

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

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

**OPENING SUBMISSION OF
THE NATIONAL COAL TRANSPORTATION ASSOCIATION**

Pursuant to the revised procedural schedule established in this proceeding by the Board on July 31, 2012 the National Coal Transportation Association (“NCTA”) hereby submits its Opening Submission.

I.

DESCRIPTION AND INTEREST OF NCTA

NCTA is a non-profit association based in Littleton, Colorado of more than 145 members consisting of producers and consumers of coal mined in North America and other entities which are interested in coal’s transportation and related issues. Over half of NCTA’s members are direct consumers of coal, and NCTA’s members include some of the largest North American coal mining companies. Relevant to this proceeding, NCTA’s members collectively produce and ship hundreds of millions of tons of coal from the Powder River Basin in Wyoming (“PRB”) each year. Other NCTA members include railcar equipment and parts manufacturers, terminal operators, providers of ancillary services to shippers, and energy industry consultants. Entities and their affiliates whose primary business is providing transportation of coal by rail, barge,

truck, pipeline slurry, or any other mode are not in the field of NCTA membership, but such companies are an integral part of the NCTA mission; and their participation is the cornerstone of success in NCTA's committee efforts.

NCTA views its role in the coal industry as providing education and facilitating the resolution of coal transportation issues in order to serve the needs of the general public, industry, and all modes of transportation. This is accomplished through the sponsoring of educational forums, and providing opportunities for the lawful exchange of ideas and knowledge with all elements of the coal production, transportation, and consumption infrastructure. In addition to holding general bi-annual conferences, NCTA has three active committees made up of NCTA member and non-member companies: The Eastern and Western Logistics & Planning Committees and the Operations & Maintenance Committee, the latter of which addresses private railcar owner technology and maintenance. These committees work throughout the year to address various industry issues, which have included the ballast fouling and coal dust mitigation issues being addressed in this proceeding. NCTA and its members have been intimately involved in the coal and utility industry discussions and analysis that began in the fall of 2005 concerning railroad ballast fouling.

II.

BACKGROUND

A. Finance Docket No. 35305 and the *Coal Dust I* Decision

NCTA participated as a Party of Record in Finance Docket No. 35305, *Arkansas Electric Power Cooperative Corporation – Petition for a Declaratory Order*. That proceeding involved a challenge to the reasonableness of coal dust mitigation provisions adopted by BNSF Railway Company (“BNSF”) in Items 100 and 101 of BNSF Price List 6041-B in May of 2009.

NCTA participated in Finance Docket No. 35305 for the limited purpose of adding to the record NCTA's review of the history of the industry discussions with BNSF about the fouled rail ballast/coal dust debate that began shortly after the derailments that occurred on segments of the PRB Joint Line in May of 2005. NCTA also provided the Board with NCTA's Railcar Coal Loss and Suppressant Effectiveness Study ("RCLSE"). This study was completed on August 3, 2009, and concluded, in part, that the 85% emission control standard and the accompanying Integrated Dust Value "IDV.2" levels invented by BNSF and its consultant had technical, statistical, and substantive deficiencies. NCTA has not performed or commissioned any additional studies on coal dust controls or standards since the RCLSE study. Although BNSF contributed in-kind support to the "dynamic" portion of the RCLSE, BNSF later conducted a second "dynamic" testing and held all data from the tests as confidential and did not share the data or results from this testing with NCTA.

On March 3, 2011, the Board issued a decision in Finance Docket No. 35305 (*Coal Dust I*) which held that Items 100 and 101, when considered as a whole, were not reasonable and therefore violated 49 U.S.C. §10702.¹ One reason for this finding was that BNSF had provided no certainty to shippers that they could meet the standard even if they used currently accepted coal suppression methods, in large part because there were serious questions about the technical aspects of the proprietary "IDV.2" monitoring and measurement system developed by BNSF to determine compliance with its "standard." *Coal Dust I* at 13-14. The Board also expressed its concern that BNSF had failed to provide an activity-based safe harbor, and that the tariff did not

¹ Under 10702, rail carriers providing transportation or service subject to the STB's jurisdiction "shall establish reasonable . . . (2) rules and practices on matters related to that transportation or service."

explain what consequences shippers would face if they were deemed by BNSF to have violated the standard.

