

March 16, 2010

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Ms. Cynthia Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

ENTERED
Office of Proceedings
MAR 16 2010
Part of
Public Record

RE: STB Finance Docket No. 35305; *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order*

Dear Ms. Brown:

Please find attached for filing in the above referenced matter, Ameren Energy Fuels and Services Company's Opening Evidence - **PUBLIC VERSION**.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



Sandra L. Brown

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35305

**ARKANSAS ELECTRIC COOPERATIVE CORPORATION –
PETITION FOR DECLARATORY ORDER**

**OPENING EVIDENCE OF
AMEREN ENERGY FUELS AND SERVICES COMPANY**

James A. Sobule
Deputy General Counsel
Ameren Services Company
1901 Chouteau Avenue
St. Louis, MO 63103
314.554.2276
314.554.4014 (fax)

Sandra L. Brown
David E. Benz
Thompson Hine LLP
Suite 800
1920 N Street, N.W.
Washington, DC 20036
202.263.4101
202.331.8330 (fax)

*Attorneys for Ameren Energy Fuels and
Services Company*

March 16, 2010

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35305

**ARKANSAS ELECTRIC COOPERATIVE CORPORATION –
PETITION FOR DECLARATORY ORDER**

**OPENING EVIDENCE AND ARGUMENT OF
AMEREN ENERGY FUELS AND SERVICES COMPANY**

Ameren Energy Fuels and Services Company (“AFS”), pursuant to the decision (“Decision”) of the Surface Transportation Board (“Board” or “STB”) served on December 1, 2009 in the above-captioned docket, hereby files its Opening Evidence and Argument.

I. BACKGROUND

The BNSF Railway Company (“BNSF”) issued tariff BNSF-6041-B on May 27, 2009. Items 100 and 101 of BNSF-6041-B mandated that BNSF coal trains operating over the Powder River Basin Joint Line and the Black Hills Subdivision should not exceed “Integrated Dust Value” (“IDV.2”) levels as measured by BNSF-installed detectors. Additionally, BNSF-6041-B stated that shippers were responsible for BNSF trains meeting this IDV.2 standard. The tariff was silent as to what would happen if a BNSF train exceeded the mandated IDV.2 maximum.

On October 2, 2009, the Arkansas Electric Cooperative Corporation (“AECC”) filed a petition with the Board, claiming that BNSF-6041-B (Items 100 and 101) constitute an unreasonable practice in violation of 49 USC § 10702 and/or a refusal to provide service in violation of 49 USC § 11101. Citing the “vital role transportation of coal by rail plays in the

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nation's energy supply and the economy in general," the Board instituted a declaratory order proceeding and invited comments from the public. Decision at page 1.

II. IDENTITY AND INTEREST OF AFS

AFS is a subsidiary of the Ameren Corporation, a public utility holding company that provides electricity to approximately 2.3 million customers in Missouri and Illinois. AFS provides fuel, transportation and energy-related products and services for the operating companies of Ameren Corporation. These operating companies own eleven coal-fired power plants, all of which rely on Powder River Basin ("PRB") coal with rail as the primary mode of coal transportation. AFS, on behalf of its operating companies is the largest purchaser of PRB coal in the U.S. In addition, Robert K. Neff, Vice President Coal Supply of AFS, has served as the President of the National Coal Transportation Association ("NCTA") from January 1, 2008 until the present.

III. SUMMARY OF OPENING EVIDENCE

Coal has been shipped in coal cars whose design has been approved by the Association of American Railroads ("AAR") for over 100 years. The method of loading of these cars has been prescribed by AAR open-top loading rules. PRB coal has been shipped by these methods since the basin was developed in the 1970's. Over 4.5 billion tons of coal were produced from the Wyoming portion of the PRB from 1998 to 2009.¹ After two 2005 derailments on the Joint Line due to soft roadbed, BNSF declared that coal dust fouling of the ballast was the cause of the roadbed softness and subsequent derailments. Undercutting, a maintenance activity usually scheduled periodically, was employed on an extensive basis in the summer of 2005 to clean the ballast on the Joint Line and restore its stability. This concentration of maintenance activity

¹ http://www.blm.gov/wy/st/en/programs/energy/Coal_Resources/PRB_Coal/production.html.

