Docket No. 23-60402

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BNSF Railway Company,

***Petitioner*,**

v.

Surface Transportation Board; United States of America,

***Respondents*.**

Petition for Review of a Decision of the
Surface Transportation Board, Docket No. NOR 42178

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER AND VACATING THE DECISION

Kathryn D. Kirmayer
J. Frederick Miller Jr.
Amber L. McDonald
Association of American Railroads
425 Third Street, SW
Washington, D.C. 20024
(202) 639-2100
kkirmayer@aar.org
fmiller@aar.org
amcdonald@aar.org

Counsel for the Association of American Railroads

CORPORATE DISCLOSURE STATEMENT

The Association of American Railroads is an incorporated, nonprofit trade association. The Association of American Railroads has no parent company and is a nonstock corporation.

/s/ Amber L. McDonald
Amber L. McDonald

TABLE OF CONTENTS

Corporate Disclosure Statement ii

Table of Authorities iv

Interest of Amicus Curiae 1

Introduction 2

Argument...4

I. The Board Misconstrues the Meaning of “Capacity,” and Its Definition Is an Inappropriate Measure of the Common Carrier Obligation 4

II. Using Contract Negotiations to Define the Common Carrier Obligation Creates a Flawed Definition, Harms Private Contracting, and Reduces Incentives for Long-Term Investment. 9

III. The Board Is Selecting Winners and Losers Among Shippers, Which Is Contrary to Law and Not the Board’s Role as a Neutral Adjudicator. 13

Conclusion 15

TABLE OF AUTHORITIES

Page(s)

CASES

Burnett v. United States, 154 Fed. Cl. 539 (2021).. 6-7

Chi., Rock Island & Gulf Ry. Co. v. Crenshaw, 126 S.W. 602 (1910)....................10

Galena & C. Union R.R. v. Rae, 18 Ill. 488 (1857)...7

Granite State Concrete Co. v. STB, 417 F.3d 85 (1st Cir. 2005) 8

ICC v. Baltimore & Ohio R.R. Co., 145 U.S. 263(1892) 2

Ill. Cent. R.R. v. Cobb, Christy & Co., 64 Ill. 128 (1872)...8

Mich. Pub. Util. Comm'n v. Duke, 266 U.S. 570 (1925)...4

Nat'l Grain & Feed Ass'n, 5 F.3d 306 (8th Cir. 1993) 7

Pa. R.R. Co. v. Puritan Coal Mining Co., 237 U.S. 121 (1915) 8

Purcell v. United States, 315 U.S. 381 (1942).. 10-11

United States v. Chesapeake & Ohio Ry. Co., 426 U.S. 500 (1976) 8

STATUTES AND LEGISLATIVE MATERIALS

49 U.S.C. § 10101(2) 12

49 U.S.C. § 10502...7

49 U.S.C. § 10903...7

49 U.S.C. § 11101...2

S. Rep. No. 104-176 (1995)...12

OTHER AUTHORITIES

B.J. Alan Co., Inc., et al., 5 I.C.C. 700, 710 (1989)..4

CSX Corp. & CSX Transp., Inc., Norfolk S. Corp. & Norfolk S. Ry. Co.—
Control and Operating Leases/Agreements—Conrail Inc. & Consol. Rail Corp.,
FD No. 33388 (Sub-No. 91) (STB served Oct. 20, 2004) 13

DeBruce Grain v. Union Pac. R.R., NOR 42023 (STB served Dec. 22, 1997) 13

Joseph Story, *Commentaries on the Law of Bailments* § 508 (1863)........................7

Livestock, S., Sw., Cent. and W. Territories, 346 I.C.C. 418 (1974).........................2

Montana v. BNSF Ry., NOR 42124 (STB served Apr. 26, 2013) 8

Nat'l Grain & Feed Ass'n v. Burlington N. R.R. Co., 8 I.C.C.2d 421 (1992)...........7

NTEC—Ex Parte Petition for Emergency Service Order,
Docket No. NOR 42178 (STB served June 23, 2023) ....*passim*

NTEC—Ex Parte Petition for Emergency Service Order,
Docket No. NOR 42178 (STB served Aug. 14, 2023)................................*passim*

