

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
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October 15, 2024
Part of
Public Record

DOCKET NO. NOR 42180

EVERGY, INC., EVERGY METRO, INC. and
EVERGY KANSAS CENTRAL, INC.

v.

BNSF RAILWAY COMPANY

**BNSF RAILWAY COMPANY'S
SUPPLEMENT TO ITS MOTION TO DISMISS**

On May 17, 2024, BNSF Railway Company (“BNSF”) filed a partial motion to dismiss with the Surface Transportation Board (“STB” or “Board”) that remains pending. In that motion, BNSF requested the dismissal of Count IV of the complaint that Evergy, Inc., Evergy Metro, Inc., and Evergy Kansas Central, Inc. (collectively, “Evergy” or “Complainants”) filed on January 31, 2024. Count IV is Evergy’s request for a forward-looking declaration fixing BNSF’s common carrier obligation to accept Evergy’s private train sets into service and guarantee historical service levels regardless of existing circumstances. Count IV does not provide a basis for Board investigation or action and therefore should be dismissed pursuant to 49 U.S.C. § 11701(b).

When BNSF filed its motion to dismiss in May, [REDACTED]

[REDACTED]

and its total coal shipments were significantly behind the projections Evergy had provided to BNSF entering 2024. *See* BNSF Mot. to Dismiss at 1-2. BNSF files this

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supplement because the sharp decline in Evergy's demand for coal transportation this year has continued, thus confirming that Evergy's request for a forward-looking declaration is inappropriate and highlighting the improper nature of its claim for damages in 2022. Further, the tonnage that Evergy has shipped this year has been marked by volatile swings up and down. As of the date of this filing:

- Iatan Facility – Evergy has requested the shipment of only [REDACTED] tons for the year 2024. This represents approximately a [REDACTED] % reduction to the amount of 2024 shipments Evergy had told BNSF in September 2023 that it wanted for 2024 ([REDACTED] tons). That forecasted amount for 2024 itself represented approximately a [REDACTED] % reduction from the amount of tons Evergy had told BNSF in September 2022 that it wanted to ship in 2023. Evergy's monthly swings in demand in 2024 have been dramatic, ranging from [REDACTED] in April to [REDACTED] [REDACTED] tons in July and August, respectively.
- Lawrence Facility – Evergy has requested the shipment of only [REDACTED] tons for the year 2024. This represents approximately a [REDACTED] reduction to the amount of 2024 shipments Evergy had told BNSF in September 2023 that it wanted for 2024 ([REDACTED] tons). That forecasted amount for 2024 itself represented approximately a [REDACTED] reduction from the amount of tons Evergy had told BNSF in September 2022 that it wanted to ship in 2023. Evergy's monthly swing in demand in 2024 have been dramatic, ranging from [REDACTED] in April and May to [REDACTED] tons in July and August, respectively.

The continued decline in Evergy's demand for coal transportation reinforces that there is no live controversy that would justify a declaratory order concerning BNSF's common carrier service. Similarly, there is no ongoing dispute about adding trainsets to meet Evergy's needs for coal. To the contrary, Evergy continues to take trainsets out of service and significantly cut back on service requests.¹

¹ Evergy's sharply declining coal demand is consistent with, and exceeds, shipper demand for coal industry-wide. At the Board's hearing regarding growth in the freight rail industry, Loop Capital noted starkly that "[c]oal is less than half of 2003 levels." Comments of Loop Capital at 1, EP 775 (filed Sept. 20, 2024). According to Association of American Railroad ("AAR") statistics, coal carloads had their best month of the year in September, and were still down 8% from September 2023. Year to date, coal carloads are down 14.5% from 2023. See <https://www.aar.org/rail-industry-overview>. AAR's third

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Evergy also continues to refuse to provide BNSF with basic information about inventory levels at its plants—the type of information that the great majority of BNSF’s other coal customers provide and that BNSF needs to provide efficient service to Evergy. This need was highlighted just last month, when trains arriving at Evergy’s Iatan plant were not promptly unloaded. When BNSF contacted Evergy in order to plan and schedule crews to pick up empty trains on September 13, 2024, BNSF learned for the first time that Evergy’s plants were both offline [REDACTED] [REDACTED]. Evergy had shut down both of Iatan’s units without prior notification or explanation to BNSF. BNSF then also learned that [REDACTED], would not unload a BNSF train that had already arrived, would not unload another BNSF train that was already en route, and in fact intended to remove a trainset from service to Iatan due to the reduced need for coal. Ex. A (BNSF’s Sept. 20, 2024 letter to Evergy). Such a stop/start approach on a day-to-day or month-to-month basis makes it impossible for BNSF to provide the type of service to which Evergy improperly suggests it is entitled under the common carrier obligation, and adds congestion to BNSF’s rail network that negatively impacts service for all customers.

