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Office of Proceedings
May 5, 2023
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May 5, 2023

VIA E-FILING

Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
Office of Proceedings
395 E Street, SW
Washington, DC 20423

**Re: STB Docket NOR 42178, Navajo Transitional Energy Co., LLC v.
BNSF Railway Co.—Ex Parte Application for Section 11123
Emergency Service Order**

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced proceeding is a PUBLIC version of the Supplemental Reply of BNSF Railway Company, with appropriate redactions that the Board can place in its docket. We are concurrently filing a HIGHLY CONFIDENTIAL version of the Supplemental Reply to be filed under seal.

Respectfully submitted,

/s/ Anthony J. LaRocca

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Attorneys for BNSF Railway Company

Enclosures

cc: All parties of record

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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42178

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

v.

BNSF RAILWAY COMPANY

EX PARTE APPLICATION FOR
SECTION 11123 EMERGENCY SERVICE ORDER

**BNSF RAILWAY COMPANY'S
SUPPLEMENTAL REPLY TO NTEC'S *EX PARTE* APPLICATION
FOR SECTION 11123 EMERGENCY SERVICE ORDER**

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Dated: May 5, 2023

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Verified Statements

- Verified Statement of Farah Lawler, BNSF’s Vice President Industrial Products
- Verified Statement of Matthew Garland, BNSF’s Vice President Transportation

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SECTION 11123 EMERGENCY SERVICE ORDER

I. Introduction and Summary

On April 14, 2023, the Navajo Transitional Energy Company, LLC (“NTEC”) filed an *Ex Parte* Application for Section 11123 Emergency Service Order (“Application”) with the Surface Transportation Board (“Board” or “STB”). In the Application, NTEC asks the Board to enter an emergency service order and an injunction directing BNSF Railway Company (“BNSF”) to increase its shipments of NTEC’s coal to a Canadian terminal for export to Asia. NTEC is seeking damages from BNSF relating to the same shipments in a complaint filed with the Board on the same day.¹ BNSF filed a highly confidential reply opposing the Application on April 19, 2023, and a redacted public reply on April 20, 2023. NTEC filed a rebuttal

¹ See NTEC’s Complaint and Petition for Declaratory Order (NOR 42179), filed April 14, 2023. BNSF replied to NTEC’s Complaint and Petition for Declaratory Order on May 4, 2023.

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on April 21, 2023. On April 27, 2023, the Board held a pre-argument conference with NTEC's and BNSF's outside counsel and posed a number of both factual and legal questions to the parties. BNSF appreciates this opportunity from the Board to expand the record here and address the Board's questions. BNSF respectfully submits this supplemental legal briefing and the attached verified statements by BNSF's Vice President Industrial Products, Farah Lawler and Vice President Transportation, Matthew Garland.

II. Responses to Board's April 27, 2023 Pre-Argument Hearing Questions

1. Does Section 11123 require a showing of irreparable harm? More broadly, is there case law explaining the distinction between emergency service orders and preliminary injunctive relief?

NTEC has asked for relief under both 49 U.S.C. § 11123 and 49 U.S.C. § 1321(b)(4). At the pre-argument conference, Chairman Oberman asked about the differences between the two forms of relief, in particular with regard to the requirement of irreparable harm, which is an explicit requirement under § 1321. Discussed below are the differences between emergency service relief, which requires the existence of an emergency involving potential harm to the public, and preliminary injunctive relief, which is intended primarily for private disputes where an action for damages does not provide an adequate remedy.

Section 11123's requirement of an emergency situation with potential harm to the public limits the availability of that extraordinary remedy to true emergencies. Situations for which injunctive relief might be appropriate do not necessarily rise to the level of justifying an emergency service order, even if they

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involve irreparable harm. While a showing of irreparable harm is not explicitly required by § 11123 and its absence may not necessarily be fatal to every possible request for emergency service, it is a factor that the Board should strongly consider in determining whether an emergency situation actually exists. Since there is no emergency in this case, but only a dispute over money damages that can be, and is being sought in a damages action, relief is not available under either statute.

A. The Difference Between Emergency Service Orders and Injunctions is that an Emergency Service Order Requires a Threat of Harm to the Public.

The Board's precedent does not explicitly discuss the difference between emergency service orders under 49 U.S.C. § 11123 and preliminary injunction orders under 49 U.S.C. § 1321(b)(4) and 49 C.F.R. § 1117.1, but it does make clear that they are separate and distinct analyses. Emergency service orders are only available in emergency situations involving potential public harms that are not present here. While there is no explicit requirement to show irreparable harm to seek an emergency service order, this higher standard of relief involving potential harm to the public, if met, will almost always involve irreparable harm. Injunctive relief might, under appropriate circumstances, be available to avoid private harms to individual shippers where there is no public emergency, but NTEC has also failed to satisfy those standards in this case because, among other things, it cannot show irreparable harm.

The concept of an "emergency" under the statute is distinct and focuses on circumstances that are rarer than those giving rise to an injunction. Unlike

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injunctions, which can be available under appropriate circumstances to address private, individualized disputes, emergency service orders involve harms to the public interest that justifies immediate action that bypasses normal procedural protections. For the relief to be appropriate and tailored to the circumstances, what constitutes an “emergency” must be somewhat subjective. But there are some clear principles that have been recognized in the case law, including that the problem giving rise to STB intervention in rail operations must be “severe.” *See St. Louis Sw. Ry.—Temp. Auth.—Chic., Rock Island & Pac. R.R., Debtor (William M. Gibbons, Trustee) Between Santa Rosa, NM, & St. Louis, MO*, 360 I.C.C. 539, 545-46 (1979). More importantly, however, there must be a true emergency involving the public.

A prominent example illustrating the central importance of the public interest component of an “emergency” involves the STB’s actions following the *UP/SP* merger, when serious service issues developed in and around Houston, affecting rail service throughout the western United States. *See Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.*, FD 32760 (Sub-No. 26), slip op. at 4 (STB served Aug. 4, 1998). In response to the service crisis, the Board issued a series of decisions under its emergency service order authority under 49 U.S.C. § 11123, beginning on October 31, 1997 and effective until August 2, 1998. *See id.*; *Union Pac. Corp.—Control & Merger—S. Pac. Rail Corp.*, FD 32760 (Sub-No. 21), slip op. at 2-3 (STB served Dec. 21, 1998). That proceeding fit squarely into § 11123’s explicit intent to address emergency situations of such magnitude that they have a

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substantial adverse impact on rail service to a region of the U.S., something that is clearly not implicated by NTEC's Application.

The necessary threat to the public interest that justifies emergency service relief is also reflected in the cases that were discussed in our Reply. (*See* BNSF Reply 15-18, Apr. 20, 2023.) For example, in *Foster Poultry Farms—Ex Parte Petition for Emergency Service Order*, FD 36609 (STB served June 17, 2022), the public interest involved access to food supplies. The Board found an emergency order under Section 11123 was warranted and directed UP to provide service to Foster Farms, a chicken grower and processor, because according to Foster Farms, the “corn delivered by UP is corn exclusively used to feed hundreds of thousands of cattle and millions of chickens that provide food supplies and that UP’s service failures impact Foster Farms’ ability to serve the public.” *Id.*, slip op. at 1; *see also* BNSF Reply 15-16.

In *Hasa, Inc. v. Union Pacific Railroad*, NOR 42165 (STB served Aug. 21, 2019), the Board ordered UP to restore and maintain five-day per week service to Hasa, Inc.’s (“Hasa”) plant at Saugus, Cal., until the Board ruled on a then-pending application for emergency service order and petition for temporary injunction. *Id.*, slip op. at 1. Hasa, a producer and distributor of sodium hypochlorite and related products, argued that the reduction in service would lead to a product shortage, which would deprive millions of American citizens of safe drinking water and threaten the public health. *Id.*, slip op. at 1-2; *see* BNSF Reply 17-18.

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B. While Irreparable Harm is not an Explicit Requirement for an Emergency Service Order, Most if not all Cases Involving a True Emergency will Involve Irreparable Harm.

Because of the need to show public harm to justify an emergency service order, most, if not all, of such cases will also involve harm that cannot be adequately compensated in a damages action, *i.e.*, irreparable harm. To receive injunctive relief, the party seeking a preliminary injunction must demonstrate four factors, including “both the imminence and the irreparable nature of any purported harm.” *Richard Best Transfer, Inc. v. Union Pac. R.R.*, NOR 42149, slip op. at 4 (STB served Dec. 22, 2016).² There is no *explicit* requirement under 49 U.S.C. § 11123 for a party seeking an emergency service order to show imminent and irreparable harm, and BNSF does not suggest that a failure to show irreparable harm would necessarily be fatal to a shipper’s request for emergency service in every conceivable circumstance. However, the requirement of imminent and irreparable harm is *implicit* in the concept of an “emergency” that is the predicate for obtaining an emergency service order, and therefore must be considered by the Board.

² The Board only has authority to issue an appropriate order, such as a preliminary injunction while a claim is pending, when necessary to prevent irreparable harm. *See* 49 U.S.C. § 1321(b)(4). A party seeking a preliminary injunction must establish all of the following: (1) it is likely to prevail on the merits of any challenge to the action sought to be preliminarily enjoined, (2) it will be irreparably harmed in the absence of the requested relief, (3) issuance of the injunction will not substantially harm other parties, and (4) granting the injunction is in the public interest. *See, e.g., Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Am. Chemistry Council v. Ala. Gulf Coast Ry.*, NOR 42129, slip op. at 4 (STB served May 4, 2012); *see also Union Pac. R.R.—Pet. for Declaratory Order & Preliminary Injunction*, FD 36197, slip op. at 3 (STB served June 29, 2018); *Richard Best Transfer, Inc.*, NOR 42149, slip op. at 4.

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The Board needs to consider the question of irreparable harm because it is difficult to imagine a true emergency that could simply be addressed through an action for damages under the Board's standard regulatory procedures. If a party is only seeking relief from compensable private harms, as is NTEC, there is no emergency justifying an emergency service order. The Board's normal procedures can be followed to determine whether relief is appropriate.

C. This Case Involves a Private Dispute that does not Justify an Emergency Service Order (or an Injunction).

There may be cases where an emergency service order may be appropriate regarding service to an individual shipper, but this is not such a case. The STB has recognized that there is a public interest to “protect the public's access to rail transportation.” *See, e.g., Keokuk Junction Ry.—Alternative Rail Service—Line of Toledo, Peoria & W. Ry.*, FD 34397, slip op. at 3, 6 (STB served Oct. 31, 2003) (Board denied emergency service request after finding rate disputes do not constitute service disruptions or inadequacies within the meaning of 49 U.S.C. § 11123). Given the important public interest in “access to rail transportation,” an emergency may exist when there is a severe deterioration of service on a line or the prospect of a cessation of service, neither of which has occurred in NTEC's situation.

In Ark. Midland R.R.—Alternative Rail Service—Line of Caddo Valley R.R. (Arkansas Midland), FD 35416 (STB served Sept. 17, 2010), a decision discussed by BNSF in its April 19, 2023 filing, the Board issued an emergency service order that allowed Arkansas Midland Railroad Company, Inc. to provide rail service on a rail line owned and operated by Caddo Valley Railroad Company (“CVR”) because CVR

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was in dire financial straits and would cease service to the shippers on the line within days. *Id.*, slip op. at 1, 3; *see also* BNSF Reply 18. The public interest involved in *Arkansas Midland* was the public interest in access to the rail network, a fundamental principle of the common carrier regulatory system.

The public interest in access to the rail network thus may have justified an emergency service order in *Arkansas Midland*. But it is one thing for shippers to face the prospect of losing rail service altogether – such a threat implicates the public interest in “access to rail transportation” entirely. It is quite another thing for a shipper who is already receiving the same or elevated service compared to historic levels to seek a particular incremental level of service or to be put ahead of other shippers in receiving rail transportation service. A shipper’s desire for additional service on a line to take advantage of market opportunities, as here, clearly falls short of such a public emergency.

Thus, while it is theoretically possible that there could be an emergency without a showing of irreparable harm, that is not the case here. Disputes like this one over the commercial arrangements between shippers and railroads that can be addressed under a fully developed record in an STB proceeding where damages are available to compensate for harm suffered by a complainant clearly do not constitute an “emergency.” Indeed, NTEC’s Application has already quantified what it believes are its damages, saying they are “in excess of \$10 million dollars, to date.” (NTEC Compl. & Pet. for Declaratory Order 24, NOR 42179, April 14, 2023; *see also* NTEC Appl. 21.) NTEC has similarly calculated alleged damages

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suffered in 2022 as part of the lawsuit it filed in federal court in Montana. In that case, which seeks only monetary damages and not any form of injunctive relief, NTEC has explicitly stated that it suffered “lost revenue of over \$150M” and “more than \$15M” in vessel demurrage as a result of BNSF’s breach of contract.

D. Both Emergency Service Orders and Injunctions Require Analysis of Harm to Others.

While the discussion above focuses on important differences between emergency service orders and preliminary injunctions, there also is a substantial overlap between the standards for injunctive relief and emergency service orders on the question of possible harm to other parties. Both remedies require that other parties not be substantially harmed when either remedy is prescribed by the Board. Section 11123(c)(2)(B) prohibits the Board from issuing an emergency service order that would “impair substantially the ability of a rail carrier to serve its own customers adequately, or to fulfill its common carrier obligations.” Similarly, an explicit requirement for the issuance of injunctive relief is that the “issuance of the injunction will not substantially harm other parties.” *Union Pac. R.R.*, FD 36197, slip op. at 3. As such, the Board has recognized that when railroads are having difficulty meeting total demand, or otherwise are having service problems that restrict overall service, it would be inappropriate and potentially counterproductive to issue emergency service orders favoring particular shippers over others, since it could interfere with the railroad’s efforts to emerge from the service problems. *See id.*, slip op. at 3-4. Not only would emergency service orders under those circumstances arbitrarily and unfairly favor particular shippers, they also could

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exacerbate service difficulties by imposing regulatory requirements that interfere with a railroad's operating decisions that are intended to improve traffic flows and maximize the total number of units delivered.