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resulted in coal disruptions to customers, causing hundreds of millions of dollars in additional costs to utilities.

BNSF subsequently declared that shippers should control the dust from trains moving on their lines, and pay for that control, even though cars were built to AAR standards, loaded under AAR loading criteria and the railroad has traditionally included track maintenance costs such as undercutting in its rates.

AFS is open to engaging in a dialogue with BNSF and other railroads to discuss reasonable measures aimed at solving any ballast fouling problems that may exist on railroad-owned track that the railroads claim is attributable to fugitive coal dust. AFS would likely support measures that can be shown to foster safe, reliable, and cost-effective rail service. However, as described in this Opening Evidence, AFS believes serious concerns remain unresolved about the reasonableness and application of BNSF-6041-B. Mr. Neff is personally aware of numerous attempts of both AFS and NCTA to engage BNSF in a collaborative discussion about the coal dust issue and BNSF's tariff. When faced by the likely prospect of having to comply with a BNSF dust standard, NCTA members expended significant funds to study which surfactant product might best address fugitive dust. The study results are summarized in NCTA's opening comments.

BNSF's approach to the dust issue is a departure from the handling of the issue by other railroads. When faced with issues of coal dust emissions from trains, both Norfolk Southern Railway and Canadian Pacific Railway took the initiative to spray the trains themselves en route. Nevertheless, BNSF has constructed its own dust criteria and proposed a tariff that requires customers' trains to comply with its invented emission level standards and novel measurement techniques, even though BNSF cannot prescribe to customers how to meet its standards. There

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is no guarantee that any measures that the customer takes will result in compliance with the tariff, and no guarantee that should a customer undertake a chemical application program, that expenditure of significant funds would have any effect other than BNSF declaring that its trains were still not in compliance.

Assuming a ballast fouling problem exists and that it is caused solely or even substantially by fugitive coal dust from the top of the railcars, there needs to be an equitable and collaborative means of addressing it. Such a solution should appropriately allocate costs to the parties who actually benefit from the measures. As the operator of the trains and the owner of the tracks, BNSF seems the likely first choice for undertaking the implementation and paying for any dust remediation solution which BNSF has raised as a rail infrastructure maintenance issue. To the extent that BNSF is permitted to push any portion of this cost of rail infrastructure maintenance directly to the shippers, BNSF should first, at a minimum, be required to create a safe harbor for shippers by informing them of the steps that should be taken, with names of specific vendors and products that should be used.

IV. GOVERNING LAW

AECC has challenged Items 100 and 101 of BNSF-6041-B under 49 USC §§ 10702 and 11101. AFS will briefly address those statutes, then spend the majority of its Opening Evidence describing some of the unresolved issues and problematic areas in the BNSF tariff.

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A. Unreasonable Practice

There is no precise definition for what is reasonable in 49 USC § 10702. Hence, the Board “has been given broad discretion to conduct case-by-case fact-specific inquiries to give meaning to these terms, which are not self-defining, in the wide variety of factual circumstances encountered.” *Granite State Concrete Co., Inc. v. Surface Transportation Board*, 417 F.3d 85, 92 (1st Cir. 2005). When faced with an allegedly unreasonable practice, one court recently enumerated several questions that might inform the Board’s inquiry:

- whether the carrier imposed restrictions on the complainant?
- what circumstances surrounded the carrier’s imposition of the restrictions?
- did the carrier have good reasons to be concerned about the circumstances?
- was the carrier’s response to the circumstances reasonable?

Granite State, 417 F.3d at 92-95. With the publishing of BNSF-6041-B, it is clear that BNSF is attempting to impose a restriction. As shown below, it is not clear whether BNSF’s response was reasonable given the circumstances surrounding the restrictions in BNSF-6041-B.

B. Common Carrier Obligation To Provide Service

As noted above, the tariff is silent regarding as to what would happen if a BNSF train exceeded the BNSF mandated IDV.2 maximum. AFS believes that a BNSF refusal to provide transportation service due to a train’s failure to meet the IDV.2 standard in BNSF-6041-B would be a violation of the common carrier obligation in 49 USC § 11101.

