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Chief of Case Administration
Office of Chief Counsel
Surface Transportation Board
395 E Street S.W.
Washington, D.C. 20423-0001

PUBLIC VERSION

Re: *Evergy, Inc., Evergy Metro, Inc., and Evergy Kansas Central, Inc.*
v. BNSF Ry., Docket No. NOR 42180

Dear Chief of Case Administration:

Enclosed for filing in the above-referenced proceeding please find the Final Brief of Complainants Evergy, Inc., Evergy Metro, Inc., and Evergy Kansas Central, Inc.

This Brief includes Confidential and Highly Confidential Information. We are simultaneously filing a Redacted version of the Brief for inclusion in the public record.

Thank you for your attention to this matter.

Sincerely,

/s/ Andrew B. Kolesar III

Andrew B. Kolesar III

cc: Counsel for Defendant

	)	
EVERGY, INC.,	)	
EVERGY METRO, INC. and	)	
EVERGY KANSAS CENTRAL, INC.	)	
	)	
Complainants,	)	
	)	
v.	)	Docket No. NOR 42180
	)	
BNSF RAILWAY COMPANY	)	
	)	
Defendant.	)	
	)	

REDACTED, PUBLIC VERSION

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	2
ARGUMENT.....	3
A. BNSF’S CORE ARGUMENTS WOULD ELIMINATE THE ESTABLISHED COMMON CARRIER COMPACT	3
B. EVERGY’S EVIDENCE DEMONSTRATED BNSF’S LIABILITY FOR VIOLATIONS OF 49 U.S.C. §§ 11101(a), 10702(2) AND 11121(a).....	12
C. EVERGY’S DAMAGES PRESENTATION IS THE BEST EVIDENCE OF RECORD.....	20
CONCLUSION	30

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>AEP Texas North Co. v. BNSF Ry.</i> , NOR 41191 (Sub-No.1), 2007 WL 2680223 (STB served Sept. 10, 2007).....	24, 26
<i>The Akron, C. & Y. R.R. v. ICC</i> , 611 F.2d 1162 (6th Cir. 1979)	4, 5
<i>Am. Trucking Ass’ns, Inc. v. Atchison, Topeka & Santa Fe Ry.</i> , 387 U.S. 397 (1967)	3
<i>Cent. Valley Ag. Grinding, Inc. v. Modesto and Empire Traction Co.</i> , NOR 42159 (STB served July 25, 2018).....	12
<i>Eric Strohmeyer & James Riffin Acquisition & Operation Application</i> <i>Valstir Indus. Track in Middlesex & Union Ctys., N.J.</i> , FD 35527 (STB served May 14, 2012)	7
<i>Ethan Allen, Inc. v. Maine Cent. R.</i> , 431 F. Supp. 740 (D. Vt. 1977).....	7
<i>Georgia Power Co. v. Southern Ry.</i> , NOR 40581, 1993 WL 455296 (ICC served Nov. 8, 1993).....	24
<i>GS Roofing Prods. Co. v. STB</i> , 143 F.3d 387 (8th Cir. 1998).....	6, 7
<i>GS Roofing Prods. Co. v. STB</i> , 262 F.3d 767 (8th Cir. 2001).....	21
<i>In re: Investigation of Advances in Rates by Carriers in W. Truck Line,</i> <i>Trans-Miss. & Ill. Freight Comm. Territories</i> , 20 I.C.C. 307 (1911).....	7, 11
<i>Johnson v. Chicago, M., St. P. & P. R.R.</i> , 400 F.2d 968 (9th Cir. 1968).....	21
<i>Louisiana Railcar, Inc. v. Missouri Pac. R.R.</i> , 5 I.C.C.2d 542 (1989)	21
<i>Nat’l Grain and Feed Ass’n v. United States</i> , 5 F.3d 306 (8th Cir. 1993).....	12
<i>Olcott v. Supervisors</i> , 83 U.S. 678, 694 (1872).....	5
<i>Otter Tail Power v. BNSF Ry.</i> , NOR 42071, 2004 WL 2852179 (STB served Dec. 13, 2004)	24, 29

<i>Overbrook Farmers Union Coop. Ass’n v. Missouri Pac. R.R.</i> , 21 F.3d 360 (10th Cir. 1994).....	21
<i>Pejepscot Industrial Park, Inc., d/b/a Grimm Industries – Petition for Declaratory Order</i> , 6 S.T.B. 886 (2003).....	10
<i>Pennsylvania Railroad Co. v. Sonman Shaft Coal Co.</i> , 242 U.S. 120 (1916).....	7, 10
<i>Sunbelt Alkali Partnership v. Norfolk So. Ry.</i> , NOR 42130, 2014 WL 2805254 (STB served June 20, 2014)	24
<i>Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.</i> , NOR 42121, 2015 WL 2365770 (STB served May 15, 2015).....	24
<i>Winnebago Farmers Elevator Co. v. Chicago and North Western Transp. Co.</i> , 354 I.C.C. 859 (1978).....	5
 <u>Statutes/Regulations</u>	
49 U.S.C. § 10702(2).....	1, 3, 12, 20, 30
49 U.S.C. § 11101(a)	1, 3, 5, 10, 12, 20, 30
49 U.S.C. § 11121(a)	1, 3, 12, 20, 30
49 U.S.C. § 11701(b).....	29
49 U.S.C. § 11704(b).....	1, 20
49 C.F.R. § 1114.1	30
Hepburn Act, 34 Stat. 584 (1906).....	5
 <u>Miscellaneous</u>	
H.R. Report No. 96-1035 (1980).....	5
<i>Navajo Transitional Energy Co., LLC v. BNSF Railway</i> , cv-00146, BNSF Brief in Support of Its Motion to Compel Arbitration and Dismiss (W.D. Mont. filed Feb. 21, 2023).....	11

Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 210(a) of the Trucking Industry Regulatory Reform Act of 1994, 1994 WL 639996 (Oct. 25, 1994).....	6, 7, 11
W. Douglas Buttrey, Remarks to the Chicago Traffic Club (May 18, 2006) (available at https://www.stb.gov/wp-content/uploads/Testimony-Buttrey-2006-05- 18.pdf).....	6

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

	)	
EVERGY, INC.,	)	
EVERGY METRO, INC. and	)	
EVERGY KANSAS CENTRAL, INC.	)	
	)	
Complainants,	)	
	)	
v.	)	Docket No. NOR 42180
	)	
BNSF RAILWAY COMPANY	)	
	)	
Defendant.	)	
	)	

COMPLAINANTS’ FINAL BRIEF

Complainants Evergy, Inc. (“Evergy”), Evergy Metro, Inc. (“Evergy Metro”) and Evergy Kansas Central, Inc. (“EKC”) (collectively “Evergy” or “Complainants” as the context indicates) hereby submit their Final Brief.

