

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET FD 35557

REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS

ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
MOTION TO COMPEL DISCOVERY FROM
BNSF RAILWAY COMPANY

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Dated: February 13, 2012

231840

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Office of Proceedings
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Pursuant to 49 C.F.R. Part 1114.31, Arkansas Electric Cooperative Corporation ("AECC") moves for an order compelling BNSF Railway Company ("BNSF") to produce documents responsive to AECC's First Request for Production of Documents ("Discovery Requests"). A copy of the Discovery Requests is attached hereto as Exhibit A. A copy of BNSF's Responses and Objections to the Discovery Requests ("Responses and Objections") is attached hereto as Exhibit B. 1/

BACKGROUND

On March 3, 2011, the Board served its Decision in Arkansas Electric Cooperative Corporation – Petition For Declaratory Order, FD 35305 ("Coal Dust I"), in which it granted AECC's petition and found that "BNSF's Tariff 6041-B Items 100 and 101 constitute an unreasonable practice under 49 USC § 10702." Decision at 16.

Thereafter, BNSF adopted a revised tariff for the ostensible purpose of reducing deposition of coal dust from trains operating on the PRB Joint Line and BNSF's Black Hills

1/ Exhibits are in a separate volume filed with this motion.

Subdivision. Following objections by PRB coal shippers to the new tariff, and the refusal of BNSF to participate in mediation regarding shippers' concerns, the Board, by Decision served November 22, 2011, instituted this proceeding in the exercise of its "discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty." Reasonableness Of BNSF Railway Company Coal Dust Mitigation Tariff Provisions, FD 35557 ("Coal Dust II"), Decision at 4.

In accordance with the Board's Decision, BNSF and the Western Coal Traffic League (WCTL) jointly moved for a procedural order on December 12, 2011, which the Office of Proceedings granted by fiat on December 16, 2011. Under the procedural schedule, the parties were permitted to engage in discovery until 50 days from the entry of the order approving the schedule, i.e., until February 6, 2012.

BNSF'S REFUSAL TO PRODUCE DOCUMENTS REQUESTED BY AECC IN DISCOVERY

On January 25, 2012, AECC served its first requests for production of documents on BNSF. See Exhibit A. On February 6, 2012, BNSF served on AECC its objections and responses to AECC's discovery. See Exhibit B.

BNSF objected to the majority of AECC's document requests and flatly refused to produce any documents in response to 29 out of AECC's 51 requests. With respect to the remaining 22 requests, BNSF stated that it "will conduct a search [for responsive documents] that is commensurate with the nature and expedited schedule of this proceeding". However, even with respect to those 22 requests, BNSF refused to produce responsive documents that were created on or before November 1, 2009.

LEGAL STANDARD

The Board's Rules permit "discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding." 49 CFR § 1114.21 (a). BNSF has refused to produce documents requested by AECC that are relevant to the subject matter of this proceeding.

The standards governing the Board's discovery rules generally follow those established by the Federal Rules of Civil Procedure. Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1), 2007 STB LEXIS 516, at *150 (STB served Sept. 5, 2007) ("[o]ur discovery rules ... follow generally those in the FRCP"). The scope of discovery is very broad. Ocean Logistics Mgmt., Inc. v NPR, Inc. and Holt Cargo Sys., STB Docket No WCC-102, at 2 (STB served Jan. 14, 2000); *see also* Edgar v. Finley, 312 F.2d 533, 535 (8th Cir. 1963) ("it is no longer open to debate that the discovery rules should be given a broad, liberal interpretation") (citing Hickman v. Taylor, 329 U.S. 495 (1947)).

Material sought in discovery is relevant if it might affect the outcome of a proceeding. Canadian Pacific Railway Company, et al.—Control—Dakota, Minnesota & Eastern Railroad Corp., et al., STB Finance Docket No. 35081, 2008 STB LEXIS 162, at *2 (STB served Mar. 27, 2008) (citing Canadian Pac Ry Co\ Waterloo Railway Company—Adverse Abandonment - Lines of Bangor and Aroostook Railroad Company and Van Buren Bridge Company in Aroostook County, Maine, STB Docket No AB-124 (Sub-No 2) (STB served Nov 14, 2003). "It is not grounds for objection that the information sought

will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Id.

The Board has made clear that it expects parties to comply with discovery requests “in a prompt and forthright manner.” Ocean Logistics, STB Docket No WCC-102 at 2. “Failure to answer or boilerplate, generalized responses are not sufficient to satisfy a party’s discovery obligations.” Trailer Bridge, Inc. v. Sea Star Lines, LLC, STB Docket No. WCC-104, 2000 STB LEXIS 627, at *19 (STB served Oct. 27, 2000).

Parties are required to act diligently in responding to discovery requests. Palm Bay Int’l, Inc. v. Marchesi Di Barolo S.P.A., No. 09-601, 2009 U.S. Dist. LEXIS 104020, at *27 (E.D.N.Y. Nov. 9, 2009) (finding that party had failed to comply with its discovery obligations and compelling party to make a thorough search for documents); Advanced Card Techs. LLC v. Harvard Label Inc., No. 07-1269, 2009 U.S. Dist. LEXIS 118779, at *2 (W.D. Okla. Dec. 21, 2009) (upholding award of expenses for failure fully answer interrogatories and conduct a thorough search for documents); DL v. District of Columbia, 251 F.R.D. 38, 48 (D.D.C. 2008) (compelling the District to perform “a complete and thorough search for responsive documents” consistent with the requirements of the Federal Rules); D’Onofrio v. Sfx Sports Group, Inc., 247 F.R.D. 43, 50 (D.D.C. 2008) (party is expected to search diligently for documents responsive to discovery requests).

Although discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought, conclusory objections relating to burden will not be sufficient to overcome a party’s showing of relevance. Arizona

Electric Power Cooperative, Inc. v. The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company, STB Docket No. 42058, 2002 STB LEXIS 527, *7-8 (STB served Sept. 11, 2002) (granting motion to compel extensive information pertaining to BNSF coal movements)

DISCUSSION

A. **BNSF Improperly Refused To Produce Documents Regarding Issues It Claims – Incorrectly – Were Previously “Decided” By The Board**

In Coal Dust I, the Board held 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.” Decision at 11. However, the Board concluded that the specific requirements that BNSF sought were not reasonable, and hence were not valid. Id. at 11-14. Having found the tariff unreasonable, the Board did not need to decide a host of other issues raised by the parties.

Indeed, the Board in Coal Dust I observed that “the science regarding the effects of coal dust dispersion, and its effective control, is still evolving, and carriers continue to work with shippers . . . to develop the methods that will achieve the optimal results in a commercially practicable manner.” Id. at 6 [footnote omitted]. On that basis, the Board explicitly sought to preserve an open process, and avoid “locking in” any specific conclusions regarding the relative merits of different approaches. Id.

Nevertheless, BNSF refused to respond to most of AECC’s document requests on the ground that they involved “issues that have already been decided by the Board”. AECC immediately asked BNSF’s counsel to “Please identify, with respect to each request to which BNSF has made this objection, the ruling by the Board that BNSF

contends 'decided' that issue." See Exhibit C. BNSF's response to that request simply repeated its general claim "the Board resolved several disputed issues" in Coal Dust I, and asserted that, "in one way or another", AECC's requests address the issue, "already resolved in BNSF' favor, namely that BNSF is entitled to establish rules requiring shippers to take reasonable measures to keep coal in rail cars." See Exhibit D.

Even BNSF's formulation of the "decided" issue concedes that the rules adopted by BNSF must be "reasonable" to be valid. In Coal Dust I the Board found that the BNSF measures then under review were unreasonable. The Board decided nothing about the rules that BNSF subsequently adopted.

The documents AECC is seeking through its Request For Production Of Documents have nothing to do with issues that the Board decided in Coal Dust I. They pertain to important issues in this case.

The specific document requests are discussed below.

RFP Nos. 2 (a), 3, 4 (d)-(e), 30, 40, 41, 42, 44, 45, 51 seek information about the benefits BNSF thinks will result from its current tariff. In Coal Dust I the Board said that consideration of the economic merits (e.g., "cost-benefit" or "cost effectiveness") of a tariff was appropriate in evaluating its reasonableness, although the Board found fault with the cost-benefit analyses proffered by the parties in that case. The Board specifically affirmed the proposition that "any tariff provision must be reasonably commensurate economically with the problem it addresses". Decision at 4-6.

