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October 21, 2009

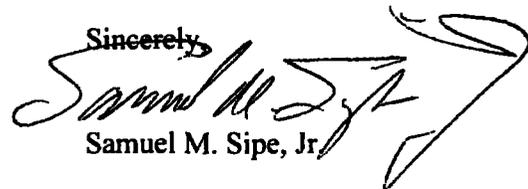
Ms. Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

Re: STB Finance Docket No. 35305

Dear Ms. Quinlan,

Enclosed for filing on behalf of BNSF Railway Company in the above-captioned matter are the following: (1) BNSF's Reply in Opposition to Arkansas Electric Cooperative Corporation's Petition for a Stay; and (2) BNSF's Reply to Arkansas Electric Cooperative Corporation's Petition for a Declaratory Order.

Sincerely,



Samuel M. Sipe, Jr.

Enclosures

cc: Counsel of record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35305

**BNSF RAILWAY COMPANY'S REPLY IN OPPOSITION TO
ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S
PETITION FOR A STAY**

BNSF Railway Company ("BNSF") hereby replies in opposition to the October 2, 2009 Petition of Arkansas Electric Cooperative Corporation ("AECC") for a Stay ("Stay Petition").

I. INTRODUCTION

In its Stay Petition, AECC requests that the Board issue an order enjoining BNSF from enforcing Items 100 and 101 of BNSF's Coal Rule publication denominated as Price List 6041-B ("Rule Publication 6041-B"). AECC's Stay Petition is a companion piece to its simultaneously filed Petition for Declaratory Order, in which AECC asks the Board to declare that Items 100 and 101 of BNSF's Rule Publication 6041-B constitute an unreasonable rule or practice. Items 100 and 101 of Rule Publication 6041-B set out coal dust emissions standards for coal cars that move over the Powder River Basin Joint Line and on BNSF's Black Hills Subdivision. The standards were issued by BNSF after extensive study and are designed to ensure the safety and efficiency of coal train operations and the reliability of service. In a separate pleading being filed simultaneously with this one, BNSF replies to AECC's Petition for Declaratory Order and explains why it would be appropriate for the Board to proceed with a properly framed declaratory order proceeding regarding BNSF's coal dust emissions standards. However, while the issue of coal dust mitigation is an important one that warrants the Board's attention, AECC's request for injunctive relief is entirely inappropriate and its Stay Petition should be denied.

As explained in more detail below, AECC has no legal basis for seeking an injunction against BNSF. AECC seeks to enjoin BNSF from allegedly violating BNSF's common carrier obligation, but BNSF does not provide common carrier service or any other service to AECC and BNSF has no common carrier obligations with regard to AECC. AECC is a part owner of facilities that obtain coal from the Powder River Basin ("PRB"), and BNSF believes that coal is shipped to those facilities under a transportation contract involving Union Pacific Railroad Company ("UP"). AECC has no basis for seeking an injunction against BNSF as it relates to such non-jurisdictional transportation.

Even if AECC had legal grounds to seek an injunction, AECC has not shown and cannot show imminent and irreparable harm, a requirement for obtaining injunctive relief from the Board. AECC claims that it would be harmed by BNSF's alleged refusal to transport cars that fail to satisfy the requirements of BNSF's coal dust emissions standards. But that alleged harm to AECC is entirely speculative. BNSF has not announced plans for enforcing compliance with its coal dust emissions standards. Moreover, BNSF at this time is suspending the effective date of Items 100 and 101 of Rule Publication 6041-B until August 1, 2010, in the hope and expectation that BNSF can achieve substantial shipper compliance with its coal dust standards by then and that the Board will have a chance by that date to affirm the reasonableness of BNSF's standards in a properly framed declaratory order proceeding. *See* Exhibits A and B. As no harm of any kind is imminent, the Board must deny AECC's Stay Petition.

II. BACKGROUND

A. BNSF's PRB Coal Lines

Items 100 and 101 of BNSF's Rule Publication 6041-B involve rail operations over the Powder River Basin Joint Line and over BNSF's Black Hills Subdivision in Wyoming. The

Joint Line is a rail line that is jointly owned and operated by BNSF and UP that extends south from Caballo Junction in Campbell County, Wyoming, over 100 miles to connections with BNSF's and UP's independently owned east-west lines. Several jointly served coal mines are located along the Joint Line. BNSF's Black Hills Subdivision refers to BNSF's independently owned rail lines that extend from Campbell County, Wyoming, at the north end of the Joint Line east through Edgemont and Alliance, Nebraska. BNSF's Black Hills Subdivision handles coal trains that originate at several mines that are not located on the Joint Line, as well as mines on the Joint Line.

The Joint Line, the Black Hills Subdivision and the other rail lines leading out of the PRB are among the most densely traveled rail lines in the United States. Extremely high traffic levels over the Joint Line create formidable operational challenges. BNSF places a premium on efficient operations to avoid congestion and resultant disruption in coal supply to electric utilities that burn PRB coal. Under the agreement between BNSF and UP governing operations on the Joint Line, BNSF is entrusted with maintaining safe and efficient operations. The Joint Line Agreement was approved by the Interstate Commerce Commission ("ICC") in connection with its approval of the construction and operation of the Joint Line. *See Chicago & N W. Transp. Co. Approval of Terms of Construction, Ownership & Operation of a Line of R.R. in Campbell & Converse Counties, Wyo.*, ICC Finance Docket No. 29066 (served Oct. 22, 1982).

B. Problems Resulting From Coal Dust Emissions

Coal is carried in open top cars that are typically loaded to capacity, which creates the risk of coal dust dispersion resulting from train movement and wind. Given the extremely high volume of coal traffic on BNSF's coal lines in the PRB, coal dust can accumulate rapidly along the railroad right of way and ballast can become contaminated by the accumulating coal dust.

The contamination can have a particularly pronounced impact on the integrity of the track structure under conditions of heavy rainfall. *See* Exhibit C at pages 1-2, 15, *Coal Dust Mitigation Update*, presented by BNSF at the September 10, 2009 STB RETAC meeting.

In May 2005, there were two significant derailments on the Joint Line within a short period of time, resulting in considerable disruption in service and congestion. BNSF determined that the derailments resulted from weakened track structure caused primarily by a combination of coal dust and heavy flooding. The effects of the derailments and the repairs to the roadbed necessitated by the coal dust accumulation were widespread. *See, e.g.*, "A Mountain of Coal Waits for a Ride," USA Today, August 25, 2005. The Board subsequently acknowledged the importance of maintaining reliable coal transportation service when it established RETAC. *See Establishment of a Rail Energy Transportation Advisory Committee*, STB Ex Parte No. 670, slip op. at 2 (served July 17, 2007) ("The Board views the reliability of the nation's energy supply as crucial to this nation's economic and national security, and the transportation by rail of coal and other energy resources as a vital link in the energy supply chain.") The reliability of coal transportation service was also the subject of a proceeding initiated by the Federal Energy Regulatory Commission. *See* Federal Energy Regulatory Commission, Discussions with Utility and Railroad Representatives on Market & Reliability Matters, FERC Docket No. AD-6-8-000 (June 30, 2006) ("[FERC] met with utility and railroad representatives to discuss railroad coal-delivery matters and their impact on markets and electric reliability.").

BNSF set out to rectify and prevent the recurrence of the problems that occurred in 2005. It did so in part through a program of roadbed rehabilitation and enhanced maintenance. BNSF also undertook to determine whether there are feasible methods available to limit the dispersion

of coal dust so as to minimize the possibility that the accumulation of coal dust on the roadbed could result in conditions that would lead to future derailments.

C. Measures For Limiting Coal Dust Dispersion

One means of limiting coal dust dispersion is proper loading (and avoiding overloading) of coal cars. BNSF carried out studies of alternative loading profiles for coal cars and determined that coal dust emissions could be reduced by changing the way coal was loaded into coal cars. See Exhibit C at page 11, showing how the erosion of coal dust can be reduced by loading coal cars with a rounded contour that eliminates sharp angles and irregular surfaces. BNSF established standards for coal load profiles that will result in significantly less coal dust flying off the top of loaded coal cars.

BNSF also undertook extensive efforts to monitor dust emissions from loaded coal cars and audited a large number of coal trains for coal dust emissions. BNSF established trackside monitors and developed procedures for measuring coal dust emissions using the trackside data. BNSF collected data from thousands of trains to assist in formulating effective coal dust emissions standards. BNSF has also explored various measures that can be taken to meet coal dust emissions standards, including the application of a surfactant or topping agent to the top of the coal pile in a loaded coal car to inhibit the dispersion of coal dust.

D. Coal Dust Mitigation Standards In BNSF's Rules Publication

Items 100 and 101 of BNSF's Rule Publication 6041-B set out coal dust mitigation requirements applicable to movements over the Joint Line and the Black Hills Subdivision respectively. Items 100 and 101 require that shippers moving coal over the Joint Line or Black Hills Subdivision "shall ensure that all cars loaded with coal . . . shall be provided in accordance with BNSF's published template entitled 'Redesigned Chute Diagram' located in Appendix A to

this publication.” *See also* Exhibit C at page 10, which contains a photograph of a redesigned chute meeting the specifications of the Rule. AECC has not challenged BNSF’s redesigned chute requirement.

