

ENTERED
Office of Proceedings
March 9, 2012

BEFORE THE
SURFACE TRANSPORTATION BOARD

~~Part of~~

REASONABLENESS OF BNSF
RAILWAY COMPANY COAL
DUST MITIGATION TARIFF
PROVISIONS

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Public Record
Docket No. FD 35557

JOINT STATEMENT OF INTEREST BY:

ALLIANCE FOR RAIL COMPETITION
AMERICAN CHEMISTRY COUNCIL
AMERICAN PUBLIC POWER ASSOCIATION
THE CHLORINE INSTITUTE
CONSUMERS UNITED FOR RAIL EQUITY
EDISON ELECTRIC INSTITUTE
THE FERTILIZER INSTITUTE
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
WESTERN COAL TRAFFIC LEAGUE

The above-referenced organizations (“Subscribing Shipper Organizations”) respectfully submit this Joint Statement of Interest¹ in support of the Joint Appeal of Western Coal Traffic League Member Organizations (“WCTL Member Organizations”) appealing the Director, Office of Proceedings decision served on February 27, 2012 (“Director’s Decision”). The Director’s Decision found that 16 individual, non-party WCTL Member Organizations “are subject to discovery in this proceeding under the Board’s subpoena power.” *Id.* at 1.

Subscribing Shipper Organizations consist of trade associations collectively representing several thousand shippers and receivers of a wide variety of commodities by rail, many of whom have actively participated in various Surface Transportation Board (“STB” or “Board”) proceedings.

¹ To the extent necessary, Subscribing Shipper Organizations request leave to intervene or participate as amici curiae in this proceeding on a limited basis to file this Statement of Interest, which should not prejudice the rights of any other person, is limited to the appeal issues raised by the WCTL Member Organizations, and does not expand the scope of this proceeding. The STB, and ICC before it, have routinely granted similar requests made by industry trade associations to participate as interveners or as amicus curiae in proceedings to address issues of industry-wide concern.

Subscribing Shipper Organizations hereby express their strong concerns over the Director's Decision for three interrelated reasons.

First, governing authority requires a moving party to demonstrate a “very strong foundation” and a “real practical need” for non-party discovery. In practice, the Board has only authorized non-party discovery under its subpoena power in limited instances (only four times in 16 years) where an entity had essential information that could not be obtained from a party to the proceeding, and a strong showing was made that the information was necessary for purposes of helping to meet a party's burden of proof. The Director's Decision to subject the WCTL members to party-based discovery in this proceeding is based on an extremely broad rationale that would apply to virtually all other STB proceedings in which trade associations participate. Specifically, the Director found:

Here, while the Member Organizations are not parties to the proceeding in their individual capacities, they have a clear interest in the proceeding and will obviously be affected by its outcome. . . . [T]here is no separate impact of the tariff on the WCTL as an organization – the impact of any ruling on the BNSF tariff is directly upon the Member Organizations that would be shipping under the tariff. Likewise, the effects of the tariff on individual shippers are also known, in the first instance, by the Member Organizations.

Director's Decision at 2. The Subscribing Shipper Organizations are concerned that the above standard is far too expansive in scope and would apply to nearly every STB proceeding in which associations choose to participate on behalf of their members, resulting in unintended adverse consequences described further below. The entire purpose of a trade association that appears before the Board is to represent the interests of its members that would be affected by the outcome of Board proceedings. Further, the members of the organizations (and not the organization itself) would always be the parties directly impacted by the Board's rulings, since the member companies engage in the shipping of goods by rail that is subject to the Board's jurisdiction. Thus, the Director's Decision applies a new standard for subjecting trade association members to discovery that does not include a finding that the requested discovery is essential and cannot be obtained from other sources or parties to a proceeding, it is unnecessarily broad in scope, fails to include appropriate limitations, and can reasonably be expected to increase substantially the frequency and amount of discovery sought by railroads from trade association members in Board proceedings.

Second, in individual Board proceedings, trade associations often collectively represent hundreds or even thousands of individual member organizations. Non-party discovery directed at individual association members who have not designated themselves individually as “parties of record” has the potential for substantial adverse impacts, including the potential to seriously disrupt and delay proceedings, and significantly impair the Board's ability to efficiently and orderly administer its dockets.

Third, this broad standard for non-party discovery directed at individual association members has the potential to have a serious chilling effect on the future participation of shipper trade associations in Board proceedings, both because of the time and significant costs necessary to engage in authorized non-party discovery by individual members, and because it would be difficult for an association to even get approval to appear in a proceeding where that appearance entailed the potential for that association's individual members to be subject to party-based discovery.

Subscribing Shipper Organizations urge the Board to do everything it can to encourage, and not discourage, participation in agency proceedings, including by ensuring that individual members of shipper trade associations that participate before it are adequately protected from broad and non-essential discovery.

Respectfully submitted,

Terry Whiteside
Whiteside & Associates
3203 Third Avenue North, Suite 301
Billings, MT 59101
***Registered Practitioner for Alliance for
Rail Competition***

Scott Stone
Patton Boggs, LLP
2550 M Street, N.W.
Washington, DC 20037
***Counsel for American Chemistry
Council***

Susan N. Kelly
Senior Vice President of Policy Analysis
and General Counsel
American Public Power Association
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, DC 20009
***Counsel for American Public Power
Association***

Paul Donovan
LaRoe, Winn, Moerman & Donovan
1250 Connecticut Avenue, N.W.
Suite 200
Washington, DC 20036
Counsel for The Chlorine Institute

Robert G. Szabo, Executive Director and
Counsel, CURE
Michael F. McBride
Van Ness Feldman PC
1050 Thomas Jefferson Street, N.W.
Washington, DC 20007
***Counsel for Consumers United for Rail
Equity***

Edward Comer
Vice President, General Counsel
and Corporate Secretary
Edison Electric Institute
701 Pennsylvania Avenue N.W.
Washington DC 20004
Counsel for Edison Electric Institute

Jeffrey O. Moreno
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, DC 20036
Counsel for The Fertilizer Institute

Karyn A. Booth
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, DC 20036
***Counsel for The National Industrial
Transportation League***

Glenn English
Chief Executive Officer
National Rural Electric Cooperative
Association
4301 Wilson Boulevard
Arlington, VA 22203
***National Rural Electric Cooperative
Association***

William L. Slover
John H. LeSeur
Andrew B. Kolesar III
Peter A. Pfohl
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, DC 20036
***Counsel for Western Coal Traffic
League***

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cc: All Parties of Record on service list