For example, in *DeBruce Grain, Inc. v. Union Pac. R.R.*, NOR 42023 (STB served Dec. 22, 1997), DeBruce Grain, Inc. ("DeBruce"), a company that merchandises grain and operates grain elevators in Nebraska City, Lexington, and Fremont, NE, sought injunctive relief and an "emergency order" requiring UP to prioritize service to DeBruce over other shippers.³ The Board denied the request explaining that it "would have [the Board] require specifically that DeBruce's shipments be given priority over other shipments . . . [and that] approach is not in the public interest, because it conflicts with the efforts of the Board and railroads to solve the serious rail service problems that exist in the western United States." *Id.*, slip op at 4. The dispute came to the Board after being dismissed by a federal court, and the Board went on to note that it shared the court's concerns that "there [was] no way to insure that the public interest will be served by any order that require[d] UP to prefer DeBruce over other shippers," that "[t]here [was] no rational basis for ordering UP to honor DeBruce's orders over all other orders," and that "there [was] no contractual requirement that all orders placed be treated on a pro rata basis. . . ." *Id.*

³ DeBruce sought relief under 49 U.S.C. § 721(b)(4), now § 1321. While it did not cite Section 11123, it did request an "emergency order," and the Board's discussion did not try to distinguish between an "emergency" order under 11123 and an "emergency" injunction. Accordingly, the discussion of "emergency" relief requested by DeBruce reflects the Board's general standards for addressing requests for "emergency" relief.

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The Board later endorsed its conclusions in *DeBruce*, explaining that in that case the Board had “balanced the interests of all concerned, and found that it would be inappropriate to issue an injunction that might benefit an individual complainant but that would undercut [the Board’s] broader efforts to alleviate a transportation crisis in the West.” *Public Views on Major Rail Consolidations*, EP 582, slip op. at 9 n.16 (STB served Apr. 7, 2000). And the Board has further emphasized the importance of doing no harm to other shippers in the proposed changes to its emergency service regulations, noting that in awarding relief, it must ensure “that it will not have an overall negative affect on shippers and that it will avoid any risk of placing other shippers in similar circumstances as petitioner.” *Revisions to Regulations for Expedited Relief for Service Emergencies*, EP 762, slip op. at 9 (STB served Apr. 22, 2022).

These harms to the public interest and other shippers not party to this proceeding require the Board to deny NTEC’s request. (*See, e.g.*, Supp. V.S. Lawler 19-22, May 5, 2023; V.S. Lawler 14, Apr. 19, 2023; V.S. Garland 3-5, 13-17, May 5, 2023.) There is no valid reason for the Board to act precipitously here, particularly where such action would likely harm other parties that are not present. There is no question that NTEC has an opportunity to seek compensation for harm allegedly suffered in litigation that does not require the Board to intervene through emergency service orders or preliminary injunctive relief in complex rail markets that may create more harm to other shippers. The Board should let NTEC’s

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common carrier complaint play out without creating unintended consequences for numerous other parties.

2. Does BNSF contend that it has “sole discretion” to determine the level of service that it provides to NTEC?

NTEC has repeatedly claimed that the service limitation notice contained in the common carrier pricing authority 90139 that BNSF sent to NTEC on December 29, 2022 reflects BNSF’s view that it has “unilateral discretion to determine the needs and economic tolerances of its customers.” (NTEC Rebuttal 2; *see also* NTEC Appl. 8, 16, 19 (suggesting that the “sole discretion” language reflects BNSF’s refusal to comply with its common carrier obligations)). Chairman Oberman responded to these claims by directing BNSF to address whether BNSF has an obligation to move any NTEC traffic as a common carrier or if it had “sole discretion” to refuse to move any NTEC cars. Tr. 49:3-50:6. The Chairman further requested that BNSF describe the extent of its common carrier obligation regarding the level of service it is obligated to provide as a common carrier to NTEC.

As a preliminary matter, NTEC failed to explain to the Board that the common carrier pricing authority currently governing NTEC’s shipments does not contain the “sole discretion” language. The pricing authority that NTEC attached to its Application containing the “sole discretion” language had already been replaced by a new pricing authority that did not contain the “sole discretion” language. BNSF sent NTEC that new pricing authority on March 27, 2023 and it was effective April 15, 2023. Thus, the pricing authority NTEC possessed when

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NTEC filed its Application did not actually contain the “sole discretion” language of which it complained.

As explained by BNSF’s witness Ms. Lawler in her Supplemental VS, the “sole discretion” language was { [REDACTED] [REDACTED] [REDACTED] } (Supp V.S. Lawler 26.) As Ms. Lawler explains, whatever meaning is ascribed to the “sole discretion” language, it is not relevant here. Ms. Lawler confirms that BNSF has always been committed to fulfilling its common carrier obligations and is committed to following the legal interpretation of that obligation. *Id.*

There is substantial precedent explaining the scope of a railroad’s common carrier obligation. When assessing whether a railroad has complied with its common carrier obligation, agency and court decisions have appropriately proceeded on a case-by-case basis. The service a railroad must provide under its common carrier obligation varies depending on the circumstances in the particular case.

To be absolutely clear, BNSF has never taken the position that BNSF can refuse to provide service upon reasonable request from a shipper. The standard for assessing a railroad’s conduct under the circumstances first involves an inquiry into whether a shipper’s request for service was indeed reasonable. 49 U.S.C. § 11101(a). If the shipper has made a “reasonable request,” a railroad does not necessarily have to provide all the service the shipper demands; it need only provide “adequate” service under the circumstances. *Granite State Concrete Co., Inc. v.*

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STB, 417 F.3d 85, 92 (1st Cir. 2005); *see id.* 92 n.10 (“‘Adequate service’ (as opposed to just ‘service’) is not in the language of section 11101, but it is a part of the general definition of common carrier obligations.”).

Further, the case law recognizes that given the complexity of rail operations, the STB will not second guess reasonable choices made by the railroad in satisfying service requests. “[H]ow a railroad satisfies its common carrier obligation is left to the railroad to decide in the first instance.” *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry. Co. (TMPA)*, NOR 42056, slip op. at 6 (STB served Sept. 27, 2004). Railroads must have flexibility “to adjust the level of train traffic over particular line segments in response to changes in shipper demands and in other market conditions” in order “to retain the ability to carry out their statutory obligation to provide common carrier service.” *Major Rail Consolidation Procs.*, 5 S.T.B. 539, 578 (2001). Conversely, agency and court decisions have recognized that bright-line, inflexible requirements are inconsistent with the common carrier obligation. *See, e.g., Sherwin Alumina Co. v. Union Pac. R.R. Co.*, NOR 42143, slip op. at 6 n.12 (STB served Sept. 29, 2015).

The case law also appropriately recognizes that a shipper moving freight under a railroad’s common carrier authority is not entitled to expect a certain level of service. “So long as the railroad offers service that satisfies its common carrier obligations (the critical inquiry), it need not provide the particular service that the shipper would prefer.” *TMPA*, NOR 42056, slip op. at 6. For example, in *Savannah Port Terminal R.R., Inc.*, the shipper complained that it was not receiving three

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switches per day, a level of service that it had received at a point in the past.

Savannah Port Terminal R.R.—Pet. for Declaratory Order—Certain Rates & Practices as Applied to Capital Cargo, Inc., FD 34920, slip op. at 8 (STB served May 30, 2008). In denying the request for three switches per day, the Board noted that just because the railroad had at times provided three switches a day, it did not mean that such a level of service was required when circumstances had changed and it was no longer reasonably able to do so. *Id.* at 8-9. Moreover, the Board emphasized that “the common carrier obligation does not require a carrier to maintain service levels for one shipper that will degrade service overall.” *Id.* at 9. As explained above, this “do no harm” principle is central to the STB’s approach in addressing emergency service order and preliminary injunction requests.

Because the inquiry of what constitutes reasonable service focuses on all of the facts and circumstances surrounding the transportation, there is no particular level of service that can constitute an objective, constant standard for adequate service on a month by month basis. That is because facts and circumstances vary, markets change, volumes rise and fall, weather fluctuates, and there are not necessarily constant levels of service that would be reasonable every month.

There are also a number of court and agency cases addressing the scope of a railroad’s common carrier obligation in times of constrained capacity, i.e., when all requests for service are not capable of being fully met with existing resources. The principle that has clearly emerged is that a railroad need not provide additional capacity to meet peak demand. A railroad must have sufficient ability to meet

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average demand for the services it holds out to the public, but it need not have all capacity necessary to meet peak demand. *See Nat'l Grain & Feed Ass'n v. Burlington N. R.R. Co.*, 8 I.C.C.2d 421, 427 (1992), *aff'd in part and rev'd in part on other grounds by Nat'l Grain & Feed Ass'n v. ICC.*, 5 F.3d 306 (8th Cir. 1993); *see also Shippers Comm., OT-5 v. Ann Arbor R.R. Co.*, 5 I.C.C. 2d 856, 867 (1989). Early on, the Supreme Court held that if a railroad faces a car shortage because of an unexpected increase in business, it is “not liable for failing to transport more than [it] can carry.” *Pa. R.R. v. Puritan Coal Mining Co. (Puritan Coal)*, 237 U.S. 121, 133 (1915). As shown in Ms. Lawler’s V.S., it is clear that NTEC is asking the Board to order BNSF to provide service levels that reflect peak demand. Even though BNSF’s service to NTEC in 2023 has been greater than it has been since 2021 and virtually identical to the service levels it has received over the life of its relationship with BNSF, NTEC is asking for even more.

Over the years, the problem of allocating constrained capacity during times of high demand for rail service has resulted in regulatory disputes many times, including in the context of coal transportation. In the Supreme Court’s *Puritan Coal* decision, the Court stated that when constrained capacity must be allocated, the railroad must do so in a “fair” and “reasonable” manner. *Id.* at 133 (“The law exacts only what is reasonable from such carriers, but, at the same time, requires that they should be equally reasonable in the treatment of their patrons.”). The ICC sought to implement this general principle with prescriptive rules that turned out to be enormously difficult to implement. A complicated scheme of allocating

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cars to coal mines based on a rating system was developed under Section 1(12) of the Interstate Commerce Act, that was added in § 402 of Transportation Act, 1920, 41 Stat. 456 (1920), later codified at 49 U.S.C. § 11126. *See, e.g., In re Rules Governing Ratings of Coal Mines Other Than Anthracite, and Distribution of Cars to Such Mines*, 95 I.C.C. 309 (1924). That prescriptive system remained in place (long after its utility was gone) until it was eliminated in the ICC Termination Act of 1995 (“ICCTA”).

A prescriptive system for allocating constrained capacity in the coal transportation market, developed when all transportation was common carrier transportation, was not consistent with the fact that Congress in the Staggers Rail Act of 1980 (“Staggers Act”) had authorized (and indeed strongly encouraged) the use of transportation contracts that provided contractual mechanisms to address shipper service requirements. In the area of coal transportation, the use of transportation contracts in short order became by far the predominant means of addressing shipper service requests. An antiquated prescriptive allocation system that had been developed for a market in which all service was common carrier service no longer made any sense.

Instead of that prescriptive and anachronistic system, the statute now sets out the general requirement, contained in 49 U.S.C. § 11101(a), that contract commitments be respected and given priority unless a railroad acted unreasonably in tying up available capacity through contracts. As explained in the next section, BNSF never acted unreasonably in committing to contract service to { [REDACTED] } over

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the decade-long relationship with {{REDACTED}} and it would be inappropriate and inconsistent with the statute to order BNSF to take actions that would prevent BNSF from satisfying those contractual expectations.

3. Provide legal argument about 49 U.S.C § 11101(a) and what it means, specifically the final sentence: “Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.”

Chairman Oberman expressly directed BNSF to address the meaning of 49 U.S.C. § 11101(a), addressing specifically the final sentence which provides “[c]ommitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.” Hr’g Tr. 45:17-47:5.

Section 11101(a) currently provides:

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. [**Sentence 1**] A rail carrier shall not be found to have violated this section because it fulfills its reasonable commitments under contracts authorized under section 10709 of this title before responding to reasonable requests for service. [**Sentence 2**] Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable. [**Sentence 3**]

49 U.S.C. § 11101(a).

Sentence 2, expressly authorizing railroads to give priority to “reasonable commitments under contracts,” was first enacted with the Staggers Act. The provision flowed from and was consistent with Congress’s important new policy of allowing railroads and shippers to enter into rail transportation contracts. The rationale of Sentence 2 seems clear – contracts would be of little value if railroads

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and shippers could not rely on them being effective over the term of the contract. And Congress was abundantly clear on the importance of contracts to the new market-based regulatory structure it was establishing. In enacting that legislation, Congress was deliberately promoting the use of contracts, explaining that “[c]ontract provisions offer significant transportation benefits in that they allow for better planning on the part of both shippers and carriers and should improve car utilization and allocation of equipment and other resources.” S. Rep. No. 96-470, at 24 (1979). Ultimately, Congress considered the contract rate provision of the Staggers Act to be “among the most important in the bill.” *Id.* at 9.

The Board has repeatedly recognized the importance that Congress attached to the contract rate provision of the Staggers Act. *See, e.g., Kan. City Power & Light Co. v. Union Pac. R.R. Co.*, NOR 42095, slip op. at 2 (STB served July 27, 2006) (citing S. Rep. No. 96-470, at 9). Rail carriers and shippers were “encouraged by the Staggers Act to enter into contracts for the delivery of specified transportation services under specified rates and conditions.” *Parrish & Heimbecker, Inc.—Petition for Declaratory Order*, 4 S.T.B. 866, 870 (2000) (citing H.R. Rep. No. 96-1430 at 80 (1980)). The Board has stated that “[t]he authority to contract was one of the more significant aspects of the new freedoms granted by the Staggers Act because it allowed rail carriers to tailor rail service more individually and thereby market transportation services more effectively.” *Id.* (citing H.R. Rep. No. 96-1430 at 100) (1980)).

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Sentence 2 and Sentence 3 were not enacted by Congress at the same time. While Sentence 2 was added in the Staggers Act, Sentence 3, which provides that “[c]ommitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable,” was added by ICCTA. *See* Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat 1895, 1929 (1980); ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, 830 (1995). We are not aware of any case law discussing the interplay between Sentences 2 and 3. However, the Committee on Transportation and Infrastructure provided a succinct explanation of Congress’s intent in adding Sentence 3 to the statute.

The Committee explained that Sentence 3 should be interpreted as follows:

[T]he focus on “reasonable” contractual commitments is intended to clarify that, although a casual requester of service cannot legally demand equal treatment with another shipper who has made a prior contract for service, the carrier may not render itself incapable of reasonably responding to such casual requests for common carrier service, such as by effectively divesting itself of control of its car fleet through committing all or virtually all of the fleet under prior contracts.

Committee on Transportation and Infrastructure, H.R. Rep. No. 104-311 at 103 (1995). First, the Committee emphasized that a common carrier shipper “cannot legally demand equal treatment with another shipper who has made a prior contract for service.” *Id.* In short, contract and common carrier shippers are not required to be treated equally. The Committee made it clear that Sentence 3 was not intended to change the priority that contract shippers enjoy. *See id.*

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Second, while the carrier may enter into contractual commitments that will be given priority, a common carrier “may not render itself incapable of reasonably responding to . . . casual requests for common carrier service.” *Id.* But, consistent with prior law,⁴ that question must be addressed as of the time the contract is executed, not later in time when circumstances change. Under prior procedures, a shipper had 30 days to challenge a contract as unreasonable. The focus was whether the carrier acted reasonably at the time it entered the contract. Thus, a carrier cannot disregard reasonable prospects of future common carrier service requests, but a reasonable contract – at the time it was executed – cannot become unreasonable simply because unexpected requests for common carrier service are made in the future. Such an approach would dramatically undermine the value of contracts because the contract parties could never know what future conditions will prevent the implementation of the contract terms.

