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SERVICE DATE – DECEMBER 13, 2023

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42178

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

Docket No. NOR 42179

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC V. BNSF RAILWAY COMPANY

Digest:[1] In this decision, the Board dismisses these proceedings in light of the parties' settlement and lifts the previously imposed preliminary injunction in Docket No. 42178.

Decided: December 13, 2023

On November 9, 2023, the Board held both of these proceedings in abeyance at the parties' request to facilitate settlement. On November 20, 2023, Navajo Transitional Energy Company, LLC (NTEC) filed, in each docket, an unopposed motion to dismiss with prejudice, stating that the parties had reached a settlement resolving all claims in the proceedings. On the same date, NTEC filed a motion to vacate the June 23, 2023 decision in Docket No. NOR 42178[2] imposing a preliminary injunction.[3]

In light of the parties' settlement, all pending claims in both proceedings will be dismissed with prejudice and the dockets will be closed. The Injunction Decision will not be vacated[4] but, in light of the settlement, the preliminary injunction ordered in that decision will be lifted.

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[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] Navajo Transitional Energy Co.—Ex Parte Pet. for Emergency Serv. Ord. (Injunction Decision), NOR 42178 (June 23, 2023), appeal dismissed pursuant to pet'r's mot., No. 23-60402 (5th Cir. November 24, 2023).

[3] The Injunction Decision sets forth a more detailed procedural history and background.

[4] See In re United States, 927 F.2d 626 (D.C. Cir. 1991); In re Mem'l Hosp. of Iowa Cnty., Inc., 862 F.2d 1299 (7th Cir. 1988).

It is ordered:

1. All pending claims in Docket Nos. NOR 42178 and NOR 42179 are dismissed with prejudice and the dockets are closed.

2. The preliminary injunction issued on June 23, 2023, in Docket No. NOR 42178 is lifted.

3. 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:

In the agency's case law and public declarations,[1] the Board has generally recognized that the parties themselves are best positioned to identify mutually beneficial solutions to complex disputes, and the Board has therefore encouraged parties to settle their differences privately. The parties here, Navajo Transitional Energy Company, LLC (NTEC) and BNSF Railway Company (BNSF), have reached settlement in both dockets. In notifying the Board of the settlement, NTEC submitted an unopposed request to vacate the Board's June 23, 2023, preliminary injunction decision designed for NTEC's own benefit.[2] In today's decision (Decision), the Board rejects this request. As a result, the Decision in effect raises future bargaining costs for moving parties, who might need to give up more to compensate for the Board's unpredictability in considering mutually agreeable solutions. The Board might accept this negative effect so it can preserve what it sees as valuable precedent, but—for several reasons explained in my prior dissents on this matter—the precedent should be eliminated, not preserved. Accordingly, though I concur with the Decision's dismissal of all claims with prejudice and closure of both dockets, I respectfully dissent from the Decision's refusal to vacate the Injunction Decision. Given the precedent in this case and considering potential similar cases in the future, I intend to focus this expression on the implications of the Board's finding related to the common carrier obligation, and I emphasize that the Board ought to value flexibility, resiliency, and service-related outcomes and effects so that it avoids harming broad groups of shippers, penalizing crucial rail capacity, and imposing unnecessary costs on the network.

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[1] See e.g., Hr'g Tr. 4028:8-9, May 12, 2022, Appl. of the Nat'l R.R. Passenger Corp. Under 49 U.S.C. § 24308(e)—CSX Transp., Inc. & Norfolk S. Ry., FD 36496 (encouraging settlement after 11 days of evidentiary hearings and several preliminary decisions); see also Consumers Energy Co. v. CSX Transp. Inc., NOR 42142 (STB served Feb. 7, 2019) (granting petition to vacate the 2018 rate prescription, dismiss the 2015 complaint, and discontinue the proceeding after the parties entered into an agreement settling the matters at issue in the proceeding).

