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VIA ELECTRONIC FILING

Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: **Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions,
STB Finance Docket No. 35557**

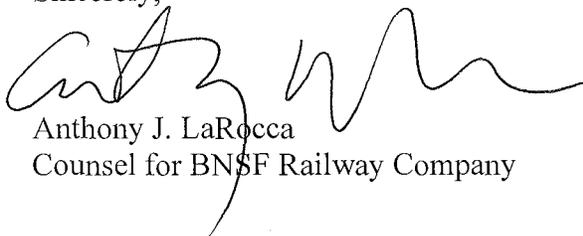
Dear Ms. Brown:

Enclosed for filing in the above-captioned matter is the public version of BNSF Railway Company's Reply To Arkansas Electric Cooperative Corporation's Petition For Reconsideration.

We are also filing under separate cover a confidential version of BNSF's Reply.

Thank you for your assistance.

Sincerely,



Anthony J. LaRocca
Counsel for BNSF Railway Company

Enclosures

cc: Counsel of Record

**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
ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
PETITION FOR RECONSIDERATION**

BNSF Railway Company ("BNSF") hereby responds in opposition to Arkansas Electric Cooperative Corporation's ("AECC") January 6, 2014 Petition for Reconsideration ("Petition") of the Board's December 13, 2013 Decision, corrected on December 17, 2013 ("December 2013 Decision"), in the above-captioned proceeding.

AECC's Petition is the latest step in AECC's four year litigation campaign to put off for as long as possible any responsibility for controlling coal dust losses from loaded rail cars in the Powder River Basin ("PRB"). The Board's December 2013 Decision, which approved the basic coal loading requirements set out in BNSF's Coal Loading Rule,¹ reflects a careful, detailed and thorough review of the extensive evidence submitted in this proceeding on the reasonableness of BNSF's Coal Loading Rule.² Reconsideration of a Board decision requires a showing of material error, new evidence or changed circumstances. 49 C.F.R. §1115.3(b). AECC's Petition fails to meet any of these criteria. AECC's Petition is nothing more than a rehashing of

¹ Item 100 of BNSF's Price List 6041-B and Appendices A and B.

² The Rule contains a safe harbor provision that identifies specific actions, including the profiling of loaded coal and the application of topper agents to the profiled coal, that will ensure compliance with BNSF's coal loading requirements. The Board's finding in the December 2013 Decision that the liability provision in the safe harbor was overbroad and ambiguous is not at issue here.

arguments that AECC has already made (in many cases, several times) and that the Board has properly rejected.

In fact, AECC's Petition primarily seeks to relitigate issues that were already decided by the Board in a different proceeding, *Arkansas Electric Coop. Corp.—Petition for Declaratory Order*, Docket No. 35305 (STB served March 3, 2011) ("*Coal Dust I*"). The Board's *Coal Dust I* decision established the framework for evaluating the reasonableness of coal loading practices relating to coal dust. AECC's Petition, like its evidence in this proceeding, effectively seeks a reopening of *Coal Dust I* to modify three central findings in that case, namely that coal dust is a pernicious ballast fouling agent, that BNSF has the right to establish loading requirements that will keep the loaded coal in rail cars in transit, and that the reasonableness of BNSF's coal loading requirements will not be judged based on a formal cost-benefit analysis. AECC has given the Board no valid reason to reopen *Coal Dust I* for the purpose of revisiting those findings.

For the reasons discussed in more detail below, AECC's Petition should be denied.

I. The Board Properly Assessed BNSF's Coal Loading Rule Under The Cost-Effectiveness Test Set Out In *Coal Dust I*.

AECC's first argument is that the Board should have applied a "cost-benefit" test to assess the reasonableness of BNSF's coal loading requirements, and that under such a cost-benefit test, BNSF's Coal Loading Rule would fail because there is no evidence of "tangible" or "quantified" benefits from the loading requirements that exceed the costs of complying with the loading requirements. Petition at 6. But the Board in *Coal Dust I* rejected shippers' argument that BNSF's coal loading requirements should be judged under a cost-benefit test and found instead that the proper inquiry was whether BNSF's loading requirements are cost effective. The Board properly concluded in the present proceeding that the safe harbor provision in BNSF's

Coal Loading Rule meets the cost-effectiveness standard and AECC has given the Board no reason to disturb or reconsider this finding.

