

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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November 15, 2012  
Part of  
Public Record

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**STB Finance Docket No. 35557**

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

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**REPLY EVIDENCE OF  
UNION ELECTRIC COMPANY D/B/A AMEREN MISSOURI**

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Union Electric Company d/b/a Ameren Missouri (“Ameren Missouri”), pursuant to the procedural schedule established by the Surface Transportation Board (“Board”) in its decision served July 31, 2012, hereby submits its Reply Evidence in the above-captioned proceeding.

As part of its Opening Evidence in this proceeding, Ameren Missouri showed that BNSF Price List 6041-B (Item 100) (the “Tariff”) constitutes an unreasonable practice in violation of 49 USC § 10702 due to the “no adverse impact” clause included therein. See Ameren Missouri Opening Evidence (filed Oct. 1, 2012) (“Ameren Opening”). This clause states that:

Any product including topper agents, devices or appurtenances utilized by the Shipper or Shipper’s mine agents to control the release of coal dust shall not adversely impact railroad employees, property, locomotives or owned cars.

See § 4 of the Tariff. Ameren Missouri explained that the “no adverse impact” clause effectively requires shippers to indemnify BNSF Railway Company (“BNSF”) for all damages or injuries arising from compliance with the emission standard of the Tariff, even when caused by BNSF, third parties, or an act of God. See Ameren Opening at 4. Ameren Missouri showed the fundamentally inequitable nature of the Tariff in that it is BNSF that has selected the approved topper agents and it is BNSF that would approve any alternate compliance method, yet the Tariff

requires the shipper to be responsible for negative consequences flowing therefrom. See Ameren Opening at 3-4. The open-ended indemnification required by the Tariff is the exact antithesis of a safe harbor, which is supposed to provide certainty. See Ameren Opening at 6. Finally, Ameren Missouri explained that governing law and public policy prohibit a common carrier such as BNSF from requiring indemnification. Id. at 7-11. All other shipper parties that filed Opening Evidence similarly expressed concerns about the “no adverse impact” provision in the Tariff.<sup>1</sup>

In its Opening Evidence, BNSF has acknowledged the over-inclusive nature of the “no adverse impact” clause by stating that it was not the “intent” to hold shippers responsible for “proper use of topper agents....BNSF’s intent was to hold shippers responsible for negligent or improper use of the toppers.” See BNSF Opening Evidence at 27 (filed Oct. 1, 2012) (“BNSF Opening”). BNSF’s acknowledgement demonstrates that the safe harbor is patently erroneous and, therefore, unreasonable. BNSF asserts that the “intent” was not to capture “proper” use of topper agents, but the plain language of the Tariff encompasses all possible adverse impacts, whether caused by proper use, improper use, third parties, acts of God, or BNSF itself. By BNSF’s own admission, the safe harbor is over-inclusive and, consequently, fails the reasonableness standard of 49 USC § 10702.

Even with BNSF’s admission, however, the safe harbor is still problematic. BNSF has asserted that “[i]t is not unreasonable for shippers to take responsibility for the consequences of their loading practices.” See BNSF Opening at 26. This sentiment cannot stand as rational for the open-ended indemnification. BNSF conveniently does not acknowledge that the “loading

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<sup>1</sup> See Opening Evidence of Coal Shippers at p. 38; Opening Evidence of Arkansas Electric Cooperative Corporation at p. 3; and Opening Evidence of National Coal Transportation Association at p. 14-16.

practices” have been mandated, designed, and approved by BNSF; they cannot plausibly be called the shippers’ loading practices. BNSF also explained that shippers should be responsible for “any adverse consequences” because the shippers and their mine agents “control the loading process.” Id. BNSF’s explanation does not justify the “no adverse impact” clause under the principles and governing law cited in Ameren Missouri’s Opening Evidence. It is BNSF that devised the Tariff and selected the topper agents included in the Tariff, and it is BNSF that would approve any alternate compliance method. Furthermore, BNSF has ignored the fact that the trains are in the exclusive control of BNSF for nearly the entire time during which “adverse impact” could occur. BNSF has also not addressed why the tariff should be allowed to remain as drafted which would unreasonably include possibilities such as acts of God, acts of third parties, and BNSF’s own actions; BNSF’s “intent” regarding such possibilities is not clear from either the Tariff or the BNSF Opening, and the Board could find the safe harbor unreasonable simply on the basis of this ambiguity.

In the end, the only reasonable, equitable, and lawful approach that can be taken is for the last sentence of Section 4 of the Tariff to be found unreasonable. Such a provision is entirely superfluous because normal tort law principles already hold shippers responsible for their own negligence. In other words, the last sentence is entirely unnecessary because the only lawful and equitable possibility, a shipper’s responsibility for its own negligence, already exists. To the extent that BNSF is seeking to make shippers responsible for anything else – events that occur while BNSF is in control of a train, acts of third parties, acts of God, normal wear and tear, acts of BNSF itself, etc. – the safe harbor is an unreasonable practice.

The liability and indemnification language in the Tariff is all the more questionable given BNSF’s position on the issue of sharing costs for the BNSF-imposed Tariff. BNSF asserts that

the Board should not get involved in the issue of cost-sharing because most BNSF transportation is provided pursuant to contract outside Board jurisdiction, and these “confidential transportation contracts...define the parties’ respective obligations.” See BNSF Opening at 25. The same could be said for the liability issue: the specific contract in place for the given transportation should govern any allocation of liability in addition to normal tort law rules. Despite wanting to rely on contracts for the cost-sharing issue, BNSF is pushing to include liability terms in the Tariff. BNSF should explain why it is treating the cost-sharing issue differently from the liability issue.

In the end, the Opening Evidence of BNSF does not change Ameren Missouri’s view; indeed, BNSF has effectively admitted that the “no adverse impact” clause of the safe harbor is unreasonably broad. The Board should find that the safe harbor is an unreasonable practice in violation of 49 USC § 10702.

Respectfully submitted,



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November 15, 2012

### CERTIFICATE OF SERVICE

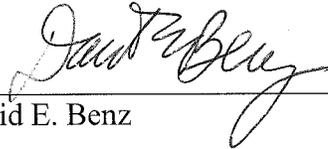
I hereby certify that this 15th day of November 2012, I served a copy of the foregoing upon all parties of record.

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