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Via Electronic Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
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Surface Transportation Board
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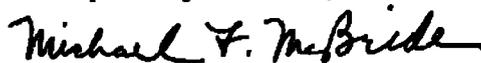
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Re: F.D. 35305 – Petition of Arkansas Electric
Cooperative for a Declaratory Order

Dear Ms. Brown:

Please find enclosed the Rebuttal Comments of American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association for filing in the above-referenced proceeding.

Respectfully submitted,



Michael F. McBride

*Attorney for American Public Power Association,
Edison Electric Institute, and National Rural
Electric Cooperative Association*

cc (w/encl.): All Persons on the Service List

**PUBLIC VERSION/THERE IS NO OTHER
BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35305

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

**REBUTTAL COMMENTS OF AMERICAN PUBLIC POWER ASSOCIATION,
EDISON ELECTRIC INSTITUTE, AND
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

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Association*

Due and Dated: June 4, 2010

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Introduction and Summary

American Public Power Association (“APPA”), the association of public power electric utilities, Edison Electric Institute (“EEI”), the association of investor-owned electric utilities, and National Rural Electric Cooperative Association (“NRECA”), the association of consumer-owned electric power systems, hereby submit their Rebuttal Comments.

APPA, EEI, and NRECA are aware of the opening Comments and Reply Comments filed herein, and the disagreements between BNSF and the various shipper parties (and, to some extent, other Railroads). Rather than review herein every issue raised by every party, some of which can only be discussed in Highly Confidential filings, APPA, EEI, and NRECA again believe it would be more helpful to the Board to submit their Rebuttal Comments in this public form to stress the key points that may assist the Board in resolving the main issues in this proceeding, so as to permit the Board to rule without having to resolve every factual dispute herein. We urge this approach on the Board because of the unprecedented nature of BNSF’s Tariff No. 6041-B (“Tariff”), the novel legal and factual issues surrounding it that have arisen, and because BNSF

sought to impose its Tariff without adequate research regarding the nature of the coal dust issue or the efficacy (or lack thereof) of spraying PRB coal to control dust.¹

Under Board and ICC precedents, most recently *Union Pacific Railroad Company – Petition for Declaratory Order*, STB Finance Docket No. 35219 (served June 11, 2009), BNSF, not the shippers, bears the burden of justifying a departure from, or reduction of, its common carrier obligations. BNSF (and the other railroads which support it in part) have not come close to justifying a Board determination that BNSF may refuse to move a PRB coal train unless the coal dust “emitted” from every one of the rail cars in the train is below the arbitrary limits set by BNSF in its Tariff.

In a variation on that theme, various railroad Reply Comments argue that it is permissible to shift some portion of their common-carrier responsibilities to the shippers. It is not.²

PRB coal shippers and coal producers have been willing to cooperate with the Western railroads on low-cost, sensible efforts to reduce dust, such as through profiling and size requirements. Various estimates suggest that such efforts reduce the amount of dust in the PRB by 70% or more. Moreover, we are informed that BNSF concluded that 10-15% of the coal trains are responsible for 90% of the total alleged coal dust, which

¹ In the interests of brevity, we do adopt, and incorporate by reference, the Initial, Reply, and Rebuttal Comments filed by AECC, WCTL/Concerned Captive Coal Shippers, and the other coal shipper parties herein, some of which are cited as appropriate.

² *E.g., Liability for Contaminated Covered Hopper Cars (Illinois Central Railroad Company)*, ICC I&S Docket No. 9275, 10 I.C.C. 2d 154, 1994 ICC LEXIS 187, at *12-*30 (1994) (holding that railroad may not shift liability in the event of damages due to contamination in railcars where railroad was required to inspect and clean (if need be) railcar before loading grain into it); *Trainload Rates on Radioactive Materials*, 362 I.C.C. 756 (1980), *aff’d sub nom. Consolidated Rail Corp. v. ICC*, 646 F.2d 642 (D.C. Cir.), *cert. denied*, 454 U.S. 1047 (1981).

supports the conclusion that sensible measures such as these will solve any coal-dust problem.³

