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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**BNSF RAILWAY COMPANY'S REPLY TO
MOTION TO COMPEL DISCOVERY BY
ARKANSAS ELECTRIC COOPERATIVE CORPORATION**

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BNSF Railway Company ("BNSF") hereby replies in opposition to the Motion to Compel Discovery served by Arkansas Electric Cooperative Corporation ("AECC") on February 13, 2012 ("AECC Motion").

I. INTRODUCTION AND SUMMARY OF ARGUMENT

AECC's approach to discovery in this case has been disproportionate to the narrow focus of the issues in the case and inconsistent with the schedule established by the Board. AECC waited eight weeks after the Board initiated this proceeding until there were less than three weeks before the close of discovery to serve any discovery requests. Rather than serving narrow discovery requests tailored to the issues in the case, AECC served 76 document requests, including subparts, that are extraordinarily broad in scope. Most of the discovery requests go well beyond the specific issue that is the subject of this case and seek information on matters that have already been addressed and resolved by the Board in *Arkansas Electric Cooperative Corp.—Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011) ("*Coal Dust I*").

The Board has narrowly defined the issue in this proceeding as the reasonableness of the safe harbor provision in Items 100 and 101 of BNSF's Coal Rules publication denominated as

Price List 6041-B (“Coal Loading Rule”). *Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, STB Finance Docket No. 35557, at 3-4 (STB served Nov. 22, 2011) (“*November 2011 Decision*”) (“We will institute a new 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.”) The Board also made it clear that issues that have “already been decided” in *Coal Dust I* are not within the scope of this proceeding. *Id.* at 3. The Board further emphasized its intent to keep this proceeding narrowly focused on the reasonableness of the safe harbor provision in BNSF’s Coal Loading Rule by denying a blanket request to extend the protective order from *Coal Dust I* to allow use of discovery materials from that proceeding in the current proceeding without a specific showing that the materials from the prior proceeding are relevant to the narrow issue that is the subject of the current proceeding. *See Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, STB Finance Docket No. 35557 (STB served Jan. 13, 2012) (“*January 2012 Decision*”)

AECC’s motion to compel challenges BNSF’s responses to every discovery request that AECC propounded, including 22 requests in response to which BNSF agreed to produce responsive, non-privileged materials. However, the main focus of AECC’s motion is BNSF’s objection to several requests on grounds that the requests seek information on issues that are not the subject of the current proceeding because they were already addressed and resolved by the Board in *Coal Dust I*. AECC groups those requests into two categories: (1) requests seeking “information about the benefits BNSF thinks will result from its current tariff”; and (2) “information about the effects of railroad operating and maintenance practices on deposition of fugitive coal.” AECC Motion, at 6-7.

As to the first category of documents, AECC’s requests make it clear that the supposed

“benefits” that are the subject of the Category 1 document requests are potential cost savings to BNSF from changes in operations or maintenance practices. But in *Coal Dust I*, AECC and other coal shippers argued that the costs of containing coal in railcars needed to be compared to the supposed benefits to BNSF in reduced maintenance and operating costs, and the Board expressly rejected that argument. *Coal Dust I*, at 5-6. Moreover, since the “benefits” to BNSF are supposedly created by cost savings in maintenance and operating practices, the requests in Category 1 actually overlap with the requests in Category 2, which AECC expressly acknowledges are about BNSF’s maintenance and operating practices.

BNSF should not have to conduct special searches for materials relating to BNSF’s operating and maintenance practices. Materials on those issues were potentially relevant in *Coal Dust I*, where one of the issues was whether BNSF had the right to establish loading rules to curtail coal dust or instead must deal with coal dust through its own operating and maintenance practices. Since BNSF’s operating and maintenance practices were potentially relevant in that proceeding, BNSF carried out an extensive search for those materials and produced numerous documents on those issues. But the Board in *Coal Dust I* rejected the arguments made by AECC that responsibility for coal dust mitigation lay with the railroads because “the way BNSF operates its trains, changes in track modulus, and poor maintenance of the line increase coal dust dispersion.” *Coal Dust I*, at 11. The Board expressly ruled that “BNSF and other coal carriers have the right to establish coal loading requirements, subject to the reasonableness requirement of 49 U.S.C. §10702.” *Id.* AECC cannot be permitted impose burdensome discovery requirements on BNSF in this case to permit AECC to relitigate issues it has already lost.

