

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 724

UNITED STATES RAIL SERVICE ISSUES

Digest:¹ The Board directs BNSF Railway Company to submit a detailed description of the contingency plans the carrier would use to help mitigate an acute coal inventory shortage at one or more generating stations in a region.

Decided: December 30, 2014

On October 22, 2014, the Western Coal Traffic League (WCTL) petitioned the Board to require BNSF Railway Company (BNSF) to submit to the Board a coal-specific service recovery plan, and for the Board to review, approve or revise, and enforce the recovery plan. In support of its petition, WCTL states that its electric utility members who are served by BNSF continue to experience severe service difficulties. In light of the concerns raised by WCTL's petition and the approach of winter weather conditions, the Board issued an order on October 24, 2014, directing BNSF to file a reply to the petition no later than November 3, 2014. Other interested persons were invited to comment on WCTL's petition by that date.

On October 28, 2014, BNSF submitted a letter to the Board, which identifies many recently completed and planned infrastructure projects which, according to BNSF, would benefit its coal franchise. The letter also details various BNSF operational and personnel initiatives to improve its transportation of coal. Additionally, BNSF outlines several of its public outreach and communications efforts, including its reporting to the Board, to provide transparency to its customers regarding the status of its network. BNSF contends that preparing and filing a coal service recovery plan, as envisioned by WCTL, would not contribute materially to its customers' perspective on its operations.² BNSF asks that, if the Board is inclined to take additional regulatory steps, BNSF be permitted to submit additional regulatory proposals that it believes would address systemic service challenges that, according to BNSF, would have the potential to have a far greater impact on coal service than the proposal by WCTL.³

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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² See BNSF Letter 2; BNSF Reply 8-10.

³ BNSF Letter 5.

On November 3, 2014, BNSF filed its reply in opposition to WCTL's petition. BNSF reiterates several of the points set forth in its October letter, and also presents several legal arguments against WCTL's request. First, BNSF argues that the Board lacks authority to mandate service requirements pursuant to 49 U.S.C. § 11145(a)(1). Second, BNSF asserts that the Board cannot compel BNSF to take specific actions related to service absent a finding of an emergency under 49 U.S.C. § 11123. Third, BNSF contends that the Board cannot grant the relief requested by WCTL because the "vast majority" of BNSF's coal traffic moves under private contracts, which are not subject to STB jurisdiction. Finally, BNSF contends that the relief requested by WCTL would detract from its overall recovery efforts as other stakeholders would seek to obtain similar relief.

The Board also received comments from several energy companies, legislators, and other interested parties generally expressing support for WCTL's petition. Dairyland Power Cooperative cites inadequate service to its Alma, Wis. coal-fired power plant that forced it to curtail electric generation and seek alternative power sources.⁴ Similarly, Minnesota Power states that it ceased operations at four electric generating units in an effort to preserve coal stockpiles.⁵ Several other power companies also comment in support of WCTL's petition and note low coal inventory and reduced deliveries.⁶ The American Public Power Association, Edison Electric Institute, National Association of Regulatory Utility Commissioners, and the National Rural Electric Cooperative Association jointly submitted comments and reiterate many of WCTL's points, citing low stockpiles and vulnerable rail service as a threat to their members.⁷ Minnesota Governor Mark Dayton, U.S. Senator Amy Klobuchar, and U.S. Senator Al Franken also submitted comments expressing support for the WCTL petition.⁸ From Wisconsin, U.S. Senator Tammy Baldwin and U.S. Representatives Ron Kind, Sean P. Duffy, Thomas E. Petri, Reid Ribble, and Paul Ryan also wrote to the Board expressing concern about coal service, requesting that, if delivery problems persist, the Board require all Class I carriers to submit publicly available coal service recovery plans and monitor carriers' progress through weekly public reporting.⁹

⁴ Dairyland Power Comment 1 (filed Nov. 3, 2014).

⁵ ALLETE d/b/a Minnesota Power Comment 1 (filed Nov. 3, 2014).

⁶ See Otter Tail Power Company Comment 1 (filed Nov. 3, 2014); and Ameren Missouri Comment 1 (filed Nov. 3, 2014); see also Consumers United for Rail Equity Comment 1 (filed Nov. 3, 2014) (citing similar concerns about low coal inventory and electric reliability).