However, APPA, EEL, and NRECA, and the other shipper interests, are frankly aghast that BNSF, supported by CSX and UP, would argue that the coal shippers are “trespassing,” and that CSX would suggest they are “dumping” or “littering” on the railroads’ property, because some coal dust apparently is found on the railroads’ rights-of-way. As AECC argued in its Reply Comments, a cause of action based on the tort of “trespass” requires that the person not have the railroad’s consent to be on the railroad. The railroads’ arguments are so extreme that it may be well to remind that coal shippers are the customers of the railroads, that coal traffic, typically captive, provides them with their largest profits, and that the railroads have a duty to carry all of the coal that is tendered to them, so that the shippers’ coal cannot be trespassing on the railroads.⁴

Of course, the coal shippers themselves do not enter the railroads’ property in the PRB or anywhere else, but rather the shippers’ coal does enter their property, when the coal mines load it onto the shippers’ (or railroads’) railcars, with the railroads’ consent.⁵ If the railroads consent to the loading of the coal in the railcars in the first place (as they

³ Apparently, the actual number, according to BNSF, is 14%. AECC Reply Comments at 19, *citing* BNSF Witness Van Hook VS at 20. As AECC argued, why should 86% of the coal traffic, which is not emitting coal dust in excess of the arbitrary “emission limits” BNSF has sought to impose, bear the costly burden of spraying, when those trains are not exceeding those limits already? Clearly, the best solution would be to reduce the amount of coal dust from the 14%, perhaps by better profiling, changes in railroad operations, or voluntary actions, rather than allowing a Tariff to impose a costly and inefficient burden on all 100% of the coal trains in the PRB.

⁴ We are reminded of Henry David Thoreau’s comment in *Walden* that “we do not ride on the railroad; it rides upon us.”

⁵ The railroads may be seeking to avoid carrying hazardous materials, such as chlorine (although some of their marketing personnel still want as much volume as they can get), but the railroads have never had to be ordered to carry PRB coal. Accordingly, the Board can safely rely on the fact that all PRB coal is carried with the railroads’ consent.

do), how then could the incidental loss of some of the coal (most likely because of railroad operations or the elements (such as wind)) be a “trespass?” Of course, it can not.

What happens to the shippers’ coal while it is in the custody of the railroads – who are common carriers, after all, and therefore have a duty to use reasonable care -- is the railroads’ responsibility, not that of the shippers.⁶ The railroads’ argument that the loss of coal from the railcars is a “trespass,” and therefore the shippers are responsible for removing it is, in the circumstances, without any basis in fact or law.⁷ No wonder BNSF’s attorneys were left simply to argue (Reply Argument at 15) that “there is something fundamentally wrong” with the argument that the coal shippers are not responsible for removing the coal dust from the railroads’ rights-of-way, but could not cite any legal basis for their position. Obviously, the reason that they could not identify the “something” that they think is “fundamentally wrong” is that there is no such basis.

Notwithstanding all the arguments of BNSF and UP, the evidence still does not support their claim that coal dust caused the 2005 derailments on the Joint Line. FRA Reports about those derailments do not support the argument that coal dust caused those derailments. Rather, those Reports show that the derailments were caused by defective track, inadequate track maintenance (producing a too-wide gauge), and inadequate

⁶ As we showed in our Reply Comments, to be accepted for carriage, railcars must conform to AAR Rules, and in the PRB, there is a process for loading of coal cars. During the 2005-07 period, when BNSF and UP could not deliver enough coal, they encouraged coal shippers to load as much coal as possible in their railcars, to mitigate the shortages caused by the 2005 derailments in the PRB. Now, the two railroads are requiring “profiling” of the coal in the cars to avoid coal dust leaving the cars. This demonstrates that the current arrangements are dictated by the railroads and the coal mines, not the shippers (who are not even present in the PRB).

⁷ And, as APPA, EEI, NRECA (as well as Western Coal Traffic League) showed in their Reply Comments, the only time a Court has addressed the “trespass” argument squarely, in litigation between UP and Entergy, it struck the defense as not grounded in law.

inspection (which should have disclosed the problems listed). If some of the information in the FRA Reports came from BNSF or UP, as the two railroads suggest, that only shows that the contemporaneous (and usually best) evidence from the railroads themselves, before litigation and other issues tended to cause the railroads to rethink their public positions, confirmed that the 2005 derailments were caused by inadequate track maintenance and a failure to detect potentially unsafe conditions during track inspections.