Items 100 and 101 further require that “[e]ffective November 1, 2009, shipper shall take all steps necessary to ensure that Trains handling cars loaded with Coal from any mine origin . . . shall not emit more than an Integrated Dust Value (IDV.2) of [a specified measure] in order to enhance retention of coal in rail cars.” For trains operating on the Joint Line, the emission standard is an IDV.2 of 300 units; for trains operating on BNSF’s Black Hills Subdivision, the standard is an IDV.2 of 245 units. Items 100 and 101 do not specify the measures that must be taken by coal shippers to meet the coal dust standards, but rather leave to the shippers and their coal suppliers the discretion to adopt appropriate measures. Nor does Rule Publication 6041-B contain provisions to enforce compliance with the standards, or prescribe penalties for failure to comply with the standards.

BNSF has taken steps to notify its coal shippers that it is suspending at this time the effective date of Items 100 and 101 of Rule Publication 6041-B from November 1, 2009 until August 1, 2010. *See* Exhibits A and B. BNSF is continuing to work with its coal shippers to implement coal dust mitigation measures and BNSF hopes and expects to achieve widespread compliance with its coal dust emissions standards by August 1, 2010. In addition, a suspension of the effective date at this time would provide the Board an opportunity to conduct a declaratory order proceeding that would affirm the reasonableness of BNSF’s coal dust standards.

E. BNSF Does Not Provide Common Carrier or Contract Service to AECC

In its Petition for Stay and accompanying Petition for Declaratory Order, AECC describes itself as having an ownership interest in three electric generating facilities located in

Arkansas – White Bluff, Independence and Flint Creek. AECC does not present evidence that it is a shipper of PRB coal and it does not refer to any commercial arrangements that it is party to that govern the shipment of PRB coal.

In fact, BNSF has no commercial dealings with AECC. BNSF does not provide either common carrier service or contract service to AECC. BNSF has not received any request from AECC to provide common carrier service. Likewise, BNSF does not currently provide coal transportation service to the White Bluff, Independence or Flint Creek plants. To the best of BNSF's knowledge, coal transportation to those generating facilities is provided by UP under transportation contracts with shippers other than AECC.

III. ARGUMENT

A. AECC Has Neither Legal Nor Factual Grounds to Seek Injunctive Relief Against BNSF

AECC's Stay Petition asks the Board to enjoin BNSF from enforcing Items 100 and 101 of BNSF's Rule Publication 6041-B. AECC's requested relief is predicated on the assertion that "if a shipper fails to meet BNSF's coal dust emission standard, BNSF threatens to refuse to allow trains handling the shipper's cars to operate over these lines or otherwise penalize the shippers." AECC Stay Petition at 1. These alleged threats, however, are entirely speculative. While BNSF has reviewed potential compliance options with shippers to obtain their feedback, BNSF has not announced any plans for enforcing compliance with its coal dust emissions standards and, as noted above, has for now suspended the effective date of its emissions standards.

AECC builds upon these speculative threats to further assert that "BNSF's refusal to transport cars that fail to satisfy the arbitrary standards of the Tariff would violate BNSF's obligations as a common carrier and would cause irreparable injury to coal shippers like AECC that rely on the Joint Line or the Black Hills Subdivision for transportation of PRB coal to their

power-generating plants.” AECC’s Stay Petition at 2. AECC’s claim that it is entitled to injunctive relief because BNSF will violate its common carrier obligations by refusing to transport coal cars is both false and legally defective.

1. BNSF Owes No Legal Obligation to AECC that Could Give Rise to a Claim for Injunctive Relief

AECC’s request for an injunction is premised on its assertion that BNSF owes a common carrier obligation to AECC. But AECC has not established that it is a coal shipper that receives common carrier service from any carrier, let alone from BNSF. Indeed AECC claims only that it is a partial owner of three facilities that receive coal—White Bluff, Independence, and Flint Creek plants. AECC Stay Petition at 2. There is nothing in AECC’s petition that gives the Board any reason to believe that AECC has any involvement at all in the transportation of coal to those facilities.

The common carrier obligation as set forth in the statute is expressed as an obligation to provide service “on reasonable request.” 49 U.S.C. § 11101; *Union Pac. R.R. Co.—Petition for Declaratory Order*, STB Finance Docket No. 35219, slip op. at 3 (served June 11, 2009) (“Railroads must provide . . . common carrier rates to any person requesting them” and “they must provide rail service pursuant to those rates upon reasonable request.”). Absent a reasonable request for service, no common carrier obligation arises.

Here BNSF does not provide common carrier service to AECC, nor has it received any request from AECC to do so. In fact, BNSF has no commercial relationship with AECC of any sort. BNSF thus owes no legal obligation to AECC that could provide a basis for a claim for injunctive relief.

2. If the Transportation at Issue Is Made Pursuant to a Contract, the Board Would Not Have Jurisdiction to Enter the Requested Stay

As noted, AECC has never sought common carrier service from BNSF. Nor does BNSF provide any transportation service to the facilities in which AECC asserts that it has an ownership interest. To the best of BNSF's knowledge, transportation to AECC's facilities is carried out under contracts involving UP. As to the Independence plant, pleadings in a pending case before the Board indicate that transportation is provided under a contract between UP and Entergy Arkansas, Inc. *See* Motion to Dismiss of Missouri & N. Arkansas R.R. Co., *Entergy Arkansas, Inc. v. Union Pac. R.R. Co. & Missouri & N. Arkansas R.R. Co.*, at 4 (filed Aug. 17, 2009) ("There is a transportation contract between UP and Entergy covering the transportation of coal from the PRB to the Independence power plant."). If coal is transported under contract to the White Bluff and Flint Creek plants as it is with the Independence plant, the Board does not have jurisdiction over any of the transportation that is the subject of AECC's Stay Petition. *See* 49 U.S.C. § 10709(c)(1) ("transportation under such contract[] shall not be subject to this part").

AECC therefore has no legal basis for claiming that Items 100 and 101 of Rule Publication 6041-B constitute an unreasonable practice as those items relate to the transportation to the White Bluff, Independence, and Flint Creek facilities. The Board has made it clear that a party to a non-jurisdictional contract cannot challenge as an unreasonable practice the terms of a common carrier publication that applies to the non-jurisdictional contract service. *See H.B. Fuller Co. v. S. Pac. Transp. Co.*, 2 S.T.B. 550, 551 (1997) (dismissing complaint that challenged common carrier storage and demurrage terms that were incorporated into a contract because "it is undisputed that the involved transportation moved under contract"). If, in fact, transportation to AECC's facilities is provided under non-jurisdictional contracts, then the Board would not have jurisdiction to issue the injunction that AECC seeks.

3. The Alleged Refusal to Transport Cars is Entirely Speculative and Therefore May Not Form the Basis of a Common Carrier Violation

AECC contends that BNSF will violate a non-existent common carrier obligation at some unknown, future date when it refuses to transport cars that have not met BNSF's coal dust emissions standards. The supposed refusal to transport cars is unsubstantiated. It is based solely on AECC's speculation as to what BNSF might do in the future. Nothing in Items 100 and 101 of Rule Publication 6041-B provides any basis for this speculation. AECC's contention is even more speculative given that BNSF suspended the effective date of Items 100 and 101 until August 1, 2010, as explained above.

Even if BNSF had a common carrier obligation—and none has been shown here—there is no factual basis for AECC's claim that BNSF has violated or will violate that obligation in the absence of an injunction. Therefore, AECC has failed to present any factual evidence of a violation of the governing statute that would support an injunction.

B. AECC Has Not and Cannot Meet the Statutory Requirements For Obtaining Injunctive Relief

As AECC has failed to establish the existence of a common carrier obligation and therefore failed to state a claim for relief, it is unnecessary for the Board to apply its standards for awarding injunctive relief under 49 U.S.C. § 721(b)(4). However, a brief review of those standards in light of the facts presented here indicates that there would be no basis for ordering injunctive relief, even if BNSF owed a common carrier obligation to AECC.

