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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35557

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REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS

**UNION PACIFIC RAILROAD COMPANY'S REPLY TO
ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
MOTION TO COMPEL DISCOVERY**

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The Board should deny the motion of Arkansas Electric Cooperative Corporation ("AECC") to compel discovery from Union Pacific Railroad Company ("UP"), which was filed on February 27, 2012 ("AECC Motion").

In a Decision served November 22, 2011, the Board instituted this proceeding to consider a narrow issue: the reasonableness of the safe harbor provision contained in the coal dust mitigation tariff issued by BNSF Railway Company ("BNSF"). *See Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, FD 35557 (STB served Nov. 22, 2011) ("*November 22 Decision*") at 4. However, several of AECC's discovery requests to UP, which AECC waited to serve until the very end of the discovery period, seek information that is not relevant to the subject matter involved in this proceeding. Rather, they seek information solely to challenge the Board's conclusions in *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, FD 35305 (STB served Mar. 3, 2011) ("*Coal Dust I*"). The requests are therefore improper. *See Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, FD 35557 (STB served Mar. 5, 2012) ("*March 5 Decision*").

In response to AECC's discovery requests, UP agreed to search for and produce documents relating to all or part of 13 of the 18 document requests propounded by AECC. UP gave AECC the benefit of the doubt: if parts of AECC's requests sought irrelevant information or were overbroad or requested documents that would have been unduly burdensome to search for and produce, UP offered compromises – which AECC accepted, at least in most situations. The document requests that are the subject of AECC's motion seek information regarding issues that are not relevant to this narrow proceeding, and they also seek a scope of documents that would require UP to engage in an unduly burdensome search and production effort. The only exception involves a document request that presumes UP has changed its position regarding the application of BNSF's tariff to UP's traffic. UP's position has not changed, so UP has no documents to produce with regard to that particular portion of that request.

Accordingly, the Board should deny AECC's motion in its entirety.

I. BACKGROUND

In *Coal Dust I*, the Board held that BNSF's original coal dust mitigation tariff was unreasonable because it created too much "uncertainty" for shippers. *Coal Dust I*, at 14. At the same time, the Board addressed several key issues regarding BNSF's right to establish a tariff to address the loss of coal from the tops of railcars. The Board found, *inter alia*, that coal dust is a "particular harmful ballast foulant," *id.* at 6; that BNSF could address coal loss from open-top cars, *id.* at 8; that BNSF reasonably concluded that containment of coal in cars is superior to maintenance of lines alone, *id.* at 9-10; and that railroads may establish reasonable loading rules related to containment of coal, *id.* at 10-11. The Board rejected arguments from AECC that responsibility for coal dust mitigation lay with railroads because "the way BNSF operates its trains, changes in track modulus, and poor maintenance of the line increase coal dust dispersion."

Id. at 11. The Board suggested that inclusion of an appropriate safe harbor provision in the tariff might provide the certainty it had found lacking. *Id.* at 12.

After BNSF issued a revised coal dust tariff that includes a safe harbor, the Board instituted this proceeding in response to a petition from Western Coal Traffic League (“WCTL”). The Board instituted this proceeding to address a specific issue: the “reasonableness of the safe harbor provision.” *November 22 Decision* at 4. The Board provided examples of the issues that WCTL raised in its petition that the Board considered to be related to the reasonableness of the safe harbor: “the [tariff’s] absence of penalties for noncompliance, the lack of cost sharing, and shipper liability associated with the use of BNSF-approved topper agents.” *Id.* at 4 n.5. The Board declined to reopen the prior coal dust proceeding on the grounds that there was no reason the proposed safe harbor would itself cause the Board to reach a “different result” than in its earlier decision. *Id.* at 3.¹

In response to the Board’s decision, WCTL and defendant BNSF filed a joint motion for a procedural schedule. The schedule, which the Board adopted in a decision served on December 16, 2011, provided for an expedited discovery period of 50 days.