⁴ The Committee was making clear that the addition of Sentence 3 was tied to the elimination of other provisions in the existing statute relating to the use of transportation contracts. In particular, prior to ICCTA, carriers were required to file their rail transportation contracts. The predecessor to current Section 10709, 49 U.S.C. § 10713, set out a process that allowed the ICC, on its own initiative or by complaint, to initiate a proceeding within 30 days from filing of a contract for the transportation of non-agricultural products to be reviewed on the grounds that a shipper “individually will be harmed because the proposed contract unduly impairs the ability of the contracting carrier or carriers to meet their common carrier obligations to the complainant under Section 11101.” Former 49 U.S.C. § 10713(d)(2)(A)(i). While the provisions setting out that process were repealed in ICCTA, the ability to challenge a contract that unduly impairs the ability to meet common carrier obligations was not eliminated, but rather moved to section 11101(a). But the movement of the provision to Section 11101 was not intended to cut back on Congress’s promotion of contracts by giving shippers an open-ended process for challenging contract commitments as unreasonable.

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As explained by Ms. Lawler, BNSF's commitments to {{REDACTED}} were clearly reasonable when they were made. At no time had any common carrier service been requested for export coal movements to Westshore, and that remained true until the end of 2022. Indeed, the vast majority of all coal, domestic and export, is transported today under contracts and there is very little common carrier coal transportation. As such, for as long as BNSF has transported export coal to Westshore, there has been little basis to expect significant future common carrier coal transportation requests, let alone a surge in non-contract service requests brought about by a hot export coal market. It would have been unreasonable to hold aside capacity desired by a contract shipper to accommodate a future request for common carrier service that had little reasonable prospect of being made.

The Committee's third point was to describe the type of contract commitment that could raise concerns, noting that it could be a problem for a carrier to "effectively divest[] itself of control of its car fleet through committing all or virtually all of the fleet under prior contracts." *Id.* But the {{REDACTED}} contract did not make "all or virtually all of [BNSF's] fleet" unavailable for common carrier transportation. Substantial capacity has always been available to serve other shippers, including common carrier shippers if they were ever to materialize.

Indeed, NTEC and its predecessor Cloud Peak received an enormous amount of coal transportation for years notwithstanding the contractual commitments under the {{REDACTED}} and arrangements with other shippers. And when NTEC chose to become a common carrier shipper, the capacity that BNSF had

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previously made available to handle NTEC traffic continued to be available to handle that traffic with NTEC as a common carrier shipper. The volume charts included in Ms. Lawler's Supplemental V.S. demonstrate that BNSF did not tie up in contracts all capacity that had previously been available to NTEC when it was shipping as a contract shipper. (Supp V.S. Lawler 18.) BNSF did not enter into unreasonable contract commitments with other shippers, so BNSF was entitled to prioritize the movement of coal under a contract with {{REDACTED}} that contained volume commitments when capacity constraints began to limit the total amount of coal that could be transported to Westshore.

III. Conclusion

Based on the arguments above and those presented in BNSF's April 19 Reply, BNSF requests that the Board deny NTEC's request for an emergency service order and request for a preliminary injunction. However, as BNSF stated in the letter filed on April 17, 2023, and its April 19 Reply, BNSF would be happy to engage with NTEC and the Board and its staff in further dialogue regarding this dispute, should the Board believe that to be productive.

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Respectfully submitted,

/s/ Anthony J. LaRocca

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Dated: May 5, 2023

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BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42178

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC
v.
BNSF RAILWAY COMPANY

EX PARTE APPLICATION FOR
SECTION 11123 EMERGENCY SERVICE ORDER

Verified Statement of Farah Lawler

Dated: May 5, 2023

Public Version

I. Introduction and Summary

My name is Farah Lawler. I am the Vice President Industrial Products for BNSF Railway Company (“BNSF”). I have been in this position since July 2022. In this role, I lead teams responsible for sales and business development for coal, petroleum and industrial products related to the energy sector, including frac sand. Previously, I have held several marketing and sales roles in Consumer Products, Industrial Products and Agriculture Products at BNSF, including Assistant Vice President, Industrial Products. In these roles, I have acquired substantial knowledge about the market and competitive conditions affecting the energy sector, including the business of coal.

I submitted a Verified Statement in this proceeding on April 19, 2023. I am submitting this Supplement Verified Statement to respond to certain questions posed to BNSF and Navajo Transitional Energy Company (“NTEC”) by the Surface Transportation Board (“STB” or “Board”) at the pre-argument conference held on April 27, 2023. I have focused my Supplemental Verified Statement on the questions posed relating to commercial issues.

II. Historical Information Regarding Coal Shipments to Westshore

I understand that the STB requested that BNSF provide more historical information about coal transportation to Westshore Terminals. BNSF’s movements of coal to Westshore Terminals have been exclusively for export to destinations outside the United States. Westshore is an export terminal located near Vancouver,

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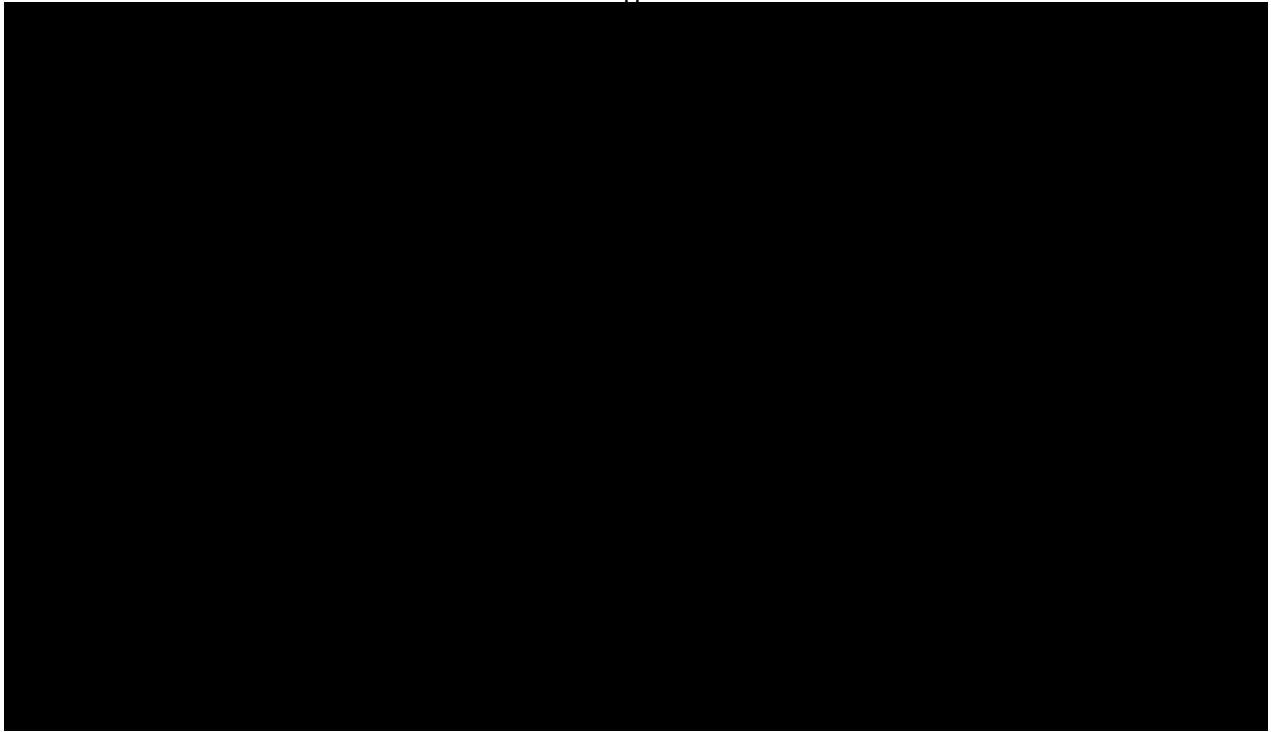
British Columbia, Canada that transloads both thermal coal and metallurgical coal from mines in Canada and the United States.

Westshore is served by BNSF, Canadian Pacific Kansas City (“CPKC”), and Canadian National Railway (“CN”). In 2022, my understanding is that CPKC and CN hauled approximately 57% of all coal transported to the facility, and during the last decade, the combined CPKC and CN share has been as high as 76% of all coal transported to the facility. The export coal volume BNSF transports to Westshore primarily originates at two mines in Montana: { [REDACTED] [REDACTED] }, and the Spring Creek mine owned by NTEC.

The annual volumes of export coal moved by BNSF to Westshore Terminals over the past ten years are illustrated in the chart below. The chart shows that the volume of coal to Westshore has varied over the last decade, averaging { [REDACTED] } tons from 2013 through 2022, with a low of { [REDACTED] } and a high of { [REDACTED] }. And while volumes declined somewhat in 2022, the volume in that year—{ [REDACTED] }—was still above average for that time period.

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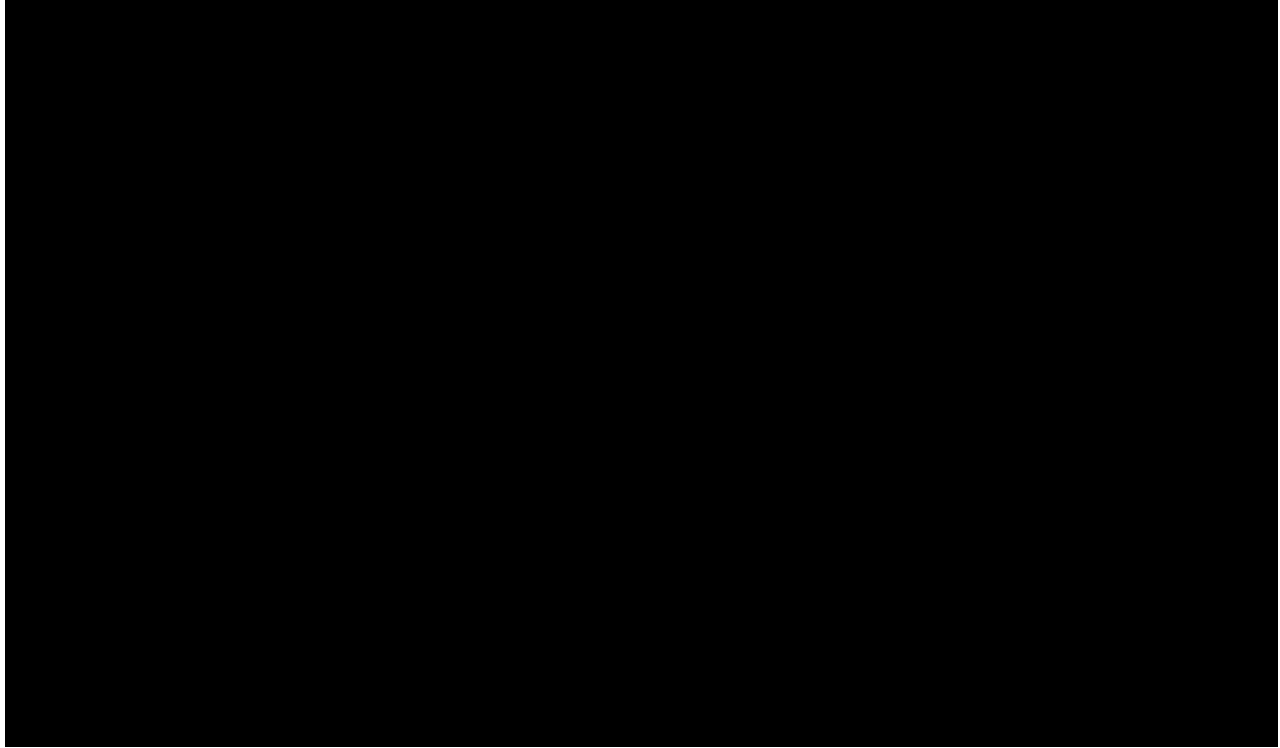


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The variability of BNSF's export coal volumes over the past decade contrasts greatly with our domestic coal volumes, which for many reasons have declined substantially over time. The following chart shows the overall {{[REDACTED]}} decline in BNSF's total annual domestic coal volume over the same time period.

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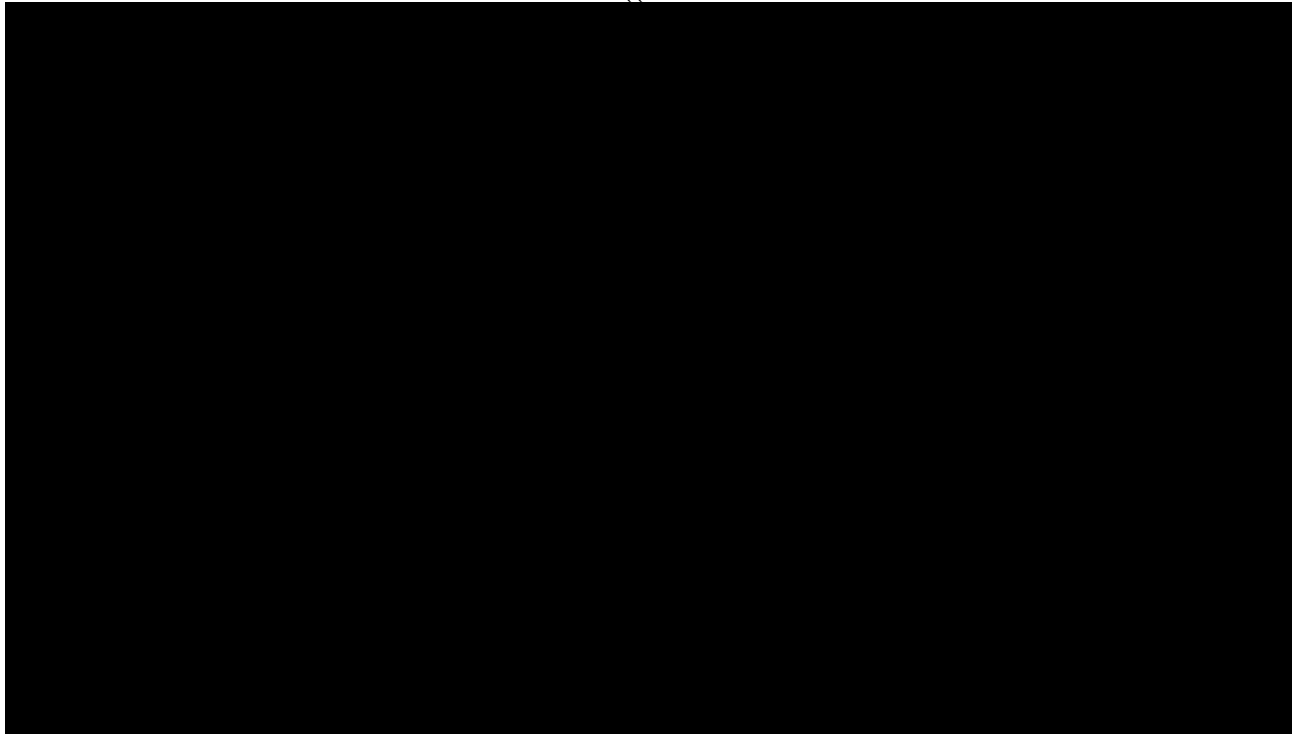


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As discussed more fully below, the decline in the much larger domestic coal market has led to constraints on the availability of trainsets for all coal movements, including export coal movements. The chart below shows BNSF's export coal movements relative to its domestic coal movements over the past decade. On a combined basis, BNSF's total coal volumes (domestic plus export) have declined { [REDACTED] } in the last decade.