Part 228 Amendment Denial, 85 C.A.B. 1961, 1980 WL 20189 (1980)..................4

Review of Commodity, Boxcar, and TOFC/COFC Exemptions,
EP 704 (STB served Oct. 21, 2010) 12

Savannah Port Terminal R.R., Inc., FD 34920 (STB served May 30, 2008)..........14

Sherwin Alumina Co., LLC, v. Union Pacific R.R Co.,
NOR 42143 (STB served Sept. 29, 2015) 8, 13

Shippers Comm., OT-5 v. Ann Arbor R.R., 5 I.C.C.2d 856 (1989) 5-6

Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry. Co.,
NOR 42056 (STB served Sep. 27, 2004) 2, 6

INTEREST OF *AMICUS CURIAE*

This brief is filed by the Association of American Railroads ("AAR") in support of Petitioner. AAR is an incorporated, non-profit trade association representing the nation's major freight railroads, Amtrak and several commuter railroads, and many smaller freight railroads. AAR frequently participates as *amicus curiae* in cases that raise issues that will impact the entire railroad industry—such as the present matter, which concerns the common carrier obligation. The common carrier obligation is a foundational aspect of the railroad industry and an issue of great importance to AAR's members. AAR files this *amicus curiae* brief because the decision of the Surface Transportation Board offers a gravely flawed definition of the common carrier obligation that—if left untouched—will have an immediate and lasting negative impact on the industry and ultimately on all those who rely on efficient and effective freight rail service.

No party's counsel has authored this brief either in whole or in part. No party or its counsel contributed money that was intended to fund preparing or submitting the brief. No person other than AAR has contributed money intended to fund preparing or submitting the brief. AAR files this brief under a Rule 29 motion for leave to file.

INTRODUCTION

The common law required railroads to "carry for all persons who applied" at a "reasonable" charge. *ICC v. Baltimore & Ohio R.R. Co.*, 145 U.S. 263, 275 (1892). This common carrier obligation was first codified in 1887. Today, the statute, 49 U.S.C. § 11101, requires that a railroad provide transportation or service on reasonable request, pursuant to its common carrier rates.

While the common carrier obligation is not precisely detailed by statute, judicial and agency precedent have established that the duty is not absolute. *See Livestock, S., Sw., Central and W. Territories*, 346 I.C.C. 418, 435 (1974). Rather, the obligation requires only that carriers act reasonably in their treatment of shippers. This means that a carrier need not acquiesce to every demand of every shipper, but, instead, as the party best positioned to apportion limited resources, a railroad has discretion to allocate its services and determine its schedules. *See Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry. Co.*, NOR 42056, slip op. at 6 (STB served Sep. 27, 2004).

On June 23, 2023, in a 3-to-2 vote, the Surface Transportation Board ("Board" or "STB") ordered BNSF Railway Company ("BNSF") to transport 4.2 million tons of coal from Montana to Canada on behalf of Navajo Transitional Energy Company ("NTEC"), pursuant to the railroad's common carrier obligation. *See NTEC—Ex Parte Petition for Emergency Service Order*, NOR 42178,

Administrative Record ("AR")0487 (STB served June 23, 2023) ("*Injunction Decision*"). The Board further ordered that BNSF must move an additional one million tons of coal for NTEC, if further resources became available to BNSF. *See id*. These 5.2 million tons of export coal represent an unprecedented volume for NTEC. Yet, NTEC has no reciprocal obligation to BNSF to ship a single pound.

In crafting its decision, the majority treated capacity as a simple math problem, the answer to which defines the scope of the common carrier obligation. All the complex factors that influence capacity and how a carrier elects to provide service to all its customers were simply ignored. And to determine the answer to the math problem, the majority picked one component of an unaccepted offer made during failed contract negotiations and declared this component to be binding on BNSF. This approach not only disincentivizes railroads from private contracting—directly contrary to stated Congressional intent—but it also undercuts long-term investment. Finally, with this decision, the Board effectively has announced that it is willing to choose winners and losers among shippers demanding rail resources. *See NTEC—Ex Parte Petition for Emergency Service Order*, NOR 42178, AR1056 (STB served Aug. 14, 2023) ("*Stay Decision*") (Schultz, dissenting).

