

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35557

REASONABLENESS OF BNSF RAILWAY COMPANY COAL DUST MITIGATION  
TARIFF PROVISIONS

Decided: March 5, 2012

This decision denies without prejudice the motion of Arkansas Electric Cooperative Corporation (AECC) to compel BNSF Railway Company (BNSF) to produce documents responsive to AECC's discovery requests. AECC may narrow its discovery requests, as described below, negotiate with BNSF, and, if necessary, file a motion to compel a revised set of discovery requests.

In the Coal Dust I decision,<sup>1</sup> the Board found a BNSF tariff intended to mitigate dispersion of coal dust from rail cars, when considered as a whole, to be an unreasonable practice. In addition, the Board made the following findings: coal dust is a particularly harmful ballast foulant; BNSF's conclusion that containment of coal dust is superior to maintenance alone was reasonable; carriers may establish reasonable coal loading requirements; and BNSF's emission standards contained in the tariff that was the subject of that proceeding were unreasonable. That proceeding involved extensive discovery, in which both BNSF and AECC participated.

Following BNSF's issuance of a new tariff that BNSF states is designed to mitigate coal dust, and which includes a safe harbor coal dust suppression provision, the Board initiated this proceeding to consider the reasonableness of the new tariff's safe harbor provision.<sup>2</sup> The Board gave some examples of issues that may be related to the reasonableness of the safe harbor provision, including, but not limited to, "the absence of penalties for noncompliance, the lack of cost sharing, and shipper liability associated with the use of the BNSF-approved topper agents."<sup>3</sup>

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<sup>1</sup> Ark. Elec. Coop. Corp.–Pet. For Declaratory Order (Coal Dust I), FD 35305 (STB served Mar. 3, 2011).

<sup>2</sup> In the same decision, the Board denied the request of Western Coal Traffic League to reopen Docket No. FD 35305. Ark. Elec. Coop. Corp.—Petition for Declaratory Order, FD 35305, et al. (STB served Nov. 22, 2011).

<sup>3</sup> Id., slip op. at 4 n.5.

The Board has since reiterated that the purpose of this proceeding is to consider the reasonableness of the safe harbor.<sup>4</sup>

On December 16, 2011, the Board granted a motion to adopt a procedural schedule, which included a discovery period. On February 13, 2012, AECC filed a motion to compel discovery from BNSF.<sup>5</sup> BNSF replied on February 23, 2012, to the motion to compel. On February 27, 2012, the Board served a decision addressing various discovery filings of BNSF. Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions (February 27th Discovery Order), FD 35557 (STB served February 27, 2012).

As a preliminary matter, the Board believes that AECC already has much of the material responsive to its requests. AECC was a party to Coal Dust I and made extensive discovery requests to BNSF. The Board's decision here will not prevent AECC from using the discovery materials it obtained from BNSF in Coal Dust I. While AECC argues that the Board ruled previously that confidential documents from the prior proceeding cannot be routinely used in this proceeding,<sup>6</sup> the Board extended the protective order from the prior proceeding to this proceeding for materials previously produced by BNSF.<sup>7</sup> AECC therefore has access to all the documents that BNSF produced in the prior proceeding and may seek to demonstrate any particular document's relevance to the reasonableness of the safe harbor provision.

In Board proceedings, parties are entitled to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 C.F.R. § 1114.21(a)(1). "The requirement of relevance means that the information might be able to affect the outcome of a proceeding." Waterloo Ry.—Adverse Aband.—Lines of Bangor and Aroostook R.R. and Van Buren Bridge Co. In Aroostook Cnty., Me., AB 124 (Sub-No. 2), et al. (STB served Nov. 14, 2003). Further, it "is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 49 C.F.R. § 1114.21(a)(2). Not all of AECC's discovery requests meet that standard.

In this proceeding, the Board is considering only the reasonableness of the safe harbor, leaving settled its conclusions from Coal Dust I. The settled issues include the Board's conclusions on coal dust's harmful effects, coal dust containment versus maintenance, and the

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<sup>4</sup> "The parties are reminded that the Board opened the declaratory order proceeding in Docket No. FD 35557 'to consider the reasonableness of the safe harbor provision in the new tariff.'" Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions, FD 35557, et al., slip op. at 2 (STB served Jan. 13, 2012).

<sup>5</sup> On February 27, 2012, AECC filed a motion to compel discovery from Union Pacific Railroad Company (UP). AECC's motion to compel UP will be addressed in a future decision.

<sup>6</sup> AECC Motion at 12-13.

<sup>7</sup> Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions, FD 35557, et al., slip op. at 2 (STB served January 13, 2012).

permissibility of reasonable coal loading requirements. The Board will not compel discovery that seeks information solely to challenge those conclusions. AECC's motion, as currently written, includes several requests for material related to these settled issues that could not affect the outcome of this proceeding.

To support the validity of its requests, AECC cites the Board's statements that a cost-effectiveness analysis of the tariff would be appropriate and that "any tariff provision must be reasonably commensurate economically with the problem it addresses."<sup>8</sup> But the Board's statements in Coal Dust I regarding cost-effectiveness analysis do not justify the full scope of the requested discovery. The Board's statements must be taken in the context of its other findings in the prior proceeding and the scope of the current proceeding. The Board heard arguments on maintenance versus containment and the effects of operating decisions on coal dust dispersion and concluded that carriers may establish reasonable loading rules for coal. While the parties representing shipper interests may choose to present a cost-effectiveness analysis in this proceeding, such an analysis must focus on the reasonableness of the safe harbor.

Although the Board will not compel BNSF to respond to the full range of discovery in AECC's motion, AECC is entitled to discovery necessary to develop a full record for this proceeding. For example, BNSF must respond to AECC's requests that concern comparisons of the cost and benefits of methods for containment. The Board will not limit potential negotiations between the parties by addressing the merits of all of the individual discovery requests at this time, but instead suggests that AECC negotiate with BNSF to resolve this discovery matter. The Board will consider a motion by AECC to compel BNSF's response to a more tailored set of discovery requests, if necessary.

AECC rightfully objects to BNSF's repeated statements that it would "conduct a search that is commensurate with the nature and expedited schedule of this proceeding" in response to twenty-two of AECC's discovery requests.<sup>9</sup> As the Board explained in the February 27th Discovery Order, the Board will not allow the constraints of the accelerated procedural schedule to preclude legitimate discovery in this proceeding.<sup>10</sup> Rather than unduly limit the discovery process, the February 27th Discovery Order held the procedural schedule in abeyance for a brief period while discovery issues are resolved. The Board expects AECC and BNSF to use this period to negotiate and for BNSF to locate documents responsive to reasonably tailored requests. BNSF must respond to reasonable discovery requests and cannot use the procedural schedule to limit its search for documents. BNSF is obligated to provide a full and thorough response to all relevant requests. The Board is particularly concerned by BNSF's use of a limiting statement in response to requests that are central to the subject of this proceeding, such as requests 27 and 28, which request documents related to testing and performance of chemical agents for controlling coal dust.

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<sup>8</sup> Ark. Elec. Coop. Corp.—Petition for Declaratory Order, FD 35305, slip op. at 5-6 (STB served March 3, 2011).

<sup>9</sup> AECC Motion at 11.

<sup>10</sup> February 27th Discovery Order, slip op. at 3.

In addition, where BNSF claims privilege with respect to a responsive document, it must provide AECC with a description of each withheld document, and the reasons for that claimed privilege as to each document. This will allow AECC to file a motion to compel production of such a document, if necessary.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. AECC's motion to compel discovery from BNSF is denied without prejudice to filing a revised motion to compel.

2. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.