

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

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UNITED STATES RAIL SERVICE ISSUES)))	Docket No. EP 724
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**PETITION OF THE WESTERN COAL TRAFFIC LEAGUE FOR AN ORDER
REQUIRING BNSF RAILWAY COMPANY TO SUBMIT A
COAL SERVICE RECOVERY PLAN**

WESTERN COAL TRAFFIC LEAGUE

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Members of the Western Coal Traffic League (“WCTL”) served by the BNSF Railway Company (“BNSF”) continue to face severe coal shortages caused by inadequate transportation service by BNSF. Regrettably, no immediate relief is in sight, and winter is coming. The Board must now take immediate action to ensure that the supply of electricity to the communities that WCTL’s members serve is secure, reliable and cost-effective during the winter months when electricity usage often soars. For these reasons, WCTL petitions the Board for an order requiring BNSF to submit a coal-specific service recovery plan, which the Board should then review, approve or revise, and, most importantly, enforce. In support of its petition, WCTL states as follows:

BACKGROUND

Despite assurances made by BNSF to WCTL members that no utilities will run out of coal and that it will fix its service deficiencies, BNSF has failed. Minnesota Power (Allete, Inc.), a WCTL member, has been forced to shutter four electric generating units as a last and costly resort to preserve coal stockpiles for the winter. Additionally, WCTL members, such as Texas Municipal Power Agency, have had to file emergency

notices of coal shortages with the U.S. Department of Energy (OE-417). Most BNSF-served WCTL members find their stockpiles are well below target levels. Moreover, BNSF has not transported millions of tons of coal that WCTL members have requested.

Other BNSF-served utilities have experienced similar difficulties to those faced by WCTL's members. We Energies has filed several OE-417 notices relating in part to poor BNSF service.¹ Xcel Energy has written three times to the Board concerning inadequate service.² Members of Congress sought the STB's help to improve BNSF's service to Dairyland Power Cooperative in light of critical coal shortages,³ and TUCO indicated that through August 2014, poor BNSF service resulted in a 1.7 million ton shortfall of coal deliveries.⁴

The limited coal deliveries and the uncertainty of adequate future deliveries have caused most of the WCTL membership to curtail coal-fired production. These curtailments have forced the utilities to seek alternative generation at significantly higher costs, which in turn has cost electric consumers and ratepayers hundreds of millions of dollars.

Electric utilities generally use the milder fall season to build stockpiles for increased generation required in winter and to hedge against possible service disruptions

¹ See <https://www.oe.netl.doe.gov/download.aspx?type=OE417PDF&ID=50>.

² See Letters from Xcel Energy Inc. dated Apr. 9, July 31, and Sept. 11, 2014.

³ See Letter from Hon. Cheri Bustos to Hon. Daniel R. Elliott III, STB Chairman (Aug. 6, 2014); Letter from Hon. Tim Walz and Hon. Ron Kind to Hon. Daniel R. Elliott III, STB Chairman (July 24, 2014).

⁴ See Public Statement of Mr. Mark Adkins, Vice President, TUCO, INC., Docket No. EP 724, at 2 (Sept. 4, 2014).

during severe winter weather. However, WCTL's BNSF-served members will have little or no opportunity to rebuild stockpiles in the fall given current BNSF service levels. Indeed, WCTL has just been informed that BNSF intends to remove approximately **60 coal train sets** from service. Thus, at a time when WCTL's members are in significant need of coal, BNSF is further cutting back service. This latest development combined with BNSF's service performance last winter and BNSF's public statements that service will not return to normal anytime soon, strongly supports the view that BNSF service this winter will be no better than during the last.

What is different this year from last is that many utilities will be entering the winter with less coal in storage than they had at the end of 2013. Thus, if another harsh winter occurs, WCTL's members will face a situation far worse than last winter.

WCTL's concerns were starkly echoed in a recent letter to Chairman Elliott from Governor Mark Dayton and Senators Al Franken and Amy Klobuchar wherein they expressed their grave concerns that the "railroads have not provided even minimally adequate levels of service," and that they are "hearing daily from . . . [utilities that] cannot secure delivery of enough coal to run power plants . . ."⁵ Indeed, their letter notes that: "each of the utilities in our state are restricting the operation of coal-fired power plants for the sole reason of conserving existing stockpiles – stockpiles that have grown precipitously and dangerously low due to BNSF's ongoing system delivery problems;" that the service situation is not improving as winter approaches; and that it is

⁵ Letter from Gov. Mark Dayton, Senators Al Franken and Amy Klobuchar to the Hon. Daniel R. Elliott III, STB Chairman, at 1-2 (Oct. 13, 2014).