This degree of government intervention into the complexities of how railroads invest in and allocate resources is both unlawful and dangerous. AAR urges this Court to vacate the Board's *Injunction Decision*.

ARGUMENT

I. The Board's Misconstrued Definition of "Capacity" Is an Inappropriate Measure of the Common Carrier Obligation.

A common carrier's duty is to "carry **for all** to the extent of its capacity at a reasonable charge and with substantial impartiality according to its holding out." *B.J. Alan Co., Inc., et al.*, 5 I.C.C. 700, 710 (1989) (emphasis added); *see also Mich. Pub. Util. Comm'n v. Duke*, 266 U.S. 570, 577 (1925) (similar). A railroad's "holding out" is "its public statements or conduct that indicate the services it performs." *Part 228 Amendment Denial*, 85 C.A.B. 1961, 1980 CAB LEXIS 530, at *4 (1980). Within a railroad's holding out, its common carrier obligation is generally only to serve up to its capacity.

However, a railroad's capacity is a dynamic concept that cannot be captured in a simple equation, such as that implied by the Board: crew + trains = capacity. Rather, there are numerous operational and commercial factors that impact capacity and service because rail is a network industry that "involves not just resources but other shippers' demand and external factors. *Stay Decision*, AR1056 (Fuchs, dissenting). Indeed, in the brief time since the Board issued its *Injunction Decision*, multiple factors have limited BNSF's ability to provide service to NTEC at the Board-mandated levels:

> a bridge collapse has required BNSF to reroute export coal and other traffic, resulting in congestion along the alternative route; issues at Westshore have reduced loading slots for BNSF, including increased

> traffic due to strikes at other Canadian ports and mechanical problems; and an NTEC equipment breakdown at Spring Creek interrupted coal loading there. In addition,…export coal prices have decreased significantly in recent months, which could reduce the tonnage of export coal NTEC itself seeks to ship.

Id. at AR1046. These circumstances, "including not only a change in the export coal market, but also labor problems at the export terminal and equipment failure at NTEC," are "outside of BNSF's control." *Id.* at AR1054-55. Yet, these are among the factors that BNSF must consider when determining how to allocate its resources—even if the Board's concept of "capacity" does not.

The issues impacting BNSF's transport of NTEC export coal exemplify how operating a railroad involves complex decisions regarding the allocation of limited resources—resources which are needed to address shippers' overlapping, and sometimes conflicting, requests for service (all of which can change with time and other circumstances). Fortunately, however, railroads have the benefit of visibility into the operations of their own network and the expertise to know how to adapt to dynamic operational and market conditions.

Accordingly, those in railroad management are best situated to make decisions regarding service, and the law grants railroads the discretion to make those decisions. This is true even with service decisions made concerning the common carrier obligation. Thus, while railroads have an obligation to "maintain a fleet sufficient to meet average demand," *Shippers Comm., OT-5 v. Ann Arbor*

R.R., 5 I.C.C.2d 856, 867 (1989), railroads retain discretion in how they "satisf[y] [their] common carrier obligation"—which is a decision "left to the railroad…in the first instance," *Tex. Mun. Power Agency*, NOR 42056, slip op. at 6.

In its *Injunction Decision*, however, the Board supplanted the railroad's individualized expertise and treated its service decisions like an oversimple math equation, likening BNSF's "capacity" with its ability to meet NTEC's request. The Board held that BNSF was obligated to fulfill NTEC's request for service to whatever extent BNSF had available crews and trainsets—without regard to the other factors a railroad considers in operating its network, including the needs of competing shippers. *See Stay Decision*, AR1061 (Schultz, dissenting) ("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.) (quoting BNSF Pet. 6.).

The appropriate role of "capacity" in the common carrier analysis is to protect carriers from being required to invest capital in order to increase their ability to provide common carrier service. Generally, railroads are prohibited from exiting their investments and have an obligation to provide service absent government permission to "abandon" a line. *See Burnett v. United States*, 154 Fed.

