injury and offered almost no supporting evidence in either docket.

[15] (Tr. 121:22.)

[16] (NTEC Reply, May 5, 2023, V.S. Babcock, Ex. MDB-7.)

[17] (Tr. 116:8-116:11.)

[18] (BNSF Reply, Apr. 19, 2023, Attach. A at 10.)

120:2.) NTEC then noted it was able to sell its coal in the spot market. (Tr 122:1-122:2.) Asked again if NTEC's inability to assure the customer of long-term train delivery prevented a long-term contract, NTEC stated that no customer explicitly said that, and NTEC inferred only that train service was something its customers are weighing. (Tr. 122:6-122:10.) The Decision states "customers have many other options if questions arise about NTEC's reliability," Decision 10, but it fails to show the selection of these options. Separately, NTEC did not establish that any alleged reputational harm would not be soon cured if the Board were to enter an effective order on the merits or BNSF service otherwise improves. When asked about whether any impact to NTEC's reputation would carry over a year from now if BNSF service were to improve, NTEC stated, "that would be highly speculative." (Tr. 124:8-124-9.)

Even assuming the shift has occurred as a result of BNSF's service, none of the Decision's arguments about lost sales or reputational harm (which mainly pertains to lost sales) establish that NTEC would curtail production,[19] so it appears the shipper's alleged lost sales and reputational harm mainly pertain not to whether NTEC sells its coal but when and how it makes those sales.[20] Indeed, NTEC states that BNSF service levels in 2022 already caused it reputational harm, yet the record shows that NTEC's common carrier request for 2023, if met, would constitute its highest export level to date. (NTEC Suppl., V.S. Babcock 9.) Though this level of demand does not mean the market disregards train service reliability, NTEC has the burden to explain the certain, imminent, and substantial market reaction. It does not provide any evidence that the reaction would be sufficient so as to lower its current, historically high demand for transportation in this lane. The absence of this evidence lends further support that NTEC could use its commercial history and market data to inform its estimates, particularly given its documented export spot and domestic market participation. (NTEC Suppl., V.S. Babcock 31, May 5, 2023); see also Dexter 345, 663 F.3d at 63.

Though the Decision references a potential cumulative impact of the service levels on NTEC's ability to support the Navajo Nation's government programs, NTEC does not claim the impact to these programs is imminent, and its concerns in the near-term are economic in nature. After extensive discussion, NTEC clarified that it was "not comfortable saying to [the Board] that because we receive 16 trains in June, we're going to cut pre-K on Navajo Nation. I don't think that's correct." (Tr. 112:17-112:19.) NTEC clarified its view that any immediate effects concern its ability to reinvest in its helium business, which NTEC states would provide additional revenue and jobs. Though NTEC references reduced royalties to the Navajo Nation from its decreased investment in wells, (Tr. 102:22-103:4), it does not clearly connect the decrease in investment to direct, imminent, and certain cuts to programs. Indeed, the Decision's reference to a "cumulative" effect stands in contrast to the "imminent" effect required under the Board's injunction standards, and the Decision does not even attempt to establish the timing of this effect would coincide with the term of the injunction. Moreover, ultimately the business investment concern relates closely to the lost revenue that NTEC claims would occur from other

[19] To the extent that any of NTEC's claims could be seen as suggesting curtailed production, they do not prove any effects are certain, imminent, and great. Even still, it would constitute an economic loss that could be calculated and adequately remedied, and there is no evidence that any effect would threaten the very existence of its business.

[20] (NTEC Suppl., V.S. Babcock 32-33, May 5, 2023.)

alleged harms, including with existing sales, lost new sales, and reputational injury, and—as noted above—I find lost investment returns, to the extent they occur, could be calculated and redressed.

For these reasons, I find NTEC has failed to show that it will suffer irreparable harm in the absence of a preliminary injunction. Based on this finding alone, the preliminary injunction should be denied. See Union Pac. R.R.—Pet. for Declaratory Order & Prelim. Inj., FD 36197, slip op. at 5 (finding that petitioner failed to demonstrate it would suffer irreparable harm and consequently declining to address the other preliminary injunction requirements). Though the Decision's failure to show irreparable harm is sufficient to deny NTEC's request for preliminary injunction, I will address the other factors needed to receive an injunction and show the Board has further grounds for denial.

Likelihood of Success on the Merits. Even if NTEC had shown irreparable harm, the Decision does not establish that the shipper has a substantial likelihood of success on the merits. The Decision purports to define the common carrier obligation by stating, "absent a satisfactory explanation, a railroad must at the very least provide a requested level of service when the railroad has the capacity to provide that level of service," Decision 4, and it attempts to use the carrier's views about a draft contract to prove it has capacity sufficient to move NTEC's requested amount (more than 5 million tons).[21] To start, the process used to advance this novel legal approach is insufficient, and I do not offer that criticism frequently or lightly given the thoughtful, diligent, and conscientious agency leadership that I have observed during my time on the Board. First, neither party advanced the theory that BNSF's view of capacity in negotiating a contract should be the focus of the Board's merits analysis, and—despite a pre-oral argument

[21] In this docket, NTEC's request is for 438,625 tons of coal per month, or roughly 29 trains per month, after May 1, 2023. (Appl. 4.) Elsewhere in the briefs, NTEC requests that same monthly amount after April 1, 2023. (Appl., V.S. Babcock 2.) From May to December 2023, its request would total about 3.5 million tons; from June to December 2023, it totals nearly 3.1 million tons. BNSF states that it moved more than 1.2 million tons from January to April, and 27 trains in May. Rounding and using NTEC's per train tonnage estimate, the total for January to May is roughly 1.6 million tons. (BSNF Status Update.) Accordingly, given the tonnage moved year-to-date, NTEC's request here—if met for the rest of the year—might be construed to amount to a total of roughly 4.7 million tons in 2023 (1.2 million + 3.5 million or 1.6 million + 3.1 million).