On January 31, 2012 – day 44 of the 50-day discovery period – AECC submitted discovery requests to UP. UP objected to certain requests, mainly on the grounds that they were unduly burdensome, overbroad, or sought information that was not relevant to this proceeding. UP suggested compromises where possible. On February 27, 2012, AECC filed its motion to compel discovery.

¹ The Board subsequently reiterated that the purpose of this proceeding is to consider only the reasonableness of the safe harbor. See *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, FD 35557, slip op. at 2 (STB served Jan. 13, 2012) (“The parties are reminded that the Board opened this declaratory order proceeding in Docket No. FD 35557 ‘to consider the reasonableness of the safe harbor provision in the new tariff.’”).

II. AECC'S DISCOVERY REQUESTS SEEK DOCUMENTS SOLELY IN ORDER TO RELITIGATE SETTLED ISSUES.

Under Board rules, discovery is appropriate “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.” 49 C.F.R. § 1114.21(a)(1). “The requirement of relevance means that the information might be able to affect the outcome of a proceeding.” *Waterloo Ry. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. and Van Buren Bridge Co. In Aroostook Cnty., ME*, AB 124 (Sub-No. 2) (STB served Nov. 14, 2003), at 2. Accordingly, “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.*, NOR 42069 (STB served July 26, 2002), at 4. Furthermore, “discovery must not unduly burden a party or raise issues untimely or inappropriate to the proceeding.” *CF Industries, Inc. v. Kaneb Pipe Line Partners, L.P. & Kaneb Pipe Line Operating Partnership, L.P.*, NOR 42084 (STB served Nov. 23, 2004), at 2.

Despite the Board’s instructions setting forth the scope of this proceeding, AECC served several discovery requests seeking documents in order to advance its efforts to relitigate issues that were decided in *Coal Dust I*. As the Board’s rules make clear, those requests are not proper, because they are not directed towards issues that are relevant in this proceeding.

Indeed, in its *March 5 Decision*, the Board addressed a motion to compel that AECC had filed against BNSF and confirmed both the limited scope of this proceeding and the irrelevance of the information AECC seeks in its present motion. The Board explained that, in this proceeding, it “is considering only the reasonableness of the safe harbor, leaving settled its conclusions from *Coal Dust I*.” *March 5 Decision* at 2. The Board explained that the “settled issues include the Board’s conclusions on coal dust’s harmful effects, coal dust containment versus maintenance, and the permissibility of reasonable coal loading requirements. *Id.* at 2-3.

The Board ruled that it “will not compel discovery that seeks information solely to challenge those conclusions” because such information is irrelevant – that is, it “could not affect the outcome of this proceeding.” *Id.*

A. Requests for Production Nos. 2(d), 2(e), 11, and 17

AECC claims that its Requests for Production Nos. 2(d), 2(e), 11, and 17 seek documents regarding whether the safe harbor is “cost-effective” and “reasonably commensurate economically with the problem it addresses.” AECC Motion at 5 (*quoting Coal Dust I*, at 6). However, AECC mischaracterizes the information it is seeking through those requests.

UP has agreed to produce documents regarding the cost and cost-effectiveness of the method of coal dust suppression set forth in the safe harbor provision in response to AECC discovery requests that were actually directed at those issues. For example:

- In response to AECC’s Requests for Production Nos. 2(a), 2(b), and 2(c), UP agreed to search for and produce documents regarding “methods for reducing the amount of PRB coal that is lost from rail cars while the coal is in transit by rail,” including “documents that refer or relate to: (a) the costs of such methods; (b) any comparisons of the costs of such methods with the costs of alternative methods; [and] (c) the effectiveness of such methods, including on the extent to which the effectiveness of such methods is affected by distance travelled, weather conditions, or other factors.”
- In response to AECC’s Request for Production Nos. 3(b) and 3(c), UP agreed to search for and produce documents regarding actions it has taken to reduce the loss of coal from rail cars through “(b) application of toppers or other treatment of coal in loaded cars conducted at [UP’s] expense; or (c) other means.”
- In response to AECC’s Request for Production No. 6, UP agreed to search for and produce “documents related to studies of methods other than (or in addition to) the application of topper agents to reduce the generation of fugitive coal in transit.”
- In response to AECC’s Request for Production No. 13, UP agreed to search for and produce documents that discuss or analyze “the performance of chemical agents for controlling coal dust and their associated application equipment.”

