51812 SERVICE DATE — AUGUST 14, 2023
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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42178

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC—EX PARTE PETITION FOR EMERGENCY SERVICE ORDER

Digest:[1] The Board earlier ordered BNSF Railway Company (BNSF) to transport a minimum of 4.2 million tons of coal on an annual basis in 2023 from a mine operated by Navajo Transitional Energy Company, LLC, to a terminal facility in Canada, and to transport an additional one million annual tons to the extent additional capacity becomes available. In this decision, the Board denies BNSF's petition to stay the requirement that it transport the additional one million tons should capacity become available.

Decided: August 13, 2023

On June 23, 2023, after a full-day oral argument, the Board issued an order under 49 U.S.C. § 1321(b)(4) to prevent irreparable harm. That order directed BNSF Railway Company (BNSF) temporarily to provide a particular level of rail service to Navajo Transitional Energy Company, LLC (NTEC) for 2023 and, if certain conditions were met, to provide a certain higher level of service. In addition, the Board required reporting by BNSF and NTEC during the pendency of a related complaint proceeding. Navajo Transitional Energy Co.—Ex Parte Pet. for Emergency Serv. Ord. (Injunction Decision), NOR 42178 (June 23, 2023), appeal docketed, No. 23-60402 (5th Cir. July 28, 2023).[2]

On July 17, 2023, BNSF filed with the Board a petition for partial stay of the preliminary injunction pursuant to 49 C.F.R. § 1115.5, to which NTEC replied on July 24, 2023. As discussed below, the Board will deny the petition for partial stay.

BACKGROUND

This proceeding concerns rail transportation service for export coal bound for Japan and Korea. (NTEC Appl. 1 & V.S. Babcock para. 7.) The service at issue originates at NTEC's Spring Creek mine in Montana, which is served only by BNSF. From Spring Creek, BNSF moves the coal in common carrier service to the Westshore Terminals facility in British

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol'y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] See the Injunction Decision for a more detailed procedural history and background.

Columbia (Westshore), where it is loaded onto ocean vessels for movement overseas. (Id. at 3, 4.) NTEC previously had contracts with BNSF for shipment of export coal to Westshore, but the primary contract expired at the end of 2022, while another contract—concerning service related to a single customer in Japan—expired in March 2023. (Id., V.S. Babcock para. 9.) BNSF and NTEC were unable to reach agreement on a new contract.

On April 14, 2023, NTEC, an entity organized under the laws of the Navajo Nation, its sole shareholder, sought either an "emergency service order" pursuant to 49 U.S.C. § 11123 or a preliminary injunction pursuant to 49 U.S.C. § 1321(b)(4) that would direct BNSF to restore and maintain adequate coal transportation service from Spring Creek to Westshore. 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. See Docket No. NOR 42179.

In seeking immediate relief, NTEC claimed that BNSF has not provided adequate service as required by its common carrier obligation under 49 U.S.C. § 11101(a), profoundly hindering NTEC's ability to operate its business, satisfy its existing contractual obligations, and market export coal for future sales, thereby harming NTEC and its shareholder, the Navajo Nation. (NTEC Appl. 6, 11.) NTEC asked the Board to direct BNSF to provide ratable service of approximately 29 trains per month beginning May 1, 2023. (Id. at 6.)

BNSF opposed NTEC's request, contesting NTEC's claims that it has violated its common carrier obligation and arguing, among other things, that the level of service NTEC has sought is extraordinary in relation to past service (BNSF Reply 20), and that resource constraints, including limited crew and trainset availability, hinder BNSF's ability to provide more service, (id. at 3, 6, 8-9, 21-22).

After holding a full-day oral argument and receiving supplemental filings, the Board issued a preliminary injunction to prevent the irreparable harm that NTEC would otherwise suffer during the pendency of the complaint proceeding in Docket No. NOR 42179. The injunction has two parts. In adopting the first part of the injunction, the Board explained that BNSF has a common carrier obligation to transport a shipper's goods to the extent it has the capacity to do so. Inj. Decision, NOR 42178, slip op. at 13. Based on BNSF's own statements, the Board found that BNSF has the capacity to move at least 4.2 million tons of coal from Spring Creek to Westshore in 2023. Id. Therefore, the Board ordered BNSF to transport a minimum of 4.2 million tons of coal (the baseline tonnage) from Spring Creek for service destined to Westshore in 2023. Id. The Board required that service to be reasonably distributed through the remainder of the year, i.e., approximately 23 trains per month. Id.

In adopting the second part of the injunction, the Board explained that it would accept, for purposes of the preliminary injunction proceeding, BNSF's assertion that it did not have sufficient crews and trainsets to provide the additional six trains per month that would reach the 29-train-per-month service level that NTEC sought (and that would allow NTEC to export an additional one million tons). Id. at 14. However, at the oral argument, BNSF represented to the Board that it was "confident the third and fourth quarter [of 2023] that [it's] going to have the right amount of crews [to] continue to increase the amount of business that we can put through

this portion of the network." (Tr. 210:5-10.)[3] Therefore, the Board made the second part of the injunction contingent: it held that *if* BNSF could secure the necessary additional trainsets beyond those needed to satisfy the 4.2 million-ton baseline, and *if* it obtained the additional crews it contends it needs, *then* the common carrier obligation would accordingly require BNSF to carry the extra million tons in addition to the 4.2 million baseline. See Inj. Decision, NOR 42178, slip op. 14 (BNSF must transport an additional one million tons of coal from Spring Creek for service destined to Westshore in 2023 (an additional 6 trains per month on average) "to the extent that additional trainsets and crews become available"); id. at 15, ordering paragraph 2 ("BNSF is ordered to transport an additional one million tons of coal from Spring Creek for service destined to Westshore in 2023 to the extent that additional train sets and crews are available to serve NTEC, as discussed above."). Nowhere in its decision did the Board order BNSF to develop additional crew capacity or obtain additional trainsets.[4]

BNSF seeks a stay of the second part of the preliminary injunction, the part that is contingent on sufficient trainsets and crews becoming available in addition to those required to meet the baseline tonnage requirements. BNSF argues that its request meets the requirements for a stay, including that it will suffer irreparable harm absent a partial stay of this aspect of the injunction. NTEC opposes the partial stay.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 1321(b)(4), the Board may issue an appropriate order, such as a stay, when necessary to prevent irreparable harm. In deciding a request for stay, the Board considers (1) whether the party seeking a stay is likely to prevail on the merits, (2) whether the party seeking a stay will be irreparably harmed in the absence of a stay, (3) whether issuance of a stay would substantially harm other parties, and (4) whether issuance of a stay is in the public interest. See, e.g., Ind. Harbor Belt R.R.—Trackage Rights—Consol. Rail Corp., FD 36099 et al., slip op. at 4 (STB served Mar. 14, 2017) (citing Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Id. (citing Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974)). See also Tex. League of United Latin Am. Citizens v. Hughs, 978 F.3d 136, 143 (5th Cir. 2020) ("The party seeking the stay bears the burden of showing its need.").

The Board has held that the threshold consideration in deciding whether a stay is appropriate is whether the moving party will be irreparably harmed without it. Joint Pet. for a Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disps., EP 765, slip op. at 2 (STB served Feb. 14, 2023) (citing R. J. Corman R.R. Prop.—Aban. Exemption—in Scott, Campbell, & Anderson Cntys., Tenn., AB 1296X, slip op. at 3 (STB served Dec. 1, 2020)). The party seeking a stay must demonstrate that the injury claimed is "imminent, 'certain[,] and

[3] All transcript citations are to the May 10, 2023 transcript.