The Decision orders BNSF to move at least 4.2 million tons in 2023, or an average of 23 trains per month, and—given that BNSF is just slightly below that pace thus far—BNSF would need to move about 2.6 million tons from June to December, which comes to about 24 to 25 trains per month. As part of its contingent injunction order, which requires BNSF to move an additional one million tons if additional crews and trainsets are available, the Decision appears to annualize NTEC's request to about 5.2 million tons (438,625 tons * 12 months). That total seems to be higher than NTEC's request in this docket because its request applies for seven or eight months in 2023. The order's total also slightly exceeds NTEC's original estimate—about 5.1 million tons—in its common carrier request. Nonetheless, for the purposes of clarity, I endeavor to use 29 trains per month in referencing NTEC's request and 23 trains per month in referencing the 4.2 million tons the Board orders for 2023.

conference with outside counsel and the Board—the Board provided scant notice to the parties of its intent to probe this matter. Second, when the Board questioned the parties at oral argument, it focused on the draft contract minimum of 4.2 million tons in 2023, yet the Decision now emphasizes BNSF's willingness to sign a contract with a maximum annual volume of 6 million tons. Third, relying on the questioning and discussion at oral argument and noting that the matter was raised for the first time, BNSF's supplemental brief addresses only the contract minimum (4.2 million tons), rather than some higher number. (BNSF Suppl. 2, May 15, 2023; Tr. 244:1-244:15, Tr. 242:7-242:18.) Finally, the very nature of a preliminary injunction process substantially reduces the opportunity for full consideration of both the facts and law related to any new approach. The Board ought not have used an injunction to set a new definition of one of the Board's most important authorities, and it errs in relying on BNSF's supposed admissions related to capacity.

Befitting the process afforded the parties, the new definition of the common carrier obligation—based on the "capacity" of a railroad—is vague and potentially harmful.[22] The Decision neither defines capacity nor provides the factors it considers in assessing capacity, and its failed reliance on supposed statements related to a draft contract keeps it, in part, from grappling with the definition. At a minimum, rail capacity for a particular customer is a dynamic concept involving not just resources, like crew or trainsets, but—in this network industry—other shippers' demand and external factors. The Decision avoids analysis of other shippers' demand, and it is not clear how the Decision considers, if at all, its precedent that "the common carrier obligation does not require a carrier to maintain service levels for one shipper that will degrade service overall.". Savannah Port Term., FD 34920, slip op. at 8. It is also not clear the extent to which the Decision envisions the Board focus on resource analysis, centering its evaluation as much on service inputs like train sets as on service outcomes, and if that type of analysis will lead to "micromanaging a carrier's operational decisions." Mont. v. BNSF, NOR 42124, slip op. at 7.[23] Though the Decision may avoid providing much meaning to its capacity definition, the sheer vagueness introduces uncertainty, and the attempted use of statements related to draft contracts raises other problems. I address concerns with the intersection of contracts (generally outside of the Board's jurisdiction) and the common carrier obligation in the Public Interest section, infra.

However, even on its own terms, the Decision's merits finding fails because the record contains no admission by BNSF that it thought it would have, or currently has, the capacity to move NTEC's requested amount. The only argument the Decision can muster in its attempt to show that BNSF supposedly "conceded" it had the capacity to move NTEC's requested amount (i.e., 438,625 tons, or roughly 29 trains per month) is by pointing to the carrier's supposed

[22] The complex and far-reaching effects of new common carrier policy has been the subject of in-depth agency consideration in the past, including a hearing that included testimony from rail carriers, shippers, government officials, state and federal government officials, and labor and other interested parties. See Common Carrier Obligation of R.Rs., EP 677 (STB served Apr. 15, 2008) (allotting time for the first of two public hearings in this docket).

[23] This Decision includes not only a contingent injunction but new reports on hiring efforts (not just crew totals), equipment acquisition efforts (not just trainset totals), and other shippers' trains.

"willingness in late 2022 to commit to a maximum level of 6 million tons during 2023" (i.e., about 33 trains per month). Decision 13.[24] However, BNSF never stated its commitment or capacity to move 6 million tons (or 33 trains per month) or even NTEC's less requested amount of roughly 5 million tons (or 29 trains per month). It only admitted that it has, and thought it would have, the capacity to move the tonnage that it currently plans to move—4.2 million tons on an annual basis, an average 23 trains per month. Without BNSF's admission of capacity to move at least NTEC's requested amount, which is clearly higher than 4.2 million tons, the Decision does not offer any statement from the carrier that could possibly amount to a substantially likely violation of its new definition of the common carrier obligation.

The Decision's sole citation to BNSF's purported admission that it has capacity in 2023 to move at least NTEC's requested amount (i.e., roughly 5 million tons or 29 trains per month) ignores the context of the discussion—BNSF's counsel was answering a question about moving 23 trains per month, or the equivalent of 4.2 million tons. It is true that BNSF's counsel admitted that "it's . . . absolutely fair to say that we would not enter into a contract we had not believed we could satisfy the terms of," (Tr. 196:9-196:12). However, that statement came in response to a question about whether the Board could "rely on the fact that [BNSF] would not be prepared to sign a contract for the shipper to provide *23 trains a month*, and then 30 trains a month [in 2024] if [BNSF] knew that it didn't have the capacity to provide those trains." (Tr. 196:2-196:6 (emphasis added).) Indeed, immediately before that exchange, BNSF also responded in the affirmative to an inquiry about whether BNSF "was ready to sign an agreement for *23 trains a month in 2023*, and . . . 30 trains a month in 2024." (Tr. 195:19-195:22 (emphasis added).) Summarizing the discussion, the Chairman observed that "from the point of view of late 2022," BNSF physically "had the capacity to provide *23 trains a month* for 2023," (Tr. 196:14-196:18 (emphasis added)), or 4.2 million tons.