There is no valid reason to require a broad and burdensome search for materials focused only on BNSF’s operating and maintenance practices. As BNSF did in *Coal Dust I*, BNSF has

carried out an extensive search for materials relating to coal dust from key employees with responsibility for monitoring coal dust, investigating methods for dealing with coal dust losses, and working with coal shippers to address the coal dust problem. BNSF has produced more than 295,000 pages of documents in this proceeding in response to discovery requests propounded by Coal Shippers¹ that were reasonably focused on the issue that is the subject of this proceeding. The documents broadly cover BNSF's efforts to address the problem of coal dust since late 2009, when the *Coal Dust I* proceeding was initiated, including BNSF's testing of topper agents, its evaluation of the effectiveness of various dust mitigation methods, and its communications with mines, vendors, and shippers regarding coal dust mitigation and the Coal Loading Rule. BNSF has produced these extensive discovery materials to AECC as well as to Coal Shippers. These materials provide a more than adequate basis for addressing the narrow issue that is the subject of this proceeding.

AECC makes a number of other arguments challenging the adequacy of BNSF's discovery responses. None of AECC's arguments has merits. The Board should reject AECC's motion to compel in its entirety.

II. BACKGROUND

The Board initiated this proceeding in response to a petition filed by WCTL on August 11, 2011 to reopen the *Coal Dust I* decision, enjoin BNSF's Coal Loading Rule that was adopted to comply with the Board's *Coal Dust I* Decision, and order BNSF to participate in broad, multi-party mediation regarding coal dust mitigation. The Board denied WCTL's petition in decisions dated August 31, 2011 and November 22, 2011. Instead, the Board initiated this declaratory order proceeding to address the narrow issue of "the reasonableness of the safe harbor provision"

¹ Coal Shippers are Western Coal Traffic League ("WCTL"), American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association.

that BNSF adopted in its Coal Loading Rule. *November 2011 Decision*, at 4. The Board also made it clear that issues that have “already been decided” in *Coal Dust I* are not within the scope of this proceeding. *Id.* at 3. On December 16, 2011, the Board adopted an expedited procedural schedule that was proposed jointly by BNSF and WCTL to deal with the narrow scope of this proceeding. Under this expedited schedule, the fifty-day discovery period closed on February 6, 2012. Opening evidence is due on March 20, 2012.

Shortly after the Board established the procedural schedule for this proceeding, BNSF received the First Set of Discovery Requests from Western Coal Traffic League, American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association (collectively “Coal Shippers”). Coal Shippers shortly followed up with their Second Set of Discovery Requests. For the most part, Coal Shippers’ requests were reasonably related to the scope of this proceeding. In response, BNSF collected and produced thousands of documents relating to its efforts to address the coal dust problem since November 1, 2009, from key employees in the engineering, marketing, research, and environmental areas who were involved in issues relating to coal dust. BNSF also collected and produced materials from its two primary coal dust consulting firms, Simpson Weather Associates (“SWA”) and Conestoga-Rovers & Associates (“CRA”), that relate to their principal consulting activities for BNSF regarding coal dust. In total, BNSF collected data and documents that came from more than 20 document custodians. Coal Shippers did not ask for materials relating to BNSF’s operations or its maintenance practices, and BNSF did not conduct special searches for those materials.