[4] Given the preliminary stage of the proceeding, the Board observed that "it would not be appropriate [at that time] for the Board to consider whether or to what extent the common carrier obligation requires a rail carrier to take reasonable steps to increase capacity in response to a request for service." Id. at 4, n.6.

great.'" Sault Ste. Marie Bridge Co.—Acquis. & Operation Exemption—Lines of Union Pac. R.R., FD 33290, slip op. at 6 (STB served Jan. 24, 1997) (quoting Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)). Where a petitioner does not demonstrate "that irreparable harm will occur if a stay is not granted, the petition for a stay will be denied and the Board need not address the remaining stay criteria." R. J. Corman R.R. Prop., AB 1296X, slip op. at 3; see also Joint Pet. for a Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disps., EP 765, slip op. at 3.

The Board will deny the petition for stay because BNSF has not met its burden. BNSF has failed to show that irreparable harm will occur if a stay is not granted. See 49 U.S.C. § 1321(b)(4); R. J. Corman R.R. Prop., AB 1296X, slip op. at 3 (denying petition for a stay due to petitioner's failure to show irreparable harm); Ind. Harbor Belt R.R., FD 36099 et al., slip op. at 5 (same); Joint Pet. for a Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disps., EP 765, slip op. at 3 (same). The additional tonnage portion of the order, by its terms, does not come into force absent voluntary actions by BNSF to develop additional capacity; yet BNSF hypothesizes that "*anything* [the additional tonnage requirements] demand puts BNSF at risk of incurring costs or liabilities it cannot recoup if the injunction is overturned." (BNSF Pet. 7 (emphasis added).) BNSF's general and speculative argument clearly does not show that the harm BNSF allegedly risks is imminent, certain and great. See Sault Ste. Marie Bridge Co., FD 33290, slip op. at 6.[5]

To the contrary, the nature of the relief ordered by the Board—that BNSF must transport the additional tonnage *if capacity to do so becomes available*—negates the possibility of imminent or certain harm to BNSF. Specifically, the Board's decision indicated that the requirement regarding the additional tonnage would not be triggered until both trainsets and BNSF crews, beyond those serving the baseline tonnage, become available. There are a host of factors that would determine whether BNSF has the trainsets and crew available to carry the additional tonnage, and many of them—including BNSF's operational and routing decisions about other traffic, its decisions concerning crew retention and hiring, and its deployment of crews throughout the system—are dependent on whether BNSF succeeds in fulfilling its representation that it would have "the right amount of crews" sometime this year. Other external factors may also impact trainset and crew availability, such as weather, track conditions, and labor conditions. Moreover, even if trainsets and BNSF crews became available, BNSF could nonetheless face other operating challenges that could undermine its ability to handle the additional tonnage. In short, BNSF must carry the extra tonnage *only to the extent it is capable of doing so*.

The lack-of-irreparable-injury finding regarding the additional tonnage requirement is informed by the parties' experience regarding the baseline tonnage. In their periodic status

[5] BNSF suggests that trainset acquisition and positioning would take some "time and resources," (see BNSF Pet. 7), but BNSF does not explain how much time would be needed or what the costs of acquiring and positioning additional trainsets would be. BNSF therefore has not met its burden to show that those costs would be "great" and, as discussed above, the Board's order does not require BNSF to acquire trainsets (or to hire additional crews) in any event. See Sault Ste. Marie Bridge Co., FD 33290, slip op. at 6.

reports, NTEC and BNSF both agree that because of recent problems with meeting the baseline requirements, there would be no point in seeking additional trainsets—a prerequisite to transporting the additional million tons—at this time. Since the Board issued its order, other factors have limited BNSF service levels: a bridge collapse has required BNSF to reroute export coal and other traffic, resulting in congestion along the alternative route (see, e.g., BNSF Status Report 1-2, June 30, 2023); issues at Westshore have reduced loading slots for BNSF, including increased traffic due to strikes at other Canadian ports and mechanical problems (see, e.g., BNSF Status Report 1-2, July 28, 2023); and an NTEC equipment breakdown at Spring Creek interrupted coal loading there (NTEC Status Report 1, July 28, 2023). In addition, as BNSF has explained, export coal prices significantly affect demand for BNSF train service to ship export coal. (See BNSF Reply 10-11, Apr. 19, 2023.) BNSF has noted that export coal prices have decreased significantly in recent months, which could reduce the tonnage of export coal NTEC itself seeks to ship. This factor also supports the conclusion that the need for additional trainsets, beyond those that would carry the baseline tonnage, is neither imminent nor certain. (See BNSF Status Report 2, July 14, 2023; see also BNSF Status Report 2-3, July 28, 2023.)

BNSF indicates its expectation that some of these issues are resolving and that traffic could normalize in the coming weeks. (See BNSF Status Report 1-2, July 28, 2023.) And the status reports for the week ending on August 2, 2023, do indeed show some improvement, which hopefully will continue (although BNSF indicates in its most recent report that it provided only 8 trains, rather than the anticipated 12, between July 27 and August 2, 2023). (See BNSF Status Report 1-2, Aug. 4, 2023; NTEC Status Report 1, Aug. 4, 2023.) However, BNSF explains that the operational issues described above, which hopefully will not recur, resulted in increased use of relief crews, impacting crew availability for the week of July 27 to August 2. (BNSF Status Report 2, July 28, 2023.) Even if all of these external issues are resolved and do not recur, overall crew availability to handle the additional tonnage will still depend on BNSF's ability to hire.

Finally, BNSF argues that "if the [additional tonnage] portion of the preliminary injunction requires BNSF to cut service to other shippers, BNSF may have to breach its contracts, and it may be subject to other shippers' common carrier complaints." (BNSF Pet. 7.) BNSF's fears are baseless, and its contention is nothing more than a red herring. Assuming that BNSF were to meet the baseline tonnage requirement, a requirement as to which it does not seek a stay, the Board's order makes clear that the additional tonnage requirements would be triggered only if BNSF were able to procure sufficient equipment and crews. And the Injunction Decision negates BNSF's contention because the Board expressly found that "[g]iven BNSF's representations in this proceeding, such an order *will not disadvantage its other customers*." Inj. Decision, NOR 42178, slip op. at 12 (emphasis added); see also id. at 14 (explaining that the contingent portion depends on BNSF "increasing its capacity to provide the additional requested trains to NTEC"). Thus, the Board's order not only does not require BNSF to cut service to other shippers to make additional trainsets and crew available to serve NTEC; it expressly found that complying with the Board's order would not result in degrading service to others. BNSF's unsupported claim that any such cuts would produce harm is without merit.

BNSF has therefore failed to demonstrate irreparable harm, and the Board will deny the petition for partial stay.

The Board had intended to focus this decision on whether BNSF had shown sufficient irreparable harm to warrant a stay. The dissents, however, level a broadside at not only the Board's decision to deny BNSF's stay motion but at the underlying decision as well. In doing so, they raise a number of "strawmen" arguments, and mischaracterize both the record and the Board's preliminary injunction order.

First, the dissents claim that the Board's decision creates serious consequences for the Board's common carrier jurisprudence, arguing that the Board is impermissibly meddling in allocation decisions that should be left to the railroad. These concerns are unsupported by the record. For example, one dissent says the Board's decision ignores the railroad's claim that the preliminary injunction "unlawfully requires [BNSF] to misallocate resources across its network . . .", infra p. 10 (Member Fuchs, dissenting), and does not account for the railroad's need to "affirmatively decide to recruit, hire, train, deploy, and assign highly skilled workers while balancing competing and changing demands across thousands of customers and while accounting for constantly shifting natural, economic and other external factors," infra p. 11 (Member Fuchs, dissenting). This dissent also suggests that the preliminary injunction will cause an "alteration of the railroad's operational and routing decisions, hiring plans, and deployment of crews around the country." Infra p. 11 (Member Fuchs, dissenting).