Cl. 539, 546 (2021) ("A railroad seeking to abandon a railroad right-of-way within the jurisdiction of the STB must either (1) file a standard abandonment application that meets the requirements of 49 U.S.C. § 10903, or (2) seek an exemption under 49 U.S.C. § 10502."). Thus, "capacity" offers a railroad limited protection by operating as a ceiling on railroads' common carrier obligation—and it has done so since the earliest common law days. *See* Joseph Story, *Commentaries on the Law of Bailments* § 508 (1863) ("[I]f his coach be full," a carrier may "refuse[] to take charge of goods."). A railroad must have "the necessary means and facilities for transporting, with dispatch the amount of freight ordinarily for carriage," but is not liable if there are "unusual and extraordinary" demands—as in the present instance, wherein NTEC has requested unprecedented service levels. *Galena & C. Union R.R. v. Rae*, 18 Ill. 488, 489 (1857); *see also Nat'l Grain & Feed Ass'n v. Burlington N. R.R. Co.*, 8 I.C.C.2d 421, 427 (1992) (holding that a railroad must have sufficient cars to meet average demand for the services it holds out to the public, but it need not have all the cars necessary to meet peak demand), *aff'd in part and rev'd in part on other grounds by Nat'l Grain & Feed Ass'n*, 5 F.3d 306 (8th Cir. 1993).

While "capacity" is meant to protect against forced investment, a railroad has the economic incentive to respond to shipper demands and ensure that its network is put to its most profitable and efficient use. Depending on the

circumstances, this might mean that a railroad has not merely a "right" but a "plain duty to refuse to receive more [goods] for shipment until its line [is] clear," to avoid mass congestion on its network. *Ill. Cent. R.R. v. Cobb, Christy & Co*., 64 Ill. 128, 137 (1872). "The more imminent the peril to the freight, the greater…the obligation of the carrier to refuse it, except upon a special contract." *Id.*

Certainly, a railroad cannot withhold its capacity for no reason; doing so would be deemed unreasonable. *See, e.g., Sherwin Alumina Co., LLC, v. Union Pacific R.R Co.*, NOR 42143, slip op. at 5 (STB Served Sept. 29, 2015) (It is "incumbent upon the carrier to provide a reasonable explanation for denying" a shipper's request for service.); *Pa. R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. at 133 ("The law exacts only what is reasonable from…carriers."). An analysis of whether a railroad has provided adequate service may "necessarily [take] into account the reasonableness of [the shipper's] requests in the first place." *Granite State Concrete Co. v. STB*, 417 F.3d 85, 94 (1st Cir. 2005). And this is the Board's proper role—to determine whether a shipper's request is reasonable, and whether a railroad is reasonable in its refusal of service. *Cf. United States v. Chesapeake & Ohio Ry. Co.*, 426 U.S. 500, 514-15 (1976) (The Board must take care not to "require specific management action, whether it be of a financial or operational nature."); *see also Montana v. BNSF Ry.*, NOR 42124, slip op. at 7 (STB served Apr. 26, 2013) ("The Board tries to avoid micromanaging a carrier's operational

decisions."). As such, the Board's misconstruction of "capacity" as a definition for the common carrier obligation is both "vague" and "harmful." *Injunction Decision,* AR0498 (Fuchs, dissenting).

II. Using Contract Negotiations to Define the Common Carrier Obligation Creates a Flawed Definition, Harms Private Contracting, and Reduces Incentives for Long-Term Investment.

The Board arrived at its determination of BNSF's capacity by relying upon certain proposed terms exchanged between BNSF and NTEC during their failed contract negotiations. *See Injunction Decision*, AR0508 (Schultz, dissenting) ("I find it very troubling that the majority bases its assessment of BNSF's common carrier obligation on private negotiations and draft contracts between the parties."). This is a significant point. Rail traffic can move one of two ways: (1) a contract rate or (2) common carrier rate. Under the common carrier obligation, rates and service terms must be reasonable and the shipper may or may not decide to utilize that rate and terms. Alternatively, rail traffic may move under contract where, as under any contractual relationship, both sides make commitments to one another and allocate risk. These privately negotiated agreements are not regulated by the STB. Typically, shippers receive customized rates and terms that suit their business needs, while railroads can negotiate for volume commitments that provide a dependable source of revenue and enable them to efficiently plan their operations and allocate resources.