Based upon the evidence presented by Evergy in its Opening and Rebuttal submissions and the weight of relevant legal authority, it is clear that Defendant BNSF Railway Company (“BNSF”) breached its obligations to Evergy under 49 U.S.C. §§ 11101(a), 10702(2) and 11121(a) in 2022 in connection with the transportation of coal to Evergy Metro’s Iatan Generating Station (“Iatan”) and EKC’s Lawrence Energy Center (“LEC”), and that as a result Evergy sustained damages recoverable under 49 U.S.C. § 11704(b) in the principal amount of \$22,862,177.65. Evergy is entitled to an award of this amount, along with interest computed from January 31, 2024, as a remedy for BNSF’s statutory violations.

SUMMARY OF ARGUMENT

In response to Evergy's evidence-based demonstration of BNSF's 2022 statutory violations and liability for damages, BNSF offered a view of a railroad's obligations under governing law that eviscerates the common carrier compact that has been central to the Board's and its predecessor's regulation of railroad behavior for decades. In consideration of the benefits of significant antitrust immunity, federal preemption of state and local laws and regulations, wide rate-setting flexibility, protection from mandated competition and broad powers of eminent domain, the compact requires railroads to have the physical and human resources and system planning necessary to meet their customers' reasonable requests for service, including responding to predictable changes in demand. In BNSF's expressed view, however, railroads should be permitted to make whatever self-serving decisions about investment, hiring and operations practices that they believe suit their goals of maximizing profits and minimizing operating ratios, and then use any resource constraints that result from these decisions to justify withholding service from disfavored shippers, which in 2022 included Evergy. The Board should firmly reject this model.

Evergy has shown that its requests for service to Iatan and LEC in 2022, and the associated requested deployments of Evergy-supplied railcar trainsets, were reasonable and consistent with years of established practice between the parties. Evergy showed that BNSF's imposed limit on the number of trainsets allowed in service breached that practice, and that { { [REDACTED]

[REDACTED]

}}. Evergy also demonstrated that the excuses offered by BNSF's consultants in 2025 for the carrier's failures – the lingering impacts of the 2020 Covid pandemic and Russia's invasion of Ukraine – { }, and in any case were without merit.

Evergy's presentation of the economic damage that resulted from BNSF's statutory violations clearly was the best evidence of record. Evergy relied on actual data-driven programs and models used by industry experts and state regulators alike to calculate the lost opportunity and increased cost to serve electric load realized because of BNSF's failures, categories recognized by previous Board and Interstate Commerce Commission precedents. BNSF offered only criticisms unsupported by sound analysis.

Based on the full record of this proceeding, the Board should find that BNSF is liable to Evergy for violations of 49 U.S.C. §§ 11101(a), 10702(2) and 11121(a) in 2022, and award damages in the principal amount of \$22,862,177.65, together with applicable interest.

ARGUMENT

A. BNSF'S CORE ARGUMENTS WOULD ELIMINATE THE ESTABLISHED COMMON CARRIER COMPACT

“The common carrier obligation is a core tenet of the Board's regulation of the freight railroad industry and is a pillar of the railroads' responsibility to our country's economy”¹ This statement reflects the long and important history of the common

¹ See [https://www.stb.gov/news-communications/latest-news/pr-23-11/#:~:text=Finally%2C%20the%20Board%20found%20that,be%20viewed%20and%20downloaded%20here](https://www.stb.gov/news-communications/latest-news/pr-23-11/#:~:text=Finally%2C%20the%20Board%20found%20that,be%20viewed%20and%20downloaded%20here;); see also *Am. Trucking Ass'n, Inc. v. Atchison, Topeka & Santa Fe*

carrier obligation, both from a regulatory perspective and in its recognition of the role of railroads in contributing to the expansion and continued success of the nation's economy. The statutory and regulatory structures that provide sweeping benefits to railroads, including BNSF, carry attendant responsibilities to serve the public upon reasonable request.² This case goes to the foundations of this regulatory compact. Did BNSF meet its common carrier obligation to Evergy? Would BNSF's position here, if accepted, effectively end the common carrier obligation, except in the direst emergencies? Without the continued enforcement of the common carrier obligation, will BNSF operate in a consequence-free environment, where its obligations to the shipping public are self-defined, thereby making it unaccountable to its shippers or the Board? Evergy submits that the common carrier obligation is still a core tenet of the Board's regulatory authority, and it should act here to enforce that obligation lest BNSF become an unregulated service monopolist.

The history of the railroads' common carrier obligation is well known. Even before statutory enactments in the United States, railroads were "ordinarily held to be common carriers of the goods delivered to them for transportation" *The Akron, C. & Y. R.R. v. ICC*, 611 F.2d 1162, 1166 (6th Cir. 1979) (citations omitted). As the Supreme

Ry., 387 U.S. 397, 407 (1967) (the common carrier obligation is "fundamental and exceptions are not to be implied.").

² V.S. Fapp at 18-19 ("EVERGY-REB" or "ER"-370-371) ("Unlike ordinary commercial enterprises, railroads accepted public common carrier obligations in exchange for substantial private benefits, including eminent domain powers, limitations on liability, and regulatory protection from competition and certain antitrust laws. This regulatory compact fundamentally alters the optimal capacity calculation.").

Court held in 1872: “[t]hat railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since conveniences for passage and transportation have had any existence” *Olcott v. Supervisors*, 83 U.S. 678, 694 (1872).

In 1906, the Hepburn Act codified and broadened the common law holdings: “it shall be the duty of every carrier subject to this provision of this Act to provide and furnish such *transportation* upon reasonable request therefor” 34 Stat. 584 (emphasis added). “It is not only ‘common carriage,’ but transportation which is subject to the Act and to the Commission's statutory powers.” *Akron*, 611 F.2d at 1168. The ICC recognized that the statute was vital to its mission. *See, e.g., Winnebago Farmers Elevator Co. v. Chicago and North Western Transp. Co.*, 354 I.C.C. 859, 868 (1978) (“We believe that the power to enforce the duty of adequate service is imperative to our ultimate purposes and responsibilities”).

The essential statutory characteristics of the common carrier obligation have not changed. The Staggers Act and the Interstate Commerce Commission Termination Act retained that essential requirement, which is now codified at 49 U.S.C. § 11101(a). Even as Congress ushered in a new era of rail regulation through the Staggers Act’s endorsement of bilateral contracts, it remained steadfast in its view that the common carrier obligation is a vital element of railroad regulation.³

³ H.R. Report No. 96-1035, at 57 (1980).