We know that requiring BNSF to perform the necessary track maintenance will solve the problems with PRB track, because that is what BNSF did, after the May 2005 derailments. Doing the necessary maintenance allowed normal transportation on the Joint Line to resume by 2007, without any spraying of coal.

As APPA, EEL, and NRECA stated in their Initial Comments and Reply Comments, we do not oppose voluntary efforts on the part of coal shippers, producers, and railroads to spray coal. Based on this record, we merely oppose allowing BNSF to unilaterally impose its untested, unexplained "emission limits" in its Tariff, and request that the requirements of Items 100 and 101 in BNSF's Tariff be determined to be an "unreasonable practice" within the meaning of 49 U.S.C. §§ 10702 and 11101. But BNSF is not correct in arguing that, "If the Board does not allow BNSF to take measure to require shippers to keep their coal in the rail cars, nothing will get done to address the problem." BNSF's Reply Argument at 3. Instead, voluntary efforts are already underway, as BNSF knows, so BNSF's argument ignores the current circumstances. Moreover, if BNSF cannot avoid the coal-dust problem by changing its own operations, and really believes that reducing emissions or spraying at least certain trains (*i.e.*, the 14% or so that it claims are the only ones whose emissions exceed its "emission limits"

and therefore would be affected by its Tariff), it could provide contractual incentives to shippers either to reduce the coal dust from those trains (perhaps by better profiling, if that is the problem) or through spraying. Finally, it could file a Petition with the Board, seeking relief, as UP did, if there are continuing problems, and regular maintenance does not solve the problem (as it did after the 2005 derailments). *See Union Pacific Railroad Company – Petition for Declaratory Order*, Finance Docket No. 35219 (served June 11, 2009)(UP Petition seeking to be relieved of its common carrier obligation due to safety concerns).

Finally, we also oppose efforts of some railroads to get the Board to take other matters into account in addressing the issues raised by BNSF's Tariff, AECC's Petition, and the Board's Decision served December 1, 2009 creating this proceeding and defining its scope. The Board has enough to do to decide the issues in this proceeding without addressing other matters, such as a UP Tariff, or the concerns of various railroads about the "chilling effect" or precedent that will be set here for other proceedings. If the Board's ruling is confined to the facts, as it should be (and as NS argued, too, in its Reply Comments), it should rule on only those matters squarely within the scope of the proceeding and that are necessary for a decision.

Argument

1. The Burden of Proof Is on BNSF Because It Seeks to Be Relieved of Its Common Carrier Obligation to Carry Shippers' Coal Unless The "Emissions" of Coal Dust Are Reduced. BNSF and other railroads argue that they may impose their own safety-related or property-related provisions in their tariffs, and the burden is on shippers

or other parties who oppose those provisions to have them struck down. That is not the law.

The Board and its predecessor the Interstate Commerce Commission were confronted with similar railroad arguments 30 years ago, and again just last year. In *Union Pacific Railroad Company – Petition for Declaratory Order*, STB Finance Docket No. 35219 (served June 11, 2009) (“*Union Pacific*”), the Board held (at 3-6) that UP, in seeking to be relieved of its common carrier obligation to quote tariff rates to US Magnesium Corporation, had the burden of proof to show that the existing safety regulations of the government (there, of DOT and TSA) are not sufficient to provide safety. The Board relied on *Akron, Canton & Youngstown R.R. v. ICC*, 611 F.2d 1162, 1169 (6th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980), and *Consolidated Rail Corp. v. ICC*, 646 F.2d 642, 650 (D.C. Cir.), *cert. denied*, 454 U.S. 1047 (1981). In *Union Pacific*, the Board held:

Court and Board precedent have addressed the extent of the common carrier obligation with regard to transporting hazardous materials. Rejecting the claim that railroads should not have a common carrier obligation to transport radioactive materials because of the extraordinary risks involved, the Board’s predecessor, the ICC, explained that “a carrier may not assert before this Commission that, as a general proposition, shipments meeting DOT and [Nuclear Regulatory Commission] requirements are too hazardous to transport.”¹⁶ In *Akron*, 611 F.2d at 1169, the court upheld the ICC’s holding that the common carrier obligation included the transportation of radioactive materials, stating that a “carrier may not ask the Commission to take cognizance of a claim that a commodity is absolutely too dangerous to transport if there are DOT ... regulations governing such transport.” Thus, the common carrier obligation requires a railroad to transport hazardous materials where the appropriate agencies have promulgated comprehensive safety regulations. Although carriers are not precluded from seeking imposition of stricter safety standards, the court in *Conrail* held that “the burden is upon [the carrier] to show that, for some reason, the presumptively valid ... [safety] regulations are unsatisfactory or inadequate in their particular circumstance.”¹⁷

¹⁶ Radioactive Materials, Missouri-Kansas-Texas R.R. Co., 357 I.C.C. 458, 464 (1977)(MKT) (applying the principles of regulatory responsibility found in Delta Air Lines, Inc. v. CAB, 543 F.2d 247, 260 (D.C. Cir. 1976)).
¹⁷ Conrail, 646 F.2d at 650.

Here, BNSF argues that coal dust is a safety hazard, and that it should be relieved of its common carrier obligation unless emissions from railcars are less than its arbitrarily determined limits, because it is otherwise too dangerous for BNSF to be expected to transport it. FRA's Reply Comments (at 3-5) make clear that it does not require spraying of coal, but rather that maintenance of ballast is all that is required by FRA's "performance-based" regulations. Accordingly, the same principle – whether BNSF should be relieved of its common carrier obligation due to safety concerns – applies equally here as in the other ICC and STB proceedings cited *supra*. The result is that the burden of proof is on BNSF, not AECC or other coal shippers.

2. According to FRA's Reports, the 2005 UP and BNSF Derailments Were Caused by a Defective Weld or Inadequate Maintenance, as Well as Inadequate Track Inspection. FRA issued Reports about the 2005 PRB derailments at issue in this proceeding ("Reports"). Curiously, FRA's Reply Comments filed herein do not address its own Reports.

In any event, we discussed those Reports in the Reply Comments of APPA/EEI/NRECA (at 4-5). Those Reports show that the 2005 derailments were caused by defective track, inadequate track maintenance, and an inadequate inspection (which failed to disclose the defect or the inadequate maintenance or a too-wide track gauge). FRA presented no evidence that coal dust caused those derailments, nor did FRA address the fact that BNSF's and UP's solution to the derailments was to do the track

maintenance work that apparently should have been done before the derailments occurred.

3. FRA's Reply Comments Are Correct in Asserting That Requirements Imposed by Common Carriers Must Be Cost-Effective, But Offer No Evidence That Spraying Is Cost-Effective. APPA, EEI, and NRECA agree with FRA that any obligation a railroad attempts to impose on a shipper must be "reasonable," and that a requirement cannot be "reasonable" unless it is both accomplishes something useful and cost-effective. *E.g., Trainload Rates on Radioactive Materials*, 362 I.C.C. 756 (1980), *aff'd sub nom. Consolidated Rail Corp. v. ICC*, 646 F.2d 642 (D.C. Cir.), *cert. denied*, 454 U.S. 1047 (1981).

APPA, EEI, and NRECA, among other parties, showed that spraying is 2-6 times more expensive than simply doing the necessary maintenance on the PRB coal lines, based on STB determinations of the cost/ton of such maintenance, and FRA in its Reply Comments cited no evidence as to whether spraying is, in fact, cost-effective. Moreover, FRA offered no evidence that spraying will achieve BNSF's "emission limits," so FRA could not have demonstrated cost-effectiveness of spraying even if it had tried. No party has suggested that imposing spraying obligations on shippers will eliminate the need for doing periodic maintenance on the railroads' lines, so even if spraying were cheaper than maintenance, the costs of spraying would not offset maintenance costs.

Also, FRA did not address BNSF's admission that only 14 percent of the coal trains exceeded its emission limits before spraying began, so for that reason as well, FRA would have a difficult time demonstrating cost-effectiveness if it believes that spraying the 86 percent of coal trains that already emit less coal dust than BNSF's "emission

limits" would be cost-effective. Finally, while FRA seems to say that it is reasonable for coal shippers to bear costs of removing coal dust, rather than for the railroads to do so, coal shippers already bear those costs through their rates (which necessarily include the costs of maintenance of railroad rights-of-way).⁸ So, FRA's argument that coal shippers may be charged by railroads to remove coal dust from the railroads' rights-of-way proves nothing, because the coal shippers are already bearing those costs, whether because railroads may charge "any rate" under the statute unless the Board orders them to charge a different rate (and the Board's ratemaking methodology requires the shipper to bear all of the railroad's costs).