Under BNSF's new tariff, the use of chemical toppers is the only option that BNSF recognizes to satisfy the "safe harbor" requirements. AECC is seeking information that pertains directly to the economic merits of the BNSF tariff under the standard articulated by the Board, in the context of the evolving science that the Board highlighted. Thus, the Board did not "decide" the economic merits of these toppers, or of any "safe harbor" alternatives, in the earlier case, but it did decide that consideration of the economic merits of a tariff was appropriate.

RFP Nos. 6 (a), 15, 16, 22, 24, 35, 36, 37, 38, 46 seek information about the effects of railroad operating and maintenance practices on deposition of fugitive coal and actions and plans by BNSF to reduce deposition of fugitive coal through changes in operating and maintenance practices. Although AECC presented extensive evidence in Coal Dust I that BNSF's operating and maintenance practices were a major cause of fugitive coal depositions, the Board did not address that issue because it found the tariff unreasonable on other grounds.

The issue about which these requests seek information is not the "containment" v. "maintenance" issue in Coal Dust I at 9-10, where the Board said that it was reasonable to use means to contain coal within the railcars, rather than just clean it up through maintenance. However, application of chemical toppers is not the only way to contain coal within coal cars, and the Board never "decided" that it was. The information that AECC is seeking about operating and maintenance practices that may increase (or decrease) deposition of fugitive coal is essential to evaluate the

reasonableness of the current tariff, and in particular its “safe harbor” provisions that consider (at present) only the use of chemical toppers.

RFP No. 17 seeks information about the effect of a number of factors on the deposition of fugitive coal. This information will be useful in evaluating the effectiveness of particular methods for reducing fugitive coal under the current BNSF tariff that is the subject of this proceeding, including new methods for which a shipper seeks “safe harbor” protection. The Board did not “decide” these issues in Coal Dust I.

RFP Nos. 21, 23, 25 seek information about ballast foulants in addition to fugitive coal. The presence of such foulants establishes baseline maintenance requirements that BNSF (or any other railroad) would face even if fugitive coal were completely eliminated, and therefore must be recognized in any assessment of the effect of particular fugitive coal control methods on maintenance needs and costs. Although the Board decided in Coal Dust I that coal dust was “a particularly harmful ballast foulant” and that it was appropriate for BNSF to seek to reduce the fouling of ballast by fugitive coal, the Board certainly did not “decide” that the effects of other ballast foulants should or could be ignored.

RFP No. 31 seeks information about where fugitive coal accumulates along the right-of-way. Such information should be helpful in assessing the mechanisms that cause fugitive coal to be deposited at particular locations, and thereby help in evaluating the effectiveness of particular methods to suppress fugitive coal, including new methods for which a shipper may seek “safe harbor” protection.

RFP No. 32 seeks information about a particular site in Nebraska that BNSF has publicly alleged was damaged by fugitive coal. BNSF referred to this site repeatedly during its oral argument in Coal Dust I, notwithstanding the absence of record evidence in that proceeding that would support BNSF's claims. Information regarding this incident would illustrate specific causes of fugitive coal deposition, and demonstrate limitations on the ability of chemical toppers to control fugitive coal that BNSF has not acknowledged. The Board did not "decide" anything about the Nebraska incident in Coal Dust I, and BNSF has proclaimed its relevance by citing it in support of its claims.

RFP No. 33 seeks information about losses of coal from the bottoms, joints, seams, etc. of coal cars, i.e., losses other than from the tops of cars. Although the Board said in Coal Dust I that it was appropriate to consider losses from the tops of coal cars (Decision at 8), it certainly did not "decide" that losses from the bottoms, seams, joints, etc. should be ignored. This information is needed to evaluate the effectiveness in reducing accumulations of fugitive coal in the roadbed of particular methods to suppress the release of fugitive coal from the tops of cars, such as through the "safe harbor" provisions of the BNSF tariff.

RFP No. 34 seeks information about disposition of undercutter spoils and other byproducts of ballast cleaning containing fugitive coal. In Coal Dust I, at 9-10, the Board specifically noted the risk that "some coal dust removed in the rail bed maintenance process may also find its way back into the environment". To evaluate the effect of chemical toppers or any other means of containing coal within the cars under

the “safe harbor” provisions of the tariff, it is important to consider the extent to which BNSF’s maintenance practices may contribute to the presence of fugitive coal. The Board certainly did not “decide” in Coal Dust I that such maintenance practices must be ignored.

RFP No. 39 seeks information about the composition of the fugitive coal leaving the tops of railcars (dust v. other forms). Information regarding the pathways and methods through which fugitive coal leaves railcars is essential for evaluating the effectiveness of different methods for reducing the accumulation of fugitive coal on track ballast, including the chemical toppers currently approved by BNSF as well as alternatives methods that might be adopted through the “safe harbor” provisions of the BNSF tariff. The Board in Coal Dust I certainly did not “decide” that such information was irrelevant.

RFP No. 47 seeks documents regarding the density of PRB coal traffic and/or other traffic on the PRB Joint Line, Black Hills Subdivision, and the BNSF subdivisions over which PRB coal traffic moves. This information is fundamental to the assessment of maintenance needs with and without specific measures to control fugitive coal, and therefore to determination of the economic merits of those measures. In Coal Dust I the Board did not “decide” anything about the economic merits of specific control measures, and certainly in did not decide anything about specific measures that might be adopted under the “safe harbor” provisions on the new BNSF tariff.

Accordingly, BNSF should be compelled to produce all documents responsive to these requests.

B. BNSF Should Be Directed to Perform A Proper Search For Responsive Documents.

Where BNSF has not refused outright to respond to a document request, it has nevertheless not committed to producing responsive information. Instead, BNSF has responded by indicating that it will “conduct a search . . . that is commensurate with the nature and expedited schedule of this proceeding.” See BNSF’s responses to RFP Nos. 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 18, 19, 20, 27, 28, 29, 43, 48, 49, 50.

BNSF’s complaints about the “expedited schedule” in this case are particularly inappropriate in light of the fact that BNSF (together with WCTL) proposed the schedule.

A party to whom a request for production has been directed does not have the right to decide unilaterally how much effort to devote to complying with its discovery obligations. Rather, the party is required to perform “a complete and thorough search for responsive documents”. DL v. District of Columbia, supra, 251 F.R.D. at 48. See, also D’Onofrio v. Sfx Sports Group, Inc., supra, 247 F.R.D. at 50 (party is expected to search diligently for documents responsive to discovery requests). The Board should not permit BNSF to be less than diligent in complying with its discovery obligations.

C. **BNSF Should Be Not Be Allowed To Unilaterally Limit The Time Period For Which It Will Produce Responsive Documents.**

Generally, AECC asked for documents covering the period from January 1, 2005 to the Close of Discovery. ^{1/} BNSF, however, states that – in those relatively few instances in which BNSF undertakes to produce documents at all – it will only produce documents created after November 1, 2009. The only justification that BNSF offers for the limitation it seeks to impose on its own discovery obligations is that older documents contain “information that has already been the subject of discovery in” Coal Dust I. BNSF Responses and Objections, at 2.

This is a strange argument for BNSF to make in light of the position it has already taken in this proceeding that discovery materials from Coal Dust I may not even lead to the development of relevant evidence in Coal Dust II. Decision Served Jan. 13, 2012, at 2 n. 1.

This is a new proceeding, and the parties are entitled to appropriate discovery in this proceeding. It is utterly irrelevant that a party to this proceeding was also a party to a prior proceeding and might have been able to obtain some documents in that prior proceeding.

The Office of Proceedings has ruled that, as a general matter, classified documents from Coal Dust I cannot be used routinely in this present proceeding. Decision Served Jan. 13, 2012, at 2. Thus, even if a responsive document was in fact

^{1/} There were a few exceptions. RFP No. 1 asked only for the current track chart for the relevant lines. RFP No. 32 asked for documents regarding an event in March 2009. RFP No. 51 asked for documents only since January 1, 2009.

produced in Coal Dust I, it would still have to be produced again in order to be used in Coal Dust II.

Having said that, AECC is always willing to discuss with another party ways to facilitate proceedings and reduce burdens. In the Request For Production, AECC stated:

AECC is prepared to cooperate with BNSF to facilitate the expeditious and cost-efficient production of information responsive to these discovery requests.