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V. THE STANDARDS IN BNSF-6041-B ARE ARBITRARY AND NOT THE RESULT OF COLLABORATIVE EFFORTS OF THE PARTIES IMPACTED

A. BNSF Has Not Made Meaningful Attempts To Collaborate With Shippers

AFS has requested several times, verbally and in writing, that BNSF provide IDV.2 data on all AFS related trains. BNSF has refused to provide such data and has stated its intent to only furnish data on the few trains that have actually exceeded the IDV.2 threshold. In addition, BNSF continues to be reluctant to establish a truly collaborative process. As part of the discovery process in this proceeding, AFS asked for BNSF to produce all of the data collected by BNSF on the trains going to the list of plants provided to BNSF that AFS provides fuel related services. BNSF produced materials that it claims is responsive to AFS's request however BNSF produced the material all as Highly Confidential so that AFS cannot see the data about AFS related plants and therefore could not perform any evaluations on its trains.

B. Credible Data Does Not Exist

BNSF has not shown that the Trackside Monitors used to create the IDV.2 numbers are not influenced by dirt, sand, crushed ballast, diesel exhaust and soot, and other types of organic and inorganic material. In short, there is no credible data supporting the BNSF solution as a means to address any ballast fouling that may exist. The theory underpinning BNSF-6041-B (items 100 and 101) rests upon numerous discretionary decisions about the correct methodology. For example, BNSF knows that []

]]² This key aspect of the tariff methodology, []

² AFS has not been able to conduct an exhaustive review of the roughly 90,000 pages of documents produced by BNSF due to the nature of this proceeding and the constrained time frame involved. The most recent documents from BNSF were produced Friday evening March 12, 2010.

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]] should have been subject to peer review, but BNSF has stated that the tariff, in fact, was not vetted by peer review. See Exhibit 2, page 5-6 of BNSF Responses and Objections to the Second Set of discovery of the Western Coal Traffic League and Concerned Captive Coal Shippers.

Through its provision of energy-related services for the operating companies of Ameren Corporation, AFS has access to reports sent by BNSF when AFS related trains operating in service to certain generating stations exceed the IDV.2 standard stated in BNSF-6041-B. These “violation reports” reveal some curious coincidences.³ For example, [[

]] Because of the limited data, AFS cannot make complete conclusions or comments about the performance of its trains.

C. No Correlation Has Been Shown Between The IDV.2 Standards And Ballast Fouling

The correlation between the output of the monitoring devices and the amount of coal dust deposited on the tracks has also not been established. The Trackside Monitors used to create the IDV.2 numbers are not located in the ballast area; instead, they are positioned several feet beyond the borders of the ballast. See BNSF Declaratory Order Reply (filed Oct. 21, 2009), Exhibit A, page 5. The Trackside Monitors are not necessarily measuring dust that is fouling the

³ BNSF would only send reports for trains that violated the IDV.2 standard and would not send reports about dust levels on trains moving between the particular origin and destination that did not exceed the IDV.2 value.

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ballast. At best, they are measuring dust (and not necessarily coal dust) that is in the air several feet away from the ballast, and that may or may not settle on the ground at some point.

VI. BNSF SHOULD BE RESPONSIBLE FOR CONSEQUENCES OF SURFACTANTS

While BNSF has studied and advocated the use of surfactants to reduce coal dust, there has been little to no discussion regarding the long-term consequences of repeated surfactant applications. Tests have revealed that a sticky residue remains on railcars after application of a surfactant. Photographs of residue are available at Exhibit 4, AFS0000263, AFS0000265, and AFS0008625. []

[]

As the Board is likely aware, many PRB coal shippers own their own or lease the railcars used in their service. AFS related entities control roughly 8,000 rail cars. The long-term impact of this residue on the railcars, as it builds over years of repeated application, could cause safety and operational problems due to its effect on unloading, braking, coupling, and other aspects of railcar operation. If BNSF is permitted to require dust surfactant spraying, BNSF should remain responsible for these safety and operational consequences.

