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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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WASHINGTON, D.C.

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

**OPENING 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 opening comments in this matter. The Department is pleased to have this opportunity to express its preliminary views on the issues raised here, including the implications for rail safety and policy.

**Background**

This proceeding stems from a prior declaratory order proceeding, which the Board instituted in late 2009 in response to a petition filed by Arkansas Electric Cooperative Corporation. *See* Decision, *Ark. Elec. Coop. Corp.—Petition For Declaratory Order*, Docket No. FD 35305 (Mar. 2, 2011) (“3/2/11 Decision”). There, the Board considered whether BNSF Railway Company's (BNSF) coal dust tariff was reasonable under governing law.<sup>1</sup> The tariff applied to coal traffic moved by BNSF in common carriage originating in the Powder River Basin.<sup>2</sup> Concerned about the problem of coal dust emissions from open-top cars in that region,

<sup>1</sup> *See* 49 U.S.C. § 10702 (establishing a reasonableness standard for railroad rates, rules and practices for services subject to the Board's jurisdiction).

<sup>2</sup> Specifically, the tariff applied to coal traffic moved over the Black Hills Subdivision and the “Joint Line,” a 102-mile line owned by BNSF and Union Pacific Corporation. 3/2/11 Decision at 2.

BNSF required in the tariff that shippers take responsibility for meeting certain coal dust emission standards, as well as for “profiling” coal in specified shapes and dimensions at loading points.

The tariff did not specify the practices or techniques for shippers to follow to limit emissions. Rather, the tariff obligated shippers to “take all steps necessary to ensure” that emissions fell below specified quantities. 3/2/11 Decision at 2 (internal quotation marks and citation omitted). BNSF determined compliance with the aid of electronic monitors placed along the railroad. *Id.*

Shippers contended that the BNSF tariff provision was unreasonable and unlawful. Among other things, shippers, including various utilities dependent upon coal, argued that railroads should be responsible for solving the problem of coal dust emissions as part of their maintenance obligations; that shippers had no clear way of conforming their conduct to satisfy the tariff’s requirements; and that the tariff failed to apprise shippers of the penalties for noncompliance. *Id.* at 2 n.3, 9, 11. By contrast, BNSF argued that coal dust presents a significant hazard for railroad safety; that shippers are generally responsible for securing their carloads; and that the tariff provided sufficient clarity for shippers. *Id.* at 7, 9, 12.

The Board considered comments from a variety of interested parties, including shippers, railroads, and the Department,<sup>3</sup> and held a hearing on this matter. The Board then reached several conclusions. First, the Board agreed with the Department’s assertion that “coal dust is a pernicious ballast foulant” that threatens railroad safety and “requires corrective action.” *Id.* at 6-7. Second, BNSF may adopt measures to reduce coal dust emissions from open-top cars, even if bottom-dump cars were the primary source of such emissions. *Id.* at 8. Third, railroads may

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<sup>3</sup> See Reply Comments of the United States Department of Transportation, FD No. 35305 (Apr. 30, 2010) (DOT Reply Comments); Rebuttal Comments of the United States Department of Transportation, FD No. 35305 (June 4, 2010) (DOT Rebuttal Comments).

reasonably require shippers to take measures to contain coal dust emissions, rather than simply addressing the problem through enhanced maintenance procedures. *Id.* at 9. Fourth, as a matter of law, railroads have the traditional authority to establish loading requirements for shipped commodities, subject to the statutory reasonableness standard. *Id.* at 11.

Notwithstanding these determinations, the Board concluded that BNSF's tariff was unreasonable. *Id.* at 11-14. The Board ruled that a tariff provision of this kind should provide shippers with greater certainty about how to comply, *i.e.*, "once they had loaded their cars correctly, they could be certain that the carrier would move their commodity without penalty." *Id.* at 12. This could be accomplished through an appropriate "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.* Otherwise, shippers, who hand control of the cars to the railroads after loading, are "subject to the vagaries of wind, weather, train speed, and track conditions" during transit—factors that a shipper can do nothing to address. *Id.* at 13-14.