Evergy’s simultaneously declining and volatile demand for coal transportation reveals a fatal flaw in Evergy’s request for a Board order guaranteeing rail volumes at historical levels achieved under prior transportation contracts with mutual commitments and obligations for both Evergy and BNSF to perform. As a common

quarter Rail Time Indicators publication notes that the 2.18 million carloads transported this year is the lowest on record.

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carrier shipper, Evergy, unlike contract shippers, has no obligation to use BNSF's coal service. But because of this variability of demand for common carrier traffic, the common carrier obligation requires railroads to take reasonable steps to respond to only reasonable service requests from common carrier shippers. Evergy's wide variations in the amount of coal it requests from BNSF, both year-to-year and on a month-to-month basis, create significant impacts to resource planning and availability of rail transportation for all customers. Evergy cannot have it both ways and expect the STB to order contract-like service without any commensurate obligations on Evergy's part.²

The recent events described in the attached correspondence also show the importance of the existing facts and circumstances in determining BNSF's obligations to act reasonably as a common carrier. *See* Ex. A, Ex. B (Evergy's September 26, 2024 letter to BNSF), Ex. C (BNSF's October 14, 2024 letter to Evergy). Such obligations cannot be declared in advance, based, as Evergy would have it, on "historical volumes." *See* Complaint at 17. The service BNSF provides its common carrier shippers must be based on the circumstances existing at the time of the service requests. As the recent circumstances reveal, historical coal volumes bear no relationship to current demand, and it would be inappropriate for the Board to

² Lacking any ongoing controversy over the level of service, Evergy can hardly rely on the sole discretion language in prior tariffs as grounds for a declaratory order, since the language was removed and has not been in the tariff since before Evergy initiated this proceeding.

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establish a future common carrier obligation for BNSF based on the facts as they existed in 2022—or even on January 31, 2024, when Evergy filed its complaint.³

For all these reasons, the Board should grant BNSF's motion to dismiss Count IV of Evergy's complaint.

Respectfully submitted,

Tamara R. Middleton
Adam Weiskittel
Kevin W. Baldwin
BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2383

/s/ Timothy J. Strafford
Timothy J. Strafford
Anthony J. LaRocca
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(202) 429-3000

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(713) 221-2309

Counsel for BNSF Railway Company

Dated: October 15, 2024

³ These circumstances also show that an important factor in assessing BNSF's service is the information that the shipper provides in support of service requests, such as information about its coal inventories and inventory management.

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing to be served electronically or by first-class mail, postage pre-paid, on all parties of record in this proceeding.

/s/ Tara A. Woods

Attorney for BNSF Railway Company
October 15, 2024

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EXHIBIT A

PUBLIC VERSION



Kristin Hansen
General Director - Coal

BNSF Railway Company
P. O. Box 961051
Fort Worth, Texas 76161-0051
2650 Lou Menk Drive
Fort Worth, Texas 76131-2830
tel 817 352-3346
fax 817 352-7939
Kristin.hansen@bnsf.com

September 20, 2024

Via E-Mail

Lloyd Jackson
Senior Director Power Marketing
Energry
1200 Main Street, Suite 29
Kansas City, MO 64105

Re: Current Situation at Iatan

Dear Mr. Jackson:

I am writing to express concern with the current situation at Energry's Iatan facility. On last Friday, BNSF's Division Trainmaster, Matthew Johnson inquired with Energry regarding your estimated time to unload trains CDMSAI0-48 and CDMSAI0-47 which had both been delivered and were holding at Iatan. BNSF was surprised to learn that Iatan did not have the ability to unload train CDMSAI0-47 and would not be able to do so for several days. BNSF was further surprised to learn that Energry would also not be able to unload en-route train CAMSAI0-39 when it arrived later that day. Thus, as of last Friday, two of the four sets in service for Iatan service were sitting idle at Iatan waiting to unload even though Energry had ordered these shipments without regard to its stockpile status or whether it would be able to accept them for unloading.

