No. 23-60402

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BNSF Railway Company,

Petitioner,

v.

Surface Transportation Board; United States of America,

Respondents.

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

Petitioner's Motion for a Partial Stay of Preliminary Injunction Pending Appeal

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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, 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.

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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

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Introduction

This case arises from a misconceived and intrusive preliminary injunction entered by a federal agency in the midst of a commercial dispute between a railroad (Petitioner BNSF Railway Company ("BNSF")) and a coal shipper (Navajo Transitional Energy Company, LLC ("NTEC")). By a 3-to-2 vote, the Surface Transportation Board ("Board") ordered BNSF to provide common-carrier service to NTEC in 2023 to transport (a) 4.2 million tons of coal from Montana to Canada for export and (b) if resources "are available," App156,[1] an additional 1 million tons (the "contingent portion" of the injunction). That total volume would be unprecedented for NTEC, and yet, because this is common-carrier service, NTEC has no obligation to ship anything at all. BNSF is now enjoined to stand ready to move billions of pounds of coal, never mind the effects on its network and the diversion of resources away from serving other shippers.

In theory, without resource constraints, NTEC could request whatever it wanted, and BNSF would easily carry NTEC's shipments.

[1] All references are to the sealed appendix filed separately in conjunction with this motion.

But in the real world, shippers must make reasonable requests, railroads must respond reasonably in light of their limited resources and the competing demands of other shippers, and regulators must judge the reasonableness of the request and the response.

The Board majority's decision is divorced from those realities, and it must be vacated. Of most immediate concern, the injunction's contingent portion must be stayed. The Board committed one legal error after another: It failed to properly assess the reasonableness of NTEC's request. Then it asked merely whether BNSF had the theoretical "capacity" to carry NTEC's coal, rather than evaluating the reasonableness of BNSF's decisions in light of BNSF's resources and competing demands. Then it elevated to irreparable-harm status the garden-variety commercial issues that any shipper and railroad face in a service dispute—expenses incurred or profits lost when shipments are delayed. And then it failed to account for the public's interest in having railroads run by railroads, not by a federal agency handing out regulatory advantages that don't exist in the free market.

BNSF requests the minimum relief necessary at this stage. It appears that BNSF can meet the 4.2-million-ton mark in 2023 without

overly compromising its operations or other shippers' interests. But the additional 1 million tons is a different matter: Whatever BNSF's precise obligations are to ensure that resources "are available," App156 (the injunction does not say), shipping an additional 1 million tons would require taking equipment and crews away from other shippers, or investing in resources that NTEC would have no obligation to use. A stay of that latter part of the injunction would avoid putting BNSF to those costly choices (for which it cannot be made whole after the injunction is vacated). And that partial stay will not irreparably harm NTEC, when that 1 million tons represents a small portion (just over 1%) of its annual coal production.

This Court should stay the contingent portion of the Board's injunction pending full review.

Jurisdictional Statement

The courts of appeals have "exclusive jurisdiction" to review "final orders of the" Board. 28 U.S.C. § 2342; *see id.* § 2321. A party aggrieved by a final Board order may, as BNSF has here, petition for review "in the judicial circuit in which the petitioner resides or has its

principal office," *id.* § 2343, within 60 days of the relevant final order, *id.* § 2344.

The Board's injunction is a final order. Courts use a flexible approach when assessing finality. *See Bennett v. Spear*, 520 U.S. 154, 177 (1997). An agency action is final if it (1) "mark[s] the culmination of the [agency's] decision-making process" and (2) has "direct and appreciable legal consequences." *United Nat. Foods, Inc. v. NLRB*, 66 F.4th 536, 542 (5th Cir. 2023). Here, both conditions are satisfied.

First, the Board's decision conclusively resolved NTEC's application for an emergency service order or, in the alternative, a preliminary injunction ("Application"). No further proceedings (other than periodic status reporting) are pending on the relevant docket before the Board. The Board need not take *any* further action on NTEC's application, so its decision cannot be viewed as "merely tentative or interlocutory," *Bennett*, 520 U.S. at 178, and this Court's review will not "disrupt the administrative process," *Bell v. New Jersey*, 461 U.S. 773, 779 (1983).