In response to this ruling, BNSF issued a new tariff, BNSF Price List 6041-B Item 100, applying to coal loaded at the Powder River Basin. That tariff, in Section 3, purports to provide an activity-based "safe harbor" for shippers for limiting coal dust emissions. First, the tariff establishes a profiling requirement for coal loading, using chutes designed in a specified way. Second, the tariff sets forth specific means by which shippers may treat coal cars to contain dust. Shippers may apply one of multiple specified surfactants, or "topper agents," to cars, essentially having the loads sprayed with commercially available chemical agents to suppress dust. Alternatively, a shipper may submit a different suppression method to BNSF for approval, provided that it can demonstrate that the alternative method will result in an equivalent level of

suppression (*i.e.*, a reduction of coal lost in transit by 85%). “Under the safe harbor provision, shippers would be in compliance with the tariff regardless of actual coal dust release” in transit. Decision of Nov. 22, 2011 at 2.

The Western Coal Traffic League (WCTL) filed a petition with the Board seeking the reopening of the prior proceeding (in docket number FD 35305), as well as injunctive relief pending Board-supervised mediation. The Board denied an injunction, refused to order mediation, and denied the request to reopen the prior proceeding. *Id.* at 2-4. Nonetheless, the Board opened this new proceeding to determine the reasonableness of the safe harbor provision in BNSF’s new tariff. *Id.* at 4. Although the Board recognized that “tariffs typically should be challenged by complaint,” it nonetheless determined that the issues raised in this proceeding were “of broad importance to the railroad industry,” and that comments by interested parties would “promote regulatory efficiency” and sharpen the issues for review. *Id.* at 4.

### Analysis

#### **I. The Department Remains Concerned About The Safety And Policy Implications Of This Proceeding**

The Department takes this opportunity to reaffirm its interests in the issues raised in this proceeding and to highlight some of the principles that should guide the Board’s decision.

First, the Department remains concerned about the problem of coal dust and its effects upon rail safety. Safety is the highest priority of the Department and of the Federal Railroad Administration (FRA), the operating administration of the Department charged with promulgating and enforcing railroad regulations. *See generally* 49 U.S.C. § 101 (vesting the Department with responsibility for promoting safe transportation and other goals); *id.* § 103 (describing the organization and functions of FRA). As the Department explained in its submissions in docket number 35305, coal dust can threaten rail safety by damaging rail ballast.

Ballast surrounds and supports railroad ties, enhancing the stability of the railroad as the ballast material (ideally, angular stones) compacts under the weight of rail traffic. DOT Rebuttal Comments at 2-3. Fouling agents, including dust, broken down ties, or other debris, fill openings in ballast, preventing effective drainage. 3/2/11 Decision at 6. Furthermore, fouling agents can become moist and muddy, causing ballast particles to slide past one another or to separate, rather than compressing. DOT Rebuttal Comments at 3. Over time, such contamination threatens the integrity of the railroad tracks.

These problems are amplified when coal dust is involved. The low density of coal dust allows it to take up greater space among ballast particles than other foulants of equivalent weight. *Id.* Thus, the Department has already expressed the view that coal dust threatens railroad safety more than other foulants, and that its emission should be contained. *Id.* at 2-3.

As the Department also previously explained, its ballast safety rules are based upon performance rather than specific prescriptions about ballast type or amount; ballast must restrain the track, provide adequate drainage, maintain track crosslevel, and meet other requirements. DOT Reply Comments at 3; *see* 49 C.F.R. § 213.103 (ballast regulations). Such performance depends upon ballast that is strong and adequately drained. DOT Reply Comments at 3. The Department will, as always, stand ready to enforce its railroad safety regulations, regardless of whether the railroads or shippers assume the costs of compliance. But as in the prior proceeding, the Department remains of the view that the BNSF tariff, including the new safe harbor provision, does not “violate applicable regulations or otherwise threaten safety.” *Id.* at 4. The Department appreciates the Board’s concern for rail safety and its recognition of the wisdom of taking steps to reduce coal dust emissions.

Second, the Department remains of the view that railroads may require shippers to take reasonable, cost-effective measures to reduce coal dust emissions from railcars. *Id.* at 4-6. Although railroads retain the responsibility to ensure that tracks are properly maintained, shippers should be held responsible, with coal as with virtually every other commodity, to ensure that railcars are securely loaded to prevent spillage or other safety hazards. *Id.* at 5. It should not be dispositive that coal shippers have not historically been held responsible for reducing coal dust emissions from railcars. On the contrary, the Board determined (correctly, in the Department's view) that carriers may "change their rules in response to changing circumstances, such as here, where the problem of coal dust became apparent after years of increasingly heavy traffic." 3/2/11 Decision at 11.

