

**PUBLIC VERSION**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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Public Record

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**STB Finance Docket No. 35557**

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

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**OPENING EVIDENCE OF  
UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI**

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Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”), pursuant to the procedural schedule established by the Surface Transportation Board (“Board”) in its decision served July 31, 2012, hereby submits its Opening Evidence in the above-captioned proceeding.<sup>1</sup>

**I. Brief Procedural Background**

In March 2011, the Board issued a decision finding that the coal dust tariff established by BNSF Railway Company (“BNSF”) was an unreasonable practice in violation of 49 USC § 10702. Arkansas Electric Cooperative Corporation – Petition for Declaratory Order, STB Docket No. 35305 (served March 3, 2011) (“Coal Dust I”). However, the Board also found that coal dust is a problem when deposited on rail lines, and that BNSF can establish rules requiring shippers to take reasonable measures to limit coal dust dispersion from trains operated by BNSF. Coal Dust I, slip op. at 2.

In Coal Dust I, the Board found it “problematic” that a train could violate the BNSF-created emission standard even if the shipper used “currently accepted methods of coal dust

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<sup>1</sup> Pursuant to the Protective Order in this proceeding, information in single brackets [ ] has been designated “CONFIDENTIAL” and information in double brackets [[ ]] has been designated “HIGHLY CONFIDENTIAL.”

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suppression,” such as complying with the load-profiling requirement of the tariff and applying a topper agent to the coal load. Coal Dust I, slip op. at 12. The Board stated that a “reasonable rule would provide certainty” to shippers. Coal Dust I, slip op. at 12. In other words, a “cost effective safe harbor” could address the Board’s concern that “the current tariff does not provide shippers with a certain method of compliance that does not depend on the monitoring system.” Coal Dust I, slip op. at 12.

Subsequently, BNSF issued a new coal dust tariff (the “Tariff”)<sup>2</sup> in the summer of 2011, including a provision whereby shippers would be “deemed to be in compliance” if they comply with the load-profiling requirement and use an approved topper agent (a.k.a., surfactant). BNSF set an effective date of October 1, 2011. A few weeks after the new BNSF Tariff was announced, the Western Coal Traffic League (“WCTL”) filed a petition, asking the Board to reopen the proceeding in Docket No. 35305, institute mediation, and stay or enjoin the effective date of the Tariff. The Board rejected the requests for reopening, mediation, and injunctive relief. However, the Board instituted this new declaratory order proceeding in Docket No. 35557 “to consider the reasonableness of the safe harbor provision in the new tariff.” Arkansas Electric Cooperative Corporation – Petition for Declaratory Order, STB Docket No. 35305, slip op. at 2-4 (served Nov. 22, 2011) (“Nov. 22 Decision”). The Board specifically noted that the new proceeding would enable the parties “to address issues...that are related to the reasonableness of the safe harbor provision, such as the absence of penalties for noncompliance, the lack of cost sharing, and shipper liability associated with the use of the BNSF-approved topper agents.” Nov. 22 Decision, slip op. at 4 (n. 5).

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<sup>2</sup> BNSF Price List 6041-B (Item 100).

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After commencement of the declaratory order proceeding, Ameren Missouri filed a notice of intent to participate on December 27, 2011. Ameren Missouri and BNSF obtained documents and information from each other in discovery. A dispute arose in discovery between BNSF and several other parties, including Ameren Missouri, causing the Board to delay this proceeding. See decisions served Feb. 27, 2012, March 9, 2012, and June 25, 2012. However, BNSF and Ameren Missouri later resolved their differences as to the discovery dispute, and BNSF withdrew its Motion to Compel directed at Ameren Missouri and its Petition for Subpoena directed at Ameren Energy Fuels & Services Company. See decision served April 30, 2012.

### **II. Summary of Argument**

Ameren Missouri shares the overall concerns raised by Western Coal Traffic League and Arkansas Electric Cooperative Corporation regarding the unreasonableness of BNSF's coal dust tariff. Ameren Missouri's opening evidence focuses on the particular aspect of the tariff related to the "safe harbor" issue. Ameren Missouri's focus in this opening evidence is not intended to diminish Ameren Missouri's overall concern with the tariff including whether the method imposed by BNSF is an effective method of dust suppression, the lack of cost-sharing for the product and application and the fact that the application of the dust suppressant could result in other fees and costs to shippers. For example, the topper spray and profiling could result in light loading of trains which are penalized by a fee imposed by BNSF.