VII. THE RAILROADS SHOULD NOT USE “COAL DUST” CLAIMS AS A WAY TO RAISE RATES

The nation’s railroads have not been immune from the economic downturn of the last few years. Like all businesses, railroads have been searching for new revenue sources or ways to increase existing revenue streams. Track maintenance expenses, such as undercutting, have traditionally been included in railroad costs when establishing rates. If BNSF tariff 6041-B is implemented, BNSF has stated that its track undercutting frequency, and by extension, its undercutting costs, will be reduced. However, dust control mitigation costs will greatly increase

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for shippers. Requiring shippers to implement measures to control dust shifts maintenance costs to shippers outside of rates and provides another profit source for railroads.

Another step railroads are taking is to move toward per-car pricing rather than per-ton pricing.⁴ The benefit of this transition is obvious – railroads get paid the same amount regardless of loading irregularities or shortfalls. Any loading restrictions imposed on coal height such as the new profiling requirements as part of the BNSF dust control tariff will have the effect of lowering the tons per car. The incentive for the railroads is obvious, too; it is financially beneficial for a railroad to divide, or force a shipper to divide, a given coal shipment into a greater number of cars to increase the revenue. The greater the number of cars, the greater the railroad’s revenue on the per-car rate.

AFS is concerned that the “coal dust” issue is one way that railroads may force shippers to reduce the tonnage in each individual coal car, thus increasing the rates that shippers must pay to transport a given quantity of coal. AFS respectfully requests that the Board, in its ultimate decision in this case, state that railroads may not use the coal dust issue as an improper way to raise rates.

VIII. IF A DUST STANDARD IS JUSTIFIED, ITS IMPLEMENTATION MUST BE EQUITABLE

A. BNSF Should Implement The Solution

If BNSF would like to create a new uniform blanket standard to improve the condition of BNSF track, like that described in BNSF-6041-B, then there should be a uniform blanket solution implemented by BNSF (and UP for Joint Line traffic), the operator of the trains and owner of the track covered by the tariff. Moreover, as the owner of the track and operator of the

⁴ During the alleged “capacity crunch” of 2005-2007, railroads were encouraging shippers to use the maximum size railcar possible, and fill those cars as much as possible.

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trains, BNSF is in the best position to know exactly what measures would best ameliorate the situation.

If BNSF can show that applying a surfactant to coal at the mines is the appropriate and most cost-effective way to address any coal dust problem that might exist, then the easiest solution would be for BNSF to apply the product to every train in a uniform manner. Costs incurred by BNSF in application should be offset by reduced maintenance costs due to a decrease in ballast fouling, or included in transportation rates.

B. At A Minimum, BNSF Should Provide A Safe Harbor Or Guidance For Shippers

As it currently stands, shippers who have been forced to contemplate compliance with BNSF-6041-B are not even sure what they should do. They could spend millions of dollars then be told by BNSF that they failed to meet the IDV.2 standard. As described above, AFS believes BNSF is in the best position to implement a coal dust solution. At an absolute minimum, however, BNSF should provide a list of approved methods, vendors, quantities, surfactant products, and dilutions so that shippers cannot be said to have violated the standard if they follow the guidelines. In short, shippers should be given a safe harbor based on following an approved practice.

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IX. CONCLUSION

For the foregoing reasons, AFS continues to believe that many unresolved issues surround the implementation of BNSF-6041-B. The Board should find BNSF's tariff unreasonable absent the conditions and additional evidence sought herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sandra Brown", is written over a horizontal line.

James A. Sobule
Deputy General Counsel
Ameren Services Company
1901 Chouteau Avenue
St. Louis, MO 63103
314.554.2276
314.554.4014 (fax)

Sandra L. Brown
David E. Benz
Thompson Hine LLP
Suite 800
1920 N Street, N.W.
Washington, DC 20036
202.263.4101
202.331.8330 (fax)

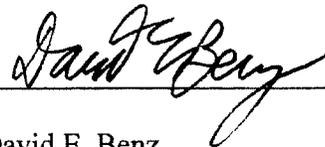
*Attorneys for Ameren Energy Fuels and
Services Company*

March 16, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March 2010, a copy of the foregoing was served via first-class mail, postage prepaid, on all parties of record.

