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## Coal Dust Control - Arkansas Electric Petition for Declaratory Order



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By David Gambrel

This is a continuation of the coal dust saga begun in the December 2010 and continued in the May 2011 issues of Coal Age. The saga centers around coal transported by rail out of the Powder River Basin (PRB) of Wyoming, and is focused on an attempt by Burlington Northern Santa Fe (BNSF) to set in place a procedure for controlling coal dust blown from the tops of open top hoppers.

Some shippers argue BNSF wants to make coal shippers pay the entire cost of prevention. Publicly-available information does nothing to refute this belief. Forcing coal shippers to have their loads sprayed with surfactant will no doubt result in less coal dust in the roadbed, and that will result in longer intervals between undercutting. That will reduce the cost of track maintenance, and shippers will pay for that reduction if BNSF continues on their current path.

### Petition for Declaratory Order

On August 12, 2011, the Western Coal Traffic League (WCTL) on behalf of the Arkansas Electric Cooperative Corp., filed a Petition to Reopen and for Injunctive Relief Pending Board-Supervised Mediation with the Surface Transportation Board (STB). Filings of support were made by NCTA, APPA, NRECA, EEI and CURE. At issue was the so-called "Revised Coal Dust Tariff," which refers to Item 100 of BNSF's Price List 6041-B, published July 20, 2011. Having found BNSF's initial attempt (Price List 6041-A) to force coal dust rules on PRB coal shippers unreasonable, the STB strongly urged BNSF to work cooperatively with coal shippers to find a reasonable substitute. It did not.

Instead, BNSF forged ahead on its own and published Price List 6041-B, which WCTL deems an unreasonable practice because (a) it fails to inform coal shippers of the penalties they face if they fail to comply with its terms, (b) all compliance costs are placed on coal shippers, (c) all liability for use of BNSF-mandated surfactants is placed on coal shippers, and (d) the tariff cannot be lawfully applied to UP shipments. WCTL claimed shippers were not given access to the results and procedures underlying the revised tariff compliance terms, and available materials concerning these results and procedures are fatally flawed.

### What WCTL Sought from the STB

Specifically, the Petition asked three things of the STB: (1) reopen the record on the coal dust tariff; (2) order STB-supervised mediation, and (3) stay or enjoin the Revised Coal Dust Tariff. In its response to the Petition, BNSF opposed all three. Even though BNSF seeks to have shippers pay every dime of cost for

rectifying their coal dust problem, it has consistently refused to enter into any meaningful dialogue with shippers concerning the development of the coal dust tariffs. This lordly approach to a business relationship with major coal customers has kept many shippers upset, and is probably responsible for prolonging a solution that all parties can accept.

WCTL believes the costs and benefits of coal dust mitigation should be shared fairly between BNSF and its PRB shippers. They believe shippers should be afforded access to BNSF's coal dust mitigation studies, procedures and data before being asked to incur expense and liability based on those studies, they should be told what penalties BNSF will impose for failing to meet any approved coal dust standards, and they should not be held liable for any damages resulting from the use of these standards. It seems like they have a pretty reasonable set of requests.

### The Facts As We Know Them

Let us for the moment travel back in time to May 2005. For several weeks heavy snow and rain had seriously affected rail and mining operations in the PRB. On May 14, a BNSF train derailed 15 cars at MP 75.3 on Main Line 1 headed eastward. On May 15, a Union Pacific (UP) train, also heading eastward on Main Line 1, derailed 29 cars of a 130 car loaded train. The UP derailment was about one mile east of NACCO junction, the turnout to the North Antelope and Rochelle mines. Basically, it had just left the coal



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mine.

Reporting on his inspection of the UP derailment, a Federal Railroad Administration (FRA) inspector concluded, "A break in the rail at a rail joint at the point of derailment ran 11 inches from a bolt hole to a field weld and then broke upward through the ball of the rail. The break allowed a portion of the rail to dislodge and caused the wheels of the 63rd head car in the train to derail. FRA has recommended prosecution of BNSF for civil penalties for failure to comply with CWR (Continuous Welded Rail) procedures: not noting required information on the web of the rail as required," and noted, "The BNSF track inspector had inspected this area on May 12, 2005, and noted no defects in the derailment area."

While the UP derailment was reported by BNSF, no FRA record of BNSF's 15-car derailment can be found. When the Department of Energy wrote about the derailment two years later, there was no mention of BNSF's CWR compliance failure. The "damaged track" was attributed to the accumulation of coal dust in the Joint Line roadbed from the point of derailment at Reno Junction to Bill, Wyo., a distance of 18 miles. The broken piece of railroad track reported by an FRA inspector had somehow become 18 miles of coal-dust-choked roadbed. The cause of the derailments was therefore switched from a railroad responsibility to a shipper responsibility.

### **Changing the Subject**

It was clear from the FRA report that the UP derailment was caused by a broken piece of CWR, and it is crystal clear the FRA held BNSF responsible for the break. The report said nothing about coal dust in the ballast, nor did it imply the problem was caused by a weakened road bed. Still, when BNSF reported to its stockholders the following month (Form 10-Q, June 2005), the cause of the derailment was reported as "the long-term accumulation of coal dust on this trackage which caused the ballast section to retain water and compromise track stability." No mention was made of the BNSF "failure to comply with CWR procedures."

Reviewing the rather sparse public record one wonders how BNSF's failure to comply with CWR procedures morphed into a dust control amendment to BNSF's coal tariff. One wonders how BNSF succeeded in getting the STB and the entire PRB coal industry focused on coal dust while they said nothing about FRA's allegation of failure to comply with CWR procedures. During the STB proceedings BNSF insisted so much of its records be kept secret that one has no choice but to wonder what they contain. The facts are simply not known, and it appears BNSF is in a hurry to act without allowing them to become known. Why?

One has to wonder why the trucking industry, under the regulations of the Federal Motor Carrier Safety Administration, must cover (tarp) their loads at their own expense, but their railroad competitors are well on their way to forcing their shippers to pay for controlling coal dust from trains. It would seem there are serious inconsistencies within the rail and trucking jurisdictions of the STB, or within the branches of Congress that regulate transportation.

### **Moving On**

No one argues that coal dust is not a problem. From the shippers' point of view the argument is over who should pay for the solution. In the collective mind of BNSF and perhaps other railroads it undoubtedly goes deeper. The railroad is their demesne, sacred ground upon which none may tread without permission. They will speak about it to no one who has not signed a contract, even though it may be to their own benefit in the long run to do so. Shippers may not like it, but BNSF has done business this way for decades, and are not likely to change soon.

WCTL had argued that reopening the coal dust case was appropriate because BNSF was not collaborative in developing the new tariff in violation of the March 2011 decision. While the Board had sought and even encouraged consensual resolution of disputes, their prior decision did not impose upon BNSF a regulatory obligation to consult with its shippers prior to issuing a new coal tariff dealing with coal dust suppression. Railroad industry watchers would have been happily shocked if BNSF had offered to negotiate with shippers a solution to the coal dust problem, but it surprised no one when they elected to choose the dictatorial route.

In a decision served November 22, 2011, the Board denied WCTL's request to reopen the proceeding in Docket 35305 and to institute mediation between BNSF and coal shippers regarding the BNSF new coal dust tariff. However, the Board will institute a new proceeding to consider the reasonableness of the tariff's "safe harbor" provision. This new declaratory order proceeding is titled "Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions," Docket No. FD35557. WCTL and BNSF were directed to file a proposed procedural schedule by December 12, 2011.

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