

BEFORE THE
SURFACE TRANSPORTATION BOARD

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REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS

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

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PREFACE

Arkansas Electric Cooperative Corporation (AECC) 1/ petitions the Board to reconsider its Decision (the "Decision") served December 17, 2013, in this Docket, because the Decision is contrary to the evidence in the record (including evidence from the railroads themselves), is unsupported by substantial evidence, and is inconsistent with the Board's own rulings in, Arkansas Electric Cooperative Corporation - Petition for Declaratory Order, Docket No. FD 35305, served Mar. 3, 2011 (hereafter, Coal Dust I). 2/

SUMMARY OF ARGUMENT

In the Decision the Board pays solicitous attention to the concerns of the railroads, but fails to give even-handed consideration to the burdens and harms BNSF's tariff imposes on shippers and on the public interest. The Board shows itself unwilling to hold

1/ AECC uses the same conventional abbreviations for railroads, companies, and locations as it used in its Opening, Reply, and Rebuttal Evidence and Argument.

2/ AECC does not seek reconsideration of the Board's ruling that the liability provision of the coal dust mitigation tariff is unreasonable and may not be enforced.

railroads accountable for their actions that create coal dust releases, and their demonstrated ability to control the preponderance of such releases. Instead, the Board gives the railroads carte blanche to impose hundreds of millions of dollars of additional costs on coal shippers and their customers, simply to cover up the railroads' own responsibility for causing coal dust to foul the PRB trackage.

In Coal Dust I, the Board granted AECC's Petition and found that BNSF's coal dust tariff was unreasonable and invalid, but the Board invited BNSF and its shippers to work together to develop a new tariff. Among the standards that a reasonable tariff should meet, the Board said, is that it "must be reasonably commensurate economically with the problem it addresses" Coal Dust I at 6. However, in the Decision the Board approved a new BNSF tariff that imposes costs of as much as \$300 million per year on coal shippers, in return for no quantifiable benefits whatsoever. The evidence establishes beyond any doubt that the costs imposed by BNSF's tariff are not "reasonably commensurate economically with the [coal dust] problem". See Part 1, below.

In Coal Dust I, the Board identified the respective responsibilities of shippers and railroads this way:

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. But on the other hand:

[O]nce a railroad accepts a loaded car, it bears responsibility for transporting the car in a manner that avoids releasing or spilling the shipment.

Id. at 14. AECC's evidence, much of which necessarily came from the railroads themselves, established that the railroads themselves cause most of the coal dust deposition on the PRB lines, by operating at intermittently at high speeds, causing coal to be blown or shaken out of the cars; by using operating practices on grades that permit unnecessary "slack action", which shakes coal out of cars; by allowing track conditions to exist that shake the coal out of the cars as they pass over switches, bridges, etc. The Board simply ignored this evidence of railroad responsibility for a problem BNSF demands that shippers pay to fix. See Part 2, below.

The Board justified the imposition of this burdensome tariff on the supposition that coal dust is a uniquely damaging ballast foulant, based on supposed expert opinion from tariff supporters in Coal Dust I. But whatever support there once was for that supposition has now evaporated. AECC showed that the opinions about coal dust expressed by USDOT's attorney, upon which the Board relied, lacked any expert authentication, and that BNSF's former witness to the supposed unique perils of coal dust, the other principal authority for the Board's ruling, has changed his mind. The consensus of informed opinion is that coal dust is a ballast foulant like many others with which railroads must deal. Yet in the Decision the Board stubbornly clung to out-moded opinions to justify the BNSF tariff. See Part 3, below.

The evidence BNSF presented to show the supposed effectiveness of toppers in reducing coal dust deposition covered only a small part of the rail journey from the mines to the power plants. AECC presented substantial evidence, mostly drawn from the railroads' own records, that widespread topper failures were in the process of occurring during the portion of the journey covered by BNSF's evidence, and that whatever reduction the toppers may cause in coal dust deposition during the early part of the trip is often overwhelmed by increased coal

deposition during the rest of the trip. The Board simply shut its eyes to this evidence. See Part 4, below.