Indeed, the Decision's reliance on BNSF's supposed "willingness in late 2022 to commit to a maximum level of 6 million tons during 2023" is unsound because there was no ambiguity that BNSF's statements about its capacity and willingness to commit pertained to the movement of 4.2 million tons, as opposed to—as the Decision now suggests—some higher number. Following the Decision's cited exchange, BNSF's counsel stated, "what I've been careful to say we would have been *ready to commit to 4.2 million tons* for the year." (Tr. 220:6-220:8 (emphasis added).) Near the end of the oral argument, the Chairman stated, "based on this record so far, that [BNSF] has the capacity to ship 4.2 million tons of coal this year for NTEC, and 5.5 million next year" and then clarified that Ms. Lawler had stated that 5.5 million tons "is for 2024." (Tr. 240:6-241:15.) It is wholly unsurprising that BNSF would state that it thought it would have, or currently has, the capacity to move the same tonnage that BNSF today anticipates

[24] The Decision reasons that, in December 2022, the draft contract under negotiation included a maximum annual volume figure of 6 million tons, BNSF's counsel stated that the carrier would not enter into a contract that it did not believe it could satisfy the terms of, and BNSF identified no exceedingly different change to its capacity since December 2022. For the reasons described above, the Decision does not establish that BNSF committed to 6 million tons, had capacity for 6 million tons, or is legally obligated to haul 6 million tons, so the entire line of reasoning fails.

achieving in 2023.[25] (Tr. 217:11-217:12 ("23 trains a month is what we have committed to, and that is what we are going to achieve this year.").)

The Decision does not point to any place in the record where BNSF stated that—to satisfy the terms of the draft 2023 contract—it would have been required to move NTEC's requested amount (roughly 5 million tons or 29 trains per month) or the draft contract's maximum annual value (6 million tons). The Decision purports not to interpret a contract or rely on contract negotiations, Decision 10, 7 n.10, 7 n.8, but it appears to imply a particular interpretation by isolating a contract provision—the maximum annual volume of 6 million tons—and quoting the statement from BNSF's counsel that the carrier would not enter into a contract it did not believe it could satisfy the terms of. However, setting aside that the question that elicited this response did not pertain to the maximum annual value, and assuming the appropriateness of probing draft contract terms, noticeably absent from any questioning or consideration is the parties' views of the draft contract's "Railroad's Failure to Transport" provision, which appears to provide a mechanism for BNSF satisfying the terms of the contract while moving less than NTEC nominates. (NTEC Suppl., V.S. Babcock, Ex. MDB-19 at 2.) BNSF was scarcely given an opportunity to present any view about either provision in the draft contract (the maximum annual volume or the failure to transport provisions) because, as noted, the Board's questions and statements at oral argument—using an argument not advanced by NTEC—focused on the draft contract minimums, particularly 4.2 million tons in 2023.

The Board has further reason to avoid any implication about the BNSF's "willingness to commit" to the 2023 draft contract's maximum annual volume of 6 million tons because the carrier explicitly states that it was not obligated to move the 2022 contract's maximum annual volume. As even NTEC explains, BNSF has long taken the position that the 2022 contract did not require it to move its maximum annual volume term of 5.5 million tons. (NTEC Suppl., V.S. Babcock 11-12, May 5, 2023; Tr. 65:17-66:19.) In 2022, BNSF CEO Katie Farmer wrote to Navajo Nation President Jonathan Nez and stated the carrier's position on this provision, stating "the contract and our recent commercial history make clear that BNSF is not required to move any specific minimum volume of coal in 2022." (BNSF Reply, V.S. Lawler, Ex. FL-01.) At oral argument, BNSF explained its view about how this type of contract functions, and how certain tonnage terms relate to other provisions, such as a percentage commitment. (Tr. 273:3-273:8.) I do not purport to interpret the 2022 contract, which is before a federal district court, or the draft 2023 contract, and I make no claim that the contracts' maximum annual volume provisions are identical or operate in the same way. However, if the Board is going to engage in an analysis of

[25] The Decision's only other cited statement from BNSF at oral argument—"nothing has happened since December [2022] to reduce the capacity of the [carrier] in [2023 or] 2024" (Tr. 204:5-204:14)—goes to the degree of change from the capacity the carrier admitted and committed to, and—as shown—BNSF did not admit capacity for, or state its willingness to commit to, any total higher than the 4.2 million tons for 2023. BNSF differentiates its capacity in 2024, the terms of the draft contract are different for 2024, and the Decision explicitly does not make a finding as to BNSF's capacity in 2024. Indeed, as the Decision recognizes, BNSF has explained its plans to add capacity throughout 2023 such that it would be able to provide a higher level of service in the latter part of the year, so it is also wholly unsurprising it would be discussing the possibility of a higher tonnage level in 2024. Decision 14 & nn.13-14.

BNSF's views of its contracts, it has reason to conclude BNSF believes it can satisfy the terms of such a contract even if it does not have capacity to haul a contract maximum annual volume.

The Decision questions the credibility of BNSF's contentions on capacity by citing, as an example, different capacity estimates offered by BNSF, but I do not share the Decision's assessment that the difference is inconsistent or self-contradictory. The Decision points to two different estimates: (1) the average coal trains per month that BNSF transported to Westshore between January-April 2023 and (2) BNSF's current (in May 2023) capacity to move coal trains to Westshore. Decision 16 n.17. The latter estimate, from May, is based on current average cycle time that includes a footnote, and BNSF explains the "average cycle time for train sets in service for NTEC can change *significantly throughout the year* due to impacts from weather, changing traffic mix on the route, and other factors." (BNSF Suppl. 5 n.6 May 15, 2023 (emphasis added).) If the May estimate differs from a previous multi-month average spanning January to April—during which BNSF's service shows variability by month[26] and, it stands to reason, by day—the difference might result from those constantly changing factors identified by BNSF. Indeed, as BNSF explicitly disclosed in making its second estimate, capacity changes throughout the year. Moreover, in each month that comprised the higher of the two estimates, BNSF did not haul the 29 trains per month that NTEC requests for the rest of the year, so neither estimate suggests that BNSF has capacity to meet NTEC's request.