In *Coal Dust I*, AECC and other coal shippers argued that “the concept of reasonableness requires the balancing of costs and benefits,” and they sought to show that the costs to shippers of taking measures to keep coal in loaded cars exceeded the benefits to railroads from reduced maintenance costs. *Coal Dust I* at 5. The Board expressly rejected the coal shippers’ proposed analytical framework: “[A] full cost-benefit analysis is not required by BNSF before it can attempt to control coal dust emissions.” *Id.* at 4. “There may be instances where a full, quantified cost-benefit analysis is warranted, but this is not that instance.” *Id.* at 6.

Instead, the Board concluded that “once a determination is made that a problem exists for which a solution is required, the focus is on whether the solution is effective in relation to its costs.” *Coal Dust I* at 5, note 14. Since the Board also concluded in *Coal Dust I* that coal dust “is a problem that must be addressed,” *id.* at 14, the reasonableness of loading requirements designed to keep the coal in rail cars in transit turns on whether those requirements are “effective in relation to [their] cost,” *i.e.*, whether the proposed requirements effectively address the problem at a cost that is reasonable relative to other alternatives.

The Board properly found in the December 2013 Decision that the loading requirements in BNSF’s Coal Loading Rule meet this “cost effectiveness” standard. As the Board explained:

The evidence shows that application of topper agents [a central feature of BNSF’s Coal Loading Rule] is the most effective measure for controlling the dispersion of dust from open-top rail cars. There is no evidence that topper agents are cost prohibitive, particularly in relation to the delivered cost of PRB coal.”

December 2013 Decision at 19. Moreover, the shippers presented no evidence of a less costly alternative that was as effective as the safe harbor measures set out in BNSF’s Coal Loading Rule, and they presented no evidence that would have supported the use of a less costly but less

effective coal dust mitigation approach. *Id.* at 20. The Board therefore concluded that the “shipper parties have not shown that the effective safe harbor [set out in BNSF’s Coal Loading Rule] is not reasonably commensurate with its costs.” *Id.* at 19.

In its Petition for Reconsideration, AECC continues to press the Board to apply a cost-benefit analysis, arguing that the Board’s *Coal Dust I* decision “affirmed the overall propriety of cost-benefit analysis.” Petition at 5. AECC’s argument that the Board’s decision in *Coal Dust I* endorsed the use of a cost-benefit analysis is contradicted by the plain language of the Board’s decision in *Coal Dust I*, which expressly rejected use of a cost-benefit framework for assessing the reasonableness of BNSF’s coal loading requirements.³ As the Board explained, a cost-benefit analysis “does not fit the circumstances of this proceeding and the available evidence.” *Id.* at 5. The Board was particularly concerned that a cost-benefit analysis of alternative coal dust approaches would not be able to account for “all the costs and benefits of each alternative,” *id.*, such as the costs associated with the disruption of coal traffic from coal dust ballast fouling if coal was allowed to blow out of cars in transit, *id.* at note 14,⁴ and “the persistent capacity constraints that would be created by a coal dust solution that focuses exclusively on

³ The Board could treat AECC’s incorrect reading of the Board’s decision in *Coal Dust I* as a request to reopen *Coal Dust I* for the purpose of changing the Board’s conclusion regarding the propriety and feasibility of a formal cost-benefit analysis. But AECC has not even attempted to show why the standards for reopening would be met.