For example, if documents responsive to AECC's requests in this case were in fact produced in discovery in Coal Dust I, AECC and BNSF might agree to make a joint motion to permit such documents to be used in Coal Dust II, and if such a motion were granted then BNSF could be excused from producing the same documents in Coal Dust II. However, until and unless such an arrangement is made and approved by the Board, BNSF should comply with its discovery obligations.

D. BNSF Should Be Required To Produce All Responsive Documents That It Has Refused To Produce.

BNSF's other objections to producing responsive documents are without merit. BNSF should be compelled to produce the requested documents.

RFP No. 1 seeks BNSF's current track chart for the PRB Joint Line and the Black Hills Subdivision. BNSF objects that the track chart is neither relevant nor likely to lead to the discovery of admissible evidence. This is absurd. The information in a track chart (profile position, MAS, turnouts, bridges, grade crossings, number of parallel lines, track spacing, etc.) is essential to any evaluation of the effectiveness of a method for reducing fugitive coal, including consideration of the capacity impacts of maintenance

windows referenced by the Board in Coal Dust I, for any method sought through the “safe harbor” provisions of the BNSF tariff.

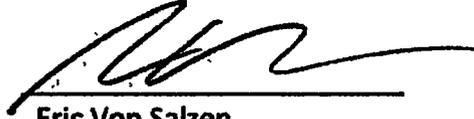
RFP No. 26 seeks documents regarding the accumulation of fugitive coal on BNSF lines other than the Joint Line and the Black Hills subdivision. BNSF objects that the requested documents are neither relevant nor likely to lead to the discovery of admissible evidence. This is incorrect, for at least two reasons. In the first place, BNSF contended in Coal Dust I that a justification for imposing on PRB shippers an obligation to reduce fugitive coal on the PRB and Black Hills Subdivision is that deposition of such coal also has significant effects on tracks beyond the Joint Line and Black Hills Subdivision. Second, such information would be vital to evaluate the economic merits of any method for reducing fugitive coal, including any method sought through the “safe harbor” provisions of the BNSF tariff.

Where BNSF states that it will produce responsive documents, BNSF qualifies that statement by saying that it “will produce responsive, non-privileged materials, if any”. See RFP Nos. 2, 4-14, 18-20, 27-29, 43, 48-50. If BNSF withholds any responsive document, it should be compelled to identify the document and the reason for withholding promptly it in accordance with the Instructions in the Requests For Production, so that AECC can consider filing a motion to compel production of the document.

CONCLUSION

For the foregoing reasons, the Board should overrule BNSF’s objections and compel BNSF to produce the requested documents immediately.

Respectfully submitted,



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Transportation Consultant

Dated: February 13, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February 2012, I caused a copy of the foregoing to be served electronically on all parties of record on the service list in this action.


Eric Von Salzen

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET FD 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**EXHIBITS TO
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MOTION TO COMPEL DISCOVERY FROM
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**ENTERED
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Dated: February 13, 2012

EXHIBIT A

**BEFORE THE
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FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS
TO BNSF RAILWAY COMPANY**

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**BEFORE THE
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**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS
TO BNSF RAILWAY COMPANY**

Arkansas Electric Cooperative Corporation ("AECC") requests that BNSF Railway Company ("BNSF") produce the following documents within 20 days after service (that is, by February 6, 2012) by delivering them to the offices of McLeod, Watkinson & Miller, Suite 800, One Massachusetts Avenue, N.W., Washington, D.C. 20001. The requests for production of documents set forth below shall be deemed continuing in nature so as to require supplementary responses promptly to be furnished if and when BNSF obtains further or different information.

AECC is prepared to cooperate with BNSF to facilitate the expeditious and cost-efficient production of information responsive to these discovery requests. If BNSF has any questions regarding the meaning or scope of any of these discovery requests, the nature of the information and documents responsive to them, or the procedure for producing responsive

material, please contact AECC's counsel, Eric Von Salzen, via email (evonsalzen@mwmlaw.com) or by telephone ((910) 235-5274 (home/office) or (910) 986-1513 (mobile)).

Part I sets forth the documents to be produced; Parts II and III set forth the Definitions and Instructions, respectively.

I. DOCUMENTS TO BE PRODUCED

1. Please produce the current track chart for the PRB Joint Line and the Black Hills Subdivision.

2. Please produce all documents that contain, reflect, or otherwise refer or relate to studies performed by You or any other Person relating to (a) the quantity of coal lost from rail cars while the coal is in transit by rail; (b) the factors and circumstances that cause coal to be lost from rail cars while the coal is in transit by rail; and/or (c) the locations relative to the track ballast where the coal lost from rail cars while the coal is in transit by rail comes to rest.

3. Please produce all documents relating to identification of the specific elements and quantities of benefits that BNSF asserts are produced by changes in the release of fugitive coal resulting from the application of toppers that satisfy BNSF's requirements, including but not limited to changes in individual components of BNSF's costs.

4. Please produce all documents that discuss, analyze, or otherwise refer or relate to methods for reducing the amount of PRB coal that is lost from rail cars while the coal is in transit by rail, including but not limited to 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;

- (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;
- (d) the benefits of such methods, including but not limited to changes in the components of BNSF's costs referenced in Request #3; and,
- (e) any comparisons of the costs and benefits of such methods.

5. Please produce all documents that refer or relate to arrangements, agreements, contracts, quotes, bids, offers, or any other communications between You and any Person, including but not limited to coal mines or suppliers of coal dust suppression products or services, regarding methods that could be used at coal mines to reduce the amount of coal that is lost from rail cars while the coal is in transit by rail.

6. Please produce all documents that refer or relate to Your plans to reduce the amount of coal that is lost from rail cars while the coal is in transit by rail. Please identify separately such plans that reduce coal loss through: (a) changes in BNSF operating or maintenance practices; (b) application of toppers or other treatment of coal in loaded cars conducted at BNSF's expense; or (c) other means, including but not limited to actions taken at the expense of parties other than BNSF.

7. Please produce all documents that discuss, analyze, or otherwise refer or relate to the effect of coal dust suppression products or services on employees of railroads, coal mines, coal shippers, or utilities, or on rail cars owned by railroads, coal mines, coal shippers, or utilities (including but not limited to corrosive effects and "buildup" of topping residue after repeated applications), or on other property owned by railroads, coal mines, coal shippers, or

utilities (including but not limited to effects of chemical toppings on utility coal-handling or air pollution control equipment and performance).

8. Please produce all documents that discuss, analyze, or otherwise refer or relate to the effect of coal dust suppression products or services on the generation of power at particular power generating facilities or at power generating facilities in general.

9. Please produce all minutes, reports, agendas, summaries, or other documents referring or relating to meetings or conferences, including meetings of committees or subcommittees, at which the subject of coal that is lost from rail cars while the coal is in transit by rail was discussed.

10. Please produce all documents that refer or relate to communications between You and any Person regarding (a) coal that is lost from rail cars while the coal is in transit by rail; and, (b) the Coal Dust Loading Rule.

11. Please produce all studies regarding the availability of water in the PRB, including but not limited to the availability and supply of water for use in coal dust suppression, and the permissibility of such use under applicable legal and regulatory standards and requirements.

12. Please produce all documents related to (a) the determination of the "Acceptable Topper Agents And Application Rates" in Appendix B of the Coal Loading Rule, and (b) the determination that other topper agents are not acceptable.

13. Please produce all 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, including but not limited to the use of active or passive vibration, pressurized water, pneumatic methods, and/or compression.

14. Please produce all documents related to studies of the cost-effectiveness or costs and benefits of different methods to reduce the generation of fugitive coal in transit.

15. Please produce all documents related to the effect of operating practices and/or maintenance practices on the part of BNSF and/or other railroads, including but not limited to operating speeds, slack action, modulus changes and/or rough track, on the deposition on rail ballast of fugitive coal.

16. Please produce all documents related to changes in Your operating practices and/or Your maintenance practices since January 1, 2005 to reduce the deposition on rail ballast of fugitive coal.

17. Please produce all documents relating to the effect(s) of the following on the deposition of fugitive coal on track ballast: (a) the rail distance from the mine to the monitoring point; (b) the speed of the train approaching and/or passing the monitoring point; (c) the disturbance by the passage of the train being monitored of fugitive coal deposited by previous trains; (d) the contemporaneous or recent passage of loaded coal trains other than the train being monitored; (e) the contemporaneous or recent passage of empty coal trains; (f) the distributed power configuration of the train being monitored and the effects of locomotive exhaust; (g) the presence of headwinds, tailwinds or crosswinds of different speeds at the monitoring point for the train being monitored; and/or (h) rain, fog, snow or other weather conditions.