4. All (or Almost All) Parties Appear to Agree That the Board's Determination Should Be Confined to the Facts, and the Issues in This Proceeding, and That the Board Should Not Decide Matters Not Within the Scope of the Proceeding. APPA, EEI, and NRECA agree with NS and with the other shipper parties that the Board's decision should be confined to the matters at issue in BNSF's Tariff, and not to matters outside the

⁸ The railroads' argument that their rates do not completely cover their maintenance costs is preposterous. The railroads did not present what their rates are, or what their costs are, so they could not possibly prove that their rates do not cover their costs of maintenance. In any event, unless a coal rate is less than 100 percent of variable costs (and we know of no such rate), by definition the rate covers all the railroads' variable costs, including all maintenance costs of rights-of-way. As the Board knows from recent coal-rate proceedings, coal rates (such as those charged Basin Electric Power Cooperative) were approximately 600 percent of variable costs. *Western Fuels Ass'n, Inc. and Basin Electric Power Coop. v. BNSF Railway Co.*, No. 42088, 2009 WL 415499 (Feb. 17, 2009), slip op. at 2 (noting that the Board was prescribing an R/VC ratio of 240 percent, which was a reduction of 60 percent), *aff'd in part and remanded in part on other grounds, BNSF Railway Co. v. STB*, ___ F.3d ___, No. 09-1092, *et al.* (D.C. Cir., May 11, 2010). Therefore, if a railroad has not recovered all of its costs in its rates, it has only itself to blame, because it may charge "any rate" under 49 U.S.C. § 10701, and the STB has no jurisdiction over contract rates, nor does it have jurisdiction over tariff rates unless they exceed 180 percent of variable costs. Accordingly, the STB may not prescribe a rate below 180 percent of variable costs.

issues raised in the AECC Petition. The Board stated what the issues are in its Decision served December 1, 2009 instituting this proceeding, which of course defines the scope of the proceeding, and interested persons relied on the Board's determination of the issues in deciding whether to participate herein.

Also, all parties⁹ have responded to the issues raised by the BNSF Tariff, AECC Petition, and the Board's Decision served December 1, 2010. No notice has been provided that any others are involved. The issues in this proceeding are, if the Board addresses them all, highly technical and complex, and therefore the Board should resist any temptation to address issues other than those squarely presented by AECC's Petition and the Board's Decision initiating this proceeding.

5. Coal Shippers Bear the Cost of Maintaining the Railroads' Lines. So There Is No "Cost Sharing" Occurring with Other Shippers. BNSF argues that, by not being allowed to adopt its "emission limits," "cost sharing" will somehow result. The argument is illogical. There is no dispute that a shipper must bear all of the "honest, economical, and efficient" costs incurred by a railroad. *See BNSF Reply Argument at 29, citing 49 U.S.C. §10704(a)(2)*. However, a shipper may not be required to bear costs that are wasteful or are the result of inefficiencies. *E.g., Trainload Rates on Radioactive Materials, Eastern Railroads, 362 I.C.C. 756 (1980), aff'd sub nom. Conrail v. ICC, 646 F.2d 642 (D.C. Cir.), cert. denied, 454 U.S. 1047 (1981)*. If better profiling, better

⁹ UP, which in its Opening Comments sought to have the STB to decide the issues herein with due regard for UP's tariffs and practices (which of course are not at issue), and CSX, which argues in its Reply Comments that the Board should rule that railroads can impose any obligation they want in their tariffs unless the STB strikes down the requirement, apparently want the Board to address matters beyond BNSF's Tariff, although they are not entirely clear in those arguments. The Board would exceed the scope of the proceeding as defined by it if it were to address issues not addressed in BNSF's Tariff or in AECC's Petition or in the Board's Decision served December 1, 2009 herein.

railroad operations, or improved maintenance are performed, the coal shippers will bear all the costs incurred by BNSF and UP to solve any problems their shipments may cause. How do we know that? Of course, under the statute, unless the Board prescribes a lower rate, a railroad may charge "any rate." And, even if the Board does order a lower rate, it may not prescribe a rate below 180 percent of variable costs. As APPA, EEL, and NRECA showed in their April 30, 2010 Reply Comments (at 10-12), under the Board's costing methodology for coal rate cases, all of the railroads' maintenance and operating costs are born by complaining shippers. So, whatever the railroads' costs associated with transporting coal, the coal shippers will bear them, and no "cost sharing" will occur.