Injunctive relief is an extraordinary remedy. As the party requesting a stay, AECC has the "obligation to justify the . . . exercise of such an extraordinary remedy. The parties seeking a stay carry the burden of persuasion on all of the elements required for such extraordinary relief." *Gen. Ry. Corp. d/b/a Iowa N.W. R.R.—Exemption for Acquisition of R.R. Line—In Osceola &*

Dickinson Counties, STB Finance Docket No. 34867, 2007 WL 2022134, at *1 (served July 13, 2007). This heavy burden on a party seeking injunctive relief is consistent with the Rail Transportation Policy to “minimize the need for Federal regulatory control over the rail transportation system.” 49 U.S.C. § 10101(2). It is also consistent with Congress’ decision to eliminate the agency’s suspension authority. By eliminating the authority to suspend a common carrier publication, Congress intended to give railroads greater freedom to make transportation decisions without interference by the agency unless or until the Board has found a violation of the statute. See *Seminole Elec. Coop., Inc. v. CSX Transp., Inc.*, STB Docket No. 42110, slip op. at 3 (served Dec. 22, 2008) (“*Seminole*”) (“[I]n the ICC Termination Act of 1995, Congress sought to facilitate railroads’ rate-making initiative by repealing the rate suspension procedures under which rate adjustments could be prohibited from taking effect without first being investigated, even without a showing of irreparable harm.”) (internal citation omitted). Given Congress’ intent to provide railroads with more freedom to make transportation decisions without regulatory interference, a party seeking an injunction must present a “strong case that an injunction is warranted.” *Seminole*, slip op. at 3. AECC cannot demonstrate the extraordinary circumstances that could justify an injunction.

1. AECC Has Not Demonstrated that it Will Suffer Irreparable Harm As the Statute Requires

Injunctive relief is available under 49 U.S.C. § 721(b)(4) only to “prevent irreparable harm.” Moreover, the harm to be prevented must be “actual and imminent.” *Tri—State Brick & Stone of New York, Inc. & Tri—State Transp., Inc.—Petition for Declaratory Order*, STB Finance Docket No. 34824, 2008 WL 367670, at *2 (served Feb. 12, 2008) (“A stay is an extraordinary remedy and should not be sought unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by a stay.”).

Speculative allegations of possible future harm cannot support an injunction: “Prior ICC and court precedent makes clear that the threat of harm warranting a stay must be both irreparable and imminent: ‘An administrative order is not ordinarily stayed without an appropriate showing of irreparable harm. A claim of speculative harm is not enough to support relief. The party seeking a stay is required to demonstrate that the injury claimed is imminent, ‘certain and great.’” *Sault Ste. Marie Bridge Co.—Acquisition & Operation Exemption--Lines of Union Pac. R.R. Co.*, STB Finance Docket No. 33290, 1997 WL 26998, at *5 (served Jan. 24, 1997) (quoting *Consolidated Rail Corp.—Abandonment—Between Corry & Meadville, in Erie & Crawford Counties, PA*, ICC Docket No. AB-167 (Sub-No. 1139), slip op. at 7 (ICC served Oct. 5, 1995) (internal citations omitted)). See also *Ariz. Pub. Serv. Co. & Pacificorp v. Burlington N. & Santa Fe Ry. Co.*, STB Docket No. 42077, slip op. at 5 (served Oct. 14, 2003); *DeBruce Grain, Inc. v. Union Pac. R.R. Co.*, STB Docket No. 42023, 1998 WL 205998, at *2 (served Apr. 21, 1998).

AECC has not shown and cannot show that it will suffer any harm at all in the absence of an injunction, let alone harm that is actual, imminent and irreparable. AECC perceives the possibility of harm in the form of a future refusal to transport cars that have not met BNSF’s coal dust emissions standards. But this perception is entirely speculative. While BNSF has reviewed potential compliance options with shippers to obtain feedback, BNSF has not announced any plans for enforcing compliance with its coal dust emission standards. In fact, BNSF does not currently transport coal cars for AECC or for any shipper of coal to the White Bluff, Independence, or Flint Creek plants. Thus, AECC has not even presented a scenario whereby this speculative refusal to transport coal cars could result in harm to those who do ship coal to these facilities.

AECC clearly cannot show that any harm is imminent in light of BNSF's suspension of the effective date of Items 100 and 101 until August 1, 2010. Between now and August 1, 2010, BNSF intends to continue to work with its customers to ensure compliance with its coal dust emissions standards and BNSF hopes and expects to achieve substantial compliance by that time. But it is not possible at this time to assess whether AECC would suffer any harm after the standards become effective or whether any harm would be irreparable.

2. The Remaining Elements of the Board's Test Weigh Against the Issuance of an Injunction

AECC acknowledges that in addition to showing irreparable harm, it must also show "substantial likelihood of success on the merits," show that the "issuance of the order will not substantially harm other parties," and show that "granting the relief is in the public interest." AECC Stay Petition at 2-3 (internal quotation marks omitted) (quoting *DeBruce Grain, Inc. v. Union Pac. R.R. Co.*, 2 S.T.B. 773, 775 n.3 (1997) (citing *Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977))). AECC cannot satisfy these additional requirements.

As to the likelihood of success on the merits, AECC's Petition for Declaratory Order, like its Stay Petition, presumes that BNSF owes a common carrier obligation to AECC. Since BNSF owes no common carrier obligation to AECC, as explained above, there is no reason to believe that AECC will succeed in obtaining its request for declaratory relief. As discussed in BNSF's reply to AECC's Declaratory Order Petition, BNSF will show in the declaratory order proceeding that it is entitled to establish rules governing the operation of coal trains over its lines. BNSF will establish that its rules are designed to inhibit the dispersion of coal dust in the interest of safe and efficient rail operations and reliability of service and that the specific coal

dust emissions standards set forth in Items 100 and 101 of Rule Publication 6041-B are not unreasonable.

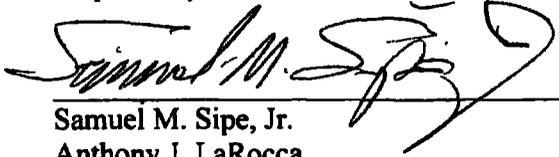
Nor can AECC demonstrate that the issuance of an injunction would not harm other parties or that it would be in the public interest. The interests of other parties, including BNSF, UP, and other coal shippers weigh strongly in favor of establishing coal dust emissions standards that minimize the accumulation of excessive coal dust on PRB rail lines. Similarly, the broader public interest is served by promoting safe and efficient PRB coal train operations. Less disruption of coal trains means a more secure supply of energy for coal fired electric utilities.

BNSF adopted its coal dust standards to prevent future incidents like those of May 2005 that could imperil the safe and efficient operation of PRB coal trains. Keeping BNSF's coal dust emissions standards in effect will promote that goal. Indeed, an injunction here would send precisely the wrong message to coal shippers, suggesting that there is no need to take seriously the problem of coal dust emissions. For several years BNSF has been grappling with a serious issue that affects the efficiency and safety of a critical segment of the rail transportation network. Issuance of an injunction would undermine this effort. *See DeBruce Grain, Inc. v. Union Pac. R.R. Co.*, 2 S.T.B. 773, 777 (1997) (denying motion for emergency order under 49 U.S.C. § 721(b)(4) and noting that "DeBruce's approach is not in the public interest, because it conflicts with the efforts of the Board and railroads to solve the serious rail service problems that exist in the western United States").

IV. CONCLUSION

For the reasons discussed above, the Board should deny AECC's Stay Petition.

Respectfully submitted,



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ATTORNEYS FOR
BNSF RAILWAY COMPANY

October 21, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2009, I have served a copy of the foregoing BNSF Railway Company's Reply in Opposition to Arkansas Electric Cooperative Corporation's Petition for a Stay on the following by Federal Express:

Eric Von Salzen
Alex Menendez
McLeod, Watkinson & Miller
One Massachusetts Avenue, N.W.
Suite 800
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(202) 842-2345

Attorneys for Arkansas Electric Cooperative Corporation

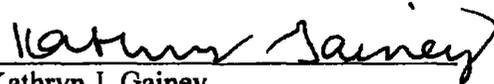

Kathryn J. Gainey

EXHIBIT A



Stevan B. Bobb
Group Vice President
Coal Marketing

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Fort Worth, Texas 76161-0051
tel 817 867-6242
fax 817 352-7940
Stevan.Bobb@bnsf.com

October 21, 2009

[Coal Shipper]

Dear [Coal Shipper]:

As you know, BNSF has put considerable time and resources toward identifying coal dust mitigation requirements that provide effective control with minimal burden, and we have continually engaged our customers and the mines that serve them in that effort. We have set reasonable and effective coal dust emission compliance standards for coal shippers as described in our operational rules and BNSF rule book. BNSF remains confident that it has established maximum dust emission standards that are reasonable and necessary to ensure the safety and efficiency of coal transportation. We have not specified particular mitigation measures that must be adopted by coal shippers to meet the BNSF coal dust emission standard, but have instead left to the shippers and their coal suppliers the discretion to identify and adopt appropriate mitigation measures.

BNSF has been presented with a number of customer requests to provide additional input regarding individual shipper compliance implementation programs. In addition, a consortium of vendors has proposed that BNSF allow them to design and facilitate a broad trial to assess the effectiveness of various mitigation methods. The suggested trial would align with requests made by a group of utilities who have requested that BNSF help facilitate their mitigation measurement study. To accelerate implementation of solutions to the coal dust problem, we are planning to take the steps identified below. We believe this will provide our customers with significant additional data to assist in identifying mitigation measures that will comply with BNSF's emission standards.