In light of this revelation, BNSF pursued additional information from Energry regarding the situation at Iatan. As a result, we learned for the first time that both of Iatan's coal-burning units were offline, and the [REDACTED]. Further discussions revealed that Energry intended to take a set out of service shortly, though that also had not previously been communicated to BNSF. At present, a week later, train CDMSAI0-47 has still not been unloaded and released back to BNSF. Nevertheless, Energry ordered and loaded yet another train, CAMSAI0-40, that BNSF has been forced to hold on our network pending clearance of the backlog at Iatan.

As was expressed in BNSF's recent response letter to Ms. Tucker, BNSF works very hard to understand our customers' current situations so that we can anticipate changes that will impact the flow of traffic and resources serving all shippers on our broader network. The unanticipated inconsistencies in Energry's demand for deliveries to Iatan this year, which included [REDACTED], had already illustrated the need for Energry to communicate with BNSF as quickly and clearly as possible. We are disappointed that Energry has

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continued to follow a path that leaves BNSF scrambling to mitigate impacts to our operations and other customers.

We look forward to working with you to resolve these issues and improve the communications between our two companies. As always, BNSF remains focused on meeting customer needs while ensuring we continue to operate as safely and efficiently as possible.

Sincerely,

A handwritten signature in cursive script that reads "Kristin Hansen".

Kristin Hansen

cc: Abby Herl (Evergy)
James Meitner (Evergy)
Jessica Tucker (Evergy)
Lance Miller, Esq. (Evergy)
Larry Meyne (BNSF)
Jill Rugema (BNSF)

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EXHIBIT B



September 26, 2024

Via E-Mail

Kristin Hansen
General Director – Coal
BNSF Railway Company
2650 Lou Menk Drive
Fort Worth, Texas 76131-2380

Re: Coal Transportation to Iatan Station

Dear Ms. Hansen:

I received your letter of September 20 and made inquiries internally regarding the statements concerning recent unit train service to our Iatan Generating Station. Based on the information that I was able to gather, it appears that BNSF has formed inaccurate conclusions based on limited or incomplete information from Iatan plant personnel, rather than consulting with our Fuels Department.

Particularly in the Spring and Fall, it is not uncommon for both Evergy and BNSF to encounter challenges in trying to coordinate coal deliveries with the seasonal variability in demand for generation at Iatan. As much as operationally possible, Evergy utilizes BNSF's Coal Forecasting Tool to nominate monthly volumes it expects to be moved by BNSF from mines to Iatan Generation Station, but it is BNSF that controls the actual timing of loading and delivery of trains. If Evergy encounters unexcused delays in unloading a train beyond the allotted free time, BNSF is compensated under the tariff. However, if BNSF sends multiple loaded trains to Iatan within a short period of time, those trains can become bunched and may have to be held short of destination. That appears to have been the case with four delivered trains starting on 09/12/24 with CAMSAI038 through CAMSAI039 on 09/14/24 00:29. Evergy did not "order" those trains; BNSF set them in motion at its own discretion and the resulting bunching was not Evergy's responsibility.

The statement that Iatan's

[REDACTED]

If BNSF was concerned about the storage capacity at Iatan, a call to our Fuels Department would have cleared up any uncertainty. Similarly, your letter states that Evergy



decided to remove a trainset from service without notifying BNSF in advance. However, Evergy's Fuels Department regularly communicates with BNSF regarding the number of trainsets in service, and it is standard practice for one or more sets that are needed during the Summer months to be removed in the Fall, after taking seasonal variability in generation demand into account. While it is not possible to forecast coal requirements with perfect accuracy, Evergy and BNSF typically work together and try to reasonably plan. In the specific instance that you cited, it was BNSF's Michael Weston that suggested removal of a trainset on September 13; Evergy's Fuels team subsequently agreed. Likewise, [REDACTED] was the subject of Evergy communications to BNSF as soon as we determined that it was operationally necessary. In addition, the likely removal of a trainset in the Fall had been communicated to BNSF back in the Spring of this year.

In the normal course of business at latan, plant personnel and BNSF train crews routinely interact to facilitate the delivery and unloading of coal shipments. As qualified as our personnel are, however, they do not always have complete information when it comes to the overall fuels picture, and drawing broad conclusions based on isolated comments risks unnecessary misunderstandings. It is unfortunate that this apparently occurred in the circumstances addressed in your letter. The lines of communication between our Fuels Department and their counterparts at BNSF are open and healthy, and we are committed to maintaining them. Please feel free to contact me if you would like to confer further.

