

ORAL ARGUMENT SCHEDULED FOR MAY 10, 2023

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

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CRUCIAL DEVELOPMENTS SINCE THE BOARD'S APRIL 27, 2023, PRE-ARGUMENT CONFERENCE

Before turning to the questions raised by the Surface Transportation Board's ("STB" or "Board") at the Pre-Argument Conference ("Conference"), Navajo Transitional Energy Company, LLC ("NTEC") brings two troubling post-Conference developments to the Board's attention.

1. On Friday April 28, the day after the Board's pre-argument conference and nine days after BNSF Railway Company ("BNSF") told the Board in a sworn verified statement that "there are short term constraints that prevent BNSF from increasing the volume of service at this time" (V.S. Lawler at 13), BNSF informed NTEC that it was increasing its estimate of June coal transportation service by six trains from 16 to 22 trains. Supplemental Verified Statement of Matthew Babcock ("S.V.S. Babcock") at ¶ 47. This increase represents a welcome development, but the total number of trains that BNSF now has estimated for June (in the context of Board scrutiny) still falls far short of NTEC's reasonable, peak-season needs for the month. Moreover, NTEC remains deeply concerned that – absent ongoing, direct attention from the Board – BNSF ultimately may not honor this revised service estimate or may provide unacceptably low train-count estimates and/or service for July or thereafter. *Id.* Simply put, BNSF only continues to reinforce to NTEC that it will serve NTEC's export coal traffic at its sole convenience and discretion.

2. Even more disturbingly, on May 4, 2023, BNSF filed its Answer to NTEC's Complaint in the separate but related docket NOR 42179, wherein BNSF claims

for the first time that on March 27, 2023, when it raised NTEC's rate by 4% under Common Carrier Tariff BNSF 90139 (applicable here), it actually removed the "the 'sole discretion' Service Limitation Notice . . . over two weeks prior to NTEC filing its Complaint and Petition for Declaratory Order." BNSF Answer at ¶ 23.

BNSF's discovery of the absence of the "sole discretion" language in its March 27 "Rate Item Price List" only appears to have occurred *after* the Board's Conference. BNSF never mentioned this significant deletion in any communications with NTEC, and BNSF did not mention the deletion in any of its pleadings filed to date in connection with NTEC's Petition for Emergency Relief.

BNSF's updated tariff, BNSF 90139, Item 1 (Counsel Exhibit 2 hereto), is plainly a supplemental "Rate Item Price List" and a simple update to the primary price authority published on December 29, 2022 (Exhibit MDB-3). It does not purport to cancel the master 90139 tariff, nor does it specifically cancel any provision of that tariff as required by regulation. Indeed, 49 C.F.R. § 1300.4(d) specifically requires that any change in tariffs service terms "*must clearly identify the increases in rates or charges or the changes in service terms.*" (Emphasis added). This tariff does not modify or cancel the "sole discretion" provision, nor does it alter other key provisions.¹ Second, if BNSF had canceled the "sole discretion" provision in the manner and on the date it now claims, BNSF's expansive April 19 Reply in this case, which included a verified statement from

¹ NTEC anticipates that if it claimed, outside of this proceeding, that BNSF's ministerial tariff update canceled the "sole discretion" provision, BNSF would disagree with that claim.

the Vice President of the BNSF coal group, would have immediately brought this critical development to the Board’s attention. And even if BNSF is now willing to cancel the “sole discretion” provision, NTEC submits that the removal of the words is not removal of the unreasonable practice itself, since BNSF has consistently demonstrated that, without the Board’s oversight, BNSF will continue to act in its sole discretion with respect to NTEC’s service.

EXECUTIVE SUMMARY

On April 27, 2023, the Board held the pre-argument Conference to “discuss the expectations for the May 10 oral argument” in this matter.² During the Conference, the Board requested that NTEC and BNSF clarify several legal standards at issue in this case and provide answers to a series of factual questions. NTEC submits this supplemental filing in response to the Board’s request.

NTEC’s Supplemental Filing is divided into three parts: (1) this Legal Argument clarifying and amplifying the relevant legal standards; (2) the Supplemental Verified Statement of Matthew Babcock (“S.V.S. Babcock”) answering factual questions regarding train volumes and discrimination, export coal marketing, contract negotiations, and certain reputational harms; and (3) the Verified Statement of Vern Lund (“V.S. Lund”) answering factual questions regarding the potential for irreparable harm,

² *Navajo Transitional Energy Company, LLC – Ex Parte Petition for Emergency Service Order*, NOR 42178, at 1 (STB served April 24, 2023).

including impacts on NTEC and potentially the Navajo Nation, as well as additional information regarding reputational harms.

Questions of Law Raised by the Board

The Board requested that NTEC, or both parties in certain cases, address the following questions of law:

1. **Question:** *Does 49 U.S.C. § 11123(a) require a showing of irreparable harm as a prerequisite to the Board ordering relief?*

Summary Answer: No. The standard for relief under 49 U.S.C. § 11123 does not require the Petitioner to show irreparable harm. Instead, Section 11123 requires only that the petitioner “show a substantial, measurable service deterioration or other demonstrated inadequacy over an identified period of time by the incumbent carrier.” *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762, at 3 (STB served Apr. 22, 2022) (“EP 762 Revisions”); *Expedited Relief for Service Inadequacies*, 3 S.T.B. 968 (1998) (“Expedited Relief”); see also 49 C.F.R. § 1146.1.

2. **Question:** *Does NTEC’s Petition for Emergency Service Order seek service from an alternative carrier as described in 49 C.F.R. 1146.1?*

Summary Answer: No. NTEC is not aware of another rail carrier that could provide service, as a practical matter, from the Spring Creek Mine in Montana to Westshore. Alternative service is also not a prerequisite to a Board order for emergency service relief under 49 U.S.C. § 11123. See *EP 762 Revisions* at 4-5 (“Under 49 U.S.C. § 11123, however, the Board is clearly authorized to issue an emergency service directive without regard to whether an alternative carrier is available or necessary to remedy the particular issue.”) (citing 49 U.S.C. § 11123(a)(1)).

3. **Question:** *If the Board considers issuing an injunction either in addition to, or in the alternative to, an emergency service order, where is the cut-off between irreparable harm in this case and harms where compensation is, or may be, calculable?*

Summary Answer: NTEC seeks, in the first instance, an emergency service order, and the Board need only consider an injunction as additive or as an alternative to an emergency service order. Irreparable harm is distinguishable from harm that can be readily addressed through monetary damages. As Messrs. Lund and Babcock explain, NTEC is already suffering significant reputational harm where its lost coal-sales opportunities are not readily calculable and which threaten NTEC's ability to market export coal on a long-term basis (if at all). Additionally, to the extent that NTEC's beneficial financial performance inures to the benefit of the Navajo Nation, lost revenues may impact the Nation's financial resources and ability to provide services and programs to its citizens. Such harm is not directly calculable, and harm suffered today due to unavailability of funding for key programs and services cannot necessarily be remedied by funds received at a later date.

4. **Question:** *Does BNSF's Common Carrier Pricing Authority BNSF 90139 governing NTEC's common carrier shipments allow BNSF to provide service at its "sole discretion"?*

Summary Answer: No. BNSF cannot nullify its statutory common carrier obligation to NTEC by granting itself a "Service Limitation" that gives it the "sole discretion" to decide whether, and the extent to which, it is really bound by that obligation. The Board, not BNSF, has the authority to regulate the extent of BNSF's common carrier obligation. 49 U.S.C. § 11101.

5. **Question:** *If the answer to Question No. 4 is "no", what does the common carrier obligation require in this case?*

Summary Answer: The *sine qua non* of the common carrier obligation is that the carrier provide service upon reasonable request. 49 U.S.C. § 11101(a). And while the inquiry of reasonableness is fact specific, NTEC's common carrier request made on November 1, 2022, clearly delineated its request, which reflected NTEC's 2021 shipment level (particularly the 3Q21 and 4Q21 levels) and the level of shipments that NTEC required in 2022. BNSF provided common carrier rates and agreed to provide common carrier service in response to those clearly stated needs, but BNSF now is refusing, in large part, to transport NTEC's requested volumes. BNSF has never directly contested the reasonableness of NTEC's request, but instead suggests it is limited by other commitments and operational shortfalls that it should have

known about when it agreed to the common carrier rates and service NTEC requested.

1. **Question:** *BNSF suggests that the 2023 contract negotiations between the parties included a BNSF-proposed provision where the parties would mutually agree to release potential claims against each other, but it is unclear what claims BNSF is referring to in its Reply. What are BNSF's claims?*

Summary Answer: BNSF's argument is a red herring. BNSF had no truly ripe or pending claims against NTEC when it sought the "mutual" release during the contract negotiations relating to 2023 shipments. Instead, as Mr. Babcock explains, BNSF inserted this release for the first time in the final execution copy proposed by BNSF. BNSF's new provision demanded that NTEC release any and all claims related to any BNSF service deficiencies in 2022 as an absolute prerequisite to agreeing to any contract for service. When NTEC objected to this ultimatum from BNSF in the negotiations, BNSF unequivocally asserted they would not agree to a contract with NTEC for 2023 without this release. As filings in this matter confirm, those claims are now the subject of NTEC's court action in Montana, where NTEC alleges lost revenue and other economic damages in excess of \$150 million. BNSF's supposed mutuality of release is premised on a potential BNSF claim for liquidated damages (that did not even yet exist at the time) under a separate rail transportation contract where BNSF *may* allege it is owed liquidated damages for the period April 1, 2022, to March 31, 2023, even though BNSF itself was the party responsible for the reduction in NTEC's service throughout 2022 and 2023 (the contract at issue just expired at the end of March). Regardless, NTEC's 2022 claims dwarf BNSF alleged liquidated damages by a factor greater than 30 to 1.

Questions of Fact Raised by the Board

The Board requested that NTEC, or both parties in certain cases, address the following questions of fact:

1. **Question:** *What specific export coal contract obligations does NTEC have now? What sales is NTEC seeking to secure? How has NTEC been irreparably harmed in connection with its efforts to obtain these contracts? Why is any lost business that results from insufficient trains not compensable in money damages?*

Summary Answer: NTEC has 395,000 tons of coal under contract for delivery to Westshore in June and 150,000 tons of coal under contract for delivery in July. S.V.S. Babcock at ¶ 71. NTEC is seeking to place an additional 3.1 million under contract for delivery between June and December, 2023. *Id.* at 74. NTEC is hesitant to execute such contracts in light of BNSF's insufficient and inconsistent service. *Id.* at ¶ 73. NTEC is facing irreparable harm in that BNSF's service has exposed it to the real risk that NTEC will not be able to fulfill its existing coal-sales obligations; that it is rapidly losing market share and market confidence from potential customers; that it has substantial risk that it will not be able to meet the demand of its customers and potential customers during the critical peak season; that no damages can repair those relationships; and that ultimately the Navajo Nation may be deprived of resources it uses to support its citizens. S.V.S. Babcock at ¶¶ 73, 78-85; V.S. Lund at ¶¶ 17-24.

2. **Question:** *What is the basis for NTEC's allegation that it has experienced reputational damage and a degradation of its standing in the marketplace? And in that context how does the international export coal market from Westshore actually function?*

Summary Answer: During in-person meetings in Asia in February and April (and in other routine communications), current and potential customers have told Messrs. Lund and Babcock that they are concerned about contracting with NTEC because NTEC has a "railroad problem." In the course of those same discussions, NTEC's customers have identified NTEC's competitors as the source of the information leading to that rail-related concern. Those same competitors have attempted to distinguish their product from the NTEC product on the grounds that the competitors do not face the same railroad problem. S.V.S. Babcock at ¶¶ 79-80; V.S. Lund at ¶¶ 21-23.

With regard to the Asian export market: (i) sales typically are made months in advance of the date of delivery (to Westshore) so shippers can arrange for vessel transportation; (ii) coordination with Westshore and consistent train service are essential to the timely loading of vessels arriving at Westshore because storage is limited and demurrage charges can be significant, i.e., on the order of millions of dollars; and (iii) NTEC's Asian coal customers expect a high level of consistent performance and will readily seek other suppliers if a given supplier is not reliable. S.V.S. Babcock at ¶¶ 27, 84-85.

3. **Question:** *Please provide more details about the threatened or actual retaliation by BNSF.*

Summary Answer: In her January 17, 2023 letter, BNSF's Ms. Lawler complained about NTEC's refusal to accept BNSF's contract demands (*i.e.*, BNSF's claim-waiver demand) and Ms. Lawler stated that "[t]he common carrier doctrine does not obligate BNSF to move every last shipment of coal that NTEC decides to ship in 2023 . . . It also does not obligate BNSF to refrain from making contractual commitments to other shippers in the manner that NTEC demands." S.V.S. Babcock at ¶¶ 45, 56-57.

4. **Question:** *What is the basis for NTEC's allegation that BNSF is cutting the number of trainsets available to NTEC in order to serve customers with more favorable terms in their contracts, and who are these other customers?*

Summary Answer: Signal Peak and Arch are the other export coal producers that use BNSF to move coal to Westshore. S.V.S. Babcock at ¶¶ 49-50. During meetings between NTEC and BNSF's senior executives in the Spring of 2022, BNSF executives mentioned BNSF's other export coal customers by name and BNSF's executives told NTEC that its contractual terms were not as favorable as the contractual terms of one or more of those other customers. *Id.* at ¶¶ 35-36. On June 24, 2022, Ms. Farmer's sent a letter to Navajo Nation President Nez, in which she first stated that, under the parties' 2022 contract, "BNSF is not required to move any specific minimum volume of coal in 2022" and she next referred to BNSF having been "committed to honoring obligations relative to customer contract terms, including any committed volumes." *Id.* at ¶ 37 & Exhibit MDB-14.

5. **Question:** *Provide NTEC's account, at least for the months in the V.S. Lawler chart on page 11, of the number of trains that NTEC's records show were actually moved by BNSF?*

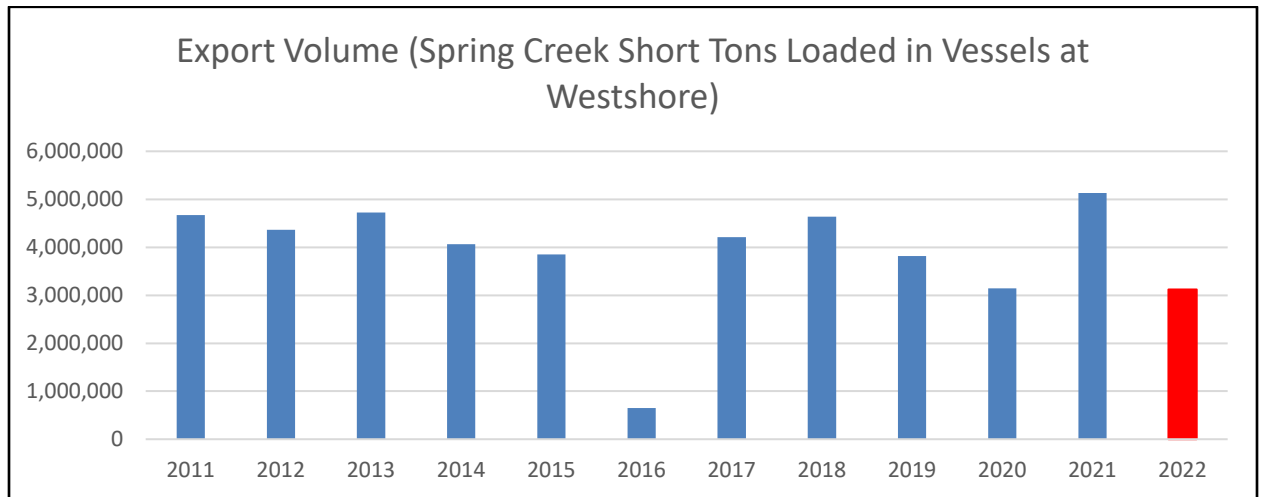
Summary Answer: Mr. Babcock's Supplemental V.S. identifies BNSF's actual tons of NTEC export coal, by month, and the associated train counts. S.V.S. Babcock at ¶ 7 and Exhibit MDB-6. For most months, the parties are in agreement on the tonnage figures. There are slight variations between NTEC's tonnage records and the data shown in Ms. Lawler's p. 11 table for certain other months, and in three instances (*e.g.*, January, August, and September 2020), NTEC's records show substantially larger volumes moving by rail. *Id.* at ¶ 8.

As these records reflect, NTEC transported at least 25 trains in 12 of the 15 months from January of 2021 through March of 2022 (*i.e.*, 80% of those

months). During the peak summer months for the export coal market (*i.e.*, June through September) in the years 2017-2019 and 2021, BNSF previously transported as many as 31, 32, 36, or even 39 trains per month of Spring Creek export coal. Exhibit MDB-6.

6. **Question:** *Provide a history of the number of export coal trains by month that BNSF has moved historically?*

Summary Answer: In this submission, NTEC identifies the detailed history of export shipments from the Spring Creek Mine on a monthly basis going back to January 2019. S.V.S. Babcock at ¶ 7; Exhibit MDB-6. BNSF's 2022 export transportation service for NTEC's Spring Creek coal (roughly 3.1 million tons) fell below BNSF's service levels for Spring Creek coal in 2011, 2012, 2013, 2014, 2015, 2017, 2018, 2019, 2020, and 2021 (*i.e.*, all years since 2011 with the exception of 2016, which was an aberration). *Id.* at ¶¶ 5-6.



7. **Question:** *How much export coal did NTEC tender to BNSF (beginning around April 2022) and how did that volume compare to the volume of export coal that BNSF delivered to Westshore?*

Summary Answer: From April 2022, NTEC consistently requested, through BNSF's Coal Forecasting Tool and other exchanges with BNSF, that it ship the 6.6 million-ton volume that NTEC had nominated in 2021 for the 2022 shipping year. S.V.S. Babcock at ¶¶ 15-17; Exhibits MDB-6 (NTEC's August 17, 2021 communication to BNSF requested 5.5 million tons of service under the parties' principal 2022 contract and 1.1 million tons under the parties' separate JERA contract). NTEC was ready, willing, and able to load all of the export coal that it had identified in its various contractual and CFT-based nominations. See S.V.S. Babcock at ¶¶ 9, 12; V.S. Lund at ¶¶ 4-9.

The volume of export coal that NTEC tendered for BNSF transportation, consistent with its annual nomination of 6.6 million tons, was substantially higher than the volume of export coal that BNSF delivered to Westshore during 2022 (*i.e.*, 3.1 million tons). S.V.S. Babcock at ¶¶ 15-16.

8. **Question:** *How does unevenness of BNSF train availability affect NTEC?*

Summary Answer: “Unevenness” in BNSF train availability prevents NTEC from marketing coal to its customers. S.V.S. Babcock at ¶ 84. If NTEC does not know that BNSF train service will be available in a given month, it cannot commit to making coal sales at Westshore for delivery during that month. *Id.* at ¶ 85.

9. **Question:** *NTEC’s common carrier pricing authority dated January 1, 2023 expired by its terms on March 31, 2023. Has this tariff been extended, or reissued?*

Summary Answer: As noted above, BNSF has not provided any comprehensive new pricing authority to replace the expired BNSF 90139, but BNSF did increase the BNSF 90139 rate by 4% with a new rate sheet effective as of April 15, 2023. V.S. Babcock at ¶ 8; S.V.S. Babcock at ¶ 58; Counsel’s Exhibit 2.