NTEC has separately filed a common-carrier complaint against BNSF. *See* Complaint, *Navajo Transitional Energy Co. v. BNSF Ry.*,

NOR 42179 (STB Apr. 14, 2023) ("Complaint"). The Complaint does not affect finality here. The Complaint is distinct from NTEC's Application; they were docketed separately, *see* App142, followed separate procedural schedules, and sought wholly distinct remedies. The Complaint sought permanent injunctive relief, damages, and penalties. Complaint at 25 (invoking 49 U.S.C. §§ 10702, 11101, 11901, 11906, 11907). The Application, by contrast, sought only temporary relief under different statutory provisions. App3 (invoking 49 U.S.C. §§ 1321(b)(4), 11123).

Second, the Board's injunction has "direct and appreciable legal consequences" for BNSF. *United Nat. Foods*, 66 F.4th at 542 (citation omitted). It requires BNSF to commit substantial resources to the transportation of coal for NTEC—to the exclusion of serving other customers and on pain of civil penalties. *See* 49 U.S.C. § 11901(a). The Board's injunction was thus an "adjudication that purports to bind parties and alter their conduct, …forc[ing] [BNSF] to alter its conduct, or expose itself to potential liability." *Louisiana v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 582 (5th Cir. 2016) (cleaned up).

Statement of the Case

A. Legal Background

1. The Interstate Commerce Commission (ICC) once had sweeping authority to economically regulate the Nation's railroads. It passed prospectively on railroads' rates, and it constantly adjudged the permissibility of other practices. Railroads were forbidden to negotiate service contracts with individual shippers unless all similarly situated shippers received the same terms. That overgrown regulatory regime proved cumbersome and suffocating. As tractor-trailers began moving goods on the new interstate highway system in the mid-twentieth century, railroads were barred from setting their own rates or flexibly contracting with customers. Railroads began to go bankrupt, leading to further governmental intervention. *See generally* Nat'l Acad. of Sciences, Eng. & Med., Transp. Research Bd., *Modernizing Freight Rail Regulation* 13-33 (2015), https://nap.nationalacademies.org/download/21759.

Congress responded by deregulating the railroad industry from the 1970s through the 1990s, most notably through the Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1897. "Congress stressed its conviction that competitive forces, rather than regulations[,] should be

used to set price and service levels where effective competition prevails." *W. Coal Traffic League v. United States*, 719 F.2d 772, 777 (5th Cir. 1983). The Board has explained that "the deregulatory approach provided by the Staggers Rail Act" has been of "critical importance to the economic viability of the rail industry." *Review of Access and Competition Issues*, EP 575, 1998 WL 69287, at *2 (STB served Feb. 20, 1998). Indeed, "[t]he Staggers Act is considered the most successful rail transportation legislation ever produced." S. Rep. 104-176, at 3 (1995).

In time, the ICC was abolished, and its residual functions now reside in the Board. *See* ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA). Unlike the ICC of old, the Board cannot enforce the common-carrier obligation across the industry. Indeed, it must exempt traffic from regulation "to the maximum extent consistent with [ICCTA]." 49 U.S.C. § 10502(a); *see generally Union Pac. R.R. Co. v. Reg'l Transportation Auth.*, No. 22-1445, 2023 WL 4755727, at *2 (7th Cir. July 26, 2023) ("[O]ne goal of [ICCTA] was to deregulate rail transportation."). And even in that limited arena, the Board's authority is cabined because shippers and railroads now can (and overwhelmingly

do) order their relationships with private, confidential contracts, which are not subject to regulatory oversight or remedies (outside of limited circumstances not present here). *See* 49 U.S.C. § 10709. For traffic that remains regulated (including NTEC's traffic here), the Board does not prospectively set rates or otherwise dictate the terms of common-carrier service—it can only investigate as necessary and act on shippers' complaints, *see, e.g.*, 49 U.S.C. §§ 10704(b), 11701.

