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Office of Proceedings
May 17, 2024
Part of
Public Record

May 17, 2024

VIA E-FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: STB Docket NOR 42180, Evergy, Inc., Evergy Metro, Inc., and Evergy Kansas Central, Inc. v. BNSF Railway Company

Dear Ms. Brown:

Enclosed for e-filing in the above-referenced proceeding is a PUBLIC version of the Motion to Dismiss of BNSF Railway Company, with appropriate redactions that the Board can place in its docket. The Parties to this proceeding intend shortly to file a Motion for Protective Order in this matter. BNSF is concurrently filing a CONFIDENTIAL version of the Motion to Dismiss to be filed under seal.

Respectfully submitted,

/s/ Timothy J. Strafford

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Enclosures

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. NOR 42180

**EVERGY, INC., EVERGY METRO, INC.,
AND EVERGY KANSAS CENTRAL, INC.**

v.

BNSF RAILWAY COMPANY

BNSF RAILWAY COMPANY'S MOTION TO DISMISS

Pursuant to 49 C.F.R. § 1111.6, BNSF Railway Company (“BNSF”) moves to dismiss Count IV of the complaint filed on January 31, 2024, by Evergy, Inc., Evergy Metro, Inc., and Evergy Kansas Central, Inc. (collectively, “Evergy” or “Complainants”) in the above captioned proceeding. Evergy’s request for a forward-looking declaration by the Board fixing BNSF’s common carrier obligation to accept Evergy’s private train sets into service regardless of existing circumstances does not provide a basis for Board investigation or action and therefore should be dismissed pursuant to 49 U.S.C. § 11701(b).

Evergy’s request for a declaratory order has two fatal flaws that require dismissal. First, Evergy seeks an order in the absence of any ongoing dispute or controversy. Declaratory orders are intended to resolve live controversies, not to establish broad and generally applicable forward-looking regulatory standards. There is no live dispute between Evergy and BNSF over the acceptance and use of Evergy’s trainsets or the levels of BNSF’s common carrier service. { [REDACTED]

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[REDACTED]

[REDACTED] } – and BNSF has complied. Second, it is particularly inappropriate to use the STB’s declaratory order authority to establish standards governing a common carrier’s future service obligations, given that those obligations are fundamentally driven by specific facts and circumstances existing at the time of the future service request.

BACKGROUND

The Complaint focuses on BNSF’s transportation of coal in 2022 from the Powder River Basin (“PRB”) to two coal-fired electric generating facilities owned and operated by Evergy¹ – the Iatan Generating Station near Iatan, MO (“Iatan”) and the Lawrence Energy Center near Lawrence, KS (“Lawrence”).² While Count

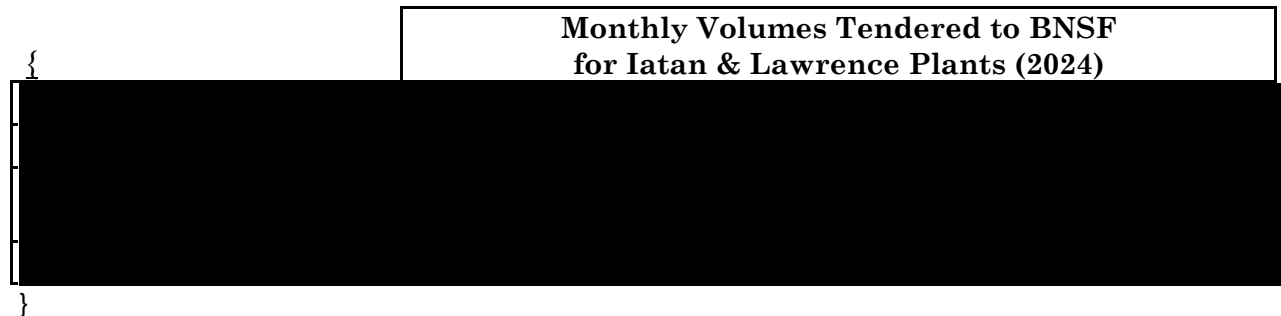
¹ Evergy is part of a family of corporate entities that assess financial performance and allocate resources on a consolidated basis (i.e., operate in one segment). Evergy is an investor-owned electric utility company engaged in the transmission and distribution of electric power to customers in Missouri and Kansas. In addition to the two operating subsidiaries participating in this proceeding, Evergy, Inc. also wholly owns and operates Evergy Missouri West, Inc., an integrated, regulated electric utility that provides electricity to customers in the state of Missouri, and Evergy Transmission Company, LLC. *See* Evergy 10-k at 90. Evergy Transmission Company, LLC owns 13.5% of Transource Energy, LLC, with the remaining 86.5% owned by AEP Transmission Holding Company, LLC, which is a subsidiary of American Electric Power Company, Inc. Transource Energy, LLC is focused on the development of competitive electric transmission projects. *Id.*