18. Please produce all documents relating to the reduction or elimination of fugitive coal due to, in whole or in part, changes in profiling and coal sizing implemented by the mines and shippers after January 1, 2005.

19. Please produce all documents that discuss, analyze, or otherwise refer or relate to:

(a) the establishment of the percentage reduction standard in the Coal Loading Rule;

(b) the difference between the percentage reduction standard in the Coal Loading Rule and the standard in the tariff that was the subject of FD 35305;

(c) the exclusion from the percentage reduction computation in the Coal Loading Rule of the reductions in fugitive coal associated with profiling, coal sizing, and other actions (other than application of toppers) that shippers or mines already have taken to reduce fugitive coal relative to coal loading practices in effect prior to January 1, 2005.

20. Please produce all documents that discuss, analyze, or otherwise refer or relate to any (a) method used by BNSF to monitor the accumulation of fugitive coal on or along its rights-of-way; and (b) dustfall quantities observed using dustfall collectors of any type by date and collector location, and the direction and distance of each collector relative to the centerline of each passing track.

21. Please produce all documents that discuss, analyze, or otherwise refer or relate to the presence of ballast foulants other than fugitive coal on the PRB Joint Line and the Black Hills Subdivision since January 1, 2005, including but not limited to any method used by BNSF to monitor the accumulation of such foulants.

22. Please produce all documents that discuss, analyze, or otherwise refer or relate to causes of fugitive coal deposition, including but not limited to train speed, slack action, modulus changes, switch maintenance, and rough track.

23. Please produce all documents that discuss, analyze, or otherwise refer or relate to (a) any method used by BNSF to assess the composition of ballast foulants on the PRB Joint Line and the Black Hills Subdivision; and/or (b) the percentages by weight and/or volume of PRB coal, ground ballast materials, traction sand, subgrade materials, ambient dust and other identified foulants in track ballast, undercutter waste and/or foulant samples, and the dates, sampling locations and results of such tests.

24. Please produce all documents that discuss, analyze, or otherwise refer or relate to methods or standards used by BNSF to ensure the stability of the track structure of the PRB Joint Line and the Black Hills Subdivision, including but not limited to the frequencies with which specific inspections and maintenance functions have been scheduled and/or performed.

25. Please produce all documents that discuss, analyze, or otherwise refer or relate to use of locomotive traction sand or other products to increase locomotive traction on the PRB Joint Line and the Black Hills Subdivision, including but not limited to changes in such use relative to practices in effect prior to January 1, 2005.

26. Please produce all documents that discuss, analyze, or otherwise refer or relate to accumulations of fugitive coal at locations on or along BNSF's rights-of-way other than the PRB Joint Line and the Black Hills Subdivision.

27. Please produce all documents that discuss, analyze, or otherwise refer or relate to the so-called "Super Trials" of chemical agents for controlling coal dust, and/or any similar test of performance upon which BNSF relies or would rely in assessing acceptability of specific chemical agents under this tariff.

28. Please produce all documents that discuss, analyze, or otherwise refer or relate to the performance of chemical agents for controlling coal dust under conditions other than the conditions under which they have been tested, including, but not limited to the performance of the agents and the associated application equipment in temperature, wind, and other weather conditions representative of winter in eastern Wyoming.

29. Please produce all documents that discuss, analyze, or otherwise refer or relate to criteria other than attainment of the 85 percent reduction standard that BNSF applies or would apply in assessing acceptability of specific fugitive coal control methods under this tariff.

30. Please produce all documents that discuss, analyze, or otherwise refer or relate to the circumstances, if any, under which an action to reduce fugitive coal that produces costs greater than benefits is preferable on an economic and/or public interest basis to the status quo.

31. Please produce all documents that discuss, analyze, or otherwise refer or relate to the track segments or locations on or along BNSF's rights-of-way that most regularly experience accumulation of fugitive PRB coal, including but not limited to:

- (a) criteria applied by BNSF to identify such segments and locations;**
- (b) itemization of such segments and locations by milepost designation;**
- (c) the current track chart showing each such segment and location if not provided pursuant to Request #1; and,**
- (d) video or other records pertaining to PRB coal trains passing through each such segment and location.**

32. Please produce all documents that discuss, analyze, or otherwise refer or relate to the deposition in March 2009 of materials from BNSF's right-of-way onto adjacent property operated as "Buckley's Organic Garden", an organic farm at Crawford, NE, including but not limited to the chemical composition of the materials, BNSF operating practices, maintenance activities, and infrastructure characteristics that may have contributed to the deposition, and actions taken by BNSF, if any, to prevent recurrences.

33. Please produce all documents that discuss, analyze, or otherwise refer or relate to losses of PRB coal, including but not limited to the quantities of such losses, from (a) the bottoms of bottom-dump railcars; and, (b) any other cracks, seams, joints, openings, or orifices other than the tops of railcars.

34. Please produce all documents that discuss, analyze, or otherwise refer or relate to BNSF policies and procedures on the PRB Joint Line and Black Hills Subdivision for managing or disposing of undercutter spoils and any other byproducts of ballast cleaning activities that normally would contain fugitive coal.

35. Please produce all documents that discuss, analyze, or otherwise refer or relate to testing and/or implementation of changes in BNSF maintenance procedures related to detection of fugitive coal issues on the PRB Joint Line and Black Hills Subdivision, including, but not limited to, use of ground-penetrating radar (GPR).

36. Please produce all documents that discuss, analyze, or otherwise refer or relate to testing and/or implementation of changes in BNSF maintenance procedures related to remediation of fugitive coal issues on the PRB Joint Line and Black Hills Subdivision, including, but not limited to, BNSF maintenance practices regarding turnouts and bridges.

37. Please produce all documents that discuss, analyze, or otherwise refer or relate to changes in BNSF operating procedures for heavy-haul trains, including but not limited to changes in maximum authorized speeds.

38. Please produce all documents that discuss, analyze, or otherwise refer or relate to standards for the frequency of ballast maintenance activities applied by BNSF.

39. Please produce all documents that discuss, analyze, or otherwise refer or relate to the percentage of coal leaving the tops of railcars that leaves in the form of dust in airborne suspension, and the percentage of coal that leaves the tops of railcars as dust in airborne suspension that lands on the track ballast.

40. Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the unit cost paid by BNSF since January 1, 2005 for work performed on each specific maintenance function that BNSF asserts is or may be affected by the deposition of fugitive coal on the PRB Joint Line, including but not limited to documentation of reimbursement from UP on the basis of such unit cost. For the purposes of this request, "unit cost" refers to U.S. dollars per unit of each function performed where the units of measurement for each function are the principal drivers of cost for that function, as in the analogous unit cost information provided by BNSF in FD 35305.

41. Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the quantities of work performed since January 1, 2005 on each specific maintenance function that BNSF asserts is or may be affected by the deposition of fugitive coal on the PRB Joint Line, and corresponding to the functions identified by BNSF in its response to.

Request #40, including but not limited to documentation of reimbursement from UP on the basis of such quantities.

42. For each specific maintenance function that BNSF asserts is or may be affected by the deposition of fugitive coal on the PRB Joint Line, please produce all documents that discuss, analyze, present, or otherwise refer or relate to the quantities of work on that function required with vs. without the application of toppers or other measures that meet BNSF's 85 percent reduction standard.

43. Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the quantities of fugitive coal that would accumulate on rail ballast on the PRB Joint Line and/or other BNSF rights-of-way after the application of toppers or other measures that meet the Coal Loading Rule.

44. Please produce all documents that discuss, analyze, present, or otherwise refer or relate to slow orders on the PRB Joint Line and Black Hills Subdivision and their causes.

45. Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the operational impacts and costs of maintenance windows on the PRB Joint Line.

46. Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the construction of new parallel track segments and/or the spacing between the centerlines of adjacent tracks on the PRB Joint Line and on the Black Hills Subdivision.

47. Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the density of PRB coal traffic and/or other traffic on the PRB Joint Line, Black Hills Subdivision and the BNSF subdivisions over which PRB coal traffic moves.

48. Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the quantity of PRB coal delivered to customers in each railcar with and without the application of toppers or other measures that meet the Coal Loading Rule, including but not limited to BNSF's valuation of coal retention.