10. **Question:** *Does NTEC have any evidence that BNSF has discriminated against NTEC, other than the allegations in NTEC’s Petition that BNSF has reduced the number of trainsets in service to NTEC, while increasing the number of sets in service to NTEC’s competitors?*

Summary Answer: NTEC is aware of the total number of BNSF export-coal trains received at the port. That information allows NTEC to calculate its share of total BNSF export transportation service to Westshore as compared to other export coal shippers. This information shows that: (i) BNSF’s total volumes transported to Westshore in 2022 (up to the point of the September 2022 labor issue at Westshore) actually exceeded the corresponding 2021 levels; and (ii) that BNSF made substantial increases in the volumes that it moved for its other Westshore customers at the same time that NTEC experienced substantial decreases in its BNSF transportation service S.V.S. Babcock at ¶¶ 48-55; V.S. Babcock at ¶¶ 24-25.

ARGUMENT

A. Standard for Relief Under 49 U.S.C. § 11123

49 U.S.C. § 11123(a) does not require the petitioner to demonstrate irreparable harm as a prerequisite to the Board granting an emergency service order. Indeed, Board precedent since it adopted the *Expedited Relief* standards applicable here demonstrates that the Board has *not* considered or required a showing of irreparable harm in any emergency service order case.³ For example, in a recent case where the Board issued an

³ *Foster Poultry Farms – Ex Parte Petition for Emergency Service Order*, FD 36609 (STB served Feb. 14, 2023, Dec. 30, 2022, July 20, 2022, July 1, 2022, and June 17, 2022) (“*Foster Farms*”); *A.F. Gelhar Co., Inc., and Grede Holdings, LLC v. C&NC R.R.*, NOR 42172 (STB served Sept. 24, 2021); *Hasa, Inc. v. Union Pac. R.R.*, NOR 42165 (STB served Aug. 19, 2019) (“*Hasa*”); *Central Valley Ag Grinding, Inc. and Central Valley Ag Transport Inc. v. Modesto and Empire Traction Co.*, NOR 42159 (STB served June 12, 2018) (“*CVAG*”); *Fort Transfer Co. – Alternative Rail Service – Toledo, Peoria & W. Ry.*, FD 35914 (STB served Apr. 15, 2015); *Canexus Chemicals Canada L.P. v. BNSF Ry. – Emergency Service Order*, FD 35524 (STB served Nov. 1, 2011, and Oct. 14, 2011); *Arkansas Midland R.R. – Alternative Rail Service – Line of Caddo Valley R.R.*, FD 35416 (STB served Feb. 11, 2011, Oct. 15, 2010, and Sept. 17, 2010); *San Francisco Bay Railroad-Mare Island Petition for Emergency Service Order and Petition for Declaratory Order – Lennar Mare Island, LLC*, FD 35360 (STB served Dec. 6, 2010); *Entergy Arkansas, Inc. and Entergy Services, Inc. v. Union Pac. R.R. and Missouri & N. Arkansas R.R.*, NOR 42104 (STB served June 26, 2009); *Roseburg Forest Products Co., et. al – Alternative Rail Service – Central Oregon & Pac. R.R.*, FD 35175 (STB served Mar. 2009); *Pioneer Industrial Ry. – Alternative Rail Service – Central Illinois R.R.*, FD 34917 (STB served Jan. 12, 2007); *Pyco Industries, Inc. – Alternative Rail Service – South Plains Switching, Ltd. Co.*, FD 34889 (STB served Nov. 20, 2006, June 21, 2006, Feb. 24, 2006, Feb. 16, 2006, and Jan. 26, 2006); *Albemarle Corp. – Alternative Rail Service – Line of The Louisiana and North West R.R.*, FD 34931 (STB served Oct. 6, 2006); *Keokuk Junction Ry. – Feeder Line Acquisition – Line of Toledo Peoria and W. Ry. Between La Harpe and Hollis, IL*, FD 34335 (STB served Jan. 24, 2005); *Arkansas Midland R.R. – Alternative Rail Service – Line of Delta Southern R.R.*, FD 34479 (STB served July 30, 2004, and Mar. 11, 2004); *Keokuk Junction Ry. –*

emergency service order, the Board did not consider, or require, a showing of irreparable harm. *See, e.g., Foster Farms* at 2 (STB served June 17, 2022) (no discussion or mention of irreparable harm). The requirement for irreparable harm is applicable only to the injunctive relief NTEC seeks *in addition to, or in the alternative to*, to an emergency service order under 49 U.S.C. § 11123(a).⁴ *See, e.g., CVAG* at 7 (granting a preliminary injunction and dismissing a request for emergency service order as moot since the injunction effectively granted the same relief). Thus, if the Board agrees that Emergency Relief is appropriate here, it need not reach the issue of irreparable harm.

Board precedent under 49 U.S.C. § 11123(a) instead relies on the standards established in *Expedited Relief* and incorporated into 49 C.F.R. 1146.1, which require that the petitioner show a “petitioner seeking relief must show a substantial, measurable service deterioration or other demonstrated inadequacy over an identified period of time by the incumbent carrier.” *EP 762 Revisions* at 3.

Alternative Rail Service – Line of Toledo, Peoria and W. Ry., FD 34397 (STB served Oct. 31, 2003); *Granite State Concrete Co., Inc. and Milford-Bennington R.R. v. Boston and Maine Corp. and Springfield Terminal Ry.*, NOR 42083 (STB served Sept. 15, 2003); *Keokuk Junction Ry. – Alternative Rail Service – Line of SF&L Ry.*, FD 34310 (STB served Feb. 14, 2003); *American Plant Food Corp. – Alternative Rail Service – Line of Texas Northeastern R.R.*, FD 33795 (STB served Dec. 7, 1999); *Petition For Emergency Service Order*, 4 S.T.B. 434 (1999); *Denver Rock Island R.R. – Alternative Rail Service – Lines of Kansas Southwestern Ry.*, 4 S.T.B. 264 (1999).

⁴ In certain emergency service order cases, the Board also considered requests for injunctive relief. Naturally, those cases considered whether the shipper was irreparably harmed, but only with respect to the injunctive relief sought and not relief under 49 U.S.C. § 11123.

NTEC has met the required showing under the *Expedited Relief* standards. In 2021, BNSF transported an average of 27.8 trains per month between the Spring Creek Mine and Westshore. Exhibit MDB-6. NTEC requested similar volume levels in 2022 and 2023, but BNSF's service deteriorated in a substantial and measurable way over that period as Mr. Babcock explains in his Supplemental Statement at ¶¶ 20-38, 46.

Moreover, BNSF's service has been erratic, which is a further inadequacy and barrier to the orderly sale and export of coal as Mr. Babcock explains at ¶¶ 84-85. And while BNSF unexpectedly increased NTEC's train count in April and now May of 2023 (relative to BNSF's prior forecasts for such service), BNSF announced its intention to drastically reduce NTEC's train count to 16 in June (now 22 as noted above).

NTEC repeatedly has asked BNSF to restore NTEC's service to adequate levels consistent with NTEC's reasonable common carrier service request or with its entitlements under the 2022 Contract at issue in NTEC's Montana litigation. As Messrs. Babcock and Lund explain, BNSF has refused to do so. S.V.S. Babcock at ¶¶ 20-40; V.S. Lund at ¶¶ 11-14.

B. NTEC Is Not Seeking Alternative Service

Chairman Oberman asked NTEC to clarify whether it is seeking any form of alternative service, from another carrier, as an element of its Petition under 49 C.F.R. § 1146.1. As noted above, NTEC is not seeking alternative service from another carrier. NTEC is not aware of any carrier that could provide the requested service as a practical matter. S.V.S. Babcock at ¶ 3. And as noted above, alternative service is not required for emergency relief under 49 U.S.C. § 11123. *See EP 762 Revisions* at 4-5 ("Under 49

U.S.C. § 11123, however, the Board is clearly authorized to issue an emergency service directive without regard to whether an alternative carrier is available or necessary to remedy the particular issue.”) (citing 49 U.S.C. § 11123(a)(1)).⁵

C. NTEC’s Alternative Request for Injunctive Relief Demonstrates Irreparable Harm

As discussed above, NTEC seeks, in the first instance, an emergency service order. NTEC’s request for injunctive relief is in addition, or in the alternative, to an emergency service order. However, the Board has requested clarification on the dividing line between irreparable harm and harms susceptible to typical compensatory damages, as well as whether NTEC is being irreparably harmed.

The well-established legal standard for a demonstration of irreparable harm, versus compensable harm, is that a party must demonstrate that (1) the harm will be “certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent irreparable harm,” and (2) “the harm must be beyond remediation.” *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 7-8 (D.C. Cir. 2016) (“*League of Women Voters*”) (internal quotations and citations omitted); see also *Colorado Wheat Admin. Comm. v. V & S Ry., LLC*, NOR 42140, slip op. at 5 (STB served May 7, 2015) (“economic losses that are substantial and unredressable can qualify as irreparable injury”) (original emphasis; footnoted citations omitted). Critically, “an inadequate remedy at law does not mean *wholly ineffectual*; rather the remedy must be

⁵ NTEC notes that the Canadian Pacific Railway (“CP”) does serve Westshore but does not serve Spring Creek. S.V.S. Babcock at ¶ 3.

seriously deficient as compared to the harm suffered.” *Foodcomm Int’l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003) (emphasis added) (“*Foodcomm*”).

Damage to business relationships can constitute irreparable harm as well. *Foodcomm*, 328 F.3d at 304-05 (7th Cir. 2003) (cited by the STB in *American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and Ppg Industries, Inc. v. Alabama Gulf Coast Ry. and RailAmerica, Inc.*, NOR 42129, at 4 n.8 (STB served May 4, 2012)). Likewise, threats to the ongoing viability of the petitioner’s business may constitute irreparable harm. *Richard Best Transfer, Inc. v. Union Pac. R.R.*, NOR 42149, at 4 (STB served Dec. 22, 2016) (citing *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Even significant changes in service terms and conditions can constitute irreparable harm. *Central Valley Ag Grinding, Inc. and Central Valley Ag Transport Inc. v. Modesto and Empire Traction Co.*, NOR 42159, at 5-6 (STB served June 12, 2018).

As Messrs. Lund and Babcock explain, NTEC’s recent customer interactions demonstrate that BNSF’s prolonged service deficiencies and inconsistencies are already causing substantial and irreparable damage to its customer relationships. S.V.S. Babcock at ¶¶ 78-83; V.S. Lund at ¶¶ 17-24. These harms are not theoretical. They are occurring today. *Id.* Moreover, NTEC has no practical means of determining the damages arising from this reputational damage as it is practically impossible to determine the exact lost volumes or the prices at which NTEC would have sold the coal. *See Newmark Owens Wolf, Inc. v. Owens*, 415 F.3d 630, 632 (7th Cir. 2005) (“it is precisely the difficulty of pinning down what business has been or will be lost that makes an injury ‘irreparable.’”).

The significant reputational harm directly threatens NTEC's ability to market export coal on a long-term basis (if at all). S.V.S. Babcock at ¶¶ 78-83; V.S Lund at ¶¶ 23-24.

NTEC's financial performance ultimately inures to the benefit of the Navajo Nation. To the extent that BNSF's reductions in service impact the Nation's financial resources and ability to provide services and programs to its citizens, such harm is not directly calculable. Moreover, the revenues that NTEC loses now due to BNSF's failure to provide adequate common carrier service impact the level of funding available to the Nation to support current services and programs. Monetary damages received at a later time will not compensate the Nation, or its Members, for the harm it suffers currently due to the lack of available funding.

D. BNSF's Does Not Have "Sole Discretion" to Define Its Common Carrier Obligation

In its Petition of April 14, 2023, and its Rebuttal of April 21, 2023, NTEC explained why BNSF's claim of "sole discretion" in determining the provision of service under NTEC's Common Carrier Pricing Authority BNSF 90931 cannot be reconciled with BNSF's statutory duty to provide common carrier service upon reasonable request.⁶ NTEC will not repeat those comments here in full but provides this supplemental argument as further background for the Board's consideration.

⁶ 49 U.S.C. § 11101(a).

BNSF is not empowered to determine, in its “sole discretion,” what its common carrier obligations are, nor is BNSF entitled to nullify its statutory obligations by including exculpatory language in its tariffs. *See, e.g., Pejepscot Industrial Park, Inc., d/b/a Grimm Industries – Petition for Declaratory Order*, 6 S.T.B. 886, 893-94 (2003) (“*Pejepscot*”) (“It is axiomatic that a rail carrier may not indirectly avoid its common carrier obligation to provide service by evading its obligation to establish rates upon request.”). BNSF’s reservation to itself of a “sole discretion” to serve (or not to serve) is functionally indistinguishable from *Pejepscot*. BNSF cannot avoid its common carrier obligation by claiming a right to refrain from providing service.

The long history and importance of common carriers to the public demonstrate why BNSF’s common carrier obligation is not discretionary and cannot be extinguished by the carrier itself. The common carrier obligation is traceable over a 700-year history dating back to English common law,⁷ but the *sine qua non* of a common carrier is a holding out to provide service to the public upon reasonable request. *See, e.g., New Jersey Steam Nav. Co. v. Merchants’ Bank*, 6 How. 344, 382-383 (1848) (“Refusal to carry the goods of some shippers was unlawful.”); *Nat’l Ass’n of Regulatory Utility Commissioners v. F.C.C.*, 533 F.2d 601, 608 (D.C. Cir. 1976) (“the primary sine qua non

⁷ *See, e.g., American Trucking Ass’n v. Atchison, Topeka and Santa Fe Ry. Co.*, 387 U.S. 397, 406 (1967) (“We begin by noting the obvious fact that the Interstate Commerce Act codified the common-law obligations of railroads as common carriers. From the earliest days, common carriers have had a duty to carry all goods offered for transportation.”).

of common carrier status is a quasi-public character, which arises out of the undertaking ‘to carry for all people indifferently’”) (citations omitted).

Consistent with this long history, Section 11101(a) of Title 49 specifies that “[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request.” 49 U.S.C. § 11101(a). This “holding out” to all constitutes a common carrier railroad’s primary obligation, the source of its powers and privileges (its public nature), and the basis for most of its regulation by the Board. *The Akron, C. & Y. R.R. Co. v. I.C.C.*, 611 F.2d 1162, 1166 (6th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980) (“The Act’s declaration of the common-carrier status of railroads is not an unjust one, in view of the governmental largess which railroads have received, and in view of the unique importance to commerce of rail transportation”) (citations omitted). The “holding out” is what transforms ownership of mere physical assets into a common carrier railroad. The statutory context also extends the common carrier obligation beyond the older common law meaning of common carrier. *Id.*, 611 F.2d at 1168 (“This ‘holding out’ may have indeed been one of the earmarks of common carriers at common law; but in the almost one hundred years since the passage of the [Interstate Commerce Act] there has developed a new ‘common’ law of transportation under which the public duty of railroads has been broadened beyond that extant under the common law of carriers. It is not only ‘common carriage,’ but transportation which is subject to the Act and to the Commission’s statutory powers.”). Significantly, the duty to hold itself out to the public

does not give carriers the right to pick and choose who they are willing to, or prefer to, hold themselves out to serve. This duty is not discretionary.

In addition to its general common carrier obligation, a carrier must provide “safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service.” 49 U.S.C. § 11121(a)(1). Likewise, the “Board may require a rail carrier to provide facilities and equipment that are reasonably necessary to furnish safe and adequate car service if the Board decides that the rail carrier has materially failed to furnish that service.” *Id.*

There are no additional statutory requisites regarding the common carrier obligation. Instead, Congress left the courts and the STB to clarify what constitute “reasonable requests,” “adequate car service,” and “reasonable rules and practices.”

In one form or another, BNSF has existed for 150 years as a common carrier railroad. BNSF cannot now evade or deny its common carrier obligation to serve all while it enjoys monopoly or duopoly status in almost every bulk commodity market it serves, including here. BNSF’s suggestion that it can define the metes and bounds of its obligations, if any, is fundamentally contrary to the long history of common carriers and the statutes at issue here. *In re: Investigation of Advances in Rates by Carriers in W. Truck Line, Trans-Miss. & Ill. Freight Comm. Territories*, 20 I.C.C. 307, 350-351 (1911) (the ICC is the empowered regulator not the railroads); *Winnebago Farmers Elevator Co. v. Chicago and North Western Transp. Co.*, 354 I.C.C. 859, 868 (1978) (“We believe that the power to enforce the duty of adequate service is imperative to our ultimate purposes and responsibilities”); *G.S. Roofing Prods. Co. v. Surface Transp. Bd.*, 143 F.3d 387,

391 (8th Cir. 1998) (a railroad may not refuse to provide service merely because to do so would be inconvenient or unprofitable). In sum, BNSF's attempt to give itself the sole discretion to determine whether, and the extent to which, it will provide common carrier service is inconsistent with the statutory obligation to hold itself out to the public and to provide service on reasonable request.

E. NTEC's Request for Common Carrier Service is Reasonable

As NTEC explained in its Petition, the Board, and the Commission before it, have held that a reasonable request for common carrier service is one that is specific as to the volume, commodity, and time of shipment. *Meyer v. North Coast R.R. Authority*, FD 34337, slip op. at 4 (STB served July 27, 2005) (citing *LI Acquisition Corp. – Abandonment Exemption – In Montgomery County, PA*, Docket No. AB-405 (Sub-No. 1X), slip op. at 9 (ICC served Aug. 23, 1994); *The Atchison, Topeka and Santa Fe Ry. – Abandonment Exemption – In Lyon County, KS*, Docket No. AB-52 (Sub-No. 71X), slip op. at 6 (ICC served June 17, 1991)). NTEC's request for BNSF common carrier service met this standard. *See* Petition, V.S. Babcock, Exhibit MDB-1.

NTEC's requested volumes for 2023 are consistent with the volumes NTEC shipped in 2021 and the volumes it nominated in 2022, but which BNSF did not ship, and which are now the subject of NTEC's Montana action.

NTEC does recognize, of course, that common carrier railroad service is subject to some variances for legitimate operating reasons. However, BNSF's systemic failures here do not change the reasonableness of NTEC's common carrier requests, especially to the extent that BNSF's service issues are attributable to: (i) its own drastic system

retraction and staffing reductions; (ii) various other BNSF decisions (including decisions to enter into certain contracts) that may have rendered BNSF unable to respond to NTEC's reasonable common carrier requests in contravention of 49 U.S.C. § 11101(a); or (iii) deliberate discrimination against NTEC. *See, e.g., Pennsylvania Railroad Co. v. Sonman Shaft Coal Co.*, 242 U.S. 120, 126 (1916) (only in times of restrictions resulting from “unusual demands or other abnormal conditions” that *could not have reasonably been foreseen* that a railroad legitimately can deny a shipper the cars “commensurate in number to his needs.”) (emphasis added).