Separate from its arguments concerning BNSF's draft contract, the Decision's reference to BNSF's current plan to haul 4.2 million tons in 2023 does nothing to show the carrier has capacity to meet NTEC's request (roughly 5 million tons or 29 trains per month) because the carrier's current plan plainly falls hundreds of thousands of tons short of that request. The Decision states that BNSF "expects to have the capacity to move NTEC's traffic at a much higher volume level than it did in recent months, or that it was willing to provide prior to the institution of this proceeding," Decision 6-7. Not only does this statement fail to establish that any forthcoming capacity is sufficient to meet NTEC's request, it is also stronger than the record will bear—prior to the Board's probing of the 23 trains-per-month figure at oral argument, BNSF had already expected to move about 23 trains per month from April to July. It is true that BNSF had lower service levels last winter,[27] but year-to-date BNSF is nonetheless currently tracking nearly 95 percent of 4.2 million tons.[28] (BNSF Supp. 12, May 15, 2023; BNSF Status Update 1.) Moreover, the Decision does not show that BNSF's willingness to move 4.2 million tons resulted from this proceeding—as noted, BNSF informed NTEC in mid-March, about one month before the shipper filed its application and complaint, that the carrier would move 27 trains in April and May. (Appl. 9 n.6.) BNSF has repeatedly upwardly revised its estimated train counts and indeed increased its estimate for June after this proceeding started, but that increase was lower than its

[26] (BNSF Ex. 5.)

[27] From January to April, NTEC's request asked BNSF to move fewer tons per month than the shipper does today.

[28] That is not to say that BNSF will not, particularly as a result of its hiring, increase its capacity. Indeed, that will be helpful for closing the small gap in its current year-to-date trajectory.

upward revisions for April and May, before NTEC first filed.[29] BNSF was largely on track to hit 4.2 million tons prior to this proceeding, and its commitment to achieve 4.2 million tons is largely consistent with other statements and facts on this record.[30] Nothing about BNSF's current plan indicates sufficient capacity to move more than 5 million tons.

The Decision's remaining supporting argument—that, in the peak year of 2021, BNSF carried more than 4.2 million tons—minimizes, or outright overlooks, well-documented recent events and important facts in the record that suggest circumstances have changed since 2021. Though the Decision relies on BNSF's peak service levels in 2021, this Board has extensively documented the crew shortages and capacity-related problems that directly led to service problems throughout 2022, including on BNSF. See, e.g., Urgent Issues June Order, EP 770 (Sub-No. 1), slip op. at 1-6. On this record, BNSF has described its recent capacity-related challenges on the lane, namely with crew shortages in Everett and train set availability. (BNSF Reply, V.S. Lawler 13-14; BNSF Suppl., V.S. Lawler 13, May 5, 2023.) The Decision provides little reason to conclude BNSF's explanations regarding crew shortages and trainset availability—both critical to capacity—are untrue, particularly given other shippers' demand for the movement of export coal to Westshore (which in turn requires additional crews and trainsets). Indeed, BNSF's service, or lack thereof, to NTEC's competitors also suggest a shift in capacity at the carrier. Arch stated that it has experienced impacts similar to NTEC, (Arch Comment 1), and the Crow Tribe has not been able to get BNSF to commit to service until the middle of this year, (Crow Tribe Comment). Thus, factoring in demand from other customers, the Board has reason to conclude BNSF's capacity on this lane has changed, and it ought not simply rely on the carrier's peak levels in 2021.

Though the Decision's merits analysis falls short, I do find that NTEC's claims warrant serious scrutiny, and the Board should move expeditiously to decide the underlying common carrier obligation case. NTEC not only argues BNSF's past peak service performance shows its ability to meet the shipper's request but also questions BNSF's allocation of service to NTEC's competitors and the carrier's efforts around certain resources. As noted, the Decision largely avoids any analysis of NTEC's core arguments on these points. However, in some—but not all—places, BNSF's counter arguments read as though rail service is zero-sum. BNSF points to current crew constraints, but the carrier knew more than a year-and-a-half ago that the headcount in Everett had started to trend downward at a much faster rate than the rest of the BNSF system. (BNSF Suppl., V.S. Garland 11-12, May 5, 2023.) BNSF also points to a current shortage of trainsets, and—though I understand NTEC needs a particular type of rotary car not used for certain other coal movements—at this juncture the carrier does not fully explain why trainsets have not been more available given the recent decrease in natural gas prices and resulting decline in domestic coal shipments. (BNSF Suppl., V.S. Lawler 14, May 5, 2023; Tr. 222:15 - 223:15.)

[29] The most recent expected train counts in June and July, were below those in April and May, but they are still within variation accepted as normal by both parties. (Tr. 197:6-197:16, 239:3-239:10.)

[30] Indeed, for these reasons, even if NTEC's request was construed as seeking an order for a lower number of trains (i.e., 4.2 million tons), rather than what the shipper asks of BNSF and now the Board, I would not find that NTEC has shown a substantial likelihood that it would succeed on the merits of its claim that BNSF has violated the common carrier obligation.

In addition, the timing and magnitude of BNSF's upward revisions—notifying NTEC of 6 to 12 monthly train count increases just over a month from transportation—appears to affect NTEC's business planning and execution.[31] Though I do not find these points amount to a finding that there is a substantial likelihood that NTEC will succeed in its common carrier obligation case, they do merit more complete briefing and consideration. In my view, the best approach would be for the Board to set an efficient procedural schedule for the underlying case.