BNSF proposes a large-scale trial of mitigation measures in which all participants can obtain information on the effectiveness of various proposed mitigation measures. Based on prior feedback, we envision that the mitigation trial would include topper application, body feed application and, possibly, mechanical vibration.

While the details would need to be agreed to, we propose that application locations be set up at a subset of mine loadouts in order to provide economic density and minimize costs of the trial. Several mine sites appear to have fairly robust infrastructure for topper and body feed application and those properties may be the best places to perform applications. Those locations are Black Thunder, East Thunder, and North Antelope Rochelle. BNSF is, of course, open to discussions regarding the use of temporary infrastructure at other sites.

A major goal of the trial is to provide statistically significant measures on each result achieved using different mitigation approaches. To that end, BNSF would provide data support to the exercise, and would support providing integrated dust value (IDV.2) information on all measured trains to all trial participants. This may require some masking of train IDs to protect shipper confidentiality.

October 21, 2009
[Coal Shipper]

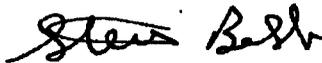
Page Two

As part of our effort to promote voluntary compliance with BNSF's coal dust emissions standard, BNSF will suspend the effective date of the standard until August 1, 2010. We hope and expect to achieve substantial compliance with the standard by that date, and we also expect that the Surface Transportation Board will by that date affirm the reasonableness of BNSF's emissions standard. We believe that the coal supply chain (utilities, mines, and BNSF) can and should use this interim period to increase its comfort with the various mitigation approaches that have been proposed.

Since your rate agreement with BNSF includes dust mitigation language, we would expect that you will pay for any chemical or application cost incurred during this trial period. As a trial participant, you will have access to all the data generated in the tests.

Please let me know as soon as possible of your interest in participating in the proposed trial as well as who at your company will be able to participate in planning this effort and be in a position to make commitments regarding trial participation. Thank you for your support in addressing this important issue and enabling PRB coal to remain a reliable, low-cost fuel source for electricity generation.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Bobb". The signature is written in a cursive style with a large initial "S" and "B".

Steve Bobb

EXHIBIT B



Stevan B. Bobb
Group Vice President
Coal Marketing

BNSF Railway Company

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Fort Worth, Texas 76161-0051

tel 817 867-6242
fax 817 352-7940

Stevan.Bobb@bnsf.com

October 21, 2009

[Coal Shipper]

Dear [Coal Shipper]:

As you know, BNSF has put considerable time and resources toward identifying coal dust mitigation requirements that provide effective control with minimal burden, and we have continually engaged our customers and the mines that serve them in that effort. We have set reasonable and effective coal dust emission compliance standards for coal shippers as described in our operational rules and BNSF rule book. BNSF remains confident that it has established maximum dust emission standards that are reasonable and necessary to ensure the safety and efficiency of coal transportation. We have not specified particular mitigation measures that must be adopted by coal shippers to meet the BNSF coal dust emission standard, but have instead left to the shippers and their coal suppliers the discretion to identify and adopt appropriate mitigation measures.

BNSF has been presented with a number of customer requests to provide additional input regarding individual shipper compliance implementation programs. In addition, a consortium of vendors has proposed that BNSF allow them to design and facilitate a broad trial to assess the effectiveness of various mitigation methods. The suggested trial would align with requests made by a group of utilities who have requested that BNSF help facilitate their mitigation measurement study. To accelerate implementation of solutions to the coal dust problem, we are planning to take the steps identified below. We believe this will provide our customers with significant additional data to assist in identifying mitigation measures that will comply with BNSF's emission standards.

BNSF proposes a large-scale trial of mitigation measures in which all participants can obtain information on the effectiveness of various proposed mitigation measures. Based on prior feedback, we envision that the mitigation trial would include topper application, body feed application and, possibly, mechanical vibration.

While the details would need to be agreed to, we propose that application locations be set up at a subset of mine loadouts in order to provide economic density and minimize costs of the trial. Several mine sites appear to have fairly robust infrastructure for topper and body feed application and those properties may be the best places to perform applications. Those locations are Black Thunder, East Thunder, and North Antelope Rochelle. BNSF is, of course, open to discussions regarding the use of temporary infrastructure at other sites.

A major goal of the trial is to provide statistically significant measures on each result achieved using different mitigation approaches. To that end, BNSF would provide data support to the exercise, and would support providing integrated dust value (IDV.2) information on all measured trains to all trial participants. This may require some masking of train IDs to protect shipper confidentiality.

October 21, 2009
[Coal Shipper]

Page Two

As part of our effort to promote voluntary compliance with BNSF's coal dust emissions standard, BNSF will suspend the effective date of the standard until August 1, 2010. We hope and expect to achieve substantial compliance with the standard by that date, and we also expect that the Surface Transportation Board will by that date affirm the reasonableness of BNSF's emissions standard. We believe that the coal supply chain (utilities, mines, and BNSF) can and should use this interim period to increase its comfort with the various mitigation approaches that have been proposed.

Since your rate agreement with BNSF does not currently include explicit dust mitigation language, in exchange for your participation in the trial, BNSF would be willing to rebate to you the reasonable chemical or application cost incurred during the trial period. In addition, as a trial participant you will have access to all the data generated in the tests.

Please let me know as soon as possible of your interest in participating in the proposed trial as well as who at your company will be able to participate in planning this effort and be in a position to make commitments regarding trial participation. Thank you for your support in addressing this important issue and enabling PRB coal to remain a reliable, low-cost fuel source for electricity generation.

Sincerely,

A handwritten signature in black ink that reads "Steve Bobb". The signature is written in a cursive style with a large, stylized "S" and "B".