While the Board concluded in *Coal Dust I* that Items 100 and 101 were unreasonable, it nevertheless also concluded that BNSF and other railroads could “take reasonable steps to address loss from the open tops of cars,” *Id.* at 6-8, by “establish[ing] coal loading requirements, subject to the reasonableness requirements of 49 U.S.C. 10702.” *Id.* at 11. That being said, however, the Board stated its preference that industry stakeholders develop a solution to the coal dust issue, stating “[i]n light of the importance of the coal transportation supply chain to the national and world economy, we are confident that railroads and coal shippers can develop reasonable solutions to the problems presented in this case.” *Id.* at 14. The Board also expressed its disappointment that BNSF had not yet provided “an activity-based safe harbor” by which “shippers that use an approved emission control method contained in the tariff would be considered in compliance with the tariff, regardless of monitoring system results.” *Id.* at 12. The Board also declined to address several other critical issues related to the emission standard referenced below because it found the standard to be unreasonable.

B. Revised Tariff 6041-B, Item 100 and the *Coal Dust II* Decision

Notwithstanding the Board’s preference for an industry solution to the coal dust dispute, NCTA is not aware of any attempt by BNSF or other railroads collaborating with shippers and miners to develop one after *Coal Dust I*. Instead, on July 20, 2011, BNSF unilaterally issued revised coal dust emission control rules in BNSF Price List 6041-B, Item 100. The issuance of the revised provision prompted a request to reopen Finance Docket No. 35305 and to stay or enjoin the effective date of the revised tariff, and also to attempt to resolve the issues raised by

the new tariff provision through Board supervised mediation.² In part because of BNSF's representations that it would provide 60 days' notice before it attempted to take any enforcement actions, the Board denied the stay request, and then later instituted this declaratory order proceeding under 49 U.S.C. §721 and 5 U.S.C §554(e) to consider the reasonableness of the safe harbor provision in the new tariff. ("*Coal Dust II*").³

The "safe harbor" component of Item 100 is the primary focus of this proceeding, but the Board also stated that this proceeding will allow parties to address other issues related to the reasonableness of the safe harbor provision that the Board did not address in *Coal Dust I*, "such as [1] the absence of penalties for noncompliance, [2] the lack of cost sharing, and [3] shipper liability associated with the use of the BNSF-approved topper agents." *Coal Dust II* at 4, note 5. The Board reaffirmed its interest in exploring these three issues in its June 25, 2012 Decision in this Docket.

C. UP's Adoption of the Provisions of Item 100

Shortly after *Coal Dust I*, UP announced that "[t]he Board's discussion of the standards it considered as it evaluated the BNSF rule will guide us as we continue to develop the Union Pacific coal dust standard." March 25, 2011 "Coal Customer Letter" from Douglas J. Glass, UP Vice President & General Manager, Energy. However, UP eventually abandoned the development of its own standard and adopted the revised BNSF tariff provision for its customers, effective October 1, 2011. UP accomplished this by issuing two very similar letters to its

² *Petition to Reopen and for Injunctive Relief Pending Board-Supervised Mediation*, filed by the Western Coal Traffic League on August 12, 2011.

³ Finance Docket No. 35305, *Arkansas Electric Power Cooperative Corporation – Petition for a Declaratory Order*; Finance Docket No. 35305 and Finance Docket No. 35557, *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions* (single decision served November 22, 2011)

customers in early September, 2011, which were accompanied by the addition of Items 215 and 216 to UP Circular 6603-C.⁴ The first letter, directed to UP customers who did not ship via contracts with UP, informed them that “UP is adopting a coal dust standard that will apply to your traffic.” The adopted standard was Item 100, the contents of which BNSF had apparently also adopted as an operating rule for the Powder River Basin Joint Line in addition to adding it to BNSF Price List 6041-B. In its letters to its customers, UP stated that the Joint Line operating rules applied to trains operated by UP, and that UP depended on “shippers and their loading operators to comply with those standards.” UP further asked its customers for their plans for complying with the BNSF standard by October 7, 2011.