In contrast to the timely discovery sought by Coal Shippers, AECC waited eight weeks after the Board issued its procedural schedule to propound any discovery requests. The requests were served on January 17, 2012, less than three weeks before the close of discovery. Moreover,

the discovery requests that AECC propounded were voluminous, unfocused, and unreasonably broad. AECC's discovery requests consist of 76 document requests, including subparts. BNSF responded to AECC's discovery requests on February 6, 2012. BNSF's responses to AECC's First Set of Document Requests are attached as Exhibit B to AECC's Motion.

On February 7, 2012, AECC wrote to BNSF requesting further information on the grounds for BNSF's objection to several discovery requests that sought information on issues that had been the subject of proceedings in *Coal Dust I* and were not issues in this case, primarily issues relating to BNSF's operations and maintenance practices. BNSF responded to AECC's letter on February 10, 2012, explaining that in one way or another, each of the requests to which BNSF had objected sought information regarding an issue that was already resolved, namely that BNSF is entitled to establish rules requiring shippers to take reasonable measures to keep their loaded coal in railcars. The February 7 and 10 correspondence is attached to AECC's Motion to Compel as Exhibits C and D.

On February 13, 2012, AECC filed its Motion to Compel. AECC's Motion focuses primarily on BNSF's objection to producing information relating to issues that were addressed and resolved in *Coal Dust I* and are therefore not the proper subject of discovery in this proceeding. However, AECC's Motion also includes arguments that were not raised by AECC prior to filing the Motion, including a challenge to the reasonableness of BNSF's discovery efforts in areas where BNSF agreed to produce responsive documents and a challenge to BNSF's objection to producing information prior to November 2009.

As explained below, none of AECC's challenges to BNSF's discovery responses is valid. BNSF has carried out extensive efforts to produce documents and other materials relevant to the reasonableness of the safe harbor provision in BNSF's Coal Loading Rule. BNSF's discovery

responses provide a more than adequate basis for addressing the narrow issue that is the subject of this proceeding.²

III. ARGUMENT

A. The Board's Discovery Rules Only Require Reasonable Discovery Efforts That Are Tailored to the Scope of the Proceeding.

AECC has approached discovery in this case, as it did in *Coal Dust I*, as though a party in proceedings before the Board has virtually unlimited rights to seek information through discovery from other parties. AECC's discovery requests in this case are not the product of an effort to focus on core issues. Rather, they are a scattered collection of questions about a broad range of issues, most of which have only tangential relevance to coal dust issues, let alone the narrow issue in this case regarding the reasonableness of the safe harbor provision in BNSF's Coal Loading Rule.

AECC misunderstands the discovery process in STB cases. The Board has made it clear that discovery in STB proceedings is supposed to be carefully tailored to the schedule and scope of the proceeding. *Canexus Chems. Canada, L.P. v. BNSF Ry. Co.*, STB Docket No. 42132, at 5 (STB served Feb. 2, 2012) (denying motion to compel in part because the requesting party "failed to show how its request is consistent with the expedited" procedures in Three-Benchmark cases) ("*Canexus February 2012 Decision*").

The Board has also emphasized that a party is only required to conduct a "reasonable search" for information responsive to discovery requests. *Entergy Arkansas, Inc. v. Union Pac. R.R. Co.*, STB Docket No. 42104, 2008 WL 2091414, at *4 (STB served May 19, 2008). "Discovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition." *Duke Energy Corp. v. Norfolk S. Ry. Co.*, STB Docket No. 42070,

² BNSF's broad discovery efforts are in stark contrast to the discovery responses of the shipper interests, who have refused to provide virtually any discovery in this proceeding.

2002 WL 1730020, at *3 (STB served July 26, 2002) (denying document requests that were overly broad where the producing party had already produced sufficient information).

