

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35557

REASONABLENESS OF BNSF RAILWAY COMPANY COAL DUST MITIGATION
TARIFF PROVISIONS

Digest:¹ The Board denies a petition to reconsider its decision that the “safe harbor” provision of a BNSF Railway Company tariff, which requires coal shippers to take certain actions intended to reduce the amount of coal dust lost from railcars during transit from mines in the Powder River Basin, is not unreasonable.

Decided: May 13, 2015

Arkansas Electric Cooperative Corporation (AECC) requests that we reconsider the Board’s decision, Reasonableness of BNSF Railway Coal Dust Mitigation Tariff Provisions (Coal Dust II), FD 35557 (STB served Dec. 17, 2013), regarding a BNSF Railway Company (BNSF) tariff that requires shippers to take specific loading measures to limit coal dust loss from railcars loaded at mines in the Powder River Basin (PRB). The Board found that the safe harbor provision in the tariff, with the exception of one sentence referred to as the “liability provision,” is not an unreasonable practice² under 49 U.S.C. § 10702(2).³ AECC argues that the Board erred. We will deny AECC’s petition for reconsideration.

BACKGROUND

The Board instituted a prior declaratory order proceeding in December 2009 to consider whether provisions of a BNSF tariff requiring shippers to limit the emission of coal dust from railcars was an unreasonable practice. Ark. Elec. Coop. Corp.—Pet. for Declaratory Order, FD 35305 (STB served Dec. 1, 2009). In March 2011, the Board issued a decision in that

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The Board found that the liability provision is an unreasonable practice and must be removed from the tariff. Coal Dust II, slip op. at 30. AECC does not ask us to reconsider that aspect of the decision.

³ Coal Dust II, slip op. at 4, mistakenly cited 49 U.S.C. § 10707(2). The decision should have cited 49 U.S.C. § 10702(2).

proceeding finding that coal dust is a particularly harmful ballast foulant and that BNSF may require coal shippers to take reasonable steps to suppress coal dust emissions from open-top railcars. Ark. Elec. Coop. Corp.—Pet. for Declaratory Order (Coal Dust I), FD 35305, slip op. at 6-11 (STB served Mar. 3, 2011). Notwithstanding that determination, the Board also found that the tariff, when considered as a whole, was not reasonable and therefore violated 49 U.S.C. § 10702. Coal Dust I, slip op. at 11-14. In particular, the Board found it problematic that, under the tariff as drafted, shippers would not know whether their railcars were in compliance with BNSF’s loading requirements even if they employed commercially accepted methods of coal dust suppression. Id. at 12. The Board observed that a cost-effective safe harbor provision (i.e., specific coal dust suppression measures that would constitute compliance with the tariff) would significantly alleviate its concerns. Id.

Subsequently, BNSF issued a revision to its tariff (Price List 6041-B Item 100), which made several changes to the requirements regarding the control of coal dust emissions from trains loaded at mines in the PRB.⁴ The most important changes were that: (1) BNSF changed the measurement standard from a proprietary methodology that the Board questioned in Coal Dust I to a requirement that shippers take measures to reduce in-transit losses of coal dust from loaded coal cars by at least 85%; and (2) BNSF added a “safe harbor” provision under which shippers that met the safe harbor requirements would be in compliance with the tariff regardless of actual coal dust release.⁵ To come within the safe harbor, a shipper must: (1) load the cars as set forth in the tariff’s profiling requirement, and (2) apply one of BNSF’s five approved suppression methods, consisting of application of certain “topper agents,” to the loaded cars.⁶

Following a petition filed by Western Coal Traffic League (WCTL), the Board 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.⁷ Ark. Elec. Coop. Corp.—Pet. for

⁴ See BNSF Opening 9 and Ex. 1 (containing revised tariff), Oct. 1, 2012. The prior tariff appears as Ex. A to AECC’s petition for declaratory order filed in the Coal Dust I proceeding. AECC Pet. for Declaratory Order, Ark. Elec. Coop. Corp.—Pet. for Declaratory Order, FD 35305, Oct. 2, 2009, Ex. A.

⁵ Compare AECC Pet. for Declaratory Order, Ark. Elec. Coop. Corp.—Pet. for Declaratory Order, FD 35305, Oct. 2, 2009, Ex. A. at 3-4 (prior tariff) with BNSF Opening, Oct. 1, 2012, Ex. 1 at 3 (revised tariff).