Contrary to AECC’s claim, AECC’s Requests for Production Nos. 2(d), 2(e), 11, and 17 seek information regarding issues other than the cost and cost-effectiveness of the safe

harbor provision. Especially given UP's agreement to respond to a wide range of requests that directly address cost and cost-effectiveness issues, it is clear that these requests seek "material related to ... settled issues that could not affect the outcome of this proceeding." *March 5 Decision* at 3.

Requests for Production Nos. 2(d) and 2(e) ask UP to produce documents that would allow AECC to relitigate the question whether railroads may establish reasonable rules to keep coal dust from escaping rail cars and accumulating on their tracks. They request documents regarding "benefits" and "comparisons of the costs and benefits" of reducing coal loss from rail cars. Because AECC separately asked for (and UP agreed to produce) documents related to the cost and cost-effectiveness of methods for reducing coal dust, AECC's Requests for Production Nos. 2(d) and 2(e) plainly seek documents related to the benefit of relying on containment rather than maintenance as a method of addressing coal dust's harmful effects. In other words, AECC wants documents that will allow it to relitigate claims regarding the risks associated with coal dust and the benefits to railroads of mitigation measures that prevent coal dust from escaping from rail cars – claims that the Board considered before concluding that railroads could adopt reasonable loading rules in *Coal Dust I* and that are now settled. *See March 5 Decision* at 2-3. These AECC requests are not focused "on the reasonableness of the safe harbor." *Id.* at 3.

AECC's motion does not demonstrate the potential relevance to this proceeding of the information it seeks in Requests for Production Nos. 2(d) and 2(e), particularly in light of the fact that UP agreed to produce documents in response to Requests for Production Nos. 2(a)-2(c), 3(b)-3(c), 6 and 13.

Request for Production No. 11 has no apparent connection to the cost or cost-effectiveness of the safe harbor. It requests "all documents since January 1, 2005 that discuss,

analyze, or otherwise refer or relate to the composition of ballast foulants on UP mainline track between Shawnee Junction and South Morrill, NE.”

In addition to being overbroad and unduly burdensome in that it seeks “all documents” dating back to 2005,² the request is plainly an attempt to obtain documents solely to allow AECC to relitigate the question whether coal dust that escapes from rail cars creates a danger that railroads may address by adopting reasonable loading rules. *See Coal Dust I* at 7 (coal dust is a “particularly harmful contaminant that requires corrective action”). AECC reveals this is its real aim in attempting to justify this request. AECC states that it needs information about ballast fouling on a UP line that is not even part of the Joint Line “because one of the rationales for dust control that BNSF espoused in *Coal Dust I* is that, without corrective measures, coal dust fouling will extend beyond the Joint Line.” AECC Motion at 6. AECC should not be allowed to relitigate the rationales for allowing railroads to adopt reasonable loading rules in this proceeding. As has been made clear, “the Board’s conclusions on coal dust’s harmful effects, coal dust containment versus maintenance, and the permissibility of reasonable coal loading requirements” are settled. *March 5 Decision* at 2-3.

Request for Production No. 17 also has no apparent connection to the cost or cost-effectiveness of the safe harbor. It requests “all documents that discuss, analyze, present, or otherwise refer or relate to the costs paid by BNSF since January 1, 2005 for individual maintenance functions performed on the PRB Joint Line, including but not limited to documentation of reimbursements sought by BNSF for UP’s share of the work.”