The *Injunction Decision*, however, cherry-picks terms from the contract negotiations to establish the level of common carrier service that BNSF would be required to provide, without requiring any consideration or reciprocal commitments from NTEC to BNSF. Thus, while the Board has obligated BNSF to provide record levels of service, "the injunction imposes no obligations on NTEC—not to utilize [acquired or repositioned] train sets, not to pay liquidated damages for failing to meet a minimum-volume commitment, or indeed to do anything." BNSF Pet. for Review at 25; *see also Injunction Decision*, slip op. at AR0488 (Fuchs, dissenting) ("Unlike the minimums in [NTEC's] earlier contract and in the draft 2023 contract, [NTEC's] request [for common carrier service] would neither obligate NTEC to ship a certain amount nor require the shipper to pay liquidated damages if it fails to meet the minimum" shipping requirements.)

No "ordinary person of ordinary prudence would have provided" the volume of service that NTEC requested absent contractual assurances. *Chi., Rock Island & Gulf Ry. Co. v. Crenshaw*, 126 S.W. 602, 603 (1910) (discussing common carrier obligation to provide infrastructure under an analysis that takes into account "all the circumstances"). Indeed, obliging a carrier to move unprecedented levels of product with no corresponding commitments from a shipper is, in a word, "wasteful." *Purcell v. United States,* 315 U.S. 381, 385 (1942) (holding that, in the context of building a line, devoting materials or labor "in an amount that cannot be

justified in terms of the reasonably predictable revenues, there is ample ground to support a conclusion that the expenditures are wasteful").

Moreover, commercial negotiations between railroads and shippers are sophisticated and delicate. Terms from a contractual negotiation reflect a private discussion about what is possible outside the regulation of the common carrier obligation, where parties can exchange mutual promises that may simply be impossible within the common carrier framework. Requiring a level of service offered during contract negotiations—without the other commitments required by the contract—disrupts the contracting process and discourages open negotiations. *See Injunction Decision*, AR0488 (Fuchs, dissent) ("[D]rawing on an incomplete record, the Decision accomplishes little while both degrading well-established protections against premature, unfair decision-making and **undermining long-term commercial relationships between rail carriers and shippers**.") (emphasis added). Adopting one proposed term in isolation from others also obscures the trade-offs and negotiated conditions that made the selected term possible.

Congress has been explicit in its direction that rail transportation should be governed by market forces—and that private contracting be *incentivized*. Prior to the partial deregulation of the industry, private contracts were prohibited and nearly all freight rail transportation was governed by the common carrier obligation—which almost bankrupted the entire industry. The Staggers Rail Act of

1980 changed that, specifically allowing for private contracts. Congress emphasized that government intervention in the rail system is to be exceptional and infrequent. *See* S. Rep. No. 104-176, at 3 (1995); *see also* 49 U.S.C. § 10101(2) (setting forth policy "to minimize the need for Federal regulatory control over the rail transportation system"). It was, in part, this freedom from intervention that permitted "the U.S. rail system's transition from a heavily regulated, financially weak component of the economy into a mature, relatively healthy industry that operates with only minimal insight." *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704, slip op. at 3 (STB served Oct. 21, 2010).

Contracting permits flexibility, promotes stability, and encourages long-term investment—such as in specialized equipment and specific infrastructure, which can only be justified by the predictability of contracts. Further, contract terms, such as liquidated damage provisions and volume expectations allow both parties to effectively manage, plan, and control their resources and allocate risk. It follows then that a reduced incentive to contract will result in reduced stability and long-term investment, potentially resulting in long-term degradation of the network.

The majority's *Injunction Decision* will chill contract negotiations. What railroad would offer to move a specified volume of goods for a certain price over a certain term in exchange for a guaranteed minimum volume, without considering that its proposal—stripped of the guaranteed minimum volume—may be converted

into a binding commitment by the regulator? It takes no imagination to see the impact of that possibility on meaningful and sincere negotiations. Both the shipper and the railroad lose the opportunity to find a customized solution that meets the needs of both. The industry reverts back to pre-Staggers Act unsustainability.