For a safe harbor to be truly safe, BNSF cannot foist liability and mandatory indemnification upon shippers. However, this is exactly what the new Tariff appears to do. The safe harbor encompassed in Section 3(B) of the Tariff lists (at Appendix B) several "topper agents" selected and approved by BNSF for use in coal dust suppression. Additionally, the Tariff provides that BNSF may approve other compliance methods proposed by shippers. See

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Tariff at Section 4. Despite BNSF selection of the three topper agents in Section 3, and BNSF approval of the other compliance methods in Section 4, the Tariff requires that there be no “adverse[] impact” on any aspect of BNSF property or personnel from the Tariff compliance. BNSF’s inclusion of the “adverse impact” language in the Tariff is in essence a requirement that shippers indemnify BNSF for use of topper agents selected by BNSF, or methods approved by BNSF. This is fundamentally unreasonable and blatantly contravenes the whole concept of a “safe harbor” as envisioned by the Board. Coal Dust I, slip op. at 12 (“A reasonable rule would provide certainty to the shippers”).

The Tariff also conflicts with normal tort law principles. Liability attaches to negligence, and BNSF should be liable if it is negligent.<sup>3</sup> This is the proper allocation of incentives, where the responsibility is placed on the party that is able to control its own behavior and prevent injuries. As drafted, however, the Tariff would effectively make shippers become insurers for acts of BNSF, not to mention acts of God and third parties. This is contrary to sound tort law principles. Furthermore, courts and regulatory agencies have regularly found that significant public policy concerns prohibit mandatory indemnification in tariffs and contracts involving common carriers, utilities, and other public service providers. For these and other reasons described below, the Board should find that, as currently drafted, the Tariff remains an unreasonable practice contrary to Coal Dust I and in violation of 49 USC § 10702.

### **III. The Tariff Unreasonably Requires Indemnification**

The Tariff is found in Item 100 of BNSF Price List 6041-B (last issued Sept. 19, 2011). As currently drafted, the Tariff states that a shipper “will be deemed to be in compliance” with

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<sup>3</sup> In fact, BNSF may be entitled to additional protections under state tort law. For example, BNSF could assert that strict liability should not apply because BNSF is acting to fulfill a public duty imposed upon it as a common carrier. Restatement (2nd), Torts § 521.

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the performance standard if the shipper engages in load profiling and uses one of the topper agents approved by BNSF and listed in Appendix B. See Item 100, Section 3. BNSF has also included a Section 4 in the Tariff, which states that a shipper will also be “deemed to be in compliance” if the shipper follows the load profiling of Section 3(A) and submits a compliance plan to BNSF “demonstrating that” an alternative method “will result in compliance.” The Tariff is silent on who determines if compliance has been “demonstrated” under a proposed alternative method, but it is almost certain that BNSF believes it is the party who determines if compliance has been “demonstrated.” Therefore, the Tariff is comprised of two options, but both are effectively pre-approved by BNSF; a shipper can use a topper agent approved by BNSF and listed in Appendix B, or a shipper can use an alternate method that has also been approved by BNSF.

The key point of the new Tariff is the last sentence of Section 4, which states:

Any product including topper agents, devices or appurtenances utilized by the Shipper or Shipper’s mine agents to control the release of coal dust shall not adversely impact railroad employees, property, locomotives or owned cars.

In other words, despite imposing and approving the compliance plan, BNSF apparently seeks a guarantee from the shipper that BNSF’s requirement will not adversely affect BNSF. The Tariff is silent on the key question of what happens if adverse impact does occur. It seems likely, or at least possible, that BNSF expects shippers to effectively indemnify BNSF in the event of adverse impact, regardless of who or what caused such impact. The Board previously recognized the implicit indemnification in the Tariff when it commenced this proceeding. Nov. 22 Decision, slip op. at 4 (n. 5)(Board states that the proceeding would enable parties “to address issues...that

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are related to the reasonableness of the safe harbor provision, such as...shipper liability associated with the use of the BNSF-approved topper agents.”).<sup>4</sup>

BNSF should be estopped from requiring this type of implicit indemnification where BNSF itself has approved the topper agent or alternative method used by the shipper. Moreover, the indemnification has no exclusion for situations where it was BNSF’s own action, omission, or negligence that caused the adverse impact.<sup>5</sup> This sort of blanket liability acceptance or indemnification is contrary to the whole idea of a safe harbor. By accepting this sort of open-ended responsibility, a shipper is not provided any “certainty” about its costs of transportation or compliance with the Tariff. In Coal Dust I, the Board stated:

A coal dust emission requirement that a shipper may be unable to meet, even if the currently accepted methods of coal dust suppression are employed, is problematic. A reasonable rule would provide certainty to the shippers, such as that in Chicago Board of Trade. There, shippers were required to take steps to address an identified problem, but once they had loaded their cars correctly, they could be certain that the carrier would move their commodity without penalty. The Board does not want to foreclose the use of emission standards in the future, but given the circumstances, we find BNSF’s standards are unreasonable.