⁴ The Board cited pages 15-16 from the Verified Rebuttal Statement of BNSF’s witnesses Kalt and Mitchell, where Professor Kalt and Dr. Mitchell explained that “a true assessment of the full costs and benefits associated with the shippers’ maintenance proposal would have to quantify the risk of track failure under the increased maintenance schedule, as well as the entirety of costs should track failure actually occur.” *Coal Dust I*, BNSF Rebuttal Evidence and Argument, Kalt-Mitchell VS at 15-16.

maintenance,” *id.* at 6.⁵ AECC presented no evidence in this proceeding that might justify revisiting the Board’s valid concerns in *Coal Dust I* about the use of a cost-benefit analysis.

In addition, AECC’s suggestion that BNSF’s Coal Loading Rule would produce “no tangible benefits” is ridiculous. Petition at 6. Why would BNSF have undertaken the demanding and costly effort to adopt effective coal dust containment rules if it had not had a well-founded belief that such rules would be effective? As the Board explained in the December 2013 Decision, “the impacts of coal dust on ballast integrity justify containment efforts.” December 2013 Decision at 19. All users of the PRB rail network, as well as the public interest in safe and efficient rail transportation, derive substantial benefits from measures that keep coal dust from blowing out of rail cars and jeopardizing the reliability of rail transportation of PRB coal. While such benefits may be difficult to quantify, they cannot rationally be ignored by labeling them non-existent.

II. The Board Properly Concluded in *Coal Dust I* That BNSF Was Entitled To Establish Reasonable Loading Rules To Address Coal Dust Losses In Transit.

AECC’s second argument is that the Board failed to consider whether the problem of coal dust should be addressed through changes to BNSF’s operating, construction and maintenance practices rather than through loading rules that impose costs on shippers. In advancing this argument, AECC again ignores that the Board had already determined in *Coal Dust I* that BNSF has the right to establish reasonable loading rules to deal with coal dust losses in transit.

In *Coal Dust I*, “[t]he Shipper Interests claim[ed] that the way BNSF operates its trains, changes in track modulus, and poor maintenance of the line increase coal dust dispersion.” *Coal*

⁵ The Board cited pages 17-18 of BNSF’s Reply Evidence in *Coal Dust I* where BNSF explained that the coal shippers’ cost analyses ignored the impact on rail operations and track capacity of extraordinary maintenance activities necessary to remove coal dust from the high-volume PRB lines.

Dust I at 11. According to the shippers, “rail carriers have the responsibility to transport the goods in a safe manner,” *id.*, therefore, railroads, not shippers, should be required to deal with the problem of coal dust either through after-the-fact clean-up efforts or through changes to operating, construction and maintenance practices.

The Board in *Coal Dust I* expressly rejected this argument, stating that “[w]e conclude 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.* As the Board explained in the December 2013 Decision, “[t]he Board addressed this issue in *Coal Dust I*, slip op. at 9-11, by explaining that BNSF may establish loading requirements, notwithstanding AECC’s argument there that operating, maintenance, and construction practices cause coal dust and that railroads should be responsible for preventing that loss.” December 2013 Decision at 8.⁶

In the present proceeding, AECC ignored the Board’s finding in *Coal Dust I* that railroads are entitled to establish reasonable coal loading rules designed to keep coal in rail cars in transit, and it recycled its evidence from *Coal Dust I* on the supposed impact of BNSF’s operating, construction and maintenance practices on coal dust losses, arguing that “the safe harbor provision is unreasonable because it imposes on shippers the responsibility to prevent the deposition of fugitive coal *caused by the actions of the railroads.*” AECC Op., at 6 (emphasis in original). In assessing AECC’s repackaged evidence, the Board properly concluded that “AECC has not shown material error, changed circumstances, or new evidence that would cause us to reconsider the Board’s *Coal Dust I* conclusion that BNSF may establish reasonable loading

⁶ Similarly, the Board noted in a March 5, 2012 decision in the present proceeding that it had heard arguments in *Coal Dust I* on “the effects of operating decisions on coal dust dispersion and concluded that carriers may establish reasonable loading rules for coal.” *Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, STB Fin. Docket No. 35557, at 3 (STB served Mar. 5, 2012).