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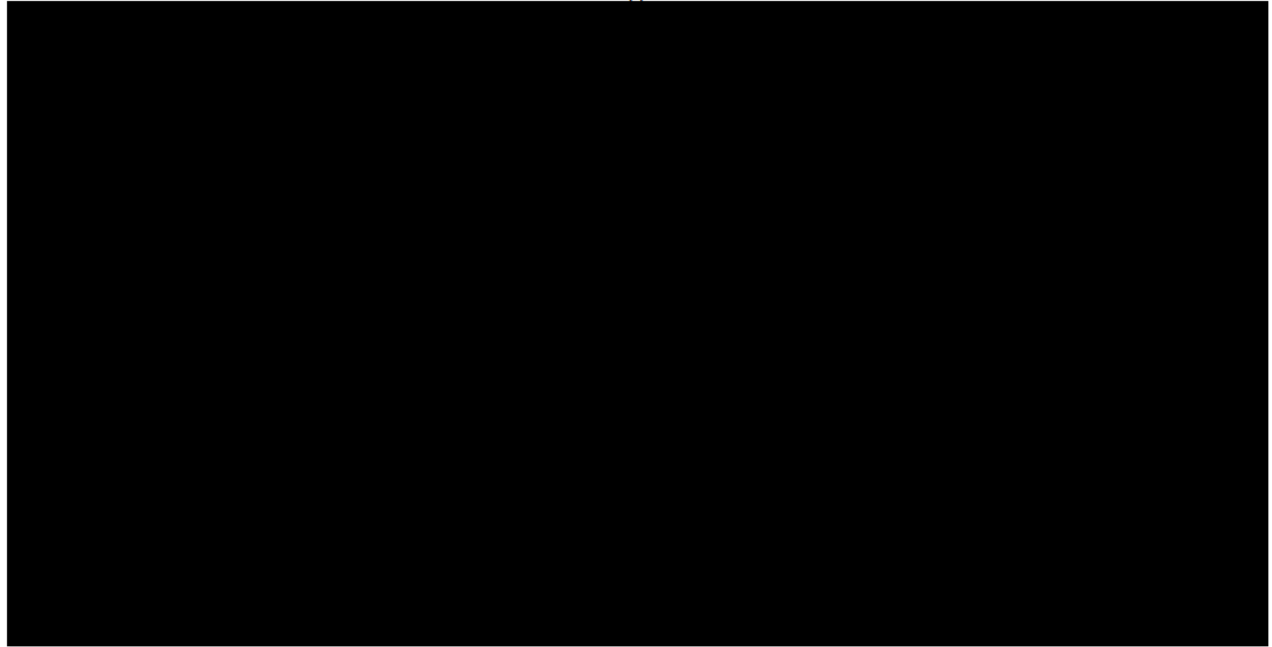


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Since 2008, there have been five shippers moving coal on BNSF to Westshore. The largest volume shippers have been { [REDACTED] }, NTEC and NTEC's predecessor, Cloud Peak. The chart below shows the breakdown of volumes by shipper over time.

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III. BNSF's 2023 Common Carrier Movements of Coal to Westshore for NTEC Have Greatly Exceeded the Average of NTEC's Westshore Volumes in 2022.

Until 2023, all of NTEC's export coal was transported under transportation contracts. I discuss the history of those contracts and negotiations over new contracts below. NTEC only started moving coal to Westshore as a common carrier shipper in 2023, and remains the first and only BNSF shipper to ever request to do so.

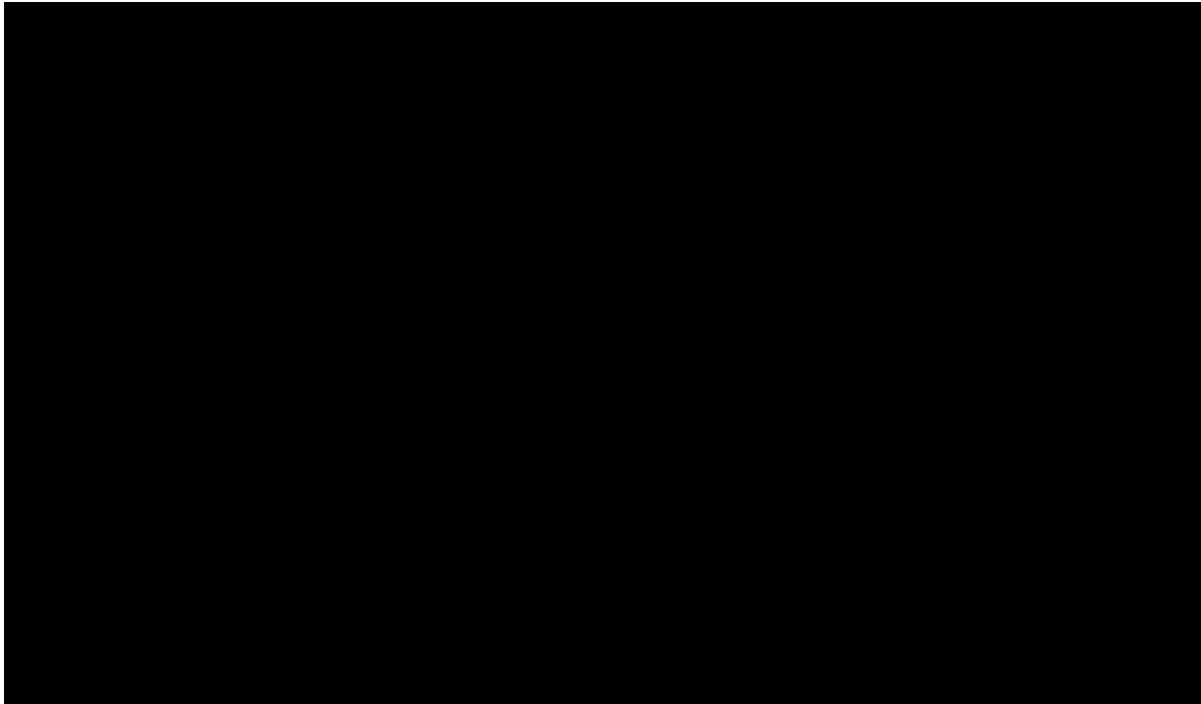
Nearly all of BNSF's coal transportation (domestic and export) occurs pursuant to contracts, not common carrier pricing authorities. This is largely because both our shippers and BNSF are better able to devote the significant resources (including BNSF-provided trainsets) associated with these large volume, single-origin to single-destination movements, if the economic and operational terms are known well in advance. This market is quite different than, for example,

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BNSF's agricultural products customers who ship predominantly under common carrier pricing authorities, which allows them the flexibility to shift their volumes to different markets BNSF serves depending upon the market dynamics in play at any given time.

Thus far in 2023, NTEC's average monthly volume of coal has substantially exceeded { [REDACTED] } the average monthly volume of coal it moved in 2022, when it was a contract shipper, as illustrated in the chart below.

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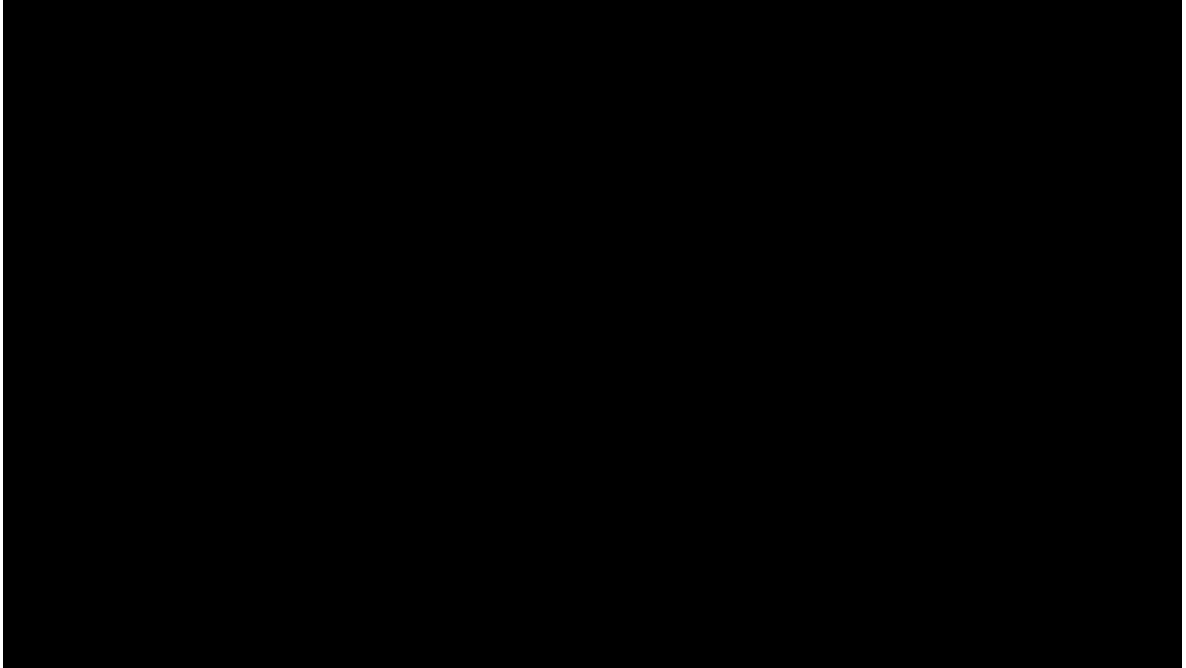
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The chart above does not include expected volumes for May and June. A major focus of NTEC's April 21, 2023 filing was the expectation that BNSF would move only 16 trains in June. However, BNSF recently advised NTEC that we

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expect to be able to run 22 trains in June. If you include these expected May and June volumes, then thus far in 2023 NTEC's average monthly volume of coal has exceeded their 2022 average monthly volume by even more {{[REDACTED]}}

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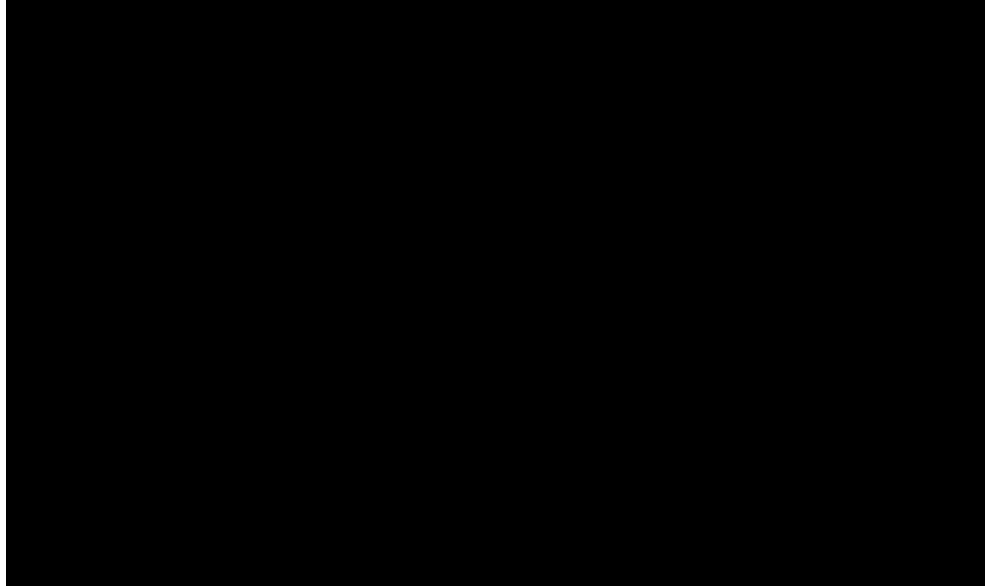


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I recognize that NTEC has filed a lawsuit complaining about the volume of coal BNSF transported in 2022, so NTEC may not believe that 2022 is the appropriate comparison. However, even if NTEC's 2023 export coal volumes are compared to its average export coal volume over the entire time period that NTEC has owned the Spring Creek mine, it is clear that NTEC's current monthly coal volumes as a common carrier shipper remain statistically identical to historical volumes.

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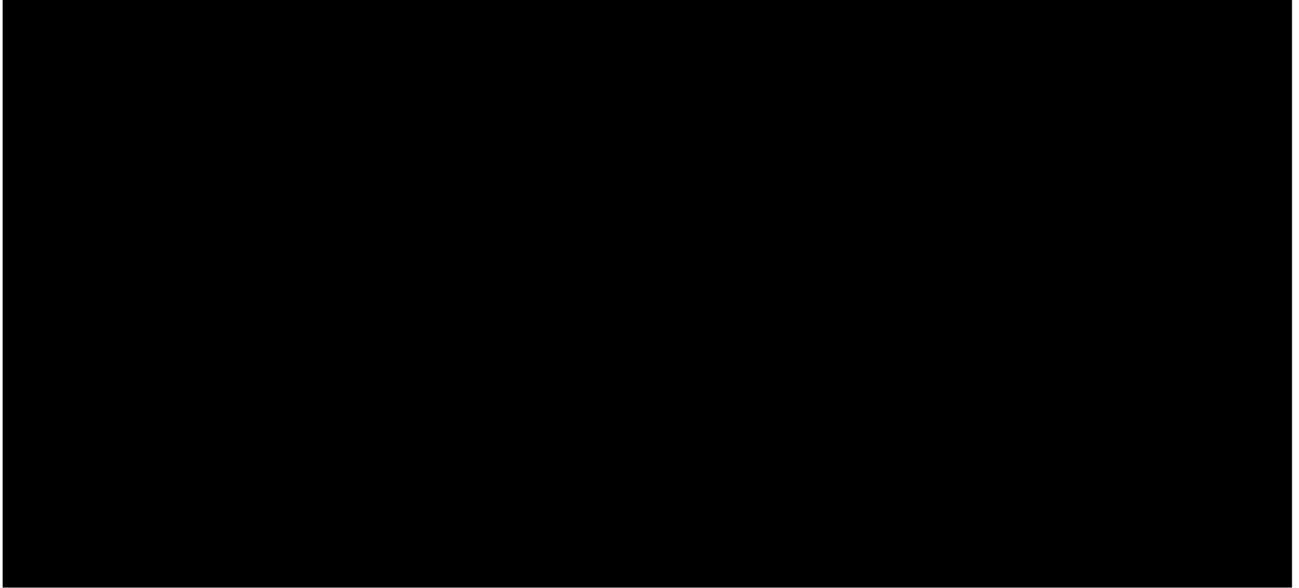


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And it is important to put NTEC's current request for substantially more coal transportation into context. The volume NTEC is now requesting that the STB order BNSF to provide is { [REDACTED] } higher than the average of its coal transportation volumes over the entire time it has owned the Spring Creek mine. The chart below illustrates NTEC's average volumes to Westshore since 2019.