For its customers shipping pursuant to contracts, UP stopped short of stating UP had adopted a coal dust standard that would apply to their traffic, but nevertheless also notified them of the BNSF operating rule and that UP expected its shippers and their loading operators to comply with the BNSF operating rules. While UP indicated its expectation that its contract customers were also required to comply with the BNSF operating rule, it made a “recommendation” that these customers comply with the BNSF standard by adopting the loading practices in Item 100.⁵ In any event, UP stated that all new contracts would be subject to the BNSF coal dust standard as contained in the BNSF operating rule.

⁴ NCTA was furnished copies of the letters, which were dated September 9, 2011 and addressed to “Dear PRB Coal Shipper,” and which were not designated confidential, by UP representatives and from member companies of NCTA who received such letters.

⁵ The distinction between “adopting” a coal dust standard for common carrier traffic and making a “recommendation” for contract customers to meet the standard by complying with Item 100 appears to be based at least in part on the apparent contractual right of some UP customers to renegotiate or terminate their transportation contracts if UP took certain actions concerning coal dust controls, since the letter to UP contract customers stated “This recommendation is not a notice that triggers the right to renegotiate if your contract includes a Coal Dust provision with the right to renegotiate and terminate.” September 9, 2011 Letter to “PRB Coal Customer” from Douglas J. Glass, entitled *Coal Dust Mitigation Recommendation*, at 1.

As stated above, the coal dust rules announced by UP were set forth in UP Circular 6603-C, Items 215 and 216, which in September of 2011 restated all of the key terms of Item 100. UP recently updated Items 215 and 216 to reflect changes BNSF made to Item 100. It is therefore clear that both UP and BNSF have adopted and expect all PRB coal shippers to comply with the revised BNSF coal dust control standard and other provisions set forth in Item 100, so the STB's disposition of the issues in this proceeding will affect the shippers and mine operators associated with both railroads. NCTA is not addressing in this submission the validity of UP's assertions that shippers and mine operators, as opposed to UP, are responsible for complying with BNSF Joint Line operating rules when only UP and BNSF are parties to the Joint Line Agreement. Nor is NCTA addressing in this submission the validity of UP's assertions that customers with common carrier or contractual arrangements with UP to transport their coal can be legally required to comply with tariff provisions and/or operating rules established by BNSF, when BNSF provides no rail transportation to that customer.

III.

ARGUMENT

A. BNSF has Still Not Established an Emissions Standard that Provides Sufficient Certainty to Coal Shippers

In commencing this proceeding the Board focused parties primarily on the reasonableness of the "safe harbor" provision in Item 100, paragraph 3.B. According to this provision, a shipper can be "deemed to be in compliance" with the "loading requirement" set out in paragraph 2 of Item 100 if it satisfies the requirements of paragraph 3. As for the applicable "loading requirement" from which safe harbor can be sought, paragraph 2 states that any shipper loading coal at any Montana or Wyoming mine "must take measures to load coal in such a way