BNSF and UP, the two railroads that serve the PRB, have been earning returns well in excess of the railroad cost of capital at least since 2011. The tariff inappropriately enhances their exercise of market power at the expense of coal shippers and the public. See Part 5, below.

Therefore, the Board should reconsider its Decision and find that the BNSF tariff is unreasonable and invalid.

ARGUMENT

1. By Approving A Tariff That Imposes Very Large Costs On Coal Shippers That Are Not Accompanied By Any Quantifiable Benefits, The Board Ignored Its Own Guidance And Applicable Professional Standards Regarding Cost-Benefit Considerations

In Coal Dust I, Slip Op. at 5, the Board reaffirmed the principle that:

Whether a particular practice is unreasonable depends upon the facts and circumstances of the case.

The Board went on to explain that “a valid standard to be applied to the coal dust problem” is “a general presumption that a tariff should employ cost-effective practices that are reasonably commercially available”. Id. “Certainly, any tariff provision must be reasonably commensurate economically with the problem it addresses” Id., at 6.

Comparison of costs and benefits is a well-accepted method for assessing the economic soundness of potential policies, decisions and investments, and it has a particularly deep history of public sector use in transportation. DOT publishes at least two guidebooks for using cost-benefit analysis (FHWA; FAA), and other major transportation entities, including the

Transportation Research Board and CalTrans, actively support the use of cost-benefit analysis. The Board (and ICC) historically have given substantial weight to cost-benefit considerations in many contexts.

In the Decision, the Board cites Coal Dust I for the proposition that it does not need to rely on formal cost-benefit analysis to assess the reasonableness of BNSF's revised coal dust tariff. However, the Board's actual discussion of this issue in Coal Dust I affirmed the overall propriety of cost-benefit analysis, and does not support the proposition for which the Board now cites it. In Coal Dust I, the Board reasoned that because of the ongoing development of new information, an option that appears preferable on cost-benefit grounds today may be superseded by a different option that is preferable on cost-benefit grounds tomorrow. As stated by the Board:

[T]he science regarding the effects of coal dust dispersion, and its effective control, is still evolving, and carriers continue to work with shippers on a collaborative basis to develop the methods that will achieve the optimal results in a commercially practicable manner.

The Board's Coal Dust I decision did not hold that benefits and costs were unimportant, but rather that the process of finding the option(s) that produced the most benefits for the lowest costs was still ongoing. The Board explicitly embraced the objective of finding the "optimal results", it did not dispute that objective.

The Decision contemplates that the revised BNSF tariff will cost shippers and their customers as much as \$300 million per year in topper agent application costs.^{3/} In Coal

^{3/} On pages 19-20 of the Decision, the Board references an estimate that topper agent application would cost \$0.10-\$0.75/ton, which at a representative PRB annual volume of 400 million tons/year translates to a cost of \$40-\$300 million/year imposed on shippers and their

Dust I, BNSF tried to justify the incurrence of costs associated with controlling coal dust on the ground that coal dust caused the railroad to incur excessive maintenance and other expenses, and that reducing coal dust would decrease costs by more than the cost of applying toppers. If true, this would appear to satisfy the Board's "commensurate" standard (leaving aside the question of who should pay the cost), and at least loosely correspond to the literal economic (and logical) standard that the selected dust control method should produce the largest possible excess of benefits over costs.

However, in the current case, BNSF abandoned the claim that maintenance cost savings would be significant:

It is not at all clear that shippers' compliance with BNSF's Coal Loading Rule will have any notable impact on BNSF's maintenance costs.

BNSF Reply, Bobb VS at 6-7 (emphasis added). BNSF presented no evidence of any cost savings or other quantifiable benefits that would be achieved as a result of the imposition of its tariff.