F. BNSF's Proposed Release of Claims is a Red Herring

As Mr. Babcock explains in his Verified Statement, BNSF and NTEC's multi-month 2023 contract negotiations ended in frustration and disappointment when, at the 11th hour, BNSF insisted upon inserting a new contract provision into the existing draft that would have required NTEC to forego any contract damages for 2022. S.V.S. Babcock at ¶¶ 61-65. NTEC rejected BNSF's heavy-handed tactic and reluctantly decided to move ahead with common carrier service even though that meant utilizing BNSF rates that currently exceed the Board's jurisdictional threshold (and are substantially higher than what NTEC had been paying under the 2022 Agreement and what BNSF was prepared to accept as part of the 2023 contract negotiation). *Id.* at ¶¶ 58, 65-66 (also noting BNSF's recent increase of 4% in the tariff rate).

In its Reply, BNSF suggested that this last-minute waiver language was really a mutually beneficial contract term since it was drafted as a “mutual release” of claims. V.S. Lawler at 10. Simply put, BNSF's claims are a red herring. NTEC's Montana

litigation alleges more than \$150 million in lost revenue stemming from BNSF's failure to transport NTEC's requirements under the 2022 Contract. BNSF's so-called mutual release stems from BNSF's intended claim (which BNSF described to the Montana court on March 28, 2023, but has not yet filed) that NTEC did not meet its minimum volume requirements under a second export coal transportation contract ("JERA Contract"), and therefore supposedly will owe BNSF approximately \${{Redacted}} in liquidated damages for the period between April 1, 2022, and March 31, 2023. BNSF mentioned that potential breach claim in the context of its effort to encourage the federal district court to send NTEC's 2022-related Complaint to private arbitration (rather than to hear the dispute itself).⁸ More importantly, BNSF's intended claim ignores the fact that BNSF itself was responsible for the shortfall in tons moved between April 1, 2022, and March 31, 2023, under the JERA Contract. In other words, BNSF's mutual release was simply a lopsided "offer" from BNSF under which all the benefits would have inured to BNSF. S.V.S. Babcock at ¶¶ 66-68.

CONCLUSION

NTEC requests the Board's consideration of the foregoing and reiterates its request for an emergency service order.

⁸ *Navajo Transitional Energy Company, LLC v. BNSF Railway Company*, CV 22-146-BLG-SPW-KLD, BNSF Reply in Support of Motion Compel Arbitration and to Dismiss (filed Mar. 28, 2023).

Respectfully submitted,

NAVAJO TRANSITIONAL ENERGY
COMPANY, LLC

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

May 5, 2023

Attorneys for Applicant-Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of May 2023, caused copies of the foregoing to be served via email on the following counsel for BNSF Railway Company:

Anthony J. LaRocca
Timothy J. Strafford
Onika K. Williams
Tara A. Woods
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795

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

NTEC TARIFF

Counsel Exhibit 2

Page 1

GENERAL RULES

- Freight charges must be prepaid when BNSF is the originating carrier or freight charges must be collect when BNSF is the terminating carrier.
- Price applies in U.S. Funds.
- The Price document number, correct address and patron code must be shown on the bill of lading to insure accurate billing. Payments of freight charges on interline through rates within this price authority are as follows: Freight charges must be prepaid when BNSF is the originating carrier. Freight charges must be collect when BNSF is the terminating carrier.
- Price authority is subject to change without notice.
- Transportation under this agreement is subject to BNSF Rules Book 6100-Series in effect as of the date of shipment. A copy of this Rules Book may be obtained via the internet at: www.BNSF.com.
- Prices in this Rate Item Price List do not alternate with other Rate Item Price Lists.
- Transportation under this agreement is subject to BNSF Rules Book 6041-Series. A copy of this Rules Book may be obtained via the internet at: www.BNSF.com. If Customer does not have access to the internet, Customer should contact Price Management at (817) 593-1134 and a copy of BNSF Rules Book 6041 will be mailed to Customer.
- Price is subject to a Fuel Surcharge. A Mileage Based Fuel Surcharge will be applied to the rates or charges in this price authority for the shipment, as provided for in Item 3383-Series (\$2.50 Strike Price) of BNSF Rules Book 6100-Series. This amount will be added to the freight bill.

COMMODITY DEFINITIONS

CODE	STCC	DESCRIPTION
1121 GROUP	1121	BITUMINOUS COAL

SHIPMENT CONDITIONS

PSMT 130 CARS UNIT TRN	Price applies if no less than 130 cars are shipped per unit train.
------------------------	--

EQUIPMENT

EQ-COAL GENERIC	Shipper owned/leased, gondolas or hoppers	Price applies in shipper/railroad owned or leased equipment. Price applies in either Open/Covered Gondolas or Hoppers (including Gravity Flow, Rotary Rapid or Double Rotary cars). When private equipment is used zero mileage will apply.
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COAL BUSINESS UNIT
RATE ITEM PRICE LIST

CUSTOMER COPY

BNSF 90139
ITEM: 1

Counsel Exhibit 2
Page 2

MATRIX

ORIGIN	DESTINATION	COMMODITY	ROUTE	SHIPMENT CONDITIONS	CI	Shipper owned/leased, gondolas or hoppers
NERCO JCT, MT	ROBERTS BANK, BC	1121 GROUP	BNSF Direct	PSMT 130 CARS UNIT TRN	C	\$5,241 PC

UNIT OF MEASURE

PC Per Car

ROUTE

BNSF

CHANGE INDICATOR DESCRIPTIONS

A	Add
C	Change
D	Decrease
I	Increase
K	Cancel
M	Multiple
X	Expire

DEFINITIONS

CI	Change Indicator
MIN WGT	Minimum Weight
UOM	Unit of Measure
+	Switching Limits

NOTES

Adjust rate effective 4/15/2023



COAL BUSINESS UNIT

RATE ITEM PRICE LIST

CUSTOMER COPY

BNSF 90139

ITEM: 1

PA-00434974-4 Version: 4 03/22/2023 02:08:47 PM
Counsel Exhibit 2
Page 4

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

VERIFIED STATEMENT OF VERN K. LUND

1. My name is Vern K. Lund. I am the Chief Executive Officer of Navajo Transitional Energy Company, LLC (“NTEC”).
2. I have worked in the coal industry for over 25 years, holding various technical, operational management, business development, and executive positions. I graduated from North Dakota State University with a B.S. in Civil Engineering, and from Auburn University with an MBA.
3. I am submitting this Statement in response to certain questions raised by the Surface Transportation Board (“STB” or “Board”) Members during the Board’s April 27, 2023, Pre-Argument Conference. In particular, I will address questions raised by the Board relating to (a) NTEC’s ability to produce and tender the volumes of export coal that NTEC sought to transport on BNSF; and (b) the reputational harm that NTEC has

experienced as a consequence of BNSF's refusal to provide coal transportation service to support our export coal needs.

A. NTEC Was Ready, Willing, and Able to Load the Volume of Export Coal it Sought to Transport in 2022 and 2023

4. At all times in 2022 and 2023, NTEC was ready, willing, and able to produce, sell, and load the quantities of export coal that we had asked BNSF to transport in our nominations for each period.

5. The Spring Creek mine can produce approximately 14 million tons of coal annually as currently configured. The mine operates in multiple pits and there are generally 1.2 to 2.0 million tons readily available for mining at any time.

6. The mine operates on a 24/7/365 basis. The 24/7/365 staffing includes personnel assigned to load trains whenever they arrive from BNSF. In fact, the day-to-day operations are geared around the anticipated train schedules. For example, if a train is expected to arrive for loading on a given day, the mine operations will ensure that our personnel are concentrating on those requirements through, potentially, engaging in more extraction, hauling, and crushing activities. In addition, the mine has a large storage shed where we typically store two trains' worth of coal reserves ready to load. We can also crush and load coal directly into railcars (*i.e.*, bypassing, or in addition to, our storage shed capabilities).

7. In 2022 and 2023, NTEC loaded all trains that BNSF provided to the mine.

8. Towards the end of 2021, NTEC even engaged two contract-mining operators to expand the near-term capabilities of the Spring Creek Mine in anticipation of NTEC's opportunity to increase its sales volumes beyond our original expectation.

9. The contract miners advanced the removal of overburden and performed other tasks. One of the two contract entities finished its activities in March 2023, but since the BNSF's service rapidly deteriorated in the Spring of 2022, NTEC was forced to cancel the second contract. NTEC also had to lay off 36 employees and idle excess equipment at Spring Creek. These actions did not impact on NTEC's ability to load its requested export coal volumes but were undertaken as a necessary reaction to the dramatic cutbacks in our rail service.

10. As Mr. Babcock explained in his initial Verified Statement, the NTEC volume expectations we communicated to BNSF for 2022 and 2023 were consistent with the volumes of export coal that BNSF actually transported for NTEC in 2021. NTEC was fully committed and prepared to tender the same volumes of export coal that it shipped in 2021 in both 2022 and 2023.

11. Indeed, I personally delivered this message in an email to BNSF's CEO, Katie Farmer, in May 2022. As I explained:

I need to ensure BNSF is aware of the severe impacts recent decisions will have on NTEC's financial health. Yesterday, we were verbally informed that BNSF does not feel an obligation to deliver tons under our annual certificate and will be limiting our export business to a total of 3.1M tons for 2022, which is less than 60% of our 2022 budgeted tons of 5.5M tons and less than 70% of our currently sold to position of 4.6M tons. Through April of this year, we have shipped roughly 1.4M tons so setting our annual tonnage to only 3.1M tons means we are forecasted to ship only 1.7M tons for the remaining eight months.

Since 2008, NTEC/CPE has been one of two long-term companies partnering with BNSF to move coal through Vancouver's Westshore terminal to serve export markets. In 2021, NTEC and BNSF shipped 5.2M tons into the export market and over the 2nd half of the year, we were shipping at a rate that exceeded 5.5M tons. This past December, BNSF agreed to our annual certificate (BNSF-90068-0099 with a maximum annual volume of 5.5M tons), when combined with a prior agreed to long-term contract (BNSF-C-12828 with annual volumes of ~1.1M), this provides for a combined maximum annual tonnage of ~6.6M tons. Based on these commitments from BNSF, we made investments, hired additional employees and contractors, entered into sales contracts with various customers to ship up to 5.5M tons into the export market for 2022. Limiting our export sales to only 3.1M tons will have severe impacts on NTEC's short-term financial health and long-term international business relationships.

Email dated May 6, 2022, from Vern Lund (NTEC) to Katie Farmer (BNSF), a copy of which is attached as Exhibit VKL-1.

12. On May 24, 2022, Matthew Babcock and I attended a meeting with Katie Farmer and Steve Bobb at BNSF's Ft. Worth offices. I emphasized the importance of export coal to NTEC as an entity and I explained the beneficial impacts that sales of export coal have on the Navajo Nation. I reiterated NTEC's nominated service requirements and the importance of the cooperative relationship we thought we had built with BNSF.

13. BNSF made it plain that it felt it had *no obligation* to transport any defined volume of coal for NTEC and stated that it would decide, at its discretion, how many trains it would move for NTEC at any particular time. I was very surprised at the tone of the meeting and at BNSF's lack of regard for a customer that was spending in excess of \$100 million per year for BNSF service, including various market-related incentives.

Moreover, I was deeply concerned that all of the export coal business that NTEC had worked for many years to build would be lost.

14. I also participated in the STB's Office of Public Assistance call with BNSF in August 2022 in which NTEC raised its concerns about BNSF service deficiencies and hoped to engage BNSF in a meaningful discussion of solutions. Unfortunately, this effort did not produce a positive outcome and BNSF continued to restrict NTEC's export coal service.

15. But for BNSF's limitation on the number of trains that it would move for us in 2022, NTEC was committed and ready to produce, sell, and transport as much as 6.6 million tons of Spring Creek export coal to Westshore in 2022.

16. Similarly, NTEC has the capability to produce, sell, and load all the tons we included in the November 1, 2022, volume estimate for 2023 that we provided to BNSF when we requested post-2022 common carrier service. The export coal market in 2023 will support those volumes, if we can secure rail transportation of the coal to Westshore.

B. NTEC's Reputation and Standing in the Export Market Have Been Harmed Irreparably

17. Since the second quarter of 2022, BNSF's transportation service to NTEC has been unreliable and unpredictable.

18. The absence of consistent, reliable, and predictable rail service has put NTEC in an extremely disadvantageous position vis-à-vis our competitors for export coal sales.

19. The lack of adequate rail service has exposed us to significant risk that we will be unable to satisfy our obligations under our existing coal sales contracts. I understand that Matthew Babcock is including a quantification of those obligations in his Supplemental Verified Statement.

20. We have also experienced increased difficulty in marketing our export coal to new or existing customers. In particular, we are unable to take advantage of the otherwise robust market for peak-season sales. These peak-season sales typically occur in the Spring/Early Summer months and are highly dependent on our ability to ensure that we have a reliable logistics supply. Without assurances that BNSF will transport a reasonable number of trains in these coming peak months, we are unable to market our product.

21. I have personally participated in sales trips to Asia as recently as February. I observed significant skepticism from our customers and from potential customers. We were advised on several occasions that the transportation shortfalls that we had recently experienced on BNSF had made those customers wary of contracting with NTEC.

22. At the same time, we are being advised by customers that they do not have the same transportation reliability-related concerns about our key export coal competitors because those competitors, unlike NTEC, are continuing to receive service from BNSF that supports their export coal needs.

23. The harm to our reputation in the marketplace is real. We have been forced to adjust our sales expectations for 2023 in recognition of the fact that rail transportation

service at levels currently forecast by BNSF will simply not support the level of sales that we would otherwise pursue.

24. Without the Board's help in ensuring that BNSF provides an adequate level of service to allow NTEC to meet its reasonable needs, our standing in the export coal marketplace will continue to be degraded relative to that of our competitors. NTEC will be unable to reliably participate in the export coal market if NTEC continues to have to participate in that market at BNSF's mercy. NTEC needs the Board to determine whether, and when, BNSF will honor its common carrier obligation and not leave that decision up to BNSF's discretion.

VERIFICATION

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



Vern K. Lund

May 5, 2023

From: Farmer, Katie M <Katie.Farmer@bnsf.com>
Sent: Friday, May 6, 2022 1:46 PM
To: Vern Lund
Subject: RE: Conversation Request

Exhibit VKL-1
Page 1 of 2

CAUTION: This email originated from outside of the organization. Do not click links, open attachments, or correspond with the sender unless you recognize the sender and know the content is safe.

Hi Vern,

I would be happy to have a conversation.

I'm getting ready to start a town hall with one of our operating divisions this afternoon. Would Monday work for you? Maybe around 11:30 CST?

Thanks,
Katie

From: Lund, Vern <Vern.Lund@NavEnergy.com>
Sent: Friday, May 6, 2022 10:21 AM
To: Farmer, Katie M <Katie.Farmer@bnsf.com>
Subject: Conversation Request
Importance: High

EXTERNAL EMAIL

Good morning Ms. Farmer,

My name is Vern Lund and I am the new CEO of Navajo Transitional Energy Company (NTEC). As you know, NTEC purchased Cloud Peak Energy (CPE) in late 2019. NTEC is an autonomous company established under Navajo law. The company's sole shareholder is the Navajo Nation, and thus, we are owned by the Navajo Nation. As set forth in NTEC's Operating Agreement, "The Company [NTEC] shall operate to support and improve the economic, financial, tax, and revenue interest of the Navajo Nation and the Navajo People." The Navajo Nation is extremely dependent on NTEC as we provide over 40% of the revenue for the Navajo Nation's annual general fund.

Katie, I would greatly appreciate a few minutes of your time. Briefly, our respective teams have been in discussions over the last couple weeks regarding expected rail performance, and most importantly, our coal export business relationship. As discussed via email between you and Matt Babcock, we appreciate the immense pressure that is placed upon BNSF and understand your team is faced with making difficult decisions. However, I need to ensure BNSF is aware of the severe impacts recent decisions will have on NTEC's financial health. Yesterday, we were verbally informed that BNSF does not feel an obligation to deliver tons under our annual certificate and will be limiting our export business to a total of 3.1M tons for 2022, which is less than 60% of our 2022 budgeted tons of 5.5M tons and less than 70% of our currently sold to position of 4.6M tons. Through April of this year, we have shipped roughly 1.4M tons so setting our annual tonnage to only 3.1M tons means we are forecasted to ship only 1.7M tons for the remaining eight months.

Since 2008, NTEC/CPE has been one of two long-term companies partnering with BNSF to move coal through Vancouver's Westshore terminal to serve export markets. In 2021, NTEC and BNSF shipped 5.2M tons into the export market and over the 2nd half of the year, we were shipping at a rate that exceeded 5.5M tons. This past December, BNSF agreed to our annual certificate (BNSF-90068-0099 with an maximum annual volume of 5.5M tons), when combined with a prior agreed to long-term contract (BNSF-C-12828 with annual volumes of ~1.1M), this provides for a combined

maximum annual tonnage of ~6.6M tons. Based on these commitments from BNSF, we made investments, hired additional employees and contractors, entered into sales contracts with various customers to ship up to 5.5M tons into the export market for 2022. Limiting our export sales to only 3.1M tons will have severe impacts on NTEC's short-term financial health and long-term international business relationships.

If you would please let me know when you are available for a 15-minute conversation, I will ensure I am available.

Best Regards,
Vern

Exhibit VKL-1
Page 2 of 2

Vern K. Lund
CEO

D: 720.566.2915 | vern.lund@navenergy.com



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Broomfield, CO 80021 Farmington, NM 87401
www.NavEnergy.com

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**SUPPLEMENTAL VERIFIED STATEMENT
OF MATTHEW D. BABCOCK**

Introduction and Summary

1. My name is Matthew D. Babcock. I am the Vice President, Sales & Marketing of Navajo Transitional Energy Company, LLC (“NTEC”). I submitted a Verified Statement in this proceeding on April 14, 2023 (“Babcock VS”). I am submitting this Supplemental Verified Statement in response to questions that I understand the Board posed in its April 27, 2023, pre-argument conference with outside counsel.

2. In response to the Board’s questions, I will address the following topics in this Supplemental Verified Statement, in two broad categories (*i.e.*, BNSF Rail Service and NTEC Coal Sales):

I. BNSF Rail Service

- A. Spring Creek Rail-Service History
- B. The Tender Process and BNSF's Operations
- C. NTEC's Repeated 2022-23 Requests for Additional Service
- D. BNSF's Service to Other Coal Shippers
- E. BNSF Retaliation
- F. Status of Common Carrier Price Authority
- G. BNSF's Claim Against NTEC and the "Mutual Release"

II. NTEC Coal Sales

- H. The Export Coal Market and NTEC's Existing Commitments for Future Export Coal Sales
- I. Reputational Impacts/Harm

I.

