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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**REPLY OF
UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI
IN OPPOSITION TO
MOTION TO COMPEL OF
BNSF RAILWAY COMPANY**

**ENTERED
Office of Proceedings**

FEB 16 2012

**Part of
Public Record**

Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”), pursuant to 49 CFR § 1114.31(a)(2), hereby provides its Reply in opposition to the Motion to Compel (“Motion”) filed by the BNSF Railway Company (“BNSF”) on February 6, 2012 in the above-captioned proceeding. The requests described in the Motion are overly broad, unduly burdensome, and not sufficiently related to the narrow issue being considered by the Surface Transportation Board (“Board”) in this expedited proceeding. For this and other reasons, the Motion should be denied.

I. SUMMARY OF ARGUMENT.

The Board instituted this proceeding to consider the reasonableness of the safe harbor provision in the newest version of the BNSF coal dust tariff. Subsequently, BNSF agreed upon a short 50-day discovery period. Now, however, BNSF seeks to compel production of a wide range of materials that have only the most tenuous relationship to the coal dust tariff, let alone

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the safe harbor issues that the STB said it would review in this docket. With the extreme breadth of BNSF's requests, it almost appears as if BNSF wishes to re-litigate all the issues in the initial coal dust proceeding, Arkansas Electric Cooperative Corporation – Petition for Declaratory Order, STB Docket No. 35305 (“Coal Dust I”). BNSF has requested virtually all information that touches upon coal loss in practically any conceivable manner and during the entirety of the coal life cycle, from mining to burning.

With the Motion, BNSF seeks to compel Ameren Missouri to respond to Request for Production (“RFP”) numbers 3, 4, 5, 6, 7, 8, and 9.¹ The BNSF requests are overly broad, seek material that is irrelevant, and are not reasonably calculated to lead to the discovery of admissible evidence.² Responding to these requests would be unduly burdensome for Ameren Missouri given the narrow scope and expedited nature of this proceeding. Under established precedent, BNSF must make “more than a minimal showing of potential relevancy” to the case at hand. This BNSF has not done. The Motion should be denied.

II. GOVERNING LAW.

“Parties may obtain discovery...regarding any matter...which is relevant to the subject matter involved in a proceeding.” 49 CFR § 1114.21(a)(1). However, a party seeking discovery must show “more than a minimal showing of potential relevancy.” Potomac Electric Power

¹ BNSF does not address the nine Interrogatories propounded on Ameren Missouri presumably because BNSF was satisfied with the substantive response Ameren Missouri provided to many of those requests.

² BNSF claims that Ameren Missouri concedes the requested information is relevant, and that Ameren Missouri has not objected on relevance grounds. This is simply not true. Ameren Missouri objected to all BNSF requests to the extent that the requests impose obligations beyond those in 49 CFR Part 1114. See Motion, Ex. 2 at 2. Under 49 CFR § 1114.21(a)(1), parties may only obtain discovery of relevant material. See, e.g., Canexus Chemicals Canada, L.P. v. BNSF Railway Company, STB Docket No. 42132, slip op. at 4 (served Feb. 2, 2012) (Board denies motion to compel because information sought is irrelevant under 49 CFR § 1114.21).

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Company v. CSX Transportation, Inc., 2 STB 290, 292 (1997). See also M&G Polymers USA, LLC v. CSX Transportation, Inc. et al., STB Docket No. 42123, slip op. at 2 (served Nov. 24, 2010).

III. ARGUMENT.

A. BNSF's discovery requests exceed the scope of this proceeding.

In its decision instituting this proceeding, the Board stated that it was for the purpose of “consider[ing] the reasonableness of the safe harbor provision in the new [BNSF] tariff.” See decision served Nov. 22, 2011. The discovery requests encompassed by the Motion dramatically exceed this limited scope. When considered together, the seven RFPs that are the subject of the Motion seek all possible documents that touch upon coal loss during any point between mining and burning, or touch upon dust suppression efforts by anyone at any conceivable location. The breathtaking extent of these requests is utterly beyond the limited parameters and expeditious procedural schedule in this proceeding.

BNSF claims that the requested materials are “central to this proceeding”, but this is either wishful thinking or a creative way to try and deter individual parties from participating in this proceeding. Motion at 3. This proceeding concerns the specific terms in the safe harbor of BNSF's coal dust tariff. In contrast, the requests of BNSF encompass practically every possible aspect of coal loss and attempts to prevent coal loss, regardless of whether such losses or attempts occur during BNSF rail transportation. BNSF has not met the relevance standard of 49 CFR § 1114.21.

