



Update on STB Coal Dust Proceeding and other Rail Regulatory Issues

National Coal Transportation Association
2010 Fall Meeting

Thomas Wilcox
GKG Law, PC
twilcox@gkglaw.com
202-342-5248

September 14, 2010

STB Coal Dust Proceeding

STB FD 35305, AECC – *Petition for a Declaratory Order*

- ◆ AECC asked STB in 10/09 to declare that coal dust emission standards in BNSF Tariff 6041, items 100 and 101 are an “unreasonable practice” under 49 U.S.C. 10702
- ◆ Remedy sought is to prohibit BNSF from imposing the standards on coal shippers
- ◆ Emission standards are the “Integrated Dust Value” (IDV.2), the successors to the IDV standard that was first revealed by BNSF at NCTA’s 2005 Fall meeting
- ◆ At request of the parties and others, STB opened up proceeding to wider participation

Coal Dust Proceeding – Overview

Cont'd

- ◆ 19 named “Parties of Record”
 - Virtually entire utility industry either individually or through groups/associations
 - NCTA is a POR and submitted an opening statement that included parts of Exponent Coal Suppressant Study; Also participated in the oral hearing on 7/29/10
 - USDOT, UP, CSX, and NS also PORs
- ◆ No other affected parties: communities, state agencies, environmental groups, coal mines, railcar manufacturers, surfactant or other suppression manufacturers
- ◆ BNSF preferred implementation date moved from August 1, 2010 to October 1, 2010

STB 7/29/10 Public Hearing

- ◆ Procedural Format
 - Three panels; DOT, BSNF & UP; Coal shipper groups and NCTA
- ◆ NCTA oral statement
 - NCTA's attempt in 2005-07 to facilitate an industry solution
 - Usefulness of Exponent coal dust study to the proceeding
 - Concerns and problems with IDV.2 standard identified by Exponent in NCTA study are still present
- ◆ The hearing lasted 5.5 hours; videos, PowerPoints, charts, graphs etc.
- ◆ Hearing video can be viewed at <http://www.stb.dot.gov/stb/audiomee.nsf>
- ◆ Transcript being finalized

Key Board Points and Questioning

◆ Elliott

- Why the sudden urgency to control PRB coal dust after decades of service?
- Is this a matter that can be resolved by the industry or via mediation, including STB-administered?
- If the science behind the standard is admittedly insufficient, then why is the standard before the STB?
- Would BNSF be amenable to a “safe harbor,” where spraying would be deemed in compliance with the standard in the short term?
- Why should the STB approve BNSF’s standard if UP may adopt a different standard?

◆ Mulvey

- Pursued explanation of what is the IDV.2 standard
- Would shippers and railroads agree to jointly fund a binding study conducted by an independent entity?

◆ Nottingham

- Would rail shipper witnesses stipulate that significant coal leaks from railcars and that this causes “negative externalities?”
- How will the standard be enforced if tariff contains no specific penalties? (“hammer” of stopping service)
- Railroads should be able to refuse to transport “leaking” railcars after “safe harbor,” sufficient advance notice, and time to stop leaks

What's Next?

- ◆ Mediation or STB-supervised mediation unlikely
 - Not much interest at the hearing from testifying parties
 - WCTL subsequently filed in support; BNSF and UP opposed
 - STB has not followed up publicly
- ◆ Industrywide negotiated solution also not likely in short term
- ◆ STB decision on the merits of the petition – seems most likely
 - One outcome: Allow standards to go into effect; leave cost shifting issues for rate cases and contract negotiations; or
 - Another: Declare BNSF emissions standards to be an “unreasonable practice”
 - ◆ Declare no emissions standard can be “reasonable” right now; or
 - ◆ Provide guidance for modified standard(s)
- ◆ UP is waiting for outcome to take its own steps
 - UP stated that UP would do something different than BNSF (including “pricing incentives” to encourage compliance)

Other STB Matters Relating to Coal Transportation

- ◆ Review of URCS costing system is on horizon
 - Drives STB rate jurisdiction and maximum rate levels
 - Influences analysis of potential rate relief
 - Potentially huge undertaking but important to coal shippers
- ◆ Oral argument is a staple in Elliott STB
 - AECC “paper barrier”/bottleneck proceeding (NOR 42104) 10/26
 - *Arizona Electric Power* coal rate case (NOR 42113) 9/28
- ◆ Little other action on coal rate case front
 - *NRG v. CSX* and *Seminole v. CSX* recently settled
 - *Western Fuels v. BNSF* remanded in part to STB on 5/11 to take another look at application of “Average Total Cost” methodology

Also Emanating from Inside the Beltway

- ◆ Railroads are doing well under the Obama administration
 - JOC Report: US Railroad bulk railcar and intermodal shipments highest in August since Fall of 2008
 - Freight railroads are receiving hundreds of millions from DOT through American Recovery and Reinvestment Act
 - ◆ Beneficiaries of Obama/DOT \$8 billion high speed rail obsession
 - ◆ TIGER grants that benefit freight railroads
 - Newly proposed \$50 billion transportation infrastructure proposal (paid for in part by energy taxes?)
- ◆ 25% rail investment tax credit is moving through Congress (S. 3749 introduced on August 5)
- ◆ Rail shippers are still waiting on 111th Congress
 - S. 2889, STB Reauthorization Act
 - ◆ Last public Senate action was in December, 2009
 - ◆ No House bill despite “optimistic” Oberstar in June
 - ◆ Rumors about bill language troubling for shippers
 - Railroad antitrust exemption repeal also in limbo
 - But: Senate Commerce Committee hearing on 9/15 (“Federal Role in National Rail Policy”)



Questions?

Thomas Wilcox
GKG Law, PC
twilcox@gkglaw.com
202-342-5248

September 14, 2010