unacceptable to have “fuel stockpiles fall to under one week – as they did last winter.”⁶ Ultimately, the Governor and Senators recommend that the “Board immediately require carriers like BNSF to submit publicly-available coal service recovery plans to the Board, hold the carriers responsible for implementing these plans, and monitor carriers’ implementation progress through weekly public reporting.”⁷

WCTL’s concerns were also echoed just last week by Federal Energy Regulatory Commissioner Philip Moeller, who expressed concerns about the reliability of the electric transmission system if substandard rail service continues, and he queried FERC staff as to whether the Board and the railroads were doing enough to rectify the situation.⁸ Likewise, from the same FERC meeting, it appears that FERC staff have brought their reliability concerns to the Board’s attention.⁹

WCTL submits that past and ongoing amorphous claims from BNSF about service recovery that provide no recovery milestones, no specific dates for such milestones, and no true timeline for when service will return to normal are insufficient for utilities that are collectively spending billions of dollars each year on such rail service; must carefully plan each year to meet the demand of its customers; and, are obligated to

⁶ *Id.* at 1.

⁷ *Id.* at 1-2.

⁸ *See* FERC Commission Meeting, Oct. 16, 2014, available at http://ferc.capitolconnection.org/101614/fercarchive_flv.htm (Commissioner Moeller speaking at minute 40).

⁹ *Id.*

provide reliable and cost-effective electricity to businesses and residences across America.

REQUESTED ACTIONS

The Board is well aware of the myriad service problems that BNSF has experienced in the past year. Through hearings, filings of concerned parties,¹⁰ and through the many shippers that have sought help from the Board's Rail Customer and Public Assistance Program, the Board has repeatedly heard that coal transportation service from BNSF has been inadequate. Significantly, the Board itself has emphasized that reliable coal transportation service is critical to the nation's economic and national security:

The Board views the reliability of the nation's energy supply as crucial to this nation's economic and national security, and the transportation by rail of coal and other energy resources is a vital link in the energy supply chain.¹¹

¹⁰ WCTL, for example, has submitted a letter, a petition to institute a proceeding, and presented three witnesses at Board hearings. All of these communications expressed serious problems with BNSF's coal service. *See* Letter from Bette Whalen, WCTL President, to Hon. Daniel R. Elliott III, STB Chairman (Mar. 14, 2014); *Petition of the Western Coal Traffic League to Institute a Proceeding to Address the Adequacy of Coal Transportation Service Originating in the Western United States*, Docket No. EP 723 (filed Mar. 24, 2014); Testimony of David McMillan and Bob Kahn on behalf of WCTL, Allethe and TMPA, *United States Rail Service Issues*, Docket No. EP 724 (filed Apr. 17, 2014); Tr. of Apr. 4, 2014 Hearing at 23-39; Testimony of Dave Wanner on behalf of WCTL and WPS, *United States Rail Service Issues*, Docket No. EP 724 (filed Sept. 5, 2014).

¹¹ *See Establishment of a Rail Energy Transportation Advisory Committee*, Docket No. EP 670, slip op. at 2 (Decision served July 17, 2007).

While the Board has recently requested that BNSF provide additional data reporting,¹² including some coal-specific reporting, the time for mere data reporting has passed. WCTL's members cannot keep waiting for the tide to turn, and the Board should no longer accept vague promises from BNSF. Therefore, WCTL requests that the Board take the following actions.

A. Coal Service Recovery Plan

WCTL requests that the Board require BNSF to publicly file a coal service recovery plan within 10 days of the issuance of an appropriate order by the Board. The service recovery plan should include, at a minimum:

1. A detailed plan describing the short-term and long-term steps the carrier is taking or will take to handle current and future demand for coal on its network. The plan should include, at a minimum, details of track maintenance and infrastructure projects, crew hiring, and equipment purchases that are designed to improve, *inter alia*, average coal train speeds or increase capacity. The plan should include specific milestones for each aspect of the plan and specific dates those milestones will be reached.
2. Detailed plans to handle severe weather events and other potential service disruptions, including holiday crew shortages.
3. Detailed schedules for the restoration of adequate coal service, including particular milestones for improved service metrics over specific, heavily-traveled coal routes such as mine origins in Wyoming and Montana to Kansas City, MO,

¹² See *United States Rail Service Issues – Data Collection*, Docket No. EP 724 (Sub-No. 3), slip op. at 3-4 (STB served Oct. 8, 2014).

Minneapolis, MN, and Ft. Worth, TX, including average coal train speed targets by date, coal car miles per day by date, and coal sets in service (private and railroad-provided), as well as plans to reduce coal sets held for more than eight hours by cause (*i.e.*, locomotives, crews, and traffic congestion) and plans to reduce recrew rates.