This proceeding has an “accelerated” procedural schedule and the time for discovery was limited to only 50 days. See decision served Dec. 16, 2011. Given this schedule and the limited scope of the proceeding, any discovery must be narrowly focused on the reasonableness of the

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safe harbor. The Board has previously stated that where “strict time constraints” exist, discovery may be “disfavored.” Montreal, Maine & Atlantic Railway, Ltd. – Discontinuance of Service and Abandonment – in Aroostook and Penobscot Counties, ME, STB Docket No. AB-1043 (Sub-No. 1), slip op. at 2 (served April 9, 2010). See also Canexus, slip op. at 4-5 (motion to compel denied because information sought is irrelevant and no showing had been made that the request was consistent with expedited procedural schedule and simplified nature of case). Cf. Potomac Electric, 2 STB at 292 (noting that “orderly administration” requires limits on discovery in 16-month coal rate cases).

BNSF believes that its requests are justified because shippers have expressed concerns about various issues. BNSF asserts that “[s]hippers cannot raise issues in their challenge to BNSF’s Coal Loading Rule without agreeing to produce information in their own files about the issues that they have raised.” Motion at 4. While appealing on its face, this argument collapses under the weight of the dramatically broad BNSF requests. Moreover, the quoted statement is based on the faulty assumption that issues raised by shippers are identical to those implicated by BNSF’s requests. For example, BNSF asserts that the cost information is relevant because the issue of costs was raised in the Petition to Reopen filed by the Western Coal Traffic League (“WCTL”) on August 11, 2011 in STB Docket No. 35305. Motion at 7. See also Motion at 4 (n. 1). However, the cost issue, as described by the Board, concerns “cost-sharing” and not the simple level of cost. Nov. 22 decision at 4 (n. 5). Whether or not parties share a cost, and what percentage each party covers, is entirely dissimilar from the specific dollar figure involved. To the extent that the cost level itself is an issue, it is entirely speculative that the cost of a dust suppression method at an electric generating facility is comparable to the cost of compliance with the BNSF tariff. A large portion of the cost in either case is likely composed of labor and

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equipment – items that could be drastically different for spraying the area on the top of a rail car versus spraying stockpiles or during handling events when coal is moved or dropped. In short, BNSF has not shown that the information sought by the requests “might affect the result of this proceeding.” Capitol Materials Incorporated – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Railway Company, STB Docket No. 42068, slip op. at 3 (served April 19, 2002). The Board has previously denied the production of information that “does not appear to be necessary” for evaluation of the issues involved. Potomac Electric, 2 STB at 292.

With the above context, Ameren Missouri now addresses the seven specific document requests that are the subject of the Motion in three groupings:

RFP #3 – With this request, BNSF seeks “all documents created on or after January 1, 2009 that refer or relate to arrangements, agreements, contracts, quotes, bids, offers, or any other communications between You and any Person...regarding methods that could be used at coal mines to reduce the amount of coal that is lost from rail cars while the coal is in transit by rail.”

RFP #4 – With this request, BNSF seeks “all documents that refer or relate to Your plans to reduce the amount of coal that is lost from rail cars while the coal is in transit by rail.”

RFP #5 – With this request, BNSF seeks “all documents that discuss, analyze, or otherwise refer or relate to the effect of coal dust suppression products or services, including but not limited to Topper Agents, on employees of railroads, coal mines, coal shippers, or utilities, or on property or rail cars owned by railroads, coal mines, coal shippers, or utilities.”

The excessive breadth of these requests is evident from BNSF’s request for “all” documents, and BNSF’s definitions of “You” (including any employees, advisors, independent contractors, consultants, affiliates, etc.), “communication” (including oral discussions, electronic mail, text messages, phone calls, etc.), “document” (a nearly one-page list of every possible type of written, electronic, or other type of record), “analyses” (including virtually all types of

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information compilations in any form, including drafts), and “refer or relate to” (including virtually any type of relationship whatsoever). Moreover, these requests are not limited to the rail lines encompassed by the BNSF dust tariff; nor are the requests even limited to Powder River Basin coal.

The information sought is also not relevant to the safe harbor at issue in this proceeding. It is not narrowly tailored to the reasonableness of the safe harbor, and therefore exceeds the scope of this proceeding. Ameren Missouri has already provided BNSF with its compliance plan for how it intends to comply with the BNSF tariff.³

RFP #6 – With this request, BNSF seeks “all documents that discuss, analyze, or otherwise refer or relate to the effect of coal dust suppression products or services, including but not limited to Topper Agents, on the generation of power at particular power generating facilities or at power generating facilities in general.”

