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BY E-FILE

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

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

Dear Ms. Brown:

On behalf of Union Pacific Railroad Company, we are e-filing Union Pacific's Reply Evidence and Argument in the referenced docket. There are Highly Confidential and Public, versions of this filing. Material that has been redacted from the public version is designated by brackets.

Thank you for your attention to this matter.

Sincerely,



Michael L. Rosenthal

cc: Counsel for Parties of Record (by e-mail)

REDACTED – TO BE PLACED ON PUBLIC FILE

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35557

REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS

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

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November 15, 2012

BEFORE THE
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STB Finance Docket No. 35557

REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS

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

No party in this proceeding disputes that the “safe harbor” provision in the coal dust mitigation tariff issued by BNSF Railway Company (“BNSF”) provides “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 Elec. Coop. Corp. – Petition for Declaratory Order*, FD 35305, slip op. at 15 (STB served Mar. 3, 2011). Rather, parties opposing BNSF’s tariff urge the Board to revisit its decision that carriers may adopt reasonable loading rules to prevent coal dust losses from loaded trains. The Board should refuse. It should also reject requests to make BNSF reimburse shippers’ costs of complying with the tariff and establish penalties for noncompliance. The Board should find that BNSF’s tariff is reasonable.¹

I. BNSF’s safe harbor addresses the Board’s concerns in *Arkansas Electric*.

BNSF’s coal dust mitigation tariff contains a reasonable safe harbor provision. A shipper will be “deemed in compliance” if it: (a) ensures that loaded uncovered coal cars will be profiled

¹ While Union Pacific and BNSF compete with respect to transporting coal to certain customers and this case is about a BNSF tariff, Union Pacific is addressing the reasonableness of BNSF’s coal dust mitigation tariff and arguments about orders the Board should direct towards BNSF because Union Pacific has its own coal dust mitigation tariff and any decision in this case would likely be invoked as precedent in any challenge to Union Pacific’s tariff.

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. The provision creates a clear means of satisfying the tariff's requirements. No party asserts that coal shippers will be unable to comply with the safe harbor provision.

Moreover, the record in this proceeding supports the reasonableness of a safe harbor that involves the application of topper agents. The parties opposed to BNSF's tariff attempt to raise questions about the effectiveness of topper agents, but BNSF presented overwhelming evidence that the application of topper agents significantly reduces coal dust losses from trains in transit. BNSF's evidence included data from the so-called Super Trial, data from earlier tests, technical literature, and experience with topper agents in other coal producing regions.² A group of tariff opponents calling themselves the "Coal Shippers" deride the Super Trial as "junk science,"³ but their own expert witness performed tests using the same basic methodology that showed topper agents can significantly reduce coal dust losses in transit.⁴ Another tariff opponent, Arkansas Electric Cooperative Corporation ("AECC"), asserts that BNSF's data show that topper agent performance can fall short of perfection for various reasons,⁵ but BNSF never assumed topper agents would eliminate all coal dust loss. And, even without data from its own testing, BNSF

² *See, e.g.*, BNSF Railway Company's Opening Evidence and Argument ("BNSF Op."), Verified Statement of William VanHook, Ex. 4 (field test results); *id.*, Ex. 13 (Super Trial results); BNSF Op., Verified Statement of E. Daniel Carré & Mark Murphy ("Carré & Murphy V.S.") at 8-15 (summarizing BNSF test results, technical literature, and experience in other coal producing regions).

³ Opening Evidence and Argument of Western Coal Traffic League, American Public Power Association, Edison Electric Institute and National Rural Electric Cooperative Association ("Coal Shippers Op.") at 15.

⁴ *See* BNSF Op., Carré & Murphy V.S. at 15.

⁵ *See* Arkansas Electric Cooperative Corporation's Opening Evidence and Argument ("AECC Op."), Verified Statement of Michael A. Nelson ("Nelson V.S.") at 40-52.

could reasonably establish a safe harbor based on a method of reducing coal dust loss that is supported by technical literature and by experience in other coal producing regions.