requirements to reduce coal dust loss.” December 2013 Decision at 8. The Board further explained that “AECC’s evidence does not convince us that there are fixes that BNSF has overlooked that would significantly reduce the emission of coal dust from open-top railcars and make it unreasonable to apply topper agents.” *Id.*

AECC’s claim in the Petition that it “did not and does not ask the Board to reconsider *Coal Dust I*” is nonsense. Petition at 8. By asking the Board to address the causes of coal dust losses that are attributable to railroad operating, construction and maintenance practices, AECC is undeniably asking the Board to revisit its conclusion that railroads may establish reasonable loading practices to deal with coal dust rather than addressing coal dust dispersion by changing operating, construction and maintenance practices.

AECC also tries to fit its recycled evidence on the supposed causes of coal dust losses into the analytical framework established by the Board in *Coal Dust I* for addressing the reasonableness of railroad loading rules. AECC argues that the Board should have considered whether changes to BNSF’s operating, construction and maintenance practices would be a more “cost-effective strategy for keeping coal in moving rail cars” than loading measures. Petition at 9. But AECC’s cost-effectiveness argument fails on several grounds.

First, the thrust of the argument is that BNSF should not be allowed to establish loading rules to keep coal in rail cars in transit because there is supposedly a superior approach, namely changing railroad operating, construction and maintenance practices. But no matter how AECC packages this argument, it is a direct challenge to the conclusion in *Coal Dust I* that BNSF may establish reasonable loading rules, and AECC has given the Board no reason to reopen *Coal Dust I* to revisit that conclusion.

Second, AECC does not set out a specific proposal that could be evaluated as an alternative to loading measures for dealing with coal dust losses. Instead, the thrust of AECC's evidence and argument here (and in *Coal Dust I*) was that the railroads need to conduct more studies of the impact of their operating, construction and maintenance practices on coal dust losses. See AECC Op., Nelson VS at 20. AECC purported to list "specific options" for reducing coal dust losses through changes in railroad operating, construction and maintenance practices, but the list simply illustrated the types of studies that AECC believes railroads should undertake to develop potential alternative methods of dust mitigation. *Id.*, at Nelson Op. VS at 55-56. AECC did not propose a specific solution to the coal dust problem. AECC's objective was to push responsibility back onto the railroads for dealing with coal dust and to avoid any responsibility on the part of shippers for dealing with the problem.

Third, AECC presented no evidence at all on the relative cost or effectiveness of any changes to railroad operating, construction and maintenance practices compared to the cost and effectiveness of BNSF's proposed loading rules. As to the supposed effectiveness of changes to rail operating, construction and maintenance practices, the Board correctly found that AECC "offers no evidence of th[e] efficacy" of any changes to railroad practices relative to loading measures in dealing with coal dust losses. December 2013 Decision at 20. As to the costs of any alternative to loading measures, the Board also correctly found that "the record in this proceeding also does not contain sufficient evidence to compare the costs of construction, operations and maintenance changes to the costs of containment." December 2013 Decision at 8. AECC's Petition offers no basis for reconsidering these conclusions.

III. The Board Properly Concluded In *Coal Dust I* That Coal Dust Is A Harmful Ballast Foulant.

AECC's third argument is that the Board did not have an adequate basis for concluding in *Coal Dust I* that coal dust is a serious problem for ballast stability that needs to be addressed through reasonable loading rules. A major focus of the evidence and argument presented in *Coal Dust I* involved the properties of coal dust as a ballast foulant. Based on the extensive record created in that proceeding, the Board concluded that "the weight of the evidence shows that coal dust is a harmful foulant that could contribute to future accidents by destabilizing tracks." *Coal Dust I* at 8.⁷ AECC's Petition challenges the Board's conclusion in *Coal Dust I* that coal dust is a harmful ballast foulant, focusing on alleged deficiencies in two of the evidentiary grounds for that conclusion.