that any loss in transit of coal dust from the shipper's loaded cars will be reduced by at least 85% as compared to loss in transit of coal dust from coal cars where no remedial measures have been taken." As with prior Items 100 and 101, however, paragraph 2 does not set out a measurable standard or means by which a shipper could determine whether it needs to take any steps to control coal dust emissions under Item 100, let alone whether it needs to seek "safe harbor" from the standard. Specifically, the term "remedial measures" is not defined, leaving the shipper with no established starting point of the amount of coal dust loss "where no remedial measures have been taken," which is the starting point for meeting the required reduction "by at least 85%." For example, NCTA is aware that some of its members, independent of BNSF's actions, have taken measures such as profiling their loads, increasing the size consist of coal being shipped, and even spraying their loads with chemical suppressants. These are arguably "remedial measures" since they are modifications of prior practices that are intended to or in fact reduce coal dust emissions. In such cases, does the starting point of measuring coal loss - "where no remedial measures have been taken" - require the shipper to halt all measures it is taking to control coal loss, *then* measure the loss, *then* reduce *that* loss by at least 85%? If so, for what period of time? Moreover, Item 100 provides no guidance or criteria on how a shipper, who has no control of its loaded railcars once they are in the possession of BNSF, can measure coal loss at any stage of this process in order to determine whether it has indeed reduced its coal loss "by at least 85%." More significantly, Item 100 provides no explanation or criteria as to how BNSF would demonstrate the required "at least 85 percent" reduction has not been met in the event of a dispute with one of its customers over compliance with the standard or how a customer would defend such a charge.

Since the revised BNSF “reduced by at least 85%” standard in Paragraph 2 (1) lacks defined criteria as to the starting point from which to reduce coal losses; and (2) also lacks criteria explaining how BNSF would measure coal dust loss to determine whether the baseline losses had been reduced “by at least 85%,” the primary standard from which safe harbor is to be sought is no more certain than the standard the Board found to be unreasonable in *Coal Dust I*. As such, the “safe harbor” provision of paragraph 3 of Item 100 is not really a safe harbor as that term is typically used. Rather, the uncertainty of the base “by at least 85%” standard forces shippers, in the face of uncertain penalties for non-compliance, to default to a “safe harbor” mechanism that it is not even clear they need to employ.

B. Item 100 Places Unreasonable Burdens on Shippers Who Desire to Use Alternatives to BNSF’s “Safe Harbor” Preferences

As written, paragraph 3.B. of Item 100 requires shippers seeking safe harbor from the reduced “by at least 85%” standard to utilize an “acceptable topper agent,” which is defined as “one that has been shown to reduce coal loss in transit by 85%.” Shippers are given the choice of using specific brands of chemical sprays selected and approved in advance by BNSF and listed in Appendix B, or other topper agents that the shipper “can demonstrate that appropriate testing has shown that the topper agent achieves compliance with this item,” *i.e.* that the agent has been shown to reduce coal dust loss in transit by at least 85%. However, Item 100 provides no guidance or criteria as to what BNSF would consider “appropriate testing” of a shipper’s coal trains to enable the use of an alternative topper agent. Given NCTA’s experience with testing coal dust control methods and chemicals in the RCLSE, the costs and resources required for “appropriate testing,” particularly when this determination is in the sole discretion of BNSF, could be significant. To the extent Item 100 does not provide specific guidance and criteria on

the testing parameters and costs of alternative topper agents or other methods, it is unreasonable.

C. Other Deficiencies in the Original Version of the Tariff Provisions Remain

1. Item 100 Still Lacks any Penalties for Non-Compliance

Although BNSF first raised the prospect of coal dust emissions standards at a NCTA meeting in 2005, BNSF has never proposed specific penalties for not complying with its “emission standard.” The lack of penalties or enforcement provisions in the original version of Tariff Items 100 and 101 was a key reason for the Board deciding that these provisions were an unreasonable practice. Even if the Board ultimately finds that the new “safe harbor” feature of Item 100 is reasonable, it should not allow BNSF to implement Item 100 until BNSF defines its specific proposed enforcement mechanisms and they are also reviewed by the Board.