Neither AECC nor the Coal Shippers present evidence of a less costly, equally effective method of reducing the loss of coal dust from rail cars than the use of topper agents. The Coal Shippers assert that “testing may well show that a combination of profiling, use of larger coals, and appropriate maintenance” is “a reasonable, cost-effective containment strategy,” but they do not actually try to show that such a strategy would be more cost-effective than the use of topper agents.⁶ AECC provides a list of “options for reducing the release” of coal dust, but it has no evidence that any of them would be more cost-effective than the use of topper agents.⁷

AECC’s and the Coal Shippers’ real objections to BNSF’s safe harbor reflect continued resistance to the Board’s ruling in *Arkansas Electric* that carriers can adopt reasonable loading requirements to help contain coal dust in rail cars. AECC repeats its arguments from *Arkansas Electric* that coal dust is not a particularly harmful ballast foulant⁸ and that coal dust loss is an

⁶ Coal Shippers Op. at 23.

⁷ See AECC Op., Nelson V.S. at 55-56. Many of AECC’s “options” involve changes in loading practices, which are the responsibility of shippers, not rail carriers. AECC and other shippers are free to test these alternatives, and if they prove as efficacious as the use of approved toppers, can seek their inclusion in BNSF’s safe harbor provision “by submitting a compliance plan to BNSF that provides evidence demonstrating that [they] will result in compliance with” the coal dust mitigation provisions. BNSF Price List 6041-B, Item 100, Section 4.

⁸ See AECC Op., Nelson V.S. at 30-31. Mr. Nelson incorrectly asserts that discovery materials produced by Union Pacific show that Professor Tutumluer, an expert on the destabilizing effect that coal dust has on rail ballast, {

} *Id.* at 31 (citing UP-AECC-00006349 to 6352). In the referenced materials, Professor Tutumluer {

} UP-AECC-00006349 to 6352, at 6351; see
also id. at 6352 {
(continued...)

operating and maintenance issue.⁹ The Coal Shippers repeat arguments that coal dust loss is a maintenance issue and that loading requirements are unnecessary because shippers already pay rates that cover all ballast maintenance costs.¹⁰ However, the Board has found that coal dust is a “particularly harmful ballast foulant,” that “containment is superior to maintenance alone,” and that “carriers have the right to establish coal loading requirements.” *Arkansas Electric*, slip op. at 6, 9, 11. There is no basis for revisiting these issues in this proceeding. *See Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, FD 35557, slip op. at 2-3 (STB served Mar. 19, 2012) (“The Board heard arguments on maintenance versus containment and the effects of operating decisions on coal dust dispersion and concluded that carriers may establish reasonable loading rules for coal.”).

}

⁹ *See* AECC Op. at 7-13 & Nelson V.S. at 13-21. Mr. Nelson attempts to support his argument by incorrectly asserting that a Union Pacific study {

} AECC Op., Nelson V.S.

at 15 (citing UP-AECC-00005599 to 5601). In fact, the referenced study did not address the impact of railroad operating or maintenance practices on coal dust loss. Nor did it show {

} *See* UP-

AECC-00005591 to 5601, at 5599.

Mr. Nelson also incorrectly implies that Union Pacific conducted a different study {

} *See* AECC Op., Nelson V.S. at 15-16.

That study {

} *See* UP-AECC-00004644-94. Moreover, Union Pacific provided evidence in *Arkansas Electric* that “troubling accumulations of coal dust” appear “at many locations that do not involve switches or bridges.” Rebuttal Evidence and Argument of Union Pacific Railroad Company, Rebuttal Verified Statement of David Connell at 2, *Arkansas Elec. Coop. Corp. – Petition for Declaratory Order*, FD 35305 (June 4, 2010).

¹⁰ *See* Coal Shippers Op. at 28-32.

In contrast with AECC and the Coal Shippers, the U.S. Department of Transportation continues to support the Board's conclusions in *Arkansas Electric*. “[T]he Department remains concerned about the problem of coal dust and its effects upon rail safety.”¹¹ It correctly believes that “coal dust threatens railroad safety more than other foulants, and that its emissions should be contained.”¹² And, it “remains of the view that railroads may require shippers to take reasonable, cost-effective measures to reduce coal dust emissions from railcars” and that “shippers should be held responsible, with coal as with virtually every other commodity, to ensure that railcars are securely loaded to prevent spillage or other safety hazards.”¹³

BNSF's coal dust mitigation tariff now contains a safe harbor that addresses the Board's concern in *Arkansas Electric* that the former rule failed to “acknowledge any 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. As the Department of Transportation recognizes, the new safe harbor provision “provid[es] shippers with conduct-based alternatives, and clarity, about how to satisfy the tariff's requirements.”¹⁴ The Department also correctly observes that the provision further responds to issues the Board raised in *Arkansas Electric* by “plac[ing] shippers' responsibilities ‘at the load-out,’ so that shippers no longer need to be concerned that factors beyond their control, like ‘the vagaries of wind, weather, train speed, and track conditions,’ will prevent compliance.”¹⁵ And, as the Department notes, the tariff still allows shippers to propose alternative methods to reduce emissions, which should encourage

¹¹ Opening Comments of the United States Department of Transportation (“DOT Op.”) at 4.

