



SURFACE TRANSPORTATION BOARD

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STB GRANTS PRELIMINARY INJUNCTION; ORDERS BNSF RAILWAY COMPANY TO TRANSPORT 4.2 MILLION TONS OF COAL FOR NAVAJO TRANSITIONAL ENERGY COMPANY, LLC

The Surface Transportation Board today issued a preliminary injunction requiring BNSF Railway Company (BNSF) to transport 4.2 million tons of coal from Navajo Transitional Energy Company, LLC's (NTEC) Spring Creek mine in Montana to the Westshore Terminals export facility in British Columbia, Canada during 2023. The Board is also requiring BNSF to transport an additional one million tons during 2023 as train sets and crews become available. The Board's order effectively requires BNSF to move 23 trains per month of NTEC's coal beginning immediately, and an additional six trains per month when additional train sets and crew become available. The Board further ordered weekly status reporting by the parties during the pendency of the proceeding with respect to the number of trains moved, BNSF's efforts to obtain additional crews, and both parties' efforts to obtain additional train sets.

On April 14, 2023, NTEC filed an application seeking an emergency service order pursuant to 49 U.S.C. § 11123. In addition, or alternatively, NTEC sought a preliminary injunction under 49 U.S.C. § 1321(b)(4). NTEC asked the Board to direct BNSF to restore and maintain adequate coal transportation service from NTEC's Spring Creek mine to the Westshore Terminals facility. In a separate docket, NTEC filed a related complaint and petition for declaratory order alleging that BNSF has breached its common carrier obligation, failed to provide adequate car service, and engaged in unreasonable practices with respect to the transportation at issue. The Board held an oral argument in the proceeding on May 10, 2023, after a pre-argument conference with the parties on April 27, 2023.

In today's decision, the Board, by a vote of three-to-two, found that NTEC prevailed on the four-part test for granting injunctive relief. In particular, the Board found that NTEC was highly likely to succeed on the merits of its claim that BNSF violated its statutory common carrier obligation to transport the volume of coal tendered by NTEC. On this prong, the Board found that NTEC's request for service was reasonable, in light of BNSF's historical performance, and factual statements in BNSF'S pleadings and at oral argument that BNSF has the capacity to provide the minimum service requested by NTEC. The Board also found that NTEC was likely to suffer irreparable harm, such as significant damage to its reputation as a dependable supplier in the global coal marketplace, which cannot be remedied by money damages. The Board found

that balancing the needs of other BNSF customers did not weigh against an injunction because the record establishes that BNSF can comply with the injunction and still meet the needs of other shippers. Finally, the Board found that an injunction serves the public interest because NTEC has shown that it plays a critical role in the Navajo Nation's economy. The Board further acknowledged that there is a public interest in accessing the rail network.

“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,” Chairman Oberman noted. “Today's decision reflects the majority's finding that the common carrier obligation requires a railroad to provide service on a customer's request that is within the railroad's capacity to provide.” Further, Oberman noted, as the STB has previously held: “The common carrier duty reflects the well-established principle that railroads ‘are held to a higher standard of responsibility than most private enterprises.’”

Board members Patrick Fuchs and Michelle Schultz dissented with separate expressions.

The Board's decision in [Navajo Transitional Energy Company, LLC—Ex Parte Petition for Emergency Service Order](#), Docket No. NOR 42178, may be viewed and downloaded [here](#).

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