⁷ American Public Power Association et al. Comment 1 (filed Oct. 31, 2014).

⁸ Comment from Governor Dayton (filed Nov. 3, 2014); Letter from U.S. Senators Klobuchar and Franken (filed Nov. 7, 2014).

⁹ Letter from U.S. Senator Baldwin and U.S. Representatives Kind, Duffy, Petri, Ribble, and Ryan (filed Nov. 19, 2014).

DISCUSSION AND CONCLUSIONS

Rail service performance throughout the national system continues to be a priority for the Board. At the Board's September 4, 2014 hearing in Fargo, N.D., shippers from various commodity groups and regions explained the impact that less reliable rail service has had on their operations. These concerns included significant backlogs for farmers,¹⁰ escalating costs,¹¹ inability to transport products to the marketplace in a timely manner,¹² and general concerns about the business impacts of rail congestion.¹³ Coal shippers, in particular, expressed concerns about increased cycle times, being forced to implement coal conservation measures,¹⁴ the inability to manage coal piles,¹⁵ and the potential impacts of coal shortages on electricity grid reliability.¹⁶ Many shippers also expressed concerns about a lack of regular communication with, and information sharing from, the railroads.¹⁷

During the Board's two rail service hearings, and in its recent filings, BNSF generally acknowledges that it has not met customer expectations with regard to its movement of coal.¹⁸ It also notes that it has been working aggressively towards remedying ongoing service issues to meet customer demand.¹⁹ To address these issues and improve its coal service, BNSF states that it has undertaken the following initiatives: increasing hiring, locomotive and car acquisitions, and capital investment in maintenance and capacity expansion;²⁰ investing in northern corridor infrastructure, including network capacity expansion;²¹ adding two double-track projects to its infrastructure investment plan to support its coal route;²² making network-wide investments, including terminal and capacity expansion projects that it states will result in a stronger railroad,

¹⁰ Sept. Hr'g Tr. 218, U.S. Rail Serv. Issues, EP 724 (Sept. 4, 2014).

¹¹ Id. at 219.

¹² Id. at 228.

¹³ Id. at 229, 233.

¹⁴ Id. at 127.

¹⁵ Id. at 151.

¹⁶ Sept. Hr'g Tr. 151.

¹⁷ Id. at 219.

¹⁸ BNSF Reply 2 ("BNSF readily acknowledges that current service has not met its customers' expectations or its own high standards in all parts of the network."); Sept. Hr'g Tr. 90; Apr. Hr'g Tr. 181, 190, U.S. Rail Serv. Issues, EP 724 (Apr. 10, 2014) (acknowledging customer concerns generally and about coal, and describing BNSF's response to increased coal demand).

¹⁹ BNSF Reply 2.

²⁰ BNSF Letter 2.

²¹ Id.

²² Id. at 3.

improving service for all customers;²³ improving fluidity on the coal network through maintenance projects across the network;²⁴ preparing enhanced Winter Action Plans, including new resources for the 2014 winter season to better handle extreme weather;²⁵ and decongesting the network by strategically removing a small number of coal sets.²⁶

With respect to this final point, WCTL expresses concern regarding an alleged near-term plan for BNSF to withdraw 60 coal-train sets from service. In response, BNSF states that it has no plan to withdraw 60 coal-train sets; rather it says that it identified an opportunity to reduce congestion on certain lanes by removing a total of fewer than 30 coal-train sets.²⁷ BNSF asserts that, by strategically removing a small number of coal-train sets, it is decongesting the system and improving overall velocity for its utility customers.²⁸ It states that the cuts are not across-the-board, but involve specific coal customers where BNSF has identified an operational and contractual opportunity for set reductions.²⁹

WCTL's petition conveys the concern that exists among WCTL members with regard to coal rail service and the potential impacts of poor service, particularly going into the winter months. Although WCTL's petition does not specifically describe the extent of the coal supply shortage that its members have been experiencing,³⁰ relevant data regarding coal supply is prepared by U.S. energy regulatory agencies. The Board monitors developments at these agencies closely in order to assess the overall coal supply picture and augment the information we receive from rail carriers and shippers. Reports issued by the U.S. Energy Information Administration (EIA) indicate that, over the past year, approximately 75-80% of coal-fired plants nationwide maintained coal stockpiles in excess of 30 days, and a significant proportion of those plants maintained stockpiles in excess of 60 days.³¹ EIA's most recent update shows that

²³ Id.