Harm to Others. In an attempt to balance the equities of the case, and despite finding NTEC has shown both irreparable harm and a very strong likelihood it will prevail on the merits, the Decision crafts an inadequately explained contingent injunction that risks harm to others. The injunction requires BNSF to move in 2023 the tonnage to which the carrier has already committed (4.2 million tons or 23 trains per month on average), and it requires BNSF to move in 2023 an additional one million tons "to the extent that additional train sets and crews are available to serve NTEC." Decision 15. The need to craft a contingent injunction at all cuts against the alleged strength of the showing on BNSF's supposedly admitted capacity, the essential component of the Decision's merits analysis, and the Decision stylizes its design as giving BNSF "the benefit of the doubt." Decision 14. I question whether such a strong finding on capacity, if true, should have doubt sufficient to render the order largely ineffectual, mostly failing to prevent the irreparable harm that NTEC alleges would occur if BNSF were to operate at the expected service levels without the injunction. Indeed, the Decision orders no immediate change to the expected service levels. However, even with its contingent design, the injunction risks harm to others because it does not adequately define the meaning of availability in this complex network industry with many shippers, including NTEC's competitors, competing for rail capacity.

The record suggests that no coal shipper to Westshore—not even the shipper that NTEC claims BNSF is favoring—is receiving service that meets 100 percent of its nominations (i.e., projected demand), meaning these other shippers also have unmet requests. BNSF states it is in the process of hiring crews, and it is allegedly engaged in efforts to locate train sets. The Decision does not explain why NTEC should receive newly available resources rather than the three competitors, the Crow Tribe, Arch, and Global. In the past, the Board has stated, upon hearing from hundreds of shippers, each with their own service problems, that it has "always tried to act in manner that will not unfairly favor one shipper or group of shippers over another." DeBruce 1997 Decision, NOR 42023, slip op. at 4. The Crow Tribe—which also cites benefits that flow from coal sales revenue—has been seeking new rail service, and it states that BNSF has delayed committing to meet its needs. Arch states it has been experiencing many of the same effects alleged by NTEC and raises concerns about the transfer of resources. (Arch Comment 3-4.) Global states its export-dependency, consistency, contractual commitments, and mining methods all support its receipt of capacity. More broadly, the Board has documented widespread crew shortages that have resulted in poor service for many shippers and that BNSF has not met certain networkwide crew targets. Urgent Issues June Order, EP 770 (Sub-No. 1), slip op. at 3; Urgent Issues in Freight Rail Serv.—R.R. Reporting, EP 770 (Sub-No. 1), slip op. at 7 (STB served Oct. 28, 2022); Urgent Issues in Freight Rail Serv.—R.R. Reporting, EP 770 (Sub-No. 1),

[31] That is not to say the Decision establishes a particular timing requirement for common carrier service projections.

slip op. at 4 (STB served May 2, 2023). And no doubt other shippers outside of the coal industry would like to see newly available crew allocated to their specific needs.

The Decision may suggest that the term "available" is meant to ensure no such effects on other shippers, but the Decision's failure to explain the meaning of the term makes it inadequate to govern BNSF's deployment of crew and trainsets and balancing the competing requests among shippers. It is true that, except for status reports, the order does not explicitly require BNSF to take any specific action. Thus, under one read, the term "available" does nothing—BNSF must simply continue to document how it is executing its current plans—and only further undercuts both the rationale and purpose of this injunction. However, under another read, BNSF—fearing another unjustified Board order that might be worse than other suboptimal actions—simply shifts capacity to NTEC, and away from other shippers, including NTEC's competitors, to limit the damage of this case.[32] This concern is especially acute for the alleged crew shortage because the Decision makes no specific assessment of need.[33] Given this ambiguity as well as the frequent status reports about its efforts to add resources, raising the prospect of micromanagement, BNSF has good reason to fear the Board will second guess its decisions, potentially leading to litigation on the meaning of availability (perhaps conducted alongside or in addition to its underlying complaint litigation). Understanding that the contingent design of the injunction is intended to limit harm to others, the practical risk of BNSF's prioritization of NTEC over other shippers counsels against the Decision's inadequately explained intervention.

Public Interest. The Decision undermines commercial collaboration between rail carriers and shippers. Because of the Decision's failed attempt to use BNSF's admissions, it does not take on the difficult work of addressing whether BNSF ought to be able to meet NTEC's request, including by examining how the carrier is allocating its service. The record suggests that BNSF has sought to meet certain needs of Global because that shipper—under long-term contract—appears to have provided more certainty to the carrier and shows a more consistent record in offering traffic, including when the export market is less strong. (Global Comment.) Given BNSF's contractual relationships with other coal shippers, and NTEC's unique status as a

[32] This practical concern may also apply to the Decision's order for 4.2 million tons absent available crews and trainsets. BNSF stated at the hearing that if the Board orders it to provide 4.2 million tons for 2023, it would "implement that order. [But] the question would be what would be the consequences for other shippers if at some point something changed, and we couldn't handle all of that any more." (Tr. 201:1-201-6.) If the network experiences an unforeseen external event that compromises BNSF's current plan, BNSF would face the practical decision as to whether to ask the Board to revise its order by pleading substantially changed circumstances, or to simply allocate increasingly scarce capacity (due to the external event) to NTEC. On a practical level, the carrier's choice involves an element of non-market evaluation that may result in the prioritization of NTEC over other shippers, especially considering the disposition of this proceeding. For this same reason, the Board's recent proclivity to order what a rail carrier states it intends to do is not without potential costs. See e.g., Foster Farms Poultry—Ex Parte Pet. for Emergency Serv. Order, FD 36609 (STB served Dec. 30, 2022).

[33] The Decision at least identifies a specific number of trainsets that BNSF allegedly needs to meet NTEC's request.

recipient of common carrier transportation, the concept of capacity and the common carrier obligation inevitably intersects with the Board's policy on contracts. Indeed, the common carrier statute speaks directly to this intersection.[34] 49 U.S.C. § 11101. Though the Decision largely avoids exploration of this matter, the Decision essentially guarantees annual tonnage levels that a shipper—like NTEC in the past—would have ordinarily negotiated in a contract, subject to liquidated damages. I find the complex policy and legal implications this dynamic better suited for the underlying merits case, particularly given the failure to show irreparable harm. However, by potentially reducing the relative value of contract minimums, it appears at this point that the Decision's early intervention may well have broader effects on the public by undermining incentives for carriers and shippers to use contracts as means to enhance business planning and communication.