III. The Board's Selection of Winners and Losers Among Shippers Is Contrary to Law.

The Board's role is to ensure that decisions made by railroads are sound and reasonable. *See Sherwin Alumina Co.,* NOR 42143, slip op. at 5 (STB served Sept. 29, 2015). The Board's role is not to decide matters anew. *See Injunction Decision*, AR0492 (Fuchs, dissenting); *Stay Decision*, AR1062 (Schultz, dissenting).

In the past, the Board has been clear that, "[a]bsent exceptional circumstances, [it] do[es] not intrude in railroads' day-to-day operational practices, because a Board-mandated change in a carrier's operational practices designed to benefit one shipper might well have negative impacts *vis-à-vis* other shippers." *CSX Corp. & CSX Transp., Inc., Norfolk S. Corp. & Norfolk S. Ry. Co.—Control and Operating Leases/Agreements—Conrail Inc. & Consol. Rail Corp.*, FD No. 33388 (Sub-No. 91), slip op. at 12 (STB served Oct. 20, 2004); s*ee also DeBruce Grain v. Union Pac. R.R.*, NOR 42023, slip op. at 4 (STB served Dec. 22, 1997) ("[W]e have always tried to act in a manner that will not unfairly favor one shipper or group of shippers over another."). Despite this governing principle, the Board broke with precedent to realign the competitive market.

In the present instance, one shipper gained the Board's favor, receiving first claim on any incremental capacity that might emerge on a specific route. *See Stay Decision*, AR1061 (Fuchs, dissenting) ("The outcome of the *Injunction Decision* is to reprioritize NTEC above all other shippers, whether under contract or common carrier service."). NTEC is not alone in wanting an increase in its export coal shipping volume; it is only alone in seeking to enforce that desire before the Board. In artificially favoring NTEC, the majority ignored the voices of other shippers—like the Crow Tribe that "urge[d] the Board to consider the competitive impacts of [its] order on other coal shippers." *Injunction Decision*, AR0483. "[T]hese other shippers also have unmet requests." *Id.* at AR0503 (Fuchs, dissenting).

The negative impacts of disrupting the expectations of other shippers spread far beyond those individual shippers. Indeed, such disruptions impact others throughout the supply chain, as well as consumers who receive their goods via rail. Although "the common carrier obligation does not require a carrier to maintain service levels for one shipper that will degrade service overall," *Savannah Port Terminal R.R., Inc.*, FD 34920, slip op. at 9 (STB served May 30, 2008), that is exactly the position that the majority has taken.

Railroads have a strong incentive to put their network and resources to their best use. Accordingly, when the Board steps in to rearrange things, it begins to play a dangerous game of picking winners and losers. And cases like this cannot

simply be dismissed as harmless one-off events. The *Injunction Decision* "only invites other shippers to seek preferential treatment through Board orders." *Stay Decision*, AR1062 (Schultz, dissenting); *see id.* ("If the goal of the Board was to pick winners and losers, it has succeeded. And it will not be surprising…if other shippers seek similar treatment through preliminary injunction requests.").

In one hypothetical, the majority's decision could create an incentive for shippers to swoop-in and claim any additional capacity a railroad creates. For example, a railroad may plan to expand a line due to contractual commitments from Shipper A but, upon completion, Shipper B could file a common carrier case for more service based on the new capacity. This results in winners and losers—while also disincentivizing investment. As such, these "wins" come at the cost of fewer mutually beneficial market solutions to today's complex transportation needs. It is not the Board's role to grant special service levels to a particular shipper to the deficit of other shippers and the public, at large.

CONCLUSION

By breaking with established precedent and ignoring explicit Congressional objectives, the Board has created a common carrier obligation that will prove disastrous for the rail network and, ultimately, the public at large. The Court should reject the majority's approach and grant the relief sought by BNSF.

Respectfully submitted,

/s/ Amber L. McDonald

Kathryn D. Kirmayer
J. Frederick Miller Jr.
Amber L. McDonald
Association of American Railroads
425 Third Street, SW
Washington, D.C. 20024
(202) 639-2100
kkirmayer@aar.org
fmiller@aar.org
amcdonald@aar.org

Counsel for the Association of American Railroads