First, AECC claims that the Board "ought to have given no weight in its Decision to the unsupported assertions of" the U.S. Department of Transportation ("DOT") regarding the harmful impact of coal dust on rail ballast. Petition at 12. According to AECC, the DOT did not

⁷ The record in *Coal Dust I* contained voluminous evidence relating to the impact of coal dust on ballast stability, including: BNSF Opening, Tutumluer VS (describing studies of coal dust's "pernicious effect upon railroad ballast"); BNSF Rebuttal, Tutumluer VS (describing the physical and mechanical properties of coal dust); BNSF Opening, VanHook VS at 12-13 (describing the effect of coal dust on ballast drainage); BNSF Reply, VanHook VS at 6-11 (documenting the extent of coal dust fouling); BNSF Opening, Sloggett VS at 3-4 (describing firsthand experience with the damage caused by coal dust to the rail ballast); BNSF Opening, Fox VS at 4-6 (discussing the role of coal dust in the costly and disruptive 2005 derailments of PRB coal trains); UP Opening, Connell VS at 12-18 (describing studies of the harmful nature of coal dust on ballast); UP Opening, Glass VS at 4-6 (describing UP's concerns about track problems arising from coal dust); UP Reply, Glass VS at 2-3 (explaining that the quantity of coal dust on PRB lines and its deposition rate, combined with its physical characteristics, make coal dust a serious threat to track stability); UP Reply, McCulloch VS at 1-11 (describing engineering studies by Shannon & Wilson on the harmful impact of coal dust); UP Rebuttal, McCulloch VS at 1-8 (explaining that coal dust accelerates wear on the concrete ties and ballast); DOT Reply VS (summarizing record evidence that when wet, coal dust can undermine the integrity of ballast); DOT Rebuttal VS ("FRA's experience confirms the record evidence that coal dust interferes with the stability of ballast to a much greater extent than other such materials.").

offer any “evidence whatsoever upon which the Board could base a conclusion that coal dust is a particularly severe ballast foulant.” *Id.* at 13. In fact, the Board had ample grounds in *Coal Dust I* to rely on the DOT’s view that coal dust was a dangerous ballast foulant and the Board had no reason in the present proceeding to conclude that its reliance on the DOT’s concerns had been misplaced.

The DOT, through the Federal Railroad Administration (“FRA”), an agency within the DOT, oversees safety in the railroad industry and regulates various practices relating to rail ballast maintenance. The FRA has extensive experience studying track geometry and ballast fouling, monitoring the integrity of rail ballast and enforcing regulations relating to rail track structure. To carry out their responsibilities, DOT and FRA have “staff experts on rail ballast and track geometry,” providing the DOT/FRA with a solid basis for assessing the potential impact of coal dust on ballast stability. December 2013 Decision at 7, note 34. DOT brought one of its experts to the *Coal Dust I* hearing held on July 29, 2010 to answer questions about the technical grounds for DOT’s concerns about coal dust as a ballast foulant. *Id.* Moreover, FRA studies have expressly found that coal dust is a pernicious ballast fouling agent.⁸ The broad experience of DOT/FRA with matters relating to rail ballast gave DOT sufficient grounds to urge the Board to acknowledge and act upon the dangers of coal dust as a ballast foulant, and the Board was fully justified in relying on DOT’s concern.

⁸ See BNSF’s Rebuttal in the present proceeding at 6, citing Federal Railroad Administration, *Subsurface Evaluation of Railway Track Using Ground Penetrating Radar* at 71-72 (April 2009) (“coal dust is a major fouling material along the data collection route and coal dust has an anomalously high absorption capacity.”); T.R. Sussmann, et. al., “Sources, Influence, and Criteria for Ballast Fouling Condition Assessment,” US DOT (TRB 2012 Annual Meeting) (“Unlike many other ballast fouling processes, the contamination of ballast with coal can occur before the ballast begins to breakdown. The result is the unusual condition where the fouling material is nearly 100% coal.”).