⁶ BNSF Opening, Oct. 1, 2012, Ex. 1 at 3 (revised tariff). Shippers that propose a method of coal dust reduction that is not currently included in the safe harbor must provide evidence to BNSF that the proposed method would accomplish the 85% standard. Id.

⁷ WCTL petitioned the Board to reopen the Coal Dust I proceeding, institute mediation, and stay or enjoin the effective date of the new tariff pending Board-supervised mediation. The Board denied the injunction request. Ark. Elec. Coop. Corp.—Pet. for Declaratory Order, FD 35305 (STB served Aug. 31, 2011). The Board then issued a decision that denied the requests to reopen the Coal Dust I proceeding and order mediation, but instead instituted this proceeding. Ark. Elec. Coop. Corp.—Pet. for Declaratory Order, FD 35305 et al. (STB served Nov. 22, 2011).

Declaratory Order, FD 35305 et al. (STB served Nov. 22, 2011). Interested parties filed opening, reply, and rebuttal evidence and argument. In addition to AECC, the following coal shippers and organizations representing their interests filed evidence and arguments in this proceeding: the National Coal Transportation Association, Union Electric Company D/B/A Ameren Missouri, WCTL, American Public Power Association (APPA), Edison Electric Institute (EEI), and the National Rural Electric Cooperative Association (NRECA).⁸ The United States Department of Transportation, BNSF, and Union Pacific Railroad Company also participated in the proceeding.

The Board found in Coal Dust II that the safe harbor provision of the new tariff was not unreasonable, except for the liability provision.⁹ In that decision, the Board also rejected arguments that certain Coal Dust I findings regarding coal dust's effect on ballast and BNSF's right to establish reasonable loading requirements to reduce coal dust loss should be revisited. Coal Dust II, slip op. at 5-8.

The Board in Coal Dust II discussed in detail the evidence regarding the safe harbor provision's effectiveness to reduce coal dust loss and concluded that the evidence showed the safe harbor is effective. Slip op. at 9-15. The Board explained that topper agents, which are sprayed over the top of loaded coal cars and form a crust intended to inhibit coal dust loss, are a generally accepted method of coal dust suppression. Id. at 9. The Board found persuasive the evidence that BNSF submitted to show that the topper agents that were selected for the safe harbor reduce coal dust loss by 85%, as required by the tariff.¹⁰ Id. at 9-15. The Board considered the various concerns raised by shipper parties regarding the evidence supporting the effectiveness of the selected topper agents, but found that shipper parties had not submitted any evidence to directly contradict BNSF's evidence. Coal Dust II, slip op. at 9-15.

The Board also addressed arguments regarding the cost effectiveness of the safe harbor. Specifically, the Board found that the shipper parties had not met their burden to show that the coal dust suppression measures in the safe harbor are not reasonably commensurate with their

⁸ WCTL, APPA, EEI, and NRECA jointly filed.

⁹ The tariff's liability provision stated that products such as topper agents used by shippers and their agents to control the release of coal dust shall not adversely impact railroad employees, property, locomotives, or owned cars. The Board found the liability provision was overbroad and ambiguous. Coal Dust II, slip op. at 30. The liability provision also did not distinguish between adverse impacts caused by the negligence of shippers and their agents and the negligence of BNSF and third parties. Id.

¹⁰ Evidence supporting the inclusion of three topper agents came from the "Super Trial," which was a field trial on loaded coal cars in which shippers and coal producers participated by selecting agents to test, allowing testing on their loaded cars, and meeting to discuss test results and procedures. Id. at 10. In addition, coal shippers and mining companies sponsored subsequent tests, which led to the approval of two additional topper agents. Id. at 10-11. The tests measured coal dust loss from the mine loading point to an end point, from which the cars continued on to their final destinations. Id. at 10, 15.

cost. Id. at 17-20. The Board explained that its consideration of the cost effectiveness arguments was informed by its conclusions regarding coal dust's highly negative effect on ballast integrity and the resulting serious maintenance issues. Id. at 19. The Board found no evidence that the load profiling and topper agent application requirements of the safe harbor provision were cost prohibitive and no evidence of an alternative method for addressing coal dust that would achieve comparable reductions in coal dust emissions. Id. at 19-20. Finally, the Board explained that the shipper parties' evidence was insufficient to allow the Board to compare the merits of a lower standard for coal dust reduction to BNSF's chosen 85% standard. Id. at 20. The Board therefore "conclude[d] that the 85% standard, which can be achieved by the currently available safe harbor, is not unreasonable." Id.