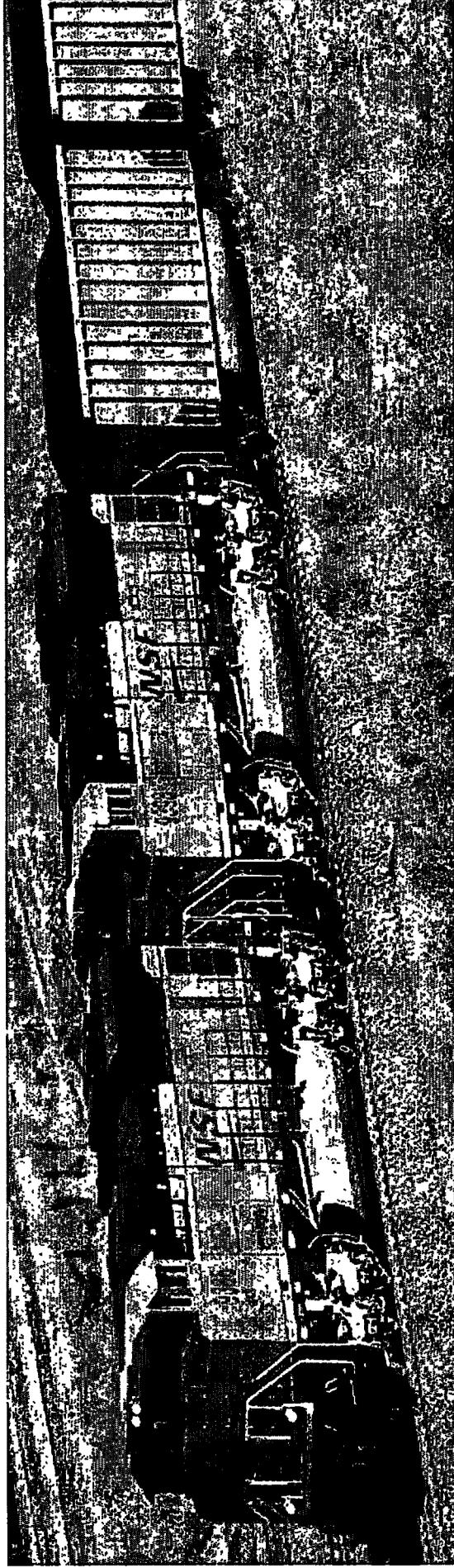
Steve Bobb

EXHIBIT C

Coal Dust Mitigation Update

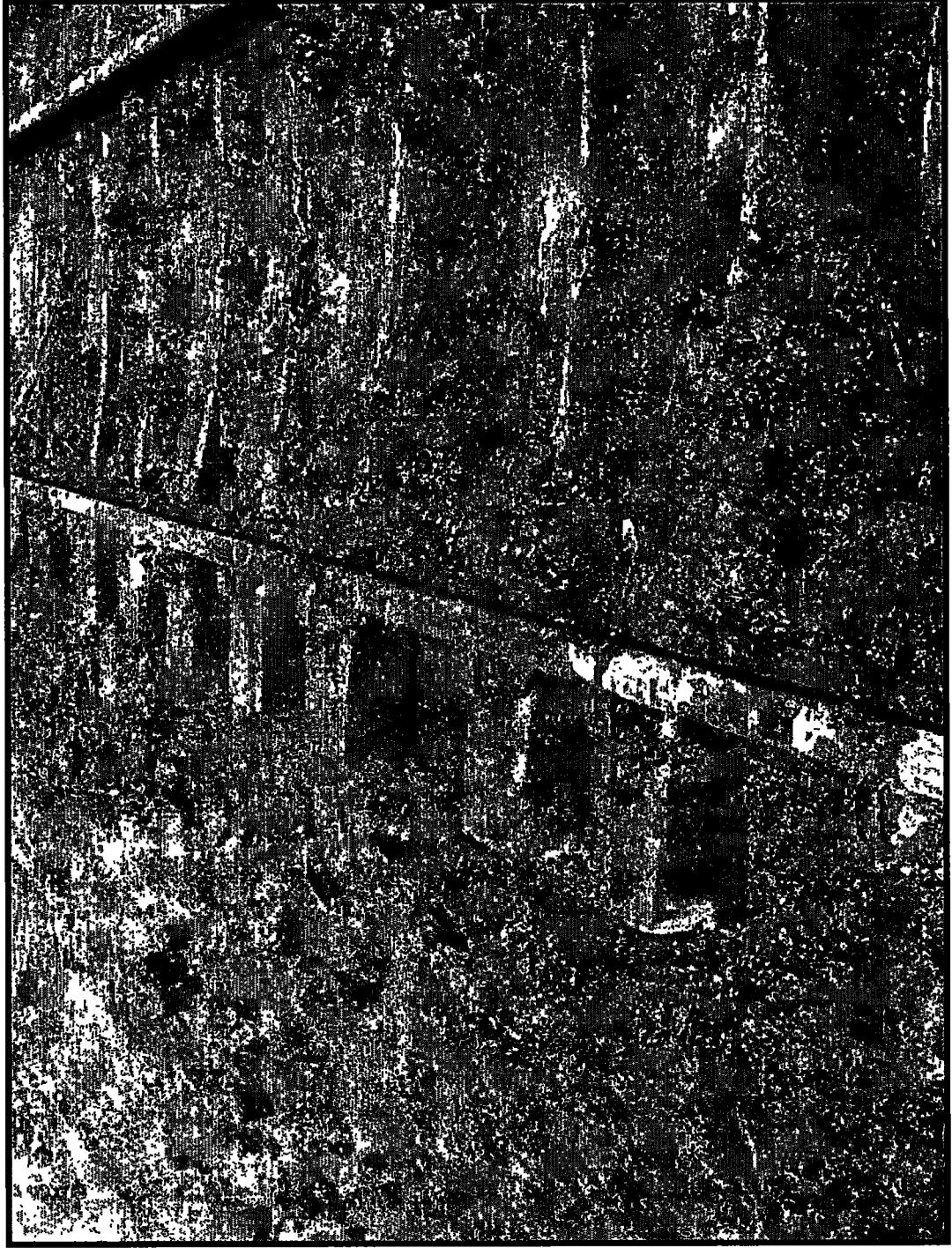
Surface Transportation Board – RETAC

September 10, 2009

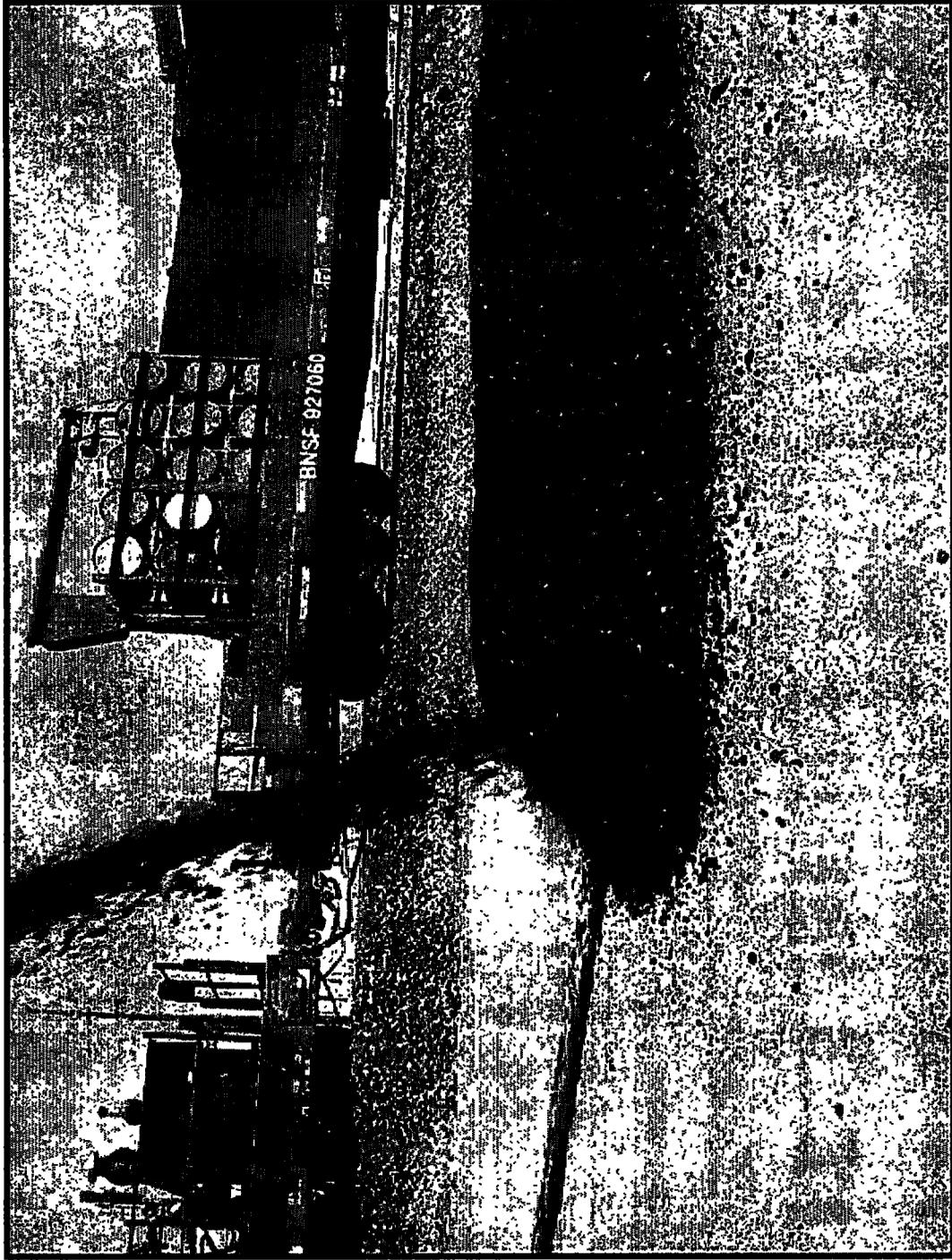


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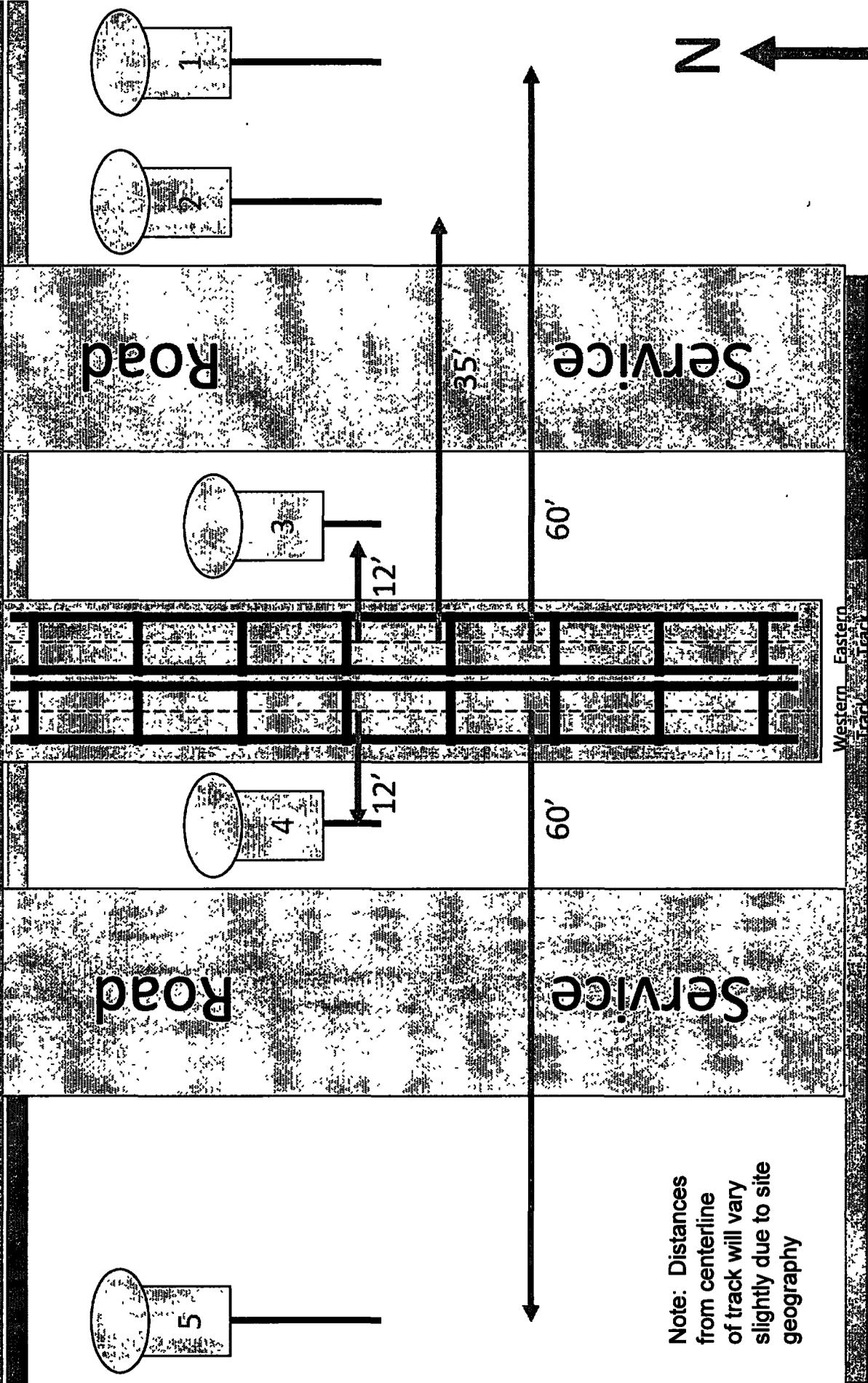
Rain Impact on Ballast Contaminated with Coal Dust