2. Under the common-carrier obligation, a railroad must "provide to any person, on request, [its common-carrier] rates and other service terms," 49 U.S.C. § 11101(b), and must provide "transportation or service" pursuant to those terms "on reasonable request," *id.* § 11101(a). But "how a railroad satisfies its common[-]carrier obligation is left to the railroad to decide in the first instance." *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, NOR 42056, 2004 WL 2619767, at *5 (STB served Sept. 27, 2004). A railroad "need not provide the particular service that the shipper would prefer." *Id.*

Deciding whether a railroad has breached its common-carrier obligation by refusing to provide service requested by a shipper is a two-step inquiry. *First*, a shipper's request must be reasonable based on all

the relevant facts and circumstances. *Union Pacific R.R.*, FD 35219, slip op. at 3-4 (STB served June 11, 2009). A request would not be reasonable, for example, if it "insist[ed] upon a wasteful…service for which the consumer must ultimately pay." *Atchison, T. & S.F. Ry. v. United States*, 232 U.S. 199, 217 (1914).

Second, because a railroad must manage shippers' many demands on its network's limited resources, a railroad can properly refuse even a reasonable request—though in a common-carrier case such as this, it will then be "incumbent upon the carrier to provide a reasonable explanation for denying that request." *Sherwin Alumina Co., LLC*, NOR 42143, 2015 WL 5711004 (STB served Sept. 29, 2015). "[T]he common-carrier obligation does not require a carrier to maintain service levels for one shipper that will degrade service overall." *Savannah Port Terminal R.R., Inc.*, FD 34920, 2008 WL 2224904, at *6 (STB served May 30, 2008). A railroad need only "provide adequate service" under the circumstances. *Bi-State Dev. Agency of the Mo.-Ill. Metro. Dist.*, FD 31425 (Sub-No. 1), 1989 WL 239312, at *2 (ICC Aug. 29, 1989).

B. Factual Background

1. Although most coal mined domestically is burned domestically, BNSF has for years transported coal from mines in the Powder River Basin of Montana and Wyoming to the Westshore Terminals in British Columbia for export to Asia. App56-57. Those shipments move along a vital, congested corridor that BNSF uses to transport cargo to and from the Pacific Northwest. App57. Until recently, finely negotiated contracts under 49 U.S.C. § 10709 between BNSF and shippers set the terms and conditions for *all* of BNSF's export coal shipments. App79. "This is largely because both…shippers and BNSF are better able to devote the significant resources…associated with these large volume, single-origin to single-destination movements, if the economic and operational terms are known well in advance." App79.

In 2019, NTEC acquired four mines in Montana from the bankruptcy estate of Cloud Peak Energy, Inc. App53. One of those mines—Spring Creek—produces approximately 15 million tons of coal annually. App53. Most of that coal heads to domestic locations, but a portion travels to Westshore for export to Japan and Korea. App53. In

acquiring the mine, NTEC also inherited a contract governing BNSF's transport of that export coal through December 2020. App57.

2. To ease NTEC's transition into the export-coal market, BNSF agreed to renegotiate that preexisting contract. It gave NTEC a number of favorable terms, including a generous payment plan for outstanding contract liabilities that Cloud Peak had incurred when it failed to meet its minimum shipment obligations for 2018 and 2019. App57; *see* App201-202. For the next two years, the parties negotiated and executed yearly contracts. App57-58.

Since NTEC acquired Spring Creek, the market for export coal has swung wildly. Export coal prices skyrocketed during 2021 and 2022, and NTEC sought to capitalize on that market opportunity by dramatically increasing its shipments to Westshore. *See* App58-59. At first, BNSF was able to accommodate that request: Fair weather, depressed passenger travel, and reduced demand elsewhere in the region allowed BNSF to devote more resources to carrying NTEC shipments during this point of peak demand. App112-113. But BNSF's ability to accommodate NTEC's peak demand for export-coal shipments proved short-lived. As the Nation exited the pandemic, demand was

volatile, key resources became scarce, and systemwide issues arose. App59-60; *see* App110.

Against this backdrop, the parties began negotiating a new shipping agreement for 2023. *See* App94-97 (summarizing negotiations). NTEC wanted to continue capitalizing on the high price of export coal, demanding BNSF commit to carrying high volumes of coal from Spring Creek to Westshore. App94-95. BNSF was mindful of volatility in the coal market (indeed, prices have since dropped sharply) and aware of both Cloud Peak's and NTEC's prior failures to meet minimum volume commitments, so it sought minimum volume commitments from NTEC in exchange for providing such a high level of service. App94.

