



# *Coal Dust Legal Developments Update*

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# Presentation Outline

- BNSF 2009 Coal Dust Tariff
  - Utility Response
  - STB Decisions
- BNSF 2011 Coal Dust Tariff
  - Utility Response
  - STB Decision
- Current Status
- UP Coal Dust Tariff

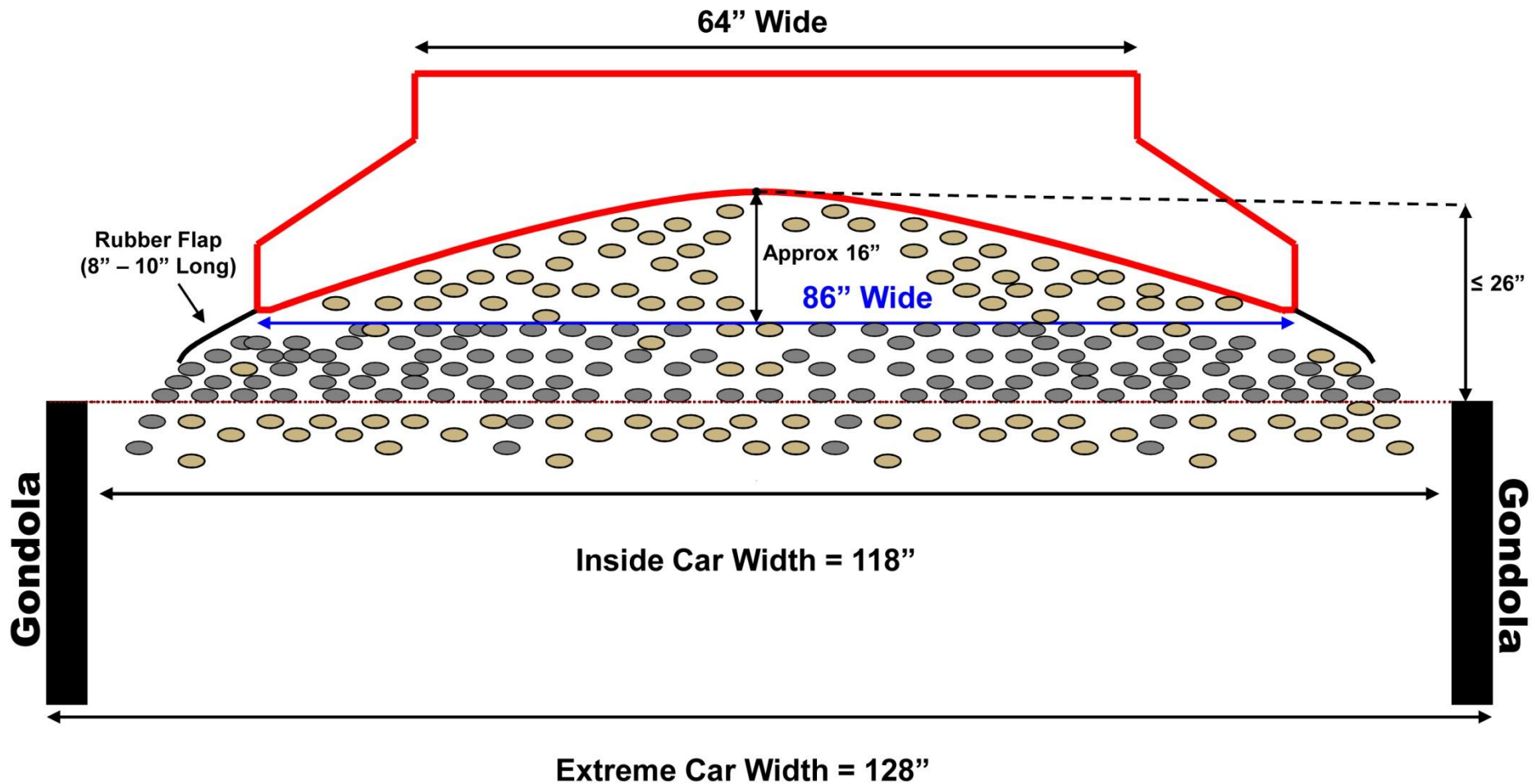
# BNSF Coal Dust Tariff Joint Line

- BNSF Price List 6041-B, Item 100
- Issued April 30, 2009
- Applies to trains moving over PRB Joint Line
- Contains train profiling and train emission standards

## Train Profiling Standards

- “Shipper shall ensure that all cars loaded with coal from any [Joint Line] mine origin . . . shall be profiled in accordance with BNSF’s published template entitled ‘Redesigned Chute Diagram’ located in Appendix A to this publication.”