Moreover, the Board should take the additional step in this proceeding of affirmatively declaring that the penalties for noncompliance may not include the refusal of service except under very narrowly defined standards, such as the repeated, willful refusal to comply with a coal dust control standard the Board permits BNSF to adopt. Specifically, the threat of refusal of service for any violation of the BNSF’s standard has been a concern of coal mines and utilities from the outset of this issue, for obvious reasons. The consequences of loaded unit trains of coal not being delivered to coal-fired electric generating facilities are potentially devastating for a utility and its ratepayers. In Finance Docket No. 35305 parties informed the Board of vague threats by BNSF that it would refuse to move a shipper’s trains if BNSF determined the shipper was not in compliance, and argued that the refusal of BNSF to provide service to shippers for any failure to comply with the tariff provisions would violate BNSF’s

common carrier obligation under 49 U.S.C. §11101.⁶ However, the Board did “not reach a decision on this particular issue as the finding that the tariff is unreasonable renders it unnecessary.” *Coal Dust I* at 2, note 4. The Board should reach this issue in this proceeding, and establish clear criteria for when the drastic step of refusing service may be considered an appropriate penalty for non-compliance with a coal dust control rule established by a railroad.

In the first place, denial of rail service under these circumstances is a serious penalty that is disproportionate to the nature of the transgression. The Interstate Commerce Commission (“ICC”), while encouraging of the carriers’ desire to ensure safe operations, nevertheless weighed the proportionality of the safety benefits to the economic burden on the shippers who eventually bore the consequences of the railroads’ initiatives. For instance, in *Trainload Rates on Radioactive Materials, Eastern Railroads*, 362 I.C.C. 756 (1980) (“*Eastern Railroads*”), a number of eastern railroads claimed that it was essential that special trains and special precautions be employed in the transportation of nuclear wastes. The ICC noted that it appreciated the desire to provide some added measure of safety where radioactive materials were involved and that it was reluctant to interfere with the management judgment as to how to conduct railroad operations. The ICC, however, stated that it was not prepared to allow the railroads to require a service that was several times as costly as regular service without commensurate safety benefits. In holding so, the ICC was evaluating whether the need for special handling of radioactive materials was sufficiently great to justify the considerable expense to shipper, and concluded that it was not. The ICC, therefore, found that the special

⁶ See, e.g., Finance Docket No. 35305, *Arkansas Electric Cooperative Corporation’s Opening Evidence and Argument* at 16; *Opening Evidence of Ameren Energy Fuels and Services Company* at 5; *Opening Evidence and Argument of Western Coal Traffic League and Concerned Captive Coal Shippers* at 52-55.

train requirement was wasteful transportation and an unreasonable practice in violation of Section 10701(a).

In *Eastern Railroad*, the ICC evidently was concerned with the economic burden that the shippers would have to sustain if the railroads were successful in the imposition of their special train requirement, in proportion to the benefit of the requirement. Here, the economic burden resulting from BNSF's refusal to provide transportation to shippers who do not comply with Tariff Item 100 would far outweigh the safety benefits that compliance with the emission standard could achieve. Penalties should be proportionate to the severity of the violation.

Second, other ICC precedent indicates that railroads are only justified in refusing to accept a shipment in cases where transporting the shipment would pose an immediate safety threat from the commodity falling off the train. Examples include instances where commodities such as scrap metal being over loaded in open top cars to the point of being "liable to fall off the car or otherwise interfere with safe operation." *Waste Material Dealers Assn. v. Chicago, R.I. & P. Ry Co.*, 226 ICC 683, 688 (1938). *See also, Consignee's Obligation to Unload Railcars*, 340 ICC 405, 410 (1972)(Quoting Rule 5 of the Uniform Freight Classification); *Coal Dust I* at 11, note 40. Coal dust from a single train or even several trains does not make a track or transportation immediately unsafe, but may do so over a long period of time, especially if the track is not properly maintained. Thus, a particular train of a rail shipper, or even a series of trains, does not pose an immediate threat to safety of the tracks. For these reasons, the extreme penalty of refusal of service should either not be permitted at all in cases of coal dust emissions, or it should only be permitted in very narrow and specifically defined circumstances which the Board should establish in this proceeding. Otherwise, disputes over the appropriateness of BNSF's efforts to enforce its standard by refusing to transport loaded coal trains will certainly

occur. *See, e.g.*, UP Opening Evidence in Finance Docket No. 35305: “Should BNSF modify its rules in the future to provide that it can stop trains or otherwise begin to interfere with their operation solely because they are emitting too much coal dust, and then apply the rule in a manner that interferes with Union Pacific’s contractual or common carrier obligations to its customers, Union Pacific will seek immediate relief, challenging the rules and their application.” Finance Docket 35305, *UP Opening Evidence* at 20.