Second, AECC argues that the Board should have repudiated in the present proceeding its conclusions in *Coal Dust I* on the harmful characteristics of coal dust based on supposed new evidence that a BNSF witness in *Coal Dust I* subsequently changed his mind regarding the pernicious qualities of coal dust as a ballast foulant. Petition at 13-14. In *Coal Dust I*, Dr. Erol Tutumluer, a professor of Civil and Environmental Engineering at the University of Illinois, described in verified statements attached to BNSF’s Opening and Rebuttal Evidence the harmful effects of coal dust on ballast stability. According to AECC, Dr. Tutumluer’s supposed change of heart is set out in a paper, *Investigation of Coal Dust Composition Affecting Railroad Ballast Behavior*, produced by Union Pacific Railroad Company in discovery in the present proceeding.

In fact, as the Board concluded based on its review of the report cited by AECC, “Dr. Tutumluer did not retract his previous conclusions about coal dust’s ballast fouling properties.” December 2013 Decision at 6. The finding in Dr. Tutumluer’s report cited by AECC that coal dust is a moisture-sensitive ballast foulant was fully consistent with the findings in prior reports by Dr. Tutumluer, with Dr. Tutumluer’s testimony in *Coal Dust I*, and with the Board’s conclusion in *Coal Dust I* that coal dust is a dangerous ballast fouling agent. *Id.* Moreover, as BNSF explained, the same report that AECC cites as evidence of a “retraction” of Dr. Tutumluer’s views on the harmful nature of coal dust expressly reiterated Dr. Tutumluer’s conclusion that coal dust is a harmful ballast foulant: {

}⁹ Subsequent studies by Dr. Tutumluer reiterated his

⁹ UP-AECC-00006351, contained in AECC Supplement to Opening, App. 1. Confidential materials are designated by a single bracket: “{”.

conclusions on the harmful characteristics of coal dust.¹⁰ The Board had no reason to revisit the grounds for its conclusion in *Coal Dust I* that coal dust fouling of PRB ballast “is a problem that must be addressed.” *Coal Dust I* at 14.¹¹

IV. Substantial Evidence Supports The Board’s Conclusion That Topper Agents Are Effective In Controlling Coal Dust Losses.

AECC’s fourth argument is that the Board disregarded evidence regarding the effectiveness of the topper agents identified in the safe harbor provision of BNSF’s Loading Rule in reducing coal dust losses outside of the PRB. AECC also argues that the Board disregarded evidence on the effectiveness of topper agents in reducing coal dust losses under real-world operating conditions. In fact, the Board addressed AECC’s evidence on both issues and found it insufficient to call into question the effectiveness of the topper agents.

As to AECC’s evidence that the crust formed by topper agents cracked on occasion, the Board properly concluded that evidence of cracking in the topper crust did not show that the toppers were ineffective in controlling coal dust. As the Board noted, BNSF’s evidence showed that with or without cracking, the topper agents approved for use in the safe harbor provisions reduced coal dust losses in transit by at least 85%. December 2013 Decision at 14. AECC offers nothing but speculation in suggesting that cracks in the topper crust may have led to “clumps of coal” falling out of the loaded car in transit as opposed to settling within the rail car. Petition at

¹⁰ See BNSF’s Rebuttal in the present proceeding at 6, note 6, citing Huang & Tutumluer, “Discrete Element Modeling for Fouled Railroad Ballast,” *Construction and Building Materials*, Vol. 25, at 3306 (Mar. 2011) (“[C]oal dust was by far the worst fouling agent for its impact on track substructure and roadbed.”).

¹¹ It is unnecessary to address AECC’s further claim that if the Board had not credited DOT’s and Dr. Tutumluer’s views about the harmful nature of coal dust, the Board might not have concluded that BNSF had the right to establish reasonable loading rules to keep coal in rail cars in transit. Petition at 15. In fact, the Board properly gave weight to the testimony of DOT and Dr. Tutumluer, as well as to the extensive additional evidence in the record, and reasonably concluded that coal dust was a problem that must be addressed to ensure safe and efficient PRB coal transportation.