BNSF never argued that the requested preliminary injunction would cause such wide-ranging consequences and did not offer any evidence to support such a contention. Thus, nothing in the record before the Board supports the dissent's assertions. Having examined the testimony and evidence, and the record as a whole, the Board made factual findings establishing the opposite conclusion. At the oral argument, the Board examined BNSF's claimed reasons for being unable to provide all of the service NTEC had requested. For example, in his verified statement, Matthew Garland, BNSF's vice president of transportation, claimed that if the Board ordered the railroad to move all 29 trains per month requested by NTEC, it would create assorted difficulties, including requiring BNSF to take away trainsets and crews serving other coal shippers and to prioritize NTEC service over service to shippers of other commodities. (BNSF Suppl., V.S. Garland 14-15, May 5, 2023.) But the exchanges during the oral argument revealed that BNSF could provide NTEC an average of 23 trains per month and, with the addition of crew and trainsets, transport the additional coal NTEC requested without diverting resources from other shippers.

More specifically, BNSF was questioned as to whether the railroad had the current capacity, "whether it was by contract or common carrier," to provide NTEC with an average of 23 trains per month during 2023 (amounting to 4.2 million tons of coal on an annual basis). (Tr. 196:2-197:16). BNSF conceded that it did. (Id.) BNSF also unequivocally agreed that providing 23 trains per month "wouldn't come at the cost of [its] other customers" (Tr. 202:5-11), and Mr. Garland agreed that, despite the language in his verified statement, "there would be no parade of horribles if it was only 23 trains a month on average because that's what BN knew it could handle." (Tr. 215:3-8.)

The Board next pursued the question of what factors were preventing BNSF from completely fulfilling NTEC's request to move an additional one million tons during 2023,

amounting to an average of an additional six trains per month over the 23 BNSF had conceded it had the ability to move. At the hearing, BNSF identified only two factors needed to avoid taking service from other customers: 1) the need for additional crew and 2) the need for additional train sets.

Focusing on these two factors, Mr. Garland identified a crew shortage in the Pacific Northwest, specifically Everett and Interbay, as impacting BNSF's capacity to move NTEC's coal. (Tr. 252:11-254:14, see also BNSF Suppl., V.S. Garland 11, May 5, 2023.) But Mr. Garland assured the Board that BNSF is endeavoring to solve and would be successful in resolving the crew shortage problem at these locations, explaining:

> We've been on an aggressive hiring spree over the last 14 months. . . . We think we've found the right amount. The pipeline continues to grow. We're confident the third and fourth quarter [of 2023] that we're going to have the right amount of crews continue to increase the amount of business that we can put through this portion of the network.

(Tr. 209:17-210:10.) In the supplemental briefing afforded by the Board, BNSF did not deviate from these representations. (See BNSF Suppl. 8-9, May 15, 2023.) Based on the entire evidentiary record, the Board drew the reasonable inference that if BNSF succeeds in hiring more crew, it will be able to provide the additional trains requested by NTEC without taking crews from other customers. The Board made such a finding in its injunction decision.

With respect to the claim that a Board order to move an additional six trains, or a total of 29 trains per month, would require the railroad to take train sets away from other coal shippers, under questioning, BNSF explained that it would need to obtain an additional "two to three [train] sets" to eliminate the need to take train sets from other shippers in order to meet NTEC's requested service. (Tr. 226:15-227:2.)

Thus, the record clearly establishes how BNSF could provide the requested service to NTEC and is clear that, with existing resources, BNSF can, without dispute, provide NTEC with 23 trains per month. If BNSF lives up to its representations to this Board concerning hiring, and if either BNSF or NTEC obtains an additional three train sets, then the record is also clear that BNSF can provide NTEC with the additional six trains per month without cutting service to its other shippers, such that no other BNSF customers will be disadvantaged. At no point in this proceeding did BNSF present evidence supporting the specter raised by the dissents that the Board's order will cause BNSF to face a "certain, imminent, and great misallocation of resources" "across its network," or interfere with its efforts to "balanc[e] competing and changing demands across thousands of customers," or alter its "deployment of crews around the country." Indeed, there is no evidence in the record to support any such conclusion.[6] The evidence was limited to the specific part of BNSF's network involving NTEC's coal shipments.

[6] One of the dissents asserts that "the record shows that other shippers to Westshore have unmet needs," but cites to no such evidence in the record. There is none. The evidence is to the contrary. As discussed in the text, above, BNSF, without contradiction, testified that it can

The dissents also argue that the Board's initial Injunction Decision, and the current determination not to stay the relief granted there, leave BNSF with too much uncertainty about what its obligations to NTEC are. For example, one dissent asserts that "BNSF must guess as to whether it is allowed to assign crew to meet up to 100 percent of the nominations from other coal shippers to Westshore before it is required to move any additional tonnage for NTEC." Infra p. 13 (Member Fuchs, dissenting). But BNSF articulates no such claim. It is BNSF that represented to the Board that it expects its improved hiring efforts will generate the crews it needs to serve NTEC without disadvantaging other customers. If that occurs, and if either party obtains the additional trainsets, then the preliminary injunction requires BNSF to provide the additional service. There is no lack of clarity in that requirement. And indeed, it will be BNSF, itself, that will determine whether it has obtained sufficient additional crews to provide the service without adversely affecting its other customers. And the Board assumes and has every reason to conclude that BNSF will make such a determination in good faith.

The dissents also argue that the uncertainty created by the Board's order or that changed circumstances could prevent BNSF from complying with the Board's order and thus the requested stay should be granted. But all injunctions requiring a respondent to take action in the future come with the uncertainty that as-yet unknown future circumstances could prevent compliance. Thus, like every other litigant, BNSF is not without remedy should any claimed lack of clarity about the requirements of the Injunction Decision impede BNSF's plan to bring more crew and trainsets online to transport additional coal for NTEC or should any future change in circumstances warrant a modification of the Board's order. To date, BNSF has sought no such modification nor brought any changed circumstances to the Board's attention. The railroad is always free to bring such concerns to the Board, and if it did, the Board would act promptly and grant relief if warranted.

More importantly, the dissents' contention that the Board should not apply the common carrier obligation to require BNSF to provide the requested service to NTEC because railroads need flexibility to meet the changing needs of their customers and to allocate resources throughout their networks is troubling. If accepted, it would eviscerate the common carrier doctrine. Any time a shipper sought relief requiring a railroad to provide "service on reasonable request," the responding railroad could successfully argue that any Board order would interfere with the railroad's flexibility to provide service to some other customer somewhere on its lines. It would become virtually impossible for the Board to ever enforce the common carrier obligation. Surely, this was not Congress' intent when it codified the centuries old common carrier doctrine, 49 U.S.C. § 11101(a).

The dissents express concern that, even though this decision requires BNSF to allocate equipment to NTEC only if it is able to do so, BNSF might read it more broadly, in a way that

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provide 23 trains per month, and with additional crews and trainsets, an additional 6 trains per month, without disadvantaging any other customer. Other shippers who filed letters with the Board stated they were concerned about their needs being met but offered no evidence to support the idea that their needs will, in fact, not be met if BNSF complies with the preliminary injunction order.

would require the carrier to obtain equipment or to allocate existing equipment to NTEC that it might need (or just prefer) to allocate somewhere else. If that were to happen, the dissents say, the injunction could severely disrupt commercial collaboration between railroads and shippers and could disincentivize parties from contracting.