Undercutter Work – Normal Ballast is not Black



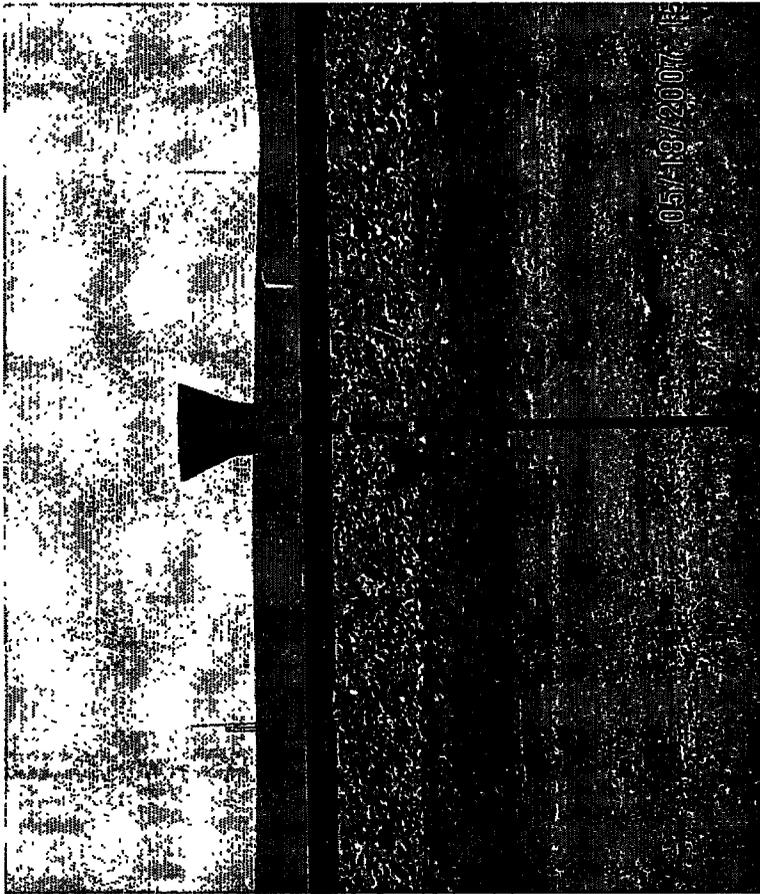
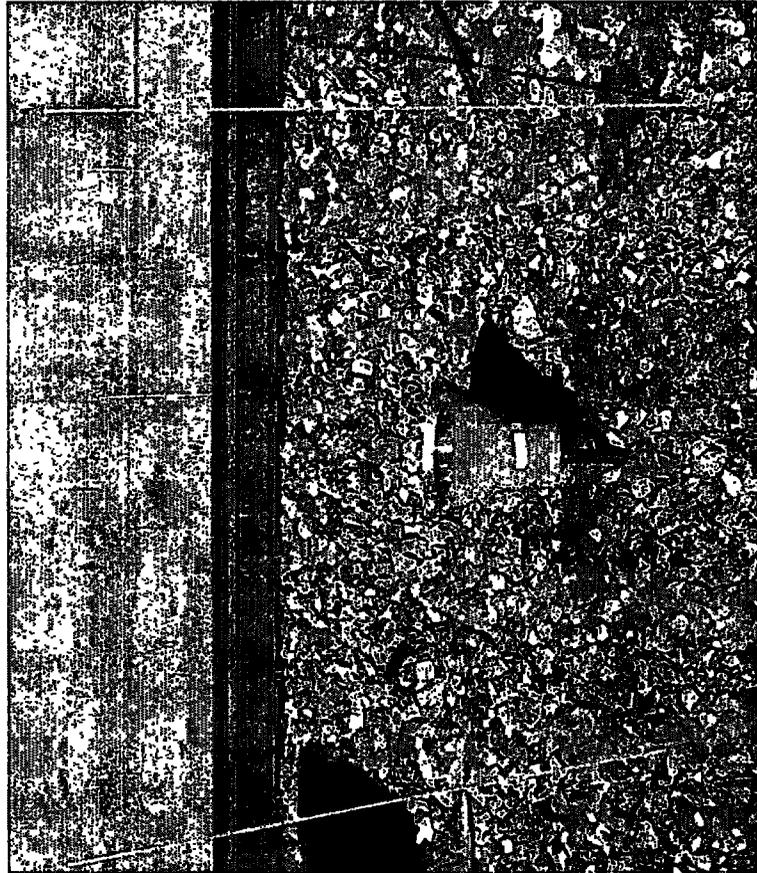
Schematic of Typical BNSF/UP Dustfall Collector Orin Subdivision Site



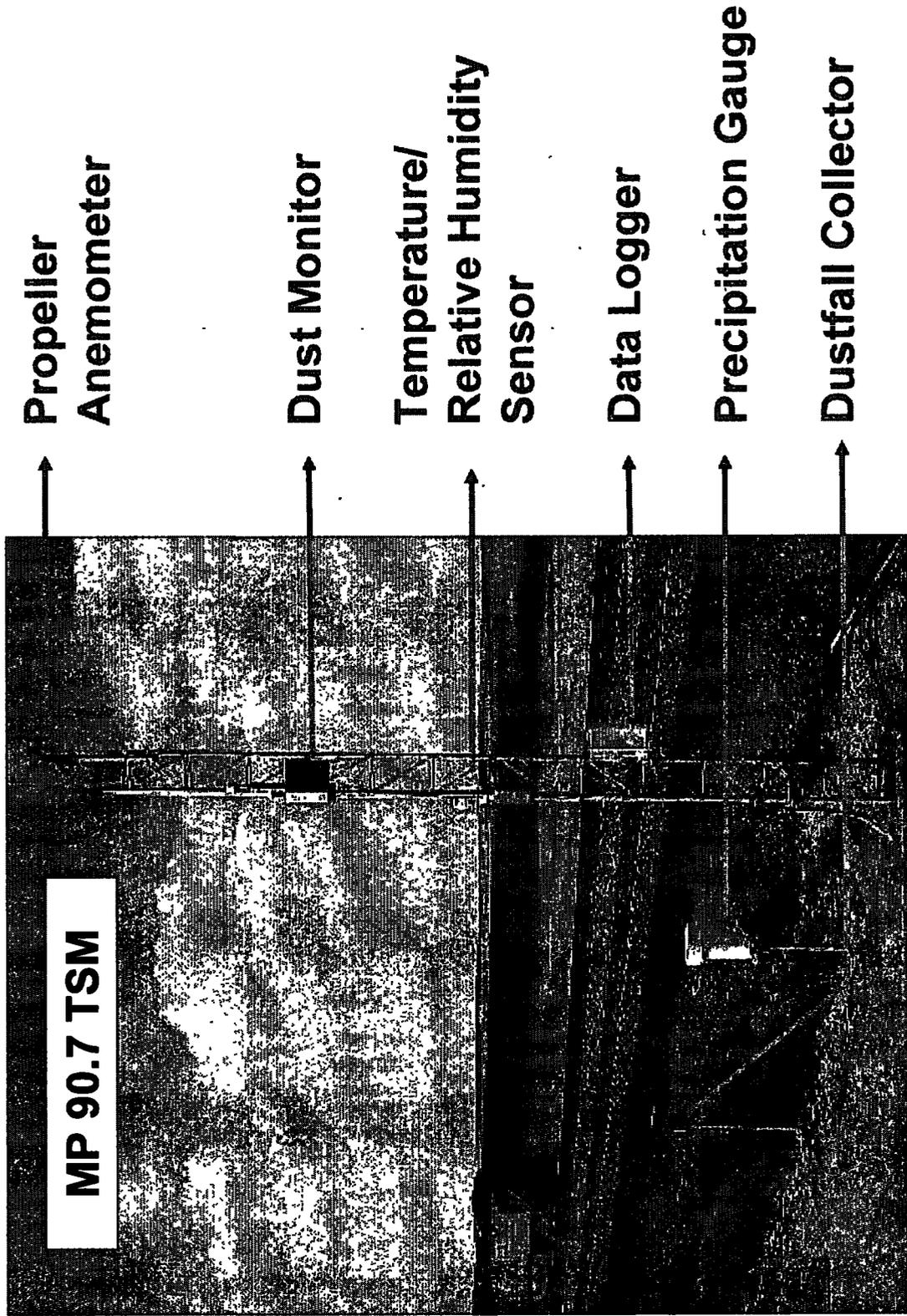
Note: Distances from centerline of track will vary slightly due to site geography