17. The Board properly concluded that “the photographs that show cracking in the topper crust do not establish topper agent failure and therefore do not prove that topper agents are failing or will fail beyond the test area.” December 2013 Decision at 15. AECC’s Petition gives the Board no reason to reconsider this conclusion.

The Board also had substantial grounds for rejecting AECC’s claim that the topper agents identified in the safe harbor provision of BNSF’s Coal Loading Rule may not be effective under real-world operating conditions. The Board carefully reviewed the record evidence and found that BNSF’s field and laboratory testing “adequately accounted for weather conditions and real world operations.” December 2013 Decision, at 13. As the Board observed, BNSF ran test trains during conditions of varying temperatures and wind speed. While BNSF excluded results from test trains that experienced precipitation because precipitation would distort the test results, the Board noted that “the approved topper agents underwent lab tests to ensure that they worked in precipitation.” *Id.* Similarly, while field tests were not conducted in the coldest months of the year, “the topper agents were designed for cold weather conditions and were lab tested under freezing conditions.” *Id.*

V. The Board’s Approval Of BNSF’s Coal Loading Rule Does Not Violates Principles Of Constrained Market Pricing.

Finally, AECC argues that the Board’s approval of BNSF’s Coal Loading Rule is inconsistent with the principles of Constrained Market Pricing (“CMP”) that underlie the Board’s regulation of rail rates. Petition at 18. AECC’s argument is that BNSF already generates “supracompetitive earnings” on PRB coal traffic, and any reduction in maintenance costs resulting from controlling coal dust losses will only increase those “supracompetitive earnings,” in violation of CMP principles. *Id.* In its reply evidence in this proceeding, AECC made a similar argument that “shipper application of toppers would have the effect of increasing BNSF’s

contribution from PRB traffic that already more than pays its own way.” AECC Reply, Nelson VS at 14.

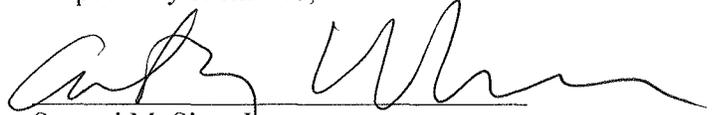
As an initial matter, the premise of AECC’s argument – that BNSF generates “supracompetitive earnings” on PRB traffic “that already more than pays its own way” – is totally unsupported. AECC does not provide a shred of evidence about BNSF’s earnings on PRB coal traffic or the costs to provide PRB coal transportation. AECC’s claim that some PRB coal transportation rates have been found to be unreasonable says nothing about the overall level of revenues earned on PRB coal transportation. Petition at 18.

More important, the principles of CMP that guide the Board’s review of the reasonableness of individual rates are not relevant to the reasonableness of BNSF’s loading rules. The Board has assessed the reasonableness of BNSF’s Coal Loading Rule based on whether they accomplish the objective of reducing coal dust fouling of rail ballast in a cost-effective manner. The reasonableness of BNSF’s rates for coal transportation is a separate matter. As the Board correctly observed, “[i]f a shipper believes it has the basis for reducing BNSF’s rate because the reduction in coal dust emissions will reduce BNSF’s costs or for other reasons, it may file a complaint against BNSF’s rates.” December 2013 Decision at 28. AECC’s claim that the Board’s reliance on its rate reasonableness procedures to deal with allegations of excessive earnings “is, at best, frivolous” is based on AECC’s view that the Board’s rate reasonableness procedures are deficient. Petition at 18-19. But any complaint that AECC might have about the existing procedures and standards applied by the Board to assess the reasonableness of particular rates should be brought in a different proceeding.

VI. Conclusion

For the reasons described above, AECC’s Petition for Reconsideration should be denied.

Respectfully submitted,



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January 27, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January 2014, I caused a copy of the foregoing to be served by e-mail and first-class mail, postage prepaid, upon all parties of record in this case as follows:

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