[2] Navajo Transitional Energy Co.—Ex Parte Pet. for Emergency Serv. Ord. (Inj. Decision), NOR 42178, slip op. at 4 (June 23, 2023), appeal dismissed pursuant to pet'r's mot., No. 23-60402 (5th Cir. November 24, 2023).

- *Flexibility*. In the future, following a Board order, a rail carrier might experience a decrease in supply—particularly a decrease driven by a large, external shock beyond the normal range of expectations—while it receives constant or increasing demand from other shippers. Carriers might not be able to increase total capacity quickly. For example, it may take months to hire, train, and qualify new crew. In these instances, if the Board's order imposed an inflexible, months-long remedy based on a shipper-specific view of capacity, ex ante, it would essentially guarantee a complaining shipper constant, individualized capacity even in the case of a decrease in total capacity. This guarantee would in effect cause other shippers to receive less capacity on an individualized basis.[3] When circumstances change, the Board's reconsideration process to revise an order—which typically requires substantial time for a petitioner to draft a pleading, a respondent to reply, and the Board to adjudicate—simply does not run at the speed of business. As time elapses, the broader group of affected shippers might experience the same types of harms—including lost sales and reputational damage—that the Board's order had intended to guard against. Thus, in a dynamic network industry with many shippers, the Board cannot necessarily escape potential costs simply by ordering a carrier to do what it currently projects for a single shipper over a period of several months.

- *Resiliency*. In anticipation of the vagaries of markets, extreme weather events, and other factors that constantly change a rail carrier's capacity, a carrier should have crew, trainsets, or track space that might appear unallocated or in excess at a given moment or even as projected for the year. The very nature of resiliency means that additional, potentially unused capacity is needed to buffer against future external forces affecting many shippers. The carrier may technically be able to "handle" more traffic from a single shipper, considered alone, but that does not necessarily entitle that shipper to the buffer capacity crucial for resiliency.[4] For example, if a shipper were to make a request for a large service increase, and the carrier has reason to believe the request is fleeting, especially if the shipper has a long history of not fulfilling previous requests, the carrier might be justified in not meeting the request. The unfulfilled shipper, by virtue of coming to the Board, ought not automatically receive a special warrant on all that a carrier can "handle" at a specific point in time, lest the Board order away the carrier's buffer capacity needed by a broader group of shippers to compensate for future events.

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[3] In this case, the capacity on the route quickly became challenged by a bridge collapse, mechanical failures at the Westshore Terminals facility, strikes at other Canadian ports, and various port outages, among other things. See e.g., Navajo Transitional Energy Co.—Ex Parte Petition for Emergency Serv. Order (Stay Decision), NOR 42178, slip op. at 5 (Aug. 14, 2023). Here, the decrease in available supply of capacity appears to have been at least partially offset by a decrease in demand for that capacity. See e.g., id.

[4] To be clear, I view the Injunction Decision as highly fact-specific, and I think it relied on a disputed interpretation of BNSF's forward-looking statements to formulate its view of what BNSF can "handle." Inj. Decision, NOR 42178, slip op. at 4. I note, however, that the Injunction Decision allows carriers to provide a "reasonable explanation" for denying a request. See id. (citing State of Montana v. BNSF, NOR 42124, slip op. at 7 (STB served Apr. 26, 2013); see also id. (referring to a "satisfactory explanation").

- *Focus on Outcomes and Effects*. Regulation based on resources, such as crew or trainsets, risks ineffectiveness or the imposition of excess costs. In future cases, if a rail carrier were indeed engaged in monopolistic behavior and artificially restricting supply to maximize profits,[5] then a Board order making increased service contingent on voluntary resource expansion might not alter the planned behavior. In other words, the carrier might not voluntarily increase its resources (e.g., make more crews and trainsets available than planned) if monopolistic profit maximization called for restriction in the first place. If the Board were to attempt to mandate an increase in resources, it would seemingly need to factor in broader shipper demand, complex operational dynamics, and a range of potential future events, even though it would have a substantially incomplete factual basis to do so (among other problems).[6] Attempting such a feat—which the Board did not do in this case[7]—presents the prospect of significant error, and the network could experience unnecessary costs, which may be borne, at least in part, by shippers.