But an injunction like this one protecting a particular shipper that has exercised its right to seek relief simply by requiring a railroad to do what it is able to do, or what it says it will do anyway, will not disrupt relations within the railroad industry. True, an order like this says that railroads do not have *carte blanche* to degrade service to shippers at their whim. Nor may they de-market their services by completely refusing to serve shippers they don't favor. But the law has always required railroads to "provide . . . service on reasonable request." 49 U.S.C. § 11101(a). The dissents express concerns about regulatory overreach. Although the complaint case is still pending, and is not the subject of this decision, the Board can say here that notwithstanding the railroads' rights to determine in the first instance how to carry out their operations, Congress clearly established that, under the common carrier obligation, there must be some oversight over a railroad's allocation of capacity in a resource-constrained environment. And in this case, the Board's preliminary injunction reflects the unobjectionable proposition, which BNSF conceded at oral argument, that if "the railroad has the capacity all things considered[,] [i.e., o]ther customers, locomotives, how much track is there," to provide requested transportation, the common carrier obligation requires it to do so. (Tr. 186:10-12; see also Tr. 186:6-187:4.)

Finally, the dissents question the need for an order at all if the Board is only directing BNSF to do what it said it would do. The simple answer to that concern is that, prior to NTEC's filing its complaint in this case, BNSF refused to provide NTEC with the service the Board has now ordered. And it was not until the oral argument that BNSF unequivocally stated that it will provide NTEC with approximately 23 trains per month, and it never agreed to provide the additional six trains per month, even with resources permitting. Having brought its petition and made its case for a preliminary injunction, NTEC has demonstrated that it is entitled to the relief awarded, as conditioned by the Board.

It is ordered:

1. BNSF's petition for partial stay is denied.

2. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz. Board Members Fuchs and Schultz dissented with separate expressions.

BOARD MEMBER FUCHS, dissenting:

Six weeks ago, when the Board issued its preliminary injunction, it claimed such an extraordinary action was necessary to prevent irreparable harm. Today, the Board's decision to deny a stay (Stay Decision) comes close to declaring that the original action, in effect, does nothing. The vagueness of the contingent portion of the Injunction Decision unfairly allows the Board to change the railroad's conduct while later disclaiming responsibility for any associated trade-offs. The Board cannot have it both ways. If the Board does not intend the contingent portion of the injunction to cause BNSF to do anything it was not already planning to do, then that portion of the injunction is plainly not necessary to prevent irreparable harm. If the Board in fact intends the contingent portion to cause BNSF to change its conduct, then the Stay Decision fails to confront the railroad's claim that the injunction unlawfully requires it to misallocate resources across its network with no adequate remedy at law. For reasons that extend far beyond its vagueness, the Injunction Decision is unfixable. Rather than forcing the agency to expend more resources defending a deficient decision, the Board should—on its own initiative—find material error and vacate its Injunction Decision.

Standard. As the Stay Decision states, under 49 U.S.C. § 1321(b)(4), the Board may issue an appropriate order, such as a stay, when necessary to prevent irreparable harm. In deciding whether a stay is warranted, the Board considers the same four elements as it does in deciding whether to issue an injunction.[1] See, e.g., Autauga N. R.R.—Lease & Operation Exemption—Norfolk S. Ry., FD 35465, slip op. at 2-3 (STB served Mar. 18, 2011) (citing Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)). Here, to receive a stay of the contingent portion of the injunction, BNSF must carry the burden of persuasion on all four elements. See id. (citing Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974)). The Stay Decision finds that BNSF fails to carry its burden on one of the necessary elements, irreparable harm, and therefore may not receive a stay. Establishing irreparable harm requires that the alleged harm "must be both certain and great; it must be actual and not theoretical." Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). In analyzing this element, the agency has found irreparable harm where a party would not have an adequate remedy at law—such as where the Board does not have authority to award damages—if that party were to prevail on the merits. E.g., Colo. Wheat Admin. Comm. v. V & S Ry., NOR 42140, slip op. 4-5 (STB served May 7, 2015); see also, e.g., R.J. Reynolds Vapor Co. v. FDA, 65 F.4th 182, 194 (5th Cir. 2023).

For a party to have a fair chance to establish it will be irreparably harmed by a preliminary injunction, and for the Board to meet its legal responsibilities, the injunction must clearly and specifically state the conduct it enjoins. Indeed, in civil litigation in federal district court, every injunction is required to "state its terms specifically" and "describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1). This rule "was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders,

[1] Unlike the Injunction Decision, the Stay Decision omits any reference to a "sliding scale" when it articulates BNSF's burden on the same elements. Compare Stay Decision at 3 with Inj. Decision, NOR 42178, slip op. at 3-4.

and to avoid the possible founding of a contempt citation on a decree too vague to be understood. . . . [B]asic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." Schmidt v. Lessard, 414 U.S. 473, 476 (1974) (citations omitted). This same rationale ought to apply in this context.[2] Likewise, regulation in general must be sufficiently detailed to "give fair notice of conduct that is forbidden or required." FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012).

In addition, separate from its authority to stay decisions, the Board has discretion "at any time on its own initiative" to reconsider and vacate a decision based on material error. 49 U.S.C. § 1322(c).

Irreparable Harm. Because the contingent portion of the injunction is inadequately framed, BNSF faces an unfair burden in establishing irreparable harm. The contingent portion requires BNSF to transport, above a baseline requirement of 4.2 million tons, an additional one million tons to the extent additional crews and trainsets "become available." Inj. Decision, NOR 42178, slip op. at 14-15. However, crews, for example, do not magically become available. A railroad such as BNSF must affirmatively decide to recruit, hire, train, deploy, and assign highly skilled workers while balancing competing and changing demands across thousands of customers and while accounting for constantly shifting natural, economic, and other external factors. The contingent portion's "availability" requirement is too vague to give notice as to which specific actions by BNSF are required or outlawed. BNSF is therefore presented with the choice of assuming either that the contingent portion causes a certain, imminent, and great misallocation of resources for which the railroad would have no adequate remedy at law (i.e., irreparable harm), or that the contingent portion has no imminent practical effect. In its petition to stay, BNSF reasonably took the first path, assuming that the contingent portion, however vague, must force the railroad to do *something* differently, particularly in the near-term, because the order would otherwise self-evidently flout the statute's requirement that injunctions be necessary to prevent irreparable harm. Now, the Stay Decision takes the second path, offering an expansive, post hoc explanation that comes close to concluding that the contingent portion has no practical effect at all. But even this new explanation cannot eliminate coercive effects on BNSF.

Despite expounding on the meaning of the injunction, the Stay Decision still does not specifically explain what BNSF must change. Stay Decision at 3-4. The Stay Decision acknowledges that BNSF plans to have the "right amount of crews" to "continue to increase the amount of business that we can put through this portion of the network." Id. at 2. Connecting BNSF's statement about the "right amount of crews" to the injunction's availability requirement, the Stay Decision suggests the Injunction Decision intends no alteration of the railroad's operational and routing decisions, hiring plans, and deployment of crews around the country. See Stay Decision at 4. The Stay Decision acknowledges that BNSF may lawfully change its plans based on other factors, such as a change in the export coal market. Id. Thus, the Stay

[2] See 49 U.S.C. § 10101(2) ("In regulating the railroad industry, it is the policy of the United States Government . . . to require fair and expeditious regulatory decisions when regulation is required.").