The Board has made it clear that the objective of discovery is to produce an adequate factual basis on which to address the issues in a proceeding. The Board therefore has repeatedly denied discovery where parties already have sufficient information to address the issues in the proceeding. In a previous declaratory order proceeding, the Board denied a motion to compel “in light of the extensive documentation” that the railroad had already produced, noting that the moving party had “sufficient information to prepare its opening statement.” *Capitol Materials Inc.—Petition for Order—Certain Rates & Practices of Norfolk S. Ry. Co.*, STB Docket No. 42068, 2002 WL 599177, at *1-2 (STB served Apr. 19, 2002); *see also Sierra Pac. Power Co. v. Union Pac. R.R. Co.*, STB Docket No. 42012, 1998 WL 25482, at *5 (STB served Jan. 26, 1998) (denying a request for production as “beyond the scope of permissible discovery” when the railroad had already produced responsive documents); *Canadian Pac. Ry. Co.—Control Dakota, Minnesota & E. R.R. Corp.*, STB Finance Docket No. 35081, 2008 WL 820744, at *3 (STB served Mar. 27, 2008) (finding that no further production was necessary because information already produced and representations in the reply were sufficient to satisfy the needs of the moving party).

The Board has repeatedly made clear that the value of information sought in discovery must be weighed against the burdens of collecting it. “[D]iscovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought.” *Canadian Pac. Ry. Co.*, STB Finance Docket No. 35081, 2008 WL 820744, at *1 (STB served Mar. 27, 2008). Discovery is often denied when the burden of producing information outweighs its asserted relevance. *E.g., Otter Tail Power Co. v. Burlington N. & Santa Fe Ry. Co.*, STB Docket No.

42071, 2002 WL 31529065, at *3 (STB served Nov. 15, 2002) (denying motion to compel when complying with the request would require searching thousands of computer files).

Under these discovery standards, BNSF's document production efforts have been more than adequate. BNSF has produced a massive amount of information relating to its testing of topper agents and other coal dust mitigation approaches, including extensive information from consultants that BNSF has engaged to assist in getting a handle on the coal dust problem. BNSF has no obligation to undertake additional discovery burdens so that AECC can relitigate issues relating to BNSF's operations and maintenance practices that are not a part of this case or so that AECC can explore other issues that are not relevant to the narrow focus of this case.

B. BNSF Should Not Be Required to Conduct Searches For Information Relating to BNSF's Operating and Maintenance Costs and Practices.

The primary focus of AECC's Motion to Compel is the requests that were the subject of AECC's February 7, 2012 letter to BNSF's counsel, in which AECC asked BNSF to explain the basis for BNSF's position that several AECC discovery requests sought information about issues that were not in this case because they had been addressed and resolved in *Coal Dust I*. At pages 6-7 of AECC's Motion, AECC puts these requests into two categories. The first category consists of requests that "seek information about the benefits BNSF thinks will result from its current tariff." AECC Motion, at 6. The second category consists of requests that "seek information about the effects of railroad operating and maintenance practices on deposition of fugitive coal and actions and plans by BNSF to reduce deposition of fugitive coal through changes in operating and maintenance practices." *Id.* at 7. A number of other requests listed by AECC at pages 8-10 of the Motion also fall into this second category, *i.e.*, requests focused on BNSF's operations or maintenance practices.

While AECC treats these requests as falling into two distinct categories, in fact there is substantial overlap between the two categories. Both categories of documents address BNSF's operations and maintenance costs and practices. The Category 1 document requests focus on maintenance and operating *costs*, since AECC's requests make it clear that the "benefits" in the Category 1 document requests are cost savings to BNSF from supposed changes in operations or maintenance practices. *See e.g.*, Request No. 3 ("Please produce all documents relating to identification of specific elements and quantities of benefits that BNSF asserts are produced by changes in the release of fugitive coal . . . including . . . changes in individual components of BNSF's costs"); Request No. 40 ("Please produce all documents that . . . relate to the unit cost paid by BNSF since January 1, 2005 for work performed on each specific maintenance function that BNSF asserts is or may be affected by the deposition of fugitive coal on the PRB Joint Line"); Request No. 45 ("Please produce all documents that . . . relate to the operational impacts and costs of maintenance windows on the PRB Joint Line").