Dustfall Collectors

- Measure amount of dust deposited in the railroad right-of-way



Trackside Monitor (TSM)



Trackside Monitors

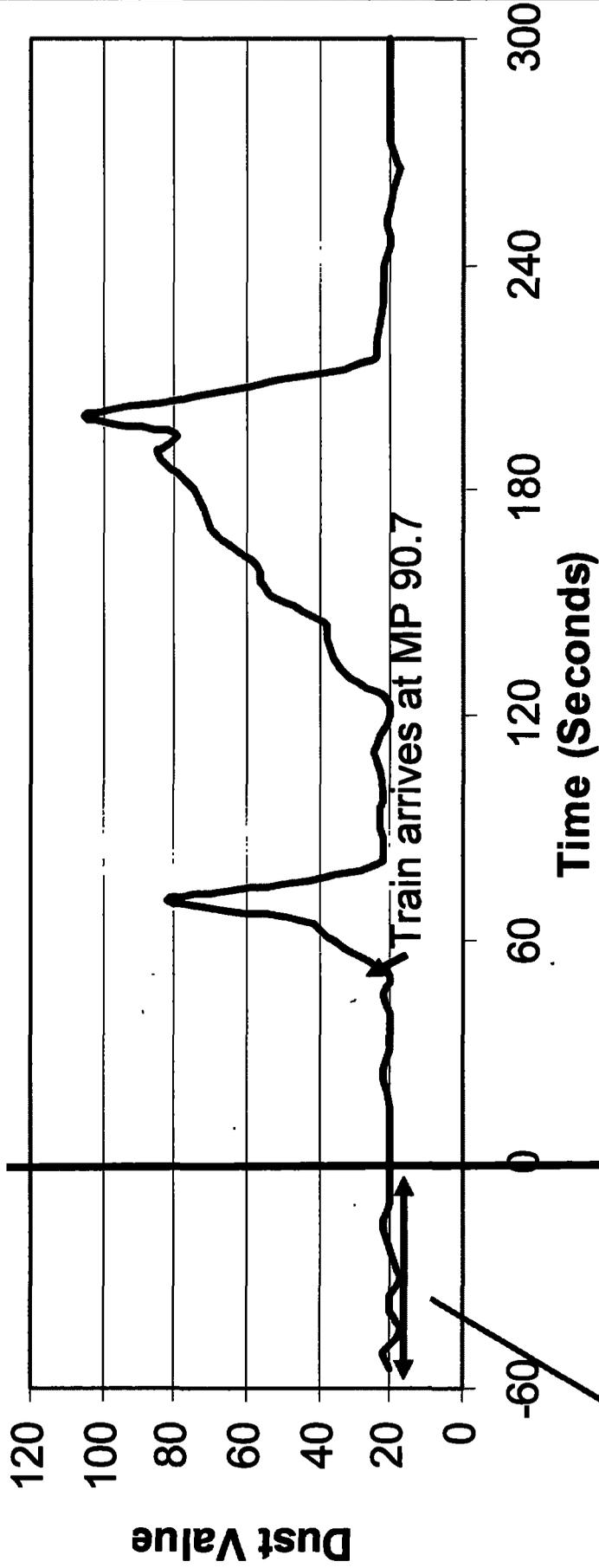
- Measures dust emission of each passing train
- Locations:
 - MP 90.7 on Orin Sub
 - Towers on East and West sides of tracks
 - Approximately 50% of trains useable
 - MP 558.2 on Black Hills Sub
 - Towers on North and South sides of tracks
 - Approximately 75% of trains useable
 - MP 693.4 on Big Horn Sub
 - Data collection only at this time

Post-Processing of Train Data

- **Train Removal Criteria for Compliance Analysis**
 - **Additional train (loaded or empty) passing TSM site within 6 minutes**
 - **High/Erratic background dust**
 - **Bin data into proper wind components**
 - **e.g., East dust monitor uses data with westerly wind component**
 - **e.g., West dust monitor uses data with easterly wind component**

Coal Dust Train Measurement

Dust Values for Passing Train at TrackSide Monitor



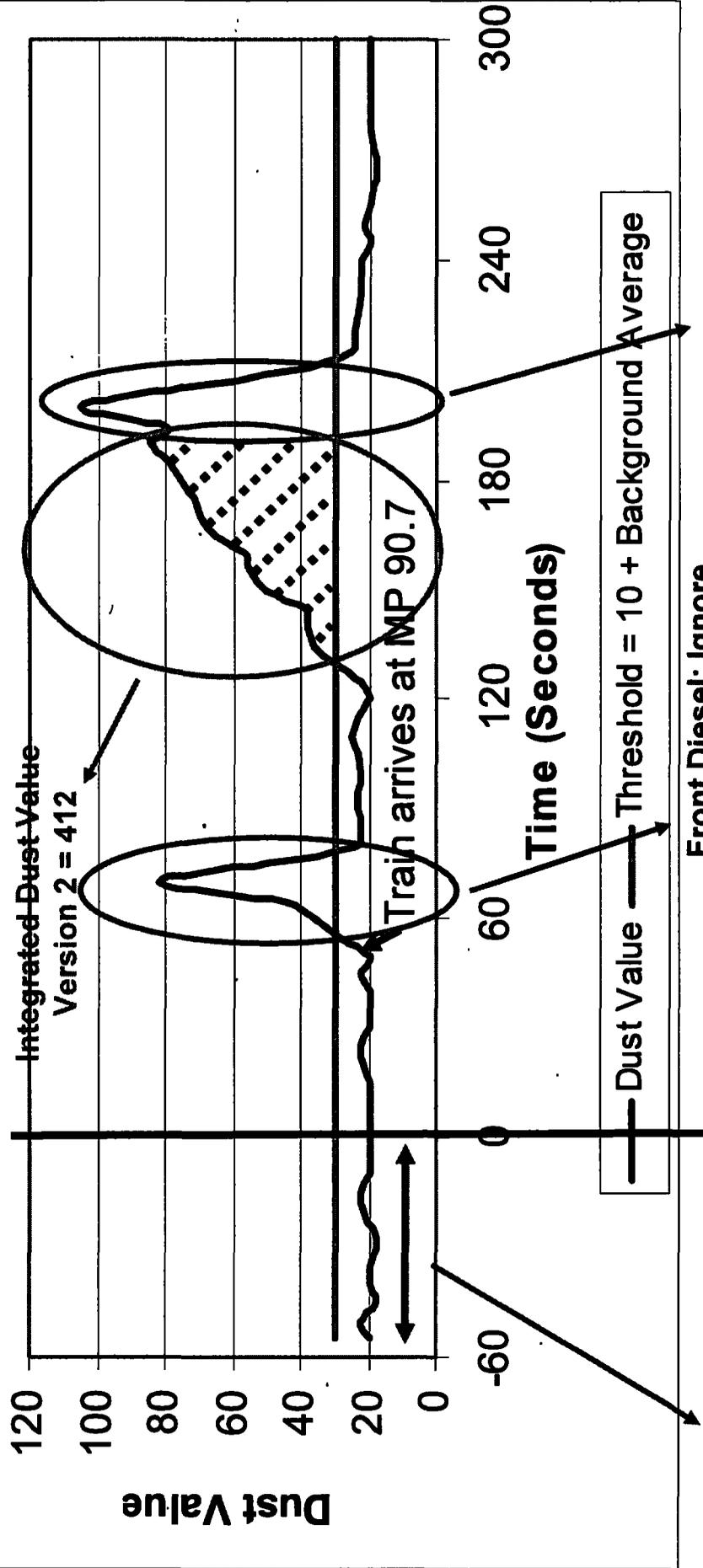
Environmental Background Dust

Train Passage at MP 90.5 According to BNSF Train Data

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Integrated Dust Value (IDV-2)