The Decision's use of contract information as part of its merits finding raises additional risks for relationships between carriers and shippers. Though the Decision disclaims any reliance on contract negotiations or draft contract interpretation, its reliance on BNSF's "willingness to contract" for a particular contract term inescapably relates to a contract that would have been outside the purview of the Board.[35] Indeed, the Staggers Act established the prioritization of reasonable commitments under contracts and removed movements conducted pursuant to transportation contracts from the agency's jurisdiction.[36] If the Board's reliance on views intimately related to a draft contract term is permissible, as I accept for my arguments

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[34] Rail shippers may tender service pursuant to contracts and a carrier does not violate its common carrier obligation simply "because it fulfills its reasonable commitments under contracts authorized under [49 U.S.C. §] 10709. . . before responding to reasonable requests for service." 49 U.S.C.A. § 11101(a). This prioritization of reasonable commitments under contracts was established in the Staggers Act and is consistent with its new emphasis on the use of contracts in the rail industry. The Senate report explained that "[c]ontract provisions offer significant transportation benefits in that they allow for better planning on the part of both shippers and carriers and should improve car utilization and allocation of equipment and other resources." S. Rep. No. 96-470, at 24 (1979). The report stated that the contract rate provision of Staggers was "among the most important in the bill." Id. at 9.

[35] "Under § 10709(c)(1), a rail services contract and transportation under such contract, shall not be subject to [49 U.S.C. Subtitle IV, Part A] and may not be subsequently challenged before the Board . . . on the grounds that such contract violates a provision of this part." Ameropan Oil Corp. v. Canadian Nat'l Ry., NOR 42161, slip op. at 3 (STB served Apr. 17, 2021) (explaining "that the Board's authority does not extend to those movements conducted pursuant to transportation contracts").

[36] To be sure, the Decision, in its reference to the contract maximum, is not alone in making arguments in some way related to contract transportation. For example, both parties submitted information about contract transportation levels to support their merits arguments. I looked to NTEC's claimed damages in its court case on the 2022 contract to inform my assessment of the calculability of its claims for 2023. However, the Decision pulls an isolated term directly from the contract itself to probe BNSF's views, and this endeavor elevates, or makes central, the obligations associated with a contract, exactly what is outside of the Board's jurisdiction.

above, it is easy to see how both rail carriers and shippers across the industry might ask how the Board might use draft contracts and contract-related communications in the future. Despite the Decision's attempt to contain these consequences, its approach—at a minimum—injects some measure of uncertainty and may well cause parties to paper candid exchanges with caveats or disclaimers or even limit dialogue, again with broader implications for the network.

Conclusion. The Decision is a poor vehicle for setting common carrier policy nationwide. It endeavors to define the common carrier obligation in terms of the carrier's current capacity while eschewing an adequate explanation and analysis that might guide future litigants. The Decision's failed short cut—its attempt to use purported admissions related to draft contracts—instead affects fundamental rail carrier and shipper commercial relationships. Using a preliminary injunction proceeding, the Decision positions the Board to intervene much more frequently with an incomplete factual record and unexplored policy and legal questions. Though NTEC may be satisfied with prevailing immediately in some way in this matter, while maintaining the possibility of winning its underlying case later, the ramifications of the Decision will harm many other shippers that do not receive similar status from the Board. I respectfully dissent.

BOARD MEMBER SCHULTZ, dissenting:

The Board has the authority to issue a preliminary injunction "when necessary to prevent irreparable harm." See 49 U.S.C. § 1321(b)(4). In issuing such an order, the Board has long followed the preliminary injunction standard applied in Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977), which requires the Board to consider the likelihood of irreparable harm to the complainant if the Board does not grant a preliminary injunction.[1] But irreparable harm must not only be possible; it must be likely to occur.[2] Finally, the Board has often stated that to qualify as irreparable harm, the party seeking a Board order must demonstrate that the injury claimed is "imminent, certain, and great."[3]

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[1] See, e.g., R.J. Corman R.R. Prop.—Aban. Exemption—in Scott, Campbell, and Anderson Cntys., Tenn., AB 1296X, slip op. at 3 (STB served Dec. 1, 2020); Ind. Harbor Belt R.R.—Trackage Rights—Consol. Rail Corp., FD 36099 et al., slip op. at 4 (STB served Mar. 14, 2017); Eighteen Thirty Group, LLC—Acquis. Exemption—in Allegheny Cnty., Md., FD 35438 et al., slip op. at 3 (STB served Nov. 17, 2010); Sault Ste. Marie Bridge Co.—Acquis. & Operating Exemption—Lines of Union Pac. R.R., FD 33290, slip op. at 6 (STB served Jan. 24, 1997).

[2] See Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that . . . he is likely to suffer irreparable harm in the absence of preliminary relief . . . .").

[3] R.J. Corman, AB 1296X, slip op. at 3 (citing Ind. Harbor Belt, FD 36099 et al., slip op. at 4 (quoting Sault Ste. Marie, FD 33290, slip op. at 6)); see also Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) ("First, the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief will not be granted against something merely feared

For the purposes of the preliminary injunction request, I believe the possible harms to NTEC can be split into two categories: (1) lost profits and additional costs incurred during the course of this proceeding, and (2) lost profits incurred in the future due to reputational harm even if NTEC were to prevail in this proceeding. The first category is readily calculable. If the Board were to find that BNSF should have provided some higher tonnage or number of trains than it did provide, the damages would be based, in large part, on the revenues that NTEC would have received had it been provided the additional tonnage/trains. NTEC itself estimates that its lost profits and costs to date are "on the order of $10 million." (NTEC Pet. 21, Apr. 14, 2023.) Because such losses are easily quantifiable, they cannot qualify as irreparable harm.[4]

In order to prevail on the second category, future reputational harm, NTEC must be able to show that, even if it prevails on the merits, the absence of preliminary injunctive relief will nevertheless subject it to ongoing reputational harm. Not only must such harm be imminent, certain, and great, the harm cannot be speculative. See Koninklijke Philips N.V. v. Thales DIS AIS USA LLC, 39 F.4th 1377, 1380 (Fed. Cir. 2022) ("Evidence of speculative harms, such as customers merely expressing concern that a potential future [International Trade Commission] exclusion order could affect [a company's] ability to deliver products down the road, is insufficient to show a *likelihood* of irreparable harm."); 11A Charles A. Wright, Arthur R. Miller, Mary K. Kane & Alexandra D. Lahav, Federal Practice and Procedure § 2948.1 & n.9 (3d ed., Apr. 2023 update) (stating that "[s]peculative injury is not sufficient" to demonstrate a likelihood of irreparable harm, and citing cases).