AECC filed its petition for reconsideration on January 6, 2014, and BNSF replied on January 27, 2014. AECC argues that the Board did not sufficiently address arguments regarding the need for a cost-benefit analysis,¹¹ railroad responsibility for coal dust loss,¹² availability of lower-cost alternatives to the safe harbor,¹³ coal dust's effect on track stability,¹⁴ the effectiveness of topper agents,¹⁵ and the tariff's inconsistency with principles underlying the Board's rate relief procedures.¹⁶

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 722(c) and 49 C.F.R. § 1115.3(b), the Board will grant a petition for reconsideration only upon a showing that the prior action: (1) will be affected materially because of new evidence or changed circumstances; or (2) involves material error. Allegheny Valley R.R.—Pet. for Declaratory Order, FD 35239, slip op. at 3 (STB served July 16, 2013). AECC's petition does not meet this standard. Because AECC does not present new evidence or claim that there are changed circumstances, we consider AECC's arguments as claims of material error.

A party must do more than simply make a general allegation of material error and repeat its previous arguments; it must substantiate its claim of material error. See Canadian Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where petitioner did not substantiate its claim of material error, but merely restated arguments previously made and cited evidence previously submitted). Most of AECC's arguments on reconsideration have already been addressed by the Board in both Coal Dust I and Coal Dust II. Although the Board instituted the Coal Dust II proceeding to consider the reasonableness of the safe harbor provision, in Coal Dust II the Board extensively addressed

¹¹ AECC Pet. 4-7.

¹² Id. at 8-10.

¹³ Id.

¹⁴ Id. at 10-15.

¹⁵ Id. at 15-18.

¹⁶ Id. at 18-19.

and rejected arguments by AECC and others that the Board's findings and conclusions in Coal Dust I were materially erroneous and should be reopened. Therefore, we refer interested parties to Coal Dust I and Coal Dust II for detailed discussions of AECC's arguments.

However, we briefly elaborate on the Board's conclusions regarding two points raised by AECC in order to clarify the Board's views on those issues. First, we address AECC's claim that the Board disregarded photographs showing that topper agents fail by the time coal cars reach their final destinations. While the Board previously addressed AECC's argument that topper agents fail in transit, it did not directly address these photographs. Accordingly, we explain below that the Board's analysis in Coal Dust II applies to the photographs. Second, we address AECC's claim that the Board did not sufficiently address arguments regarding Constrained Market Pricing (CMP) principles. While the Board's direct discussion of the argument was brief in Coal Dust II, below we elaborate upon that discussion and explain the relevance of other Coal Dust II analyses to the CMP argument.

Photographs. AECC argues that the Board disregarded photographic evidence showing that topper agents fail by the time coal cars reach their final destinations.¹⁷ But the Board did address essentially the same argument raised by AECC, specifically, its claim that the topper agents had already failed at the end point of the tests. Coal Dust II, slip op. at 14-15. The Board found that the evidence from field tests showed the effectiveness of the selected topper agents. Id. at 14. The Board concluded that topper agents could be effective despite cracking in the crust and that topper application was expected to improve with permanent equipment, rather than the temporary equipment used during the testing process. Id. at 14-15. In making this finding, the Board considered photographs of the test cars at the test end point that AECC claimed show topper failure. Id. That rationale can be applied to the photographs of the cars at their final destination that AECC claims the Board failed to consider. Accordingly, there is no material error on this basis.

Constrained Market Pricing. AECC also asserts that the Board's decision is inconsistent with CMP principles.¹⁸ Although AECC's reasoning is unclear, we interpret their filing to argue that that BNSF should bear the cost of coal dust suppression because, in AECC's view, BNSF is revenue adequate and indeed is earning what AECC describes as "supracompetitive earnings."¹⁹

¹⁷ AECC Pet. 17.

¹⁸ AECC Pet. 18-19. CMP is a set of pricing principles that the Board uses to evaluate the rates charged to captive shippers in rate reasonableness complaints. W. Coal Traffic League—Pet. for Declaratory Order, FD 35506, slip op. at 7-8 (STB served July 25, 2013). CMP imposes three main constraints on the extent to which a railroad may charge differentially higher rates on captive traffic: revenue adequacy, management efficiency, and stand-alone cost. A fourth constraint—phasing—can be used to limit the introduction of otherwise-permissible rate increases when necessary for the greater public good. Id.