BNSF RAIL SERVICE

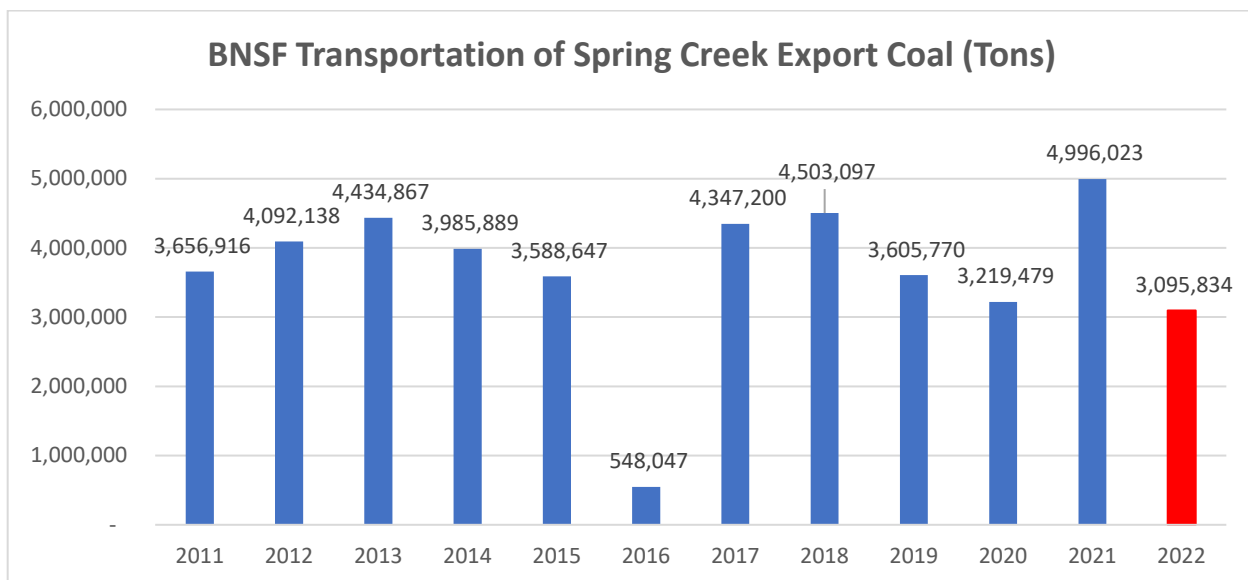
A. Spring Creek Rail-Service History

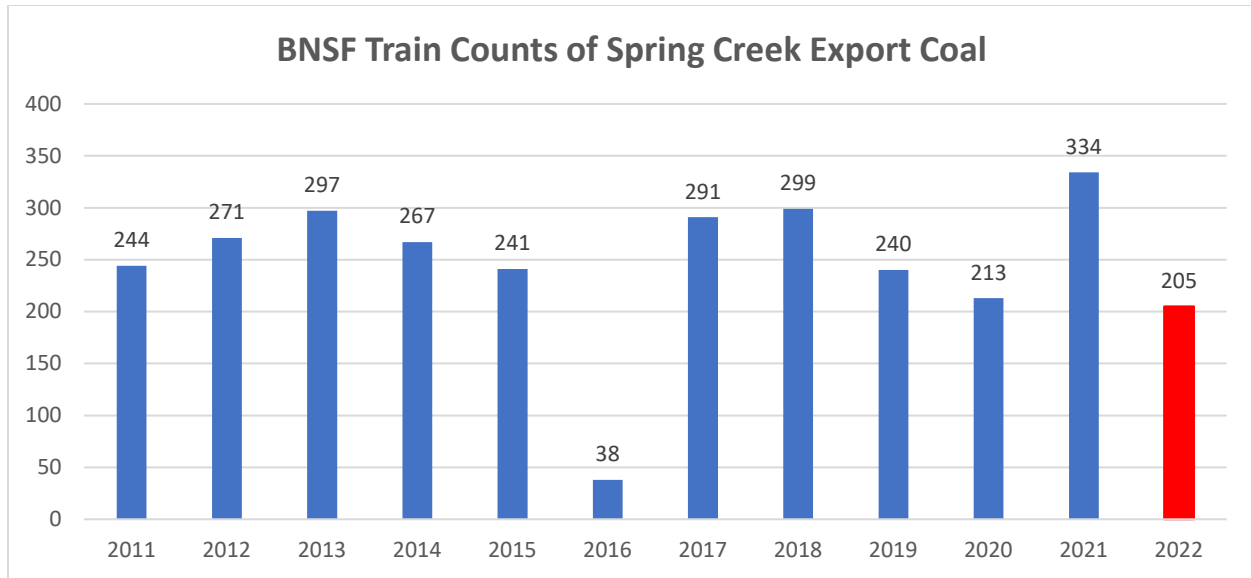
3. NTEC's Spring Creek Mine, which is located in Big Horn County, Montana, began its production of coal in 1980. The Mine began selling its coal on a regular basis into the export market in 2008. Nearly all export sales of Spring Creek Mine coal have moved via BNSF Railway Company ("BNSF") through Westshore Terminals in Roberts Bank, British Columbia ("Westshore"). There is no rail carrier

other than BNSF that is capable of moving coal from Spring Creek to Westshore (Canadian Pacific does serve Westshore, but not the Spring Creek Mine).

4. Spring Creek Mine pioneered the Powder River Basin export business for BNSF, and Spring Creek coal has been a stable component of this BNSF business segment for 15 years.

5. The following charts identify: (i) Spring Creek’s historic export coal volumes – by year – from 2011 to the present; and (ii) the total number of Spring Creek export coal trains that BNSF moved to Westshore during each year:





Year	Spring Creek Export Tons Moved by BNSF	Trains
2011	3,656,916	244
2012	4,092,138	271
2013	4,434,867	297
2014	3,985,889	267
2015	3,588,647	241
2016	548,047	38
2017	4,347,200	291
2018	4,503,097	299
2019	3,605,770	240
2020	3,219,479	213
2021	4,996,023	334
2022	3,095,834	205

6. As the foregoing charts indicate, BNSF’s 2022 export transportation service for NTEC’s Spring Creek coal (roughly 3.1 million tons) fell below BNSF’s service

levels for Spring Creek coal in 2011, 2012, 2013, 2014, 2015, 2017, 2018, 2019, 2020, and 2021 (*i.e.*, all years since 2011 with the exception of 2016, which was an aberration).

7. In Exhibit MDB-6 to this Supplemental Verified Statement, I identify NTEC's historic monthly export coal volumes from January 2019 to the present. For each month, I identify the number of BNSF export trains that departed from Spring Creek for Westshore, and I identify the total number of tons of coal transported. I also identify the number of tons/trains that NTEC (or its predecessor) had nominated for service during each month.

8. I have reviewed the NTEC coal volume chart that appears on page 11 of Ms. Lawler's April 19, 2023 Verified Statement in this proceeding. Our records generally agree with Ms. Lawler's chart, except for three months in 2020 (January, August, and September) in which our records show significantly higher movement totals than BNSF's records show (*i.e.*, a difference of 246,821 tons in total). I am uncertain why these discrepancies exist, but I believe that NTEC's records are accurate. In any event, BNSF's movement of NTEC's export coal (in many months of 2022 and 2023) was substantially lower than the service level that we had intended and expected to receive. I explain this situation in greater detail below.

B. The Tender Process and BNSF's Operations

9. Next, I will address the subject of the coal volumes that NTEC sought to move via BNSF in 2022 and in 2023. I understand that the Board has raised questions about the cause of the 2022 reduction in NTEC export coal movements, and, specifically, whether the change in volume was requested in whole or in part by NTEC. NTEC did

not request a reduction in BNSF's service. The reductions are related to BNSF's service, rather than from any affirmative NTEC decision to reduce its export coal volumes. In fact, we would have been happy to move substantially higher volumes of export coal in 2022 and we repeatedly communicated with senior BNSF executives requesting improvements in BNSF service.

10. In practice, whether we can load NTEC's export coal into any given BNSF railcar/train is entirely subject to BNSF's control.

11. We cannot, of course, load any coal unless BNSF actually arrives with a train and empty railcars. Accordingly, our "tender" process consists primarily of making coal volumes available for BNSF service by giving advanced notice to BNSF of the service that we would like to receive through annual, semi-annual, or quarterly nominations and through the monthly use of the BNSF Coal Forecasting Tool. Once we have requested transportation of our coal by giving these notices to BNSF, there is nothing else we can do to facilitate export coal movements until BNSF brings the railcars to our Mine for loading.

12. Throughout 2022, and at all times in 2023, NTEC had adequate, mineable reserves available to load that were well in excess of the tonnages we nominated for transportation. I understand that Mr. Lund is separately addressing the mining capacity at Spring Creek.

13. We keep two trainloads' worth of coal in storage at Spring Creek at all times. Whenever a BNSF train arrives, we load that train with coal. In addition, we can also mine, crush, and load while a train is onsite. Our loading process is very quick and

takes only about 4 hours per train. BNSF's locomotives remain with the railcars during the loading period.

14. We historically have made periodic nominations under our coal transportation contracts with BNSF, and we have used (and continue to use) the BNSF online Coal Forecasting Tool in order to inform BNSF of the volumes that we seek to move in any given month.

15. As of August 17, 2021, NTEC had notified BNSF that it intended to ship 6.6 million tons in 2022 (5.5 million for the in-negotiation 2022 Contract and 1.1 million for the existing, separate JERA contract). The 5.5-million-ton figure was the maximum volume, but NTEC specifically negotiated that point because it intended to ship 5.5 million tons in 2022 and prepared accordingly at the mine as Mr. Lund explains in his Verified Statement. From that point, NTEC also provided quarterly nominations for its 2022 Contract as follows:

2022 Quarter	Volume	Approx. Train Count
Q1	1,510,000	100
Q2	1,359,000	90
Q3	1,434,500	95
Q4	1,359,000	90
Total	5,662,500	375

16. NTEC also provided monthly nominations (including both 2022 Contract and JERA tons), as required by BNSF, through the railroad Coal Forecasting Tool as follows for 2022:

Month	Volume	Approximate Train Count
January	604,000	40
February	604,000	40
March	604,000	40
April	604,000	40
May	694,600	46
June	528,500	35
July	724,500	48
August	679,500	45
September	679,500	45
October	453,000	30
November	453,000	30
December	453,000	30
Total	7,081,600	469

BNSF's Coal Forecasting Tool requires a shipper to provide – each month – a monthly nomination for the following month on the 15th of the month prior to the shipping period (or the first business day following the 15th day of the month if the 15th day falls on a weekend or holiday), and preferably for the next three months. The mine is expected to enter its volume the day following the shipper's nomination due date. Obviously, for our Westshore-bound shipments, we are both the mine and the shipper so we only enter the volume once. NTEC also enters the volume for the full year and modifies the nomination as needed throughout the year – e.g., if volume nominated is not delivered in a given month we might increase our nomination for the following month to make up for the shortfalls in deliveries (which explains the 7.1 million figure in the table above).

17. For NTEC's 2023 volumes, as described in my initial Verified Statement at 4-5, NTEC's common carrier request for 2023 included our required annual volume of 5,310,000 tons (not including the tons that would move in 1Q23 under our expiring JERA Contract). Our November 1, 2022 common carrier request also identified monthly volumes. For 2023, NTEC included the following monthly volumes in BNSF's CFT:

2023 (Month)	Volume	Train Count
January	360,000	24
February	450,000	29-30
March	450,000	29-30
April	450,000	29-30
May	450,000	29-30
Total	2,160,000	140-144

18. In 2021, BNSF sent what amounted (on average) to roughly one empty train to NTEC per day for loading with export coal. Given the 1,500-mile length of the loaded movement to Westshore (and the several days that it takes to complete one round-trip cycle), BNSF kept multiple trains in NTEC service in order to maintain its regular service pace.

19. In early 2022, however, BNSF's empty-train arrivals at Spring Creek became more and more irregular and the total number of such arrivals dropped. In fact, we saw the following intervals between BNSF train arrivals in 2022: as long as 15, 12, and 10 days at various points in 2022, and as long as 8 days in 2023.

C. NTEC's Repeated 2022-2023 Requests for Additional BNSF Service

20. As I have explained above, we never wavered in our intention to move as much export coal as possible during 2022. Our communications to BNSF during 2022 were entirely consistent with that intention.

21. There was a brief period in September and early October of 2022 in which export volume fell due to a labor issue at Westshore, but outside of that limited time period, the reduction in NTEC export volumes resulted entirely from BNSF's service failures and/or its decisions to use its resources to serve others. As I explain in detail below, we made multiple requests to BNSF to improve our 2022 service. Senior NTEC executives traveled repeatedly to BNSF's Ft. Worth headquarters to meet with senior BNSF executives. We repeatedly expressed our concern about BNSF's poor service and we repeatedly asked BNSF to increase the level of service that it was providing, which fell far short of what we understood to be BNSF's obligation under our then-existing rail transportation contracts.

22. We also spent time engaging with the Board's Office of Public Assistance (both in the Summer of 2022 and in the Spring of 2023). I personally participated in one of those calls during the Summer of 2022. Unfortunately, those efforts did not result in any improvement to our ability to obtain adequate service from BNSF.

23. When kicking off the negotiations for our main 2022 Contract on August 17, 2021, I advised my counterpart at BNSF (Ms. Jessie McCabe, BNSF's Director, Coal Marketing), that NTEC intended to move a somewhat higher volume in 2022 than it had moved in 2021. *See* Exhibit MDB-7 (August 17, 2021 email from Babcock to McCabe).

In particular, I explained that we intended to move 5.5 million tons under our to-be-negotiated principal agreement and approximately 1.1 million tons under our separate “JERA” agreement governing BNSF’s movement of export coal for sale to a single NTEC customer located in Japan (JERA Trading Pte Ltd.):

Let’s kick off discussions for the 2022 rail agreement for SCM exports to Westshore. We have been satisfied with our recent approach of quarterly certificates but you’ve mentioned that you may want to put something in place for longer term, especially due to the higher volumes we expect to ship next year. I’m open to however you would like to approach the agreement but would like to have something in place well in advance of the holidays this year so that we can both have this off our task list as things get busy at the end of the year.

Here’s what we’re targeting:

2022 Volumes in short tons:	
JERA (already under agreement BNSF-C-12828) (pending official JERA nomination)	1,100,000 tons
Non-JERA	5,500,000 tons
2022 Total	6,600,000 tons

...

I know these are some really rough ideas to kick off with but I think it’s relatively simple what NTEC is looking for. I also wanted to make sure you all have a sense of the magnitude that we’re expecting next year. We’re not expecting 2022 to be a huge increase from 2021 but volume should be up by about 1 million short tons.

Exhibit MDB-7 at 1.

24. On October 22, 2021, Ms. McCabe responded to my email by sending me the initial draft of our 2022 Contract. Her draft included the 5.5 million-ton maximum volume that we had requested. Neither Ms. McCabe nor anyone else at BNSF told us

prior to the execution of our 2022 Contract that BNSF would not be able to provide this level of service to us in 2022. BNSF and NTEC each signed the 2022 Contract (with its stated 5.5 million ton maximum volume) on December 1, 2021.

25. The problems with BNSF export service first became apparent to us in the early Spring of 2022. Our volumes started to fall below what we had expected and were well behind the pace that would have been necessary to achieve the 5.5-6.6 million ton overall movement level that we had requested.

26. Initially, BNSF explained that it was struggling with service. BNSF even acknowledged that it was not meeting its commitments to NTEC and that it was working to improve. In fact, in March 2022, when we expressed concerns to BNSF about reduced service for NTEC's export coal, BNSF responded by noting that it was struggling with resources and that it was hopeful to get back on track. BNSF continued to indicate that NTEC's business was important and that it was trying to meet our requirements.

27. As the service difficulties grew and we were told that the situation might get worse, we began to express our concerns to BNSF's executives – including those at the highest levels of the railroad – and to meet with BNSF to request improvements in service. For example, on April 8, 2022, I wrote to BNSF's Ms. Katie Farmer (Chief Executive Officer), Mr. Stevan Bobb (Executive Vice President & Chief Marketing Officer), and Mr. Todd Carter (Group VP), expressing NTEC's serious concerns with the poor level of service that BNSF was providing and explaining the adverse impact of that poor service upon NTEC:

Since late Q4 of 2021 to date, BNSF rail service for NTEC's coal exports through Vancouver, B.C., has underperformed significantly. NTEC has been unable to rapidly recalibrate vessel arrivals and vessel queues have built unfavorably as customers wait for product at port. The high vessel demurrage costs resulted in a financial loss for our coal export segment in Q1 of 2022. This was a deeply disappointing result considering the strong book of export sales that had to be deferred or became uneconomic due to the high costs of delivery delays and volume shortfall.

Exhibit MDB-8 (emphasis added).

28. On April 9, 2022, BNSF's Katie Farmer replied to my note, acknowledging that BNSF "clearly know[s] we are not where we need to be":

Good Afternoon Matt, Thank you for your note and your patience.

We continue to work to address the challenges we have across our network. We have added crews, locomotives and worked to reduce inventory to improve velocity.

We have seen incremental progress but clearly know we are not where we need to be.

You have my commitment to continue to communicate our progress as we look to recover from the many challenges over the last several months.

We appreciate your continued collaboration and support as we work together to restore the network.

Exhibit MDB-8. (emphasis added).

29. Roughly two weeks later (*i.e.*, April 21, 2022), an NTEC delegation including myself, Tres Tipton (Chief Growth Officer), and Rick Ziegler (Chief Operating Officer) met in Ft. Worth, Texas with BNSF's Mr. Todd Carter (Group VP at the time), Mr. Doug Jones (AVP Operations), Ms. Jessie McCabe (Director of Coal Sales), and Mr.

Scott Myers (Director Operations). The purpose of our meeting was to discuss BNSF's service. During the meeting, BNSF's Mr. Jones was very candid and told us that BNSF rail service to NTEC would not improve until the Fourth Quarter of 2022 at the earliest.

30. At the April 21 meeting, BNSF reported that the primary constraint on its service was crew labor and that BNSF had been unsuccessful at hiring (and keeping) rail crew employees at a pace that could provide a meaningful improvement to rail performance. *See* Exhibit MDB-9 (Babcock April 21, 2022 summary of meeting). BNSF acknowledged that the hiring efforts in process at the time would not start to have an impact on Pacific Northwest performance until October. *Id.* Summer would be difficult as rail crew employees take vacations and a labor buffer did not exist to maintain service levels. BNSF added that parts, equipment, materials, railcars, locomotives were not the concern worry at that point, and that it had the capital needed. *Id.*

31. After the April 21 meeting, BNSF's attitude changed suddenly. Rather than reassuring NTEC that BNSF was trying to meet NTEC's requirements, BNSF declared, instead, that it had *no obligation* under the 2022 Contract to move any trains for NTEC. Specifically, during a May 5, 2022 call that I had with Todd Carter and Jessie McCabe, BNSF's representatives told me that BNSF did not feel that it had *any* obligation to deliver tons to NTEC under the parties' 2022 Contract. Exhibit MDB-10. BNSF added that it would move only 9 export trains for NTEC in June and that BNSF would transport only 3.1 million tons of NTEC's export coal, in total, in calendar year 2022. *Id.*

32. That same day, I reached out to BNSF's Steve Bobb to express my serious concerns about BNSF's service and its claim to lack any service obligation:

Please call me to discuss our coal export rail performance. I had a call earlier today with Jessie and Todd and received some disappointing guidance on a significant decrease in 2022 volume expectations. The disappointment isn't that current rail crew struggles will curtail some volume this year but that it was explained to me that BNSF does not feel an obligation to deliver tons under our annual certificate BNSF-90068-0099. It was expressed that only 3.1 million short tons of rail service would be made available to NTEC this year despite having planned to ship approximately 5.0+ million together. NTEC is already sold to 4.6 million tons for 2022 (approximately 500,000 tons less than what we shipped together last year). The reduction in BNSF's commitment to serve our customers in Asia will have a severe impact on our commercial relationships and NTEC's 2022 financial performance. I have asked Jessie and Todd to revisit the volume estimate and hope that we can get 2022 volume closer to 4.5 million tons. We need BNSF's support.