In this case, the reputational harm alleged by NTEC is speculative, as admitted by one of NTEC's witnesses at the Board's hearing. When asked by the Chairman whether the reputational harm from insufficient service now "will carry over to a time when maybe there's sufficient service," NTEC's Vice President of Sales and Marketing responded: "That would be highly speculative. . . . We want to make sure [our customers are] served the way they need to be, but I can't really speculate. I would assume if this continues it will be, at some point we will get to a point where it becomes very difficult to continue to do business in Asia." (Tr. 124.) In other words, if NTEC were to prevail on the merits, and the Board orders BNSF to provide "sufficient service," NTEC's witness could not assert, much less present evidence, that NTEC would be likely to suffer ongoing reputational harm. I agree with NTEC's witness that

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as liable to occur at some indefinite time; the party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." (citations, internal quotations, and alterations omitted)); Colorado v. U.S. EPA, 989 F.3d 874, 886 (10th Cir. 2021) ("[T]o constitute irreparable harm, an injury must be imminent, certain, actual and not speculative."); Novus Franchising, Inc. v. Dawson, 725 F.3d 885, 895 (8th Cir. 2013) ("In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." (quoting Iowa Utils. Bd. v. FCC, 109 F.3d 418, 425 (8th Cir. 1996)).

[4] See Wis. Gas Co. v. FERC, 758 F.2d at 674 ("It is . . . well settled that economic loss does not, in and of itself, constitute irreparable harm.").

reputational harm in this case is speculative; therefore, NTEC cannot demonstrate that it is likely to suffer irreparable harm.

In the majority's decision today (Decision), the Board does not address the statements from NTEC's witness that NTEC's future reputational harm is speculative. Moreover, the Board does not address whether NTEC would be likely to suffer reputational harm *even if* it prevails on the merits, which is a necessary prerequisite to a finding of irreparable harm. Instead, the Board turns what it has repeatedly deemed "extraordinary relief" into a relief that is much more ordinary: The claimed harms in the Decision are purely economic in nature and could be experienced by any shipper receiving less service than it would like.

Without a showing of irreparable harm, I would not reach the question of whether NTEC is likely to prevail on the merits. The Decision, however, does reach that issue, appearing to establish a common carrier obligation that is based on contract negotiations, past (and, indeed, peak) performance, and past projections, without allowing for changed circumstances or mistake. I find this analysis to be severely flawed.

First, I find it very troubling that the majority bases its assessment of BNSF's common carrier obligation on private negotiations and draft contracts between the parties. See Decision at 6-7, 11-13. In a lengthy disclaimer, the majority asserts that its determination "is not based on any purported contract negotiations between the railroad and NTEC." Id. at 7 n.10. But that claim is factually inaccurate. The 4.2 million to 6 million annual tonnage projections, which the Decision repeatedly cites as support for BNSF's purported ability to transport NTEC's requested volume, see id. at 6-7, 11-14, did not simply materialize out of thin air. Those figures originate from the parties' private contract negotiations and confidential drafts. (See NTEC Suppl., Ex. 5, ¶¶ 13-14, May 11, 2023; Tr. 68, 70-71, 194-96, 219-20.) BNSF's statements at hearing that it expects to transport at least 4.2 million tons of coal to Westshore in 2023 were elicited in the context of discussing the parties' contract negotiations and proposed terms. (See Tr. 194-200 (questioning whether BNSF would have been willing to commit to contract terms it did not have the capacity to satisfy)); Decision at 6. Moreover, the Decision twice cites BNSF's "willingness" to contract for those precise terms (between 4.2 and 6 million annual tons) as support for its conclusion that NTEC has established a likelihood of success on the merits of its common carrier claim. See Decision at 6, 7. The Decision also repeatedly relies on the 4.2-million-tons figure as an indicator of BNSF's current "capacity"—which, by the Decision's own apparent logic, determines BNSF's common carrier obligation. See id. at 4, 6-7, 12-14.

By relying on these contract terms, the Decision essentially establishes that a carrier's proposed or expected service levels—conveyed in private negotiations, at one particular point in time—may be used to set a floor for its common carrier obligation going forward. In particular, the Board notes BNSF's "willingness to contract" to move at least 4.2 million tons in 2023, before concluding that BNSF was required to show "why its failure to agree to provide that level of service to NTEC (4.2 million tons, and more as equipment becomes available) going forward does not amount to a violation of its common carrier obligation." Id. at 6-7. It also concludes that, "at a minimum, BNSF has a common carrier obligation to transport a shipper's goods to the extent it has capacity to do so. Based on the current record, the Board finds that BNSF has the capacity to move at least 4.2 million tons of coal . . . ." Id. at 13. I believe that the majority's

use of BNSF's representations, made originally in the context of private contract negotiations, to define what constitutes a common carrier violation, is not appropriate. This approach could drastically chill rail carriers' willingness to propose expected volumes in the context of contract negotiations, potentially dooming many future attempts at reaching private contracts. Carriers are now on notice that such negotiations could later be used to find that a common carrier obligation exists for the railroad to carry a specific minimum volume, and that such obligation could even be imposed on a preliminary basis before discovery and full findings of fact.