The Category 2 documents are more directly focused on obtaining information about BNSF's operations and maintenance practices. *See e.g.*, Request No. 6(a) ("Please produce all documents that refer or relate to Your plans to reduce the amount of coal that is lost from rail cars . . . through . . . changes in BNSF operating or maintenance practices"); Request No. 15 ("Please produce all documents related to the effect of operating practices and/or maintenance practices . . . on the deposition on rail ballast of fugitive coal").

Several of the discovery requests listed by AECC on pages 8-10 of its Motion to Compel that AECC does not expressly include in its Category 2 document requests also seek information about BNSF's operating and maintenance practices. AECC acknowledges that Request Nos. 21, 23, 25, 34, and 47 seek information relating to BNSF's maintenance practices. *See* AECC

Motion, at 8 (describing Request Nos. 21, 23, and 25 as seeking information relating to “baseline maintenance requirements that BNSF . . . would face even if fugitive coal dust were completely eliminated”); AECC Motion, at 10 (describing Request Nos. 34 and 47 as seeking information relating to BNSF’s “maintenance practices” and “maintenance needs”).³ In addition, Request Nos. 17, 31 and 39 seek information about the accumulation of coal dust in the rail ballast, which would be available only from a review of BNSF’s maintenance records.⁴

The common thread in all of these requests is that they seek information about BNSF’s operations and maintenance costs and practices. While AECC describes its Category 1 document requests as addressed to “benefits” to BNSF, those requests are actually addressed to the supposed costs savings that would result from changes in operating and maintenance practices. The other document requests are explicitly focused on operating and maintenance practices.

BNSF has objected to these requests because a full response to these requests would require BNSF to expand substantially its discovery efforts to search for information that would be contained in files that relate to BNSF’s operating and maintenance practices. BNSF has not searched those files to date because they do not contain materials relevant to the controlling issue in the current case – the reasonableness of BNSF’s safe harbor provision. To the extent that some information sought by the requests identified above may have been captured by the broad

³ AECC also seeks an order compelling BNSF to produce current track charts in response to Request No. 1. While AECC did not include Request No. 1 in the category of requests seeking information about BNSF’s operating and maintenance practices, AECC claims that it needs the requested information in connection with “capacity impacts of maintenance windows referenced by the Board in *Coal Dust I*.” AECC Motion, at 13-14.

⁴ Request No. 26 goes a step further and asks for information about coal dust accumulation on lines *outside* of the PRB. AECC claims it is entitled to such information because the “deposition of such coal also has significant effects on tracks beyond the Joint Line and Black Hills Subdivision.” AECC Motion, at 14.

search that BNSF has already conducted of files of the key employees in the engineering, marketing, research, and environmental areas who were involved in issues relating to coal dust and the files of BNSF's consultants SWA and CRA, AECC will obtain that information from BNSF's discovery production. While BNSF has objected to the discovery requests described above, BNSF has not excluded information relating to those requests if the information is otherwise contained in materials that BNSF has collected in its search for materials relating to coal dust. BNSF has objected only to expanding the scope of its document collection efforts to include files relating only to BNSF's operations and maintenance practices and the costs associated with those practices.

BNSF should not be required to undertake such a burdensome expansion of its discovery efforts in this case. BNSF's operating and maintenance practices and costs are not at issue here. In *Coal Dust I*, AECC repeatedly argued that shippers should not have to undertake efforts to reduce coal dust emissions because BNSF's own operating and maintenance practices contribute to the coal dust problem. Indeed, a substantial portion of AECC's argument and evidence, including a major part of the testimony of AECC's consultant, Michael Nelson, focused on an effort to blame the coal dust problem on BNSF's operating and maintenance practices. The Board rejected AECC's argument that responsibility for coal dust mitigation lay with the railroads. The Board expressly ruled that "BNSF and other coal carriers have the right to establish coal loading requirements, subject to the reasonableness requirement of 49 U.S.C. §10702." *Coal Dust I*, at 11.