² In April 2021, Evergy announced that it would retire the remaining two coal-fired units at its Lawrence plant, the oldest in its fleet, by the end of 2023, and add 700 megawatts of solar power by the end of 2024. *See* <https://kansasreflector.com/2021/04/30/evergy-to-shutter-lawrence-coal-plant-speed-transition-to-renewable-energy/>. Evergy reversed course in 2023, however, announcing that it would keep the Lawrence plant in service until 2028 and not add any additional solar power until 2026. *See*

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IV of the Complaint seeks a declaration from the STB as to BNSF's future legal obligations to transport PRB coal for Evergy beyond 2024, the Complaint contains no factual allegations about BNSF's current transportation services or the relationship between BNSF and Evergy from the end of 2022 until today. { [REDACTED]

[REDACTED] } As shown in the chart below, this is a dramatic change from the volumes Evergy had forecasted to BNSF just a few months ago.



Lacking any factual basis to seek regulatory intervention based on current circumstances, the Complaint instead attempts to use allegations regarding 2022 service to attempt to establish what might be a reasonable level of service at some undefined point in the future. As the Board knows, 2022 was a year when the U.S. rail network experienced significant challenges as the nation's economy emerged from the COVID-19 pandemic. *See, e.g., Urgent Issues in Freight Rail Service –*

<https://missouriindependent.com/2023/06/16/evergy-slashes-planned-renewable-energy-additions-proposes-more-natural-gas/>.

³ “Annual Declaration” refers to the information submitted by coal customers to BNSF to communicate estimates of volumes expected to move in the next year as part of a series of communications that lead up to the actual tendering of coal for transportation.

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Railroad Reporting, EP 770 (Sub-No. 1), slip op. at 1 (STB served June 13, 2022) (cataloguing major challenges experienced by rail stakeholders.). As sections of the nation emerged from the pandemic lockdowns in the second half of 2021 at varying rates, demand for rail transportation spiked significantly. The combination of lack of employee, equipment, and warehouse resources throughout the supply chain, along with railroad-specific challenges, resulted in network-wide fluidity problems. BNSF detailed these challenges, which included historic snowfall in the Powder River Basin area during April 2022, in its June Supplemental Service Recovery Plan. *See* Supplemental Service Recovery Plan of BNSF Railway Company, *Urgent Issues in Freight Rail Service – Railroad Reporting*, EP 770 (Sub-No. 1), at 4 (filed June 23, 2022) (“Supplemental Recovery Plan”). These challenges had an exaggerated impact on a network that was already in recovery mode, causing a number of service interruptions that adversely affected numerous lines of business, consuming large amounts of crew and other resources while BNSF was attempting to aggressively pursue service recovery efforts.

As BNSF explained to the STB, a critical element of BNSF’s service recovery plan for that time period was to control the volume of private railcars operating on the network:

As a reaction to the overall network delays stemming from these service interruptions, we experienced an increased amount of private car inventory on our network in late 2021 and early 2022. As our velocity slowed with increased demand, there was an understandable instinct from our customers to add more cars to the network in the hopes that increased orders would allow them to get their needed volumes as expected.

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Id. at 5. It is widely understood, and consistent with everyday rush-hour experience, that adding cars to a congested network makes things worse, as BNSF further explained:

Unfortunately, adding cars to a strained network had the opposite result, decreasing velocity and increasing dwell, leading ultimately to the delivery of less product for all of our customers. It also more intensely consumes crew resources without increasing service levels.

Id.