In late December 2022, NTEC abandoned those negotiations. App97. It sued BNSF, claiming breach of the 2022 contract, *id.*, and it demanded BNSF commit to providing a year's worth of common-carrier service at or above the peak level reached in prior years, *see* App112. BNSF explained why it could not make that commitment. Whatever might have been possible under contract, BNSF could make no such commitment given its available resources, given other demands on its

network, and given that NTEC would have *no obligation to ship any coal at all* under a common-carrier relationship.

C. Board Proceedings

1. NTEC went to the Board to get what it could not obtain by negotiated contract. On April 14, 2023, NTEC filed an ex parte application seeking an emergency service order or preliminary injunction. App142. NTEC sought an order directing BNSF to transport 5.2 million tons of coal from Spring Creek to Westshore over 2023, distributed evenly throughout the year (approximately 29 trains per month). App143. That request exceeded the highest volume of coal the mine has ever exported during its nearly 20-year lifetime. Indeed, Spring Creek has only once shipped 5 million tons of coal for export in a single year.

2. By a 3-to-2 vote, the Board issued an injunction requiring BNSF "to transport a minimum of 4.2 million tons of coal" from Spring Creek to Westshore "in 2023" to be "reasonably distributed through the remainder of the year" (approximately 23 trains per month). App154. The primary (if not exclusive) basis for the Board majority's decision was BNSF's supposed "capacity" to transport coal, as evidenced by

shipping volumes offered during complex contract negotiations. *E.g.*, App147-148. The Board treated BNSF's offer to transport at least 4.2 million tons (made during complex contractual negotiations) as an outcome-determinative concession on the common-carrier-obligation question—irrespective of any other market factor. *Cf.* App147.

Of particular relevance to this motion, the Board also ordered BNSF "to transport an additional one million tons of coal" (approximately 6 more trains per month) "to the extent that additional train sets and crews…become available." App154-155. The Board provided little explanation for this contingent portion of the injunction. It did not explain what was meant by "additional train sets and crews…becom[ing] available"; such resources do not spontaneously generate. Nor did it say whether, how, or to what extent, BNSF must shift or expand its resources to make such "additional train sets and crews…available" when NTEC would have no obligation to use them.

3. Board Members Fuchs and Schultz each dissented. Both would have denied NTEC's request, concluding the majority's approach was flawed at multiple stages of the analysis. For example, Member Fuchs explained how the Board majority's capacity-based test was

"vague and potentially harmful." App167. Both dissenting Members would have rejected NTEC's claimed irreparable harm because NTEC failed to show "that any [alleged] harm is certain, imminent, or great." App164 (Fuchs, dissenting); *see* App176 (Schultz, dissenting) (explaining how NTEC conceded its harms were "highly speculative"). And they explained how the Board majority ignored the complexities of the coal market and "drew on an incomplete record" in a "premature, unfair decision-making" process, leading to "an inadequately explained contingent injunction that risks harm to others." App156-157, 172 (Fuchs, dissenting).

Federal Rule of Appellate Procedure 18(a)(2)(A) Statement

On July 17, 2023, BNSF petitioned the Board to stay the contingent portion of its injunction. On July 24, 2023, NTEC replied to BNSF's petition. App192. On July 26, 2023, BNSF informed respondents that, failing Board action, it would seek a stay from this Court. More than a week later, the Board has "failed to afford the relief requested," Fed. R. App. P. 18(a)(2)(A)(ii)—or take any action.

Circuit Rule 27.4 Statement

Although this motion is not an emergency matter under Circuit Rule 27.3, BNSF has serious need for the Court to resolve this motion

by late August. BNSF has been providing service to NTEC at a pace that is likely to comply with the Board's 4.2-million-ton requirement, which BNSF does not ask this Court to stay. As the end of the year draws closer, it becomes increasingly difficult or impossible to increase the volume of shipments by 1 million tons to comply with the contingent portion of the injunction. A combination of seasonal cycles that peak in the fourth quarter in the Pacific Northwest—including increased shipments of domestic coal as winter approaches, increased intermodal container traffic, and agricultural traffic from the fall harvest—make it especially difficult to significantly expand service for any shipper. Thus, BNSF needs 1-2 months' lead time to plan traffic on its network and communicate those plans to other shippers whose shipments may be constrained if BNSF is required to serve NTEC at the Board-ordered level. BNSF therefore respectfully requests a decision on this motion by August 31, 2023.