² On pages 12-13, we address the generally burdensome nature of all AECC’s discovery requests insofar as they seek documents from UP dating back to 2005 and AECC’s complaint about UP’s adoption of a November 1, 2009 cut-off date. However, we note that, for a proceeding focused on whether a rule that became effective in September 2011, a discovery request that seeks information about the composition of ballast foulant more than six years before the rule’s effective date is a particularly egregious example of overreaching.

The request is overbroad and unduly burdensome in that it seeks “all documents ... that otherwise refer or relate to the costs paid by BNSF” dating back to 2005. The request is also objectionable because past Joint Line maintenance costs are not relevant to the cost or cost-effectiveness of the safe harbor provision. Past maintenance costs might relate to issues that the Board addressed in *Coal Dust I* – for example, whether coal dust is a problem that railroads can address through loading rules. However, unless the Board intends to allow AECC to relitigate those issues, UP should not be required to provide discovery regarding past maintenance costs for the Joint Line.³

In sum, documents regarding the benefits of reducing the amount of coal that is lost from rail cars, the composition of ballast foulants on UP track, and past maintenance costs for the Joint Line may have been relevant in *Coal Dust I*, but they are not relevant to the issues presently before the Board. AECC is seeking the documents solely to relitigate “settled issues that could not affect the outcome of this proceeding.” *March 5 Decision* at 3.

B. Requests for Production Nos. 3(a), 7, and 15

AECC states that its Requests for Production Nos. 3(a), 7, and 15 seek documents that are potentially relevant here because “it will be important to examine the extent to which the deposition of fugitive coal is caused by the way in which the coal is loaded . . . and the extent to which the deposition of fugitive coal is caused by the way the trains are operated and/or the way the track is maintained.” AECC Motion at 7-8. However, in concluding that railroads have the “right to establish coal loading requirements” to combat the release of coal dust, the Board

³ The request is also objectionable because it is seeking information about maintenance costs paid by BNSF, and AECC has propounded a similar request on BNSF. If BNSF, which is the operator of the Joint Line and performs all of the maintenance, is not required to produce this information, AECC should not be entitled to obtain the information from UP. If AECC does obtain the information from BNSF, then forcing UP to produce the same information would yield no benefit, while imposing a burden on UP.

already considered those issues in *Coal Dust I*. *Coal Dust I* at 11. As the Board has explained, “[t]he 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.” *March 5 Decision* at 3.

AECC’s motion makes clear that AECC propounded these requests because it *is* seeking to relitigate the reasonableness of BNSF entire coal dust tariff. AECC incorrectly states that, in this proceeding, the Board will be “evaluating the new BNSF tariff and its safe harbor provision.” AECC Motion at 7. However, the Board has clearly stated that this proceeding involves the reasonableness of the safe harbor provision itself. *See November 22 Decision* at 4; *March 5 Decision* at 2-3. AECC also states that the Board did not consider the role railroad operating and maintenance practices played in the release of coal dust in *Coal Dust I*, but in fact the Board addressed the various arguments that were made on this subject. *See Coal Dust I* at 11 (rejecting AECC’s claims that railroads should be solely responsible for coal dust mitigation because “the way BNSF operates its trains, changes in track modulus, and poor maintenance of the line increases coal dust dispersion”). Materials related to the impact of railroad operating and maintenance practices on the deposition of coal dust have no relevance to the reasonableness of the safe harbor provision. The materials AECC seeks in Requests for Production Nos. 3(a), 7, and 15, would be relevant only if AECC intends to claim that BNSF’s containment approach is unreasonable *ab initio*, in contradiction to the Board’s previous holdings.