Exhibit MDB-10 (emphasis added).

33. The day after I sent my note to Steve Bobb, NTEC's CEO (Vern Lund) contacted Katie Farmer to request time for a senior-level discussion. I understand Mr. Lund is providing additional details about those interactions in his Verified Statement.

34. During this same general time period, BNSF informed one of my staff members (Mr. Jason Plett) that it would move only 9, 15, and 17 export trains, respectively, for NTEC during June, July, and August of 2022. See Exhibit MDB-11 (Jason Plett May 18-19, 2022 email exchange with Jessie McCabe confirming BNSF's prior representations regarding anticipated service levels).

35. Vern Lund and I traveled to Ft. Worth on May 24, 2022 to meet with BNSF executives once again. Specifically, we met with Katie Farmer and Steve Bobb. As my May 24, 2022 notes of the meeting held earlier that same day confirm, we explained that BNSF's service was unacceptable and we objected to BNSF intentionally discriminating against NTEC relative to the other export coal customer using Westshore:

Meeting Date/Time: Tuesday, May 24, 2022 / 10:00am
Location: BNSF Corporate HQ in Ft. Worth, TX

Participants: Katie Farmer (BNSF CEO), Steve Bobb (BNSF CMO), Vern Lund (NTEC CEO), Matt Babcock (NTEC VP S&M)

Notes/Comments: . . .

- Highlighted the understanding of the ongoing supply chain crisis and impact on rail expectations.
- Reminded BN of the long-term business relationship building the export lane in PNW with annual volume graph.
- Discussed the need to receive more than the recently forecasted train allotments of 9, 15 & 17 for June, July & August respectively.
- Vern and I made BN aware that it had been conveyed to NTEC by Westshore that directives from BN were given to prioritize loadings of Signal Peak (SP) trains over NTEC. Of the 75+ trains expected to load monthly, SP is to be allotted a firm 55 and any remaining capacity would be distributed to NTEC and Arch. When we challenged them on this approach, the reply from Steve Bobb was that they were giving priority to SP because their contract with SP had a firm minimum volume commitment from SP and the agreement with NTEC had no firm minimum volume commitment. NTEC challenged that the minimum volume commitment was made by the shipper and not

the railroad so there was no contractual requirement for BN to take this approach to directing rail service.

- Steve Bobb held firm on his approach that BN is justified in rationing coal shipments this way and that BN had recently taken more control over the decisions of whose trains should load instead of letting Westshore direct rail traffic to meet vessel schedules.
- NTEC asserted that favoring SP over NTEC was discriminatory and harmful to NTEC & The Navajo Nation.
- Katie Farmer was not familiar with the history of our business and asked many questions about contracts and the relationship.
- Vern advocated firmly and appropriately that the prioritization of rail freight movements for SP at NTEC's harm was giving priority to billionaire owners of SP over a Native American, minority owned company. He also advocated that the federal government & STB has a responsibility to support Native American owned interests. . . .

Exhibit MDB-12 (emphasis added)

36. In June 2022, the President of the Navajo Nation (then-President Jonathan Nez) wrote to BNSF's Katie Farmer to express his concern about BNSF's poor service to NTEC and about BNSF's claim that its commitments to its other customers prevent it from meeting NTEC's service needs:

I understand that last December, BNSF committed to transport up to 5.5 million tons of NTEC's coal from its Spring Creek Mine to the Westshore Terminals outside Vancouver, B.C.

BNSF, however, now indicates that it will not transport anything close to its contractually agreed to amounts, claiming instead that it has commitments to other customers

that prevent it from doing so. Yet, 5.5 million tons is consistent with NTEC's historic BNSF volume levels over the past several years, and BNSF never previously favored other customers over our tribal entity in years past. BNSF's failure to transport has already prevented NTEC from committing to sell all 5.5 million tons of coal to customers this year. Unless BNSF remedies its service deficiencies to NTEC quickly, NTEC will not be able to ship the 4.6 million tons of coal it has already committed to its customers.

The Navajo Nation requests that BNSF provide immediate assurances that it will uphold the promises it made in its agreement with NTEC to transport the contractually-required volume of coal.

Exhibit MDB-13 at 1-2 (June 16, 2022 Letter from President Nez to Katie Farmer)
(emphasis added).

37. Ms. Farmer replied to President Nez by letter dated June 24, 2022.

Therein, she acknowledged that BNSF was not meeting the service expectations of its customers (including NTEC), but she denied that BNSF was obligated to move any specific minimum volume of coal for NTEC in 2022:

BNSF has acknowledged in many settings over recent months that we are not meeting the service expectations of our broad customer base. As part of that, we acknowledge that BNSF has not met NTEC's requested volume of coal shipments this year, and we understand that NTEC anticipates missing some opportunities to sell its coal in the export market as a result.

...

Unfortunately, NTEC continues to make incorrect assertions about the nature of BNSF's contractual obligations, which, respectfully, makes it more difficult to commercially resolve our contractual disagreements to the benefit of both parties. I understand that we may have different views on the nature of BNSF's service obligations under our contract, but the contract and our recent commercial history make clear that

BNSF is not required to move any specific minimum volume of coal in 2022. . . .

Again, BNSF understands that we have not delivered all the coal requested by NTEC in 2022 but we are making significant efforts to improve our service.

Exhibit MDB-14 (June 24, 2022 – Letter from Katie Farmer to Navajo Nation President Jonathan Nez) (emphasis added).

38. BNSF’s estimates of future export service remained bleak as of late June 2022. Specifically, BNSF’s Mr. Todd Carter informed me on June 28, 2022 that, since mid-June, the crew shortage that he had identified in April (and that would limit BNSF to moving fifteen export trains for NTEC in July) has been “further exacerbated by summer vacation season and is expected to further decline with the July 4 holiday with material impact to July export shipments.” Exhibit MDB-15. Mr. Carter added that “[w]e are still working toward 15 trains in July for NTEC and will keep you informed of any adjustments to this forecast.” *Id.*

39. On August 5, 2022, after several weeks of scheduling issues, NTEC and BNSF participated in a video conference with the STB’s Office of Public Assistance. BNSF did not offer any solutions to NTEC’s service issues and it stood fast in its position that it had no service obligation to NTEC.

40. We continued to try to work with BNSF during the balance of 2022 in order to resolve our differences and to obtain improved rail service. Those efforts ultimately proved to be unsuccessful. As filings submitted in connection with this proceeding confirm, NTEC filed a Complaint against BNSF in December of 2022 in the United

States District Court for the District of Montana. *See* Exhibit MDB-16 (Complaint).

That Complaint remains pending.

41. On November 1, 2022, we requested that BNSF disclose its common carrier rate for service from Spring Creek to Westshore. In that letter, we identified our anticipated volumes on both an annual and monthly basis. *See* Babcock VS at ¶ 9.

BNSF provided its common carrier rate to us on November 14, 2022. Babcock VS at ¶ 11.

42. BNSF sent us its Common Carrier Pricing Authority 90139 on December 29, 2022. Therein, BNSF reiterated its November 14, 2022 rate quotation, but BNSF added language regarding its “sole discretion” either to provide or to refrain from providing any service.

43. The day after we received BNSF 90139, Jason Plett of my staff wrote to BNSF’s Jessie McCabe to object to the inclusion of this language and to clarify that BNSF should not interpret any NTEC tender of coal under BNSF 90139 as acceptance of the BNSF Service Limitation language:

NTEC objects to BNSF’s Service Limitation Notice: (1) to the extent that it contemplates any level of service that falls below the level required under 49 U.S.C. § 11101; and (2) to the extent that it asserts any level of BNSF discretion that exceeds whatever discretion may be allowed under 49 U.S.C. § 11101. Accordingly, NTEC’s tender of coal for transportation pursuant to BNSF 90139 should not be interpreted as agreement with BNSF’s Service Limitation Notice or as a waiver of NTEC’s continuing objection thereto. NTEC hereby reserves all rights to common carrier service as specified in the relevant statutory provisions and as interpreted under STB or court precedents, and NTEC

strongly disagrees that BNSF may unilaterally alter either NTEC's rights or BNSF's obligations.

Plett December 30, 2022 Letter to McCabe, Exhibit MDB-17 at 1.

44. By letter dated January 17, 2023, BNSF's Farah Lawler replied to my December 19 letter and to Jason Plett's December 30 letter. Therein, Ms. Lawler first suggested that it had been BNSF's desire in the contract negotiations to "move forward with an unencumbered focus on growing NTEC's business in a mutually beneficial way." Lawler January 17, 2023 Letter, Exhibit MDB-18 at 1. Given the substantial reduction in BNSF's movement of NTEC export coal as between 2021 and 2022, we did not share BNSF's view that BNSF had been seeking to grow our business.

45. In any event, Ms. Lawler next took issue in her letter with NTEC's suggestion that BNSF must refrain from taking any action that would interfere with its ability to provide common carrier service to NTEC, but she did not make any explicit reference to the "sole discretion" language that had been the subject of our December 30, 2022 letter:

NTEC stated that BNSF is required to move 100% of the coal NTEC anticipates shipping in 2023 (i.e., approximately 360,000 tons of export coal per month in Q1 2023 and approximately 450,000 tons of export coal per month in Q2-Q4 2023). NTEC also stated that BNSF is required to refrain from entering into any contractual commitments that will interfere with BNSF's ability to provide service to NTEC at the full level that NTEC desires. Of course, NTEC's implicit expectation is that while BNSF must plan for and fulfill 100% of NTEC's anticipated demand, potentially to the exclusion of other BNSF customer volumes, NTEC has the right to downwardly adjust its volume tendered to BNSF at any time without regard to the consequences for BNSF or its other customers. NTEC's expectations do not appear to align what

is required of BNSF as a common carrier under 49 U.S.C. §11101.

The common carrier doctrine does not obligate BNSF to move every last shipment of coal that NTEC decides to ship in 2023. It also does not obligate BNSF to refrain from making contractual commitments to other shippers in the manner that NTEC demands. . . . NTEC had the option to execute a contract that contained commercial terms upon which NTEC had agreed, including volume commitments, but instead chose to ship under a common carrier price authority in 2023 and pursue litigation of meritless claims.

Id. at 1-2.

46. Much like BNSF's 2022 contract service, BNSF's 2023 service under the common carrier rate has been poor. We repeatedly have been in communication with BNSF requesting additional service but BNSF has declined to provide the service that we need.

47. In my Verified Statement, I described NTEC's grave concerns that BNSF's plan to provide only 16 trains in June would greatly harm NTEC. To my surprise, since I understood that BNSF had told the Board it could not provide any additional trains to NTEC in June, on April 28, 2023, one day after the Board's pre-argument conference, BNSF informed NTEC that it would now provide 22 trains in June. NTEC is pleased with the additional trains, but it still does not meet the service requirements we have long expressed to BNSF. Furthermore, we remain very concerned that BNSF will not actually provide that level of service in June, and that BNSF can, and will, change reduce our train counts in July and onward at its discretion.

D. BNSF's Service to Other Coal Shippers

48. I understand that the Board has asked NTEC to provide additional support for the statements in ¶¶ 24-26 of my Verified Statement regarding BNSF providing service to other shippers rather than to NTEC.

49. As noted above, there are two principal shippers moving export coal to via BNSF to Westshore: NTEC and the Signal Peak Mine. Signal Peak is located near Roundup, MT and ships large volumes of export coal via BNSF to Westshore.

50. Arch Coal also ships some Powder River Basin coal to Westshore via BNSF, but it is my understanding that the volumes that Arch moves in export service are much lower than the volumes that Signal Peak moves.

51. The following table shows the Spring Creek export coal volumes as a percentage of the total coal that BNSF moved each year to Westshore. As this table demonstrates, BNSF has substantially reduced the share of export coal transportation service that NTEC receives as a percentage of BNSF's total volume:

Year	Spring Creek % of Total BNSF Export Movements to Westshore
2011	51.9%
2012	52.9%
2013	46.0%
2014	40.4%
2015	38.8%
2016	9.3%
2017	36.4%
2018	34.2%
2019	33.0%
2020	30.5%
2021	39.4%
2022	28.2%
2023 YTD	28.7%

52. As I explained earlier in this statement, our 2022 communications with BNSF specifically referenced Signal Peak and Arch. For example, we discussed Signal Peak with BNSF’s Katie Farmer and Steve Bobb during our May 24, 2022 meeting in Ft. Worth. *See* Exhibit MDB-12.

53. In her June 24, 2022 letter to Navajo Nation President Nez, BNSF’s Katie Farmer disagreed with the suggestion that BNSF was “favoring other customers over NTEC,” but she further commented that “[d]uring this period of service challenges, BNSF has been committed to honoring obligations relative to customer contract terms, including any committed volumes.” Exhibit MDB-14 at 2. This statement was the only explanation we received as to why other export coal shippers were receiving more BNSF trainsets than NTEC.

54. Ms. Lawler’s January 17, 2023 letter similarly takes issue with our suggestion about contractual commitments that would prevent BNSF from serving NTEC, commenting that the common carrier obligation “does not obligate BNSF to refrain from making contractual commitments to other shippers in the manner that NTEC demands.” Exhibit MDB-18.

55. Information available to us also indicates that, from 2021 to 2022, BNSF substantially increased the volume of Powder River Basin coal that BNSF moved (albeit in domestic service) for Peter Kiewit Mining. In particular, we understand that BNSF increased its Kiewit volumes by 7.6 million tons (*i.e.*, from 10.6 million tons in 2021 to 18.2 million tons in 2022), which represented a 71% year-over-year increase in volume.

E. BNSF Retaliation

56. In my Verified Statement at ¶ 27, I explained that – during a December 17, 2022 phone conversation – BNSF’s Ms. Lawler warned us that if we were to switch (for 2023) from moving coal in contract service to moving coal in common carrier service, BNSF may seek to secure additional export-coal contract business. According to BNSF, securing that additional export coal business would (or at least could) leave BNSF in the position of being unable to provide common carrier service to NTEC at the levels that NTEC was seeking.

57. I do not have any additional information as to whether BNSF acted on Ms. Lawler’s threat and entered into additional export coal contract commitments between December 17, 2022 and the present.

F. Status of Common Carrier Price Authority

58. In response to the Board's related question, I can report that we have not received any comprehensive replacement for BNSF Pricing Authority 90139 (which, by its terms, expired on March 31, 2023). Nevertheless, on March 21, 2023, BNSF's Patrick Moynihan (Director, Coal Marketing) did provide notice to my staff of an upcoming 4% increase in BNSF's rate, effective as of April 15, 2023. I addressed this increase on page 8 of my initial Verified Statement, and I provided a copy of the subject BNSF correspondence. *See* Babcock Exhibit MDB-5 ("BNSF will publish an adjustment to your Coal tariff BNSF 90139 to be effective as of 4/15/2023: Current rate has been extended from 3/31/23 to 4/14/2023. Rate will increase on 4/15/2023 from \$5,030/car to \$5,241.18/car. Please let me know if you have any questions."). BNSF provided an updated rate sheet to us (with that new \$5,030/car rate) on March 27, 2023. *See* NTEC Counsel's Exhibit 2. BNSF did not indicate that the Rate Sheet otherwise modified the Common Carrier Tariff service terms.

G. BNSF's Claim Against NTEC and the "Mutual Release"

59. I also understand that the Board has asked about: (i) BNSF's eleventh-hour proposal for a "mutual release" of claims regarding our expired contractual arrangements; and (ii) BNSF's as-of-yet unfiled breach of contract claim against NTEC. BNSF's December 2022 effort to obtain a supposedly "mutual" release of contract-related claims arose in the context of the parties' unsuccessful efforts to negotiate a new, post-2022 contractual arrangement. *See* Babcock VS at ¶ 27.

60. I understand that counsel is separately addressing BNSF's recent claims and filings made in the federal district court in Montana in today's Supplemental Response. I address here my interactions with BNSF surrounding its alleged claim.

61. As I explained above, we tried to work with BNSF during the Fall of 2022 to develop a contract for post-2022 export coal service. We exchanged a number of different drafts with BNSF. BNSF sent the first draft of the post-2022 contract to NTEC on August 12, 2022. That draft contract (which BNSF identified as draft Contract BNSF-13468) did not include any "release-of-claims" language. *See* Exhibit MDB-19. We sent a mark-up of that initial draft back to BNSF on September 2, 2022, which also did not include any release-of-claims language.

62. On October 7, 2022, BNSF sent its second draft of Contract BNSF-13468 to NTEC. That second draft did not include any release-of-claims language. *See* Exhibit MDB-20.

63. On November 28, 2022, I asked BNSF's Farah Lawler to send us BNSF's best and final offer within that week. On November 29, 2022, BNSF sent us its third draft of Contract BNSF-13468. That third draft similarly did not include any release-of-claims language. *See* Exhibit MDB-21.

64. On December 8, 2022, BNSF sent us its fourth draft of Contract BNSF-13468. That draft included for the first time the following release-of-claims language:

43. Release of Claims. Upon execution of this Agreement, each Party, on behalf of its successors and assigns, irrevocably, unconditionally, and fully releases, acquits, and forever discharge the other Party and its Affiliates (and with respect to each of them, their officers, directors, attorneys,

employees, agents, insurers, predecessors, successors and assigns), from any and all claims, damages, costs and expenses of any kind and nature, at law, in equity, or otherwise, that the Party now has or may hereafter have, whether presently known or unknown, relating in any way to transportation of Coal by Railroad on behalf of Shipper under Certificate 90068-0099 and BNSF-C-12828 during calendar year 2022. For the avoidance of doubt, this release does not pertain to any claims arising out of the performance or breach of this Agreement.

See Exhibit MDB-22.

65. On December 10, 2022, we responded to BNSF by sending back an executed copy of BNSF's December 8, 2022 offer with only one change; namely, we removed the release-of-claims paragraph but otherwise accepted all of the terms of BNSF's contract offer. BNSF rejected that offer and instead reiterated its demand that NTEC waive all damage prior claims regarding BNSF's 2022 service. *See Exhibit MDB-23* (Babcock letter to Lawler dated December 19, 2022). I explained in my December 19 letter that NTEC could not accept BNSF's waiver demands and would ship coal on a common carrier basis after the end of 2022. *Id.*

66. I also note that BNSF personnel verbally indicated several times that they wanted a 2023 contract to "look forward and not back", and that they wanted the agreement to make up for 2022. Despite the verbal assurances, BNSF did not incorporate those verbal indications into the key terms of the draft contract, nor did BNSF accept or offer any favorable economics to make up for 2022. Instead, BNSF proposed to significantly increase its rates and BNSF rejected some most of NTEC's key service and rate terms. And in the end, BNSF inserted the release language, which we only noticed

while reviewing the clean execution version that BNSF transmitted. The release clause was never included in a redline. My staff member, Jason Plett was told by Farah Lawler that I supposedly verbally agreed to the clause. When I challenged Ms. Lawler on a December 17 call as to why it was added, she said she thought we wanted it added to protect against JERA damages. I told her she was incorrect and that it was extremely disappointing and inappropriate to have a contract exchange that did not specifically identify a significant edit.