Dust Values for Passing Train at TrackSide Monitor



Environmental Background Dust

Train Passage at MP 90.5 According to BNSF Train Data

Front Diesel: Ignore first 30 seconds of values once dust signal exceeds threshold

Rear Diesel: Ignore last 15 seconds of dust signal once dust signal exceeds threshold

Improved Loading Profile

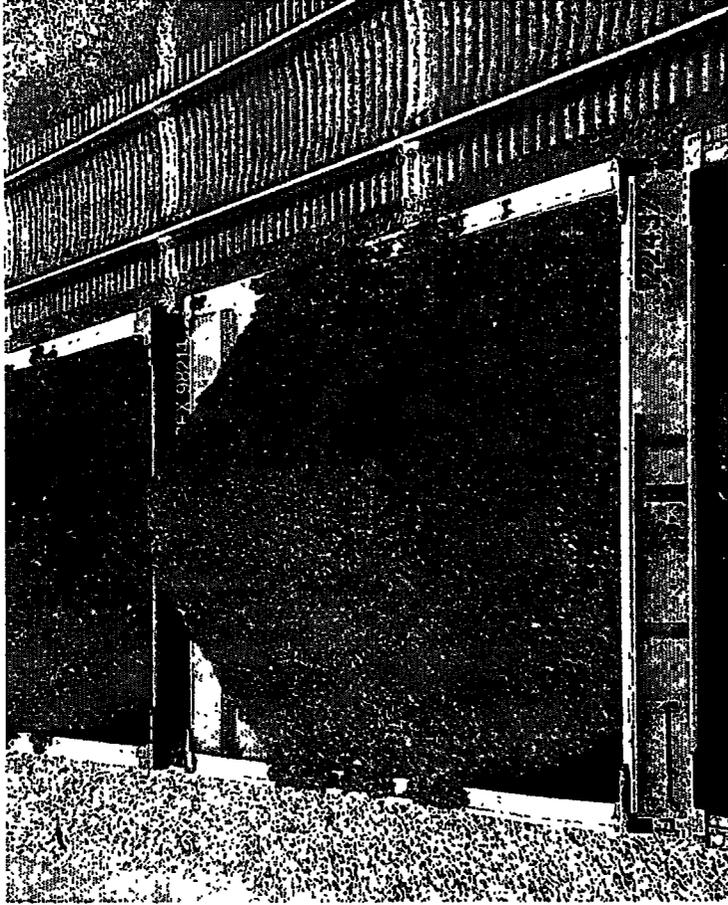


Redesigned Chute
Flared to 7 ft. wide
Same height as normal chute
Promotes bread loaf shape
Limits height chute can be raised



Normal Chute
5 ft. wide
Promotes center peaked load
Allows loading heights 3' to 4'
above sill

Impact of Modified Chutes



BEFORE

Note Peaked Loads, Sharp Lines, Steep Angle of Repose and other irregular surfaces which are susceptible to erosion



AFTER

Note Rounded Contour, No Sharp Angles, Flatter Angle of Repose and few irregular surfaces which are susceptible to erosion

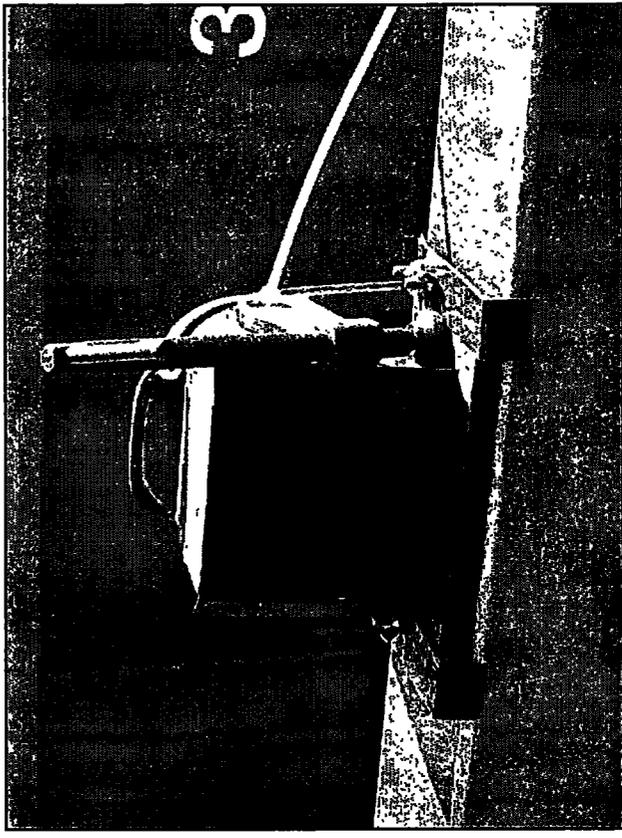
Field Profile Audits

- Monthly unannounced audits
- Trains found not in compliance, provide mines
 - Written report
 - Photograph
 - Video of train
- Audited 225 trains year to date

RTEPS and Passive Collectors



RTEPS typically applied on last car of train with Passive Collector to determine external forcings (Wind Speed/Direction, Precipitation, Ambient Temp/RH, Coal Surface Temp, and Airborne Dust)

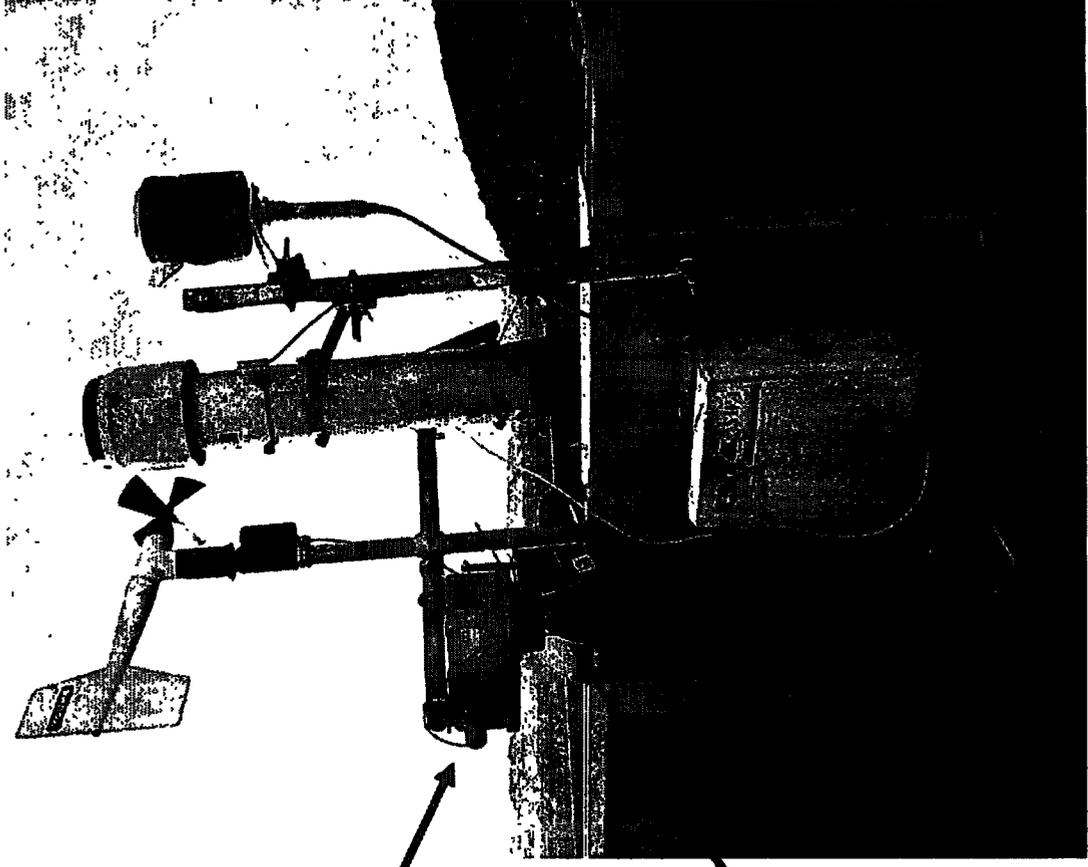


Passive Collectors applied in sets of 5 – 10 to test effectiveness of dust suppression method compared to control technique

Instrumentation

• Rail Transit Emission Profiling System (RTEPS)

- Airborne Dust Monitor
- Precipitation Gauge
- Ambient Temperature/Relative Humidity Sensor
- Propeller Anemometer
- Infrared Sensor for Coal Surface Temperature
- Global Positioning System
- Passive Dust Collector (PC)



Nacco Bridge - Undercut 2006



Coal has filtered down to the top of the bridge deck