The focus of this proceeding is whether the loading requirements that BNSF has established – specifically the safe harbor provision in BNSF's Coal Loading Rule -- are reasonable, not whether BNSF's operating and maintenance practices contribute to the coal dust

problem. Nor are BNSF's costs associated with maintenance of coal dust relevant here. AECC and other coal shippers argued in *Coal Dust I* that BNSF should be required to deal with coal dust through changes in operations and enhanced maintenance because those activities were less costly than containing coal dust in loaded railcars. The Board rejected that argument out of hand, specifically finding that "BNSF's conclusion that containment is superior to maintenance alone is reasonable." *Coal Dust I*, at 9. The Board found that the type of cost-benefit analysis that the shippers contemplated, where the costs of maintenance were compared to the costs of containment, was inappropriate in assessing BNSF's measures to deal with coal dust since such an analysis could not possibly address all of the relevant costs and benefits. *Id.* at 5-6.

AECC's dogged pursuit in *Coal Dust I* of issues related to BNSF's operating and maintenance practices were fully aired in that proceeding. There is no valid reason to allow AECC to continue pursuing those issues here.

C. AECC Has No Basis For Challenging BNSF's Response to 22 Document Requests Where BNSF Agreed to Produce Responsive Documents.

While AECC's Motion to Compel focuses primarily on BNSF's objection to expanding the scope of its document collection to include issues relating to BNSF's operations and maintenance practices and costs, AECC also challenges BNSF's responses to 22 other document requests where BNSF agreed to undertake a reasonable search for responsive documents. The 22 requests at issue are listed at page 11 of AECC's Motion. As to those requests, AECC claims that it was improper for BNSF to limit its response to "conduct[ing] a search . . . that is commensurate with the nature and expedited schedule of this proceeding." AECC Motion, at 11. However, AECC does not point to any specific area where AECC believes BNSF's document production has been inadequate. Indeed, there is no indication in AECC's Motion that AECC has made any effort to review the extensive materials that BNSF has produced. AECC's sole

complaint is that BNSF has agreed only to conduct discovery that is tailored to the nature and expedited schedule of this proceeding.

AECC's challenge to BNSF's response to the 22 requests is misplaced. The Board itself recently stated that the scope of a party's discovery efforts is supposed to be tailored to the schedule and scope of the proceeding. *Canexus February 2012 Decision*, at 5. AECC's complaint is with the Board's discovery policy that expressly links the scope of discovery to the nature and schedule of a particular proceeding. BNSF's discovery efforts in this case have been extensive, and BNSF has produced more than 295,000 thousand pages of responsive documents, as well as more than 500,000 pictures and video files. AECC has identified no valid basis for questioning the adequacy of BNSF's discovery efforts as it relates to the 22 document requests listed at page 11 of AECC's Motion.

D. AECC Has Not Even Attempted To Demonstrate the Relevance of Materials Created Between January 2005 Through November 2009 That Were Produced In *Coal Dust I*

AECC's Motion also challenges BNSF's objection to producing materials generated before November 2009 that were produced to AECC and other parties in *Coal Dust I*. AECC Motion, at 12. Again, AECC points to no particular type of document or area of discovery from the time period before November 2009 that it believes it needs in order to address the narrow issue in this proceeding. Rather, AECC seeks broad authority to conduct wide-ranging discovery on all of the issues it has raised from time periods prior to the initiation of *Coal Dust I* and the subject of discovery in that proceeding.

AECC's insistence that BNSF engage in a broad production of documents that were already produced in *Coal Dust I* flies in the face of the Board's decision that discovery materials from *Coal Dust I* may be used in this proceeding only if they are shown to be relevant to the issue in this proceeding. When WCTL asked the Board to extend the protective order from *Coal*

Dust I so that discovery materials from that proceeding could be used in this case. the Board denied the request, noting that the “parties have not yet demonstrated the relevance of the materials from the prior proceeding to the new proceeding.” *January 2012 Decision*, at 2. AECC has not even attempted to show that the materials it seeks from BNSF that have already been produced in *Coal Dust I* are relevant to the issues in this proceeding. AECC’s request for a blanket order that BNSF be required to produce pre-November 2009 discovery materials should be denied.