Argument

For a stay pending review, this Court "consider[s] four factors: (1) whether the requester makes a strong showing that it [is] likely to succeed on the merits; (2) whether the requester will be irreparably

injured without a stay; (3) whether other interested parties will be irreparably injured by a stay; and (4) where the public interest lies." *Wages & White Lion Invs., LLC v. FDA*, 16 F.4th 1130, 1135 (5th Cir. 2021). "The first two factors," likelihood of success and irreparable injury, "are the most critical." *Valentine v. Collier*, 956 F.3d 797, 801 (5th Cir. 2020) (per curiam). All factors strongly favor a stay of the contingent portion of the injunction.

A. BNSF Is Likely to Succeed on the Merits, Especially with Respect to the Contingent Portion

The Board applies a traditional four-factor preliminary injunction analysis, considering (1) the movant's likelihood of success, (2) irreparable harm to the movant absent an injunction, (3) harm to other interested parties if an injunction were entered, and (4) the public interest. *See* App144. The Board's error on a single factor would be sufficient to vacate its decision, but the Board erred each step of the way—arbitrarily ignoring facts, disregarding its own precedent without explanation, acting contrary to judicial precedent, and failing to rationally connect the facts it found to the injunction it issued. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 57 (1983) (describing standard for review under

5 U.S.C. § 706(a)(2)). This Court's review is "not toothless" and has "serious bite"—and there is much to chew on here. *Data Mktg. P'ship, LP v. U.S. Dep't of Lab.*, 45 F.4th 846, 856 (5th Cir. 2022) (citations omitted).

1. In holding that NTEC was likely to succeed on the merits, the Board applied a contrived understanding of the common-carrier obligation, ignoring undisputed facts and skipping necessary steps in its own common-carrier framework.

First, the Board's analysis of whether NTEC made a "reasonable request" for shipment ignored the real-world facts. NTEC requested that BNSF transport more than 5.2 million tons of coal from Spring Creek to Westshore during 2023. *See* App62. That request exceeded the maximum amount *ever* shipped from Spring Creek to Westshore in a single year (in 2021). App62.

A confluence of events—favorable weather conditions, declining passenger travel, fewer export coal shippers in the market, and the ample resources that resulted—had allowed 2021 to reach unprecedented volumes. App112-113. But nothing about the 2023 market suggested a record year was around the corner. The export coal

market had already begun to decline by 2023—following a drop in export prices. App59.

Thus, NTEC was requesting record-level service without bearing any risk (*i.e.*, no contract protections for BNSF) in a market already on the downswing. With reason to doubt that NTEC would meet this shipment level, its request appeared to be an unreasonable "insist[ence] upon a wasteful…service for which the consumer must ultimately pay." *Atchison, T. & S.F. Ry.*, 232 U.S. at 217.

Second, the Board missed an entire step in the common-carrier analysis. Even if NTEC's request had been "reasonable," BNSF's common-carrier obligation is not a mandate to provide all the service a shipper demands; BNSF's obligation is to provide "adequate" service under the circumstances. *Granite State Concrete Co., Inc. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005); *see id.* at 92 n.10 ("'Adequate service'…is a part of the general definition of common[-]carrier obligations.") (citing, *e.g.*, *Wales Transp., Inc. v. ICC*, 728 F.2d 774, 780 n.9 (5th Cir. 1984)). A railroad is best positioned to assess its ability to render adequate service to the many shippers that rely on its network. Here, BNSF had, and articulated to the Board, well-grounded reasons for declining to

commit to the extraordinary service level NTEC demanded. The Board erred and departed from its own precedent by failing to engage those explanations. *See Sherwin Alumina*, 2015 WL 5711004, at *7 (rejecting shipper's common-carrier complaint, reasoning in part that "[i]t was reasonable for [the railroad] to conclude that [meeting the shipper's request] would have a negative impact on [the railroad's] other customers").

