

BEFORE THE
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 35557

REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS

**OPENING EVIDENCE AND ARGUMENT
OF UNION PACIFIC RAILROAD COMPANY**

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The Board instituted this proceeding to consider a narrow issue: “the reasonableness of the safe harbor provision” in the coal dust mitigation tariff issued by BNSF Railway Company (“BNSF”). *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, FD 35557, slip op. at 4 (STB served Nov. 22, 2011). Union Pacific Railroad Company (“Union Pacific”) believes the safe harbor provision in BNSF’s current tariff is plainly reasonable under the standard established by the Board in a prior case involving BNSF’s efforts to address coal dust emissions, *Arkansas Electric Cooperative Corp. – Petition for Declaratory Order*, FD 35305 (STB served Nov. 22, 2011).

In *Arkansas Electric*, the Board determined that BNSF could establish a tariff designed to address the loss of coal from the tops of railcars. The Board found that coal dust is a “particularly harmful ballast foulant,” *Arkansas Electric*, slip op. at 6; that BNSF could address coal loss from open-top cars, *id.* at 8; that BNSF reasonably concluded that containment of coal in the cars is superior to maintenance of lines alone, *id.* at 9-10; and that carriers may establish reasonable loading rules related to the containment of coal, *id.* at 10-11.

Nonetheless, the Board held that BNSF’s original rule “create[d] too much uncertainty to be deemed a reasonable practice.” *Id.* at 14. It was concerned that BNSF had established a “coal

dust emission requirement that a shipper may be unable to meet, even if the currently accepted methods of coal dust suppression are employed,” and it was concerned by disputes over certain “technical aspects” of the monitoring system used to measure compliance. *Id.* at 12. However, the Board also explained that BNSF could resolve both its concerns by adopting a reasonable “safe harbor” – that is, a provision establishing that “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.*

BNSF’s current coal dust mitigation tariff contains a reasonable safe harbor provision. The tariff provides that a shipper will be “deemed in compliance” if it: (a) ensures that loaded uncovered coal cars will be profiled in accordance with a published template; and (b) ensures that an approved topper agent will be applied to loaded cars in accordance with manufacturer specifications. *See* BNSF Price List 6041-B, Item 100. BNSF’s tariff thus follows the Board’s suggestion in *Arkansas Electric* by providing “steps that, if taken by a shipper before coal cars are tendered to the railroad, would guarantee that the shipper would be deemed in compliance with the tariff.” *Arkansas Electric*, slip op. at 14; *see also id.* at 12 (stating that a “reasonable rule would provide certainty to the shippers” so that “once they had loaded their cars correctly, they could be certain that the carrier would move their commodity without penalty”).

BNSF’s tariff is also reasonable in that it reflects a cost-effective approach to the issue of coal dust suppression. Under BNSF’s tariff, shippers are not limited to any specific technology for suppressing coal dust. Rather, shippers may use any method that is proven to be as effective as those already approved. Currently, shippers may use any of five topper agents that BNSF has approved, and they may obtain approval for additional topper agents, and for other methods of coal dust suppression, by demonstrating their effectiveness. *See* BNSF Price List 6041-B, Item

100, Sections 3.B & 4. By adopting an approach ultimately based on performance, even while providing an activity-based safe harbor, BNSF's tariff encourages continued pursuit of lower-cost alternatives for meeting the basic goal of coal dust suppression.

Union Pacific and its customers are not subject to BNSF's tariff, but Union Pacific has a strong interest in the tariff's application to coal traffic moving over the Joint Line in the Powder River Basin. Reducing coal dust emissions will promote safe, reliable, efficient transportation of BNSF's and Union Pacific's traffic over the Joint Line. In addition, Union Pacific bears a large share of the costs of removing coal dust from the Joint Line, as well as the costs of removing coal dust from its own lines. Moreover, although BNSF's tariff applies only to "coal cars loaded at Montana and Wyoming mines *by shippers whose coal transportation is subject to [BNSF's] Rules Book,*" *id.*, Section 1 (emphasis added), the terms requiring compliance with coal dust mitigation measures are mirrored in a BNSF operating rule that applies to Union Pacific under the Interstate Commerce Commission-approved Joint Line Agreement. To comply with the BNSF operating rule, Union Pacific has adopted coal loading rules and recommendations for its customers that reflect the terms of the BNSF operating rule and therefore mirror the BNSF tariff. *See* UP Circular 6603-C, Items 215 & 216.¹

Union Pacific believes BNSF's current coal dust mitigation tariff reasonably addresses the loss of coal from the tops of railcars. Accordingly, Union Pacific urges the Board to act promptly to affirm BNSF's right to adopt the rules in BNSF Price List 6041-B, Item 100.

¹ UP Circular 6603-C is available at <http://c02.my.uprr.com/wtp/pricedocs/UP6603BOOK.pdf>.

Respectfully submitted,

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October 1, 2012

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 1st day of October, 2012, I caused a copy of the Opening Evidence and Argument of Union Pacific Railroad Company to be served by first-class mail, postage prepaid, on all parties of record in this proceeding.



Michael L. Rosenthal