Sincerely,

A handwritten signature in cursive script that reads "Lloyd Jackson".

Lloyd Jackson
Managing Director, Power Marketing

cc: Jessica Tucker (Evergy)
Abby Herl (Evergy)
JP Meitner (Evergy)
Lance Miller, Esq. (Evergy)
Larry Meyne (BNSF)
Jill Rugema (BNSF)

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EXHIBIT C

PUBLIC VERSION



Kristin Hansen
General Director - Coal

BNSF Railway Company
P. O. Box 961051
Fort Worth, Texas 76161-0051
2650 Lou Menk Drive
Fort Worth, Texas 76131-2830
tel 817 352-3346
fax 817 352-7939
Kristin.hansen@bnsf.com

October 14, 2024

Via E-Mail

Lloyd Jackson
Senior Director Power Marketing
Evergy
1200 Main Street, Suite 29
Kansas City, MO 64105

Re: Current Situation at Iatan

Dear Mr. Jackson:

Thank you for your letter of September 26. In the interest of clear and open communication, I am writing to clarify several inaccuracies in your response.

Evergy directs the amount of coal that BNSF delivers to your plants. Evergy inputs its desired tonnage in BNSF's Coal Forecasting Tool, which is then confirmed by your coal suppliers. BNSF then provides carriage for Evergy's private trainsets in cycle between the supplying mine and your plants. Evergy has visibility into the location of its trainsets on BNSF's network through the customer portal at bnsf.com. At any point, Evergy can (and does) contact BNSF to reroute or hold service, or to park or remove sets from cycle. It is incorrect to claim that BNSF "set[s] them in motion at its own discretion" or that BNSF bears responsibility for the backlog that recently occurred at Iatan.

Evergy has withheld – and continues to withhold – information from BNSF regarding the status of its plants and coal inventory levels. BNSF regularly receives such information from other coal customers and is able to work collaboratively with them to more accurately forecast delivery schedules and cycle times to optimize deliveries and avoid congestion both at customer facilities and on BNSF's network. As Evergy declines to provide this information, it is Evergy's responsibility to advise BNSF when it expects to be unable to receive coal and needs trains held.

The information reported in my September 20 letter was based on the responses of Evergy's Fuels Department to BNSF's inquiry after the delays at Iatan began, and not any misconception based on information provided by your plant personnel. I enclose the correspondence between Abby Herl and Michael Weston, wherein Abby directed the removal of the set. Abby's initial response to Michael's question about the number of sets in service advised that Evergy had planned to remove one shortly – a fact that had not been previously discussed with BNSF in any of its frequent communications with Evergy.

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Evergy's Fuels Department most recently advised it plans to remove yet another set from Iatan for November, leaving only two sets in cycle for the month. In addition, only one set has been in cycle for Lawrence since the plant restarted operations in June. Evergy has agreed to place another set into service for Lawrence but has requested it be shopped for most of October. As BNSF has advised Evergy's Fuels Department, we are able and planning to deliver all of the tons requested in your current CFT entries for the year, but that will not be achievable without attaining the set levels BNSF has recommended in service for each plant. As we did for 2022, BNSF has also offered several options to promote flexibility and allow sets to flow between Iatan and Lawrence. Evergy's CFT requests for 2024 are already far less than its declared volume for the year (█% at Iatan and █% at Lawrence) and based on Evergy's most recent directions it does not appear at this time that Evergy even wants BNSF to ship what is currently reflected in the CFT. As Evergy's Fuels Department has simultaneously declined to reduce the tons currently requested in the CFT, we will need further direction on the options BNSF has offered if you still desire to receive the full number of tons requested.

We appreciate Evergy's commitment to maintaining lines of communication with BNSF and encourage a more open and forward-looking disclosure of conditions impacting Evergy's transportation needs from your team. By working with BNSF to keep us apprised of current and anticipated conditions we will be better able to serve Evergy's transportation needs while ensuring we continue to operate as safely and efficiently as possible.