While the Board says that AECC and the other shipper parties have failed to show that "the effective safe harbor is not reasonably commensurate with its cost" (Decision at 19), the Decision on its face concedes that the costs (to shippers and their customers) could be as high as \$300 million/year while no tangible benefits have been quantified on this record. With a discrepancy of this magnitude, the Board's "reasonably commensurate" standard cannot possibly be satisfied.

customers. A second estimate of \$50-150 million/year is referenced by the Board in footnote 124 on page 20 of the Decision.

The problems associated with the Board's neglect of cost-benefit considerations are raised to an even higher level by the Board's observation that "if the safe harbor does reduce maintenance costs, the savings would only further justify containment". Decision at 19 n. 121. In the Board's own words, it views cost impacts on railroads as being relevant to the calculus, while cost impacts on shippers are not.

In the past, the Board (and ICC before it) recognized that a very important component of the public interest involved minimizing costs for all affected parties, not just the railroads. This has been particularly evident in merger proceedings, where cost reductions have been counted as public benefits, whether they would be retained by the railroad or passed through to shippers in the form of lower rates. Against this type of even-handed standard, which is needed to properly assess and protect the public interest, the Board here has turned a completely blind eye to the very substantial costs – borne by shippers and their customers - that accompany the spraying requirement.

Thus, in the pursuit of "optimal results in a commercially practicable manner", the Board apparently has defined "optimal" as being results that involve no costs to the railroads and the possibility of benefits only to the railroads, irrespective of the financial burdens placed on shippers; and has defined "commercially practicable" as being anything the railroads have the market power to coerce, without regard for their consistency with the public interest. These definitions might make sense for a railroad marketing department, but they are not adequate to support the proper discharge of the Board's public interest responsibilities.

2. The Board Ignored Evidence Showing That The Railroads Themselves Cause Most Of The Fugitive Coal Releases at Issue, and Have Cost-Effective Alternatives Available that Would Control the Problem at Its Source

AECC presented extensive evidence in this proceeding, mostly from the railroads' own records and workpapers, that coal deposition is caused primarily by such factors as high train operating speeds; train handling practices that generate slack action (particularly on the very long trains frequently used in the PRB); and by infrastructure and maintenance practices that cause passing railcars to experience impacts and vibrations that produce releases of fugitive coal. See AECC Opening at 8-12, and Nelson VS at 13-21; AECC Rebuttal at 3-10, and Nelson Rebuttal VS at 27-32. BNSF did not refute this evidence, but the Board refused to consider it, on the ground that AECC was

. . . asking us to reconsider the Board's Coal Dust I conclusion that BNSF may establish reasonable loading requirements to reduce coal dust loss, slip op. at 11, or the Board's finding that BNSF reasonably concluded that calculated containment efforts are superior to maintenance alone, slip op. at 9-10.

Decision at 8.

This characterization of AECC's positions is wholly inaccurate, and does not provide a legitimate basis for neglecting AECC's evidence. AECC did not and does not ask the Board to reconsider Coal Dust I, and does not dispute that BNSF may establish reasonable loading requirements to reduce coal dust loss. ^{4/} Likewise, AECC is not advocating that

^{4/} In Coal Dust I the Board affirmed the principle that a railroad "may establish reasonable loading requirements to reduce coal dust loss", but that did not give the railroad carte blanche to impose any requirements that it wishes. The requirements must be reasonable, and if they are not reasonable they are invalid – as the Board found the requirements in Coal Dust I to be. In this present case, AECC presented evidence that the revised tariff also is unreasonable, and nothing in Coal Dust I excuses the Board from evaluating that evidence on its merits.

railroads simply continue to clean up the fugitive coal through routine maintenance without undertaking (reasonable) containment efforts.