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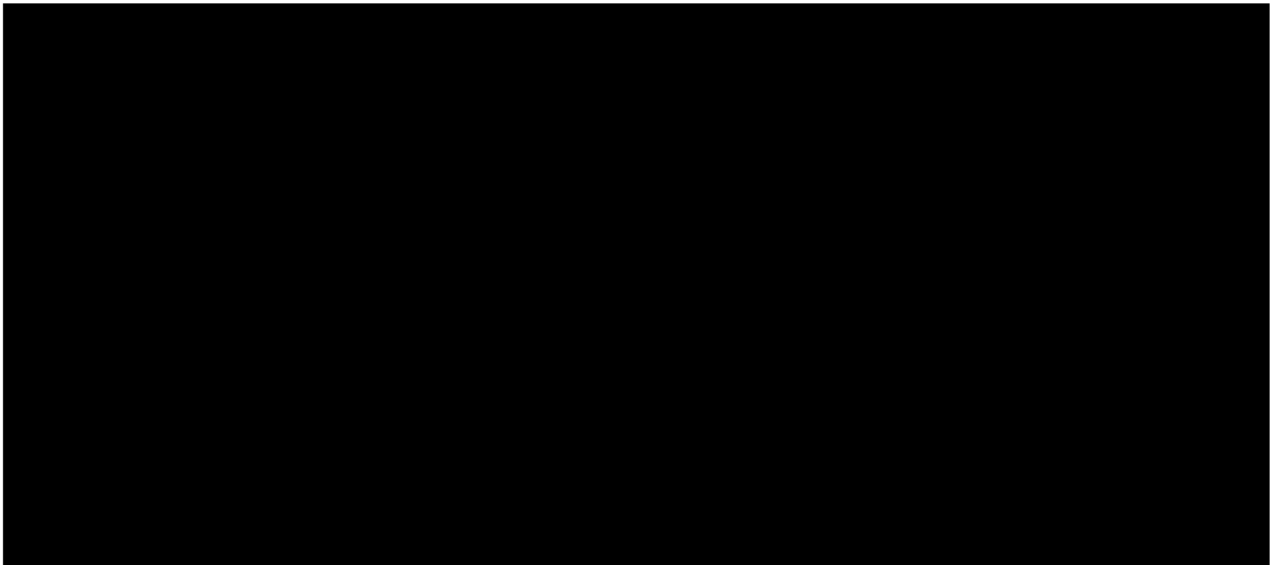
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And, as shown in the chart below, if you compare the minimum monthly volume of coal that NTEC is now asking the STB to order BNSF to transport to the monthly volume of coal that BNSF has transported since the beginning of 2022, the request is { [REDACTED] } higher.

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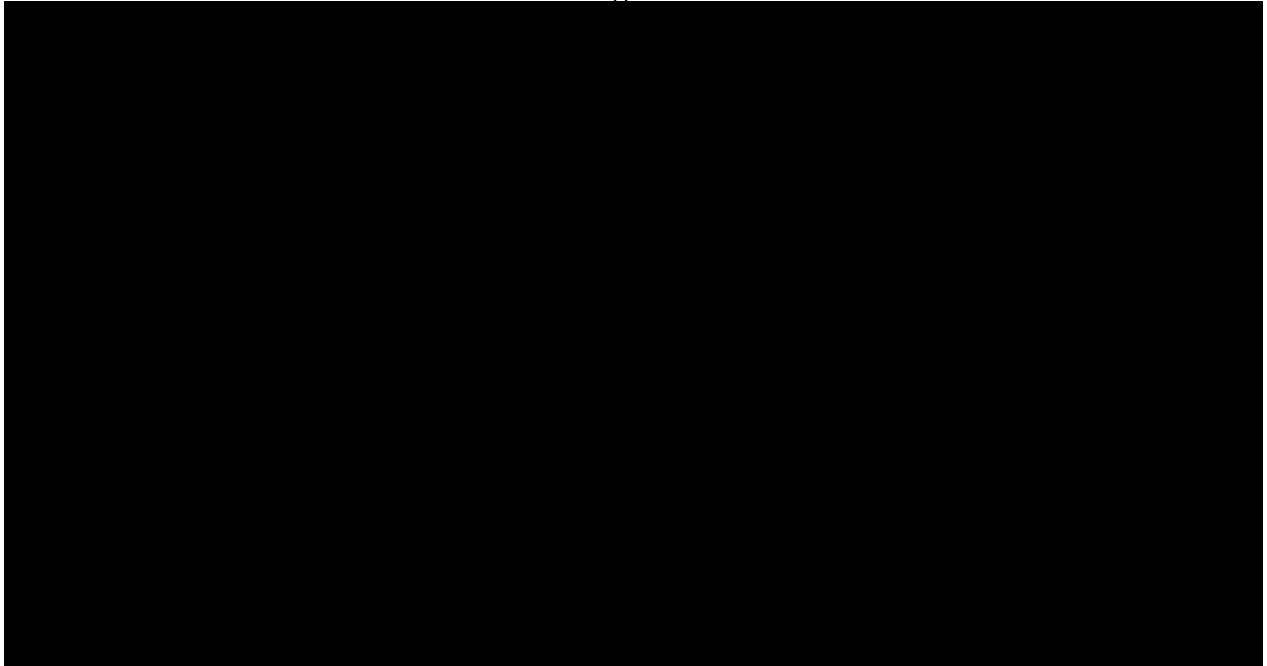
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Concerning NTEC's export and domestic movements, I have also included below a chart that was erroneously excluded from page 3 of my April 19, 2023

Verified Statement. This chart demonstrates that {{

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IV. A Number of Constraints Have Made It Difficult to Meet Total Demand for Export Coal Transportation Since Early 2022.

In my April 19 Verified Statement, I showed that the price of coal in export markets has surged, leading to a significant spike in demand for BNSF's transportation of coal to Westshore since 2021. BNSF has not been able to fully satisfy this surge in demand from our customers. While the export coal market has softened slightly in 2023, prices of coal in the export market remain above historical averages and the demand for BNSF's transportation to Westshore remains high.

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BNSF acknowledges that we were not able in 2022 to transport the total amount of coal that NTEC requested. And while BNSF's movements of coal for NTEC have increased substantially since January 2023 when NTEC became a common carrier shipper, NTEC continues to request more coal transportation than BNSF is able to satisfy.

As stated in my April 19 Verified Statement, the inability to deliver a higher volume of coal for NTEC is driven by several factors, namely (1) the lack of additional available trainsets to put into export coal service; (2) constraints on the availability of crews at BNSF's Everett crew base; and (3) the need to serve BNSF's other customers. I address the question of trainsets below. My colleague, Matthew Garland, will address the operating constraints in the Everett and Seattle (Interbay) areas, with a particular focus on the availability of crew in his Verified Statement.

The limited availability of trainsets that could be added to Westshore service is the result of external factors that BNSF does not control, including the long-term decline in coal as an energy source. Where possible, BNSF has sought to increase the number of cars available for coal service in recent years. In 2021, BNSF stopped returning coal cars as leases expired, began renewing more leased cars and increased the net fleet. In 2022, BNSF added {{REDACTED}} cars to the fleet. However, BNSF has not been able to locate additional trainsets to put into NTEC service.

As explained above, BNSF total coal volumes (domestic and export combined) have declined by {{REDACTED}} over the last decade. This structural decline in demand for

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coal transportation reflects broader trends in the economy as coal has declined as a source of energy, due largely to competition from lower natural gas prices and other sources of energy. This structural decline in coal transportation has led railcar manufacturers to produce fewer and fewer new coal cars over time. Indeed, it is my understanding that there are currently no new coal cars being manufactured today. There is little incentive for railcar manufacturers, lessors, coal shippers or railroads to invest in building new long-term assets given the declining market. In addition, high scrap metal prices have led car owners and lessors to scrap existing cars.

When possible, BNSF has put train sets typically used for domestic utility coal into export service for NTEC and other export shippers. As we move into the summer months, that capacity tightens as domestic electricity demand surges and utility stockpiles are diminished.

V. BNSF Has Offered NTEC the Ability to Ship Via Interchange with CPKC, and NTEC Has Utilized that Option.

Because Westshore Terminals is also served by CPKC, it is possible for NTEC's export coal to be transported in interline BNSF-CPKC service via interchange at Sweetgrass, Montana/Coutts, Alberta. BNSF has been willing to move NTEC's coal in that alternative route, and NTEC has shipped more than { [REDACTED] } tons to Westshore that way thus far in 2023. While this alternative routing avoids the current constraints that exist on BNSF's network in Everett, it remains an imperfect option for NTEC for the reasons set forth in Mr. Garland's Verified Statement.

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BNSF and NTEC began discussion of establishing a rate for movement of export coal to Westshore Terminals via Sweetgrass interchange in the summer of 2022. After consulting with CPKC about the operational feasibility of the move, BNSF and NTEC executed an agreement governing test shipments in August 2022. Once the test shipments were completed, BNSF issued BNSF 90140 Common Carrier Price Authority governing ongoing shipments via Sweetgrass interchange in January and that remains in effect today. In January and February 2023, BNSF moved {{[REDACTED]}} and { [REDACTED] } tons, respectively, to Westshore via interchange with CPKC.

VI. BNSF Has Been Forced to Allocate Capacity Among Shippers as Demand Has Increased.

As I explained above, one of the primary factors that constrains BNSF's ability to provide the total volume of transportation that NTEC requests is the demand by other shippers. The same surge in coal export prices that has led NTEC to seek additional transportation to take advantage of a commercial opportunity is also causing other shippers to demand coal transportation service, including new shippers that have never previously participated in the export coal market through Westshore.

In 2022 and years prior, all of BNSF's export coal shippers tendered shipments pursuant to contracts. In 2023, BNSF has generally attempted to fulfill its obligations to those shippers who have committed volumes before serving customers with no committed volumes.

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{ [REDACTED] }

and has had a contract with committed volumes the entire time. In that time,

{ [REDACTED] } In the six years before NTEC entered the coal export market by purchasing Cloud Peak's assets out of bankruptcy in 2019, { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

}}

During 2022, none of the shippers in this lane received all of the coal transportation they desired. As reflected in the chart below, { [REDACTED]

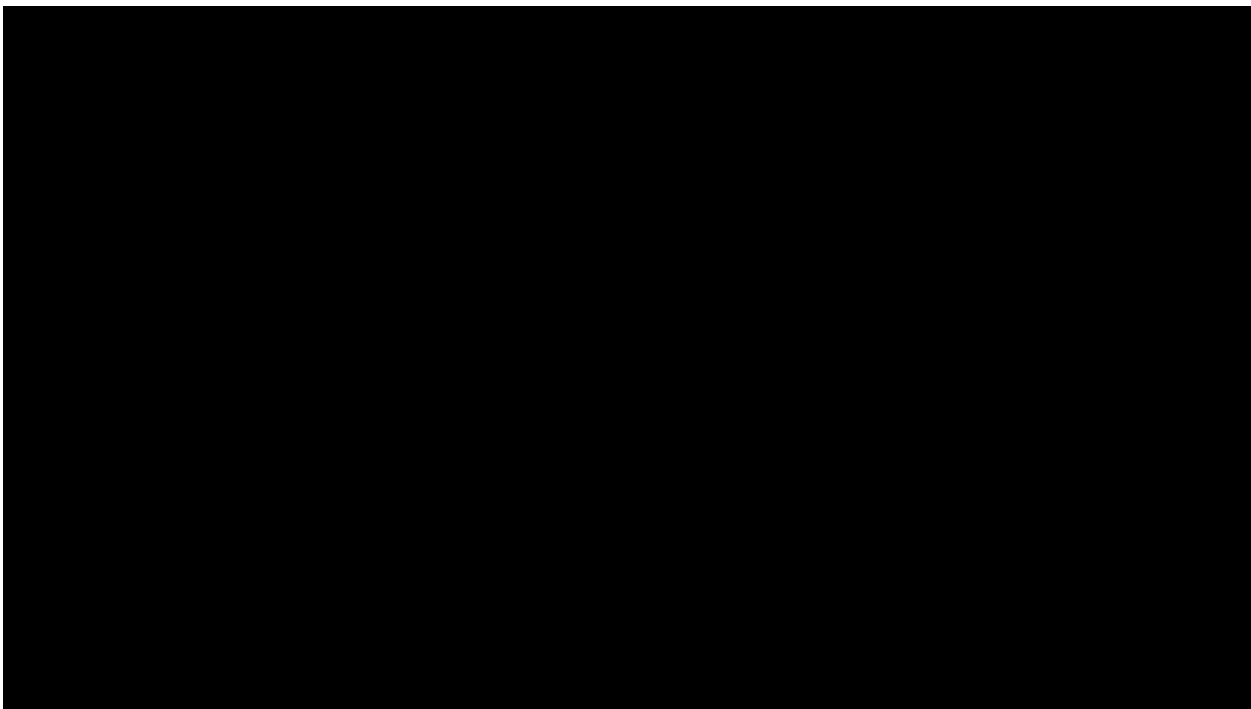
[REDACTED]

[REDACTED].}} NTEC received more of the coal transportation it requested in 2022 than its other competitor, { [REDACTED]

[REDACTED]

[REDACTED]