2. **The Board Should Decide the Cost-Sharing Issues Presented to it in *Coal Dust I*.**

A significant and contentious issue that was extensively briefed by the parties in *Coal Dust I* but not decided by the Board was the allocation of the costs and benefits of imposing coal dust control requirements on rail shippers and other non-railroad parties. *See, e.g.*, Finance Docket 35305, *Reply Evidence and Argument of Western Coal Traffic League and Concerned Captive Coal Shippers* at 28, note 24, (“Of course, what BNSF and UP really want to do is to publish tariffs that place all of the costs of coal spraying and profiling on coal shippers, while they reap all of the benefits in the form of potentially reduced maintenance costs.”).

The railroads in Finance Docket 35305 gave no indication that they would decrease rates, refund cost savings, or otherwise share in the benefits of shipper coal dust controls, even though the cost of maintaining tracks, which includes cleaning coal dust from the ballast, is included in coal transportation rates. Moreover, keeping the coal dust in the cars relieves the railroad of maintenance costs it would otherwise incur.

The Board should revisit and decide the issue of whether, as a condition of approving Item 100 or another tariff requirement to control coal dust, BNSF and UP should either directly pay for the treatment they are mandating or to reimburse their customers for at least a reasonable share of the costs they incur to comply with the tariff provisions. Reimbursement for the costs of

applying the mandated chemicals or other treatment should be the minimum payment to shippers, since decreasing the amount of coal dust that accumulates in rail ballast results in significant benefits to the railroad owning the track in the form of deferred maintenance and increased productivity.

Additional authority for ordering railroads to reimburse coal shippers who institute coal dust controls an allowance for the costs of such compliance resides under 49 U.S.C. §10745. This provision states that the Board may start a proceeding, either on its own motion or on application to prescribe a maximum reasonable allowance to compensate a shipper for furnishing services related to the transportation it receives. In *Coal Dust I*, the Board stated “once a railroad accepts a loaded car, it bears the responsibility for transporting the car in a manner that avoids releasing or spilling the shipment.” *Coal Dust I* at 14. If a shipper incurs the cost of helping the railroad to avoid releasing or spilling the shipment, then the shipper should receive an allowance for such costs. This is particularly appropriate in the area of coal transportation, since the railroads demand that many shippers supply them with open top, gondola railcars that the shipper pays for and maintains.

3. The Tariff’s Liability Provisions are Unreasonable

Finally, the Board recognized that this proceeding will allow parties to address “shipper liability associated with the use of the BNSF-approved topper agents.” The general source of concern over this issue is Item 100, paragraph 4, which states more broadly that “[a]ny product including topper agents, devices or appurtenance [sic] utilized by Shipper or Shipper’s mine agents to control the release of coal dust *shall not adversely impact railroad employees, property, locomotives or owned cars*” (emphasis added). By this provision, BNSF appears to be broadly placing 100% of the risk of harm to the railroad from controlling coal dust by any means

on its customers. Such a wide ranging indemnification provision is unreasonable and unfair as to the BNSF-mandated topper agents approved for the “safe harbor” of Item 100 since it is BNSF that is demanding that shippers utilize only coal dust controls that BNSF approves. Having required that shippers take measures to control coal dust that are selected by BNSF under restrictive and costly standards, BNSF should bear the risk of the effects of such measures on its employees and equipment, unless it can be proved that the shipper was negligent.