In 1994, the ICC studied the public’s ongoing interest in common carrier railroad facilities:

[T]he dependence of our nation’s economy on rail transportation of *essential raw materials* makes the network of rail lines an important national resource and the *smooth provision of uninterrupted service over those lines a matter of national importance*. The nation has an interest in the availability and operation of these lines that transcends the interests of the particular company that owns or operates the lines (or even the shippers that currently utilize them). Without continued regulatory oversight . . . service over some lines could be *needlessly interrupted* or lost altogether.⁴

Relatedly, a former Board Chairman noted the critical role of railroads in transporting coal to the nation’s utilities, which in turn have an obligation to provide consistent and reliable service regardless of demand, economic downturns, pandemics, or changes in the global political environment:

[C]oal helps keep us warm in winter, cool in summer, and keeps factory assembly lines and hospital operating rooms in business. The efficient movement of coal is essential to the economic health and national security of this country. The Board will use its authority, at least as long as I am there, to do whatever is within its power to do, to facilitate a steady supply of coal to the Nation’s power grid.⁵

The courts and the Board have repeatedly held that the common carrier obligation “reflects the well-established principle that railroads are held to a higher standard of responsibility than most private enterprises.” *GS Roofing Prods. Co. v. STB*, 143 F.3d

⁴ See Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 210(a) of the Trucking Industry Regulatory Reform Act of 1994, 1994 WL 639996 at *73 (Oct. 25, 1994) (“*ICC Study*”) (emphasis added).

⁵ W. Douglas Buttrey, Remarks to the Chicago Traffic Club, at 8 (May 18, 2006) (available at <https://www.stb.gov/wp-content/uploads/Testimony-Buttrey-2006-05-18.pdf>).

387, 391 (8th Cir. 1998). “It has long been recognized that the quasi-public nature of railroads entails a higher degree of public responsibility than is required of most private corporations.” *Ethan Allen, Inc. v. Maine Cent. R.*, 431 F. Supp. 740, 742-43 (D. Vt. 1977); *GS Roofing*, 143 F.3d at 391; *Pennsylvania R.R. v. Sonman Shaft Coal Co.*, 242 U.S. 120, 126 (1916) (only in times of restrictions resulting from “unusual demands or other abnormal conditions” that *could not have reasonably been foreseen* can a railroad legitimately deny a shipper the cars “commensurate in number to his needs.”). Relatedly, railroad common carriers may not pick and choose the scope of their common carrier obligation with respect to the commodities handled or customers served. *In re: Investigation of Advances in Rates by Carriers in W. Truck Line, Trans-Miss. & Ill. Freight Comm. Territories*, 20 I.C.C. 307, 350-351 (1911) (the ICC is the empowered regulator, not the railroads); *Eric Strohmeyer & James Riffin Acquisition & Operation Application Valstir Indus. Track in Middlesex & Union Ctys., N.J.*, FD 35527 (STB served May 14, 2012) at 2 (recognizing the “broad principle railroads have a statutory common carrier obligation under 49 U.S.C. § 11101 to provide transportation for commodities that have not been exempted from regulation pursuant to 49 U.S.C. § 10502.”) (internal quotations and marks omitted). At the same time, enforcement of “regulation must be sufficiently vigilant, forceful, and effective to provide the constraints needed to protect the public from abuses of monopoly power.” *ICC Study* at *6.

The railroads’ common carrier obligation (now applicable to non-exempt commodities such as coal) is tied to the sweeping and valuable benefits that inure to the railroads under this regulatory compact. Of foremost importance in this case, BNSF had

the unfettered right, in the first instance, to set the line haul rates to Evergy's Iatan and LEC facilities; to change those rates on 20-days' notice; to apply a mileage-based fuel surcharge; to change that same fuel surcharge at its sole discretion; and to establish other ancillary charges, all subject only to backstop regulation by the Board, which few shippers have invoked and where fewer still have prevailed.

More broadly, BNSF enjoys federal preemption of virtually all state and local laws otherwise applicable to its line haul activities; exemptions from many federal antitrust laws and most state antitrust laws (including many that apply to joint rail activities); broad eminent domain powers; and the government's stamp of approval on its monopoly position with respect to Evergy's service, including "immunity from other federal and state laws that might otherwise" have blocked the various mergers or acquisitions "of nearly 400 different railroad lines"⁶ that led to the creation of BNSF in its current constitution. *Id.* at *10. BNSF also enjoys antitrust immunity for approved line transfers, leases, and trackage rights; federal preemption for construction of new lines; federal preemption for the abandonment of lines; and the right to impose paper barriers on sales of rail lines. BNSF's predecessors also enjoyed the benefits of significant federal grants of land to build their lines in the 1800s.

Thus, BNSF owns over 23,000+ miles of track and operates in 28 states, where it enjoys broad federal preemption in those activities and holds a government-approved monopoly over captive traffic, for which it can set prices largely free from interference.

⁶ <https://bnsf.com/about-bnsf/our-railroad/index.page>.

Significantly, the *sine qua non* of the compact is that BNSF must provide rail service upon reasonable request, and it is expected to maintain a higher standard of readiness to meet that obligation.

This same standard applies to Evergy in its furnishing of electricity. Indeed, it would be unthinkable in our electricity-dependent society for Evergy to pick and choose electricity “haves” and “have nots” as BNSF did with its common carrier service in 2022. As Evergy explains when describing how it is regulated:

Today, regulated energy utilities work under the terms of state law, enforced through the state regulatory commission. The sum of these laws is often called the **regulatory compact**. The compact recognizes that electricity is most efficiently delivered when limited to single entities. This exclusive right to serve is partnered with an obligation to provide service to all customers within a service area. In return for the exclusive right to serve, the utility is subject to oversight from the state utility commission.

...

Evergy relies on investors and shareholders to provide funds to service the debt and equity cost necessary to finance new and upgraded power plants, transmission lines, distribution systems and other assets. Investors will only support Evergy and our customers if they are provided an opportunity to earn a reasonable return on that equity. Profits are not guaranteed; they reflect only that we have the potential to earn through efficient, quality service.⁷

BNSF’s position in this case breaks the regulatory compact. BNSF’s apparent view is that the common carrier obligation is almost entirely within its control. Indeed, BNSF argues that it can protect its competitive traffic (*e.g.*, intermodal) without due regard to serving Evergy’s common carrier shipments as required under 49 U.S.C. §

⁷ <https://www.evergy.com/manage-account/rate-information-link/how-rates-are-set/utility-regulation> (emphasis in original).

11101(a) (“Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.”). BNSF also argues that it has sole discretion with respect to the provision of equipment (or, in this case, the acceptance of Evergy’s trainsets), which it does not. *See, e.g., Pennsylvania R.R. v. Sonman Shaft Coal Co, supra*. BNSF argues that whether it met its common carrier obligation ought to be judged on the “reasonableness of the railroad’s circumstances” that it largely controls through its own investment, hiring and operational decisions and “effectively not the reasonableness of the shipper’s request,” as the statute requires.⁸ BNSF eschews any obligation to hold itself to a standard higher than that of an ordinary business, especially any obligation to maintain adequate staffing to account for regular and predictably cyclical changes in the demand for services.⁹ BNSF would further undermine the compact by suggesting that only its contract customers are owed any service commitments, because only those customers have made commitments to ship on BNSF,¹⁰ notwithstanding that its statutory obligations are to the contrary, that its captive customers (such as Evergy at Iatan and LEC) effectively have made the same commitments, and that BNSF has the power to set pricing on customer traffic or change that pricing on 20-days’

⁸ V.S. Fapp at 6 (ER-358). *Accord Pejepscot Industrial Park, Inc., d/b/a Grimm Industries – Petition for Declaratory Order*, 6 S.T.B. 886, 893-94 (2003) (“It is axiomatic that a rail carrier may not indirectly avoid its common carrier obligation to provide service by evading its obligation to establish rates upon request.”).