¹² *Id.* at 5.

¹³ *Id.* at 6.

¹⁴ DOT Op. at 7.

¹⁵ *Id.* at 7 (quoting *Arkansas Electric*, slip op. at 13-14).

shippers and others to continue to pursue even more cost-effective methods of preventing the loss of coal dust from rail cars.¹⁶ The Board should affirm the reasonableness of the rules in BNSF Price List 6041-B, Item 100.

II. BNSF should not be required to reimburse shippers for their compliance costs.

BNSF should not be required to reimburse shippers for the costs they incur to comply with its coal dust mitigation tariff. Shippers are responsible for the costs of loading their freight into rail cars and ensuring that the freight remains in the cars. *See, e.g., Bd. of Trade of City of Chi. v. Abilene & S. Ry.*, 220 I.C.C. 753, 761 (1937); *Sw. Mo. Millers' Club v. St. Louis & San Francisco R.R.*, 26 I.C.C. 245, 250 (1913); *Nat'l Wholesale Lumber Dealers' Ass'n v. Atl. Coast Line R.R.*, 14 I.C.C. 154, 163 (1908). The Coal Shippers complain that shippers do not control the railroad operating and environmental conditions that can affect the amount of coal dust loss in transit,¹⁷ but a shipper is required to “pack and load his commodity as to insure against damage by leakage from the package or otherwise, due to the ordinary incidents of transportation.” *Sw. Mo. Millers' Club*, 26 I.C.C. at 250.¹⁸

The Coal Shippers assert that they should not be required to pay for loading costs that are “not needed for safe transportation of a shipper’s freight,”¹⁹ but the record in *Arkansas Electric* establishes that BNSF’s loading rule addresses a significant transportation safety issue:

¹⁶ *Id.*

¹⁷ *See* Coal Shippers Op. at 31.

¹⁸ The National Coal Transportation Association (“NCTA”) incorrectly asserts that the Board has authority to order BNSF to reimburse coal shippers for applying topper agents under 49 U.S.C. § 10745. *See* Opening Submission of National Coal Transportation Association (“NCTA Op.”) at 14. Section 10745 applies when shippers pay for transportation services that railroads are obligated to provide. Section 10745 does not apply to loading costs, which are a shipper’s responsibility.

¹⁹ Coal Shippers Op. at 25.

[T]he weight of the evidence shows that coal dust is a harmful foulant that could contribute to future accidents by destabilizing tracks.

Arkansas Electric, slip op. at 8; *see also id.* at 7 (“We conclude that coal dust is a particularly harmful contaminant of ballast that requires corrective action.”). The fact that the harms from coal dust lost in transit manifest themselves over time should not make coal shippers any less responsible for mitigating those harms. Notably, the Department of Transportation shares the Board’s view that containment of coal dust is a safety issue, explaining that “coal dust threatens railroad safety more than other foulants,” and that “its emission should be contained.”²⁰ It also recognizes that “shippers should be held responsible, with coal as with virtually every other commodity, to ensure that railcars are securely loaded to prevent spillage or other safety hazards.”²¹

Holding coal shippers responsible for the costs of loading their coal so it remains in rail cars is a matter of fairness. Shippers of other commodities bear the costs of loading their cars to prevent their products from spilling or leaking in transit. Coal shippers would be paying only the costs they should have been paying all along.²² The Coal Shippers’ assertions that coal shippers are already paying for all coal dust-related maintenance costs in their line haul rates²³ simply are not true.²⁴ Moreover, Union Pacific negotiates its rates based on market conditions, not costs.²⁵

²⁰ DOT Op. at 5; *see also id.* at 4 (“[C]oal dust can threaten rail safety by damaging rail ballast.”).

²¹ *Id.* at 6.