With the foregoing, I do not imply the Board ought not exercise its authorities to address service problems. Under the Chairman's leadership, the Board has engaged in collaborative and intensive oversight,[8] unanimously imposed unprecedented service-related transparency measures,[9] and unanimously proposed a significant rulemaking concerning competitive access and inadequate service.[10] The Board also retains authority to issue emergency service orders and to resolve common carrier disputes. However, denying vacatur to, in part, preserve the common carrier precedent in the Injunction Decision—which is not only highly fact-specific but comes

[5] That is not to say I have concluded BNSF has engaged in such behavior.

[6] For example, BNSF and AAR have raised relevant legal arguments, which I do not address here.

[7] The precedent here does not state that a rail carrier violates the common carrier obligation based on a lack of capacity in the first place—often described as excessive cost cutting—or from a particular profit-motivated prioritization of another shipper. Those matters have been the focus of several informal complaints in recent years. See e.g., Hr'g Tr. 75:10-15, Apr. 26, 2022, Urgent Issues in Freight Rail Serv., EP 770; see also Urgent Issues in Freight Rail Serv., EP 770, slip op at 2 (Apr. 7, 2022); Nat'l Grain & Feed Ass'n, Ex. at 5, Apr. 17, 2014, U.S. Rail Serv. Issues, EP 724.

[8] See generally, Urgent Issues in Freight Rail Serv., EP 770 (STB served Apr. 7, 2022) (announcing, in response to widespread reports of inconsistent and unreliable rail service, a public hearing to hear rail carriers, shippers, shipper organizations, and labor organizations, about rail service and efforts to improve service); Oversight Hr'g Pertaining to Union Pac. R.R. Embargoes, EP 772 (STB served Nov. 22, 2022) (announcing a public hearing pertaining to the significant increase in the use of embargoes by Union Pacific Railroad Company).

[9] See Urgent Issues in Freight Rail Serv.—R.R. Reporting, EP 770 (Sub-No. 1), slip op. at 4-7 (STB served May 6, 2022) (mandating, among other requirements, submission of service recovery plans and weekly service metrics).

[10] See generally Reciprocal Switching for Inadequate Serv., EP 711 (Sub-No. 2) (STB served Sept. 7, 2023).

with potential unintended consequences—is not worth any negative effects on future private settlements. Adding on my significant concerns with several other aspects of the Injunction Decision, presented in previous dissents, I would have vacated the decision in full.

Going forward, the Board could best avoid many unintended consequences by assembling all the facts in a dispute, focusing on outcomes and effects, and, if warranted, awarding damages. As implied by the above, oftentimes in this network industry, when one shipper experiences a service problem, other shippers are similarly experiencing service problems. Indeed, in this proceeding, three other shippers opposed the emergency relief and preliminary injunction that NTEC sought. Given the relatively fixed nature of capacity in the near term, it is extraordinarily difficult to design an effective injunction or emergency service order that completely avoids negative effects on other shippers. Thus, for good reason, the Board has traditionally cabined urgent and immediate intervention to emergency situations, such as imminent threats to public health, where it can accept negative effects on other shippers in furtherance of a greater countervailing public benefit. The Board has wisely declined to treat economic harms, including reputational damage, as irreparable harm, avoiding more difficult immediate trade-offs between shippers with similar economic profiles when the Board can award damages later. As a general matter, if the Board must intervene prior to hearing all the facts and deciding the underlying complaint, it ought to steer clear of directly regulating resource levels, or their availability, particularly when it does not have information to effectively judge or enforce, and it should instead focus on outcomes and effects. When the Board takes the extraordinary step of issuing an injunction or emergency service order, it should consider limiting its order to short time periods.[11] In similar future cases, the Board must exercise caution and restraint—not just to run a fair process for carriers—but to protect other shippers and the broader public.