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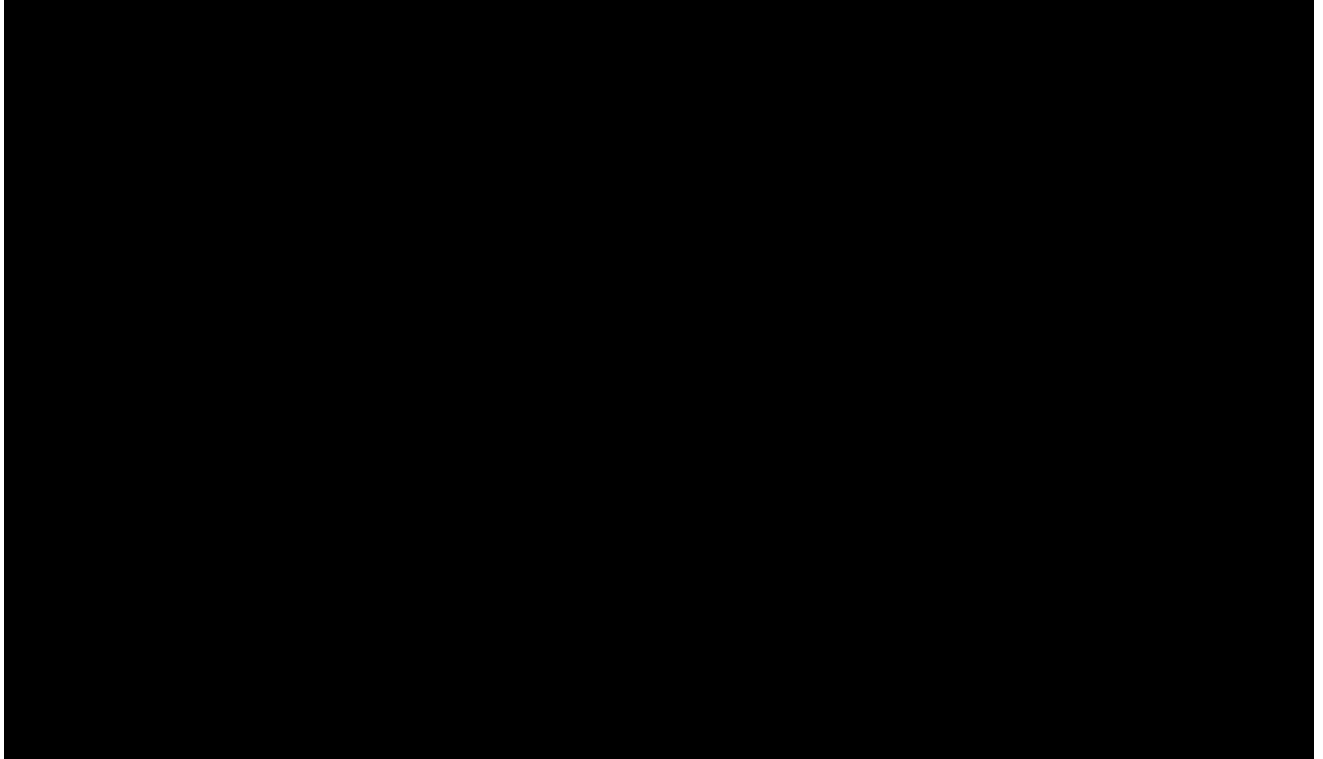


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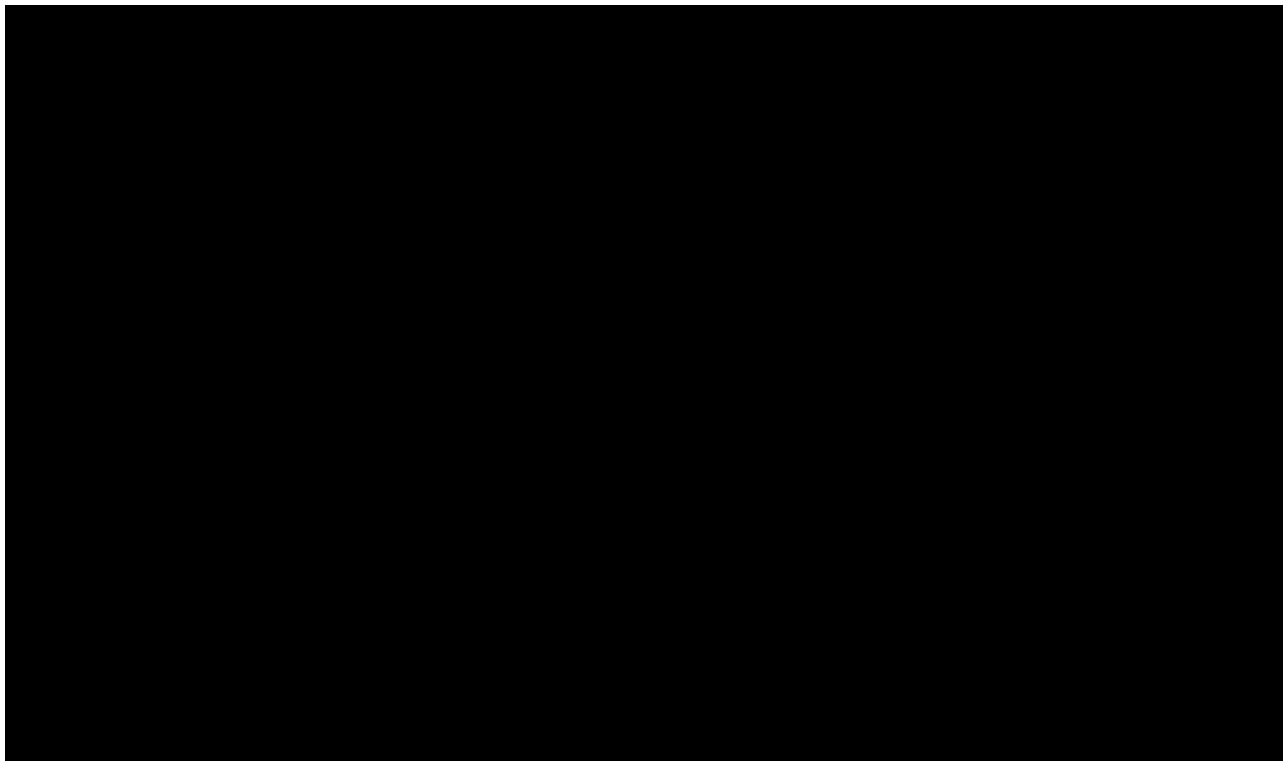
The number of tons BNSF is able to transport to Westshore varies monthly due to a variety of factors including weather, the timing of unloading slots at the port, customer demand, and BNSF capacity constraints. Yet despite this variability, NTEC has asked the Board to order BNSF to deliver a minimum of 438,625 tons per month regardless of then-current conditions. The charts below illustrate the monthly variability of BNSF's export tonnage each month since January 2021 both in total and by shipper.

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The tonnage of coal carried by a single train depends upon how many railcars are in the consist, but the average loaded BNSF train moving to Westshore contains 15,500 tons of coal. Utilizing that 15,500 tons per train assumption, the chart above reflects that BNSF's transportation to Westshore averaged {█} trains per month in 2021, {█} trains per month in 2022, and {█} trains per month in 2023.

In addition to the existing shippers in the market, BNSF has been working with the {█
█
█}}

VII. If BNSF Were Required to Increase Movements to NTEC, We Would Have to Reduce Service to Other Shippers.

I have explained above that BNSF cannot expand the total amount of transportation service it provides to Westshore in the near term. Even if additional trainsets were available, and they are not, forcing BNSF to move the additional volumes that NTEC has requested would harm many shippers of commodities that are important to the public interest, like agricultural or energy products. Therefore, the only practical way to increase volume for NTEC in the near term would be to take volume away from other Westshore shippers.

As mentioned above, {█
█
█}} BNSF's ability to serve {█} would require

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some reduction of volumes to BNSF's other coal export shippers, including NTEC.

In fact, the reason that BNSF expects to be able to provide 22 trains for NTEC in

June 2023 is that {{ [REDACTED]

[REDACTED] }} to be denied

transportation service because NTEC is demanding an increase in its movements.

{{ [REDACTED] }} largest shipper to Westshore, so an order requiring BNSF to move additional trains for NTEC would likely require that { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

{{

[REDACTED]

}}

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At the time {{[REDACTED]}} had already established itself in the export market and BNSF had ample capacity to serve the shippers in the lane. {{[REDACTED]}}

[REDACTED]

[REDACTED]

[REDACTED]}

Until {{[REDACTED]}} NTEC's predecessor. No shippers in this lane have moved traffic under common carrier rates before NTEC began doing so in January of this year. {{[REDACTED]}}

[REDACTED]}

When we have a shipper that has made explicit tonnage commitments to BNSF, we believe we are obligated to allocate our resources to try to meet their demand first. Until December 2022 when NTEC advised BNSF it would not sign a contract, every shipper in this lane had shipped pursuant to contracts, so allocating between contract and common carrier shippers was not an issue. As demonstrated from the charts above, even though NTEC has only been a common carrier shipper for four months so far, BNSF has nonetheless moved the same average amount of coal per month for NTEC in 2023 as we did on average for NTEC when they shipped pursuant to a contract.

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It is difficult to understand why NTEC believes it is now entitled to significantly more service from BNSF as a common carrier shipper in 2023, despite having chosen to eliminate any commitments to BNSF.

VIII. Contract Negotiations with NTEC in 2022 Broke Down Over Differences in Economic Expectations, and BNSF is Not Retaliating Against NTEC.

The history of contract negotiations between BNSF and NTEC show that NTEC's suggestion that it is receiving lower volumes as the result of retaliation or discrimination is not borne out by the facts. The parties were unable to reach agreement on the economics of a new contract relationship, but since those negotiations broke down, NTEC has received the same average level of coal transportation as it has over the life of our relationship, and significantly more coal transportation than it received just last year. There is no basis to suggest that BNSF is retaliating against NTEC for the failure to reach a contract.

The parties began contract negotiations in July 2022 and exchanged contract proposals, trying to find a solution that made economic sense for both parties. A key issue was {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]}} Now NTEC is seeking to

have the Board enforce higher volumes obligations on BNSF, while retaining the ability to tender little or no shipments to BNSF whenever it desires. Prior to contract negotiations stopping, {{ [REDACTED]

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[REDACTED]

[REDACTED] } The minimum monthly service NTEC has requested from the Board—438,625—would thus be a {[REDACTED]} increase from the volumes to which NTEC wanted to commit in a contract.

A mutual release of claims related to the contract issues arising in 2022 was part of the economics that the parties were negotiating and had been on the table since the summer of 2022. NTEC’s characterization that BNSF attempted to force NTEC into an eleventh-hour waiver of a damages claim worth tens of millions of dollars, is simply false. Notably, the mutual release of claims that NTEC claims was one-sided would have covered BNSF’s damages claims against NTEC as well.

There were a number of economic issues that drove our contract negotiations, including {[REDACTED]}

[REDACTED] } Another economic issue was the fact that NTEC was going to {[REDACTED]}

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] } On the other hand, NTEC communicated their belief that BNSF’s service in 2022 was inadequate and had caused NTEC damages in the form of vessel demurrage and potential lost sales (BNSF disputes that allegation). The value of

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those mutual damages claims was folded into the negotiation of the other economic terms of the contract, including the calculation of the transportation rate.

From the start of the contract negotiations through the beginning of December, NTEC {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}

It was clear to me that NTEC's objection to the concept of a mutual waiver was tied to the larger economic deal that NTEC wanted. As shown in the chart below, NTEC had owed BNSF liquidated damages on multiple occasions during our relationship and the payment of those liquidated damages claims, whether in full or at a discounted level to which BNSF agreed, was always successfully folded into our subsequent contract negotiations.

{{

[REDACTED]

$$\}} \quad$$
 $\{$

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IX. BNSF Has Always Intended to Fully Comply with Our Common Carrier Obligations.

NTEC points repeatedly to language in our Common Carrier Pricing Authority 90139 about the limitations on the service that NTEC can expect, focusing in particular on the reference to “sole discretion.” But that language is not in NTEC’s current common carrier tariff, nor has it been there since before NTEC filed its emergency service request with the STB on April 14, 2023. On March 27, 2023, BNSF sent the updated tariff to NTEC in response to its request. The updated tariff had an effective date of April 15, 2023 and did not include any service limitation or reference to BNSF’s “sole discretion.” The service limitation language in the older version of the pricing authority language {{ [REDACTED] [REDACTED] }} It continued into the first iteration of the common carrier pricing authority applicable in 2023, but it was eliminated in the updated tariff. BNSF has always committed to fulfilling its common carrier obligations.

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VERIFICATION

I, Farah Lawler, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Supplemental Verified Statement.

/s/ Farah Lawler

Farah Lawler

Executed on May 5, 2023.

Public Version

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42178

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC
v.
BNSF RAILWAY COMPANY

EX PARTE APPLICATION FOR
SECTION 11123 EMERGENCY SERVICE ORDER

Verified Statement of Matthew Garland

Dated: May 5, 2023

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I. Introduction and Summary

My name is Matthew Garland. I am the Vice President Transportation for BNSF Railway Company (“BNSF”). I have been in this position since October 2020. In this role, I lead teams responsible for the crews, dispatchers, and yardmasters who move BNSF trains. Previously, I have held several positions related to railroad operations at BNSF, including Vice President Southern Region Operations, General Superintendent with responsibility for BNSF’s Network Operations Center, and General Manager Division Operations. I also previously served as the Terminal Superintendent for the Greater Seattle Terminal Complex, which includes western Washington state and our British Columbia operations. In these roles, I have acquired substantial knowledge about railroad operations, including operations throughout the Pacific Northwest.

I am submitting this Verified Statement to respond to questions posed to BNSF and Navajo Transitional Energy Company (“NTEC”) by the Surface Transportation Board (“STB” or “Board”) at the pre-argument conference held on April 27, 2023 in this proceeding.

As background, the Northwest Division of BNSF is made up of approximately 2,220 route miles in Washington, Oregon, Idaho, British Columbia, and Northern California. Due to steep mountain grades on two of the three east-west rail corridors traversing the state of Washington, the vast majority of loaded shipments bound for export terminals in the Puget Sound region, including export coal, traverse a corridor from Spokane to Pasco, then through the Columbia River Gorge

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to Vancouver, Washington. From that point, export coal proceeds north along a corridor passing through Tacoma and Seattle onto a corridor consisting of BNSF's Bellingham and New Westminster Subdivisions to reach Westshore Terminals at Roberts Bank, British Columbia. Empty cars return along this Bellingham-New Westminster corridor to Everett, Washington before diverging east to Spokane via Wenatchee.

Within this corridor, two line segments warrant special mention. The Bellingham-New Westminster corridor is a single-tracked main line that runs approximately 141 miles from Everett to New Westminster, British Columbia. For much of its length, the corridor runs along the coasts of the Puget Sound and Semiahmoo Bay and through numerous densely populated coastal towns. Due to the ecologically sensitive geographies through which the line runs, there are relatively limited opportunities to add double-tracking, additional or lengthened sidings, or other capacity expansions. Likewise, the approximately 230-mile Fallbridge Subdivision running through the Columbia River Gorge is predominantly single-tracked with limited opportunities for capacity expansion. Our inability to construct second tracks or lengthen sidings in these segments is a limiting factor on the length of trains and ultimately the amount of freight we can move with a single crew and locomotive consist.