Sincerely,

Kristin Hansen

Kristin Hansen

cc: Abby Herl (Evergy)
James Meitner (Evergy)
Jessica Tucker (Evergy)
Lance Miller, Esq. (Evergy)
Kristin Hansen (BNSF)
Jill Rugema (BNSF)

PUBLIC VERSION

From: Abby Herl
To: Weston, Michael D; Jessica Tucker
Cc: Meyne, Larry C; Meyer, Scott L
Subject: Re: [EXTERNAL]Iatan Pushing Coal
Date: Friday, September 13, 2024 1:14:23 PM
Attachments: image001.png

EXTERNAL EMAIL

Internal Use Only

Hi Mikel
Yeah it is a bit surprising because it is still humid and at times hot around here.
Jessi and I circled, we are okay with dropping 1 set at this point in time.
I can send a set to COPLANT. I am looking right now on which set that will be.
Will follow-up in a bit.

From: Weston, Michael D <Michael.Weston@bnsf.com>
Sent: Friday, September 13, 2024 12:19 PM
To: Abby Herl <abby.herl@evergy.com>; Jessica Tucker <jessica.tucker@evergy.com>
Cc: Meyne, Larry C <Larry.Meyne@bnsf.com>; Weston, Michael D <Michael.Weston@bnsf.com>; Meyer, Scott L <Scott.Meyer@bnsf.com>
Subject: [EXTERNAL]Iatan Pushing Coal

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This is a surprise!!

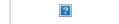
What does the long term plan look like Abby – with one set parked at the plant we will be in for out – if the C-CDMSAIO-47 is not going to unload before 9/17 of next week we will have 2 more loaded coal trains in the mix – the E-SAICAMO-38 will be at the mine on the 14th – putting it in the Sadler area on the 17th and the SAICDMO-48 is called at the Utility – it should load by the 16th – putting it at the plant on the 19th. Will the plant be able to stay ahead of these trains?

With 4 sets & having to – do we have too many sets operating based on what the plant is consuming?

Would appreciate some feedback and what your plans are moving forward to help mitigate this situation.

Thank you.

Michael D. Weston | Sr Mgr Bulk Operations & Equipment | BNSF Railway Fort Worth, TX | * michael.weston@BNSF.com | Work - (817-867-0828) – Cell (817-584-8237)



From: Johnson, Matthew Allen <Matthew.Johnson@BNSF.com>
Sent: Friday, September 13, 2024 11:29 AM
To: Hughes, Michael J <Michael.Hughes3@BNSF.com>; Larue, Heath N <Heath.LaRue1@BNSF.com>; Compton, Darren R <Darren.Compton@BNSF.com>
Cc: Donn, Frank A <Frank.Donn@BNSF.com>; Gray, S Mark <Stephen.Gray@BNSF.com>; OPR DL MLU Central <OPRDLMLUCentral@BNSF.com>
Subject: Iatan Update

Good afternoon –

Just spoke with Iatan and They currently are unloading the E SAICAMO 48 with a pre-release of 1400 today. They don't plan to unload the C CAMSAIO 47 (arrived 0700 this morning) for a few days. And they have the C CAMSAIO 39 due into them around 2130 tonight.

We are going to pull the power off of the set 047 and they will unload set 039 first but most likely won't be until Sunday or Monday.

They will need power back on hand at Iatan either Tuesday or Wednesday so they can unload the C CAMSAIO 47. Timing is all going to depend if they are allowed to turn on one of their units to start burning more coal.

Thank you



From: Jeffrey Karsten <jeffrey.karsten@evergy.com>
Sent: Friday, September 13, 2024 11:17 AM
To: Johnson, Matthew Allen <Matthew.Johnson@BNSF.com>; Amy J Hawk <Amy.Hawk@evergy.com>
Subject: RE: [EXTERNAL]Sets 047 and 048 on hand

EXTERNAL EMAIL

Internal Use Only

We are unloading CDMSAIO-48 now, and should be done by 1400 hours. At this time we do not have room to unload the CDMSAIO-47. I'm guessing it will be a couple days before we will be able to make room on our coal pile to start unloading. The CAMSAIO-39 will have to park for an additional couple days, unless one or both of the units would get called up.

From: Johnson, Matthew Allen <Matthew.Johnson@BNSF.com>
Sent: Friday, September 13, 2024 8:03 AM
To: Amy J Hawk <Amy.Hawk@evergy.com>; Jeffrey Karsten <jeffrey.karsten@evergy.com>
Subject: [EXTERNAL]Sets 047 and 048 on hand

This Message Is From an External Sender

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Good morning –

Can you give me rough ETA's when you will begin to unload these sets so I can update the lineups?

Thank you

Matt Johnson | Division Trainmaster – St. Joseph, MO | BNSF Railway | Matthew.Johnson@BNSF.com | Office: 816-364-7822 | Cell: 816-308-6345