AECC's evidence indicates that the most cost-effective "containment effort" to keep coal in moving railcars is for the railroads to undertake a comparatively small number of changes at a limited set of specific points to address the operational considerations that cause the coal to leave the railcars. AECC's evidence specifically showed how the railroads can use existing data to pinpoint the locations of dust releases, and identified specific ways that current railroad maintenance, operating, and infrastructure practices can be altered to minimize fugitive coal releases at such locations. The impacts, forces, and vibrations that cause fugitive coal releases stress the rail infrastructure as much as they stress the railcar and cargo, and their remediation would constitute "good railroading" even if fugitive coal were not being released. Indeed, AECC's evidence specifically highlighted real-world railroad efforts to control impacts, forces and vibrations at some of the same types of locations where fugitive coal releases have been concentrated. ^{5/}

In advancing this as the most logical and cost-effective strategy for keeping coal in moving railcars, AECC has asked only that the Board evaluate the revised tariff under the standard the Board articulated plainly in Coal Dust I:

^{5/} AECC Opening, Nelson VS at 15-21. Because the railroads have shown that actions to control impacts, forces, and vibrations are desirable on the basis of considerations other than coal dust, there is no need for "evidence to compare the costs of construction, operations, and maintenance changes to the costs of containment." Decision at 8. The railroads put forward no evidence that such actions would not be feasible or cost-effective in the context of the issues in this proceeding. In the record, AECC's evidence that such actions constitute a cost-effective alternative has not been disputed or rebutted, so the Board has no legitimate foundation for ignoring it.

[O]nce a railroad accepts a loaded car, it bears responsibility for transporting the car in a manner that avoids releasing or spilling the shipment.

Coal Dust I, Slip Op. at 14, quoted in AECC Opening at 8.

In Coal Dust I, the Board did not decide whether, or to what extent, railroad actions were responsible for causing coal dust deposition, because it held that the original BNSF tariff was invalid on other grounds. But the Board most certainly did not hold that a tariff would be reasonable even if it imposed responsibility on shippers where a railroad transports a car in a manner that releases or spills the shipment.

The Board's Decision simply ignored the evidence that AECC actually raised in this case regarding the Board's own standard, and instead dealt only with a straw man. The Board should reconsider the Decision and address this issue in a manner consistent with the standard it articulated in Coal Dust I.

3. The Board's Decision Rests On The Now-Unsupported Assumption That Coal Dust Presents A Unique Threat To Track Stability.

While BNSF abandoned in this case the claim that coal dust deposits cause excessive maintenance costs, it relied heavily on the proposition that the particular characteristics of coal dust make it a special threat to the stability of the track structure:

BNSF's objective in requiring that shippers take measures to keep their coal in the loaded rail cars in transit is not to reduce maintenance costs but to eliminate the serious risks associated with coal dust fouling in the PRB.

BNSF Reply, Bobb VS at 7. Absent a cost-benefit justification (as discussed in Part 1, above), the Board explicitly relies on such infrastructure stability concerns as the basis for its approval of the tariff.

The Board claims that AECC's evidence and argument regarding the effect of coal dust on track stability amounts to a request that the Board reopen Coal Dust I, as if the Board had reached a definitive and sustainable conclusion on this inherently scientific issue. Decision at 5. However, In Coal Dust I, the Board expressly acknowledged that its findings regarding the harmfulness of coal as a ballast foulant were preliminary and subject to change:

The science related to coal dust is evolving and we expect that there will be continued work in the field to examine the impact of coal dust on rail ballast, including studies sponsored by shipper and carrier groups, ideally in collaboration. However, we must resolve this controversy based upon the evidence available at this time. Based on the record before us, we find that BNSF's arguments and evidence are sufficiently persuasive for the Board to hold, at the outset, that coal dust is a pernicious ballast foulant.

In this proceeding, AECC responded (in its Reply) to an argument made by USDOT in its opening that "coal dust threatens rail safety more than other foulants". USDOT Opening at 5. USDOT submitted no testimony or other evidence to support this assertion, but relied entirely on the evidence it had submitted in its rebuttal filing in Coal Dust I. ^{6/} Thus, it was USDOT, not AECC, that brought into this case the USDOT materials from Coal Dust I.