⁹ *See, e.g., V.S. Prince* at 16-19 (BNSF-446-449).

¹⁰ *Id.* at 3, 20-22 (BNSF-433, 450-452).

notice if it found itself truly disadvantaged by a change in a common carrier shipper's requirements, which did not happen in this case.

BNSF's positions, if adopted, threaten the very foundations of the regulatory compact. BNSF's view, if followed to its logical end, means that the common carrier obligation has no meaning other than what a railroad says it does,¹¹ even when the railroad creates the very circumstances that it invokes to deprive a shipper of service. Such a result is plainly at odds with the statutes that set out the common carrier obligation and the agency's enforcement authority "to provide the constraints needed to protect the public from abuses of monopoly power." *ICC Study* at *6. BNSF's view also leads to a position that only contract shippers matter, which in turn means that its actions would be entirely shielded from Board review. However, BNSF's argument also could render contracts equally meaningless, for without the backstop of common carrier service for coal shippers, BNSF would enjoy unfettered power to dictate all terms, including the consequences (or lack thereof) of service failures under the contract.¹² Shippers would exist in a regulatory black hole in which a contract service provision is useless, and the common carrier obligation would be virtually unenforceable. If BNSF were standing in Evergy's shoes, it essentially would be arguing that it has the sole discretion to decide if

¹¹ As the ICC noted in a similar context with respect to rate setting, which it rejected: "This is not regulation of railroads by the nation, but regulation of the industries and commerce of the country by its railroads." *In re: Investigation of Advances in Rates by Carriers in W. Truck Line*, 20 I.C.C. at 351.

¹² BNSF has already taken this position in a contract dispute case. *See, e.g., Navajo Transitional Energy Co., LLC v. BNSF Ry.*, cv-00146, BNSF Brief in Support of Its Motion to Compel Arbitration and Dismiss, at 5-6 (W.D. Mont. filed Feb. 21, 2023).

and when the lights will be turned on. This is the ultimate monopolist position and must be rejected by the Board in this case.

B. EVERGY’S EVIDENCE DEMONSTRATED BNSF’S LIABILITY FOR VIOLATIONS OF 49 U.S.C. §§ 11101(a), 10702(2) AND 11121(a)

Evergy’s evidence demonstrated that BNSF failed to meet its obligations to Evergy under 49 U.S.C. §§ 11101(a), 10702(2) and 11121(a) in 2022, principally by refusing to accept into service a sufficient number of Evergy trainsets to transport its reasonably requested coal volumes for delivery to Iatan and LEC. Those volumes, as identified by Evergy using the BNSF-mandated CFT nomination process, as well as Evergy’s associated requested private trainset deployments, were consistent with decades of established BNSF practice at Iatan and LEC.

With respect to Section 11101(a), BNSF contends that Evergy’s requests for service in 2022 were not reasonable (or did not constitute actual “requests” for purposes of the statute), that BNSF provided “adequate” service in response to Evergy’s requests, and that any BNSF failure to provide adequate service resulted from circumstances outside BNSF’s control and therefore should be excused. BNSF is wrong in each respect.¹³ Evergy followed the specific instructions set forth in BNSF’s tariff for

¹³ In its Rebuttal Argument at 10-12 (ER-14-16), Evergy demonstrated the flaws in BNSF’s efforts to evade STB scrutiny under Sections 10702(2) and 11121(a). Briefly summarized, BNSF’s Evergy tariffs included provisions that, when invoked, constituted an unreasonable practice, and BNSF’s trainset limits in light of historic practice violated 49 U.S.C. § 11121(a). *See, e.g., Cent. Valley Ag. Grinding, Inc. v. Modesto and Empire Traction Co.*, NOR 42159 (STB served July 25, 2018) at 3 (railroad “tariff provisions and conditions of service” are within the scope of the Board’s Section 10702(2) jurisdiction); *Nat’l Grain and Feed Ass’n v. United States*, 5 F.3d 306, 311 (8th Cir. 1993) (reviewing a challenge under Section 11121(a) to a railcar allocation scheme and recognizing the

requesting service, BNSF declined to allow sufficient trainsets in order to provide that service even though its physical system capacity was more than adequate to meet Evergy's needs,¹⁴ and the circumstances ostensibly impacting BNSF's deliveries to Evergy were entirely within BNSF's control. BNSF lacked the crews to provide service to Evergy because BNSF had acted (in textbook "PSR" style) to minimize its operating ratios by furloughing large numbers of crew members in 2016 and 2019, {{ [REDACTED]

[REDACTED] }}. *See* Op. Arg. at 31-37; V.S. Denny at 1-2; Op. V.S. Mulholland/Crowley at 24-28, 38-39; Reb. V.S. Mulholland/Crowley at 12-29 (ER-251-268). Section 11101(a) does not excuse a rail carrier from providing service "on reasonable request" simply because the carrier's own self-serving, profit-maximizing actions have rendered the carrier unable to provide the requested service.

Contrary to BNSF's accusations that Evergy "overstated" its actual demand for coal (*see* BNSF Arg. at 18-22 (BNSF-86-90) and V.S. Baranowski/Zebrowski at 28 (BNSF-640)), Evergy's 2022 nominations were consistent with historic delivery levels to Iatan and LEC.¹⁵ Based upon multiple years of that recent history, there certainly would

"common carrier obligation to provide equitable and adequate car service on reasonable request").

¹⁴ *See* Op. V.S. Mulholland/Crowley at 2-3, 21-22 and Exhibit 14. BNSF's attempt to analogize the circumstances in 2022 to a "traffic jam" (BNSF Reply at ES-8 (BNSF-9); V.S. Prince at 25-26 (BNSF-455-456)) fails when considered against the actual facts.

¹⁵ BNSF's "over-nomination" argument also suffers from an improperly static approach that fails to consider potential Evergy responses to any increased deliveries.