Request for Production No. 7 suffers from a problem in addition to the fact that it targets irrelevant materials: notwithstanding AECC’s attempt in its Motion to explain what it meant to request, the request is incoherent, because it incorrectly suggests that “slack action,” “modulus changes,” and “rough track” are “railroad operating practices and/or maintenance

practices.” AECC says that “UP should have no trouble understanding what AECC is asking for.” AECC Motion at 9 n.4. But UP should not be required to reconstruct an incoherent discovery request and guess what AECC meant.

Finally, Request for Production No. 15 is plainly overbroad. AECC has made no effort to connect the request to coal dust issues. The request asks UP to search for and produce “all documents” regarding changes in “UP operating procedures” for “heavy-haul trains,” but UP has many heavy haul trains that handle commodities other than PRB coal. Moreover, even with respect to only PRB coal trains, a request for “all documents” regarding changes in operating procedures for those trains since January 1, 2005, would plainly encompass a wide variety of changes in train operations having no connection to any of the issues in this proceeding.

C. Request for Production No. 9

In Request for Production No. 9, AECC asked UP to produce “all documents that discuss, analyze, or otherwise refer or relate to the application [of BNSF’s coal dust provision to] UP trains and UP customers.” Contrary to AECC’s statement in its motion to that UP “refused to provide any documents” in response to this request (AECC Motion at 10), UP objected to the breadth of the request and offered to compromise by producing “documents sufficient to show UP communications to UP customers regarding the application of BNSF’s coal dust operating rule to UP traffic.”

AECC’s motion focuses on a portion of Request No. 9 that specifically seeks “all documents” relating to “differences between UP’s current position regarding the application of [the BNSF coal dust provision] to UP traffic and UP’s position [in the first coal dust proceeding] regarding the application to UP traffic of the BNSF coal dust tariff provisions.” UP specifically objected to this part of AECC’s request because the request incorrectly assumes there are “differences” between UP’s “current” and prior “positions.”

In a February 22, 2012, letter to UP and in its motion, AECC attempts to explain the difference it sees in UP's positions. As UP explained in its response to AECC's letter, any difference AECC sees exists only in AECC's perception, not because UP actually changed its position. In *Coal Dust I*, UP explained that AECC's concern that BNSF would stop movement of UP trains was misplaced and unwarranted. UP explained that BNSF's tariff rules do not bind UP's customers. UP also explained that BNSF's coal dust operating rule contains no provision authorizing BNSF to stop UP trains that do not comply with the rule from moving over the Joint Line. There is nothing inconsistent between those statements in *Coal Dust I* and UP's more recent communications urging customers to comply with BNSF's tariff rules voluntarily. Indeed, UP has previously encouraged customers to comply with BNSF's original tariff rules voluntarily, as UP stated at the Board's hearing during the *Coal Dust I* proceeding. See *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*, FD 35305, July 29, 2010 Hearing Transcript, at 79.

Accordingly, AECC's motion seeking to compel discovery on this issue is moot; as UP has tried to indicate, it has no documents responsive to this portion of AECC's request. See *Duke Energy Corp. v. Norfolk S. Ry.*, NOR 42069 (STB served July 26, 2002), at 10 (noting that compelling discovery is "pointless" when there are no documents to produce in response to a request).

III. AECC'S DISCOVERY REQUESTS ARE BURDENSOME AND OVERBROAD IN RELATION TO THE VALUE OF THE INFORMATION SOUGHT INsofar AS THEY SEEK DOCUMENTS CREATED BEFORE NOVEMBER 1, 2009.

AECC's motion also challenges UP's general objection to producing documents created before November 1, 2009. AECC Motion at 11-12. UP raised its objection in response to AECC's "instructions" for responding to its requests, which state that the requests "cover the period from January 1, 2005 to the date of [UP's] response." Instruction No. 2.