AECC's Reply pointed out that the USDOT filing from Coal Dust I contained no verified statements by experts on the subjects addressed in the filing, but only unsworn arguments of USDOT's counsel. The filing sought to give the appearance of analytical support for these arguments by citing several USDOT studies, which counsel asserted:

^{6/} USDOT did not comply with 49 CFR 1114.5, which requires that when "any portion of the record before the Board in any proceeding other than the proceeding at issue is offered in evidence, a true copy will be presented for the record." If it had done so the absence of substantive support for USDOT's stated arguments would have been obvious.

. . . confirms the record evidence that coal dust interferes with the stability of ballast to a much greater extent than other such materials. DOT's Volpe National Transportation Systems Center has conducted several studies on track buckling to evaluate track strength and stability limits, including the effects of ballast condition. These materials and the relevant literature on the subject confirm the particularly destructive qualities of coal dust on ballast.

USDOT Rebuttal, Coal Dust I, at 2. But in fact none of those studies had anything whatsoever to do with "the particularly destructive qualities of coal dust on ballast". AECC Reply at 19-22. AECC's witness Nelson pointed out in Reply the lack of substance to the USDOT argument. AECC Reply, Nelson RVS at 18-19. The Board ought to have given no weight in its Decision to the unsupported assertions of USDOT.

Nevertheless, the Board relied explicitly on USDOT in the Decision and sought to justify doing so on the ground that "USDOT has staff experts in rail ballast and track geometry" (Decision at 7 n. 34). Such staff experts may exist, but no such staff experts presented any testimony or evidence in this case or in Coal Dust I regarding the effect of coal dust on rail ballast and track geometry. The Board further sought to justify its reliance on USDOT on the ground that USDOT "brought one of [its staff experts], Dr. Sussman, to the Coal Dust I proceeding's oral hearing . . ." Id. But Dr. Sussman did not say anything at the hearing about coal dust being a particularly severe foulant, nor did he sponsor any documents or studies on that subject. 7/

7/ See Hearing Transcript, FD 35305, July 29, 2010, at 10-37. The sole signatory of USDOT's rebuttal filing in Coal Dust I was its attorney, Paul Samuel Smith, who candidly admitted that "I would be utterly at sea if I tried to answer any technical questions [from the Board]." Tr. at 10.

The Board asserts that AECC has “not offered evidence that refutes the engineering and physical facts about coal dust presented by USDOT” (Decision at 7 n. 34), whereas the truth is that USDOT “offered no evidence” about “engineering and physical facts” about coal dust, and no evidence whatsoever on which the Board could base a conclusion that coal dust is a particularly severe ballast foulant.

Other than USDOT, the Board relies in its Decision on a former BNSF witness from Coal Dust I, Erol Tutumluer, to support the proposition that coal dust produces unmanageable instability in rail infrastructure.

The Board’s reliance on witness Tutumluer is misplaced for several reasons. In Coal Dust I, a number of parties, including but not limited to AECC, identified significant infirmities in portions of Dr. Tutumluer’s analysis (much of this material was classified, and therefore is not discussed in detail here). To his credit, witness Tutumluer, after further study and consideration, changed his views of the role of coal dust as a causal factor in ballast instability, bringing them into conformity with the mainstream views appearing in engineering texts.

In relying in the current Decision on Dr. Tutumluer’s conclusions in Coal Dust I, the Board ignores this change in his views because, it claims, “Dr. Tutumluer did not change his opinion that coal dust threatens ballast integrity.” Decision at 6. However, the Tutumluer report cited by AECC in its Opening and Reply, Tutumluer , et al. “Investigation Of Coal Dust Composition Affecting Railroad Ballast Behavior”, says exactly what AECC said it said about the

ballast-fouling properties of coal. 8/ If BNSF thought that AECC had misunderstood or mischaracterized Dr. Tutumluer's change of mind on this subject, BNSF could have submitted a verified statement by Dr. Tutumluer to that effect (AECC's conclusions about Dr. Tutumluer's opinion appeared in both AECC's Opening and its Reply, so BNSF had two chances to respond), but BNSF did not do so. The obvious conclusion to be drawn from these facts is that AECC is correct that Dr. Tutumluer changed his mind about the supposed unique ballast-fouling properties of coal dust.