6. BNSF's Tariff and Filings Herein Have Not Informed Coal Shippers or the STB What BNSF Will Do If a Coal Car's Claimed "Emissions" Exceed BNSF's "Emission Limitations." BNSF admits that it "has not established an enforcement regimen for the coal dust standards." BNSF Reply Argument at 34. While UP and BNSF argue that it is not necessary for the Board or BNSF to know what BNSF would do to enforce its "emission limits," it is not clear what BNSF will do if a coal shipper's coal cars allegedly exceed those "limits."¹⁰ *Id.* In its Opening Comments, UP candidly stated that it, too, does not know what, if anything BNSF will do if a UP train exceeded BNSF's emission limits; UP stated it would object and immediately seek relief if BNSF were to attempt to stop a UP coal train from moving. But coal shippers, UP, and the STB should

¹⁰ We note that there is substantial evidence that the track devices BNSF uses to measure coal dust have been shown to be inaccurate and to measure other dust as well as coal dust. However, because they only purport to measure coal dust coming off the tops of railcars, they do not (and cannot) measure coal coming out of the bottom of railcars. Yet, it is obvious that coal coming out the bottom of a railcar is far-more likely to end up a railroad's track bed than is coal dust blowing off the top of a coal car that may be moving at 50 mph or more (without taking into account wind speed) and so may travel a long distance before hitting the ground.

not – indeed, we submit, may not -- be left unclear as to what BNSF will do to “enforce” its own standards; it is unreasonable by definition for a railroad to publish such an incomplete Tariff, and leave the Board and the coal shippers to guess at what it means and how it will be enforced, if at all.¹¹

This problem is exacerbated by the fact that UP argues that BNSF’s Tariff does not apply to UP traffic, even though UP trains will apparently be measured by BNSF’s dust-measurement devices. Moreover, UP asserted that, if BNSF tried to stop one of UP’s trains from proceeding, UP would immediately seek relief. If such relief is appropriate for a coal shipper whose coal is in a UP train, the relief is also appropriate for a coal shipper whose coal is in a BNSF train; after all, it is the same (PRB) coal, and could even be in the same cars.

7. BNSF’s Role as a Landowner Is Irrelevant; the Railroads May Not Shift Their Common Carrier Obligation to the Shippers, or Fail to Meet Their Obligation, Unless They Persuade the Board That Their Approach Is “Reasonable.” CSX (Reply Comments at 5) emphasizes what it considers to have been “mentioned only briefly by BNSF” (citing BNSF’s Opening Evidence and Argument at n.1), *i.e.*, that CSX “believes that BNSF’s rights as a property owner factor substantially in the determination of reasonableness.” Other railroads join in various versions of this argument, with BNSF and UP arguing that coal dust on their rights-of-way is a “trespass” (which we have

¹¹ While BNSF states that its “enforcement approach would turn on an individual common carrier shipper’s good faith efforts to comply with the standards,” BNSF Reply Argument at 34, BNSF also claims that 14 percent of the PRB coal trains have emissions that exceed BNSF’s limits. The Board cannot assume that, left to its own devices to determine what is compliance and how to enforce its Tariff, BNSF will not require oversight by the Board of its enforcement process and remedies for alleged violations.