49. Please produce all documents that discuss, analyze, present, or otherwise refer or relate to measures taken since January 1, 2005 to reduce fugitive coal when coal is in transit by rail for coal movements originating at points other than the PRB, including but not limited to coal originated by railroads other than BNSF.

50. Please produce all documents transmitted between BNSF and Berkshire Hathaway that discuss, analyze, present, or otherwise refer or relate to fugitive PRB coal.

51. Please produce all documents since January 1, 2009 that discuss, analyze, or otherwise refer or relate to the causes of the two major derailments that occurred on the PRB Joint Line in 2005.

II. DEFINITIONS

The following definitions form an integral part of these Requests for Production of Documents:

1. The connectives "and" and "or", as used herein, shall be construed either disjunctively or conjunctively as necessary to bring within the scope of each discovery request all responses that might otherwise be construed to be outside of its scope.

2. "Black Hills Subdivision" means BNSF's independently owned rail lines that extend from Campbell County, Wyoming at the north end of the PRB Joint Line east and southeast toward Edgemont, SD.

3. **"BNSF"** means BNSF Railway Company, and any affiliates or predecessors thereof.
4. **"Coal Loading Rule"** means Item 100, and Appendices A and B thereto, of BNSF's Coal Rules publication denominated as Price List 6041-B, as issued on July 14, 2011 and any subsequent iterations thereof.
5. **"Communication"** means the transmittal or exchange of information of any kind in any form, including oral, written, or electronic form, with another Person, whether Person to Person, in a group, in a meeting, by telephone, letter, telefax, electronic mail, text message, or otherwise, and including without limitation any printed, typed, handwritten, or other readable document, and any tape recording, correspondence; memorandum, report, contract, diary, logbook, minutes, note, study, analysis, survey, and forecast.
6. **"Document(s)"** is used in the broadest sense permitted by 49 C.F.R. § 1114.30 and should be interpreted to include all writings and records of every type in Your possession, custody or control, or known by You to exist including but not limited to: electronically stored information, electronic mail, testimony and exhibits, contracts, drafts, agreements, memoranda, correspondence, letters, reports (including drafts, preliminary, intermediate, and final reports), surveys, evaluations, studies (as defined above, including economic and market studies), summaries, comparisons, tabulations, work papers, statistical records, proposals, outlines, charts, books, pamphlets, periodicals, published material, magazines, newspapers, advertisements, brochures, blueprints, graphs; telegrams, photographs, maps, bulletins, corporate or other minutes, notes, diaries, log sheets, calendars, appointment books, address books, schedules, ledgers, journals, transcripts, microfilm, microfiche, computer tapes,

computer discs, computer data and printouts, data compilations, mechanical and electrical recordings, telephone and telegraphic communications, data sheets or data processing cards, speeches, and all other records, tables, written, electronic, or otherwise, and drafts of any of the above; including every copy of a document that contains handwritten or other notations or that otherwise does not exactly duplicate the original or any other copy and any attachments or appendices to any document.

7. "Fugitive coal" means coal in any form (e.g., dust, chunks, clumps, etc.) that leaves railcars while in transit, whether the coal exits the rail car from the top, through the bottom, seams, or any other location, due to any cause.

8. "Load Profiling" means loading uncovered coal cars in accordance with the "Redesigned Chute Diagram" included in the Coal Dust Loading Rule.

9. "Person" means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions, organizations, or other entities of any kind.

10. "PRB" means the Powder River Basin located in Montana and Wyoming.

11. "PRB Joint Line" means the rail line that extends south from Caballo Junction in Campbell County, Wyoming, to connections with BNSF's and Union Pacific Railroad Company's independently owned lines.

12. "Refer or relate to", as well as the terms "relating to", "relates to", "referring to", or "refers to" mean consisting of, making reference to, describing, discussing, reflecting, citing, commenting on, constituting, containing, embodying, evaluating, explaining, supporting, contradicting, regarding, evidencing, concerning, summarizing, or analyzing, or otherwise pertaining to, whether directly or indirectly, the matter.

13. "Studies" means any analyses, reports, evaluations, memoranda, summaries, statistical compilations, presentations, reviews, audits, or other types of written, printed or electronic submissions of information, including drafts, preliminary, intermediate, and final versions.

14. "Topper Agent" means a chemical agent, such as a surfactant, that is applied to coal for the purpose of reducing the amount of coal that is lost from rail cars while the coal is in transit by rail.

15. When used in these requests, the phrase "in transit by rail" should be construed to include the movement of coal over any rail lines by any railroad and is not limited to movements of coal over the PRB Joint Line or the Black Hills Subdivision.

16. "You" and "Your" refer to BNSF, as well as any of its employees, agents, partners, officers, directors, advisors, representatives, attorneys, independent contractors, expert consultants, or departments, assignees, and all other persons acting (or who act or have acted) on its behalf.

III. INSTRUCTIONS

1. In producing the documents requested, you are instructed to furnish all documents within your possession, custody, or control.

2. Unless otherwise indicated, these requests cover the period from January 1, 2005 to the Close of Discovery.

3. If you withhold any document responsive to a request, indicate the grounds for withholding it, including any claim of privilege, and identify each such document in writing on

or before the date specified for production by providing the following information: the type of document (e.g., letter, memorandum, etc.); the date or your best approximation of the date on which the document was prepared; the author(s); the subject matter; the names, addresses, and organization of all persons to whom such document was directed and/or addressed, and/or by whom it was received; and the paragraph number of the request to which such document responds.

4. If you do not have a document responsive to a request, but you know of person(s) or organization(s) who may have all or any portion of the document, then all such information, including names, addresses, and telephone numbers, shall be disclosed in the response to the request.

5. If any document called for by these requests for production is available in machine-readable format, please produce the document or information in that format, along with a description of the format and a decoder, as well as any other information, necessary and sufficient to permit access to and an understanding of the electronic information.

Respectfully submitted,

Michael A. Nelson
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(413) 684-2044

Transportation Consultant


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(202) 842-2345

Counsel for Arkansas Electric Cooperative
Corporation

Dated: January 17, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January 2012, I caused a copy of the foregoing document to be served electronically on Counsel for BNSF Railway Company, and courtesy copies on other parties of record in this docket.


Eric Von Salzen

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET FD 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**EXHIBITS (CONTINUED) TO
ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
MOTION TO COMPEL DISCOVERY FROM
BNSF RAILWAY COMPANY**

**ENTERED
Office of Proceedings
FEB 13 2012
Part of
Public Record**

**Michael A. Nelson
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Dalton, MA 01226
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**Counsel for Arkansas Electric Cooperative
Corporation**

Dated: February 13, 2012

EXHIBIT B

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**BNSF RAILWAY COMPANY'S RESPONSES AND OBJECTIONS TO ARKANSAS
ELECTRIC COOPERATIVE CORPORATION'S FIRST REQUESTS FOR
PRODUCTION OF DOCUMENTS**

Pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, Defendant BNSF Railway Company ("BNSF") hereby responds and objects to the First Requests for Production of Documents served by Arkansas Electric Cooperative Corporation on January 17, 2012 ("AECC's Requests").

GENERAL OBJECTIONS

The following general objections are made with respect to AECC's Requests.

1. BNSF objects to AECC's Requests to the extent they seek documents that contain information that is confidential, commercially sensitive, or proprietary, including sensitive nonpublic information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904.

2. BNSF objects to AECC's Requests to the extent they seek disclosure of documents that are protected by the attorney-client privilege, work product doctrine, and/or any other appropriate privilege or doctrine. Any production of privileged or otherwise protected documents is inadvertent and shall not constitute a waiver of any claim of privilege or other protection.

3. BNSF objects to AECC's Requests to the extent they seek information or

documents relating to issues previously resolved by the Board in *Arkansas Electric Cooperative Corporation—Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011). Such issues are not within the scope of the Board’s proceeding in *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, STB Finance Docket No. 35557 (STB served Nov. 22, 2011).

4. BNSF objects to AECC’s Requests to the extent they seek information created before November 1, 2009, on grounds that such requests are overly broad and unduly burdensome in that they seek information that has already been the subject of discovery in *Arkansas Electric Cooperative Corporation—Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

5. BNSF objects to AECC’s Requests on grounds that they are overly broad and unduly burdensome. AECC’s Requests are excessive and repetitive and in many cases seek information that is outside the scope of this proceeding. Responding to AECC’s fifty-one document requests that were served less than three weeks before the close of discovery imposes a substantial burden on BNSF that is not justified by the nature of this proceeding, including the highly compressed discovery period.