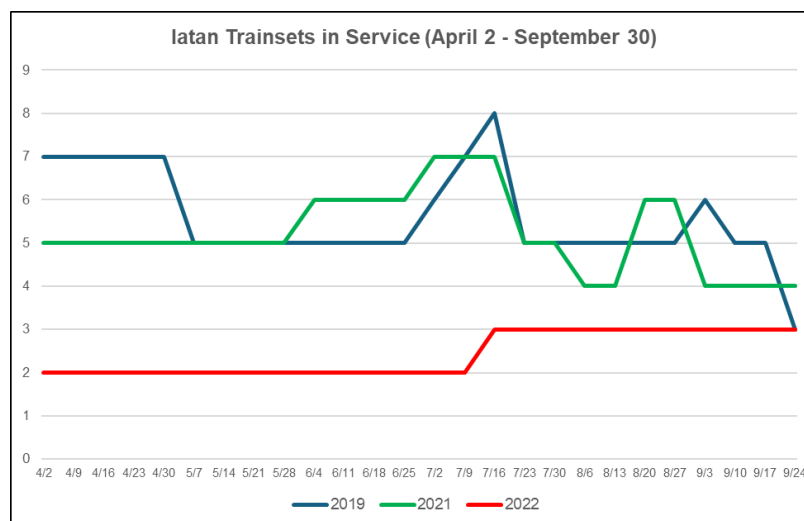
not have been any reason for BNSF to have been surprised by Iatan nominations of 4.88 million tons or LEC nominations of 1.44 million tons:

Tucker Op. V.S. Table 4 (Tucker Op. V.S. at 9)

BNSF Historic Deliveries and 2022 CFT Schedules (Tons)			
Year	Iatan	LEC	Total
2017	6,045,783	1,661,511	7,707,294
2018	4,227,518	1,742,176	5,969,694
2019	4,730,041	1,488,900	6,218,940
2020	3,969,555	1,081,509	5,051,064
2021	4,572,587	1,282,730	5,855,317
<i>Average</i>	<i>4,709,097</i>	<i>1,451,365</i>	<i>6,160,462</i>
<i>Average w/o 2020</i>	<i>4,893,982</i>	<i>1,543,829</i>	<i>6,437,811</i>
2022 CFT	4,882,000	1,440,800	6,322,800

Rather than allowing the number of trainsets in Evergy service that it historically had allowed (and that would have enabled BNSF to transport Evergy’s nominations), BNSF capped Evergy’s trainsets at unreasonably low levels, with Iatan “trainset weeks” in the six-month period from April to September of 2022 limited to only 43% and 46%, respectively, of the trainset-weeks that BNSF had allowed in 2019 and 2021 (*i.e.*, 63 trainset-weeks in 2022 vs. 145 and 136 trainset-weeks in the prior years):

Tucker Reb. V.S. Table 1 (ER-140)



See also Reb. V.S. Tucker at 11-12 (ER-140-141); *id.* at 12-13 (ER-141-142) (showing trainset limitations for LEC). As Evergy documents in its evidence, BNSF advised

Evergy { [REDACTED] }
[REDACTED]}. The net effect of BNSF's refusal to accept the required private equipment was to put Evergy in a situation (as of the Spring of 2022) in which it recognized that it would fall critically short of the volumes of coal that it would need for the Summer, Fall and Winter, which included peak demand periods: {{

[REDACTED]

}} Op. V.S. Tucker Exhibit JT-6; Reb. V.S. Tucker at 6 (ER-135). Notably, BNSF's decision to cap Evergy's trainsets followed fairly soon after Evergy had elected to award its competitive-station business to a rail carrier other than BNSF.

{ [REDACTED] }
[REDACTED]
[REDACTED]
[REDACTED] } Op. V.S. Tucker at 23 and Exhibit JT-6. {{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

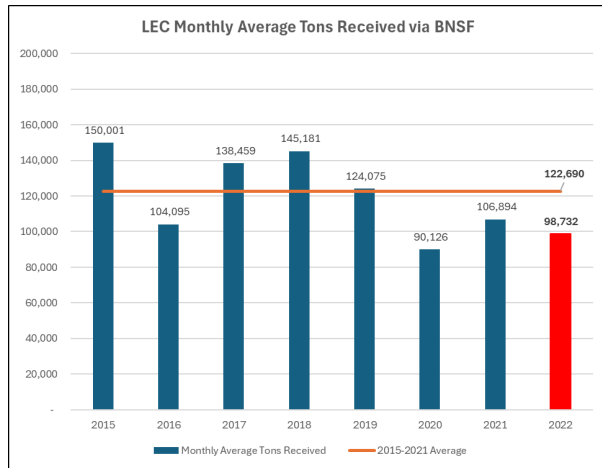
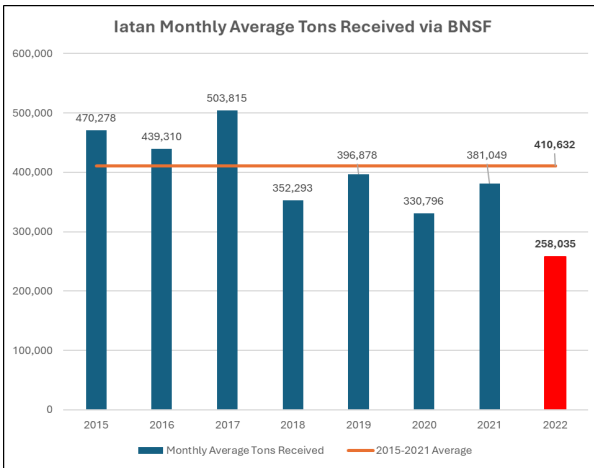
[REDACTED] }} Ultimately, BNSF delivered only

67.7% of the total tons that Evergy nominated for 2022:

Tucker Op. V.S. Table 5 (Tucker Op. V.S. at 10)

2022 CFT Schedules vs. Deliveries (Tons)			
Item	Iatan	LEC	Total
CFT Schedules	4,882,000	1,440,800	6,322,800
Deliveries	3,096,420	1,184,780	4,281,200
Difference	1,785,580	256,020	2,041,600
% of CFT Schedules Delivered	63.4%	82.2%	67.7%
% Shortfall	36.6%	17.8%	32.3%

BNSF's average monthly deliveries to Iatan and LEC in 2022 fell far short of BNSF's average deliveries to each facility in the 2015-2021 time period:



Source: Reb. V.S. Tucker at 51, 58 (ER-180, 187).¹⁶ In fact, if BNSF had delivered those same average 2015-2021 coal volumes during 2022, BNSF would have exceeded Evergy’s 2022 CFT nominations at each location. Iatan’s 2015-2021 average annual coal receipts were 4,927,578 tons (with a 2022 CFT nomination of 4,882,000 tons); LEC’s 2015-2021 average annual coal receipts were 1,472,282 tons (with a 2022 CFT nomination of 1,440,800 tons). Op. V.S. Tucker at 10 (Table 5) (above); Reb. V.S. Tucker at 51, 58 (ER-180, 187).

BNSF devoted much of its Reply to the argument that a faster-than-expected recovery from Covid prevented BNSF from accepting Evergy’s trainsets into service. BNSF has failed to justify this claim, and the relevant facts undermine any effort to do so. As Ms. Tucker explained in her Rebuttal Statement, { [REDACTED]

¹⁶ The foregoing Iatan figure reproduces Table 19 from Reb. V.S. Tucker at 51 (ER-180). The LEC figure takes annual delivery data drawn from Reb. V.S. Tucker at 58, Table 29 (ER-187) and Tucker Rebuttal electronic workpaper “Tucker Reb. V.S. Tables.xlsx” at Tab “Table 29,” divides those annual delivery figures by twelve to derive monthly averages, and calculates an average delivery figure for 2015-2021.

