

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

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

233512

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

ENTERED
Office of Proceedings
December 17, 2012
Part of
Public Record

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 Rebuttal Evidence in the above-captioned proceeding.

This proceeding concerns whether the safe harbor provision in BNSF Price List 6041-B (Item 100) (the “Tariff”) is a reasonable practice under 49 USC § 10702. See Board decision, slip op. at 4 (served Nov. 22, 2011). Ameren Missouri has previously filed both Opening Evidence (filed Oct. 1, 2012) and Reply Evidence (filed Nov. 15, 2012) in this proceeding. In those prior filings, Ameren Missouri focused primarily on the “no adverse impact” sentence in the Tariff. 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. In both its Opening and Reply Evidence, Ameren Missouri showed that the Tariff is an unreasonable practice because 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 such damages or injuries

are caused by BNSF, third parties, or an act of God. See Ameren Opening at 4; Ameren Reply at 2-3. Ameren Missouri also explained that (1) the Tariff is fundamentally inequitable because BNSF mandated, devised and/or approved the compliance methods, yet the Tariff requires shippers to be responsible for any and all resulting negative consequences, whatever the cause; (2) the open-ended indemnification of the Tariff is the exact antithesis of a safe harbor, which should provide certainty; and (3) governing law and public policy prohibit a common carrier from requiring indemnification. See, e.g. Ameren Opening at 3-11.

In its evidentiary filings to date, BNSF has only confirmed the fact that the Tariff is an unreasonable practice. In both its Opening Evidence and its Reply Evidence, BNSF admitted that the “no adverse impact” language of the Tariff does not match BNSF’s “intent” in drafting the Tariff. See, e.g., BNSF Opening at 27; BNSF Reply at 28. In its Opening, BNSF claimed that its intent with the Tariff was “not to hold shippers responsible for injury or damages associated with the proper use of topper agents.” See BNSF Opening at 27. However, the plain language of the Tariff does not match BNSF’s claimed “intent.” The plain language of the “no adverse impact” sentence clearly covers every conceivable cause, including BNSF itself, third parties, acts of God, or otherwise. The Tariff is an unreasonable practice for the simple reason that it does not accurately reflect BNSF’s intent.

In its Reply Evidence, BNSF has re-confirmed the erroneous and unreasonable nature of the Tariff. BNSF again states that Ameren Missouri and others “misunderstand” the Tariff. BNSF Reply at 28. BNSF has also reiterated its “intent” with regard to the “no adverse impact” language. BNSF stated that its intent is to (1) hold shippers liable for “negligent or improper use of the safe harbor toppers”; and (2) make clear that if a shipper proposes other dust mitigation methods, the “shipper will first need to show that those alternative approaches will not pose a

hazard to BNSF's personnel or property." See BNSF Reply at 28. This formulation of the BNSF intent again confirms that the plain language of the Tariff is unreasonable and, in fact, BNSF raises more questions than it answers. For example, BNSF has not explained:

- Why is the "no adverse impact" liability provision even necessary? If it is intended to only capture shipper negligence, then normal tort law already does exactly that.
- Alternatively, why doesn't BNSF simply revise the liability language to match its claimed "intent"? BNSF claims that it only intended to cover shipper negligence, but BNSF's "intent" differs dramatically from the plain language of the Tariff.
- Does BNSF expect shippers to be responsible if they use alternative approaches in a non-negligent manner? BNSF's Reply (just like the Tariff) is silent and/or ambiguous regarding intent as to "regular" use of alternative approaches.

Moreover, Ameren Missouri restates the additional points and arguments from its Opening and Reply Evidence filings, to which BNSF has not yet adequately responded.

In a final effort to salvage the "no adverse impact" provision of the Tariff, BNSF cites to an Interstate Commerce Commission ("ICC") decision from 1920 to purportedly show that a railroad can use a tariff to establish liability provisions holding a shipper responsible for its own negligence. See BNSF Reply at 28. The case cited by BNSF is of dubious relevance. It concerned transportation of perishable commodities, and the ICC wanted to include a warning to shippers that the railroads could not guarantee the condition of the commodities despite the traditional cargo loss and damage rules. Perishable Freight Investigation, 56 ICC 449, 483 (1920). Therefore, the ICC ordered the following language to be included in the perishable cargo tariff:

[C]arriers are not liable for any loss or damage that may occur because of acts of the shipper, or because his directions were incomplete, inadequate, or ill-conceived.

56 ICC at 483. The decision involved a pre-deregulation, industry-wide tariff adoption ordered by the ICC in an area of law, cargo loss and damage, with a unique and significant common law background. The decision does not state that railroads have a general right to include negligence, liability, or indemnification language in their tariffs. As such, it does not stand for the broad principle attributed to it by BNSF.

BNSF has admitted that there is a fundamental disconnect between BNSF's intent in creating the Tariff and the "no adverse impact" language of the Tariff's safe harbor. Moreover, the safe harbor is inequitable and contrary to public policy considerations. The Board should find the safe harbor to be an unreasonable practice in violation of 49 USC § 10702.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that this 17th day of December 2012, I served a copy of the foregoing upon all parties of record.

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