

**No. 23-60402**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE FIFTH CIRCUIT**

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BNSF Railway Company,  
*Petitioner,*

v.

Surface Transportation Board; United States of America,  
*Respondents.*

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On Petition for Review of a Decision of the  
Surface Transportation Board, Docket No. NOR 42178

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**Petitioner's Motion to Expedite Briefing and Decision**

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**Certificate of Interested Persons**

No. 23-60402

BNSF Railway Company,

*Petitioner,*

v.

Surface Transportation Board; United States of America,

*Respondents.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

**Petitioner:** BNSF Railway Company is a Delaware corporation and wholly-owned subsidiary of Burlington Northern Santa Fe, LLC, a Delaware limited liability company. Burlington Northern Santa Fe, LLC's sole member is National Indemnity Company, a Nebraska corporation. The following publicly traded company owns 10% or more of National Indemnity Company: Berkshire Hathaway Inc., a Delaware corporation.

**Counsel for Petitioner:** Jill K. Mulligan, Tamara R. Middleton, Adam Weiskittel, and Jill M. Rugema of BNSF Railway Company; Benjamin J. Horwich, Kathleen Foley, and J. Kain Day of Munger, Tolles & Olson LLP; Anthony J. LaRocca, Timothy J. Strafford, Tara A. Woods, and Onika K. Williams of Steptoe & Johnson LLP.

**Respondents:** Surface Transportation Board and United States of America.

**Counsel for the Surface Transportation Board:** Erik Gerrard Light.

**Counsel for the United States of America:** Robert J. Wiggers, Robert B. Nicolson, and Daniel Haar.

**Petitioner before the Surface Transportation Board:** Navajo Transitional Energy Company, LLC, is wholly owned by the Navajo Nation. NTEC has filed a motion to intervene in this Court, but the Court has not yet ruled on that motion.

**Counsel for Petitioner before the Surface Transportation Board:** Daniel M. Jaffe, Frank J. Pergolizzi, and Andrew B. Kolesar III of Slover & Loftus LLP.

**Amici Curiae before the Board:** Crow Tribe; Arch Coal Sales Company, Inc.; and Global Coal Sales Group, LLC.

**Counsel for Arch Coal Sales Company, Inc.:** Daniel R. Elliott of GKG Law, P.C.

DATED: August 3, 2023

/s/ Benjamin J. Horwich  
Benjamin J. Horwich

### **Motion to Expedite Briefing and Decision**

The Court may expedite proceedings upon a showing of “good cause.” 5th Cir. R. 27.5; *see also* Fed. R. App. P. 2 (“On its own or a party’s motion, a court of appeals may—to expedite its decision or for other good cause ... order proceedings as it directs.”). These rules “make clear” that this Court can “expedite the determination of cases of pressing concern to the public or to the litigants.” Fed. R. App. P. 2 advisory committee’s note to 1967 amendment.

Here, good cause exists to expedite review because it would (1) avoid any risk of mootness and (2) serve the public interest. Accordingly, petitioner BNSF Railway Company (“BNSF”) requests this Court enter an order adopting the following schedule:

<b>Deadline</b>	<b>Event</b>
August 24, 2023	Filing of the Administrative Record
August 31, 2023	BNSF’s Principal Brief
August 31, 2023	Any amicus curiae briefs in support of BNSF
September 21, 2023	Respondents’ and any Intervenor’s Response Briefs
September 21, 2023	Any amicus curiae briefs in support of Respondents
October 5, 2023	BNSF’s Reply Brief
TBD	Argument at the Court’s earliest convenience

BNSF has conferred with the Surface Transportation Board (“Board”) and the United States, both of which oppose this motion. BNSF has also attempted to confer with the Navajo Transitional Energy Company, LLC (“NTEC”) (the petitioner below and real party in interest and proposed intervenor in this Court). At the time of filing, BNSF has not received a response from counsel for NTEC, and therefore assumes NTEC opposes the relief requested.

Pursuant to Circuit Rule 27.4, BNSF states that, although this motion is not an emergency matter under Circuit Rule 27.3, BNSF has serious need for the Court to act on this motion in time for the expedited schedule to take effect. BNSF respectfully requests a decision on this motion reasonably in advance of the first date on that schedule, which would require the Board to file the administrative record by August 24, 2023.

## **I. Background**

On April 14, 2023, NTEC filed an ex parte application before the Board seeking an emergency service order and a preliminary injunction. On June 23, 2023, the Board served its injunction decision requiring BNSF “to transport a minimum of 4.2 million tons of coal”

(approximately 23 trains per month) from Spring Creek to Westshore “in 2023” to be “reasonably distributed through the remainder of the year.” App154.\* The Board also ordered BNSF “to transport an additional one million tons of coal” (approximately 29 trains per month) “to the extent that additional train sets and crews...become available.” App154-155. This was not all the relief NTEC had asked for, and as a result, it was not clear whether NTEC would request reconsideration of that decision. It was only after the reconsideration period expired, 20 days later, that BNSF could know that the injunction decision was final. *See* 49 C.F.R. § 1115.3(e) (setting reconsideration deadline); *id.* § 1115.3(f) (allowing for stays pending reconsideration). Just two business days after the reconsideration period ended, BNSF asked the Board to stay its injunction pending appeal. App181 (filed on July 17, 2023). Just over a week later, BNSF filed its petition for review of the Board’s injunction decision (as it was awaiting the Board’s ruling on the stay motion). ECF No. 1 (July 26, 2023).

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\* All references are to the sealed appendix filed separately in conjunction with this motion.