[REDACTED]

[REDACTED]

[REDACTED] } Reb. V.S. Tucker at 15 (ER-144)
(quoting Moynihan June 24, 2022 email (Reb. Exhibit JT-1) (emphasis added)). Had BNSF not embarked on a multi-year force reduction program that reduced its labor cadre by some 27% between 2015 and 2021,¹⁷ dealing with events as predictable and routine as Summer vacations and seasonal maintenance would not have led to trainset restrictions that undermined BNSF’s responses to reasonable requests for service. Ms. Tucker also explained that BNSF’s post-Covid trainset allowance for Evergy in 2021 had been far higher than BNSF’s allowance in 2022. Reb. V.S. Tucker at 14 (ER-143).

Evergy witnesses Robert D. Mulholland and Timothy D. Crowley demonstrated in their Joint Rebuttal Statement that BNSF made substantial crew reductions in 2016 and 2019, froze pay for unionized workers wages in January 2020, implemented over-bearing work rules in February of 2022 (*i.e.*, the “Hi-Viz” program), and participated in a drawn-out and ultimately unsuccessful mediation with its unions through the first half of 2022. Ultimately, these short-sighted actions – rather than any sort of unforeseeably rapid recovery from Covid – prevented BNSF from having enough crews to meet its customers’ 2022 shipping needs and led to BNSF’s refusal to accept sufficient Evergy trainsets into service. Reb. V.S. Mulholland/Crowley at 12-19 (ER-251-258).

¹⁷ See Reb. V.S. Mulholland/Crowley at 12-21 (ER-251-260).

Significantly, BNSF does not appear to have viewed all its traffic as being equally deserving of access to crews. During 2022, BNSF actively defended its intermodal franchise from the threat of the then-pending Canadian Pacific-Kansas City Southern merger. Witnesses Mulholland and Crowley explained that one of the primary goals of the merger had been to increase intermodal volumes by capturing traffic from other railroads. *Id.* at 26 (ER-265). Through the testimony of the same witness Nathaniel Zebrowski who supported BNSF’s Reply in the instant case, CP/KCS argued in their merger application that the resulting entity would “create an attractive service alternative to the existing intermodal services between Chicago and Dallas.” *Id.* at 27 (ER-266). Importantly, the Kansas City to Holliday, KS segment used by trains serving LEC “lies right in the middle of the BNSF intermodal route between Chicago and Dallas, which CP and KCS singled out as ripe for diversion in 2022.” *Id.* at 28 (ER-267).

Witnesses Mulholland and Crowley went on to explain that BNSF did not have sufficient crew buffers to accommodate increasing demand, and they demonstrated that BNSF “chose to sacrifice coal volumes to provide adequate service to its other traffic groups with insufficient resources.” *Id.* at 31 (ER-270). Critically, “[t]his was a business decision,” and even if sidelining coal traffic “was a net positive for BNSF, it created winners and losers among BNSF’s shipper group.” *Id.*

Every showed on Rebuttal that BNSF and its witnesses Baranowski and Zebrowski repeatedly presented misleading statements and figures and drew inaccurate conclusions. *See, e.g., id.* at 34-104 (ER-273-343). For example, BNSF compared percentage variations in Every nominations to { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] }}. *See, e.g.*, BNSF Arg. at 26 (BNSF-94); V.S. Baranowski/Zebrowski at 33, 34, 81, 83 (BNSF-645, 646, 693, 695). Witnesses Mulholland and Crowley provided a more accurate and meaningful comparison in their Rebuttal Statement at 98-99 (ER-337-338) and their Rebuttal Exhibit 20 (ER-346-349); *see also* Reb. V.S. Tucker at 23-35 (ER-152-164) (demonstrating the fallacy of BNSF’s claim regarding 2022 deliveries to Evergy and/or Evergy burn levels being consistent with or even exceeding historic levels); *id.* at 46-50 (ER-175-179) (documenting Evergy’s 2022 CFT nominations relative to those of the two preceding years regarding the question of ratability).

In summary, Evergy demonstrated that BNSF violated its obligations under 49 U.S.C. §§ 11101(a), 10702(2) and 11121(a) by refusing to allow enough trainsets into Evergy service, which number was entirely consistent with the long history of BNSF service to Iatan and LEC. BNSF’s own actions, rather than any circumstances outside its control, led to BNSF’s unwillingness to allow an adequate number of trainsets into service. Actions that BNSF took to maximize its profitability cannot constitute legitimate excuses for failing to meet its statutory obligations.

**C. EVERGY’S DAMAGES PRESENTATION
IS THE BEST EVIDENCE OF RECORD**

Under 49 U.S.C. § 11704(b), a rail carrier subject to the Board’s jurisdiction “is liable for damages sustained by a person as a result of an act or omission of that carrier in

violation of this part.” In its Opening and Rebuttal Evidence, Evergy demonstrated that in 2022 BNSF violated multiple sections of the governing statute in restricting the number of Evergy-supplied trainsets allowed in service to levels below those needed to meet Evergy’s reasonable service requests, and justifying the restriction based upon unreasonable tariff provisions. As a result, Evergy sustained economic damages in two categories – lost opportunity (or profit) and otherwise avoidable increased costs – that the Board and its predecessor long have recognized as legitimate sources of redress under Section 11704(b).¹⁸ *Louisiana Railcar, Inc. v. Missouri Pac. R.R.*, 5 I.C.C.2d 542, 547-49 (1989); *GS Roofing Prods. Co. v. STB.*, 262 F.3d 767,777-78 (8th Cir. 2001); *Johnson v. Chicago, M., St. P. & P. R.R.*, 400 F.2d 968, 975 (9th Cir. 1968); *Overbrook Farmers Union Coop. Ass’n v. Missouri Pac. R.R.*, 21 F.3d 360, 365 (10th Cir. 1994).

On Rebuttal, Evergy refuted BNSF’s various proffered excuses seeking to avoid liability, including specifically linking Evergy’s damages to BNSF’s actions,¹⁹ demonstrating that BNSF was responsible for damages associated with service to LEC as well as Iatan,²⁰ connecting Evergy’s damages with BNSF’s 2022 acts and omissions,²¹ and showing that Evergy took reasonable steps in an effort to mitigate its damages.²² Evergy will not repeat the details of those refutations here, but respectfully refers the

¹⁸ See Reb. Arg. at 35-49 (ER-39-53).

¹⁹ *Id.* at 35-38 (ER-39-42).

²⁰ *Id.* at 38-46 (ER-42-50).

²¹ *Id.* at 46-49 (ER-50-53).