UP submits that November 2009 is a reasonable discovery cut-off because the Board did not even institute the *Coal Dust I* proceeding until December 2009. AECC points to no particular type of document or area of discovery from the period prior to November 2009 that might be relevant to address the issues in this proceeding. Documents dating back to January 1, 2005, would have little or no probative value on the issue of the reasonableness of the coal dust safe harbor provision. After all, the safe harbor provision was created by BNSF, not UP, and it first appeared in a BNSF tariff published on July 20, 2011. Moreover, AECC makes no effort to show how the benefit of searching for and producing such documents would outweigh the costs and burdens on UP of conducting searches for documents dating back to January 1, 2005.

“[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. – Control – Dakota, Minnesota & Eastern R.R. Corp.*, FD 35081 (STB served March 27, 2008), at 1. In evaluating whether to compel discovery, the Board balances the “need for the information” against “the burdens” imposed. *Oregon Int’l Port of Coos Bay – Feeder Line Application – Coos Bay Line of the Central Oregon & Pacific R.R.*, FD 35160 (STB served Sept. 10, 2008), at 3. AECC makes no attempt to explain its need for UP documents dating back to January 1, 2005, in a proceeding regarding the reasonableness of a safe harbor provision that BNSF established just last year, or why its need for such documents outweighs the obvious burdens on UP. Accordingly, the Board should deny AECC’s request that UP be required to search for and produce responsive documents dating back to January 1, 2005.

IV. THE BOARD SHOULD DENY AECC’S INSISTENCE THAT UP PRODUCE A “PRIVILEGE LOG.”

Finally, AECC has moved to compel UP to provide a log of documents that UP withholds from production because they are privileged. UP objected to providing a privilege log

as unduly burdensome. UP recognizes that the Board has ordered BNSF to produce a privilege log. See *March 5 Decision* at 4. However, AECC has not justified its demand that UP produce a privilege log with respect to the discovery AECC seeks from UP.

Production of a privilege log is an expensive, resource-intensive exercise that typically provides little value. The parties did not produce a privilege log in *Coal Dust I*. In fact, an electronic search of Board decisions does not reveal a single case in which the parties were required to produce a privilege log. In the only case that even touched on the issue, the Board declined to order the production of a privilege log. See *Application of the National Railroad Passenger Corp. Under 49 U.S.C. 24308(a)*, FD 33381 (STB served June 26, 1997), at 3-4.

The burdens associated with producing a privilege log can be expected to be particularly significant in a proceeding like this one, where litigation has been ongoing in one form or another for several years. In fact, UP's preliminary review of potentially responsive documents for the period after November 1, 2009, identified approximately 5,000 documents as potentially privileged.⁴ If half of those documents are actually privileged, and assuming that it takes five minutes to create a single entry in the privilege log, that means that just creating the initial privilege log could take more than 200 hours, or 26 days (assuming one person working eight hours a day).⁵ Additional time would be required for lawyers to review the privilege log and ensure that the documents are described accurately and recorded correctly.

⁴ UP expects that the number of privileged documents would increase substantially if UP were required to produce documents dating back to 2005.

⁵ The assumption that it would take five minutes per entry likely understates the time actually required. AECC's Instruction No. 3 requires that for each document withheld as privileged, UP identify (i) the type of document; (ii) the date or best approximation of the date on which the document was prepared; (iii) the author; (iv) the subject matter; (v) the name, address, and organization of all persons to whom such document was directed and/or addressed, and/or by whom it was received; and (vi) the paragraph number of the request to which such document responds.

The Board should not allow AECC to demand production of a privilege log without making some showing to justify the burdens it would be imposing on UP.

V. CONCLUSION

For the foregoing reasons, the Board should deny AECC's motion.

Respectfully submitted,

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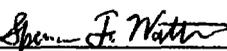
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March 8, 2012

CERTIFICATE OF SERVICE

I, Spencer F. Walters, certify that on this 8th day of March, 2012, I caused a copy of Union Pacific's Reply to Arkansas Electric Cooperative Cooperation's Motion to Compel to be served by e-mail and by first-class mail, postage prepaid, on all parties of record in this proceeding.



Spencer F. Walters