Thus, one of the key short-term levers to improve fluidity in situations like the congestion that plagued the national rail network in 2022 is to reduce the number of cars online. BNSF transparently explained this in its June 2022 Supplemental Recovery Plan submitted to the Board.⁴ *See id.* at 6. It was imperative to decrease the number of cars online to increase fluidity and car velocity and thereby increase the volume of service that BNSF could provide to its entire customer base. As a result of significant efforts to improve fluidity over the course of the year, by the end of 2022, BNSF had largely restored service levels on its network to pre-pandemic levels. *See* Supplemental Service Recovery Plan of BNSF Railway Company, *Urgent Issues in Freight Rail Service – Railroad Reporting*, EP 770 (Sub-No. 1), at 1 (filed June 30, 2023).

The bulk of Evergy's Complaint challenges these efforts by BNSF and

⁴ Closely managing car supply during periods of network congestion has long been an important and effective strategy in the rail industry. BNSF itself has previously explained to the Board the necessity of limiting trainsets to alleviate congestion and increase fluidity in the context of coal transportation. *See* BNSF Reply, *United States Rail Service Issues*, EP 724 (filed Nov. 3, 2014); BNSF Letter, *United States Rail Service Issues*, EP 724 (filed Jan. 29, 2015).

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complains that they violated the law. In particular, the Complaint focuses almost entirely on BNSF's allegedly unlawful refusal to accept additional Evergy trainsets into service for the Iatan and Lawrence plants during the period of network-wide congestion in 2022, regardless of the impact that Evergy's requests for additional trainsets would have had on the rail network or other shippers. BNSF's evidence and argument will show that Evergy's allegation that BNSF acted unlawfully has no merit. But Count IV goes even further and asks that the Board declare that, "so long as coal shipments to Iatan and Lawrence are transported in common carrier service, BNSF's obligations under 49 U.S.C. §§ 10702(2), 11101(a), and 11121(a)(1) require it to accept into service a sufficient number of private Evergy railcars to transport Iatan's and Lawrence's respective nominated coal volumes, consistent with historic volumes and subject to Evergy's scheduling of shipments using BNSF's prescribed procedures." Complaint at 17. That is, Evergy asks the Board to establish a permanent requirement that BNSF accept all of Evergy's private equipment regardless of the circumstances existing at the time of any future request for service and regardless of the impact on other customers.

ARGUMENT

Under 49 U.S.C. § 11701(b), the Board may dismiss a complaint when it determines that the complaint does not state reasonable grounds for investigation and action. That is the case with respect to Evergy's request for general declaratory relief. There is no basis for Board action because Evergy fails to allege an ongoing question or controversy that would warrant a declaratory order. Moreover, a

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declaratory order is particularly ill-suited to set requirements for future conduct by a common carrier—conduct that, by its nature, must turn on a fact-bound analysis of future circumstances that are neither known nor knowable in the present.

A. There is No Ongoing Controversy that Would Warrant a Declaratory Order.

The Administrative Procedure Act authorizes agencies like the Board to “issue a declaratory order to terminate a controversy or remove uncertainty.” 5 U.S.C. § 554(e). Declaratory orders are not used to establish broad, generally applicable regulatory standards. There must be a live dispute creating uncertainty or an existing controversy to be resolved. *See, e.g., Hollister Ranch Owners’ Ass’n v. FERC*, 759 F.2d 898, 903 (D.C. Cir. 1985). The ICC has stated clearly that any exercise of declaratory order authority requires consideration of, among other things, “the ripeness of the controversy.” *Delegation of Authority – Declaratory Order Proceedings*, 5 I.C.C. 2d 675, 675-676 (1989) (citing *InterCity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984)). Reflecting this important limitation on the STB’s authority, the Board has routinely denied requests for declaratory orders where there was “no active case or controversy for the Board to resolve.” *See, e.g., CF Industries, Inc. v. Indiana & Ohio Rwy. et al. – Pet. for Declaratory Order*, FD 35517, slip op. at 3-4 (STB served June 21, 2013) (citing *Nat’l Solid Wastes Mgmt. Ass’n—Pet. for Declaratory Order*, FD 34776, slip op. at 4 (STB served Mar. 10, 2006)).