²⁴ Id.

²⁵ Id. at 3.

²⁶ BNSF Letter 3-4.

²⁷ Id. at 4.

²⁸ Id.

²⁹ Id.

³⁰ For example, the petition does not include information regarding WCTL's members' current versus historical coal stockpile levels; historical, actual and projected burn rates; current versus historical cycle times and cycle time trends; a description of available mitigation; and the availability and costs of procuring replacement power from other sources. As noted earlier, however, two commenters, Dairyland Power and Minnesota Power, did cite specific decisions to curtail electric generation.

³¹ See U.S. Energy Information Administration, Electric Power Sector Coal Stocks: October 2014 (Dec. 23, 2014), http://www.eia.gov/electricity/monthly/update/fossil_fuel_stocks.cfm (scroll down to "Capacity by days of burn" chart).

nationwide, 52.2% of coal-fired plants maintained stockpiles in excess of 60 days; 39.8% of plants maintained stockpiles between 30 and 60 days; and 8% of plants maintained stockpiles of less than 30 days.³² Coal stockpiles in certain states, however, are lower than historical levels. At an open meeting of the Federal Energy Regulatory Commission (FERC) held on December 19, 2014, FERC staff noted that coal stockpiles in Iowa and Oklahoma are more than 40% lower than last year's level, and coal stockpiles in Minnesota, Wisconsin, Missouri, and Texas are between 25 and 40% below last year.³³ Representatives of a regional transmission organization and a utility also provided testimony at FERC's open meeting about specific coal reliability situations, most of which appeared to reflect some progress on stockpiles.³⁴

The Board has been collecting specific service performance data from Class I railroads across all commodities. U.S. Rail Serv. Issues—Data Collection (October 8 Order), EP 724 (Sub-No. 3) (STB served Oct. 8, 2014). Several categories of data collected under the October 8 Order specifically provide insight into BNSF's coal service performance, including:

- System average train speed for coal unit trains (part of Item 1). BNSF's reports to date show system average train speed for coal unit trains around 17 to 19 m.p.h. This remains below recent historical levels (2009-mid 2013), which ranged from 20 to 24 m.p.h.³⁵
- Weekly average dwell time at origin for coal unit trains (part of Item 4). BNSF's reports to date show weekly average dwell time at origin for coal unit trains around 4 to 5.5 hours.
- Average daily coal unit train loadings versus plan for the reporting week by coal production region (Item 10). BNSF's reports to date show that while its average train loadings per day in the Powder River Basin (PRB) did not meet its plan in

³² Id.

³³ Coal Delivery Issues for Electric Generation, Staff Overview (Dec. 18, 2014), slide 3, <http://www.ferc.gov/media/headlines/2014/2014-4/A-3-presentation-staff.pdf>.

³⁴ Midcontinent Independent System Operator, Inc., stated that "coal-pile drawdowns this year have not yet resulted in a significant issue from a reliability perspective on the system." FERC Open Meeting, Dec. 18, 2014 (video archive), at 00:74:15, available at http://ferc.capitolconnection.org/121814/fercarchive_flv.htm. ALLETE d/b/a Minnesota Power stated that "we enter January in much better shape than we were last year. The coal pile is full and with some certainty that it will stay full in February and March, we look good this year compared to where we've been at our biggest power plant." Id. at 00:85:35.

³⁵ See BNSF Weekly Reports in United States Rail Service Issues—Data Collection, Docket No. EP 724 (Sub-No. 3). See also Performance Measures Subcommittee Update, Rail Energy Transp. Advisory Committee, Oct. 2, 2014, slide 11 ("Historical Coal Train Speed"), available at <http://www.stb.dot.gov/stb/rail/retac.html> (select "Performance Measures" hyperlink adjacent to Oct. 2, 2014 Meeting Minutes).

reporting weeks 3 to 7, BNSF either met or exceeded its plan in weeks 1, 2, 8, 9, and 10.