E. The Board Should Deny AECC’s Request For An Order Compelling BNSF To Produce Documents Responsive to Two Miscellaneous Requests.

Finally, AECC moved to compel BNSF to respond to two additional requests that do not fit into the other discovery areas discussed above. For the reasons set forth below, AECC’s Motion to Compel as to these requests should be denied.

1. Request No. 32 (Documents relating to coal dust depositions at “Buckley’s Organic Garden” near Crawford, NE).

AECC claims that it is entitled to information about coal dust depositions at “Buckley’s Organic Garden” because “BNSF referred to this site repeatedly during its oral argument in *Coal Dust I*.” AECC Motion, at 9. While the impact of coal dust on property near the PRB rail lines was relevant to the question in *Coal Dust I* of whether BNSF could require shippers to take reasonable measures to limit coal dust losses, and therefore was an issue addressed by BNSF at oral argument in *Coal Dust I*, that issue was decided by the Board, as discussed above. The Board has already concluded that BNSF may require shippers to take reasonable measures to curtail coal dust losses, and there is no reason to revisit that issue in this proceeding.

2. Request No. 33 (Documents relating to losses of PRB coal from the bottoms, joints, or seams of rail cars)

In *Coal Dust I*, shippers also sought to deflect responsibility for dealing with coal lost from the tops of loaded coal cars by arguing that coal is also lost out of the bottom of certain types of coal cars. But the Board found shippers' arguments about coal losses from bottom-dump railcars to be irrelevant to the question whether shippers have a responsibility to deal with coal losses from the top of loaded railcars. The Board expressly recognized that "BNSF may take reasonable steps to address loss from the open tops of cars" and that the "possibility that some coal is lost through bottom-dump cars does not negate BNSF's general right to address loss from open-top cars." *Coal Dust I*, at 8. Indeed, AECC concedes that the Board has already decided that BNSF was entitled to address coal losses from the tops of rail cars. AECC Motion at 9 (recognizing that "the Board said in *Coal Dust I* that it was appropriate to consider losses from the tops of coal cars . . .").

The safe harbor provision in the Coal Loading Rule that is at issue here deals with coal losses from the top of loaded railcars. The question of coal losses from the bottom of railcars is not relevant at all to the issue in this case, and BNSF should not be required to conduct a special search for documents on coal losses from the bottom of railcars.⁵

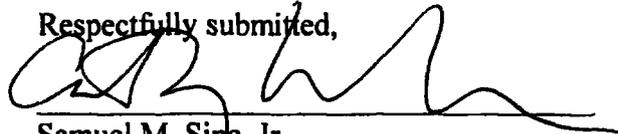
⁵ As BNSF explained previously in connection with other discovery requests, BNSF has not excluded any documents that might contain information about coal losses from the bottom of railcars if such information was contained in the materials that BNSF has collected to respond to other valid requests. BNSF simply objects to expanding the scope of its discovery efforts to specially seek out information on coal losses from the bottom of railcars.

IV. CONCLUSION

AECC's motion to compel is as broad and unfocused as its blunderbuss discovery requests. AECC's Motion is also unfounded in all respects. BNSF has produced substantial information on the issues that are the subject of this proceeding, and AECC has ample information to address the issues in this proceeding in its evidence. AECC has identified no valid basis for an order compelling BNSF to augment its already extensive discovery production in this case. The Board should deny AECC's motion in its entirety.

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Dated: February 23, 2012

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2012, I caused a copy of the foregoing to be served by e-mail or first-class mail, postage prepaid, upon all parties of record in this case as follows:

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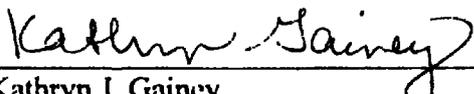
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