Coal Dust I, slip op. at 12 (emphasis added).

The Tariff is so broadly drafted that it could encompass virtually any scenario of negative impact on BNSF property. For example, the “product” or “device” used by the Shipper “to control the release of coal dust” could simply be the Shipper’s rail car. In fact, the “adverse impact” provision of the Tariff also applies to the redesigned profiling and loading requirements.

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<sup>4</sup> The Board is not alone in evaluating the reasonableness of BNSF’s apparent attempt to mandate certain key terms in its transportation contracts. Other federal agencies are taking a hard look at unilaterally-imposed provisions related to financial products. For example, the Consumer Financial Protection Bureau (“CFPB”) recently sought public comment regarding mandatory and onerous arbitration provisions in agreements related to credit cards and other financial products. Notice and Request for Information, Docket No. CFPB-2012-0017, 77 Federal Register 25148 (April 27, 2012).

<sup>5</sup> This is entirely possible if not likely given that these trains are in the exclusive control of BNSF for the vast majority of the transportation.

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Thus, BNSF could interpret the Tariff to require Shippers to compensate BNSF for normal wear and tear (alleged “adverse impact”) on BNSF track or locomotives due to the weight or loading of Shipper rail cars pursuant to the tariff.

Ameren respectfully requests that the Board find that it is an unreasonable practice for a safe harbor to require the shipper to guarantee no “adverse impact” or otherwise indemnify BNSF for following either the method prescribed by BNSF in Item 100 or another method approved by BNSF. Thus, the Board should find that the last sentence of Section 4 of Item 100 is an unreasonable practice.

#### **IV. Public Policy Concerns Show the Tariff is Unreasonable**

The Tariff imputes indemnification in every conceivable scenario. Therefore, it necessarily includes situations where BNSF itself negligently causes the adverse impact. This is contrary to established jurisprudence across many disciplines and many types of industries, including communications, energy, transportation, and others. By its very nature, a tariff is generally non-negotiable – tariffs are unilaterally imposed by common carriers. Yet, even in the realm of contracts, which are normally the result of mutual negotiation,<sup>6</sup> public policy concerns prohibit indemnification for negligence where the party seeking indemnification is a common carrier, utility, or other public service provider. The Restatement (2nd) of Contracts states that:

A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if...the term exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty.

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<sup>6</sup> II

II Ameren Missouri submitted its compliance plan to BNSF and has started spraying at certain mines notwithstanding the fact that BNSF has refused to address Ameren Missouri’s concerns raised in the Coal Dust I and II proceedings.

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Restatement (2nd), Contracts § 195(2)(b). See also id. at § 195, comment a. This principle has been enforced and upheld by courts and other authorities across the country. See, e.g., Santa Fe, Prescott & Phoenix Railway Company v. Grant Brothers Construction Company, 228 U.S. 177, 184 (1913) (“It is the established doctrine of this court that common carriers cannot secure immunity from liability for their negligence by any sort of stipulation.”). See also Richardson-Wayland Electrical Corporation v. Virginia Electric and Power Company, 247 S.E.2d 465 (Va. 1978); Tunkl v. Regents of The University of California, 383 P.2d 441 (Cal. 1963); Wagenblast v. Odessa School District, 758 P.2d 968 (Wash. 1988); Somerville v. Pennsylvania Railroad Company, 155 S.E.2d 865 (W.Va. 1967); Pennsylvania Railroad Company v. Kent, 198 N.E.2d 615 (Ct. App. Ind. 1964).

The U.S. Supreme Court has justified this “general rule long used by courts” by reference to two points: first, the need to “discourage negligence by making wrongdoers pay damages, and, second, in order to “protect those in need of goods or services from being overreached by others who have power to drive hard bargains.” Bisso v. Inland Waterways Corporation, 349 U.S. 85, 90-91 (1955). Recent court decisions have continued to hold that contracts may not bar liability for negligence by common carriers or other public service providers. See, e.g., Entergy Mississippi, Inc. v. Burdette Gin Company, 726 So.2d 1202, 1206 (Miss. 1998) (“In contracts between the utility and its customers, where the utility’s public duty to exercise a very high degree of care is invoked, we hold that indemnity provisions protecting the utility from its own negligence are void as a matter of public policy.”). Cf. Valhal Corporation v. Sullivan Associates, Inc., 44 F.3d 195, 206 (3rd Cir. 1995) (public policy concerns may invalidate waiver