Decision does not specify that anything about BNSF's plans is substantially likely to violate the law or that the railroad is substantially likely to take unlawful action contrary to its stated plans.

Instead, the Stay Decision suggests that the contingent portion of the injunction comes into effect only after BNSF adds resources across its network, accounts for external events, and makes its "operational and routing decisions about other traffic," see id. at 4, but that still leaves open the question of what specific conduct the contingent portion enjoins.[3] Because the Board now appears to have defined the set of "available" crews and trainsets not to include resources that BNSF has decided to allocate to other traffic, see id., the contingent portion of the injunction could now be read to prohibit BNSF only from accumulating resources without allocating them to any traffic. However, the Board makes no finding that BNSF would expend capital to hire and deploy crew, which might entail new training and qualification of engineers and conductors on territory traversed by the relevant lane, only to intentionally have those crew do nothing. The Board also makes no finding that BNSF would acquire and deploy trainsets to the relevant territory, only to intentionally let them sit idle.[4] Indeed, such findings would not make sense economically,[5] and there is no evidence for them.

Assuming the contingent portion of the injunction has a practical effect, the Stay Decision still leaves enough ambiguity for the contingent portion to have coercive effects on BNSF because it pressures the railroad to favor NTEC lest it run afoul of the Board's vague order. The record shows that other shippers to Westshore have unmet needs, as do other shippers outside of the coal industry, and BNSF did not represent to the Board that it planned to have sufficient crew "available" to move up to 5.2 million tons[6] without disadvantaging other

[3] The Stay Decision also states the contingent portion comes into effect "only if BNSF were able to procure sufficient equipment and crews." Stay Decision at 5. This phrase could be read to suggest the contingent portion takes effect as crew are hired or equipment are acquired, but elsewhere the Stay Decision suggests that BNSF has more discretion to deploy resources before the contingent portion governs its actions. See id. at 4.

[4] As BNSF notes, the Injunction Decision, in its order pertaining to trainsets, does not address 49 U.S.C. subchapter II. Notwithstanding, the same highly questionable economic proposition would hold, to the extent additional trainsets are needed. The record indicates that crews are the more significant limitation, (see BNSF Suppl. 6, May 15, 2023), so this dissent focuses on that aspect of the contingent portion.

[5] If a railroad sought to artificially limit supply, it is highly unlikely to pursue a course that incurs additional resource costs and liability over a lower-cost strategy (i.e., not expanding inputs and triggering a new regulatory requirement only to restrict output). More broadly, this dynamic suggests that design of the contingent portion may perversely disincentivize a capacity increase.

[6] It is not even clear that NTEC's own request for preliminary injunction, if granted in full, would have resulted in a total tonnage 5.2 million tons because the shipper's request for roughly 29 trains per month applied for eight months in 2023 (from May to December), whereas the Injunction Decision appears to have mistakenly calculated the contingent portion's one-million-ton requirement on a one-year basis. See Inj. Decision, NOR 42178, slip op. at 25 n.21 (Board Member Fuchs, dissenting).

shippers.[7] Though the Stay Decision appears to validate BNSF's hiring, training, and national deployment plans, it still does not clearly specify the extent to which BNSF—once it has more crew deployed to relevant territories—has freedom to balance competing demands in this constrained environment. For example, BNSF must guess as to whether it is allowed to assign crew to meet up to 100 percent of the nominations from other coal shippers to Westshore before it is required to move any additional tonnage for NTEC,[8] or whether the railroad is allowed to continue serving those others shippers only up until the point that they see no reduction in their relative percentage of nominations fulfilled (i.e., the other shippers are not "disadvantaged"). Thus, even after this Stay Decision, BNSF—faced with an unclear order and intensive scrutiny of its service to a single shipper—is incentivized to resolve any ambiguity in favor of NTEC, in effect privileging that shipper over its competitors. The Board cannot evade responsibility for any new trade-offs that it imposes on BNSF. The associated costs involve the imminent reallocation of resources by BNSF and the resulting effects on the rail network and on competition in the export coal market. See BNSF Mot. for a Partial Stay of Prelim. Inj. Pending Appeal 33, NTEC v. BNSF, No. 23-60402 (5th Cir. Aug. 3, 2023); (BNSF Pet. for Partial Stay of Prelim. Inj. 7-8, July 17, 2023).

If BNSF were to prevail on the merits following the denial of its requested stay, any costs that that the railroad incurs from the injunction's unjustified pressure, or outright requirements, would be unrecoverable because the Board lacks the authority to require compensation to the railroad. See, e.g., Colo. Wheat Admin. Comm., NOR 42140, slip op. at 4-5; R.J. Reynolds Vapor Co., 65 F.4th at 194. In contrast, if NTEC prevails on the ultimate merits, the Board has statutory authority to award damages to the shipper. 49 U.S.C. §§ 11101, 11704.

The Stay Decision seems to argue the effects of the contingent portion are not certain or imminent because BNSF is already having trouble meeting the baseline requirement. See Stay Decision at 4-5. However, this argument underscores the problems with the entire injunction. Under the Injunction Decision, BNSF does not have a choice as to whether to meet the baseline tonnage requirement, and the effects of the contingent portion would apply at any amount up to one million tons more than that requirement. At oral argument, BNSF explicitly raised concerns that a requirement to move 4.2 million tons (i.e., the baseline tonnage requirement) could create "consequences for other shippers if at some point something changed," (Tr. at 201:4-5), and the Stay Decision now identifies changed circumstances, many of which are outside of BNSF's

[7] The Stay Decision cites the Injunction Decision, see Stay Decision at 5, but these citations primarily go to the number of trainsets that BNSF needs, (see BNSF Suppl. 6, May 15, 2023; Tr. 226:5-227:2; see also Tr. 48:8-49:15). Aside from a general expectation to increase its crew and move more freight, BNSF does not provide a specific crew target and associated volume increase (above 4.2 million tons). (Tr. 226:10-11; Tr. 210:5-10.) Indeed, the railroad stated that—even if it were to acquire the identified number of additional trainsets—it would not be able to move them without harming other shippers until it improves its crew situation, and it never stated that its crew situation would improve to the point of allowing it to move up to 5.2 million tons for NTEC without harming others. (See BNSF Suppl. 6, May 15, 2023.)

[8] Considering the most recent evidence of other shippers' percentages of nominations that are not fulfilled, it is highly unlikely—if this outcome were allowed—that the contingent portion of the injunction would have any effect at all.

control, including not only a change in the export coal market but also labor problems at the export terminal and equipment failure at NTEC, see Stay Decision at 5. The Board set the baseline tonnage requirement on an annual basis, and it now possesses evidence appearing to show that—absent an amended order—the baseline requirement may force the railroad to quickly make up tonnage on a higher monthly basis than previously assumed (again privileging NTEC over its competitors). The baseline requirement sets a bright line, and BNSF is affected on either side of it, if not both sides. Thus, the Stay Decision in effect implies that, even if BNSF were to prevail on the ultimate merits, any harm from the contingent portion is unlikely because BNSF and its other shippers will likely experience harm from the baseline requirement instead.