All credible mainstream evidence indicates that coal dust is a ballast foulant on par with others commonly found (including dust from degraded ballast particles and crossties, traction sand, etc.). All such foulants are "moisture-sensitive" in the sense that adding water to any ballast that is fully fouled with such materials tends to degrade its stability, so periodic ballast maintenance is required, and has been a routine aspect of railroad operations basically since the time railroads were invented. It is not unreasonable for a railroad to seek to control the accumulation of such ballast foulants, but the economic merits of any method of control intrinsically are driven by the maintenance cost impacts/savings they produce. It is the presence of clay – which forms the subgrade in much of eastern Wyoming - that is particularly destabilizing when water is introduced, but there is nothing about the use of toppers that would change that.

8/ The Tutumluer Report, produced in discovery by UP, is classified Confidential, and although the Board summarized part of that Report in the Decision, we will not do so in this Petition. However, the last paragraph on p. 2 of the Report, UP-AECC-00006350, says exactly what AECC described about Tutumluer's changed conclusions regarding the ballast-fouling properties of coal.

In relying on Tutumluer's former opinion and on USDOT for the appearance of support for its position on infrastructure stability, the Board is ignoring no fewer than four elephants in the room. First, FRA – the agency responsible for rail infrastructure specifications and safety – has promulgated no standards pertaining to the supposed unique harmful effects of coal dust. Second, the Board itself in Coal Dust I, even without the benefit of witness Tutumluer's change of heart, declined to accept BNSF's strenuous assertions that the PRB derailments of 2005 were caused by coal dust. Coal Dust I at 7-8. Third, in the 8+ years since those derailments, the PRB rail infrastructure has operated without a recurrence of the 2005 problems. Why? Coal dust has continued to accumulate, but the railroads have altered their maintenance schedules to deal with the challenges presented by the extra-heavy traffic volumes in the PRB and on adjacent trackage. Fourth, even among those few places around the world where toppers on coal movements are used, absolutely none do so based on the proposition that coal dust is uniquely or unmanageably harmful to infrastructure stability.

If the Board is going to require shippers and their customers to pay up to \$300 million/year for toppers, the Board needs to offer more than what has turned out to be the bogeyman of infrastructure instability as a justification. Based on the facts and evidence, it cannot.

4. The Board Ignores Evidence That Topper Failures Reduce Or Eliminate The Effectiveness Of Toppers Over The Entire Length Of Haul.

The Decision disregards evidence presented by AECC that, even to the extent that toppers may reduce coal dust deposition during the first part of the trip from mine to power plant, toppers fail to prevent – and may even increase – coal dust deposition over the

entire length of the trip. The Board asserts that topper failures observed during testing are insignificant, and are not indicative of further failure or performance problems beyond the area where testing was conducted:

Shippers have not shown that the topper agents fail beyond the test end point. As discussed above, 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.

Decision at 15. However, this denial cracks to pieces even more rapidly than does a thin topper crust applied to a 120 ton load of PRB coal that experiences impacts, vibrations, shifting, and settlement in transit.

First of all, regarding BNSF's awareness of topper performance degradation beyond the test end point, AECC called the Board's attention to BNSF's own workpapers, 9/ and AECC witness Nelson's description of topper cracking and its significance was based on candid observations by BNSF's consultants, based on years of field experience with toppers. 10/ The workpapers referred to in this discussion are classified Highly Confidential by BNSF, and therefore Mr. Nelson's analysis had to be similarly classified. Although the Board's Decision disclosed some classified material, Decision at 2 n. 2, we do not mention any specific details about this material to avoid disclosing classified information. But the cited classified workpapers are available to the Board and fully support AECC's position on this subject. BNSF's advocates might argue that a heavily cracked topper crust in the early stage of a long

9/ The citation to this work, at BNSF COALDUSTII 00580441, was provided in footnote 18 on page 7 of AECC witness Nelson's reply verified statement.