Export coal shares this corridor with numerous shipments of other commodities bound for shared export terminals. An average of 49 freight trains operate on the portion of the corridor running from Vancouver, Washington to

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Seattle daily while the predominantly single-tracked Bellingham Subdivision running north to the U.S.-Canada border operates 23 average daily trains. In 2022, BNSF operated on average 7.1 grain trains per day into export terminals in the Pacific Northwest, an amount that climbed to 10 trains per day during harvest season. Last year, BNSF moved over 2,900 carloads of crude oil in unit service over the corridor to oil refineries in the Puget Sound region.

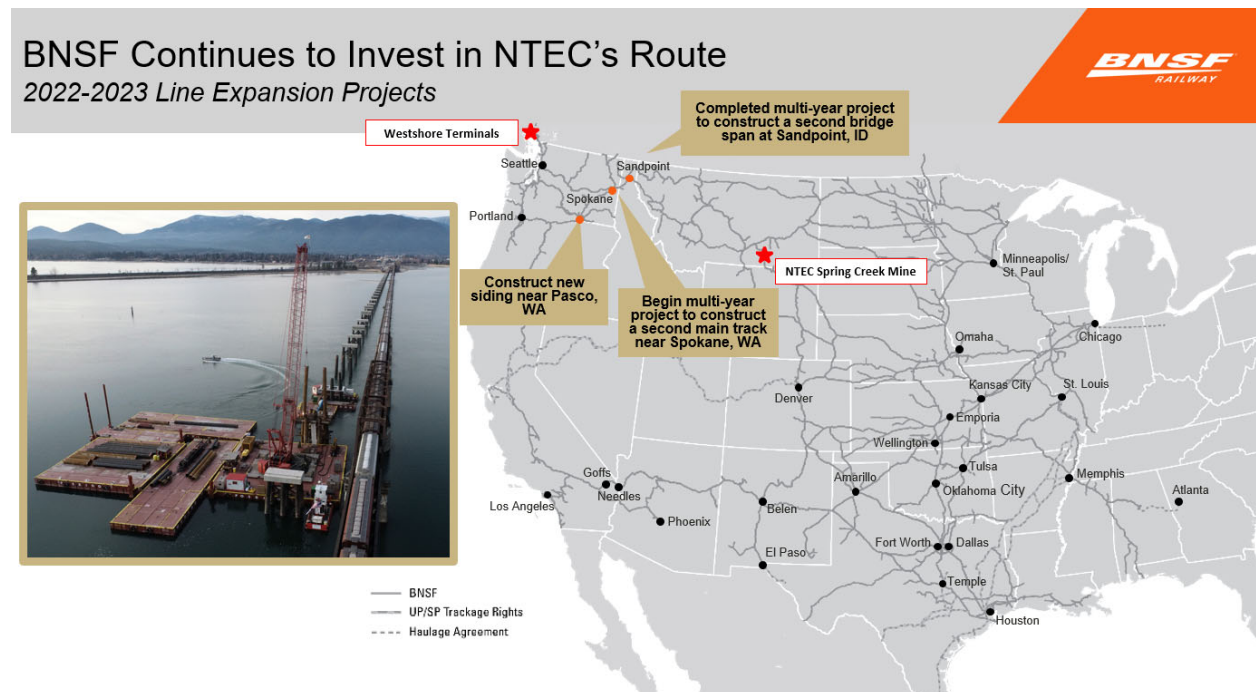
The corridor also supports the movement of numerous important public interest commodities in addition to movements of grain and other food products. Last year, BNSF transported over 1,300 carloads of chlorine gas south from British Columbia that are used in water treatment facilities in the U.S., over 35,000 carloads of lumber and panel products (plywood, gypsum wallboard, etc.) used in home construction in the U.S., and over 79,000 containers of municipal waste from communities throughout the Puget Sound region south through the corridor from Everett to Roosevelt, Washington.

BNSF also hosts passenger rail along the corridor utilized by export coal from Vancouver, Washington to Vancouver, British Columbia. Amtrak's Cascades service operates four daily trains between Vancouver, BC and Seattle as well as eight daily trains between Seattle and Portland, Oregon. The Empire Builder service also operates a round trip long-distance train along a route that includes the Spokane-Vancouver, WA and Everett-Seattle segments of the export coal corridor. Finally, BNSF operates Sound Transit commuter rail service staffed by BNSF train

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crews. There are four commuter trains each weekday between Everett and Seattle and 26 commuter trains between Lakewood and Seattle each weekday.

Over the last five years, BNSF has invested over \$911 million into infrastructure in the region, including several substantial capacity expansion investments as noted on the graphic below. These investments included constructing a second bridge at Sandpoint, Idaho, constructing a new siding to improve throughput at Pasco, Washington, and commencing a multi-year project to construct a second main track near Spokane, Washington. Across our entire network in 2023, BNSF is making capital investments totaling \$3.9 billion (\$213 million in Washington), including \$709 million slated for expansion and efficiency projects.

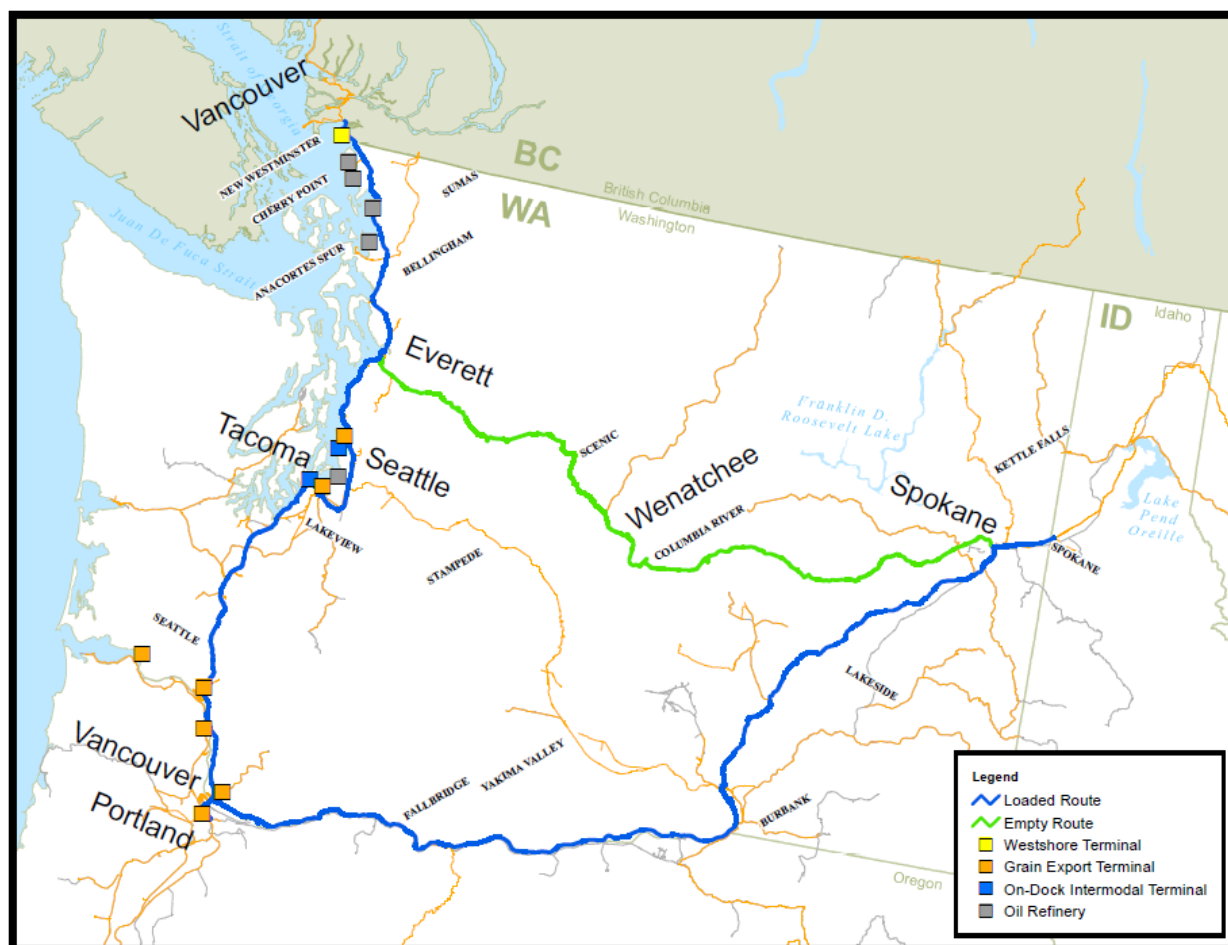


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In addition to these expansions, BNSF has also invested considerably into hardening our infrastructure to limit service interruptions and slow orders that affect velocity and fluidity. These projects have included replacing four major bridges on the Fallbridge Subdivision (with a fifth to be replaced this year), partnering with the Washington Department of Transportation (WSDOT) to rebuild the Ballard Bridge in Seattle, an ongoing partnership with WSDOT to build catchment walls for mudslides, repairs and reinforcement to seawalls along the Seattle-Everett route, and ventilation upgrades at the Cascade Tunnel. Collectively, these initiatives have contributed to a 57% reduction in average daily minutes of delay attributable to slow orders since 2018.

Much of the import and export traffic flowing through the corridor originates or terminates at capacity-limited facilities, many of which allocate landing slots among multiple railroads. As the graphic below shows, these facilities are concentrated along the corridor through which export coal moves. In addition to Westshore Terminals, BNSF serves eight grain export terminals, five oil refineries (plus an oil export terminal), and two on-dock intermodal terminals along the corridor from Vancouver, WA to Vancouver, BC. Sequencing trains into these facilities requires close coordination with the facilities themselves and other railroads as well as alignment with vessel schedules.

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A further layer of operational complexity derives from the substantial Union Pacific traffic that moves along the I-5 corridor between northern California and the Pacific Northwest. This traffic is marketed by UP and moves on BNSF lines pursuant to the I-5 Proportionate Rate Agreement entered into in 1997 in connection with the UP-SP merger. While BNSF has the ability to account for existing network conditions and traffic flows before bringing new business onto our railroad ourselves, BNSF does not have visibility into UP's I-5 traffic until it is

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billed to us for transportation. Last year, BNSF moved approximately 21,500 I-5 carloads across the Northwest Division.

The complexity of the network in the Pacific Northwest led BNSF to create a command center to manage traffic flows in 2017. The Northwest Division command center is staffed around the clock, seven days a week by BNSF terminal managers responsible for managing and coordinating trains in the busy corridor. The command center works directly with Westshore Terminals and other import/export terminals to understand their loading plans and coordinate train arrivals with vessel loadings and slot availability. The command center also monitors weather and other operational conditions to stage and coordinate traffic flow to promote fluidity. For instance, when adverse weather or a facility outage affects the ability to land and unload trains, the command center operates to coordinate traffic bound for that facility to prevent yard and siding capacity from becoming overwhelmed with staged trains.

II. Factors Driving BNSF's Operational Planning and Service

With regard to trains running from the Powder River Basin to Westshore, a number of factors drive operational planning and influence BNSF's ability to deliver shipments for NTEC. The following are the three most impactful factors.

A. Operations at Westshore Terminals

First is the available receiving and loading capacity at Westshore itself. Westshore has facilities to unload two trains simultaneously, which it allocates between its customers for volumes transported by three different Class I railroads.

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In coordinating slot availability among the three railroads, Westshore seeks to sequence deliveries and allocate slots according to vessel schedules. Westshore realizes operational efficiencies from loading directly from an arrived train to a vessel as opposed to allowing railroads to unload to its ground pile. Further, Westshore seeks to manage the size of its pile for safety reasons in order to mitigate the potential of a pile fire. Accordingly, Westshore has historically sought to prioritize trains from particular customers whose vessels are due for loading.

BNSF's process for planning our export coal service proceeds on this basis. Customers provide BNSF with forecasts on a rolling basis of anticipated vessel arrivals over the forthcoming two to three-month period. BNSF uses this forecast information to plan the available capacity for export service over that period, taking into account available crew resources, planned track maintenance, any planned outages at mines or Westshore, seasonal patterns in other commodities, and other factors that affect cycle times. For instance, domestic coal demand traditionally softens in the spring and fall, which may free up resources for export loadings. Likewise, BNSF may seek to push additional loadings ahead or behind heavy traffic flows during periods of tight fluidity, such as fall harvest or the peak lumber shipping season from February to June/July. Seasonal spikes for different commodities overlap, and managing these volume flows is a careful, ongoing balancing act.

The arrival and loading time for a specific vessel at Westshore will generally become firm two to three weeks prior to a vessel's arrival, at which point BNSF

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begins loading trains to load the vessel. BNSF communicates with Westshore multiple times per week to ensure visibility into operations at the terminal and direct empty sets to mines in accordance with the service plan.

In addition to the railroad-related factors that can affect service, which I discuss below, vessel delays or outages at Westshore can impact the volume of coal BNSF is able to deliver. For instance, BNSF lost 85 unloading slots at Westshore in September and October 2022 due in part to a work stoppage at Westshore. Beyond extraordinary events such as work stoppages, weather and mechanical conditions can also create loading difficulties at Westshore as the unloading equipment is susceptible to freezing and frozen coal can affect loading operations.

B. Railcar Availability

Second, there must be equipment available to move the traffic. BNSF moves coal in dedicated train sets that make up unit trains. The number of cars in those sets varies but averages approximately 127 cars. Over the last 13 months, BNSF has averaged approximately 283 coal train sets in service across the network with approximately 20-25 sets in export service and the remainder in service for domestic utilities. Not all coal cars can be used in export service. Westshore is not set up to unload drop-bottom coal hoppers, so export coal sets must consist of rotary gondolas or hoppers. As such, only a subset of the total fleet of coal sets is available for diversion into export service, and as my colleague Farah Lawler describes in her Supplemental Verified Statement, it is difficult to source train sets in the current market environment.

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Most coal sets—82% of the coal cars in service on BNSF—are privately owned, and BNSF cannot divert them to other customers without the owner’s agreement. BNSF’s own rail-controlled fleet of coal cars is fully engaged with no cars in storage. BNSF manages equipment resources by moving train sets in and out of export service as well as between export customers to coincide with demand changes, seasonal market changes, and other externalities.