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or release in contract involving common carriers and similar entities). The prohibition is especially relevant where “the customer has only one choice.” Entergy, 726 So.2d at 1206.<sup>7</sup>

In light of the fact that such a policy exists for contracts – which may include some ability of the customer to negotiate terms with the service provider – the policy should be even stronger for tariffs – which are unilaterally imposed by the service provider. Research reveals that authorities have implemented just such a policy in the tariff arena. The Federal Energy Regulatory Commission (“FERC”) has an established policy that pipeline companies cannot file tariffs that would bar liability for the pipelines’ own negligence:

The Commission has consistently held that a simple negligence standard is appropriate for the liability and indemnification provisions of open access tariffs on the ground that all parties, including the pipeline, should be liable for their negligent acts....This will prevent Cameron [the pipeline] from being insulated from loss or damage attributable to its own simple or ordinary negligence.

Cameron Interstate Pipeline, LLC, FERC Docket Nos. CP05-119-001 and CP05-121-001, 115

FERC ¶61,229 at p. 13 (May 22, 2006). Cf. Common Carrier Obligation of Railroads –

Transportation of Hazardous Materials, STB Docket No. 677 (Sub-No. 1), slip op. at 4 (n. 8)

(served April 15, 2011) (Board refuses to condone railroads’ attempt to establish specific liability

terms for hazardous materials as a prerequisite for rail service.); West Point Relocation, Inc. and

Eli Cohen – Petition for Declaratory Order, STB Docket No. 35290 (served Oct. 29, 2010)

(Board finds tariff imposing liability on principals of shipper party to be unreasonable practice.).

Courts, too, have made similar findings regarding tariffs of public service providers. See, e.g.,

Straus & Company v. Canadian Pacific Railway Company, 254 N.Y. 407 (1930); Lee v.

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<sup>7</sup> While some shippers of PRB coal can utilize either BNSF or Union Pacific Railroad Company (“UP”), the truth of the matter is that there is no actual choice regarding the coal dust tariff because UP has indicated that it will likely implement a tariff that mirrors the BNSF provisions eventually approved by the Board See, e.g., UP Rebuttal, STB Docket No. 35305, at p. 34 (filed June 4, 2010).

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Consolidated Edison Co. of New York, 407 N.Y.S.2d 777 (New York County, Civil Court 1978).

In contrast, courts have upheld limitations of liability in tariffs when certain limited circumstances exist, such as: (1) no inequality of bargaining power; (2) not a concentrated market; and (3) customer could have paid an additional fee for more coverage. Canarctic Shipping Company, Limited v. Great Lakes Towing Company, 670 F.2d 61, 63 (6th Cir. 1982). Of course, none of the three factors mentioned in Canarctic exist with respect to BNSF's coal dust tariff; accordingly, the quasi-indemnification sought by BNSF is unreasonable.

Despite this clear precedence for mutually-negotiated contracts, BNSF's unilaterally-imposed tariff has no exclusion for BNSF negligence. It requires the Shipper to accept all responsibility for all adverse impact associated with attempting to comply with the coal dust tariff. The Board should find that the Tariff is an unreasonable practice because it does not have an exclusion for BNSF negligence or other adverse impact caused by BNSF.

**A. The tariff is still unreasonable even if it excludes situations where BNSF was negligent or otherwise caused the adverse impact**

Even if the Tariff excluded situations where BNSF was negligent or BNSF otherwise caused the adverse impact, any mandatory indemnification provision should also be found unreasonable. Equal bargaining power does not exist between shippers and railroads. A shipper with a facility sole-served by BNSF does not have the option of using other railroads. Instead of unilaterally-imposed indemnification in a tariff, state law regarding tort liability should govern who is responsible if "adverse impact" occurs. State tort law doctrines are based upon important societal principles such as: (1) responsibility should be assigned to the party at fault; and (2) responsibility should be assigned to the party best able to eliminate or prevent injuries. Congress

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recently re-affirmed the value of keeping railroads subject to normal state law tort principles. See 49 USC § 20106(b), added in § 1528 of P.L. 110-53 (Aug. 3, 2007).

Obviously, no indemnification should be required where the shipper itself is not negligent. Each party should be responsible for its own negligence. In the rare circumstance where neither the shipper or BNSF is at fault, the parties should allow the implementation of state law to determine who is responsible.