already shown to be unsupported at law¹²), and with CSX analogizing to “littering” and “dump[ing] unwanted goods on CSXT’s land.” *Id.* at 5-6. The difficulty with all of these arguments is that trespassers, litterers, and illegal dumpers do not have a right to be on CSX’s property, but the shippers’ coal is, of course, on the property of BNSF, CSX, NS, and UP (and any other railroad) as a matter of right, with the consent of the railroads either under their common carrier obligation or as a matter of voluntary contract entered into by the railroad(s). The incidental loss of property (here, the coal), which may indeed be the result of railroad operations or insufficient maintenance of their tracks and track beds by the railroads, is not at a “trespass,” “litter,” or “dumping” for the simple reason that the shipper – *i.e.*, the customer – was not engaging in trespass, dumping or littering, but rather the shipper’s coal was on the railroads’ property, obviously through consent of the railroads (and statutory right to carriage). One cannot be guilty of “trespass” or “littering” or “dumping” if one has the consent of the landowner (here the railroad) or ships via one’s rights under law. In any event, it is the action of the railroad (or the mine), not the shipper as owner of the coal, that causes the coal to leave the rail cars.

¹² April 30, 2010 Reply Comments of APPA, EEL, and NRECA at 14 & n.12; 1 *Restatement of Law 2d* § 167 (“Unless a license is granted on the condition that the licensee shall pay for any harm which is done in its exercise, consent to enter a particular part of the land in a particular manner or at a particular point or for a particular purpose carries with it consent to such harm to the land and to the possessor’s interest in the persons and things on the land as is incidental to a careful exercise of the license”). Here, the “license” is the shipper’s statutory right to carriage of its coal, and, in any event, the Board’s ratemaking methodology, and the railroads’ statutory right to charge “any rate” unless a different rate is prescribed by the Board, together ensure that shippers pay for all of the costs of maintaining the railroads’ rights-of-way. Therefore, it is not possible for the shippers to be “trespassing” on the railroads rights-of-way simply because incidental amounts of their coal are present.

Moreover, CSX and perhaps the other railroads seem to want the Board to assume their role is that of "property owner."¹³ So, it is altogether too easy to throw around "trespass" or "littering" or "dumping" claims, which may belong "on the other foot," but which in any event appear to be irrelevant here.

Rather, the only issue is whether the shippers have the railroads' consent, or the statutory right to railroad carriage of their coal, or both – which of course they do. If so, the terms and conditions of that carriage must be "reasonable," as a matter of statute, as all parties appear to concede. If coal companies do not properly load a railcar with coal, or railroads do not maintain their tracks and track beds properly, or operate in a manner that causes some coal dust to escape the cars, those circumstances do not mean that the coal shipper, who is uninvolved, somehow bears responsibility for the actions of the railroad, the coal mine, or both. The railroads have simply cited no authority for that proposition, and there is none.¹⁴

The law is that a railroad may not shift liability to a shipper in the event of damages due to contamination resulting from a railroad's failure to perform its common carrier obligation. *E.g., Liability for Contaminated Covered Hopper Cars (Illinois*

¹³ In fact, their status is often not that; railroads often operate via easements, some of which, especially in the East, were prescriptive, *i.e.*, it was the railroad that initially trespassed on another property owner's property, and it acquired the right to operate over it only because of its "open and notorious" use of the property, a prerequisite to a prescriptive easement in many States.

¹⁴ Other parties have shown that the few, ancient cases cited by BNSF are inapposite, because they involve shippers' desire to have doors in grain cars installed to prevent leakage. *See, e.g.,* Reply Argument of Western Coal Traffic League and Concerned Captive Coal Shippers at 21-28 (*citing, inter alia, Chicago Bd. Of Trade v. Abilene & S. Ry.*, 220 I.C.C. 753, 761 (1937), and *In re W. Trunk Line Rules, Regulations, and Exceptions to Classifications*, 34 I.C.C. 554, 578 (1915)) and Arkansas Electric Cooperative Corporation's Reply Evidence and Argument (at 4-5)(*distinguishing same and In re Suspension of Western Classification No. 51*, 25 I.C.C. 442, 485-86 (1912)).

Central Railroad Company), ICC I&S Docket No. 9275, 10 I.C.C. 2d 154, 1994 ICC LEXIS 187, at *12-*30 (1994) (holding that railroad may not shift liability in the event of damages due to contamination in railcars where railroad was required to inspect and clean (if need be) railcar before loading grain into it). Here, coal dust finds its way onto the railroads' rights-of-way either because of railroad actions, actions of the coal mine that loaded the coal, or the wind (which is not the responsibility of any party). The coal shippers have no involvement in any possible scenario associated with coal dust blowing off the tops of rail cars, and therefore cannot be made liable for the actions of others.¹⁵ If no party's actions are responsible, the railroad has the responsibility to perform necessary maintenance, and the coal shippers obviously will be charged for maintenance expenses in their rates.