Moreover, to the extent BNSF seeks to broadly shift all risk to its customers, this could conflict with other statutory and regulatory schemes governing railroads. For example, injuries and harm to railroad employees due to railroad negligence in maintaining track ballast and operating rail equipment are covered by the Federal Employee Liability Act (“FELA”) and the Federal Rail Safety Act (“FRSA”). Under FELA, railroad employees may seek redress against railroads for accidents caused by the railroad failing to provide and maintain a safe environment. 45 U.S.C. §51, et seq. In the case of chemicals to control coal dust sprayed on loaded coal cars, an unsafe environment could be created by the use of BNSF-approved topper agent chemicals (independent of the coal dust they are designed to control) which prove later to be harmful to railroad employees either (1) because BNSF conducted inadequate testing of their effects on people, or (2) because, even if applied as instructed by BNSF, the chemicals nevertheless create an unsafe working environment by, for example, accumulating on the tracks and ballast and causing footing to be unstable. In each case, the rail customer would be using BNSF-approved chemical topper agents as commanded by BNSF, but would nevertheless be required to

indemnify BNSF for the injuries to BNSF employees caused by BNSF's negligence in selecting the chemical toppers that provide "safe harbor."⁷

As for adverse impacts to "railroad . . . locomotives or owned cars," shifting all responsibility to rail shippers and mines would usurp the railroad's responsibilities under FRA rules to maintain and inspect its locomotives and railcars, as well as the clear responsibilities of railroads for cars in their custody and control under the AAR Interchange Rules. See Rule 1.

III.

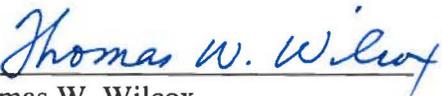
CONCLUSION

In conclusion, BNSF's revised coal dust control standard, while it contains a "safe harbor" provision, still falls short of meeting the reasonableness standard of 49 U.S.C. §10702. BNSF has still not demonstrated that the base "reduce by at least 85%" standard is valid or how such a standard, even if valid, provides shippers with sufficient certainty as to the criteria being applied. Thus, shippers have no certainty that they must take steps to comply with a standard, let alone utilize a "safe harbor" alternative. As for that alternative, shippers are essentially limited to the specific chemical sprays that BNSF selects, as the hurdles and costs of obtaining approval for an alternative means of meeting the base standard are high. Finally, should the Board

⁷ The United States federal courts are not in agreement over whether FELA or FRSA applies to injuries to railroad employees sustained while walking on or working around railroad ballast. Specifically, some cases have held that the FRSA, under which the Federal Railroad Administration ("FRA") maintains regulations concerning ballast construction and maintenance in 49 CFR Part 213, preempts any state law negligence claims brought under FELA for injuries sustained due to railroad negligence in maintaining rail ballast. *Compare, Nickels v. Conan Trunk Western R.R. Inc.*, 560 F.3d 426 (6th Cir. 2008), and *Davis v. Union Pacific R. Co.*, 598 F. Supp. 955 (E.D. Ark. 2009). However, it would appear that FELA would apply in the case of injuries caused to employees attributed to coal dust suppression methods. This is because the FRA regulations cover construction and maintenance of the ballast and track, not the control of coal dust emissions from railcars. Thus, there is no FRA regulatory regime under the FRSA governing coal dust emission controls from railcars to preempt the application of FELA.

nevertheless determine that the BNSF's revised standard passes muster under §10702, then the Board must also address in this proceeding the key related issues of (1) the appropriate penalties for non-compliance; (2) the equitable sharing of the costs and benefits of controlling coal dust loss from rail cars; and (3) the appropriate allocation of liability for requiring rail shippers to treat their loaded railcars with chemical suppressants selected exclusively by BNSF.

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Dated: October 1, 2012

Certificate of Service

I hereby certify that on this 1st day of October, 2012, I have served a copy of the foregoing Opening Submission of The National Coal Transportation Association via email and U.S. mail upon all parties of record as follows:

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