Likelihood of Success on the Merits. For all the reasons discussed in the dissents to the Injunction Decision, BNSF is substantially likely to succeed in showing the injunction is unlawful. The Stay Decision and the associated filings lay bare some of the previously identified problems with the Injunction Decision. The Stay Decision frames the Injunction Decision as having two parts, and—while it is certainly true the injunction has separate baseline and contingent requirements—the analysis underlying the injunction is unclear. In the Injunction Decision, it is not clear that the Board made separate merits and irreparable harm findings for both the baseline requirement (4.2 million tons or roughly 23 trains per month) and contingent portion (an additional 1 million tons or 6 trains per month). The Board appears to have made a single merits finding[9] on NTEC's requested amount (roughly 29 trains per month) and stylized the injunction as a balancing of equities in order to restructure relief. If the baseline requirement were evaluated on a separate and standalone basis, finding a substantially likely violation of the common carrier obligation is unsound. Year-to-date, BNSF was on track to transport the required volume, had plans to transport that volume on an annual basis, and had several months to do so. See Inj. Decision, NOR 42178, slip op. at 38 (Board Member Schultz, dissenting); id. at 29-30 (Board Member Fuchs, dissenting). If the merits element of the Injunction Decision is based on whether BNSF was substantially likely to violate the common carrier obligation by not hauling NTEC's full requested amount, that finding is not only also unsupported by the record at the time but directly contradicted in this latest round of review. See id. at 27 (Board Member Fuchs, dissenting).

Relying on the reasoning in the Injunction Decision, NTEC's reply to the petition to stay states that BNSF "unequivocally and repeatedly conceded" it would not have offered to transport 6.0 million tons if it had lacked capacity to do so, (NTEC Reply to BNSF Pet. for Partial Stay of Prelim. Inj. 2, July 24, 2023), but BNSF conceded no such thing. In NTEC's supporting footnote for this declaration, the shipper cites two parts of the transcript that go to whether BNSF would sign a contract it could not fulfill, but NTEC must rely on the Injunction Decision to find the 6.0-million-ton figure. (See id. at 2 n.2.) If BNSF unequivocally and repeatedly conceded its capacity to move 6.0 million tons, there would be no need to look outside the transcript—out of context and in a completely different source—to superimpose the key term, 6.0 million tons. That other source, the Injunction Decision, also can produce no such concession because—despite its claim not to interpret the draft 2023 contract—it needed to pull the 6.0-million-ton figure from that contract and infer that BNSF must have been referring to this amount. The

[9] It is unclear that the Injunction Decision evaluated whether the contingent portion prevented irreparable harm.

problem for the Injunction Decision is that the entire discussion that preceded BNSF's statements about its expected capacity for 2023, and the railroad's intent in signing a contract, involved the transportation of 4.2 million tons, not 6.0 million tons. See Inj. Decision, NOR 42178, slip op. at 26-29 (Board Member Fuchs, dissenting). The record does not include a statement from BNSF that it expected to have, or currently has, capacity to move more than 4.2 million tons in 2023. Therefore, the record contains no concession from BNSF concerning its capacity to move NTEC's full requested amount, and the foundation of the Injunction Decision is not substantiated.

NTEC's reply later proves the point. NTEC cites a colloquy in which the Chairman questioned BNSF on whether the railroad has capacity to move one more train every five days (i.e., 6 more trains in a month), but this discussion was only necessary because BNSF stated that its capacity at the time allowed it to move only 4.2 million tons (i.e., roughly 23 trains per month). (NTEC Reply to BNSF Pet. for Partial Stay of Prelim. Inj. 2 n.3, July 24, 2023; Tr. at 240:3-240:17.) NTEC's requested amount was roughly 6 trains per month more than that. The Chairman would not have needed to question BNSF further if the railroad had repeatedly and unequivocally conceded its capacity to move 6.0 million tons (i.e., roughly 33 trains per month) because the railroad would have admitted it could move at least NTEC's requested amount (i.e., 29 trains per month). But BNSF did not do so.

The cited colloquy also suggests broader implications of the approach underlying the Injunction Decision. NTEC offers a BNSF executive's statement that "one train every five days is not going to tank our system" as a repudiation of other statements in the record and as support for the Injunction Decision. (See NTEC Reply to BNSF Pet. for Partial Stay of Prelim. Inj. 6-7; Tr. at 214:21-216:15.) However, the common carrier obligation does not require a railroad to provide service to an individual customer up until the point that its entire system would tank. See Inj. Decision, NOR 42178, slip op. at 20 (Board Member Fuchs, dissenting). As stated in my previous dissent, in this network industry, capacity for a single customer is not a static concept, and it involves not just resources but other shippers' demand and external factors. The very nature of a network, and the exponential marginal effects that come from increased congestion, heavily counsels against an embrace of this statement as bearing on the common carrier obligation, and it is not supported by precedent.

To be clear, NTEC's ultimate merits case does not hinge on its embrace of the Injunction Decision. The shipper rightly did not rely on the draft 2023 contract in its arguments concerning the injunction or in its underlying common carrier obligation complaint. By engaging in unjustified inference disguised as purported concessions, the Injunction Decision avoided analysis of many of NTEC's core arguments and much of its evidence submitted to-date, in the same way that the decision set aside or ignored critical arguments and evidence from BNSF. Even though an injunction is not necessary to prevent irreparable harm, and BNSF is substantially likely to succeed in showing the injunction is unlawful, the shipper's underlying common carrier obligation complaint continues to deserve full and fair consideration.

Other Factors. Staying the contingent portion of the injunction would not irreparably harm NTEC and would be in the public interest. As described in the dissents to the Injunction Decision, NTEC has not established that it will suffer irreparable harm in the absence of a

preliminary injunction, so staying the contingent portion of the injunction will cause no such harm. More broadly, a stay would be in the public interest because it would minimize potential negative effects of the Injunction Decision on commercial collaboration between railroads and shippers, including the potential disincentives for contracting, among other things.

Preferred Action. The Board is not limited in its discretion to merely grant or deny a stay. See 49 U.S.C. § 1322(c). The Board should instead reconsider and vacate the Injunction Decision, and it should dispense with the petition to stay as moot. Without substantiation in the record, the Injunction Decision employs an unusual and consequential approach that undermines contract negotiations and deviates from common carrier precedent. It is unfixable. The Board has many important outstanding adjudications, regulatory proceedings, and court cases that—unlike the Injunction Decision—have major, positive public interest implications. In such matters, I look forward to continuing to partner with my colleagues to facilitate new efficiencies and better, clearer incentives for the industry. However, defending the unneeded Injunction Decision is not consistent with these objectives. Given the Board's authority to reconsider a decision at any time on its own initiative, see 49 U.S.C. § 1322(c), a better use of the Board's resources would be to reconsider and vacate the Injunction Decision immediately. More broadly, such an outcome would eliminate the unfairness and confusion posed by the inadequately framed contingent portion of the injunction and therefore promote fair and expeditious decision making. See 49 U.S.C. § 10101(2).

Views on the Response to the Dissent. The Stay Decision criticizes the above reasoning with additional assertions and policy arguments, and—with great respect for my colleagues—I welcome the opportunity to provide more information about my perspective.

First, in the response to this dissent, the Stay Decision asserts that Mr. Garland's statement that BNSF is going to have the "right amount of crew" to "increase its business" in the third and fourth quarters supports the reasonable inference that the railroad could move an additional one million tons during 2023 (i.e., up to 5.2 million tons), without harming its other customers. Stay Decision at 6-7. The majority and I agree that BNSF stated its capability and plan to move 4.2 million tons on an annual basis, equal to roughly 23 trains per month for the year. See supra pp. 14-15; Inj. Decision, NOR 42178, slip op. at 26-28 (Board Member Fuchs, dissenting); (see also Tr. 220:6-220:8 ("[W]hat I've been careful to say [is] we would have been ready to commit to 4.2 million tons *for the year*." (emphasis added))). Regarding any amount more than 4.2 million tons for 2023, I also considered the following:

- Around the time Mr. Garland made his general, forward-looking statement, BNSF had been tracking year-to-date roughly 95 percent of 4.2 million tons on an annual basis. (See BNSF Supp. 12, May 15, 2023; BNSF Status Rep. 1, June 9, 2023.) Mathematically, BNSF would need to "increase its business"—namely, increase its monthly average over the remaining months in the year (i.e., during the third and fourth quarters)—or else the railroad would not achieve 4.2 million tons *for the year*.