A handwritten signature in black ink, appearing to read "David E. Benz", is written over a solid horizontal line.

David E. Benz

EXHIBIT 1

REDACTED

EXHIBIT 2

1/21/10

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35305

**PETITION OF ARKANSAS ELECTRIC
COOPERATIVE FOR A DECLARATORY ORDER**

**BNSF RAILWAY COMPANY'S RESPONSES AND OBJECTIONS TO THE
SECOND SET OF INTERROGATORIES AND REQUESTS FOR
PRODUCTION OF DOCUMENTS OF WESTERN COAL TRAFFIC
LEAGUE AND CONCERNED CAPTIVE COAL SHIPPERS**

BNSF Railway Company ("BNSF"), pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, hereby responds and objects to the Second Set of Interrogatories and Requests for Production of Documents served by Western Coal Traffic League and Concerned Captive Coal Shippers on December 30, 2009 ("WCTL's Second Set of Discovery Requests").

**GENERAL OBJECTIONS AND
OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS**

The following general objections and objections to definitions and instructions are made with respect to WCTL's Second Set of Discovery Requests.

1. BNSF objects to WCTL's Second Set of Discovery Requests to the extent they seek documents that contain confidential and proprietary information relating to

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

RESPONSES AND OBJECTIONS TO INTERROGATORIES

Interrogatory Number 8:

Please state whether any of the dust monitoring and/or IDV analysis performed by BNSF and/or Simpson Weather Associates, Inc. (“SWA”) on the Joint Line and/or the Black Hills Sub-Division has been submitted in whole or in part for peer review or critique by any member of the technical and/or academic community involved in air quality, air quality monitoring, dust monitoring, industrial hygiene, and/or other related field of expertise.

BNSF Response: BNSF objects to Interrogatory No. 8 to the extent it refers to “other related field of expertise” on grounds that such reference is vague and undefined. Subject to and without waiving its objections, BNSF states that the dust monitoring and/or IDV analysis performed by BNSF and/or by SWA for BNSF on the Joint Line and/or Black Hills Sub-Division has not been submitted for peer review by a firm specializing in air quality, air quality monitoring, dust monitoring or industrial hygiene.

Interrogatory Number 9:

Please state whether the design and use of the passive collectors used by BNSF and/or SWA on the Joint Line and/or the Black Hills Sub-Division have ever been analyzed, critiqued, and/or peer-reviewed for performance by any member of the technical and/or academic community involved in air quality, air quality monitoring, dust monitoring, industrial hygiene, and/or other related field of expertise.

BNSF Response: BNSF objects to Interrogatory No. 9 to the extent it refers to “other related field of expertise” on grounds that such reference is vague and undefined. Subject to and without waiving its objections, BNSF states that the design and use of passive collectors used by BNSF and/or by SWA for BNSF on the Joint Line and/or the

Black Hills Sub-Division has not been analyzed, critiqued, and/or peer-reviewed for performance by a firm specializing in air quality, air quality monitoring, dust monitoring or industrial hygiene.

Interrogatory Number 10:

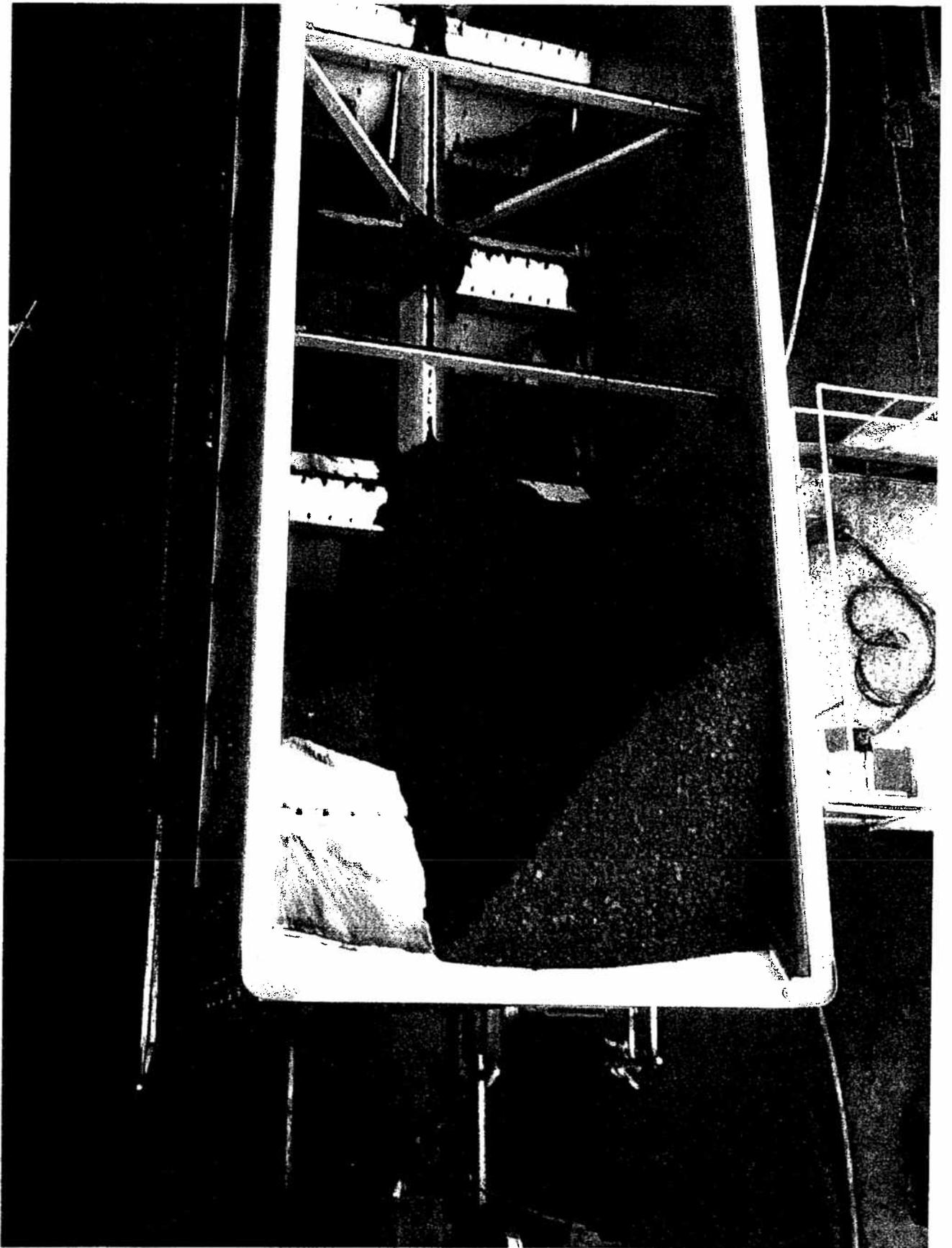
Please describe in detail any and all calibration procedures, routines, techniques, and/or protocols that have been performed on the TSM E-Samplers by BNSF or SWA since they were installed at each respective TSM site on the Joint Line and/or the Black Hills Sub-Division.

BNSF Response: BNSF objects to Interrogatory No. 10 to the extent it seeks information about each calibration procedure, routine, technique, and/or protocol relating to each TSM E-Sampler installed on the Joint Line and/or Black Hills Sub-Division on grounds that such request is overly broad and unduly burdensome. Subject to and without waiving its objections, BNSF states that Met One Instruments, the manufacturer of the E-Sampler dust monitor, recommends that the dust monitors be calibrated every 2 years. However, the dust monitors are exposed in the field for 2 months then shipped to the manufacturer for “As Received” testing, cleaning, and calibration. The “As Received” testing allows for determination of signal drift during the exposure period. Typically, the exposed dust monitors’ signals are within 10% of a calibration unit, which is considered within manufacturer tolerance. The calibration verifies the accuracy of the dust monitor signal and flow values. In addition to the bi-monthly manufacturer calibration, the dust monitors are programmed to self-calibrate every 12 hours verifying the dust signal and pump flow. The unit also corrects for optical cleanliness by adjusting the output dust signal “background” level during this self-calibration period.