RFP #7 – With this request, BNSF seeks “all documents that discuss, analyze, or otherwise refer or relate to methods for reducing the amount of coal that is lost from coal stockpiles at power generating facilities” including, but not limited to, (a) cost; (b) comparison to cost of other methods; (c) effectiveness; (d) impact on power generation; and (e) legal requirements for dust suppression.

The excessive breadth of these requests is evident from BNSF’s request for “all” documents, and BNSF’s definitions of “document”, “analyses”, and “refer or relate to”. The requests are also not limited to the rail lines encompassed by the BNSF dust tariff; nor are the requests limited to Ameren Missouri’s power generating stations, or even just generating stations that burn Powder River Basin coal. Likewise, RFP#7 encompasses coal lost from stockpiles at any electric generating station in any conceivable location; thus, the request exceeds the scope of this proceeding. These requests also seek information on coal dust at stationary locations, yet this proceeding is limited to the safe harbor issues related to BNSF’s tariff on dust created by

³ In addition, Ameren Missouri has offered to re-produce any of the over 10,000 pages of documents produced by Ameren entities in Coal Dust I, if desired by BNSF because of the limitation in the Protective Order in Coal Dust II.

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moving rail cars on two specific BNSF rail lines. Thus, these requests exceed the scope of this proceeding, and are grossly overboard and unnecessary.

Finally, the request for “legal or regulatory requirements” is a legal issue, not a factual issue, and, therefore, is an inappropriate topic for discovery. Ameren Missouri has already provided BNSF with its compliance plan for how it intends to comply with the BNSF tariff.

RFP #8 – With this request, BNSF seeks “all minutes, reports, agendas, summaries, or other documents referring or relating to meetings or conferences at which the subject of coal that is lost from rail cars while the coal is in transit by rail was discussed.”

RFP #9 – With this request, BNSF seeks “all documents that refer or relate to communications between You and any Person regarding the Coal Loading Rule.”

The excessive breadth of these requests is evident from BNSF’s request for “all” documents, and BNSF’s definitions of “document”, “communications”, “You”, “analyses”, and “refer or relate to”. The requests are not limited to the rail lines encompassed by the BNSF dust tariff; nor are the requests even limited to transportation of Powder River Basin coal. The information sought is not relevant to the safe harbor at issue in this proceeding. In addition to potentially seeking privileged materials, the requests are not narrowly tailored to the safe harbor issue, and therefore the requests exceed the scope of this proceeding.

B. Compliance with the requests would be unduly burdensome.

The Motion should also be denied because responding to the requests would be unduly burdensome, especially given the narrow scope of this proceeding and the expedited procedural schedule. To comply with the BNSF requests covered by the Motion, Ameren Missouri would, at a bare minimum, have to take the following steps:

1. contact its four electric generating stations (assuming BNSF's requests are limited to only the Ameren Missouri business)

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2. determine exactly what and where documents might be available from multiple departments in these businesses with respect to coal loss and dust suppression in every conceivable step of the coal life cycle, including: mine, loading, transportation, unloading, handling, stockpiling, processing, conveying, and burning
3. determine who has any role whatsoever in the above steps
4. commence an electronic search
5. direct numerous employees to engage in a paper search of their files
6. review all documents, correspondence, communications, notes, electronic files, e-mails, etc. from all mines that supply coal to Ameren Missouri's generating stations;
7. review all documents, correspondence, communications, notes, electronic files, e-mails, etc. from all railroads that provide transportation services to Ameren Missouri's generating stations
8. review all documents, correspondence, communications, notes, electronic files, e-mails, etc. from any contractor that provided any service related to coal loss or the effects of coal loss in any way whatsoever
9. review all documents, correspondence, communications, notes, electronic files, e-mails, etc. from any third party where such document touches upon coal loss or the effects of coal loss in any way whatsoever
10. determine whether the accounting system has any relevant information and whether it can be searched and produced in a meaningful and timely fashion
11. review of all potentially responsive documents for privilege issues

The time and effort required by numerous Ameren Missouri employees far exceeds what is reasonable given the limited scope of this proceeding. With its Motion, BNSF has made only

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a minimal showing that the requests are relevant to this proceeding; consequently, the Motion should be denied. Potomac Electric, 2 STB at 292.