### **B. BNSF played a large role in the approval of topper agents**

Indemnification of any sort would be inequitable due to the simple fact that it was BNSF that selected the approved topper agents to include in Appendix B of the Tariff, and BNSF will be the one providing unilateral approval of the alternate compliance methods described in Section 4 of the Tariff. Moreover, indemnification would be inequitable due to the large role played by BNSF in testing and approving the topper agents eventually listed by BNSF in Appendix B. First, BNSF initiated, managed, and otherwise exercised considerable control over the Super Trial of topper agents during 2010. See, e.g., BNSF Reply to Petition at p. 7-8, STB Docket No. 35305 (filed Aug. 23, 2011) (stating that BNSF “facilitated” the Super Trial and that, once the trial ended, BNSF revealed “test results to all participants”). Moreover, BNSF selected Simpson Weather Associates, Inc. (“SWA”) to provide technical support for the Super Trial.

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Given BNSF's large role in the Super Trial, not to mention BNSF's selection of the approved topper agents and/or any alternative dust suppression method, BNSF should be responsible for its own acts and negligence and applicable law already in place should determine the liability for acts of God and third parties.

**V. CONCLUSION.**

For all the reasons described herein, the Board should find that BNSF's Tariff is an unreasonable practice in violation of 49 USC § 10702.

Respectfully submitted,



Sandra L. Brown  
David E. Benz  
Thompson Hine LLP  
1919 M Street, N.W., Suite 700  
Washington, D.C. 20036  
(202) 263-4101  
sandy.brown@thompsonhine.com

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

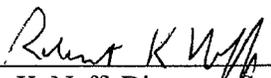
James A. Sobule  
Deputy General Counsel  
Ameren Services Company  
1901 Chouteau Avenue  
St. Louis, MO 63103  
(314) 554-2276

October 1, 2012

**VERIFICATION**

I Robert K. Neff, pursuant to 49 CFR § 1104.5 verify under penalty of perjury that the foregoing is true and correct based upon my information and belief. Further I certify that I am qualified and authorized to file this Opening Evidence.

Executed on October 1, 2012.

  
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Robert K. Neff, Director, Coal Supply  
*Union Electric Company d/b/a as UE or  
Ameren Missouri*

**Exhibits 1-4**  
**REDACTED**

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**CERTIFICATE OF SERVICE**

I hereby certify that this 1st day of October 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: <a href="mailto:twilcox@gkglaw.com">twilcox@gkglaw.com</a></p> <p><i>Counsel for The National Coal Transportation Association</i></p>	<p>Michael L. Rosenthal Covington &amp; Burling LLP 1201 Pennsylvania Avenue NW Washington, DC 20004-2401 E-mail: <a href="mailto:mrosenthal@cov.com">mrosenthal@cov.com</a></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: <a href="mailto:christopher.perry@dot.gov">christopher.perry@dot.gov</a></p>	<p>Samuel M. Sipe, Jr. Anthony J. LaRocca Kathryn J. Gainey Steptoe &amp; Johnson LLP 1330 Connecticut Ave. NW Washington, DC 20036 E-mail: <a href="mailto:ssipe@steptoe.com">ssipe@steptoe.com</a></p> <p><i>Counsel for BNSF Railway Company</i></p>
<p>Eric Von Salzen McLeod, Watkinson &amp; Miller One Massachusetts Avenue NW Suite 800 Washington, DC 20001 E-mail: <a href="mailto:evonsalzen@mwmlaw.com">evonsalzen@mwmlaw.com</a></p> <p><i>Counsel for Arkansas Electric Cooperative Corporation</i></p>	<p>John H. LeSeur Andrew B. Kolesar III Peter A. Pfol William Slover Slover &amp; Loftus 1224 Seventeenth Street NW Washington, DC 20036 E-mail: <a href="mailto:jhl@sloverandloftus.com">jhl@sloverandloftus.com</a></p> <p><i>Counsel for Western Coal Traffic League, American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association</i></p>
<p>Andrew P. Goldstein McCarthy, Sweeney &amp; Harkaway, PC 1825 K Street, NW Suite 700 Washington, DC 20006 E-mail: <a href="mailto:apg@mshpc.com">apg@mshpc.com</a></p>	<p>Honorable Rick Larsen U.S. House of Representatives 108 Cannon House Office Building Washington, DC 20515</p>

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<p>Terry C. Whiteside Whiteside &amp; Associates 3203 3rd Avenue, North Suite 301 Billings, MT 59101 E-mail: <a href="mailto:twhitesd@wtp.net">twhitesd@wtp.net</a></p>	<p>Louis P. Warchot Association of American Railroads 425 3rd Street, SW, Suite 1000 Washington, DC 20024 E-mail: <a href="mailto:lwarchot@aar.org">lwarchot@aar.org</a></p>
<p>Robert S. Rivkin U.S. Department of Transportation 1200 New Jersey Avenue, SE Washington, DC 20590</p>	

  
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David E. Benz