

BEFORE THE
SURFACE TRANSPORTATION BOARD

WASHINGTON, D.C.

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ENTERED

Office of Proceedings
December 17, 2012

Part of
Public Record

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Reasonableness of BNSF
Railway Company Coal Dust
Mitigation Tariff Provisions
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STB No. FD 35557

REBUTTAL COMMENTS OF THE
UNITED STATES DEPARTMENT OF TRANSPORTATION

Pursuant to the Board's decisions of November 21, 2011 and July 30, 2012, the United States Department of Transportation (Department or DOT) hereby submits its rebuttal comments in this matter. The Department appreciates the Board's continued attention to the important issues raised in this proceeding.

The Department commented at the opening stage, reiterating the safety concerns that it had raised in *Coal Dust I*;¹ offering the preliminary view that the BNSF "safe harbor" appeared reasonable; and expressing the Department's interest in hearing from other interested parties. See Opening Comments of the United States Department of Transportation (Oct. 1, 2012) ("DOT Opening Comments"). Upon consideration of the other parties' submissions, the Department wishes to bring to the Board's attention the following additional points.

First, the Department is concerned about the attempt made by some of the parties, including Arkansas Electric Cooperative Corporation (AECC), to broaden the scope of this proceeding beyond what the Board intended. The Board already concluded in *Coal Dust I* "that

¹ *Ark. Elec. Coop. Corp.—Petition for Declaratory Order*, Docket No. FD 35305 (Decided Mar. 2, 2011). For convenience, the Department refers to the Board's decision in FD 35305, dated March 2, 2011, as the "*Coal Dust I* Decision."

coal dust is a particularly harmful contaminant of ballast that requires corrective action,” and that railroads may require shippers to take reasonable measures to contain coal dust emissions, instead of merely relying upon enhanced maintenance. *Coal Dust I* Decision at 7, 9. The Board instituted this proceeding to consider a narrower question, *i.e.*, “the reasonableness of the safe harbor provision in the new [BNSF] tariff.” Decision, *Ark. Elec. Coop. Corp.–Petition for Declaratory Order*, Docket No. FD 35305, *Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, Docket No. FD 35557, at 4 (Nov. 21, 2011) (“11/21/11 Decision”). Among other things, the Board invited views relating to concerns that coal shippers have raised about the administration of the safe harbor, including “the absence of penalties for noncompliance, the lack of cost sharing, and shipper liability associated with the use of the BNSF-approved topper agents.” *Id.* at 4 n.5. However, the Board did *not* invite the parties to reopen the docket in *Coal Dust I* for the purpose of reconsidering that proceeding’s evidence or to revisit the threshold determination that coal dust threatens rail safety.² In the Department’s view, the Board should continue to focus its inquiry upon the discrete question presented at the outset of the proceeding.

Second, the Department particularly disagrees with AECC’s attempt to second-guess the Department’s evidence, and the Board’s conclusions, about the safety implications of coal dust. AECC contends that the Department errs in continuing to characterize coal dust as a particularly harmful ballast foulant, and that the Department’s evidence is insufficient to support such an

² Indeed, the Board denied a petition to reopen the proceeding in *Coal Dust I*, opting instead to initiate the current proceeding. 11/21/11 Decision at 3-4. Furthermore, in denying AECC’s motion to compel discovery requests, the Board noted that it is “leaving settled its conclusions from *Coal Dust I*,” including the Board’s prior determinations on (1) “coal dust’s harmful effects”; (2) “coal dust containment versus maintenance”; and (3) “the permissibility of reasonable coal loading requirements.” Decision, *Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, Docket No. FD 35557, at 2 (Mar. 19, 2012).

assertion. AECC Reply Evidence and Argument at 19-22 (Nov. 15, 2012) (“AECC Reply”).³ But as AECC recognizes, the Department did not submit new evidence in its opening submission in this proceeding. *Id.* at 20. Instead, the Department merely referred the Board to its submissions in *Coal Dust I*, reiterated the Board’s conclusions from that proceeding, and advised the Board that the Department remains interested in this proceeding due to ongoing concerns about the safety implications of coal dust. DOT Opening Comments at 4-6.⁴

In *Coal Dust I*, the Board received extensive evidence on the problem of coal dust and its safety implications. AECC submitted evidence and participated in the hearing before the Board, just as the Department and various other parties did. *See* Tr. of Hrg. in *Coal Dust I* at 158-80 (remarks of Eric Von Salzen and Steve Sharp on behalf of AECC), 10-37 (remarks of Paul Samuel Smith and Dr. Ted Sussman on behalf of DOT) (July 29, 2010). The Board asked a number of questions of those appearing for DOT about coal dust safety issues. *Id.* at 10-37. The Board ultimately “[found] that the studies done by FRA and BNSF provide sufficient evidence for [the Board’s] conclusions about coal dust,” even if FRA “accident reports related to the 2005 derailments [on the Joint Line at the Powder River Basin] do not refer to coal dust” specifically. *Coal Dust I* Decision at 7. Thus, the Board had ample opportunity to consider the impact of coal dust upon rail safety and to probe the parties’ evidence, and ultimately decided that “the weight of the evidence shows that coal dust is a harmful foulant that could contribute to future accidents

³ In *Coal Dust I*, the Department contended that “FRA’s experience,” along with various studies from the DOT Volpe National Transportation Systems Center relating to track buckling and ballast conditions, as well as “the relevant literature on the subject[,] confirm the particularly destructive qualities of coal dust on ballast.” Rebuttal Comments of the United States Department of Transportation in *Coal Dust I* at 2 & n.2 (June 4, 2010) (DOT *Coal Dust I* Rebuttal Comments).

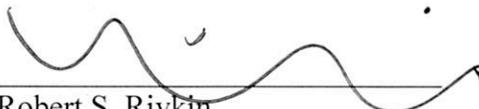
⁴ The Department provided to AECC an updated link to a website containing various studies relevant to this proceeding, which the Department had cited in its Rebuttal Comments in *Coal Dust I*. *See* <http://www.volpe.dot.gov/coi/pis/pubs-buckle.html> (listing studies); DOT *Coal Dust I* Rebuttal Comments at 2 & n.2.

by destabilizing tracks.” *Id.* at 8. In the Department’s view, AECC fails to offer a persuasive reason why the Board should now revisit these settled matters.

Finally, to the extent that the Board remains interested in these safety issues, the Department wishes to advise the Board that it continues to hold the same concerns about the problem of coal dust that it has already expressed in prior submissions, and at the hearing that the Board conducted in *Coal Dust I*. The Department and FRA will continue to enforce their regulations and otherwise take actions necessary to ensure the safety of rail travel.

December 17, 2012

Respectfully submitted,



Robert S. Rivkin
General Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2012, I caused a copy of the foregoing document to be served upon all Parties of Record in this proceeding.

Handwritten signature of Christopher S. Perry in cursive script, underlined.

Christopher S. Perry