**II. The BNSF Tariff's "Safe Harbor" Provision Appears Reasonable, Subject To Further Consideration Of Enforcement And Compliance Issues**

The Board previously held that railroads may, consistent with 49 U.S.C. § 10702, establish reasonable tariff loading terms for coal, and may require shippers to undertake "coal dust containment efforts that are appropriately calculated to produce reliable and efficient service." 3/2/11 Decision at 9, 10-11. Nonetheless, the Board held that the prior BNSF tariff was unreasonable, since it failed to give "certainty to the shippers" as to how they could be in compliance with the tariff's dust containment standards. *Id.* at 12. The Board indicated that "an activity-based safe harbor" would help to provide shippers with certainty and "could go a long way to address [the Board's] concern" about the reasonableness of the tariff. *Id.*

The new BNSF safe harbor provision appears to address these concerns. The tariff includes profiling requirements with specific dimensions, allowing coal to be loaded in a "bread

loaf” shape to reduce dust emissions.<sup>4</sup> The tariff specifies particular topper agents that can be sprayed upon the coal for shippers to be in compliance.<sup>5</sup> Alternatively, shippers can come to BNSF to propose an alternative method to reduce emissions to an equivalent level. This arrangement places the shippers’ responsibilities “at the load-out,” so that shippers no longer need to be concerned that factors beyond their control, like “the vagaries of wind, weather, train speed, and track conditions,” will prevent compliance. *Id.* at 13-14. Thus, it is the Department’s preliminary view that the BNSF safe harbor provision appears to be a reasonable means of addressing the legitimate problem of coal dust emissions from railcars, providing shippers with conduct-based alternatives, and clarity, about how to satisfy the tariff’s requirements.

Nonetheless, the Department looks forward to reviewing the comments submitted by other parties on the issues raised in this proceeding. In particular, the Department is interested in hearing more about the enforcement and compliance mechanisms used in connection with the safe harbor. The shippers appear to contend, as they did in the prior coal dust proceeding, that they lack sufficient information about the penalties for noncompliance. *See* Western Coal Traffic League, Petition to Reopen and for Injunctive Relief Pending Board-Supervised Mediation at 2 (Aug. 11, 2011); 3/2/11 Decision at 2 n.3. The Department notes, as it did previously, that it is common practice in the railroad industry to require shippers to secure their carloads, *see* DOT Reply Comments at 5 & n.5 (citing to Association of American Railroads

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<sup>4</sup> The shippers’ concerns appear to have been focused more upon the application of surfactants than the profiling requirement, although the Department is interested in hearing more from shippers about whether that remains the case.

<sup>5</sup> It is the Department’s understanding that the updated version of BNSF’s safe harbor offers greater choice to shippers about the specific topper agents that may be used to comply. *See* BNSF Railway Company, BNSF Price List 6041-B, Item 100 & Appendix B, *available at* <http://newdomino.bnsf.com/website/prices.nsf/PublicationsLookup/B926BC37B5758972862579170063BEC2?Open> (last visited October 1, 2012). This should provide greater flexibility to shippers, although the Department would be pleased to hear more from the parties about their experiences in obtaining and applying the topper agents specified in the safe harbor.

rules for loading open top cars); perhaps BNSF may take the position that it may refuse to ship coal cars that do not meet the tariff terms, or take additional punitive steps. These issues may be relevant to the Board's disposition here and should be considered in greater depth.

**Conclusion**

The Department continues to be interested in the implications of this proceeding, and remains of the view that coal dust emissions present rail safety problems and should be contained. The Board has already recognized that railroads can require shippers to take reasonable steps to reduce coal dust emissions. The new BNSF safe harbor provision appears to address the concerns that the Board previously raised, offering shippers greater certainty about how to comply with the tariff's requirements. Thus, the tariff appears to be reasonable, but the Department is interested in hearing more from other parties about the issues involved in this proceeding, particularly those relating to enforcement, compliance, and penalties. The Department will apprise the Board of any modifications to its position as this matter proceeds.

October 1, 2012

Respectfully submitted,



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Robert S. Rivkin  
General Counsel

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of October, 2012, I caused a copy of the foregoing document to be served upon all Parties of Record in this proceeding.

Christopher S. Perry

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