6. BNSF objects to AECC’s Requests to the extent they seek production of or information regarding “all documents,” “all minutes, reports, agendas, summaries or other documents,” and “all studies” relating to matters described in particular requests on grounds that those requests are overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF will conduct a search for responsive information as indicated in its response to specific requests that is commensurate with the nature and expedited schedule of this proceeding.

7. BNSF objects to AECC's Requests to the extent they seek information relating to BNSF's internal management cost data on grounds that such requests seek highly sensitive information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. BNSF further objects to such requests on grounds that they are beyond the scope of permissible discovery.

8. BNSF objects to AECC's Requests to the extent they seek information relating to UP trains operating on the Joint Line.

9. BNSF objects to AECC's Requests to the extent they seek information related to transportation outside of the Powder River Basin ("PRB") on grounds that such information is neither relevant nor reasonably likely to lead to the discovery of admissible related to the issues in this proceeding.

10. BNSF objects to AECC's Requests to the extent they seek information that is publicly available on grounds that such a request is overly broad and unduly burdensome.

11. BNSF objects to AECC's Requests to the extent they seek information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery.

12. BNSF objects to AECC's Requests to the extent they are duplicative or overlap with previous requests from other parties of record in this case.

OBJECTIONS TO DEFINITIONS

BNSF objects to definitions incorporated in AECC's Requests.

1. BNSF objects to the definition of "You" and "Your" on the basis that it is overly

broad, unduly burdensome, and beyond the scope of permissible discovery to the extent it requires the production of information or documents that are not in the possession, custody, or control of BNSF, including, for example, documents in the possession of former employees, directors, affiliates, partners, advisors, attorneys, independent contractors, expert consultants, assignees, and "all other persons acting (or who have acted) on its behalf." Subject to and without waiving this objection, BNSF will produce responsive, non-privileged documents that are reasonably available from its two primary coal dust consulting firms, Simpson Weather Associates ("SWA") and Conestoga-Rovers & Associates ("CRA"), that relate to the principal consulting activities that those firms performed for BNSF.

2. BNSF objects to the definitions of "Document(s)," "Refer or relate to," "relating to," "relates to," "referring to," and "refers to" on grounds that they are overly broad, unduly burdensome, and beyond the scope of permissible discovery to the extent they require BNSF to search files where there is not a reasonable likelihood of finding responsive documents or include materials that are not in BNSF's possession, custody, or control.

3. BNSF objects to the definition of "Studies" as vague to the extent it includes "other types of written, printed, or electronic submissions of information."

OBJECTIONS TO INSTRUCTIONS

BNSF objects to the following instructions accompanying AECC's Requests.

1. BNSF objects to Instruction Number 1 on grounds that it is overly broad, unduly burdensome, and beyond the permissible scope of discovery.

2. BNSF objects to AECC's Requests, including Instruction Number 2, to the extent they seek information created before November 1, 2009, on grounds that such instructions and requests are overly broad and unduly burdensome in that they seek information that has already

been the subject of discovery in *Arkansas Electric Cooperative Corporation—Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011).

3. BNSF objects to Instruction Number 3 on grounds that it is overly broad and unduly burdensome to the extent it seeks information that is not necessary to enable AECC to assess the grounds for withholding of a document.

4. BNSF objects to Instruction Number 4 on grounds that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery.

5. BNSF objects to Instruction Number 5 on grounds that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery.

BNSF incorporates these General Objections, Objections to Definitions, and Objections to Instructions into each Response below as if fully set forth therein.

RESPONSES AND OBJECTIONS TO REQUESTS FOR PRODUCTION

Request for Production No. 1:

Please produce the current track chart for the PRB Joint Line and the Black Hills Subdivision.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 2:

Please produce all documents that contain, reflect, or otherwise refer or relate to studies performed by You or any other Person relating to (a) the quantity of coal lost from rail cars while the coal is in transit by rail; (b) the factors and circumstances that cause coal to be lost from rail cars while the coal is in transit by rail; and/or (c) the locations relative to the track ballast where the coal lost from rail cars while the coal is in transit by rail comes to rest.

BNSF's Response: BNSF objects to Request Number 2(c) on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks

information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding. Subject to and without waiving its specific and general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009 that are responsive to Request Number 2(a) and (b), and BNSF will produce responsive, non-privileged materials, if any, relating to Request Number 2(a) and (b).

Request for Production No. 3:

Please produce all documents relating to identification of the specific elements and quantities of benefits that BNSF asserts are produced by changes in the release of fugitive coal resulting from the application of toppers that satisfy BNSF's requirements, including but not limited to changes in individual components of BNSF's costs.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 4:

Please produce all documents that discuss, analyze, or otherwise refer or relate to methods for reducing the amount of PRB coal that is lost from rail cars while the coal is in transit by rail, including but not limited to 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;
- (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;
- (d) the benefits of such methods, including but not limited to changes in the components of BNSF's costs referenced in Request #3; and,
- (e) any comparisons of the costs and benefits of such methods.

BNSF's Response: BNSF objects to Request Number 4(d) and (e) on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding. Subject to and without waiving its specific and general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009 that are responsive to Request Number 4(a)-(c), and BNSF will produce responsive, non-privileged materials, if any, relating to Request Number 4(a)-(c).

Request for Production No. 5:

Please produce all documents that refer or relate to arrangements, agreements, contracts, quotes, bids, offers, or any other communications between You and any Person, including but not limited to coal mines or suppliers of coal dust suppression products or services, regarding methods that could be used at coal mines to reduce the amount of coal that is lost from rail cars while the coal is in transit by rail.

BNSF's Response: BNSF objects to this Request to the extent it seeks proprietary information relating to third parties, including information that, if produced, could result in the violation of any contractual obligation to third parties. Subject to and without waiving its specific and general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any, that are responsive to this request.

Request for Production No. 6:

Please produce all documents that refer or relate to Your plans to reduce the amount of coal that is lost from rail cars while the coal is in transit by rail. Please identify separately such plans that reduce coal loss through: (a) changes in BNSF operating or maintenance practices; (b) application of toppers or other treatment of coal in loaded cars conducted at BNSF's expense; or (c) other means, including but not limited to actions taken at the expense of parties other than BNSF.

BNSF's Response: BNSF objects to Request Number 6(a) on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding. Subject to and without waiving its specific and general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009 that are responsive to Request Number 6(b) and (c), and BNSF will produce responsive, non-privileged materials, if any, relating to Request Number 6(b) and (c).

Request for Production No. 7:

Please produce all documents that discuss, analyze, or otherwise refer or relate to the effect of coal dust suppression products or services on employees of railroads, coal mines, coal shippers, or utilities, or on rail cars owned by railroads, coal mines, coal shippers, or utilities (including but not limited to corrosive effects and "buildup" of topping residue after repeated applications), or on other property owned by railroads, coal mines, coal shippers, or utilities (including but not limited to effects of chemical toppings on utility coal-handling or air pollution control equipment and performance).

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 8:

Please produce all documents that discuss, analyze, or otherwise refer or relate to the effect of coal dust suppression products or services on the generation of power at particular power generating facilities or at power generating facilities in general.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 9:

Please produce all minutes, reports, agendas, summaries, or other documents referring or relating to meetings or conferences, including meetings of committees or subcommittees, at which the subject of coal that is lost from rail cars while the coal is in transit by rail was discussed.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 10:

Please produce all documents that refer or relate to communications between You and any Person regarding (a) coal that is lost from rail cars while the coal is in transit by rail; and, (b) the Coal Dust Loading Rule.

BNSF's Response: BNSF objects to this Request to the extent it seeks proprietary information relating to third parties, including information that, if produced, could result in the violation of any contractual obligation to third parties. Subject to and without waiving its specific and general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 11:

Please produce all studies regarding the availability of water in the PRB, including but not limited to the availability and supply of water for use in coal dust suppression, and the permissibility of such use under applicable legal and regulatory standards and requirements.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 12:

Please produce all documents related to (a) the determination of the "Acceptable Topper Agents And Application Rates" in Appendix B of the Coal Loading Rule, and (b) the determination that other topper agents are not acceptable.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 13:

Please produce all 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, including but not limited to the use of active or passive vibration, pressurized water, pneumatic methods, and/or compression.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 14:

Please produce all documents related to studies of the cost-effectiveness or costs and benefits of different methods to reduce the generation of fugitive coal in transit.