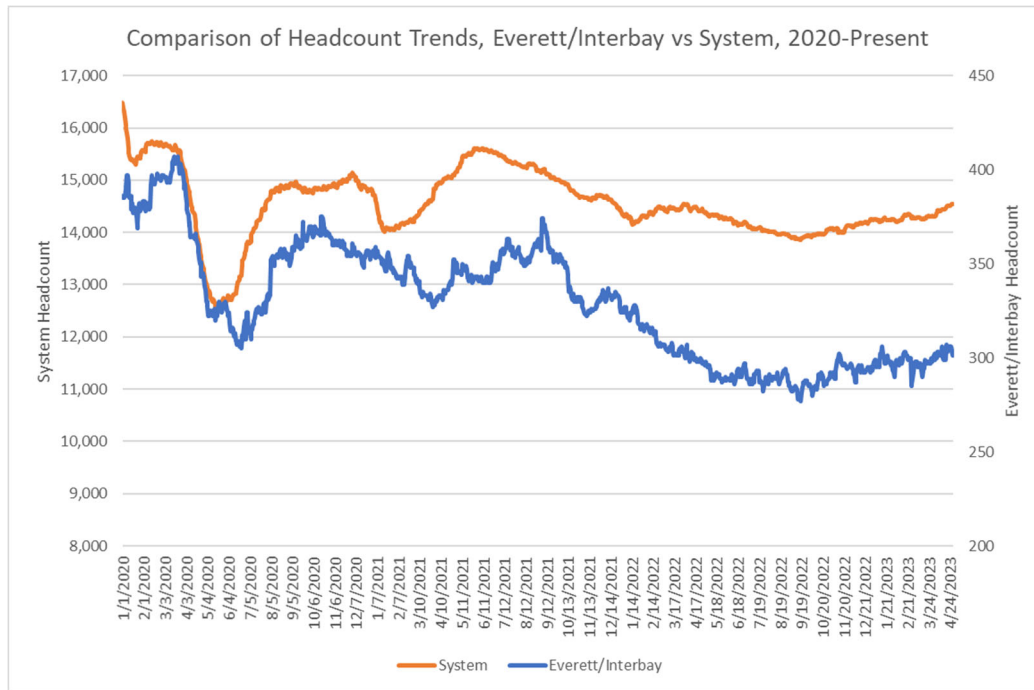
C. Crew Availability

Third, crew availability has also limited the number of trains BNSF can run to Westshore—particularly availability at the Everett and Interbay terminals responsible for serving the Vancouver, WA-New Westminster portion of the route. Although BNSF did furlough employees at these locations as volumes plunged at the outset of the COVID-19 pandemic, by September 2021 BNSF had recalled or attempted to recall all furloughed employees at these terminals, and equally importantly, BNSF had sufficient crews to meet demand throughout the first half of 2021.

Beginning in the fall of 2021, headcount at Everett and Interbay then began to trend downward at a much faster rate than the rest of the BNSF system as shown in the chart below. This divergence from system averages was the result of attrition as the labor market in the Puget Sound area was and remains especially competitive. Additionally, in September 2021, Canada announced that train crews entering Canada would be required to be vaccinated for COVID-19 effective January 2022. During this time period, 21 of the 93 train crew employees that

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protected trains operating into Canada elected not to be vaccinated and exercised seniority rights to move to other jobs. None of the headcount loss from September 2021 onward was a result of any reduction taken by BNSF.



Today, Everett and Interbay remain one of the most challenging parts of the BNSF network in terms of crew availability. Efforts to recover headcount in the Pacific Northwest terminals have been generally less successful than systemwide efforts. Since October of last year, average system headcount has returned to 91% of BNSF's pre-pandemic headcount, but at Everett and Interbay, the same figure has been only 73%.

BNSF has aggressively sought to add employees in the Pacific Northwest, implementing hiring incentives in April 2022 for terminals throughout the region, including monetary incentives that ultimately reached \$20,000 for the Interbay and

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Everett terminals. In 2022, BNSF's efforts translated into the successful hiring of 288 Train Yard and Engine ("TY&E") employees on the Northwest Division (89.7% of plan). However, these new hires have had only a 63% retention rate, notwithstanding hiring incentives that only became fully payable at ten months of employment. Year to date, BNSF has added an additional 164 TY&E employees on the Northwest Division in 2023 against a plan of 292 (56.2% of plan).

BNSF has also sought to incentivize relocation of employees from other parts of its network with mixed success. Given the nature of seniority districts under the applicable collective bargaining agreement, BNSF has essentially two options: (1) BNSF can only offer short-term transfers (3-6 months in duration); or (2) offer employees a permanent transfer that would require them to restart their seniority, which would negatively affect their earning potential in an area with a relatively higher cost of living than elsewhere on the BNSF network. With respect to the first option, temporary transfers, BNSF's efforts were met with limited success. At no point in 2022 could BNSF attract more than 10 temporary transfers to the Everett and Interbay pools despite offering significant monetary incentives to do so.

III. Effects of the Requested Relief

The STB has asked BNSF to respond with specificity to the consequences to other customers of ordering BNSF to move a minimum of 438,625 tons per month (or roughly 29 trains per month) for NTEC. NTEC appears to have based its demand for emergency service on 2021 peak service levels. BNSF was able to move a near record amount of coal to Westshore and a record amount of coal for NTEC in

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2021 due to the confluence of several favorable factors. First, the winter of 2020–21 was milder than the following winter, which provided an operational tailwind in the first quarter of 2021. Second, BNSF dropped from three to two export coal shippers from July 2020 until August 2021, which made more equipment and unloading slots available to NTEC. Third, both Amtrak and Sound Transit passenger services were reduced during the height of the pandemic and were not yet fully restored during 2021, which freed up capacity for freight traffic through the complex. Finally, one unit of a two-unit coal-fired power plant in Centralia, Washington ceased operations in 2020, further freeing up crew and locomotive capacity for export service. Not all of these factors are within BNSF's control or repeatable, and they cannot be duplicated at will.

A regulatory directive to deliver a minimum of 438,625 tons per month in ratable service to NTEC would have several direct consequences to BNSF's other customers. First, in the short term to serve NTEC, BNSF would have to take train sets from another coal shipper, either another export coal shipper or a domestic utility. As such, this would directly reduce the amount of coal BNSF can move for the affected other customers.

Second, BNSF would need to find crews to run the trains. Based on current trends, BNSF believes that headcount in Everett and Interbay will be significantly improved by the end of the year, and hopefully by the third quarter of this year, but today crew availability remains constrained at Everett and Interbay. In the short term, those crews would have to come from our service to another export coal

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shipper or another train on the corridor. A regulatory directive to deliver a minimum of 438,625 tons per month to NTEC would require BNSF to prioritize the staffing of trains carrying NTEC export coal shipments over other commodities – grain and other ag products, lumber and other construction materials, chlorine and other chemicals used in water treatment, domestic coal used for generation of electricity during the summer months, and crude oil.

Third, even if there were more equipment and the necessary crews, slotting in more trains into the busy corridor would be challenging. While BNSF has and will continue to make investments to expand capacity, the freight corridor does contain unavoidable bottlenecks due to the physical characteristics of the terrain, in particular on the Bellingham and Fallbridge Subdivisions, both of which are also intercity passenger corridors. BNSF would have to consider how to honor the Board's order while meeting its statutory preference obligations to Amtrak at a time when BNSF is working constructively with public partners in restoring passenger service toward pre-pandemic levels. In turn, BNSF would also have to slot those additional trains in around scheduled intercity and commuter service.

BNSF would also have to coordinate the ordered NTEC trains with other freight trains on the line. BNSF would have to prioritize NTEC shipments at the expense of its other export coal customers that would affect those customers, operations at Westshore, and operations throughout the region. To meet such an order BNSF would have to prioritize NTEC loadings regardless of vessel schedules at Westshore—loading NTEC coal even when there are no vessels inbound to take

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it. Westshore may resist assigning slots for NTEC trains given Westshore's preference to unload direct to vessels and avoid potential hazards arising from pile size. Provided BNSF could get slots to unload these trains, NTEC trains would then be unloaded onto the ground, requiring a separate work event to load vessels, slowing fluidity at the terminal to the detriment of all terminal users.

The more likely scenario is that NTEC trains out of sync with Westshore would have to be staged en route at times when Westshore is prioritizing trains for vessels served by other customers or other railroads. This staging would create a cycle, driving down delivered tonnage for all customers. Staged coal sets holding NTEC coal would be unavailable for loading by other customers, increasing their cycle times and delaying the loading of vessels, which in turn would prolong dwell time for the staged NTEC sets.

Beyond its effects on export coal service, staged coal sets would consume siding and yard capacity along the route, affecting fluidity and velocity for all service products on the line. Train meets would become more difficult to coordinate because of occupied sidings, resulting in further delays as trains would need to be held further afield to accommodate traffic that is required to be more service sensitive for regulatory and safety reasons, such as passenger trains and trains moving rail security-sensitive materials (RSSMs). Staged trains would likewise consume crew starts, exacerbating the crew problems in the region. Similarly, staged trains would unproductively utilize locomotives, leaving fewer locomotive resources to serve other volume in the corridor.

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As these staged trains accumulate and consume track, crew, and power capacity, fluidity losses would be spread across our other customers. While BNSF would continue to prioritize passenger and certain hazardous materials traffic as we must, it would become more difficult to move lumber and other forest products south to markets across the country. Municipal waste may accumulate in transfer stations across Western Washington while crews sit on idling coal sets in sidings, and BNSF would be less able to move grain traffic during harvest season, with cascading upstream effects on BNSF's grain network and downstream effects on global food markets. In sum, such an order would inevitably create additional service constraints for other customers and could ultimately impact delivery of critical food, energy, and health commodities for the country.

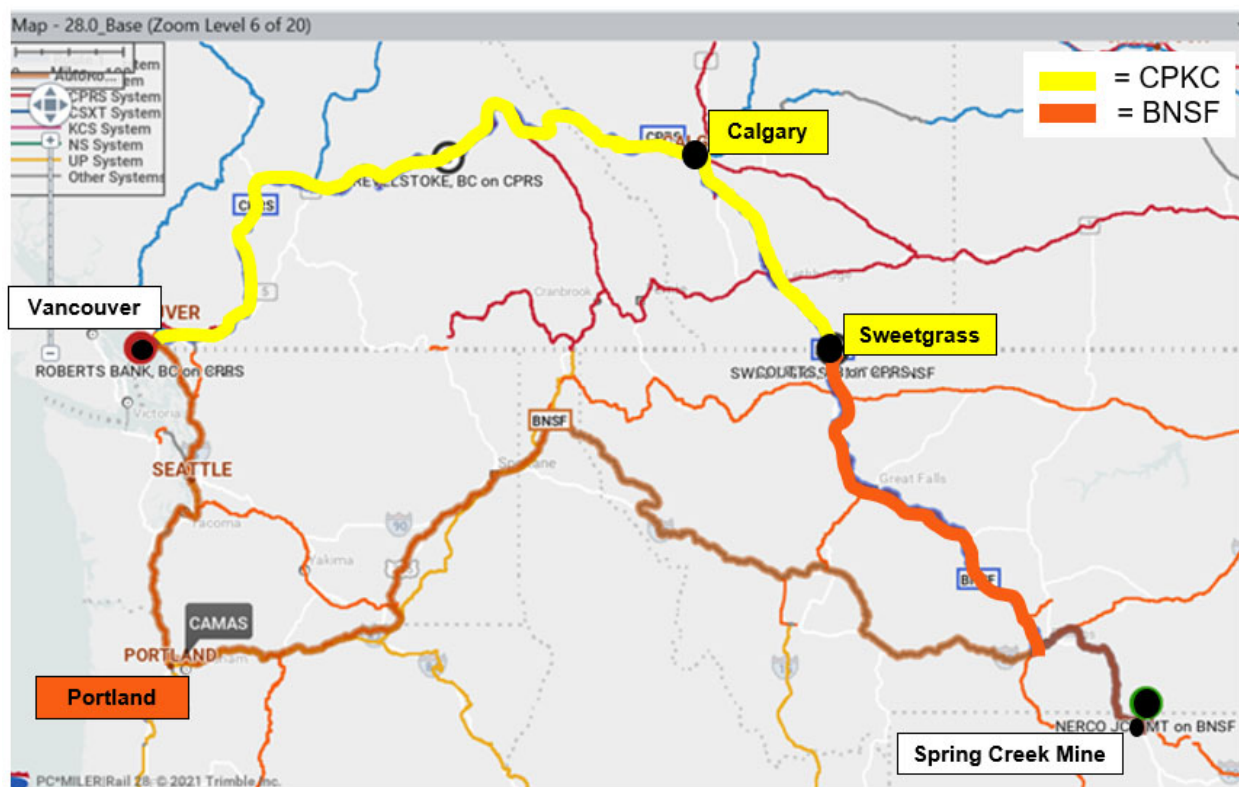
IV. Alternative Service via BNSF Interchange with CPKC

An alternative routing exists to move NTEC trains to Westshore via interchange with CPKC. My colleague, Farah Lawler, describes in her supplemental verified statement that there is a rate in place for trains to interchange with CPKC at Sweetgrass, Montana and that alternative has been used in the past. However, this interchange operation is less efficient than BNSF's direct service.

The operational details of such a move would require BNSF to move trains approximately 545 miles from Spring Creek Mine to Sweetgrass where it would be interchanged with CPKC. CPKC would then move the train the approximately 840 miles from Sweetgrass to Westshore. After unloading, the empty set would traverse

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the route in reverse back to Spring Creek. The Sweetgrass route is illustrated in the map below.



When accounting for the return empty move, the total mileage for the BNSF/CPKC move would be slightly longer than the BNSF-direct move (2,768 miles versus 2,722 miles), and the cycle times for the joint line move are slower due to the complexities of interchange and the CPKC route characteristics. In addition to a longer cycle time, less tonnage per train can move on the BNSF-CPKC route because the mountain grade on the CPKC route requires CPKC to limit train length to 120 cars.

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V. Conclusion

The NTEC route through the Pacific Northwest is a vital corridor on our system with unique volume mix, geographic, and environmental complexities. There remains work to be done to provide optimal service, and BNSF is continuing to make the investments into our human capital and infrastructure to reach that goal. BNSF is committed to helping our customers grow their businesses, but that commitment to any one customer, including NTEC, must be balanced by our commitment to each of our customers. Our people work tirelessly to meet those commitments. Doing so requires careful and continued coordination of our finite capacity, and so I urge the Board to carefully consider any regulatory intervention that would disrupt our network and potentially place the Board in the position of picking winners and losers among our customers.

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VERIFICATION

I, Matthew Garland, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

/s/ Matthew Garland

Matthew Garland

Executed on May 5, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing *BNSF Railway Company's Supplemental Reply to NTEC's Ex Parte Application for Section 11123 Emergency Service Order* to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Tara A. Woods

Tara A. Woods
Attorney for BNSF Railway Company

Dated: May 5, 2023