²² *Id.* at 63-71 (ER-67-75).

Board to the fulsome explanation of their bases and supporting authorities set forth in Evergy's Rebuttal.

Evergy's lost opportunity damages were measured by the difference between the Southwest Power Pool ("SPP") net generation dispatch revenues that Evergy earned from Iatan and LEC during 2022 when coal conservation measures compelled by BNSF's trainset limitations were in place, and the net revenues that would have been earned had conservation not been implemented and Evergy was able to offer Iatan and LEC generation to SPP based on actual fuel and variable operations and maintenance ("O&M") costs. *See* Reb. V.S. Crosby at 2-3 (ER-395-396); V.S. Russo at 7 (ER-456). The best way to perform this calculation is to first replicate the actual 2022 offers to SPP and net generation dispatch revenues attributable to Iatan and LEC, which can be accomplished using standard and publicly available spreadsheet technology. Then, a computer model that uses actual 2022 inputs for fuel costs, O&M and other SPP offer price components is executed to show the generation offers that would have been submitted to SPP and the net revenues that would have been earned "but for" the price adders applied as part of coal conservation measures. Reb. V.S. Crosby at 5 (ER-398).

The major part of Evergy's additional costs damages – the net increase in Evergy's cost to serve its load requirements in SPP – was measured by comparing the performance of the entire SPP market in terms of net costs incurred by Evergy to serve load in the scenario where Iatan and LEC were subject to coal conservation measures for specific periods in 2022 (the periods when conservation actually was implemented), and the net costs (positive or negative) that would have been incurred had those measures not been in

place. Performing this task requires the use of a production cost model, given that there are more than 750 generating units in SPP and Evergy only controls and has data access for a fraction of them. *See* Reb. V.S. Foo at 7-8 (ER-417-418). *See also* V.S. Russo at 15 (ER-464).

For the first calculation, Evergy's witness Crosby employed GenTrader, a publicly available generation dispatch model, together with standard and easily available spreadsheet technology. Reb. V.S. Crosby at 2 (ER-395). For the second, Evergy's witness Foo used PROMOD, a nationally recognized production cost model, the results of which are accepted by SPP and the state regulatory bodies with rate-setting jurisdiction over Iatan and LEC. Reb. V.S. Foo at 3-4 (ER-413-414). Evergy's expert witness Christopher J. Russo explained that each model was well-suited to its assigned task, and that Evergy's use of separate models to calculate separate categories of damages was reasonable. V.S. Russo at 15-18 (ER-464-467). Equally important, each is a self-contained model whose internal formulas and algorithms are not subject to manipulation by the user, so reasonable inputs will lead to reliable outputs. Op. V.S. Crosby at 15; Op. V.S. Foo at 3.

BNSF objected to the use of modeling to calculate Evergy's damages with the argument that because GenTrader and PROMOD are not "within the expertise" of the Board, they should not be relied upon in determining those damages. BNSF Arg. at 113 (BNSF-181). However, the Board has a history of basing key evidentiary conclusions on

model-based analyses,²³ and BNSF’s argument amounts to a claim that if a complainant’s damages are best represented by the outputs of a computer model, the defendant should not be held to account. This position is untenable as a matter of basic fairness, and also runs counter to the Board’s often-expressed view that it will look for the “best evidence” presented – even if it is less than perfect in all respects – and will prefer that evidence to claims of flaws that are unaccompanied by alternative presentations, which is precisely the case here. *Sunbelt Alkali Partnership v. Norfolk So. Ry.*, NOR 42130, 2014 WL 2805254 (STB served June 20, 2014), at *33, 67; *AEP Texas North Co. v. BNSF Ry.*, NOR 41191 (Sub-No.1), 2007 WL 2680223 (STB served Sept. 10, 2007), at *17-18; *Georgia Power Co. v. Southern Ry.*, NOR 40581, 1993 WL 455296 (ICC served Nov. 8, 1993), at *8.

Substantively, Mr. Crosby’s use of GenTrader to calculate Evergy’s lost opportunity damages is largely unchallenged by BNSF. Contrary to BNSF’s implication,²⁴ the inputs for Mr. Crosby’s model run were taken directly from Evergy’s actual 2022 offers to SPP during the conservation period, and since he was analyzing only two (2) Evergy generating facilities, his model LMPs matched the actual data produced by SPP in his “actual” case. In his “but for” case Mr. Crosby accounted for the fact that had Iatan and LEC been fully available during the conservation periods and

²³ See, e.g., *Total Petrochemicals & Refining USA, Inc. v. CSX Transp., Inc.*, NOR 42121, 2015 WL 2365770 (STB served May 15, 2015) at *1; *Otter Tail Power v. BNSF Ry.*, NOR 42071, 2004 WL 2852179 (STB served Dec. 13, 2004) at *3.

²⁴ BNSF Arg. at 110 (BNSF-178).

Evergy's offers were standard, cost-based offers without adders, the LMPs in the subject load regions would have been lower. While he used a price differential calculation provided by Evergy's witness Foo, the SPP prices themselves were actual prices. Reb. V.S. Crosby at 7-8 (ER-400-401).

BNSF attempts to cast doubt on the accuracy of Mr. Crosby's calculations by pointing to certain internal calculations made by other Evergy employees in time periods prior to the filing of the Complaint in this proceeding,²⁵ but Mr. Crosby explained from first-hand knowledge that the spreadsheet highlighted by BNSF was a "primitive" effort that did not accurately capture actual operations or rely on actual generation offers to SPP.²⁶ Likewise, the fact that Evergy employees may have discussed alternative approaches to measuring the adverse economic impacts of BNSF's trainset limitations is neither surprising nor unusual, and in no sense undermines a complete and detailed generation dispatch analysis based on actual 2022 offers to SPP and performed using a recognized program specifically tailored to the purpose and fully supported by accompanying workpapers. *See* Reb. Arg. at 55-56 (ER-59-60).

As Ms. Foo explained in her Opening and Rebuttal Verified Statements, PROMOD is the premier and accepted program for modeling operations and calculating LMPs across the SPP marketplace, which includes over 750 individual generating stations. Op. V.S. Foo at 2-5; Reb. V.S. Foo at 3 (ER-413). BNSF and its witness Paul

²⁵ *See* BNSF Arg. at 116-119 (BNSF-184-187).

²⁶ Reb. V.S. Crosby at 8 (ER-401).