For example, in *Petition of Nebkota Rwy., Inc. and West Plains Co. for Declaratory Order*, FD 35352, slip op. at 3 (STB served Apr. 28, 2010), the Board

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denied a request for declaratory relief where there was “no longer any controversy or uncertainty before the Board that would justify declaratory relief.” Complaint procedures, not declaratory order proceedings, are available to address historical claims, and petitioners could not “continue to seek case-specific relief under the guise of a request for a declaratory order.” *Id.* Similarly, in *BNSF Railway Company and Musket Corporation v. Union Pacific Railroad Company*, FD 35740, slip op. at 1 (STB served Dec. 31, 2013), the Board held that “because the record indicates that there is no longer an active controversy here, a declaratory order proceeding will not be instituted.”

The Complaint alleges no active controversy that would justify declaratory relief here. All of the factual allegations in the Complaint relate to the service Evergy received in 2022, and the Complaint does not allege that BNSF is currently engaged in any conduct that supposedly violates BNSF’s obligations under the controlling statutes. The failure to allege an ongoing controversy that would be resolved by a declaratory order requires dismissal of Count IV.

In effect, Evergy is seeking to avoid the specific requirements of the statutes that authorize the STB to prescribe future conduct. The Board’s limited authority to regulate service levels comes from two specific statutory provisions: 49 U.S.C. §§ 11701 and 10704. But both provisions require as a predicate for STB action a finding that there is an ongoing (or imminent) violation of the statute that must be

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remedied.⁵ Section 11701 gives the Board authority to “take appropriate action to compel compliance with this part,” but only “if the Board finds a violation of this part.” While Section 10704(a)(1) gives the STB authority to order carriers to cease an ongoing violation and prescribe a rule, classification, or practice, there must be an existing practice that “does or will violate this part. . . .” The Board’s prescriptive authority does not extend to hypothetical future practices that are not currently or even recently engaged in, but which might, under some unknown and unspecified future conditions, potentially violate one of the statutes governing common carrier conduct.

B. A Declaratory Order is Particularly Ill-Suited to Resolve Fact-Bound Questions Regarding Service Provided by Common Carriers.

Everygy’s request for declaratory order should also be dismissed because a declaratory order is particularly ill-suited to set requirements for future conduct by a common carrier that must turn on a fact-bound analysis of future circumstances that are not, by definition, known or knowable in the present. Declaratory orders are intended to resolve legal questions applicable to a known set of facts. *See, e.g.*, Charles H. Koch, Jr., 2 ADMINISTRATIVE LAW AND PRACTICE § 5:17, at 40 (3d ed. 2010) (“Ordinarily declaratory orders should be issued only where critical facts are clear and cannot be altered by subsequent events.”); Administrative Procedure

⁵ To the extent that the Board’s authority to issue an emergency service order pursuant to 49 U.S.C. § 11123 or to issue an injunction under 49 U.S.C. § 1321 can be conceived of as regulating rail service levels, both provisions likewise require proof of existing, ongoing circumstances warranting such relief. In any event, Everygy seeks no such relief, makes no allegations that could support it, and lacks any conceivable basis for doing so.

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in Government Agencies, Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 77-8, at 32 (1941) (stating that declaratory orders should "be employed only in situations where the critical facts can be explicitly stated, without possibility that subsequent events will alter them"); *see* Gellhorn, Declaratory Rulings by Federal Agencies, 221 ANNALS AM. ACAD. POL. & SOC. SCI. 153, 157 (1942) (arguing that "declaratory rulings should be reserved for cases which reflect a real need for administrative guidance" and "are appropriate only when the fact situations to which they relate can be described accurately and unequivocally"). *See also North America Freight Car Association – Petition for Declaratory Order*, FD 34939, slip op. at 2 (STB served Dec. 20, 2007) ("A declaratory order proceeding is not intended to deal with the level of discovery and evidence needed to build a record upon which the Board could base a decision.").