67. On March 27, 2023, without waiting for the completion of the required dispute-resolution discussions under our JERA Contract, BNSF's Farah Lawler sent a letter to me indicating that – even though the contract year had not yet ended – it was “clear that NTEC will not meet its [Minimum Volume] for the 3rd Contract Year and will owe liquidated damages to BNSF.” Exhibit MDB-24. Ms. Lawler added that “[b]ased on the {{Redacted}} Shipper Shortfall Tons calculated by BNSF, NTEC owes {{Redacted}} in liquidated damages for the 3rd Contact Year Shipper Shortfall.”
Id.

68. BNSF's Redacted “claim” for liquidated damages – relating to tonnage shortfalls that BNSF itself caused – is only a small fraction of the value of the claims NTEC has raised in the Montana District Court litigation. BNSF first mentioned the possibility of such a claim when trying to persuade NTEC to drop its own much larger claims (which are also related to BNSF-caused shortfalls).

II.

NTEC COAL SALES

H. **The Export Coal Market and NTEC's Existing Commitments for Future Export Coal Sales**

69. In my Verified Statement (at ¶ 20), I explained that the complex nature of the multi-modal export coal supply chain “requires NTEC to market its coal for sale multiple months in advance of the start of actual deliveries to Westshore.” I added that “[t]his lead time is necessary to give NTEC’s customers sufficient time to arrange for the ocean transportation of their coal.” *Id.* I also explained that low levels of BNSF service (*i.e.*, 16 trains in June 2023) would cause NTEC to “encounter significant problems meeting our existing coal sales obligations and/or marketing coal for future sales.”

70. I understand that, during its pre-argument conference, the Board identified the foregoing portions of my Verified Statement and asked that I provide additional detail regarding the functioning of the international market, the nature of coal as a commodity, and the current state of NTEC’s future export sales commitments.

71. I will begin by identifying the total future coal volumes that we have committed to sell, by month:

NTEC 2023 Committed Export Coal Sales (Tons)		
May	June	July
470,000	395,000	150,000

72. 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.

73. NTEC presently is in a difficult position with respect to future coal sales. We are seeing high levels of demand in the export coal market, but we do not know whether we will have sufficient levels of rail transportation available to allow us to support our existing sales, much less any potential additional sales. If we commit to selling additional coal volumes in the coming months, we run the risk that we will be unable to meet our contractual obligations. If we turn away potential business during the highest-demand time of the year, then we necessarily will lose the revenue associated with those sales.

74. Our current best estimate of the additional, future coal sales that we could make (assuming adequate rail transportation service) are as follows:

NTEC 2023 Committed Export Coal Sales Plus Estimated Future Coal Sales Prospects (Tons)					
	May	June	July	Aug	Sept
Sold/ Contracted	470,000	395,000	150,000	-	-
Prospects	160,000	160,000	320,000	560,000	560,000
Total	630,000	555,000	470,000	560,000	560,000

75. Each of the elements of the global export coal market can change without warning so estimating future sales necessarily is somewhat difficult. Nevertheless, it is entirely fair to conclude that NTEC has significant volume opportunities in the current market.

76. While it is possible that we could sell our coal into the export market at some point in time in the more distant future (for example, if BNSF were to provide better service next year than it is providing this year), we do not know what future demand levels will be. We do not know what price levels will prevail in the market in the future (particularly not during future peak seasons) and we do not know whether customers will elect to do business with our competitors on some long-term basis that will eliminate demand for our coal.

77. Moreover, while it is theoretically possible that we could try to sell more of our coal into the domestic market, domestic demand presently is not as strong as export demand (due to low natural gas prices), and BNSF service to the domestic market is poor as well. We thus are faced with the choice of selling our coal into a weaker market with similarly uncertain transportation, declining to sell any additional volumes, or selling

additional volumes into a robust export coal market with no firm idea of the transportation that BNSF may elect to provide to us.

I. Reputational Impacts/Harm

78. As part of my role as Vice President Sales & Marketing, I frequently interact with NTEC's export coal customers. I am responsible for identifying sales opportunities, developing supplier relationships with potential customers, understanding our customers' needs, negotiating rates and other key terms, and preparing contractual arrangements with our customers.

79. In this role, I regularly travel to Asia to meet with existing and potential customers. For example, I traveled to Asia this February and again during the latter half of April. A recurring theme during those most recent trips has been our customers' need for reliable supply.

80. During my April trip to Korea, I met with existing and prospective coal customers. During those meetings, one prospective customer informed me that he had heard from one of NTEC's competitors (during a recent visit the competitor had made to Korea) that NTEC has what he termed "railroad problems."

81. On that same April trip to Korea, I met with our largest export customer, and at the request of that customer, we spent nearly 20 minutes discussing the need for reliable rail service, including drawing railroad logistics illustrations on a whiteboard, to educate and calm the concerns of their logistics team and fuel buyers.

82. When potential customers in Asia evaluate Powder River Basin coal suppliers, they will consider price, coal quality, and service reliability. Those customers

are considering the expenditure of many millions of dollars to secure coal for a given year, and a reliable supply of that coal is essential in order to permit our customers to continue to operate their electric generating facilities in a dependable manner. Critically, our reliability in terms of supplying coal into vessels at Westshore is only as good as the BNSF service that we receive.

83. If BNSF favors other export coal producers relative to NTEC, then we will face a substantial (if not insurmountable) impediment to our ability to win the business or to win the business at current market rates.

84. Finally, I also understand that the Board asked NTEC to comment on the impact on our export coal business of any “unevenness” in BNSF’s rail transportation from month to month. That sort of unevenness creates significant issues for us. We need to be able to rely on the consistent availability of rail transportation service to market export coal. Our customers are looking for a steady supply of coal to power their electric generating facilities and they need to make their purchase arrangements sufficiently far in advance to ensure that the coal arrives in Japan or Korea when needed. While our customers do maintain stockpiles to allow some buffer against demand and/or supply swings, there necessarily are limits to how much variation in supply they can tolerate.

85. There are substantial costs associated with delaying ocean-going vessels and there can be significant grid reliability issues if one of our customers begins to run low on coal supply. As such, unevenness in BNSF rail shipments from month to month can create significant marketing and customer-relation problems for us. Our customers

need us to provide a reliable, steady stream of coal to them. If we are not able to provide that regular supply, our customers will endeavor to find a supply that is able to do so.

VERIFICATION

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



Matthew D. Babcock

May 5, 2023

NTEC 2019 Monthly Volumes and Nominations

Year	Month	Actual Volume*	Train Count	Nomination**
2019	January	406,574	27	453,000
2019	February	29,993	2	226,500
2019	March	239,101	16	241,600
2019	April	270,158	18	302,000
2019	May	45,522	3	256,700
2019	June	241,056	16	453,000
2019	July	585,390	39	739,900
2019	August	484,448	32	513,400
2019	September	452,073	30	468,100
2019	October	211,146	14	468,100
2019	November	374,560	25	468,100
2019	December	265,750	18	468,100
2019 Total		3,605,770	240	5,058,500
2020	January	421,080	28	453,000
2020	February	267,194	18	453,000
2020	March	422,346	28	407,700
2020	April	332,946	22	362,400
2020	May	470,944	31	498,300
2020	June	196,625	13	166,100
2020	July	60,936	4	75,500
2020	August	198,344	13	166,100
2020	September	243,330	16	317,100
2020	October	75,980	5	151,000
2020	November	272,381	18	302,000
2020	December	257,375	17	392,600
2020 Total		3,219,479	213	3,744,800
2021	January	574,539	38	317,100
2021	February	417,130	28	588,900
2021	March	388,145	26	588,900
2021	April	253,523	17	377,500
2021	May	391,360	26	422,800
2021	June	453,473	30	513,400
2021	July	538,047	36	498,500
2021	August	392,231	26	362,400
2021	September	434,598	29	362,400
2021	October	313,597	21	437,900
2021	November	408,233	28	604,000
2021	December	431,148	29	604,000
2021 Total		4,996,023	334	5,677,800
2022	January	427,487	29	604,000
2022	February	276,646	19	604,000
2022	March	417,321	28	604,000

NTEC 2019 Monthly Volumes and Nominations

Year	Month	Actual Volume*	Train Count	Nomination**
2022	April	349,031	23	604,000
2022	May	318,596	21	694,600
2022	June	136,052	9	528,500
2022	July	216,077	14	724,500
2022	August	292,943	19	679,500
2022	September	91,566	6	679,500
2022	October	200,055	13	453,000
2022	November	263,430	17	453,000
2022	December	106,631	7	453,000
2022 Total		3,095,835	205	7,081,600
* Actual volumes include JERA contract volumes where applicable. ** Monthly nominations may exceed annual nominations when a shortfall in a given month resulted an increased nomination the next month.				

Date of email is August 17, 2021

From: [Babcock, Matthew D.](#)
To: Jessie.mccabe@bnsf.com
Subject: 2022 NTEC rail contract for SCM coal to Westshore

Hi Jessie,

I hope you're doing well. We missed you at the ACC conference last week but it was nice seeing Jennifer and John.

Let's kick off discussions for the 2022 rail agreement for SCM exports to Westshore. We have been satisfied with our recent approach of quarterly certificates but you've mentioned that you may want to put something in place for longer term, especially due to the higher volumes we expect to ship next year. I'm open to however you would like to approach the agreement but would like to have something in place well in advance of the holidays this year so that we can both have this off our task list as things get busy at the end of the year.

Here's what we're targeting:

2022 Volumes in short tons:

JERA (already under agreement BNSF-C-12828)	1,100,000 tons (pending official JERA nomination)
Non-JERA	5,500,000 tons
2022 Total	6,600,000 tons

For the Non-JERA tons, here is my feedback:

- Term: 1 year or 2 years
- Estimated Annual Volume: 5,500,000 tons
- Minimum Volume: 100% of coal shipped to WS at Roberts Bank, BC
- Redacted
- Redacted

I know these are some really rough ideas to kick off with but I think it's relatively simple what NTEC is looking for. I also wanted to make sure you all have a sense of the magnitude that we're expecting next year. We're not expecting 2022 to be a huge increase from 2021 but volume should be up by about 1 million short tons.

Let me know what your thoughts are and we can start looking at a draft document.

Thanks,
Matt

Matt Babcock | Vice President, Sales & Marketing

Navajo Transitional Energy Company

Office: +1 720-566-2930 | Mobile: +1 720-443-7691

NTEC-LOGO-NEW COLOR (002)



From: [Farmer, Katie M](#)
To: [Babcock, Matthew D.](#)
Cc: [Bobb, Stevan B](#); [Carter, Todd B](#); [Lund, Vern](#)
Subject: Re: Message of Confidence from Navajo Transitional Energy Company (NTEC)
Date: Saturday, April 9, 2022 5:28:15 PM

CAUTION: This email originated from outside of the organization. Do not click links, open attachments, or correspond with the sender unless you recognize the sender and know the content is safe.

Good Afternoon Matt,

Thank you for your note and your patience.

We continue to work to address the challenges we have across our network. We have added crews, locomotives and worked to reduce inventory to improve velocity.

We have seen incremental progress but clearly know we are not where we need to be.

You have my commitment to continue to communicate our progress as we look to recover from the many challenges over the last several months.

We appreciate your continued collaboration and support as we work together to restore the network.

Thank you,
Katie

On Apr 8, 2022, at 7:03 PM, Babcock, Matthew D.
<Matthew.Babcock@navenergy.com> wrote:

EXTERNAL EMAIL

Katie, Steve & Todd:

I hope you all are doing well.

I would like to convey our confidence in your leadership and the BNSF organization. Coal from our mines in Wyoming and Montana have traveled safely on the BNSF to our domestic and international customers for decades. Over that time there have been periods of very challenging logistics circumstances but we have consistently witnessed BNSF's ability to perform and overcome obstacles. NTEC is closely monitoring the ongoing BNSF service recovery program and we have appreciated the weekly network updates that candidly discuss some of the issues you are facing and the many actions that are being taken to restore service.

Since late Q4 of 2021 to date, BNSF rail service for NTEC's coal exports through Vancouver, B.C., has underperformed significantly. NTEC has been unable to rapidly

recalibrate vessel arrivals and vessel queues have built unfavorably as customers wait for product at port. The high vessel demurrage costs resulted in a financial loss for our coal export segment in Q1 of 2022. This was a deeply disappointing result considering the strong book of export sales that had to be deferred or became uneconomic due to the high costs of delivery delays and volume shortfall.

We recognize that BNSF and U.S. freight railroads are experiencing great challenges as the nation and the world adapt to historic changes in demand and trade flows at a time when labor is scarce and critical parts and equipment are equally as difficult to procure. NTEC will continue to closely collaborate with our operations and commercial counterparts at BNSF to make sure that we can navigate through the logistics uncertainties and still meet critical operational and financial business expectations. I appreciate that Todd has been gracious with his time since moving into his new role and has discussed our business in-depth.

We'll continue to roll up our sleeves with you and fully expect the BNSF network to return to levels that can meet our business expectations in the months and years ahead!

Thanks,
Matt

Matt Babcock | Vice President, Sales & Marketing
Navajo Transitional Energy Company
Office: +1 720-566-2930 | Mobile: +1 720-443-7691

NTEC-LOGO-NEW COLOR (002)



Date of email is April 21, 2022

From: [Babcock, Matthew D.](#)
To: [Lund, Vern](#); [Tipton, Tres](#); [Ziegler, Rick](#); [Clemetson, Amy](#); [Masters, Bernard](#)
Subject: [Confidential] BNSF Meeting Summary

[Confidential]

NTEC Attendees: Tres Tipton, Rick Ziegler, Matt Babcock

BNSF Attendees: Todd Carter (Group VP), Doug Jones (AVP Operations), Jessie McCabe (Director of Coal Sales), Scott Myers (Director Operations)

- We provided a summary of our business concerns and BNSF provided an outlook for service
- NTEC's two critical meeting objectives
 - Objective 1: Get a realistic outlook on BN rail performance situation and improvement timeline
 - Doug Jones (BN Ops) was very candid that "rail service would not improve until Q4 2022" at the earliest
 - The primary constraint is rail crew labor and BN has been unsuccessful to date at hiring (and keeping) rail crew employees at a pace that can provide a meaningful improvement to rail performance. They think the hiring that is in process now will not start to have an impact on Pacific Northwest performance until October. Summer will be difficult as rail crew employees take vacations and the labor buffer doesn't exist to maintain service levels.
 - Parts, equipment, materials, railcars, locomotives are not a worry at this point. They have the capital needed.
 - This was a sobering conversation that provided little optimism of rail performance significantly improving in the next several months.
 - Objective 2: Redacted
[Redacted]
 - Redacted
[Redacted] will begin organizing the request and circulate for feedback. We will look to engage BNSF with this request early next week.
 - BNSF is also in the process of refreshing their volume outlook for 2022 export shipments and will provide a realistic volume estimate next week. The forecast will likely be below our current expectations for SCM exports. We'll need to use this to calibrate our remaining export sales and vessel lineup for 2022.

Tres & Rick - Please feel free to add any additional commentary or thoughts.

Matt Babcock

720-443-7691

Date of email is May 5, 2022

From: [Babcock, Matthew D.](#)
To: [Bobb, Stevan B](#)
Subject: NTEC - Coal export performance

Steve,

Please call me to discuss our coal export rail performance. I had a call earlier today with Jessie and Todd and received some disappointing guidance on a significant decrease in 2022 volume expectations. The disappointment isn't that current rail crew struggles will curtail some volume this year but that it was explained to me that BNSF does not feel an obligation to deliver tons under our annual certificate BNSF-90068-0099. It was expressed that only 3.1 million short tons of rail service would be made available to NTEC this year despite having planned to ship approximately 5.0+ million together. NTEC is already sold to 4.6 million tons for 2022 (approximately 500,000 tons less than what we shipped together last year). The reduction in BNSF's commitment to serve our customers in Asia will have a severe impact on our commercial relationships and NTEC's 2022 financial performance. I have asked Jessie and Todd to revisit the volume estimate and hope that we can get 2022 volume closer to 4.5 million tons. We need BNSF's support.

Please call me.

Thanks,
Matt Babcock
Office: 720-566-2930
Cell: 720-443-7691

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NTEC-LOGO-NEW COLOR (002)



From: [Plett, Jason](#)
To: [Babcock, Matthew D.](#)
Cc: [Reents, Brian D.](#)
Subject: FW: Forecast
Date: Thursday, May 19, 2022 10:21:56 AM

info

Jason

From: Plett, Jason <Jason.Plett@NavEnergy.com>
Sent: Thursday, May 19, 2022 7:55 AM
To: McCabe, Jessie L <Jessie.McCabe@bnsf.com>
Subject: RE: Forecast

Thank you Jessie,

I think it would be a good idea to have a weekly call with Westshore/NTEC/BNSF established during this difficult time. Can you take lead on that or shall I contact Michael Weston?

I also need to inform you that NTEC does not find this volume acceptable. Our expectation of performance hasn't changed, and we look forward to BNSF improving performance and adding additional capacity to get us there as we progress into Q2 and beyond.

Jason

From: McCabe, Jessie L <Jessie.McCabe@bnsf.com>
Sent: Thursday, May 19, 2022 6:53 AM
To: Plett, Jason <Jason.Plett@NavEnergy.com>
Cc: McCabe, Jessie L <Jessie.McCabe@bnsf.com>
Subject: RE: Forecast

CAUTION: This email originated from outside of the organization. Do not click links, open attachments, or correspond with the sender unless you recognize the sender and know the content is safe.

Hi Jason, this is our plan based on current performance and is subject to change. I will keep in touch and communicate any material changes in these projections as we move forward.

Thank you,

Jessie

Jessie McCabe

Director Coal Marketing

BNSF Railway Company

✉ jessie.mccabe@bnsf.com

☎ 817-867-6248

From: Plett, Jason <Jason.Plett@NavEnergy.com>

Sent: Wednesday, May 18, 2022 5:24 PM
To: McCabe, Jessie L <Jessie.McCabe@bnsf.com>
Subject: Forecast

EXTERNAL EMAIL

Jessie hi, just to confirm you are committed to providing the following rail service to NTEC:

Export:

June-9 Trains

July-15 Trains

August- 17 Trains

Is that the plan?

Jason Plett | Manager Logistics

Navajo Transitional Energy Company

385 Interlocken Crescent, Suite 400 | Broomfield | CO 80021

O: 720-566-2936 | C: 307-689-1417 | jason.plett@navenergy.com



From: [Matthew D. Babcock](#)
To: [Vern Lund](#)
Cc: [Tres Tipton](#); [Rick Ziegler](#); [Bernard Masters](#)
Subject: BNSF Meeting - Katie Farmer (CEO), Steve Bobb (CMO)
Date: Tuesday, May 24, 2022 3:15:02 PM
Attachments: [BNSF Farmer-Bobb Mtg - May 24.docx](#)

Vern,

For the record, below are my notes/comments from our BNSF meeting. Please add or comment with any thoughts from your view as well.