EXHIBIT 3

REDACTED

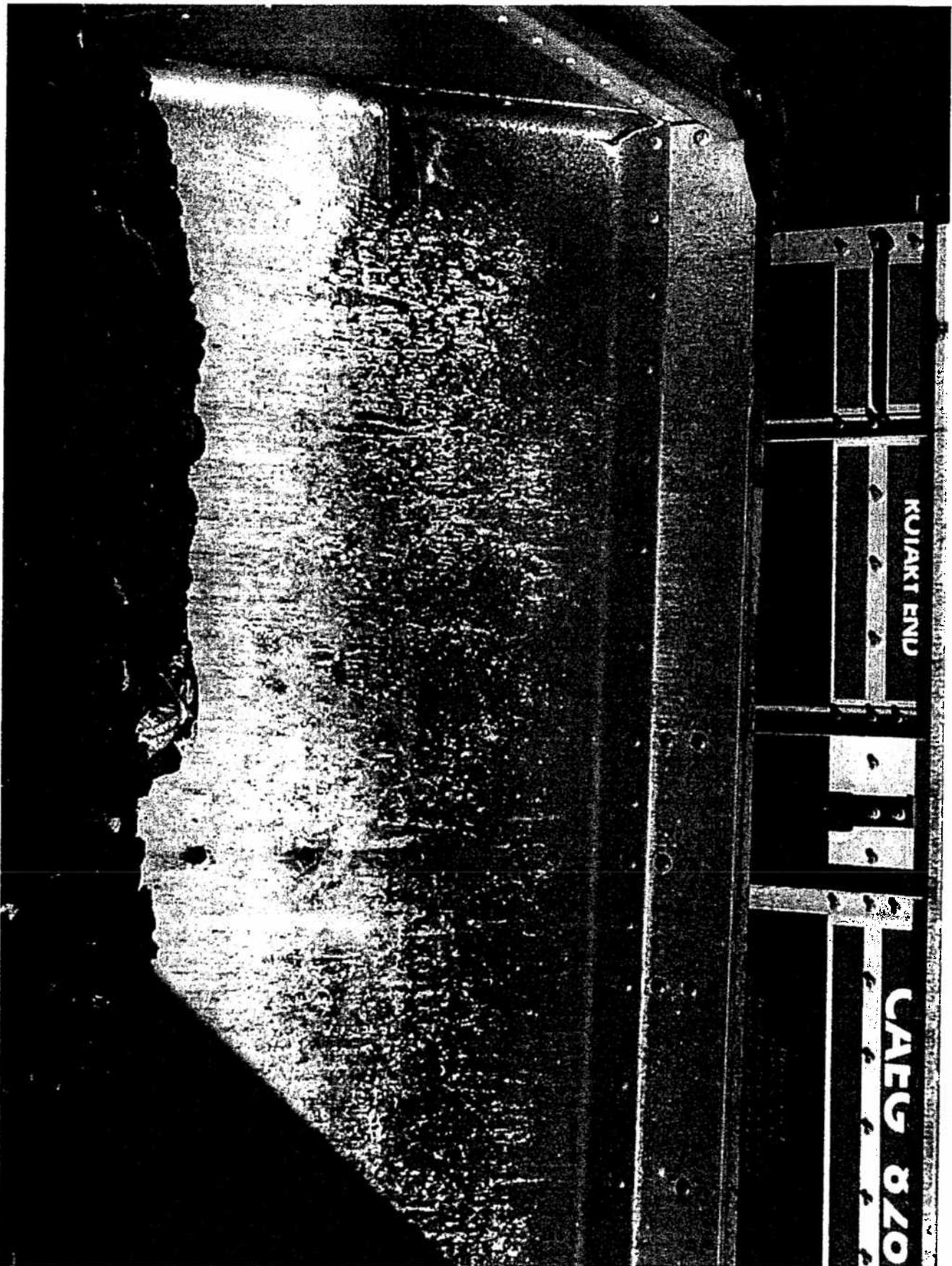
EXHIBIT 4



AFS0008625



AFS0000265



KUIAKT END

CAEG 820

EXHIBIT 5

REDACTED

EXHIBIT 6

REDACTED