BOARD MEMBER SCHULTZ, dissenting:

I respectfully dissent from the portion of majority's decision (Decision) that denies NTEC's unopposed motion to vacate the Board's June 23, 2023 decision (June 2023 Decision) that granted NTEC preliminary injunctive relief.[1] Because the parties have reached a settlement agreement that resolves all the claims in these proceedings, I find no basis for denying the motion, nor does the Decision offer any explanation for doing so.

The agency's general policy has been to grant requests to vacate prior decisions when parties have agreed to settle the issues underlying the proceeding. See, e.g., Consumers Energy Co. v. CSX Transp. Inc., NOR 42142 (STB served Feb. 7, 2019) (granting a joint petition to vacate a rate prescription upon parties reaching commercial settlement). This agency has, on occasion, made exceptions where the prior decisions set forth new legal principles or interpretations that provide valuable guidance to future litigants. See, e.g., Mendocino Coast

[11] The emergency service statute, which constrains initial intervention to 30 days, may reflect wisdom. See 49 U.S.C. § 11123(a).

[1] In light of the parties' settlement, I concur with the majority's dismissal of these proceedings and lifting of the previously imposed preliminary injunction in Docket No. NOR 42178.

Ry.—Discontinuance of Train Serv. in Mendocino Cnty., Cal., 4 I.C.C.2d 71 (1987). The Decision provides no reason why that exception should apply here. In support, the Decision cites two cases where courts have regarded the "social value" of precedent as the basis for denying motions to vacate prior decisions. But the Decision fails to explain what, if any, precedential value the June 2023 Decision holds, as that decision itself acknowledges, the Board's findings were largely based on facts relevant only in the context of that proceeding. See June 2023 Decision, NOR 42178, slip op. at 4 ("Determining whether BNSF's conduct at issue in NTEC's complaint likely violates the common carrier obligation is a fact-specific inquiry."); see also Winona Bridge Ry.—Trackage Rts.—Burlington N. R.R., FD 31163, slip op. at 2 (ICC served Mar. 31, 1989) (vacating prior decisions in a proceeding where "the issue of interest . . . is more factual than legal").

To the extent that future litigants might rely on the June 2023 Decision for guidance in determining a carrier's common carrier obligation, the precedential value of that decision is questionable. The findings in the June 2023 Decision are based on the "reasonableness" of NTEC's request, and that reasonableness was assessed according to a carrier's purported "capacity," while never defining "capacity" or explaining how to measure it.[2] As a result, I do not believe the June 2023 Decision provides useful guidance in defining or assessing a carrier's common carrier obligation under 49 U.S.C. § 11101; nor did it adequately explain how BNSF violated its common carrier obligation.[3] I do not see, nor does the Decision explain, how the June 2023 Decision offers useful guidance to future litigants.[4]

For these reasons, I dissent from the portion of the majority's decision that denies NTEC's motion to vacate the June 2023 Decision.

[2] Moreover, I strongly disagree with the June 2023 Decision's reliance on private negotiations and draft contracts between parties in assessing BNSF's common carrier obligation. The June 2023 Decision essentially suggested that a carrier's proposed or expected service levels—conveyed in private negotiations, at one particular point in time—may be used to set a floor for its common carrier obligation going forward.

[3] This case can be distinguished from In re Memorial Hospital of Iowa County, Inc., 862 F.2d 1299 (7th Cir. 1988), which denied vacatur of an underlying decision that found a party in contempt of court for violating an automatic stay in a bankruptcy proceeding. In finding that an opinion may not be "expunged by private agreement," the court noted the underlying decision's "persuasive force as precedent." 862 F.2d at 1300, 1302. Here, as discussed, the June 2023 Decision made no definitive finding of a violation of the common carrier obligation. Nor did it explain how it would define that obligation, thereby giving it little to no precedential value.

[4] I also question the precedential value of the June 2023 Decision to future litigants seeking injunctive relief, particularly with regard to irreparable harm. In my opinion, the harm was purely economic and speculative in this case, and therefore it was not irreparable.