Meeting Date/Time: Tuesday, May 24, 2022 / 10:00am

Location: BNSF Corporate HQ in Ft. Worth, TX

Participants: Katie Farmer (BNSF CEO), Steve Bobb (BNSF CMO), Vern Lund (NTEC CEO), Matt Babcock (NTEC VP S&M)

Notes/Comments:

- NTEC presented the attached document.
 - Highlighted the understanding of the ongoing supply chain crisis and impact on rail expectations.
 - Reminded BN of the long-term business relationship building the export lane in PNW with annual volume graph.
 - Discussed the need to receive more than the recently forecasted train allotments of 9, 15 & 17 for June, July & August respectively.
- Vern and I made BN aware that it had been conveyed to NTEC by Westshore that directives from BN were given to prioritize loadings of Signal Peak (SP) trains over NTEC. Of the 75+ trains expected to load monthly, SP is to be allotted a firm 55 and any remaining capacity would be distributed to NTEC and Arch. When we challenged them on this approach, the reply from Steve Bobb was that they were giving priority to SP because their contract with SP had a firm minimum volume commitment from SP and the agreement with NTEC had no firm minimum volume commitment. NTEC challenged that the minimum volume commitment was made by the shipper and not the railroad so there was no contractual requirement for BN to take this approach to directing rail service.
- Steve Bobb held firm on his approach that BN is justified in rationing coal shipments this way and that BN had recently taken more control over the decisions of whose trains should load instead of letting Westshore direct rail traffic to meet vessel schedules.
- NTEC asserted that favoring SP over NTEC was discriminatory and harmful to NTEC & The Navajo Nation.
- Katie Farmer was not familiar with the history of our business and asked many questions about contracts and the relationship.
- Vern advocated firmly and appropriately that the prioritization of rail freight movements for SP at NTEC's harm was giving priority to billionaire owners of SP over a Native American, minority owned company. He also advocated that the federal government & STB has a responsibility to support Native American owned interests.
- NTEC advised that we want to come to a favorable commercial result to support our needs

but we are currently being backed into a corner with no alternatives but to go public with messages about our treatment from BN and engage government and STB channels.

- The meeting finished with Katie Farmer making the follow commitments:
 - Evaluate the PNW export train forecast for the next few months and see if they can do better for us.
 - Evaluate any additional financial considerations that can be made to help relieve some financial burden of the current situation.
 - Connect our tribal contacts.

Katie said that they would be working on these commitments this week but did not give a firm deadline that any additional conversation would occur within the week.

My final thoughts:

- The conversation lasted about 45 mins (planned for 20-30mins). Although we did not leave with a quantifiable, firm commitment from BN to commit to more export trains, Vern and I achieved the goal of articulating clearly every important pre-determined commercial point that needed to be communicated to our business partner. Success or effectiveness of our message resonating enough with BN to take the actions we demanded remains to be seen.

Recommended next steps:

- **Follow up on conversations with the tribal liaison point of contact – can we get an introductory call within this week?**
- **Privileged**
- **Have NTEC logistics group engage with BN commercial and operations contacts to get feedback on any BN Sr. Mgt direction given as a result of the meeting.**

Matt Babcock | Vice President, Sales & Marketing
Navajo Transitional Energy Company
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NTEC-LOGO-NEW COLOR (002)



THE NAVAJO NATION



JONATHAN NEZ | **PRESIDENT** MYRON LIZER | **VICE PRESIDENT**

June 16, 2022

Ms. Katie Farmer
CEO
BNSF Railway Company
P.O. Box 961065
Fort Worth, TX 76161-0065

Re: BNSF's Violation of Agreements with NTEC

Dear Ms. Farmer,

I write to you as President of the Navajo Nation regarding the ongoing problems in rail service for mines owned and operated by our tribal entity, Navajo Transitional Energy Company ("NTEC"). The deficient service, which appears to inequitably affect our Navajo-owned business, risks negatively impacting the Navajo people. We ask that BNSF take immediate action to improve service to NTEC.

Navajo Transitional Energy Company ("NTEC") is wholly owned by the Nation and is a critical source of funding for the Navajo Nation government. The Navajo Nation created NTEC in 2013 to protect and promote the economic and financial best interests of the Nation, as well as to ameliorate the economic, financial, and social conditions of the Nation. NTEC's annual royalties, dividends and taxes represent 40% of the Nation's annual operating budget. NTEC owns and operates three coal mines in the Powder River Basin of Wyoming and Montana (Antelope, Cordero Rojo, and Spring Creek). I understand that last December, BNSF committed to transport up to 5.5 million tons of NTEC's coal from its Spring Creek Mine to the Westshore Terminals outside Vancouver, B.C.

BNSF, however, now indicates that it will not transport anything close to its contractually agreed to amounts, claiming instead that it has commitments to other customers that prevent it from doing so. Yet, 5.5 million tons is consistent with NTEC's historic BNSF volume levels over the past several years, and BNSF never previously favored other customers over our tribal entity in years past. BNSF's failure to transport has already prevented NTEC from committing to sell all 5.5 million tons of coal to customers this year. Unless BNSF remedies its service deficiencies to NTEC quickly, NTEC will not be able to ship the 4.6 million tons of coal it has already committed to its customers.

The Navajo Nation requests that BNSF provide immediate assurances that it will uphold the promises it made in its agreement with NTEC to transport the contractually-required volume of

THE NAVAJO NATION

JONATHAN NEZ | PRESIDENT MYRON LIZER | VICE PRESIDENT



coal.

Sincerely,

Jonathan Nez, President
THE NAVAJO NATION

Cc: Concetta Tsosie DeHaro, Senate Committee on Indian Affairs
Alanna Purdy Montesinos, Office of U.S. Senator Ben Ray Luján
Holt Edwards, Office of U.S. Senator Cynthia Lummis



Katie Farmer
*President and
Chief Executive Officer*

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

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

June 24, 2022

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

Dear President Nez:

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

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

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

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

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

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

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

Sincerely,

A handwritten signature in black ink, appearing to read "Katie Farmer". The signature is fluid and cursive, with the first name "Katie" and last name "Farmer" clearly distinguishable.

Katie Farmer
President and Chief Executive Officer

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

From: [Carter, Todd B](#)
To: [Matthew D. Babcock](#)
Cc: [McCabe, Jessie L](#)
Subject: July trains NTEC
Date: Tuesday, June 28, 2022 6:13:37 PM

CAUTION: This email originated from outside of the organization. Do not click links, open attachments, or correspond with the sender unless you recognize the sender and know the content is safe.

Matt,

In April, we communicated that the crew resource situation in the northwest was not improving and at that time we were forecasting to ship 15 trains for NTEC in July. Since mid-June, the crew shortage has been further exacerbated by summer vacation season and is expected to further decline with the July 4 holiday with material impact to July export shipments. We are still working toward 15 trains in July for NTEC and will keep you informed of any adjustments to this forecast.

Thank you,
Todd

Sent from my iPhone

John G. Crist
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*ATTORNEYS FOR PLAINTIFF,
NAVAJO TRANSITIONAL ENERGY COMPANY, LLC*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION**

NAVAJO TRANSITIONAL ENERGY
COMPANY, LLC,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

Case No. _____

**COMPLAINT
[DEMAND FOR JURY TRIAL]**

Plaintiff Navajo Transitional Energy Company, LLC (“NTEC”), by and through its legal counsel, hereby respectfully submits this Complaint and Demand for Jury Trial and alleges as follows:

PARTIES

1. This dispute involves a claim that one of the nation's largest railroads, Defendant BNSF Railway Company ("BNSF"), elected to breach its contractual commitment to transport up to 5.5 million tons of NTEC's export coal in 2022. (BNSF and NTEC are collectively referred to herein as the "Parties").

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

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

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) (diversity) because: Plaintiff NTEC is an incorporated entity organized by the Navajo Nation, with its corporate offices in Colorado; Defendant BNSF is a citizen

of a different state; and the amount in controversy exceeds the sum of \$75,000.00, exclusive of interest and costs.

5. Venue is proper in this Court under 28 U.S.C. § 1391(b)(2) because: (i) the contract at issue in this proceeding pertains to the transportation of coal mined in this judicial district; (ii) BNSF resides, owns property, and provides rail transportation in and through this judicial district; and (iii) BNSF is subject to personal jurisdiction in this judicial district. The Spring Creek Mine is located in Big Horn County, part of the Billings Division of this Court.

6. Under 49 U.S.C. § 10709(c)(2), this Court is authorized to provide a remedy for a railroad's breach of a rail transportation agreement.

FACTS

A. The Navajo Nation and NTEC

7. The Navajo Nation is located on 27,000 square miles extending into the States of Utah, Arizona, and New Mexico.

8. The Navajo Nation created NTEC for the express purpose to “support and improve the economic, financial, tax, and revenue interests of the Navajo Nation and the Navajo People through management and development of the Navajo Nation’s resources and new sources of energy, power, transmission, and attendant resources and facilities.” NTEC’s business includes the mining and sale of coal produced on the Navajo Nation and in Montana and Wyoming. NTEC presently

owns four coal mines. One of those mines, the Spring Creek Mine located in Big Horn County, Montana, is central to the present dispute.

9. NTEC provides roughly \$50 million per year in direct economic support for the Navajo Nation. This funds approximately one-third of the Navajo Nation's \$158 million annual General Fund. NTEC's operations also provide indirect support for the Navajo Nation in the form of wages, charitable donations and other contributions to the community. These additional forms of indirect support to the Navajo Nation amount to approximately \$75 million per year.

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

B. Export Coal from Spring Creek

11. In 2008, the prior owner of the Spring Creek Mine, *i.e.*, Cloud Peak Energy, began selling coal for export via the Westshore Terminals facility at Roberts Bank, British Columbia, Canada. At Westshore, coal from Spring Creek is loaded

onto vessels for transportation to Asia (Japan and Korea). Westshore is located approximately 1,500 miles from Spring Creek via rail.

12. BNSF is the only rail carrier capable of providing single-line, direct coal transportation service from the Spring Creek Mine to Westshore, and BNSF has provided all of the coal transportation service from Spring Creek to Westshore since the export shipments began.

13. When NTEC acquired the Cloud Peak assets out of bankruptcy in 2019, the Cloud Peak estate owed over \$6.15 million to BNSF in delinquent invoices (and interest) for the shipment of coal under then-existing contracts. NTEC could have properly rejected these contracts in the bankruptcy proceeding as well as the outstanding debt owed to BNSF. However, NTEC wished to preserve a mutually beneficial commercial relationship with BNSF and elected to honor these obligations and paid BNSF the outstanding debt owed by Cloud Peak. Accordingly, NTEC became a party to (among others) a January 9, 2018 coal transportation agreement between Cloud Peak and BNSF, as amended on March 29, 2018 (“BNSF-C-12828”). BNSF-C-12828 governs the transportation of coal from Spring Creek to the Westshore Terminal for sale to a single customer in Japan (*i.e.*, JERA Trading Pte Ltd. or “JERA”).

14. NTEC has since entered into other contracts with coal purchasers in Asia. NTEC likewise entered into other rail transportation contracts with BNSF,

including a contract denominated as Certificate BNSF 90068-0095 (the “2021 Contract”). The 2021 Contract did not include any stated maximum transportation volume.

15. The 2021 Contract originally applied only to rail service occurring during the first six months of 2021. By amendment dated June 21, 2021, however, the Parties agreed to extend the term of the 2021 Contract to cover all of calendar year 2021. The 2021 Contract expired on December 31, 2021.

16. In 2021, NTEC shipped an aggregate total of 5.1 million tons of Spring Creek export coal via BNSF to Westshore (under BNSF-C-12828 and the 2021 Contract). That total equates to an average of 28.4 BNSF trains per month for the year. During the latter half of 2021, BNSF transported an even higher volume of Spring Creek trains to Westshore, averaging 29.7 trains per month (or roughly one train per day), which – if annualized – would translate to 5.39 million tons.

C. The 2022 Contract

17. On August 17, 2021, NTEC contacted BNSF to initiate negotiations regarding a contract to replace the expiring 2021 Contract. In particular, on NTEC’s Vice President, Sales & Marketing, Mr. Matt Babcock, emailed BNSF’s Ms. Jessie McCabe, Director Coal Marketing, and requested that the Parties “kick off discussions for the 2022 rail agreement for [Spring Creek] exports to Westshore.” Mr. Babcock explained NTEC’s willingness to cooperate with BNSF regarding the

term of any new agreement: “[Y]ou’ve mentioned that you may want to put something in place for longer term, *especially due to the higher volumes we expect to ship next year.*”

18. In his note, Mr. Babcock reiterated that NTEC was targeting 5.5 million tons under the new contract for 2022. Mr. Babcock also specifically stressed NTEC’s anticipated volumes for 2022: “I also wanted to make sure you all have a sense of the magnitude that we’re expecting next year. We’re not expecting 2022 to be a huge increase from 2021 *but volume should be up by about 1 million short tons.*”

19. BNSF did not object in any manner to this requested 2022 volume. Instead, when sending its first draft of a replacement contract to NTEC on October 22, 2021 (in response to Mr. Babcock’s August 17 email), BNSF included NTEC’s requested 5.5 million ton maximum volume without comment: “The maximum annual volume is 5,500,000 short tons.”

20. In December 2021, NTEC and BNSF executed the agreement presently at issue. The Parties denominated this agreement as “Coal Unit Train Commitment Certificate Number BNSF 90068-0099” (hereinafter “2022 Contract”). The 2022 Contract covers the transportation of coal between the Spring Creek Mine and the Westshore Terminal throughout 2022.

21. In the 2022 Contract, NTEC committed to the exclusive use of BNSF to ship all its Spring Creek export coal to Westshore.

22. BNSF, in turn, committed to “provide transportation” to NTEC for up to 5.5 million tons of NTEC’s 2022 export coal shipments. BNSF historically had provided all railcars and all other equipment, personnel, and facilities used to transport NTEC’s coal.

23. At no time during the Parties’ negotiations did BNSF ever advise NTEC it could not or would not be able to commit the rail equipment and facilities necessary to move up to 5.5 million tons of NTEC’s 2022 export coal. Nor at any time during negotiations did BNSF advise NTEC of its belief (subsequently expressed) that the 2022 Contract did not obligate BNSF in any way to ship any particular quantity of coal, at any particular time, or on any particular schedule.

24. Each train operating under the 2022 Contract transports a total of approximately 15,125 tons. Transportation of the 5.5-million ton annual volume requires approximately thirty train movements per month.

25. In reliance on BNSF’s commitment to transport NTEC’s 2022 coal volumes, NTEC secured agreements with export coal purchasers in Japan and Korea. That coal would originate at Spring Creek, would be transported from Spring Creek to Westshore via BNSF (in BNSF railcars), and then would be loaded into ocean vessels at Westshore for ultimate delivery to its overseas purchaser.

26. In addition to executing such contracts for the sale of export coal in 2022, NTEC anticipated and planned for additional spot export coal sales throughout 2022 to meet the significant demand for the product.

D. BNSF's Transportation Under the 2022 Contract

27. From January through November 2022, BNSF transported an aggregate average of only 18 trains per month from Spring Creek to Westshore for NTEC (*i.e.*, 10.4 trains per month below BNSF's 28.4-train monthly aggregate average for NTEC Westshore shipments in 2021 and 11.7 trains per month below BNSF's 29.7-train monthly average for NTEC for the second half of 2021). A 10.4-train per month reduction in transportation service to NTEC prevents approximately 157,000 tons of coal from reaching the Westshore Terminal (and NTEC's customers) each month. In addition, BNSF's 2022 service to NTEC became substantially more erratic than under predecessor arrangements with 15 or more days between trains versus an average of about one train per day in 2021.

28. During April and May 2022, NTEC sought assurances from BNSF that it would meet its transportation obligations under the 2022 Contract. At a meeting in Ft. Worth, Texas on April 21, 2022, BNSF's Mr. Todd B. Carter (BNSF's former Vice President, Coal and Petroleum Products) indicated to NTEC personnel (Matthew Babcock, Tres Tipton, and Rick Ziegler) that BNSF rail service would not improve until the Fourth Quarter of 2022 at the earliest.

29. During a May 5, 2022 meeting, BNSF's Todd Carter and Jessie McCabe informed NTEC's Mr. Babcock, for the first time, that BNSF did not feel any obligation to deliver tons under the 2022 Contract and also explained that NTEC would receive only nine trains, in the aggregate, in June.

30. At that same May 5, 2022 meeting, BNSF also informed NTEC that BNSF would transport only 3.1 million tons of NTEC's coal during 2022.

31. Following the May 5, 2022 meeting, NTEC's Matt Babcock emailed BNSF's Executive Vice President and Chief Commercial Officer Stevan Bobb. Babcock stated that:

it was explained to me [during a call from Mr. Carter and Ms. McCabe on May 5, 2022] that BNSF does not feel an obligation to deliver tons under our annual certificate [the 2022 Contract] BNSF-90068-0099. It was expressed that only 3.1 million short tons of rail service would be made available to NTEC this year despite having planned to ship approximately 5.0+ million together. NTEC is already sold to 4.6 million tons for 2022 (approximately 500,000 tons less than what we shipped together last year). The reduction in BNSF's commitment to serve our customers in Asia will have a severe impact on our commercial relationships and NTEC's 2022 financial performance. I have asked Jessie and Todd to revisit the volume estimate and hope that we can get 2022 volume closer to 4.5 million tons. We need BNSF's support.

BNSF did not directly respond to this email.

32. On May 19, 2022, BNSF's Jessie McCabe (Director, Coal Marketing) advised NTEC's Jason Plett (Manager Logistics) that BNSF would only transport

nine, fifteen, and seventeen export coal trains per month for NTEC in June, July, and August, respectively, for a total of 41 trains for those three months, which was less than half the approximately 90 trains NTEC required during the period. Upon information and belief, each of those figures pertained to aggregate transportation under both the 2022 Contract and BNSF-C-12828. BNSF ultimately provided 42 trains during the June through August time period.

33. On May 24, 2022, Mr. Babcock and Mr. Vern Lund, NTEC's Chief Executive Officer, travelled to Fort Worth, Texas to meet with BNSF. BNSF representatives did not provide any assurances to NTEC that BNSF was willing to restore NTEC service to transport NTEC's anticipated 2022 coal volumes, or even anything close to those volumes.

34. Thereafter, BNSF's CEO, Katie Farmer, told the President of the Navajo Nation that "we acknowledge that BNSF has not met NTEC's requested volume of coal shipments this year" ("Farmer Letter").

35. BNSF further stated, however, that its service problems extended to "our broad customer base," and that NTEC was not alone in its concerns.

36. In April 2022, the federal agency with responsibility for regulation of railroads, the Surface Transportation Board ("STB"), instituted a proceeding to consider solutions to what the STB described as the railroads', including BNSF's, largely self-inflicted capacity shortages. In discussing this capacity issue and related

service impacts, the STB expressed its concerns that the railroads are more concerned with generating maximum profits for their owners and shareholders than with providing adequate service to their customers. *See* STB April 7, 2022 Press Release and Statement of STB Chairman Martin Oberman (“During my time on the Board, I have raised concerns about the primacy Class I railroads have placed on lowering their operating ratios and satisfying their shareholders even at the cost of their customers. Part of that strategy has involved cutting their work force to the bare bones in order to reduce costs. Over the last 6 years, the Class Is collectively have reduced their work force by 29% – that is about 45,000 employees cut from the payrolls. In my view, all of this has directly contributed to where we are today – rail users experiencing serious deteriorations in rail service because, on too many parts of their networks, the railroads simply do not have a sufficient number of employees.”). Upon information and belief, BNSF’s failure to meet its contractual obligations to NTEC reflects a similar prioritization of maximum profits over customer needs.