10/ The citation to these observations, at BNSF COALDUSTII 00573929, was provided in footnote 24 on page 12 of AECC witness Nelson's rebuttal verified statement.

movement is “good enough”, but no one who was seriously committed to keeping coal in railcars over hundreds of miles of rail travel would regard it so. Moreover, AECC witness Nelson demonstrated the true significance of topper integrity problems and failures by showing photographs of the condition of approved toppers when the railcars arrived at their final destinations (not just at the end of a Super Trial test). See AECC Reply, Nelson RVS at 6-11.

As shown and discussed in further detail in AECC witness Nelson’s reply verified statement, topper failures are a problem that the railroads have neglected to address. Such failures can cause losses of clumps of coal that collectively outweigh by a wide margin the quantity of coal retained in the car as a result of the topper application. While the Board apparently is content to rely on the fact that such clumps of coal rarely gain enough altitude to get caught in BNSF’s dust-measuring devices, shippers who pay for the application of toppers regularly see the true extent and significance of the topper failure issue. Given the reams of photos presented to the Board by AECC that unambiguously showed integrity problems with approved toppers at the test end point, and the corroborating evidence of topper failures at destination points, the Board’s summary dismissal of this issue is plainly inconsistent with record evidence.

Similarly, the Board seems to have been in such a hurry to excuse the lack of topper testing in adverse conditions that it overlooks record evidence regarding the observed failures of toppers applied and used under such conditions to achieve the claimed dusting reductions. Likewise, it simply parrots the railroad party line for the lack of topper testing in rainy conditions, neglecting record evidence regarding the adverse impacts of even a simple rain shower on the ability of the toppers to perform their intended function over a 1000+ mile

trip from the PRB. The Board's blanket inattentiveness to record evidence regarding topper failures raises the question of how it could be in the public interest for shippers to be compelled to spend large sums on toppers that not do not perform as advertised under many common real-world operating conditions, and at least sometimes cause the loss of more product than they were designed to retain.

5. The Board's Approval Of The BNSF Tariff Is Inconsistent with Constrained Market Pricing (CMP) Principles

As AECC has documented and discussed in multiple recent proceedings, it is against the public interest for the Board to increase rail contribution when it already is above the revenue adequacy level for any movement or group of movements. In this proceeding, AECC's original point in this area was that PRB coal traffic as a whole has been found in several recent rate cases to be producing supracompetitive earnings (i.e., due to the finding or stipulation that the rate resulting from the SAC test would fall below the jurisdictional threshold), which would be exacerbated by any Board decisions that offload costs 11/ onto shippers without corresponding rate reductions. The Board's sole response to this point – that shippers who believe their use of toppers has reduced the railroad's costs can file a rate case (Decision at 28) is, at best, frivolous. The Board is well aware that URCS does not differentiate a railroad's costs according to whether toppers have been applied, and the Board surely recalls that it has prohibited use of the type of movement-specific adjustments to URCS that in the

11/ While BNSF did not claim in this proceeding that rail maintenance cost savings would result from the use of toppers, the Decision contemplates that some such savings could occur. Decision at 19 n. 121.

past might have been used to account for such savings. The issue of supracompetitive earnings is a real one that cannot be dismissed this casually.

Indeed, as the Board is aware from its most recent revenue adequacy determinations, the largest Class I railroads as a group had earnings above the revenue adequacy level in 2011 and 2012. Supracompetitive earnings are therefore even more extensive than was reflected in AECC's coal dust evidence, and warrant far more careful consideration than the Board gave them in the Decision.

CONCLUSION

For the foregoing reasons, the Board should reconsider the Decision, and address the several arguments and issues raised by AECC that the Board either failed to give adequate consideration, or ignored entirely. Following such reconsideration, the Board should conclude that the revised tariff is unreasonable and unenforceable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing documents to be served electronically or by first class mail, on this 6th day of January 2014, on all persons on the Board's service list in this Docket.



Eric Von Salzen