Rather than assessing BNSF's reasonable explanations for why it would not provide NTEC's requested level of service, the Board majority focused instead on BNSF's purported "capacity." *E.g.*, App57-58. The Board misconstrued the role of "capacity" in this context. "Capacity" sets a *ceiling* on a common carrier's obligation, which is to "carry for all *to the extent of its capacity* at a reasonable charge and with substantial impartiality." *B.J. Alan Co., Inc. v. United Parcel Serv.*, 5 I.C.C. 2d 700, 710 (1989) (emphasis added); *see Mich. Pub. Util. Comm'n v. Duke*, 266 U.S. 570, 577 (1925) (same). Finding that a railroad *has* the "capacity" to meet one shipper's demands says nothing about whether the railroad has reasonably *allocated* that capacity. As Member Fuchs pointed out in dissent, the Board inexplicably ignored its "precedent that 'the

common[-]carrier obligation does not require a carrier to maintain service levels for one shipper that will degrade service overall.'" App211 (quoting *Savannah Port,* FD 34920, slip op. at 8).

Even if the Board had not misunderstood the role of capacity, defining the common-carrier obligation by reference to a railroad's "capacity" would be "vague and potentially harmful." App167 (Fuchs, dissenting). "[R]ail 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." *Id.* The contingent portion of the injunction is especially problematic because it could be read to require BNSF to *increase* capacity in response to a common-carrier request—a question even the Board majority expressly reserved. *See* App145; App154-155 (requiring BNSF to ship an additional 1 million tons of coal "to the extent that *additional* train set and crews…*become available*" (emphasis added)).[2]

[2] To be clear, BNSF does not believe that the contingent portion requires BNSF to acquire additional train sets. Ordering that relief on a preliminary injunction would be unprecedented. And any such requirement would arise not from the common-carrier obligation but from the Board's statutory power to "require a rail carrier to provide facilities and equipment that are reasonably necessary to furnish safe

2. The Board also committed legal error in finding that NTEC would suffer irreparable harm absent an injunction. Irreparable harm is a statutory prerequisite, 49 U.S.C. § 1321(b)(4), and there "there must be more than an unfounded fear on the part of the" movant. *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985). "Speculative" allegations of harm will not do. *Id.* "[O]nly those injuries that cannot be redressed by the application of a judicial remedy after a hearing on the merits can properly justify a preliminary injunction." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

NTEC's claimed harms, *on the Board's own telling*, fail those metrics. The Board majority asserted that "injury to NTEC's reputation," resulting in "loss of nascent business" and possibly impacting the Navajo Nation, constituted irreparable harm. App151. But it did not, and could not on this record, find that alleged harm was "certain, imminent, or great." App164 (Fuchs, dissenting). For example, *NTEC's own witness* testified that it "would be highly

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and adequate car service." 49 U.S.C. § 11121(a)(1). Such an order demands comprehensive operational and economic findings, *see id.*, which NTEC did not brief and the Board's decision never mentions.

speculative" to predict that inability to ship extremely high volumes of coal would have any enduring impact on NTEC's reputation, App138, an admission that the Board ignored entirely, *see* App172 (Schultz, dissenting) (raising this issue, without response from the majority). Consistent with its admission, NTEC failed to provide any concrete evidence supporting a claim of irreparable harm. *See* App161 (Fuchs, dissenting); App172 (Schultz, dissenting). Its arguments centered on lost sales—the quintessential economic harm remedied (if proven) through damages. *See* App162 (Fuchs, dissenting).

Most importantly for present purposes, the Board majority did not attempt to assess the irreparable harm question as it relates to the "contingent" part of the injunction. Simple math refutes the notion that NTEC will suffer irreparable harm without that part of the injunction: The contingent, incremental 1 million tons represents a fraction of NTEC's coal mines' annual production (roughly 90 million tons). App53, 63.

3. The Board's analysis of the harms to other interested parties and the public interest is also unlikely to withstand judicial review. The Board failed to rationally account for the interests of other shippers

in the lane, disregarded impacts on the larger community of shippers that relies on BNSF, and gave no weight to BNSF's interest in efficiently managing its network. That was despite the fact that three other shippers that compete with NTEC (or wish to) filed comments with the Board opposing the injunction NTEC sought. *See* App120, App70; App67. Every shipper of coal to Westshore has, in the recent past, desired an increase in its export shipping volume. *See* App120; App67. NTEC is not unique in that regard, so the injunction (especially the contingent portion) picks winners and losers in a battle over scarce resources. *Cf.* App172-173 (Fuchs, dissenting) ("[T]hese other shippers also have unmet requests.… And no doubt other shippers outside of the coal industry would like to see newly available crew allocated to their specific needs."). That result is an unexplained, untenable departure from settled Board precedent against playing favorites among shippers. *E.g.*, *DeBruce Grain v. Union Pac. R.R.*, NOR 42023 (STB served Dec. 22, 1997).