4. Detailed plans on how the railroad will handle seasonal variations in coal transportation requirements.

The Board has the undisputed authority to direct the submission of coal service recovery plans, and the immediate need for such plans is clear. *See, e.g., United States Rail Service Issues – Data Collection*, Docket No. EP 724 (Sub-No. 3), slip op. at 2 (STB served Oct. 14, 2014) (citing the Board’s authority under 49 U.S.C. §§ 721(b) and 11145(a) to order Canadian Pacific Railway Company to provide a similar recovery plan).

B. Board Review and Approval of the Coal Service Recovery Plan

The Board should carefully review BNSF’s service recovery plan to: (i) ensure that the plan meets the requirements of the Board’s order for specificity and transparency; (ii) ensure that the plan is aggressive, but feasible; and (iii) ensure that the plan meets the short-term and long-term needs of coal shippers. If the Board finds that any element of the coal service recovery plan is deficient, it should require appropriate revisions by BNSF. The Board should also invite public comments on the sufficiency of the plan if needed.

The Board has the power to review, revise and approve any such plan. Indeed, the Board's power extends to specific directed service orders if need be. *See* 49 U.S.C. § 11123(a) authorizing the Board to issue emergency service orders whenever it determines that any "failure of traffic movement exists which creates an emergency situation of such magnitude as to have substantial adverse effects on shippers, or on rail service in a region of the United States" and authorizing the Board to "direct the handling, routing, and movement of the traffic of a rail carrier and its distribution over its own or other railroad lines." *Accord Joint Petition for Service Order*, 2 S.T.B. 725, 729-30 (1997) (providing for directed service orders in the UP/SP service crisis and noting that while UP's service recovery plan might be "gradually breaking the logjam," it was not enough and the Board therefore "concluded that the recovery effort must be more aggressive than that proposed by UP/SP"). Thus, upon approval of the plan, the Board should issue an order directing BNSF to comply with the Board-approved plan.

C. Oversight and Enforcement of Coal Service Recovery Plan

The Board should closely monitor BNSF's compliance with the Board-approved service recovery plan by ordering BNSF to publicly file weekly compliance updates that include all the specific service metrics needed to verify compliance with the plan. If the Board finds that BNSF is not meeting its obligations under the service recovery plan, the Board should enforce compliance with the plan by using its "range of available tools,"¹³ including fines as appropriate. *See, e.g., Canadian National Railway*

¹³ *United States Rail Service Issues*, Docket No. EP 724, slip op. at 6 (STB served Aug. 18, 2014).

Co. & Grand Trunk Corp. – Control – EJ&E West Company, Docket No. FD 35087, slip op. at 1 (STB served Dec. 21, 2010) (imposing a \$250,000 fine for failing to make required reports and noting that the Board has authority under 49 U.S.C. § 11901(a) to fine railroads for failing to comply with Board orders).

The Board’s willingness to enforce the service recovery plan through the application of fines and other measures is critical given the fact that, at the very time it is failing to meet the service needs of its customers, BNSF continues to realize record earnings. BNSF’s owner has stated that BNSF is “the most important artery in our economy’s circulatory system.”¹⁴ The evidence presented herein and brought to the Board’s attention elsewhere demonstrates that our economy’s most important transportation artery is failing to meet the needs of the shipping public. The irony of the transportation facts and circumstances which confront the Board is that while BNSF has failed and continues to fail to render adequate coal transportation services, its owner describes it as a “sainted”¹⁵ “powerhouse”¹⁶ in its ability to generate massive profits and akin to the biblical Noah in “anticipating the needs of its customers.”¹⁷

Something is very, very wrong with this picture which has BNSF generating massive profits at the same time it provides substandard service to WCTL

¹⁴ See *Berkshire Hathaway Inc.*, Letter to Shareholders, at 11 (Feb. 28, 2014), available at <http://www.berkshirehathaway.com/letters/2013ltr.pdf>.

¹⁵ *Id.* at 4.

¹⁶ *Id.*

¹⁷ *Id.* at 12.

members and numerous other coal shippers resulting in increased costs to millions of electric ratepayers.

There must be consequences for BNSF. The Board cannot continue to countenance such an absurd situation. The Board has a responsibility to protect the public interest and Congress has given it the power to ensure that BNSF faces appropriate consequences if it fails to comply with a sound service recovery plan.

CONCLUSION

Congress has tasked the Board with ensuring that consumers of rail transportation receive adequate and efficient service. The Board is now faced with the anomalous circumstance in which a major transportation provider, subject to its jurisdiction, earns enormous profits, yet fails to meet the legitimate service needs of WCTL members as well as numerous other coal shippers. The time has come for decisive action from this agency.

Wherefore, WCTL respectfully requests that its petition be granted for the reasons set forth herein.

Respectfully submitted,

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