8. The Railroads' Own Actions Contribute to the Problem About Which They Complain. Finally, the Board should understand that the typical PRB coal shipper is shipping its coal in a 125- to 135-car unit train, under arrangements negotiated with the railroads, so as to move the largest amount of coal in the most efficient manner. The railroads impose a four-hour limit on loading each 125- to 135-car train, so as to maximize the railroads' efficiencies in the PRB, by loading the largest amount of coal for the largest number of shippers. Given the speed at which each train is loaded, some coal may end up on the sill (*i.e.*, the top edge of the sides of the rail car), and some of that coal may fall off the sill onto the railroads' right-of-way. So, the railroads' own directive to load the rail cars within four hours is a cause of some of the coal that ends up on the railroads' rights-of-way. Coal shippers, of course, have no part in the loading of the coal

¹⁵ *E.g.*, Reply Evidence and Argument of Western Coal Traffic League and Concerned Captive Coal Shippers at 24-25 (*citing* *Viz* Reply V.S. at 8-11).

or in the directive to load a 125- to 135-car train in four hours, so coal shippers should not be held responsible, or made to pay for spraying (or a penalty or both), because of the railroads' loading directions. Yet, the "benevolent rail carrier" (as one EEI member describes it) apparently believes that the coal shipper has responsibility to prevent coal from ending up on the sill of the rail car, despite the fact that the shipper is not present and the problem, if there is one, is due at least in part to railroad directives.

If most of this problem can be dealt with by the coal producers causing coal not to be on the sills, as well as "profiling" the loaded coal correctly, that is yet another reason why the STB should refuse to permit BNSF to enforce its "emission limits" in its Tariff, but instead state that it expects that the parties can further improve operations, if the railroads are flexible, so that BNSF's "emission limits" are unnecessary and therefore constitute unreasonable practices under within the meaning of 49 U.S.C. §§ 10702 and 11101.

Conclusion

In their Reply Comments, APPA, EEI, and NRECA showed that spraying coal is more expensive than simply doing necessary maintenance. Neither FRA nor the railroads have demonstrated in their Opening or Reply Comments that track maintenance cannot adequately maintain track and prevent derailments without also spraying the coal, and all the evidence shows that track maintenance is sufficient without spraying. (Therefore, any effort the railroads may make for the first time on Rebuttal to show that track maintenance alone would not be sufficient would therefore come entirely too late and should not be permitted.)

The solution to the presence of coal dust along the Joint Line and the Black Hills Subdivision is not to impose unprecedented obligations to comply with “emission limits” that are unproven, that have not been shown to be based on objective data, and that use devices whose locations and accuracy have not been shown to be appropriate and which may measure other emissions (such as locomotive emissions and other dust) in addition to coal dust from a given train. The Western Railroads have not shown that spraying coal would reduce the need for track maintenance by an amount that would justify the costs of spraying.

Accordingly, BNSF has not justified the extraordinary (but implicit) new obligation its Tariff would impose on coal shippers to spray their coal, and BNSF's “emission limits” in its Tariff are, therefore, an unreasonable practice within the meaning of 49 U.S.C. §§ 10702 and 11101.

For the reasons stated herein, (1) the Board should assert its authority over the lawfulness of BNSF's Tariff, and (2), given FRA's determinations about the causes of the 2005 derailments and (3) the lack of evidence that spraying coal would be cheaper or more efficient than simply performing routine maintenance of railroad track beds, the Board should conclude that BNSF's “emission limits” and the implicit requirement to spray coal before it can be transported on BNSF's Joint Line and Black Hills Subdivision constitute an “unreasonable practice” within the meaning of 49 U.S.C. §§ 10702 and 11101.

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Certificate of Service

I hereby certify that I have served, this 4th day of June, 2010, a copy of the

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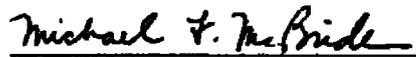
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