## II. Expediting Briefing and Argument Would Prevent Mootness

Without expedition, there is a significant possibility that this petition for review will become moot. The Court's default schedule (absent any extensions) allocates more than four months for briefing, with further time required for oral argument and for the Court to issue a decision. *See* Fed. R. App. P. 17(a) (40 days to file record); Fed. R. App. P. 31(a) (40 days for principal brief, 30 days for response brief, and 21 days for reply brief). In total, the median duration of the appellate process in this Court from docketing to decision is more than nine months. *See* United States Courts, Table B-4 (tabulating median times to termination), available at [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_b4\\_0930.2019.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_b4_0930.2019.pdf).

The order on review, however, will have expired long before that process could be completed. The Board issued an injunction directing BNSF to provide certain rail service to NTEC *for 2023*, App156, and it expressly reserved judgment on an injunction applicable to later periods, *id.* n.16. Accordingly, in roughly five months, the Board's order will cease to have any effect—potentially mooting BNSF's petition for review. That is only about half the median time necessary for a case to



conclude in the ordinary course of events and barely enough time for briefing to conclude.

This Court has explained that, in such circumstances, parties should seek expedited consideration. *Cf. Empower Texans, Inc. v. Geren*, 977 F.3d 367 (5th Cir. 2020). “Expedited procedures are available in this circuit before certain categories of cases become moot,” *id.* at 371, which would include cases that seek review of preliminary injunctive relief. *See* 5th Cir. R. 47.7 (preferencing calendaring of such cases). And failure to utilize those procedures can have dire consequences, including barring an appellant from relying on certain exceptions to mootness. *Id.* at 372 (holding the appellant could not rely on the capable-of-repetition-yet-evading-review exception to mootness when it failed to invoke expediting procedures). Expedited proceedings serve a critical role in preventing mootness from stripping appellate courts of jurisdiction to hear important disputes.

Given these obligations, BNSF has acted in prompt and orderly fashion in seeking review by this Court on an expedited schedule. Once it was clear that NTEC would not be seeking reconsideration (an action which might have delayed the effect of, or finality of, the Board’s

injunction, *see* 49 C.F.R. § 1115.3(f)), BNSF acted immediately to seek a stay before the Board. Then, while awaiting the Board's action on its petition for stay, BNSF petitioned this Court to review the Board's flawed injunction decision. Now, shortly after its petition was docketed and appearances have been made by other parties, and as BNSF continues to await a decision on its petition for a stay from the Board, BNSF requests an expedited briefing schedule and an expedited decision.

If this petition for review were to become moot, the Court would be unable to correct critical errors in the Board decision. As BNSF's briefing and motion to stay will explain in more detail, a bare majority of the Board has issued an injunction riddled with legal errors that will have serious consequences if left standing. It failed to apply a century's worth of precedent on the nature of the common carrier obligation. It treated purely economic harm as irreparable injury justifying the extraordinary remedy of a preliminary injunction. And it failed to take into account the interests of other shippers whose interests its order affects—despite those very shippers expressing their concern about the Board picking commercial winners and losers through its orders.

To preserve BNSF's right to be heard on the merits and to have an opportunity to correct important errors in the decision below, this Court should expedite briefing, argument, and resolution of this petition for review.

### **III. Expediting Review Would Serve the Public Interest**

Protecting the public interest is at the core of BNSF's petition for review. As Member Fuchs explained in his dissenting opinion below, the Board majority's injunction "undermines commercial collaboration between rail carriers and shippers," App173, and it warps the incentives to negotiate contracts between railroads and shippers, App174, both of which harm the public. Moreover, under the terms of that injunction, BNSF may be forced to divert resources from serving other shippers. *See* App112-116 (discussing effect of ordering BNSF to transport approximately 29 trains per month). This creates a risk of upsetting other shippers' supply chain and, ultimately, harming the consumers of all the goods that travel by rail.

The longer the Board majority's unlawful injunction remains effective, the deeper these harms become. The Board majority's flawed reasoning will only further infect parallel proceedings, as a companion

case between NTEC and BNSF proceeds before the Board. *See* Complaint, *Navajo Transitional Energy Co., LLC v. BNSF Railway Co.*, No. NOR 42179, (STB Apr. 14, 2023). Expediting review, and thus expediting reversal of the Board majority's decision, would serve the public interest.

### **Conclusion**

For the foregoing reasons, Petitioner respectfully requests that the Court enter an expedited schedule for briefing and argument.

Date: August 3, 2023

Respectfully submitted,

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*Counsel for Petitioner*

**Certificate of Conference**

Pursuant to 5th Cir. R. 27.4, I hereby certify that the movant has conferred with counsel for Respondents, both of which oppose the relief requested. Movant also attempted to confer with the Navajo Transitional Energy Company, LLC (“NTEC”) (the petitioner below and real party in interest and proposed intervenor in this Court). At the time of filing, movant has not received a response from counsel for NTEC, and therefore assumes NTEC opposes the relief requested.

Dated: August 3, 2023

/s/ Benjamin J. Horwich  
Benjamin J. Horwich

**Certificate of Service**

I certify that on August 3, 2023, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

Dated: August 3, 2023

/s/ Benjamin J. Horwich  
Benjamin J. Horwich

**Certificate of Compliance**

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1,395 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Century Schoolbook.

3. Per this Court's rules, (a) the required privacy redactions have been made to this motion, 5th Cir. R. 25.2.13; (b) the electronic submission is an exact copy of any paper document to be filed at a future date, see 5th Cir. R. 25.2.1; and (c) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

DATED: August 3, 2023

/s/ Benjamin J. Horwich  
Benjamin J. Horwich