Questions relating to the future car service or other obligations of a common carrier cannot meet this requirement of settled facts for the simple reason that future circumstances cannot possibly be known in the present. Evaluation of a carrier's common carrier obligation is a case-by-case, fact-specific inquiry. *See, e.g., Savannah Port Terminal R.R., Inc. – Petition for Declaratory Order – Certain Rates & Pracs. As Applied to Cap. Cargo, Inc.*, FD 34920, slip op. at 8 (STB served May 30, 2008) Service must be reasonable "under the existing circumstances." *Milmine Grain Co. v. Norfolk & Western R. Co.*, 352 I.C.C. 575, 585 (1976); *Town of Smithtown, N.Y. – Petition for Declaratory Order*, FD 36575 (Sub-No. 1), slip op. at

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5 n.9 (STB served Feb. 23, 2024). As the STB has observed, “how a railroad satisfies its common[]carrier obligation is left to the railroad to decide in the first instance.” *Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, NOR 42056, slip op. at 6 (STB served Sept. 27, 2004). A railroad “need not provide the particular service that the shipper would prefer.” *Id.*

Railroads do not have the equivalent of a “strict liability” standard to provide the level of service requested by a shipper at any given moment; instead, they are obligated to act reasonably under the circumstances. The factual analysis of reasonableness that must be the focus of any STB evaluation cannot be accomplished in the abstract, without knowing the particular circumstances that will confront the rail carrier at the time of a future service request. Given the central importance of this “reasonableness” obligation and the necessity that a declaratory order rely on settled facts, a declaratory order cannot be used to fix a railroad’s common carrier obligations in the future. But that is precisely what Evergy asks the Board to do in Count IV.

The recovery of fluidity to the national rail network that has been achieved since 2022 and the drastic change from Evergy’s demand in 2022 to its current volume levels both show the wisdom of not attempting to fix common carrier service levels in the abstract. If the Board were to establish forward-looking service level obligations for specific shippers regardless of current circumstances, railroads would have little flexibility to deal with changing conditions across the network or with changing circumstances for individual shippers, { [REDACTED]

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████████████████████ } Railroads would likely need to build in excess capacity for those shippers advantaged by regulatory intervention, creating inefficiencies that would harm other customers. This is inconsistent with the conception of a common carrier.

As the STB has recognized, the common carrier obligation runs not only to a particular railroad customer, but also to “all shippers on [a] line” and to the “public.” *Savannah Port Terminal R.R., Inc.*, FD 34920, slip op. at 9 (STB served May 30, 2008). Indeed, under some circumstances, in order to avoid mass congestion on its network, a railroad may not merely have a “right” but a “plain duty to refuse to receive more [goods] for shipment until its line [is] clear.” *Ill. Cent. R.R. v. Cobb, Christy & Co.*, 64 Ill. 128, 137 (1872); *see also id.* (“The more imminent the peril to the freight, the greater was the obligation of the carrier to refuse it, except upon a special contract.”). This settled legal principle is eminently sensible as a policy matter. It would make no sense to require a railroad to take steps that would harm other shippers, such as introducing additional private railcars onto an already congested network.⁶ Adding more railcars where there is a lack of capacity would just worsen congestion, to the harm of the vast number of other common carrier shippers receiving service. Everyg nevertheless improperly asks the Board to order BNSF to accept a particular minimum number of their railcars in

⁶ Nor does the law require a common carrier to do so. *Atchison, Topeka & Santa Fe Rwy. v. U.S.*, 232 U.S. 199, 214 (1914); *Texas Municipal Power Agency v. Burlington Northern and Santa Fe Rwy.*, NOR 42056, slip op. at 9 (STB served Mar. 24, 2003); *Shippers Comm. v. Interstate Commerce Commn.*, 968 F.2d 75 (D.C. Cir. 1992).

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perpetuity, regardless of whether presently unknown and unknowable future circumstances establish that doing so would cause or exacerbate network congestion. Evergy's request is without basis and should be dismissed.

CONCLUSION

For the foregoing reasons, BNSF requests that the Board dismiss Count IV of Evergy's complaint.

Dated: May 17, 2024

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Respectfully submitted,

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VERIFICATION

I, Adam Weiskittel, declare under penalty of perjury that I am AVP and Associate General Counsel, Operations of BNSF Railway Company, that I am authorized to make this verification, and that I have read the foregoing *BNSF Railway Company's Motion to Dismiss* and know the facts asserted therein are true and accurate as stated to the best of my knowledge, information, and belief.

/s/ Adam Weiskittel

Adam Weiskittel

May 17, 2024

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the public version of the foregoing *BNSF Railway Company's Motion to Dismiss* 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

May 17, 2024