37. Upon information and belief, BNSF’s broad service failures did not, in fact, extend to its transportation of export coal from Powder River Basin origins to Westshore. Instead, through August of 2022, BNSF *increased* the total number of coal trains for all coal shippers that it moved to that terminal relative to BNSF’s 2021 monthly averages for that same portion of the year. (A strike disrupted coal train

unloading at Westshore in September and October of 2022.) And while BNSF transported more coal trains to Westshore for other export coal producers in 2022 than it had transported in 2021, BNSF dramatically reduced the number of movements that it made to transport NTEC's export coal in 2022. As a direct consequence of BNSF's discriminatory actions, NTEC volumes to Westshore declined to levels well below NTEC's historic volume levels, while at the same time, the overall number of coal trains BNSF delivered to Westshore increased.

38. As stated, BNSF's total coal deliveries on this route for all coal shippers actually increased year-on-year. This is demonstrated by the fact, upon information and belief, BNSF moved an average of 70 total coal trains per month to Westshore during January through August of 2021. From January through August of 2022, BNSF moved even more coal trains to Westshore per month:

	2021	2022
January	73	62
February	58	68
March	78	74
April	67	76
May	47	78
June	74	70
July	86	69
August	78	73
Total	561	570
<i>Average</i>	<i>70.1</i>	<i>71.3</i>

39. Upon information and belief, BNSF transported a total of 561 export trains to Westshore in the first eight months of 2021. From January through August

of 2022, BNSF transported a total of 570 export trains to Westshore. In other words, BNSF *elected* not to move NTEC's coal to Westshore even as BNSF's year-over-year train count to the port increased substantially.

40. Upon information and belief, BNSF also entered into new contracts for 2022 with shippers that were not transporting export coal bound for Westshore in 2021. By its own actions, BNSF further jeopardized its ability to meet its contractual obligations to NTEC under the 2022 Contract.

41. In the Farmer Letter, BNSF's CEO claimed that the 2022 Contract does not impose any transportation obligation upon BNSF. BNSF's CEO's claim that the 2022 Contract allows it to transport any volume of coal it chooses, or even no volume of coal if it chooses, ignores BNSF's commitment to transport NTEC's export coal volumes up to the maximum volume.

42. Through November 30, 2022, BNSF had moved a total of only 2.99 million tons of NTEC coal to Westshore (including tons moving under the 2022 Contract and tons moving under Contract BNSF-C-12828), which was well short of the pace necessary to transport NTEC's full requirements for the year.

43. BNSF's failure to provide NTEC transportation service has imposed – and each day continues to impose – crippling financial hardships upon NTEC amounting to many tens of millions of dollars. BNSF's failure to transport coal has prevented NTEC from realizing the reasonably expected benefits of the 2022

Contract – namely the transportation of its 2022 export coal volumes up to 5.5 million tons. BNSF’s actions have directly prevented NTEC from selling its full 2022 volume of 5.5 million tons of coal and BNSF has directly prevented NTEC from meeting its delivery obligations for the 4.6 million tons of coal that NTEC has already committed to sell. As of the date of filing, BNSF’s refusal to deliver NTEC’s coal to Westshore has resulted in lost revenue of over \$150 million, not including spot sales that NTEC declined to make recognizing that BNSF was not meeting its contractual commitments.

44. BNSF’s failures to transport coal also caused NTEC to incur substantial vessel-related demurrage charges at the Westshore terminal due to the inability to load ocean-going vessels in a timely manner. Multiple trains of coal are required to fill a given ocean-going vessel at Westshore with a target of five days’ wait time from vessel-arrival to departure. When sufficient numbers of BNSF trains do not arrive at Westshore within a pre-defined time period for loading a given vessel, then the shipping company will impose demurrage charges that NTEC must bear. As a result of BNSF’s failure to provide regular service, vessels loaded by NTEC in 2022 required as much as thirty days or more to load, even though other shippers currently are able to load those same types of vessels in fewer than ten days. The average wait time for vessels loading NTEC coal through the beginning of August 2022 was 41.8 days. That figure is significantly higher than 2021 levels.

45. As a result of BNSF's failures to transport NTEC's export coal, NTEC incurred demurrage charges of more than \$15 million in 2022.

46. To attempt to mitigate future potential demurrage charges, NTEC has declared force majeure under its export coal sales contracts.

47. In addition to this direct financial hardship, BNSF's poor service has harmed – and is continuing to harm – NTEC's reputation in the market for the sale of export coal. BNSF's service has left NTEC unable to fulfill its contractual obligations to its customers, but NTEC's competitors (who enjoy more frequent BNSF service over the same route) have extra export coal available to sell at Westshore on the spot market. The harm to NTEC is real and substantially limits NTEC's ability to generate revenues that are necessary to its continued ability to provide support for the Navajo Nation.

48. Beginning in August 2022, BNSF and NTEC engaged in discussions regarding a contract to govern post-2022 service from Spring Creek to Westshore. During those discussions, BNSF insisted upon the inclusion of onerous contractual terms that were unacceptable to NTEC, including the insertion of a provision calling for the broad waiver of all 2022 claims that had not been included in any drafts prior to BNSF's last and final offer to NTEC. BNSF and NTEC therefore were unable to reach agreement on a contract to govern post-2022 rail transportation service. NTEC

will purchase transportation service from BNSF on a “common-carrier” basis in 2023. *See* 49 U.S.C. § 11101; *cf.* 49 U.S.C. § 10709.

CLAIMS

COUNT I

Breach of Contract

49. NTEC hereby realleges and incorporates by reference paragraphs 1-48 of this Complaint.

50. In December 2021, the Parties entered into the 2022 Contract.

51. The 2022 Contract – as executed by NTEC and BNSF on December 1, 2021 – is a valid and enforceable contract for the transportation of coal by BNSF from NTEC’s Spring Creek, Montana mine to the Westshore Terminals.

52. By executing the 2022 Contract, NTEC accepted BNSF’s offer to transport up to 5.5 million tons of the coal to be shipped from NTEC’s Spring Creek Mine to Westshore, where that coal is transloaded into ocean vessels for export.

53. BNSF’s obligation to transport NTEC’s 2022 export coal volumes is subject to a maximum of 5.5 million tons.

54. BNSF agreed to transport all of NTEC’s tendered volumes up to the 5.5 million ton maximum.

55. BNSF also agreed to provide railcars, equipment, and other facilities, necessary to transport NTEC's export volumes, subject only to the 5.5-million ton annual maximum.

56. While negotiating the 2022 Contract, NTEC made BNSF aware that NTEC's volumes for the 2022 contract year would reach the 5.5-million-ton annual maximum. At no time during the negotiations did BNSF ever suggest to NTEC that it lacked the capacity (whether expressed in terms of railcars, locomotives, track or any other metric) to transport those volumes. At no time during negotiations did BNSF assert that the 2022 Contract would not obligate it in any way to carry any particular quantity of coal.

57. NTEC reasonably relied upon BNSF's commitment transport up to 5.5 million tons of export coal in 2022, and NTEC had a reasonable expectation that BNSF would provide all the equipment and resources necessary to transport NTEC's volumes.

58. NTEC complied with all of its obligations under the 2022 Contract.

59. Throughout 2022, BNSF failed: (1) to transport coal in accordance with BNSF's contractual obligations; and (2) to provide the necessary equipment for such transportation.

60. BNSF's 2022 service also was increasingly erratic, thereby further delaying the loading of vessels at Westshore and causing NTEC to incur substantial

demurrage damages for delayed ship-loading of tons that should have been transported under the 2022 Contract.

61. BNSF's actions also threatened NTEC's contractual relationships with its export coal purchasers, forcing NTEC to declare force majeure and to lose revenue under those existing sales contracts.

62. BNSF's failure to comply with its transportation obligations, including the failure to provide all necessary equipment, labor, and facilities, deprived NTEC of reasonably expected benefits NTEC bargained for in entering the 2022 Contract.

63. BNSF failed to act in good faith in performing its obligations under the 2022 Contract and to make all reasonable efforts to meet its contractual obligations to NTEC during 2022.

64. Although BNSF drastically reduced NTEC's trains to Westshore during 2022, on information and belief, BNSF actually increased its 2022 transportation of coal trains to Westshore on behalf of its other transportation customers.

65. As of the filing of this Complaint, BNSF's breaches of its transportation obligations NTEC's coal under the 2022 Contract caused tens of millions of dollars' worth of harm to NTEC.

66. By each of the above failures, BNSF breached the transportation, equipment, and good-faith obligations contained in the 2022 Contract.

67. As a direct and proximate consequence of the above failures, NTEC suffered direct and actual harm and damages.

68. NTEC seeks monetary damages for the substantial harm that BNSF's transportation and equipment failures caused.

COUNT II

Breach of the Implied Covenant of Good Faith and Fair Dealing

69. NTEC re-alleges the allegations set forth in Paragraphs 1-68 above and incorporates the same herein by reference.

70. Under the 2022 Contract, BNSF had some measure of discretion as to how to provide the transportation service, equipment, and other facilities that it promised to provide.

71. The 2022 Contract contains an implied covenant of good faith and fair dealing. The covenant is a mutual promise that the parties will deal with each other in good faith and not attempt to deprive the other party of the benefits of the contract through dishonesty or abuse of discretion in performance.

72. BNSF had sufficient resources in 2022 to transport NTEC's coal and to provide all necessary equipment, facilities and other resources necessary to provide that transportation service.

73. BNSF chose, instead, to allocate its transportation resources in 2022 in a manner that favored other shippers, including other and new export coal customers to Westshore, at the expense of NTEC.

74. BNSF's choices to limit NTEC's transportation – and to limit its supply of equipment to NTEC service – constitute breaches of BNSF's duty of good faith and fair dealing.

75. As a direct and proximate consequence of BNSF's lack of good faith in its performance of its obligations under the 2022 Contract, NTEC has suffered, and is continuing to suffer, direct and actual harm and damages.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(a), Plaintiff requests trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief:

1. For the entry of judgment in favor of Plaintiff and against Defendant on all claims pled herein;
2. For an award of all compensatory damages for all the harm associated with BNSF's ongoing breach of contract and its ongoing breach of the duty of good faith and fair dealing;
3. For the award of allowable costs, and
4. For any other relief that this Court deems proper and just.

DATED this 19th day of December, 2022.

CRIST, KROGH, ALKE & NORD, PLLC

By: /s/ John G. Crist
John G. Crist
Harlan B. Krogh
CRIST, KROGH, ALKE & NORD, PLLC
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*ATTORNEYS FOR PLAINTIFFS,
NAVAJO TRANSITIONAL
ENERGY COMPANY, LLC*



December 30, 2022

Via Email and First-Class Mail

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

Re: BNSF Common Carrier Pricing Authority BNSF 90139

Dear Jessie:

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

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

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



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

Sincerely,

DocuSigned by:
Jason Plett
6A1177D05313433...
JASON PLETT

Manager of Logistics
Navajo Transitional Energy Company



Farah Lawler
Vice President
Industrial Products

BNSF Railway Company
P.O. Box 961065
Fort Worth, TX 76161-0065

2650 Lou Menk Drive
Fort Worth, TX 76131

817-867-6553 Office
farah.lawler@bnsf.com

January 17, 2023

Matt Babcock
VP, Sales and Marketing
Navajo Transitional Energy Company
385 Interlocken Crescent, Suite 400
Broomfield, CO 80021

Re: NTEC Common Carrier Service in 2023

Dear Matt:

This letter responds to your December 19, 2022 letter to Farah Lawler, as well as the December 30, 2022 letter that Jason Plett sent to Jessie McCabe, regarding BNSF's transportation of coal for NTEC in 2023.

As you know, BNSF and NTEC negotiated for more than 5 months over the terms of a new contract that would have become effective January 1, 2023. That contract included committed volume levels for NTEC and service commitments from BNSF for the term of the contract. BNSF and NTEC reached agreement on all key commercial terms (e.g., price, service, etc.) with one exception—a mutual release of any claims by the parties arising from BNSF's transportation of coal in 2022. Given the highly aggressive approach NTEC took regarding BNSF's service difficulties throughout 2022, including reaching out to regulators and other public officials about our confidential contract relationship, BNSF desired to resolve that issue in a reasonable commercial manner that would position us to move forward with an unencumbered focus on growing NTEC's business in a mutually beneficial way. BNSF communicated its desire for such a release early in the negotiations—including directly to you—and your assertion that it was a last-minute demand made in bad faith is simply false.

Consistent with that desire, BNSF proposed a mutual release whereby BNSF was willing to release any claims it might have against NTEC related to 2022 volumes, including claims BNSF may have had under our separate contract regarding JERA. Unfortunately, after all other terms of the contract had been agreed upon and the parties were preparing to execute the contract, NTEC refused to sign any contract that included release language. On December 19, 2022, NTEC communicated its intent to transport export coal to Westshore Terminals in 2023 pursuant to a common carrier pricing authority BNSF had previously provided. NTEC then filed suit against BNSF that same day for claims arising from BNSF's service in 2022.

In both your and Mr. Plett's letters, NTEC outlined its expectations for BNSF's transportation of coal in 2023. NTEC stated that BNSF is required to move 100% of the coal NTEC anticipates shipping in 2023 (i.e., approximately 360,000 tons of export coal per month in Q1 2023 and approximately 450,000 tons of export coal per month in Q2-Q4 2023). NTEC also stated that BNSF is required to refrain from entering into any contractual commitments that will interfere with BNSF's ability to provide service to NTEC at the full level that NTEC desires. Of course, NTEC's implicit expectation is that while BNSF must plan for and fulfill 100% of NTEC's anticipated demand, potentially to the exclusion of other BNSF customer volumes, NTEC has the right to downwardly adjust

its volume tendered to BNSF at any time without regard to the consequences for BNSF or its other customers. NTEC's expectations do not appear to align what is required of BNSF as a common carrier under 49 U.S.C. §11101.

The common carrier doctrine does not obligate BNSF to move every last shipment of coal that NTEC decides to ship in 2023. It also does not obligate BNSF to refrain from making contractual commitments to other shippers in the manner that NTEC demands. BNSF fully intends to provide service to NTEC consistent with the terms of the common carrier pricing authority BNSF has provided and our common carrier obligation. NTEC had the option to execute a contract that contained commercial terms upon which NTEC had agreed, including volume commitments, but instead chose to ship under a common carrier price authority in 2023 and pursue litigation of meritless claims.

BNSF values its commercial relationship with NTEC, and has been and will continue to be reasonable managing that relationship. You will recall that BNSF has made several significant commercial concessions to NTEC since 2019 to support NTEC's success in the export market, including settling liquidated damage claims, reducing rates, forgoing upside sharing and rate adjustments for periods of time, and providing NTEC with more flexibility by eliminating volume commitments after NTEC incurred significant liquidated damages when it did not meet its volume commitment in 2020. BNSF has been reasonable in the face of these issues, opting to resolve these issues commercially rather than suing NTEC.

In 2022, in the face of significant service issues due to weather, crew shortages and other factors, BNSF communicated regularly with NTEC about projected volumes and updated NTEC as those projections changed. In June 2022, BNSF made a significant offer to NTEC to forego a portion of upside sharing in the second half of 2022 to help alleviate some of the financial impact NTEC was reporting, despite BNSF having no obligation to do so. Likewise, BNSF worked closely with NTEC in 2022 to establish a new route from the Spring Creek mine to Westshore Terminals via interchange to CP at Sweetgrass, MT because NTEC felt that was important for facilitating the movement of NTEC coal to export. BNSF is hopeful that BNSF and NTEC can continue to have a productive relationship in 2023.

On a final note, Jason Plett asked BNSF to provide rates as soon as possible for traffic that will beginning moving April 1, 2023. BNSF is reviewing that request and will provide the updated rates as soon as those are available.

Sincerely,



Farah Lawler

CC: Matt White
Jessie McCabe
Jason Plett jason.plett@navenergy.com

**EXHIBITS MDB-19 THROUGH MDB-22
REDACTED IN FULL**



Navajo Transitional Energy Company

December 19, 2022

Via Email and First-Class Mail

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

Re: NTEC Common Carrier Service and Draft BNSF-C-13148

Dear Farah:

During the week of December 12, 2022, BNSF declined to counter sign NTEC's proposed version of BNSF-C-13148, and instead proposed revisions on substantially the same basis that BNSF had proposed on December 8, 2022, and which NTEC had then modified and signed on December 10, 2022. While NTEC appreciates BNSF's continued communications, NTEC cannot agree to waive any claims that may relate to 2022 as a condition on moving forward with a contract commitment from BNSF for 2023. BNSF's actions and inactions in 2022 have caused substantial damage to NTEC and the Navajo Nation. We consider BNSF's last-minute attempt to condition a 2023 agreement upon the release of 2022 claims as completely unreasonable and not in good faith.

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



Navajo Transitional Energy Company

Thank you for your continued attention this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Matt Babcock". The signature is fluid and cursive, with the first name "Matt" written in a more abbreviated, stylized manner.

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



Farah Lawler
Vice President
Industrial Products

BNSF Railway Company
P.O. Box 961065
Fort Worth, TX 76161-0065

2650 Lou Menk Drive
Fort Worth, TX 76131

817-867-6553 Office
farah.lawler@bnsf.com

March 27, 2023

Matt Babcock
VP, Sales and Marketing
Navajo Transitional Energy Company
385 Interlocken Crescent, Suite 400
Broomfield, CO 80021

Dear Matt,

We are now a few days away from the March 31, 2023 expiration of the Rail Transportation Agreement between BNSF Railway and Navajo Transitional Energy Company, LLC dated January 19, 2018, as amended and assigned, governing the movement of coal bound for JERA Trading Pte. Ltd. ("JERA Agreement"). As you know, the JERA Agreement includes "Minimum and Maximum Volume Requirements," setting a minimum volume of coal that NTEC is required to load or caused to be loaded for each of the three contract years of the JERA Agreement.

For the 3rd Contract Year, which runs from April 1, 2022 through March 31, 2023, NTEC is required to ship a "Minimum Volume Requirement" ("MV") Redacted

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Please let me know if NTEC intends to make payment for the liquidated damages outlined above in accordance with the terms of Section 15 of the JERA Agreement. If NTEC disputes BNSF's calculation of Shipper Shortfall Tons and/or the calculation of liquidated damages, BNSF would like to set up a meeting as soon as possible to discuss NTEC's concerns and attempt to negotiate a resolution of this issue, as is contemplated by Section 30 of the JERA Agreement.

Sincerely,

A handwritten signature in blue ink that reads "Farah Lawler".

Farah Lawler

cc: Matt White, General Director Coal Marketing, BNSF Railway
Pat Moynihan, Director Coal Marketing, BNSF Railway
Jason Plett, Logistics Manager, Navajo Transitional Energy Company