Second, the Board now provides to NTEC more favorable terms under common carriage than NTEC was able to negotiate in its unexecuted contract with BNSF. The proposed contract for 2023 provided that NTEC must load a minimum of 4.2 million tons of coal. (NTEC Suppl., Ex. 5, ¶ 13, May 11, 2023; see also Tr. 68 ("[T]he minimum [] volume that was described for 2023, which mind you is [NTEC's] requirements, not BNSF's . . . was the 4.2 million.").) If NTEC failed to load that volume, with certain exceptions, NTEC would be subject to liquidated damages. (NTEC Suppl., Ex. 5, ¶ 18, May 11, 2023; see also Tr. 73 ("[T]he only reason why you see the 4.2 [million ton minimum] in 2023 was because it was stated we had concerns on [BNSF's] ability. We didn't want to have to pay liquidated damages to a 5.5 [million ton minimum.]") The proposed contract did not guarantee NTEC a specific monthly number of trains. (NTEC Suppl., Ex. 5, ¶ 16, May 11, 2023; see also Tr. 219-20 ("So for clarity, the contracts that we have historically had, and that we were preparing to enter into did not mandate a specific tonnage per month or a specific number of trains. They spoke in terms of annual numbers . . . .") Contrast those terms with what the Board provides—no liquidated-damages clause for NTEC, and a requirement that BNSF deliver an average of 23 trains per month—and it is clear that the Board has imposed a common carrier obligation that exceeds what NTEC was able to bargain for in a contract. Allowing a shipper to obtain, through a common-carriage complaint, all the benefits of a contract without any of the reciprocal risk, will undermine the railroads' use of contracts, an essential and widespread tool that affords carriers the ability to better predict and plan for the overall demand on their systems. And it would undermine the statutory principle that a carrier may first satisfy its contractual obligations without violating its common carrier obligation to non-contract shippers. 49 U.S.C. § 11101(a).

Finally, it is unclear how, exactly, the Decision is defining and assessing the common carrier obligation. It seems to base that determination on the "reasonableness" of NTEC's request, and it appears to assess reasonableness based on a carrier's purported "capacity." See Decision at 4, 6-7 & n.10, 11-12. Yet the Decision never defines "capacity" or explains how to measure it,[5] and it does not meaningfully address BNSF's valid arguments about how capacity may be constrained by preexisting contracts, potential degradation of overall service, and fluctuations in demand.[6] The Decision puts much stock in BNSF's past performance, repeatedly touting that the carrier has transported "up to 39 trains per month in the peak summer export months." Id. at 5, 7. Yet the very NTEC filing that it cites shows that the parties moved NTEC's requested volume (29+ trains per month) in only 8 out of 48 months from 2019 to 2022, and moved 39 trains only once. (See NTEC Suppl., at Ex. MDB-6, May 5, 2023.) The Decision

[5] See also id. at 4, 6, 10-14 (discussing capacity as measured by, variously, trainsets, crews, service to other customers, space at yards/ports).

[6] See Decision at 7 n.9.

appears to frame its order in terms of annualized tons, see Decision at 13, 15, yet it also requires an "average" or "approximate" (or even "total," id. at 15) number of monthly trains, see id. at 13-15.

The Decision muddies the concept of the common carrier obligation to the extent that neither BNSF in this case, nor other carriers in future cases, can predict what the Board might consider in determining what the railroad's capacity is to provide the requested service. Based on this decision, capacity could be assessed solely in terms of train sets and crews, without consideration of usage of the line by other users. The Board might look at historical movements, disconnected from present circumstances, to impose a common carrier obligation based on the carrier's 15-20% top-performing months over the last several years. Or the Board may look to representations in past contract negotiations, using proposed minimum tonnage requirements to define the obligation of the railroad.

Additionally, the Board's "contingent preliminary injunction," ordering BNSF to provide up to 29 trains per month *if* it is able to acquire the crews and train sets to do so, raises additional concerns. First, it appears that the Board has pre-assigned any additional crews to NTEC until BNSF can provide 29 trains per month, regardless of whether other shippers may also be in need of additional service. Second, how an injunction requiring this level of service remedies any reputational harm to NTEC is unclear, as NTEC would certainly have no basis to promise 29 trains worth of coal to its customers per month when BNSF does not currently have the capacity to meet that demand.

Most fundamentally, however, the Decision fails to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). The Decision does not clearly state what it believes to be the common carrier violation in this case. How can the Decision conclude that NTEC is likely to establish a common-carrier violation for BNSF's failure to carry the "requested" 5.2 million tons (or 29 trains per month) in 2023,[7] when the Decision accepts that BNSF only has enough capacity to carry about 4.2 million tons (or 23 trains per month) in 2023?[8] If BNSF has *already committed* to carry at least 4.2 million tons in 2023,[9] and the majority has deemed that level of service acceptable under the common carrier obligation,[10] what, if anything, is BNSF's "violation?" Especially when *over six months* remain for BNSF to fulfill its commitment? And if BNSF already intends to provide an acceptable level of service under the common carrier obligation, how can the Decision conclude that NTEC will likely (and imminently) suffer *any* harm, let alone irreparable harm requiring injunctive relief? By finding that BNSF does not have the capacity to provide NTEC's requested 29 trains per month going forward, and instead that BNSF intends to provide the level of service that it has the

[7] Decision at 7; see also id. at 2.

[8] Id. at 11-14.

[9] (See Tr. 217; BNSF Resp. to Board Questions 12, May 15, 2023); see also Decision at 7.

[10] Decision at 7, 13.

capacity to provide, the Decision seems to conclude that NTEC is *not* likely to prevail on the relevant merits, despite the Decision's stated conclusion to the contrary.

In summary, NTEC has not demonstrated that it is likely to suffer irreparable harm in the absence of injunctive relief, and the Board's analysis of the merits of this case is deeply flawed. But beyond the legal deficiencies in the Decision, I am concerned that the Decision will create great uncertainty as to how the Board determines the level of service required to meet a railroad's common carrier obligation, and how the Board determines a railroad's capacity to provide that service. Accordingly, I respectfully dissent.