C. BNSF's discovery requests are posed for an improper purpose.

Ameren Missouri also objects to all seven discovery requests encompassed by the Motion because of the looming possibility of a breach of contract claim by BNSF against Ameren Missouri. See Highly Confidential Ex. 1 (BNSF letter Nov. 14, 2011) and Highly Confidential Ex. 2 (Ameren Missouri letter Dec. 28, 2011). BNSF recently told Ameren Missouri [[

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

]] The potential threat of

litigation suggests that the dramatically broad discovery requests in STB Docket No. 35557 are designed to influence or cause Ameren Missouri to settle a contract dispute. Cf. Societe Nationale Industrielle Aerospatiale et al. v. United States District Court for the Southern District of Iowa, 482 U.S. 522, 546 (1987) (due to cost issues, international discovery might be used “for the improper purpose of motivating settlement”); First Bank of Marietta v. Hartford Underwriters Insurance Company, 307 F.3d 501, 524-525 (6th Cir. 2002) (noting that the legal system can be used for improper purposes); United States v. Bisceglia, 420 U.S. 141, 146 (1975) (Internal Revenue Service summons to produce documents, if challenged, should be “scrutinized by a court to determine whether it seeks information relevant to a legitimate investigative purpose and is not meant to harass the taxpayer or to put pressure on him to settle a collateral dispute”) (internal quotation omitted).

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BNSF has publicly stated that common carriage shippers would be provided with 60 days notice prior to any enforcement action regarding the coal dust tariff. See BNSF Reply at 19, 24, and V.S. Bobb at 7-8 (filed Aug. 23, 2011) in Coal Dust I. See also Coal Dust I, slip op. at 3 (served Aug. 31, 2011). Ameren Missouri is also aware that the Board previously stated that “there will be there would be no imminent, irreparable harm to any shippers, given that shippers faced no current possibility of a sanction for noncompliance” due to the 60-day notice promise. Id. However, Ameren Missouri is not a common carrier shipper; all of the transportation provided by BNSF for Ameren Missouri is pursuant to contract. The Board does not have jurisdiction over contracts, 49 USC § 10709, thus amplifying the danger that BNSF’s discovery is for an improper purpose.⁴

IV. CONCLUSION.

For all the reasons described herein, the Board should deny the Motion.

Respectfully submitted,



Sandra L. Brown
David E. Benz
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 263-4101
sandy.brown@thompsonhine.com

*Counsel for Union Electric Company d/b/a
Ameren Missouri*

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⁴ Ameren Missouri is certainly aware that a protective order is in place in this proceeding. However, the simple bar regarding use of materials from this proceeding for any other purpose does not affect the cost, burden, and influence issues mentioned in the cited precedent, nor can it un-ring any bell once it has been rung and heard.

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CERTIFICATE OF SERVICE

I hereby certify that this 16th day of February 2012, I served a copy of the foregoing upon all parties of record.

<p>Thomas W. Wilcox GKG Law, PC Canal Square 1054 31st St. NW, Suite 200 Washington, D.C. 20007-4492 E-mail: twilcox@gkglaw.com</p> <p><i>Counsel for The National Coal Transportation Association</i></p>	<p>Michael L. Rosenthal Covington & Burling LLP 1201 Pennsylvania Avenue NW Washington, DC 20004-2401 E-mail: mrosenthal@cov.com</p> <p><i>Counsel for Union Pacific Railroad Company</i></p>
<p>Christopher S. Perry U.S. Department of Transportation Office of the General Counsel 1200 New Jersey Avenue SE Room W94-316 Washington, DC 20590 E-mail: christopher.perry@dot.gov</p>	<p>Samuel M. Sipe, Jr. Anthony J. LaRocca Kathryn J. Gainey Steptoe & Johnson LLP 1330 Connecticut Ave. NW Washington, DC 20036 E-mail: ssipe@steptoe.com</p> <p><i>Counsel for BNSF Railway Company</i></p>
<p>Eric Von Salzen McLeod, Watkinson & Miller One Massachusetts Avenue NW Suite 800 Washington, DC 20001 E-mail: evonsalzen@mwmlaw.com</p> <p><i>Counsel for Arkansas Electric Cooperative Corporation</i></p>	<p>John H. LeSeur Slover & Loftus 1224 Seventeenth Street NW Washington, DC 20036 E-mail: jhl@sloverandloftus.com</p> <p><i>Counsel for Western Coal Traffic League, American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association</i></p>



David E. Benz

EXHIBIT 1

REDACTED

EXHIBIT 2

REDACTED