¹⁹ AECC seems to suggest the Board should either require BNSF to reimburse shippers for the cost of applying topper agents or assume responsibility for applying topper agents after a shipper tenders the loaded cars to BNSF for transportation.

In other words, AECC appears to be arguing that it is somehow a violation of CMP principles for BNSF to use its pricing power to require coal shippers to bear the cost of coal dust suppression. We find that AECC's arguments do not provide any basis for reconsideration.

First, the Board's decision that coal shippers should bear the cost of commercially reasonable methods of coal dust suppression does not turn on whether the affected rail carrier is revenue adequate or has some degree of pricing power. Rather, as the Board held in Coal Dust I, slip op. at 11, rail carriers have the right to establish reasonable loading requirements for the safe transportation of the commodities they carry, including commercially reasonable requirements to keep the commodity intact and prevent spillage during transport. The Board determined in Coal Dust I and reiterated in Coal Dust II, slip op. at 19, that containment—that is, the prevention of coal dust dispersion in the first instance—is superior to addressing coal dust loss through enhanced maintenance to remove fugitive coal dust that has fallen from railcars, and found that no party presented evidence of a better method of coal dust reduction. Because coal shippers and their mine agents control the loading of railcars at the mines, it is not unreasonable that these shippers should be responsible for the measures necessary to comply with the tariff.

Second, while AECC briefly asserted in its reply evidence and argument in this proceeding²⁰ that the Board should, based on CMP principles or railroad pricing power, require BNSF to pay or share the cost of safe harbor compliance, AECC did not provide a useful analytical framework nor the record evidence for the Board to reach that conclusion. This is not a matter of whether a carrier's rate is too high under our CMP analysis. Rather, AECC is asking the Board to conclude, based on its theory of market power, that cost responsibility for the suppression of coal dust should be imposed on rail carriers in the PRB. But AECC has not explained why BNSF's market power, if it exists, negates the Board's conclusion that it is not unreasonable to place that responsibility on shippers as part of the loading process, which is controlled by the shippers and the mine agents.

A party may not use a petition for reconsideration to provide, for the first time, explanation and support for claims it previously made and that the Board addressed in the prior decision. See Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1), slip op. at 12-13 (STB served Mar. 19, 2008). However, even if it were appropriate for AECC to use its petition for reconsideration to correct the deficiencies in its reply evidence and argument, its petition would not persuade us that the Board erred. We find no basis for reconsideration on the grounds of market power or CMP principles.

AECC also objects to the Board's conclusion in Coal Dust II, slip op. at 28, that a shipper may challenge the coal dust suppression costs imposed on it by filing a rate complaint. Specifically, AECC argues that the Board's Uniform Rail Costing System (URCS) will not fully recognize the reduction in roadbed and track maintenance costs that AECC claims railroads in the PRB will experience by requiring shippers to employ the coal dust suppression methods in the tariff.²¹ However, although under 49 U.S.C. § 10707, the Board uses URCS when

²⁰ AECC Reply 15-17, V.S. Nelson 13-15, Nov. 15, 2012.

²¹ AECC Pet. 18.

determining jurisdiction in rate reasonableness proceedings, URCS does not affect a shipper's estimate of roadbed and track maintenance costs under the Stand-Alone Cost (SAC) test. Contrary to AECC's argument, therefore, a captive shipper that utilizes the SAC test when challenging the reasonableness of the existing railroad's rates does not need to rely on URCS to support the shipper's estimate of roadbed and track maintenance costs. See Major Issues in Rail Rate Cases, EP 657 (Sub-No. 1), slip op. at 8 (STB served Oct. 30, 2006) (explaining SAC test and stand-alone railroad (SARR) design), aff'd sub nom. BNSF Ry. v. STB, 526 F.3d 770 (D.C. Cir. 2008); Review of the Gen. Purpose Costing Sys., EP 431 (Sub-No. 4), slip op. at 2 (STB served Feb. 4, 2013) (describing uses of URCS). The captive shipper can attempt to prove that the SARR will have lower roadbed and track maintenance costs than the existing carrier historically has experienced because of enhanced coal dust suppression.

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 petition for reconsideration is denied.
2. This decision is effective on its service date.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.