

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35557

REASONABLENESS OF BNSF RAILWAY COMPANY COAL DUST MITIGATION
TARIFF PROVISIONS

Decided: March 19, 2012

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

In the Coal Dust I decision,¹ the Board found a BNSF Railway Company (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.

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.² 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."³

¹ Ark. Elec. Coop. Corp.—Pet. For Declaratory Order (Coal Dust I), FD 35305 (STB served Mar. 3, 2011).

² 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).

³ 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.⁴

On December 16, 2011, the Board granted a motion to adopt a procedural schedule, which included a discovery period. On February 27, 2012, AECC filed a motion to compel discovery from UP. UP replied on March 8, 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, FD 35557 (STB served Feb. 27, 2012). On March 5, 2012, the Board served a decision addressing an AECC motion to compel discovery from BNSF. Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions, FD 35557 (STB served Mar. 5, 2012).

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 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 a number of 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.”⁵ 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

⁴ “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).

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

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 UP 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, UP must respond to AECC's requests that concern comparisons of the cost and benefits of methods for containment. From the record, it appears that UP has agreed to provide much of the relevant information to AECC. The Board expects that AECC will negotiate with UP to resolve outstanding discovery matters. The Board will consider a motion by AECC to compel UP's response to a more tailored set of discovery requests, if necessary.

AECC's document requests sought documents since January 1, 2005. UP objected to this date as unreasonable and proposed a cutoff date of November 1, 2009. UP argues that this date is reasonable, as it is approximately when the Board instituted the declaratory order proceeding that culminated with the Coal Dust I decision. However, there are likely relevant documents regarding the effectiveness of surfactants that predate November 1, 2009. The parties should negotiate to determine a reasonable date that balances the likelihood of uncovering relevant information with burden on the parties. As AECC suggests in its motion, it is likely that UP produced a large amount of relevant material in the Coal Dust I proceeding. To reduce the burden of duplicating prior efforts, the parties are free to negotiate, and to seek any required Board authority, for the use of that information in this proceeding.

In addition, where UP claims privilege with respect to a responsive document, it must provide a privilege log that gives AECC the ability to determine whether the assertion of the privilege is proper. UP argues that this requirement is overly burdensome. UP and AECC should negotiate to determine whether there are ways of reducing the burden associated with developing a privilege log.

Finally, AECC seeks documents associated with what it argues is a change in position that UP has made regarding the application of BNSF's coal dust tariff to UP traffic. UP maintains that it has not changed its position and, therefore, has no responsive documents. Nonetheless, UP has indicated, in a February 24, 2012 letter, that it will provide documents "sufficient to show its communications to its customers regarding the application of BNSF's coal dust operating rule to UP traffic." At this juncture, it appears that the information UP has agreed to produce is sufficient.

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 UP 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.