Hibbard argued that PROMOD cannot be used to estimate increased cost to load resulting from coal conservation in 2022 because certain of the model's inputs do not match "actual" inputs for Iatan and LEC, and not all the model's outputs match 2022 "market" outcomes. *See* BNSF Arg. at 109-112 (BNSF-177-180). However, as Ms. Foo explained, PROMOD is not designed to replicate historic outcomes; it models how the SPP market can be expected to function under specified conditions and constraints, such as with and without coal conservation at Iatan and LEC,²⁷ and thereby produces an accurate relative measure. Since it is not possible to run a GenTrader-type model analysis using "actual" inputs for the 750+ generating units in SPP, due to data unavailability and the extraordinary time and resource burden that would be involved even if it was hypothetically possible, PROMOD-based modeling of the SPP system represents the best method to evaluate the SPP market's performance with and without the conservation measures applied at Iatan and LEC in 2022. Particularly considering the absence of any counter-presentation from BNSF, it stands as the best evidence of record regarding the increased net cost to load component of Evergy's damages. *AEP Texas North Co., supra*, 2007 WL 2680223 at *29, 58.

Rather than offer an alternative calculation of Evergy's increased net cost to load, BNSF attempted to challenge Ms. Foo's PROMOD results as "random" outcomes that could be altered by changing the inputs, and could even lead to Evergy earning higher

²⁷ Reb. V.S. Foo at 16-18 (ER-426-428).

margins as a result of conservation.²⁸ Obviously, *any* model's outcomes can be affected by manipulating inputs, but Ms. Foo explained clearly that her execution of PROMOD did not involve any such manipulation, and the results were driven by the model's internal algorithms and processes that cannot be altered by the operator. Op. V.S. Foo at 6-10; Reb. V.S. Foo at 8 (ER-418). Moreover, as Evergy's witness Russo found, Ms. Foo's PROMOD results were { [REDACTED] } the coal conservation periods. See V.S. Russo at 7 (ER-456) and Figure 6 (ER-467). There was nothing "random" about Ms. Foo's results.²⁹ Also, Evergy clearly refuted the suggestion that because Evergy's margins appeared to increase in certain hours, conservation could have been applied to increase profits. Ms. Foo explained that the cost to load calculation is a net determination over the entire conservation period, and because coal conservation is a response to projected fuel constraints and not a business strategy, the expectation is that conservation will result in *increased* net cost to load, as was the case here. Reb. V.S. Foo at 8 (ER-418). Additionally, Evergy demonstrated that any profit-oriented coal conservation attempt would run afoul of SPP rules and the requirements of state regulators, and could not be pursued, something that BNSF's own witness Hibbard effectively confirmed.³⁰

In rebuttal to Mr. Hibbard's Statement and Exhibits, Evergy also presented the expert testimony of Christopher J. Russo of Charles River Associates, whose

²⁸ See, e.g., BNSF Arg. at 103 (BNSF-171); V.S. Hibbard at 39 (BNSF-769).

²⁹ See Reb. V.S. Foo at 8 (ER-418); Reb. Arg. at 56 (ER-60).

³⁰ See Reb. Arg. at 74-77 (ER-78-81).

qualifications include extensive experience with electric utility operations, regional transmission organization functions and utility production cost modeling. Responding directly to Mr. Hibbard and to those elements of BNSF's Argument that relied on his testimony, Mr. Russo independently confirmed the reasonableness of Evergy's decisions to conserve coal based on the specific circumstances that Evergy faced in the Spring of 2022. V.S. Russo at 11-15 (ER-460-464). He also endorsed the use of GenTrader as a recognized and accurate generation dispatch model, and PROMOD as the leading production cost model used by energy price forecasters, independent system operators and Mr. Hibbard himself. *Id.* at 17-18 (ER-466-467). Responding specifically to BNSF's criticism of Evergy's use of two (2) models instead of one (1) – though BNSF never identified which one – Mr. Russo explained that each was appropriate to the purpose for which Evergy's witnesses selected it. *Id.* at 15-17 (ER-464-466).

Mr. Russo also highlighted BNSF's witness Hibbard's failure to present his own calculation of Evergy's lost opportunity damages, showing that it was possible to roughly estimate those damages to corroborate Mr. Crosby's more specific and actual data-based model results using standard computer technology and publicly available data.³¹ V.S. Russo at 22-25 (ER-471-474). While more generalized than Mr. Crosby's calculations,

³¹ Mr. Russo explained that he focused on lost opportunity as an example because execution of PROMOD requires access to input data from across SPP which the model already includes, so any re-run of PROMOD under the conditions applicable to Ms. Foo's analysis would have yielded the same result since PROMOD cannot be internally manipulated by a user. V.S. Russo at 22 (ER-471).

Mr. Russo's results approximated Mr. Crosby's final lost opportunity damages.³² Plainly, Mr. Hibbard could have undertaken a similar exercise, though the outcome obviously would have undermined his criticisms. *Id.* at 25 (ER-474).

Finally, Evergy's Rebuttal presentation showed that while BNSF leveled criticisms against Evergy witness Tucker's calculation of inventory management and railcar storage cost damages, it offered nothing in the way of actual evidence that could justify rejection of her calculations, which remained the best evidence of record. *Otter Tail Power v. BNSF Ry.*, NOR 42071, 2006 WL 275904 (STB served Jan. 27, 2006) at *19. Evergy also debunked BNSF's and its witnesses' various allegations that Evergy somehow was responsible for its own damages or failed to mitigate them,³³ and showed how established Board precedent rendered irrelevant any claim that Evergy did not suffer actual harm because a fuel adjustment clause in its regulated rate structure allowed Evergy to recover the costs of fuel transportation and electric generation. *See id.* at 71-74 (ER-75-78). The governing statute provides likewise. *See* 49 U.S.C. § 11701(b) (Board may not dismiss a complaint "because of the absence of direct damage to the complainant").

³² Both Mr. Crosby and Ms. Foo made minor adjustments to their Opening damages calculations, based on comments offered by BNSF's witness Hubbard. Mr. Crosby's restated lost opportunity damages total is \$16,914,540, and Ms. Foo's updated increased net cost to load total is \$5,326,774. Reb. V.S. Crosby at 16 (ER-409); Reb. V.S. Foo at 28 (ER-438).

³³ Reb. Arg. at 63-71 (ER-67-75).

CONCLUSION

In 2022, BNSF violated its obligations to Evergy under statutes subject to the exclusive jurisdiction of the Board, resulting in significant and measurable harm to Evergy and the millions of electric ratepayers that Evergy represents. The evidence and argument presented by Evergy in this proceeding make a clear case for the Board to hold BNSF accountable for its actions, and award Evergy appropriate compensation. Based on the entire assembled record, the Board should find that BNSF violated 49 U.S.C. §§ 11101(a), 10702(2) and 11121(a) in 2022 with respect to coal transportation to Iatan and LEC, and award damages to Evergy under 49 U.S.C. § 11704(b) in the principal amount of \$22,862,177.65, together with interest calculated from January 31, 2024 until the date paid pursuant to 49 C.F.R. § 1114.1.

Respectfully submitted,

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Dated: February 23, 2026

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CERTIFICATE OF SERVICE

I hereby certify that this 23rd day of February 2026, I have caused copies of the foregoing to be served electronically upon counsel for Defendant BNSF Railway Company.

/s/ Andrew B. Kolesar III
Andrew B. Kolesar III