- Following the exchange cited by the Stay Decision, Mr. Garland was asked directly if the participants in the colloquy had established that BNSF "could handle" 29 trains per month on average for the year, and Mr. Garland replied, "I don't think we have, no. *23*

trains a month is what we have committed to, and that is what we are going to achieve *this year*." (Tr. 217:6-12 (emphasis added).) Mr. Garland stated that an order increasing the amount of trains that would be required to go through Everett to Westshore could result in the Board picking one shipper over another because of capacity-related problems, and he sought to turn the discussion to crews and other resource constraints (Tr. 214:6-214:18.) Mr. Garland raised a concern that BNSF "would have to in effect pick winners and losers."[10] (Tr. 216:2-214:3.)

- Mr. Garland made his statement near the midpoint of the year, and any inference about an "additional one million tons" would seem to imply a transportation level greater than 29 trains per month for the remaining months of the year. The Board issued its Injunction Decision on June 23, so—even assuming for the sake of argument that the Board ought to have inferred BNSF could immediately increase its transportation to NTEC to a level of 29 trains per month without harming other shippers—it would seem the total additional tonnage for the rest of 2023 would amount to about half of one million tons (i.e., 6 additional trains per month * 15,125 tons per train * roughly 6 months left in the year). See supra p. 12 n.6; Inj. Decision, NOR 42178, slip op. at 25 n.21 (Board Member Fuchs, dissenting). Thus, it appears the Board can have additional confidence that Mr. Garland was not referring to moving for NTEC—without harming others—up to 5.2 million tons (i.e., an additional one million tons, above 4.2 million tons, in 2023).

Second, the response to my dissent states that BNSF never argued that the injunction would cause certain wide-ranging consequences, such as the misallocation of resources, and that BNSF did not offer any evidence to support such a contention.[11] See Stay Decision at 6. In its petition to stay, BNSF argues that, absent a stay, it may need to: (1) "divert resources from serving other shippers," affecting "consumers of all the goods that travel by rail"[12]; (2) "breach

[10] As noted above, following oral argument, BNSF stated "even if BNSF and/or NTEC could add three external train sets without taking them from other customers, BNSF's ability to move them without reducing service to other shippers will be limited until the crew situation improves." (BNSF Suppl. 6, May 15, 2023.)

[11] As part of its network consequences argument, the Stay Decision quotes phrases from this dissent and interprets them as suggesting that the injunction does not account for the railroad's need to make certain crew-related decisions and that the injunction will cause an alteration of operational, routing, hiring, and deployment decisions. I will allow the context of the cited quotations to speak for itself.

[12] The Stay Decision asserts there is no evidence in the record that other shippers to Westshore have unmet needs. I clarify that I relied on: (1) the Crow Tribe's letter, (Crow Tribe Comment, May 5, 2023; BNSF Suppl. Reply, V.S. Lawler 20, May 5, 2023); (2) Arch's letter, (Arch Comment 3-4, May 10, 2023); (3) Mr. Garland's crew data for the Pacific Northwest, (BNSF Supp. Reply Garland V.S. at 11-13, May 5, 2023); (4) Ms. Lawler's nomination and volume data in 2022 as a baseline for understanding 2023 volume data, even with a change in market and contracting, (BNSF Supp. Reply Lawler V.S. at 15-18, May 5, 2023); and (5) BNSF's attestations that a mandated increase in NTEC's service levels would harm other shippers, including those to Westshore, (see, e.g., BNSF Reply Lawler V.S. 14, Apr. 19, 2023). I

contracts" and subject itself to other common carrier complaints; and (3) make unrecoverable expenditures on resources, including acquiring and positioning trainsets that NTEC may not even use and has no obligation to use. (See BNSF Pet. for Partial Stay of Prelim. Inj. 7, 9-10.) The railroad also argues that the Injunction Decision warps incentives for contract negotiations. (Id. at 9.) In addition, more relevant to the baseline requirement of 23 trains per month, BNSF's recent status report states that—following repairs to an equipment problem at NTEC's facility—the railroad "diverted resources initially planned for other export shippers to Spring Creek Mine once loading operations resumed on July 22, 2023, in order to load twenty-three (23) export coal trains at Spring Creek Mine in July, as planned." (BNSF Status Rpt. 2, Aug. 4, 2023.)

The argument concerning BNSF's evidence, in some ways, relates well to the overarching point of this dissent. By its very nature, a vague order produces uncertainty, and a party seeking to stay such an order, which may have coercive effects, is faced with the risk of presenting to its regulator an overstated or mistaken degree of certainty. Indeed, it is difficult for a party to adduce evidence of certainty, timing, and magnitude when the order does not allow the party to know specifically what is prohibited or required. I view this dynamic as confirming that the Supreme Court was correct in not only assessing that "[b]asic fairness" requires clear, explicit injunctions but also in observing that vaguely phrased injunctions complicate any subsequent review. Schmidt v. Lessard, 414 U.S. 473, 476-77 (1974).

Third, the response to my dissent states that there is "no lack of clarity" in the contingent portion of the injunction. Stay Decision at 8. In its petition to stay, BNSF states that its "affirmative obligations under the contingent portion of the injunction are unclear." (See BNSF Pet. for Partial Stay of Prelim. Inj. 7.) The railroad also uses phrases indicating a struggle to understand the contingent portion of the injunction, citing consequences from "anything" the contingent portion demands and caveating certain claims by stating "if the contingent portion of the preliminary injunction requires . . . ." (See, e.g., BNSF Pet. for Partial Stay of Prelim. Inj. 7.) I appreciate the additional clarification offered by the majority in response, stating "it will be BNSF, itself, that will determine whether it has obtained sufficient additional crews to provide the service without adversely affecting its other customers" and "the Board assumes and has every reason to conclude that BNSF will make such a determination in good faith." Stay Decision at 8. As mentioned, crews are the most significant resource capacity constraint identified by the railroad. See supra p. 12 n.4. Considering BNSF's constraints, its representations about the problems with hauling more than 4.2 million tons for NTEC, and its reasonable inference that the intent of the contingent portion of the injunction must have sought to change planned or expected conduct, I can hardly fault the railroad for assuming a stronger effect than suggested now by the Stay Decision's apparently deferential posture toward the railroad's management of its crews.

Fourth, the Stay Decision asserts that "BNSF refused to provide NTEC with the service the Board has now ordered" and that the railroad did not state it would provide NTEC with at

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viewed this record evidence in the context of the Board's broader data on BNSF's service and crew levels. See Urgent Issues in Freight Rail Serv.—R.R. Reporting, EP 770 (Sub-No. 1), slip op. at 3-4 (STB served May 2, 2023).

least 23 trains per month until the oral argument. Stay Decision at 9. In evaluating the record, I considered:

- In the two months immediately preceding the Injunction Decision, BNSF provided NTEC with more than 23 trains per month. (See NTEC App. 6 n.9; Tr. 203:17-19; BNSF Status Rep. 1, June 9, 2023.)

- Prior to NTEC filing the case, BNSF estimated to the shipper a forthcoming three-month average (April to June) of almost exactly 23 trains per month. (See NTEC App. 6 n.9.)