B. BNSF Faces Irreparable Harm Absent a Stay

BNSF's affirmative obligations under the contingent portion of the injunction are unclear, but anything they demand puts BNSF at risk of

taking actions that will incur unrecoverable costs or liabilities if the injunction is overturned. For example, acquiring and repositioning train sets would take time and resources from BNSF, but the injunction imposes no obligations on NTEC—not to utilize those train sets, not to pay liquidated damages for failing to meet a minimum-volume commitment, or indeed to do anything. BNSF has no way of recouping its expenditures if NTEC does not use BNSF's service.

If the contingent portion of the preliminary injunction requires BNSF to cut service to other shippers, BNSF may have to breach its contracts, or face other shippers' common-carrier complaints—trapping BNSF in a Catch-22 of the Board's own making. Here, too, compliance with the injunction will come at a cost to BNSF, but BNSF will have no path to being made whole if this Court overturns it.

The Board majority accounted for none of this. The injunction decision explained the contingent portion of the injunction as being rooted in "the benefit of the doubt" accorded to BNSF, App155, and reasoned that, based on BNSF's statements, BNSF could be expected to have the capacity to move 1 million additional tons, *e.g.*, App147-148 & nn.9-10. But Member Fuchs's dissent correctly understood the record of

BNSF's statements as *at most* establishing that BNSF could move 4.2 million tons. App167-170. And Member Schultz agreed that BNSF's arguments about constraints on its capacity were "valid." App178.

C. A Stay Will Not Irreparably Harm NTEC

NTEC, the real party in interest here, would face no harm if a stay were granted—and indeed, it did not argue before the Board that it would be harmed by a partial stay, *see* App201. As explained in Part A.2, *supra*, NTEC faces no irreparable harm—especially not from a stay of the contingent portion, which concerns a volume equal to scarcely more than 1% of NTEC's total annual coal sales. The very fact that the additional 1 million tons is *contingent* suggests it is not at all *necessary* to avoid irreparable harm.

D. The Public Interest Supports a Stay

The Board's injunction "undermines commercial collaboration between rail carriers and shippers," App173 (Fuchs, dissenting), and it warps the incentives to negotiate contracts, App174 (Fuchs, dissenting), both of which harm the public. The adverse effect of the preliminary injunction on the public interest supports a stay.

Other public-interest considerations further counsel strongly in favor of a stay. *First*, absent a stay, BNSF may be forced to divert

resources from serving other shippers. Upsetting other shippers' expectations would negatively affect not only those shippers, but also others in the supply chain, and, ultimately, consumers of all the goods that travel by railroad.

Second, and more broadly, modern federal railroad law and policy rest on a foundational recognition that the railroad—not its regulator—will be the most efficient decisionmaker with respect to allocation of its resources because it has the best information about its network's capabilities. *E.g.*, App161 (Fuchs, dissenting) (noting that "[r]ailroads must maintain the flexibility to respond to changes in demand and market conditions" (quoting *Major Rail Consol. Procs.*, 5 S.T.B. 539, 578 (2001)); *id.* ("[T]he Board tries to avoid micromanaging a carrier's operational decisions." (citation omitted)). The flexible, efficient use of the rail network is, indeed, expressly declared as sound public policy. *See* 49 U.S.C. § 10101(2), (3), (9) (articulating federal policy "to promote a safe and efficient rail transportation system," to encourage "efficient management of railroads," and "to minimize the need for Federal regulatory control over the rail transportation system"). The contingent

portion of the preliminary injunction disserves those principles, and staying it pending judicial review would promote them.

Conclusion

The contingent portion of the injunction should be stayed.

Date: August 3, 2023

Respectfully submitted,

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Certificate of Conference

Pursuant to 5th Cir. R. 27.4, I hereby certify that the movant has conferred with counsel for Respondents and attempted to confer with counsel for NTEC regarding the relief sought in this Motion. The Surface Transportation Board did not indicate its consent. The United States stated that it typically does not take substantive positions responding to requests for stays of Board rulings. 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, this 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 5,160 words.

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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
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