With respect to BNSF and coal specifically, the totality of the information collected to date suggests that BNSF's coal service has struggled, although there has been some progress in recent weeks. It is critical that the Board continue to closely monitor BNSF's performance for indications of improving or deteriorating service. In addition to monitoring BNSF's coal service performance via the data we collect, we will continue to hold regular meetings with BNSF senior management so that we can receive first-hand information about the challenges and progress BNSF is experiencing with respect to all service issues, including coal.³⁶ Also, the Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) will maintain its weekly calls with BNSF to discuss service issues, including the status of BNSF's coal service. OPAGAC will continue its outreach and regular communications with counterparts at the Department of Energy (DOE) and FERC in order to share information about the coal railroad supply chain as it relates to the reliability of energy production.

Moreover, we will direct BNSF to provide specific information with regard to its coal service contingency planning. BNSF's October 28 Letter and its November 3 Reply indicate that the carrier devotes particular attention to utility customers at or below a 10-day stockpile level "to ensure that the customer does not run out of coal."³⁷ However, BNSF does not provide more specific information. A key concern of the Board is the railroad's ability to promptly and effectively redeploy resources in the event that unanticipated circumstances cause one or more regionally significant generating stations to reach critical stockpile levels. So that the Board has a full understanding of how BNSF would mitigate any critical shortfalls of coal, BNSF is directed to provide to the Board its contingency plans for addressing any such shortfalls, including a detailed description of the steps it takes to identify coal-fired plants at critical levels and to remedy acute shortages in a timely fashion. BNSF's response should address equipment, infrastructure, and personnel resources used to respond to such situations. BNSF may also submit the regulatory proposals referenced in its October 28 Letter, which it stated would address systemic service challenges.

To ensure that the Board receives the full range of perspectives regarding coal service, we also invite utilities and other coal stakeholders to submit status reports in this docket. Together with the input received through the Board's continued coordination with FERC and DOE, its continued calls and meetings with BNSF,³⁸ and the coal service data collected pursuant to the October 8 Order, these reports will increase the Board's ability to monitor the status of coal service. If utilities and other coal stakeholders choose to submit such reports, we request that they address:

³⁶ See, e.g., U.S. Rail Serv. Issues, EP 724, slip op. at 2 (STB served Aug. 18, 2014) ("At the Board's request, senior management representatives of BNSF and CP have met individually with Board Members on a number of occasions . . .").

³⁷ BNSF Reply 10.

³⁸ OPAGAC holds regular, informal meetings with BNSF and the other Class I carriers.

- Information regarding regional, state, or plant-specific stockpiles. This information (as well as any other information included in these status reports) may be filed under seal if the submitting party chooses to do so. Questions about submitting a filing under seal, including how to request a protective order, may be directed to OPAGAC at (866) 254-1792 or rcpa@stb.dot.gov.
- Information regarding the status of coal by rail service received from railroads (including, but not limited to, BNSF).

The Board's access to all of the information described above from a combination of carriers, shippers, and energy regulatory agencies will assist the Board in evaluating whether further regulatory steps with regard to coal service are necessary, and if so, when. As the Board is not requiring the service recovery plan enforcement requested by WCTL, we need not reach a conclusion on BNSF's legal objections to that remedy. We do note, however, that BNSF has raised a significant concern with respect to the scope of the Board's authority over contract traffic under 49 U.S.C. § 10709. Section 10709 states that transportation provided under private contract is not subject to the Board's governing statute; parties are not subject to statutory duties with respect to contract service; and the "exclusive remedy" for breach of contract is in a court of competent jurisdiction. 49 U.S.C. § 10709(b) and (c). Given that the vast majority of coal rail traffic nationwide moves under contract, § 10709 could have an impact on the scope of any prospective relief available under the Interstate Commerce Act. At the same time, however, a carrier entering contracts "remains subject to [its] common carrier obligation . . . with respect to [its non-contract] traffic" under § 10709(f). The national rail system carries both regulated and non-regulated traffic and the Board necessarily must look to the fluidity of that network.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. WCTL's petition is granted in part and denied in part, as discussed above.
2. BNSF shall submit no later than January 29, 2015 a detailed description of the contingency plans it would use to mitigate an acute coal inventory shortage at one or more generating stations in a region.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.