BNSF's Response: BNSF objects to this Request to the extent it focuses on "costs and benefits" of different methods to reduce on the grounds that seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding. Subject to and without waiving its specific and general objections, BNSF will conduct a search for documents relating to studies of the cost-effectiveness of different methods to reduce the generation of fugitive coal in transit that is commensurate with the nature and

expedited schedule of this proceeding for materials created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 15:

Please produce all documents related to the effect of operating practices and/or maintenance practices on the part of BNSF and/or other railroads, including but not limited to operating speeds, slack action, modulus changes and/or rough track, on the deposition on rail ballast of fugitive coal.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 16:

Please produce all documents related to changes in Your operating practices and/or Your maintenance practices since January 1, 2005 to reduce the deposition on rail ballast of fugitive coal.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 17:

Please produce all documents relating to the effect(s) of the following on the deposition of fugitive coal on track ballast: (a) the rail distance from the mine to the monitoring point; (b) the speed of the train approaching and/or passing the monitoring point; (c) the disturbance by the passage of the train being monitored of fugitive coal deposited by previous trains; (d) the contemporaneous or recent passage of loaded coal trains other than the train being monitored; (e) the contemporaneous or recent passage of empty coal trains; (f) the distributed power configuration of the train being monitored and the effects of locomotive exhaust; (g) the presence of headwinds, tailwinds or crosswinds of different speeds at the monitoring point for the train being monitored; and/or (h) rain, fog, snow or other weather conditions.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information

relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 18:

Please produce all documents relating to the reduction or elimination of fugitive coal due to, in whole or in part, changes in profiling and coal sizing implemented by the mines and shippers after January 1, 2005.

BNSF's Response: BNSF objects to this Request to the extent it seeks information created before November 1, 2009, on grounds that such a request is overly broad and unduly burdensome in that it seeks information that has already been the subject of discovery in *Arkansas Electric Cooperative Corporation—Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011). Subject to and without waiving its specific and general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for information created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 19:

Please produce all documents that discuss, analyze, or otherwise refer or relate to:

(a) the establishment of the percentage reduction standard in the Coal Loading Rule;

(b) the difference between the percentage reduction standard in the Coal Loading Rule and the standard in the tariff that was the subject of FD 35305;

(c) the exclusion from the percentage reduction computation in the Coal Loading Rule of the reductions in fugitive coal associated with profiling, coal sizing, and other actions (other than application of toppers) that shippers or mines already have taken to reduce fugitive coal relative to coal loading practices in effect prior to January 1, 2005.

BNSF's Response: BNSF objects to Request Number 19(c) on grounds that it is vague and unclear. Subject to and without waiving its specific and general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding

for materials created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 20:

Please produce all documents that discuss, analyze, or otherwise refer or relate to any (a) method used by BNSF to monitor the accumulation of fugitive coal on or along its rights-of-way; and (b) dustfall quantities observed using dustfall collectors of any type by date and collector location, and the direction and distance of each collector relative to the centerline of each passing track.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 21:

Please produce all documents that discuss, analyze, or otherwise refer or relate to the presence of ballast foulants other than fugitive coal on the PRB Joint Line and the Black Hills Subdivision since January 1, 2005, including but not limited to any method used by BNSF to monitor the accumulation of such foulants.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 22:

Please produce all documents that discuss, analyze, or otherwise refer or relate to causes of fugitive coal deposition, including but not limited to train speed, slack action, modulus changes, switch maintenance, and rough track.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the

issues in this proceeding.

Request for Production No. 23:

Please produce all documents that discuss, analyze, or otherwise refer or relate to (a) any method used by BNSF to assess the composition of ballast foulants on the PRB Joint Line and the Black Hills Subdivision; and/or (b) the percentages by weight and/or volume of PRB coal, ground ballast materials, traction sand, subgrade materials, ambient dust and other identified foulants in track ballast, undercutter waste and/or foulant samples, and the dates, sampling locations and results of such tests.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 24:

Please produce all documents that discuss, analyze, or otherwise refer or relate to methods or standards used by BNSF to ensure the stability of the track structure of the PRB Joint Line and the Black Hills Subdivision, including but not limited to the frequencies with which specific inspections and maintenance functions have been scheduled and/or performed.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 25:

Please produce all documents that discuss, analyze, or otherwise refer or relate to use of locomotive traction sand or other products to increase locomotive traction on the PRB Joint Line and the Black Hills Subdivision, including but not limited to changes in such use relative to practices in effect prior to January 1, 2005.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the

issues in this proceeding.

Request for Production No. 26:

Please produce all documents that discuss, analyze, or otherwise refer or relate to accumulations of fugitive coal at locations on or along BNSF's rights-of-way other than the PRB Joint Line and the Black Hills Subdivision.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 27:

Please produce all documents that discuss, analyze, or otherwise refer or relate to the so-called "Super Trials" of chemical agents for controlling coal dust, and/or any similar test of performance upon which BNSF relies or would rely in assessing acceptability of specific chemical agents under this tariff.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 28:

Please produce all documents that discuss, analyze, or otherwise refer or relate to the performance of chemical agents for controlling coal dust under conditions other than the conditions under which they have been tested, including, but not limited to the performance of the agents and the associated application equipment in temperature, wind, and other weather conditions representative of winter in eastern Wyoming.

BNSF's Response: BNSF objects to this Request on grounds that the reference to "chemical agents for controlling coal dust under conditions other than the conditions under which they have been tested" is vague and unclear. Subject to and without waiving its specific and general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009, and BNSF

will produce responsive, non-privileged materials, if any.

Request for Production No. 29:

Please produce all documents that discuss, analyze, or otherwise refer or relate to criteria other than attainment of the 85 percent reduction standard that BNSF applies or would apply in assessing acceptability of specific fugitive coal control methods under this tariff.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 30:

Please produce all documents that discuss, analyze, or otherwise refer or relate to the circumstances, if any, under which an action to reduce fugitive coal that produces costs greater than benefits is preferable on an economic and/or public interest basis to the status quo.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 31:

Please produce all documents that discuss, analyze, or otherwise refer or relate to the track segments or locations on or along BNSF's rights-of-way that most regularly experience accumulation of fugitive PRB coal, including but not limited to:

- (a) criteria applied by BNSF to identify such segments and locations;
- (b) itemization of such segments and locations by milepost designation;
- (c) the current track chart showing each such segment and location if not provided pursuant to Request #1; and,
- (d) video or other records pertaining to PRB coal trains passing through each such segment and location.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information

relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 32:

Please produce all documents that discuss, analyze, or otherwise refer or relate to the deposition in March 2009 of materials from BNSF's right-of-way onto adjacent property operated as "Buckley's Organic Garden", an organic farm at Crawford, NE, including but not limited to the chemical composition of the materials, BNSF operating practices, maintenance activities, and infrastructure characteristics that may have contributed to the deposition, and actions taken by BNSF, if any, to prevent recurrences.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 33:

Please produce all documents that discuss, analyze, or otherwise refer or relate to losses of PRB coal, including but not limited to the quantities of such losses, from (a) the bottoms of bottom-dump railcars; and, (b) any other cracks, seams, joints, openings, or orifices other than the tops of railcars.

BNSF's Response: BNSF objects to this Request to the extent it seeks information that overlaps with information requested in Request Number 4(a)-(c). BNSF further objects to Request Number 33(a) and (b) on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 34:

Please produce all documents that discuss, analyze, or otherwise refer or relate to BNSF policies and procedures on the PRB Joint Line and Black Hills Subdivision for managing or disposing of undercutter spoils and any other byproducts of ballast cleaning activities that normally would contain fugitive coal.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 35:

Please produce all documents that discuss, analyze, or otherwise refer or relate to testing and/or implementation of changes in BNSF maintenance procedures related to detection of fugitive coal issues on the PRB Joint Line and Black Hills Subdivision, including, but not limited to, use of ground-penetrating radar (GPR).