²² As the Board recognized in *Arkansas Electric*, carriers are allowed “to change their rules in response to changing circumstances, such as here, where the problem of coal dust became apparent after years of increasingly heavy traffic.” *Arkansas Electric*, slip op. at 11.

²³ *See Coal Shippers Op.* at 28-29.

In short, there is no reason the Board should create special rules for sharing the costs of compliance with BNSF's coal dust mitigation tariff.

Finally, Union Pacific rejects the Coal Shippers' suggestion that BNSF should establish a reimbursement for shippers' tariff compliance costs and "UP could then follow suit."²⁶ Union Pacific will make all commercial decisions regarding its compliance with the BNSF coal dust mitigation operating rule that applies to Union Pacific under the Powder River Basin Joint Line Agreement based on its independent assessment of the marketplace.

III. BNSF should not be required to establish penalties for noncompliance.

The Board should reject the Coal Shippers' and NCTA's arguments that BNSF's coal dust mitigation tariff must contain penalties for noncompliance. As BNSF's tariff now stands, there is no penalty for noncompliance. BNSF explained in its opening evidence and argument that it does not expect shippers to defy its rules, but if problems do arise, it will "determine what actions are appropriate" and provide shippers with an opportunity "to seek Board intervention."²⁷ Neither NCTA nor the Coal Shippers cite any law precluding this approach. Nor do they explain why BNSF should be required to develop penalties to address events it does not expect to occur, or why the Board should address the reasonableness of penalties that may never be applied. *See,*

²⁴ Union Pacific demonstrated in *Arkansas Electric* that shippers have not paid for maintenance costs associated with coal dust removal. *See* Rebuttal Evidence and Argument of Union Pacific Railroad Company at 25-28, Rebuttal Verified Statement of Mark J. Draper at 1-7, *Arkansas Elec. Coop. Corp. – Petition for Declaratory Order*, FD 35305 (June 4, 2010).

²⁵ Even the limited circumstances in which Union Pacific does charge cost-based rates for coal traffic – that is, when its rates have been prescribed by the Board – they are based on URCS system-average variable costs, which distribute Union Pacific's coal dust-related maintenance costs over all Union Pacific traffic rather than allocating it to only those car-loads responsible for those costs.

²⁶ Coal Shippers Op. at 33.

²⁷ BNSF Op. at 24.

e.g., Ag Processing Inc. – Petition for a Declaratory Order, FD 35387, slip op. at 3 (STB served May 9, 2012) (dismissing shipper challenge to tariff “because there is no present likelihood that Petitioners will be impacted negatively by the tariff”).²⁸

There is no requirement that every tariff rule must contain penalties for noncompliance. In fact, UP Circular 6603-C, which contains Union Pacific’s general rules for coal trains originating in Wyoming, includes several important rules that Union Pacific has adopted to improve the safety and reliability of its coal network and that do not impose penalties for noncompliance.²⁹ Examples include Item 226-A, which establishes heightened maintenance requirements on coal cars in order to reduce derailments associated with axle failures, and which has been in place since December, 2007, without generating any complaint that the rule is unreasonable because it does not include penalties for noncompliance. Other examples include Item 250-A, which requires coal shippers to submit monthly coal tonnage forecasts, and Item 370, which requires coal shippers to provide transportation instructions for each coal train after the trains are loaded. Union Pacific adopted these rules pursuant to 49 U.S.C. § 10702(2), which provides that rail carriers must establish reasonable “rules and practices” on matters related to transportation they provide. Section 10702(2) does not require that rules and practices include penalty provisions.

²⁸ NCTA also asks the Board to declare that any penalties for noncompliance with BNSF’s tariff “may not include the refusal of service except under very narrowly defined standards.” NCTA Op. at 10. This request is also premature. However, Union Pacific notes that it is unaware of any BNSF threat to stop movement of Union Pacific trains because they do not comply with the BNSF coal dust operating rule, and Union Pacific has previously explained why stopping its trains would not be an effective enforcement mechanism. *See* Opening Evidence and Argument of Union Pacific Railroad Company, Verified Statement of Douglas Glass at 8, *Arkansas Elec. Coop. Corp. – Petition for Declaratory Order*, FD 35305 (Mar. 16, 2010).

²⁹ *See* <http://c02.my.uprr.com/wtp/pricedocs/UP6603BOOK.pdf>.

Respectfully submitted,

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November 15, 2012

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 15th day of November, 2012, I caused a copy of the Reply 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