- Prior to the Board first inquiring about service levels at oral argument, BNSF offered to NTEC a new three-month average (May to July) of 23 trains per month. (See id.; BNSF Suppl. Reply, V.S. Lawler 8-9, May 5, 2023; Tr. 171:12-17.)

The volume data and projections at the time,[13] along with both BNSF's documented plans to continue to increase hiring in the Pacific Northwest through the rest of the year and the railroad's data about demand, suggest to me that the railroad's representations of its plan and capability to move an average of 23 trains per month in 2023, or a total of 4.2 million tons, were credible. (See BNSF Reply, V.S. Lawler 11, Apr. 19, 2023; BNSF Suppl. Reply, V.S. Garland 12-13, May 5, 2023; BNSF Suppl. Reply, V.S. Lawler 20, May 5, 2023; Tr. 209-210.) I do not see the Injunction Decision or Stay Decision establish that the railroad would not achieve this level (aside from, of course, the recent changed circumstances since issuance of the Injunction Decision). Regarding the contingent portion of the injunction, it is difficult to ascertain the level of service that is ordered.

Finally, the Stay Decision alleges that the dissents, after citing a general need for flexibility, do not want to apply the common carrier obligation to provide the requested service to NTEC, thereby eviscerating the common carrier doctrine. Both of my dissents in this docket explicitly reserve judgment on the ultimate merits, and my dissent from the Injunction Decision proactively states the specific need to further examine, on a full record, NTEC's claims about BNSF's crew levels, alleged trainset acquisition efforts, and allocation decisions. Inj. Decision, NOR 42178, slip op. at 30-31 (Board Member Fuchs, dissenting). If railroads have "*carte blanche*," Stay Decision at 9, such statements would be unnecessary. When the Board has the benefit of a full record in this matter, I look forward to working with my colleagues to ascertain whether BNSF has violated the common carrier obligation. I respectfully dissent.

BOARD MEMBER SCHULTZ, dissenting:

I agree fully with the dissent by Board Member Fuchs, which explains why the Board should vacate its June 23, 2023 decision (Injunction Decision) rather than issuing a stay. I write

[13] As stated in this dissent, and in the Stay Decision, service levels since the issuance of the Injunction Decision have been affected by external factors, so some of the prior projections have not held.

separately only to underscore the damaging effects of the Injunction Decision on rail regulation, effects that today's decision (Stay Decision) only exacerbates.

The Board, like any regulator, has a duty to set forth clear guidelines that give regulated entities notice of what conduct is required. See FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."). I agree with BNSF that "BNSF's affirmative obligations under the contingent portion of the injunction are unclear." (BNSF Pet. 7, July 17, 2023.) The Injunction Decision fails the basic requirement of giving BNSF notice of what it is supposed to do.

The Board directed BNSF to transport 4.2 million tons of coal for NTEC, but increased that requirement up to 5.2 tons "if BNSF is able to obtain the additional crews it contends it needs and the 'two to three' additional train sets." Inj. Decision, NOR 42178, slip op. at 14. If BNSF acquires these resources, "the common carrier obligation would accordingly require this additional service to NTEC." Id. NTEC need not use additional train sets acquired by BNSF, but if BNSF were to increase service to another shipper, and NTEC wanted to increase its coal shipments to any amount up to 5.2 million tons, then BNSF, per the Board's Injunction Decision, will have failed in its common carrier obligation to NTEC if it does not use its increased capacity to serve NTEC.

The effect of the Board's decision is this: If BNSF allocates additional capacity to a shipper other than NTEC, BNSF may be found liable. And, as discussed below, if BNSF fails to hire additional personnel for the purpose of providing service to NTEC, BNSF may be found liable. BNSF, faced with the uncertainty inherent in the Board's contingent preliminary injunction, has taken the only reasonable position it can—it must "allocate any additional crews and trains sets to NTEC alone," disadvantaging NTEC's competitors and shippers of other commodities, regardless of their unmet needs.[1] (BNSF Pet. 6.)

The outcome of the Injunction Decision is to reprioritize NTEC above all other shippers, whether under contract or common carrier service. Not only must additional crews be allocated to NTEC first, NTEC is entitled to those crews without any commitment that it will use them. Unlike NTEC's competitors that ship by contract and may be subject to minimum tonnage or other requirements, NTEC is under no obligation to ship the 4.2 to 5.2 million tons that the Board has ordered BNSF to transport. So, for the remainder of this year, and likely next year, BNSF is in the unfortunate position that they must hold that capacity for NTEC, because the Board has found that "the common carrier obligation . . . require[s] this additional service to NTEC." Inj. Decision, NOR 42178, slip op. at 14; see also id. at 15 n.16 ("[T]o the extent the factual situation for 2024 mirrors the record established for 2023, the Board expects it would

[1] The majority asserts that there is no evidence in the record that shippers to Westshore have unmet needs. Stay Decision at 7 n.6. However, BNSF's witness stated that "[d]uring 2022, none of the shippers in this lane received all of the coal transportation they desired," and one of NTEC's competitors received, relative to the amount each shipper requested, even less coal transportation than NTEC received. (BNSF Supp., V.S. Lawler 16, May 5, 2023.)

apply the same analytical framework applied here to any further claims by NTEC under the common carrier obligation.")

The Injunction Decision injects uncertainty into the network. It ties up capacity by allocating it to a shipper who may not even need it. See Stay Decision at 5 (noting that reduced export coal prices could reduce the amount of coal NTEC needs to ship). It prevents BNSF from increasing service to other shippers. And it only invites other shippers to seek preferential treatment through Board orders. That should not be the role of the Board, especially in non-emergent situations or situations where irreparable harm is not imminent.

Through today's Stay Decision, the Board doubles down on this uncertainty, keeping BNSF on the hook through a contingent preliminary injunction that may never be necessary but one that nevertheless restricts BNSF's ability to manage its fleet and respond to shipper's demands. Does BNSF need to hire more employees or acquire additional trainsets? It is unclear. The Board today takes pains to note that "[n]owhere in its decision did the Board order BNSF to develop additional crew capacity or obtain additional trainsets," but the Board also suggests that it may later find that BNSF's failure to "increase capacity" constitutes a violation of the common carrier obligation. Stay Decision at 3 & n.3; see also Inj. Decision, NOR 42178, slip op. at 4 n.6. The safest course for BNSF is to provide preferential treatment to NTEC and to give NTEC the right of first refusal if BNSF increases its capacity. If the goal of the Board was to pick winners and losers, it has succeeded. And it will not be surprising to me if other shippers seek similar treatment through preliminary injunction requests.

Injunctive relief is supposed to be extraordinary, granted in the rare circumstance where a complainant will be irreparably harmed without it. But the Board has shown twice in the past year that it is willing to issue a preliminary injunction or similar order even when doing so prevents no harm at all. In this case, the Board ordered BNSF to provide service to move 4.2 million tons of coal, even though BNSF already expected to provide that level of service. Inj. Decision, NOR 42178, slip op. at 7. In December, the Board issued a similar order, under unknown statutory authority, directing Union Pacific Railroad Company to provide five trains to a customer that it already intended to provide. Foster Poultry Farms—Ex Parte Pet. for Emergency Serv. Ord., FD 36609, slip op. at 2-3 (STB served Dec. 30, 2022). From a legal perspective, such orders are abuses of the Board's statutory authority. From a practical perspective, I believe the Board's limited resources could be better spent on other matters, rather than ordering carriers to do what they already intend to do.

Because today's Stay Decision refuses to acknowledge the damaging effects and indefensible logic of the Injunction Decision, I respectfully dissent.