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 36:

Please produce all documents that discuss, analyze, or otherwise refer or relate to testing and/or implementation of changes in BNSF maintenance procedures related to remediation of fugitive coal issues on the PRB Joint Line and Black Hills Subdivision, including, but not limited to, BNSF maintenance practices regarding turnouts and bridges.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 37:

Please produce all documents that discuss, analyze, or otherwise refer or relate to changes in BNSF operating procedures for heavy-haul trains, including but not limited to changes in maximum authorized speeds.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information

that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 38:

Please produce all documents that discuss, analyze, or otherwise refer or relate to standards for the frequency of ballast maintenance activities applied by BNSF

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 39:

Please produce all documents that discuss, analyze, or otherwise refer or relate to the percentage of coal leaving the tops of railcars that leaves in the form of dust in airborne suspension, and the percentage of coal that leaves the tops of railcars as dust in airborne suspension that lands on the track ballast.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 40:

Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the unit cost paid by BNSF since January 1, 2005 for work performed on each specific maintenance function that BNSF asserts is or may be affected by the deposition of fugitive coal on the PRB Joint Line, including but not limited to documentation of reimbursement from UP on the basis of such unit cost. For the purposes of this request, "unit cost" refers to U.S. dollars per unit of each function performed where the units of measurement for each function are the principal drivers of cost for that function, as in the analogous unit cost information provided by BNSF in FD 35305.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information

that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 41:

Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the quantities of work performed since January 1, 2005 on each specific maintenance function that BNSF asserts is or may be affected by the deposition of fugitive coal on the PRB Joint Line, and corresponding to the functions identified by BNSF in its response to Request #40, including but not limited to documentation of reimbursement from UP on the basis of such quantities.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 42:

For each specific maintenance function that BNSF asserts is or may be affected by the deposition of fugitive coal on the PRB Joint Line, please produce all documents that discuss, analyze, present, or otherwise refer or relate to the quantities of work on that function required with vs. without the application of toppers or other measures that meet BNSF's 85 percent reduction standard.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 43:

Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the quantities of fugitive coal that would accumulate on rail ballast on the PRB Joint Line and/or other BNSF rights-of-way after the application of toppers or other measures that meet the Coal Loading Rule.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding

for materials created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 44:

Please produce all documents that discuss, analyze, present, or otherwise refer or relate to slow orders on the PRB Joint Line and Black Hills Subdivision and their causes.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 45:

Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the operational impacts and costs of maintenance windows on the PRB Joint Line.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 46:

Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the construction of new parallel track segments and/or the spacing between the centerlines of adjacent tracks on the PRB Joint Line and on the Black Hills Subdivision.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 47:

Please produce all documents that discuss, analyze, present, or otherwise refer or relate to

the density of PRB coal traffic and/or other traffic on the PRB Joint Line, Black Hills Subdivision and the BNSF subdivisions over which PRB coal traffic moves.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

Request for Production No. 48:

Please produce all documents that discuss, analyze, present, or otherwise refer or relate to the quantity of PRB coal delivered to customers in each railcar with and without the application of toppers or other measures that meet the Coal Loading Rule, including but not limited to BNSF's valuation of coal retention.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 49:

Please produce all documents that discuss, analyze, present, or otherwise refer or relate to measures taken since January 1, 2005 to reduce fugitive coal when coal is in transit by rail for coal movements originating at points other than the PRB, including but not limited to coal originated by railroads other than BNSF.

BNSF's Response: BNSF objects to this Request to the extent it seeks information created before November 1, 2009, on grounds that such a request is overly broad and unduly burdensome in that it seeks information that has already been the subject of discovery in *Arkansas Electric Cooperative Corporation—Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011). Subject to and without waiving its specific and general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009, and BNSF

will produce responsive, non-privileged materials, if any.

Request for Production No. 50:

Please produce all documents transmitted between BNSF and Berkshire Hathaway that discuss, analyze, present, or otherwise refer or relate to fugitive PRB coal.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search that is commensurate with the nature and expedited schedule of this proceeding for materials created after November 1, 2009, and BNSF will produce responsive, non-privileged materials, if any.

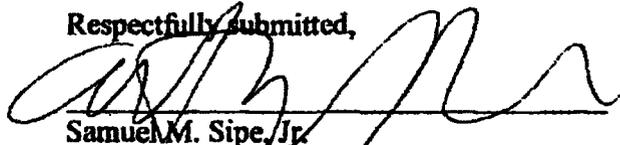
Request for Production No. 51:

Please produce all documents since January 1, 2009 that discuss, analyze, or otherwise refer or relate to the causes of the two major derailments that occurred on the PRB Joint Line in 2005.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information relating to issues that have already been decided by the Board and therefore seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence related to the issues in this proceeding.

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Respectfully submitted,



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Attorneys for BNSF Railway Company

Dated: February 6, 2012

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2012, I caused a copy of the foregoing to be served by e-mail or first-class mail, postage prepaid, upon all parties of record in this case as follows:

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EXHIBIT C

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OF COUNSEL

February 7, 2012

Via email

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RE: Reasonableness Of BNSF Railway Company Coal Dust Mitigation
Tariff Provisions, STB Finance Docket No. 35557

Dear Counsel:

In its responses to AECC's requests for production of documents, BNSF objected to 31 of the 51 requests on the ground that the request "seeks information relating to issues that have already been decided by the Board" (see responses to RFP Nos. 2-4, 6, 14-17, 21-25, 30-42, 44-47, and 51). None of these "issues" has been decided by the Board. Please identify, with respect to each request to which BNSF has made this objection, the ruling by the Board that BNSF contends "decided" that issue.

In response to 22 of AECC's requests, BNSF stated that "BNSF will conduct a search" for responsive documents (see responses to RFP Nos. 2, 4-14, 18-20, 27-29, 43, 48-50). Notwithstanding the representation that BNSF "will" conduct a search, I hope that the search for these documents was well underway at the time BNSF filed its responses. Please advise me of the date(s) when BNSF anticipates producing documents responsive to these requests.

I look forward to hearing from you on the foregoing matters before the end of this week.

In addressing these particular issues, AECC is not waiving its objections to any other aspects of BNSF's responses to discovery that are inadequate.

MCLEOD, WATKINSON & MILLER

February 7, 2012

Page 2

If you would like to discuss these matters, please call me at my home/office,
(910) 235-5274.

Very truly yours,

A handwritten signature in black ink, consisting of a series of fluid, connected strokes that form the name Eric Von Salzen.

Eric Von Salzen

cc: Mr. Steve Sharp, AECC

EXHIBIT D

STEPTOE & JOHNSON ^{LLP}
ATTORNEYS AT LAW

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February 10, 2012

VIA E-MAIL

Eric Von Salzen
McLeod, Watkinson & Miller
One Massachusetts Avenue, NW
Suite 800
Washington, DC 20001-1401

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

Dear Eric:

This letter responds to your February 7, 2012 letter regarding BNSF's Responses and Objections to Arkansas Electric Cooperative Corporations' First Requests for Production of Documents (served February 6, 2012).

First, you note that BNSF has objected to providing discovery in response to several AECC discovery requests on grounds that the issues addressed in those requests are not the subject of the current proceeding. You asked us to identify the Board ruling that addressed the issues raised by the discovery requests to which BNSF has objected. As you know, the Board resolved several disputed issues relating to coal dust in its decision last year in *Arkansas Electric Cooperative Corporation—Petition for Declaratory Order*, STB Finance Docket No. 35305 (STB served Mar. 3, 2011) ("*Coal Dust I*"). When the Board initiated the present proceeding, the Board made it clear that issues that have "already been decided" in *Coal Dust I* are not within the scope of this proceeding. *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, STB Finance Docket No. 35557, at 3 (STB served Nov. 22, 2011). The Board's November 22, 2011 decision also made it clear that this proceeding would be limited to the "reasonableness of the safe harbor provision in the new tariff." *Id.* at 4.

The AECC discovery requests you list in the first paragraph of your February 7, 2012 letter go well beyond the "reasonableness of the safe harbor provision in the new tariff." In one way or another, they address an issue that the Board already resolved in BNSF's favor, namely that BNSF is entitled to establish rules requiring shippers to take reasonable measures to keep coal in the rail cars.

Mr. Eric Von Salzen
February 10, 2012
Page 2

STEPTOE & JOHNSON LLP

In response to the question in the second paragraph of your letter, BNSF has produced documents to you with bates numbers BNSF_COAL DUST II_00000001 through BNSF_COAL DUST II_00142636. As indicated in my letter dated February 7, 2012, there are a few materials, most notably video files and pictures, that will have to be produced on an external hard drive. To receive a copy of these video files and pictures, please send us a 2 TB external hard drive. Finally, BNSF will be producing some additional responsive, non-privileged documents.

Please let us know if you have any questions.

Regards,


Kathryn J. Gainey