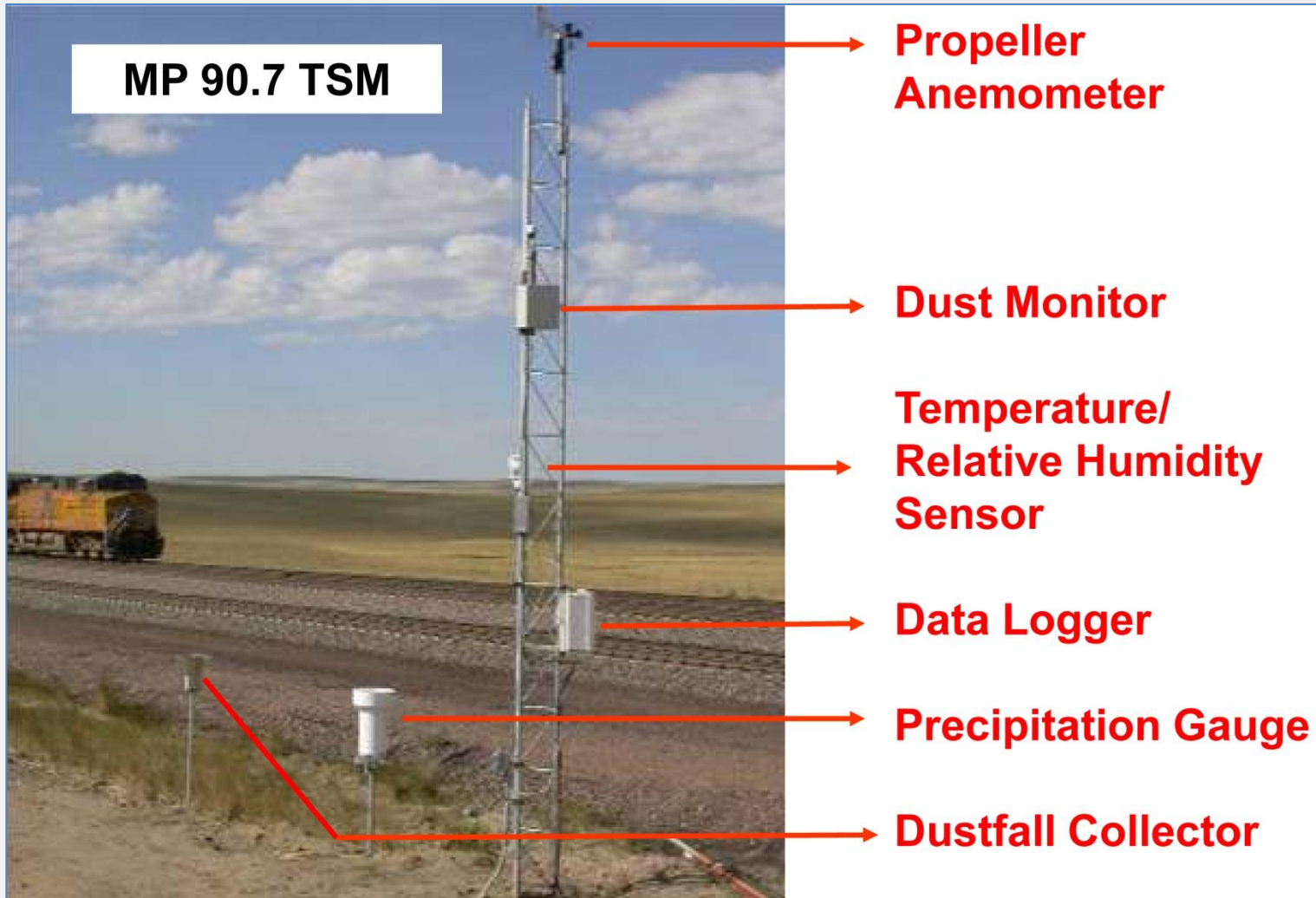
# Train Profiling Standards



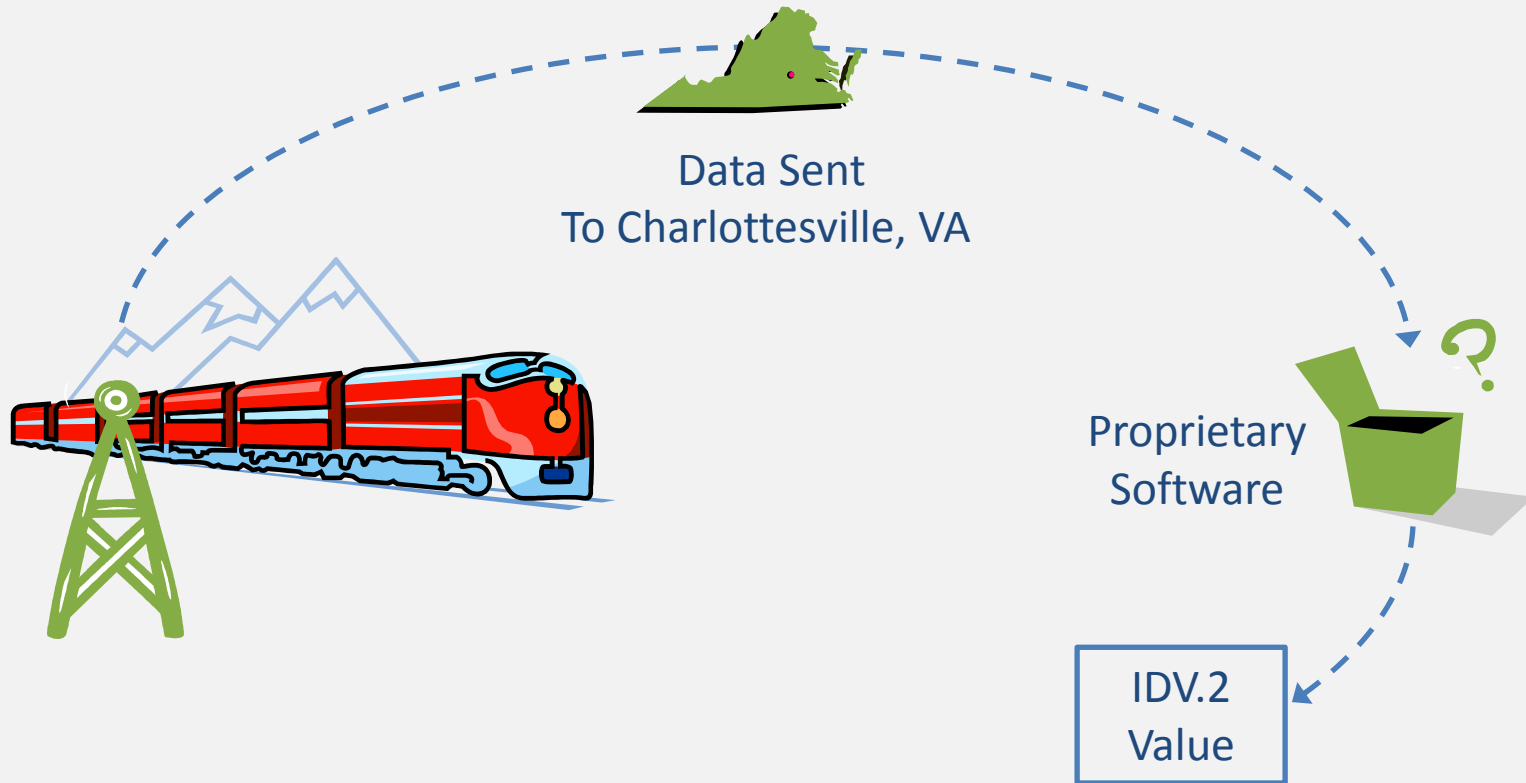
## Train Emission Standard

- “Effective November 1, 2009, Shipper shall take all steps necessary to ensure that Trains handling cars loaded with Coal from any mine origin that move over the Joint Line shall not emit more than an Integrated Dust Value (IDV.2) of 300 units in order to enhance retention of coal in rail cars.”
- “An IDV.2 unit is a measure of the volume of coal coming off of the coal train over its entire length.”

# Train Emission Standard



# Train Emission Standard





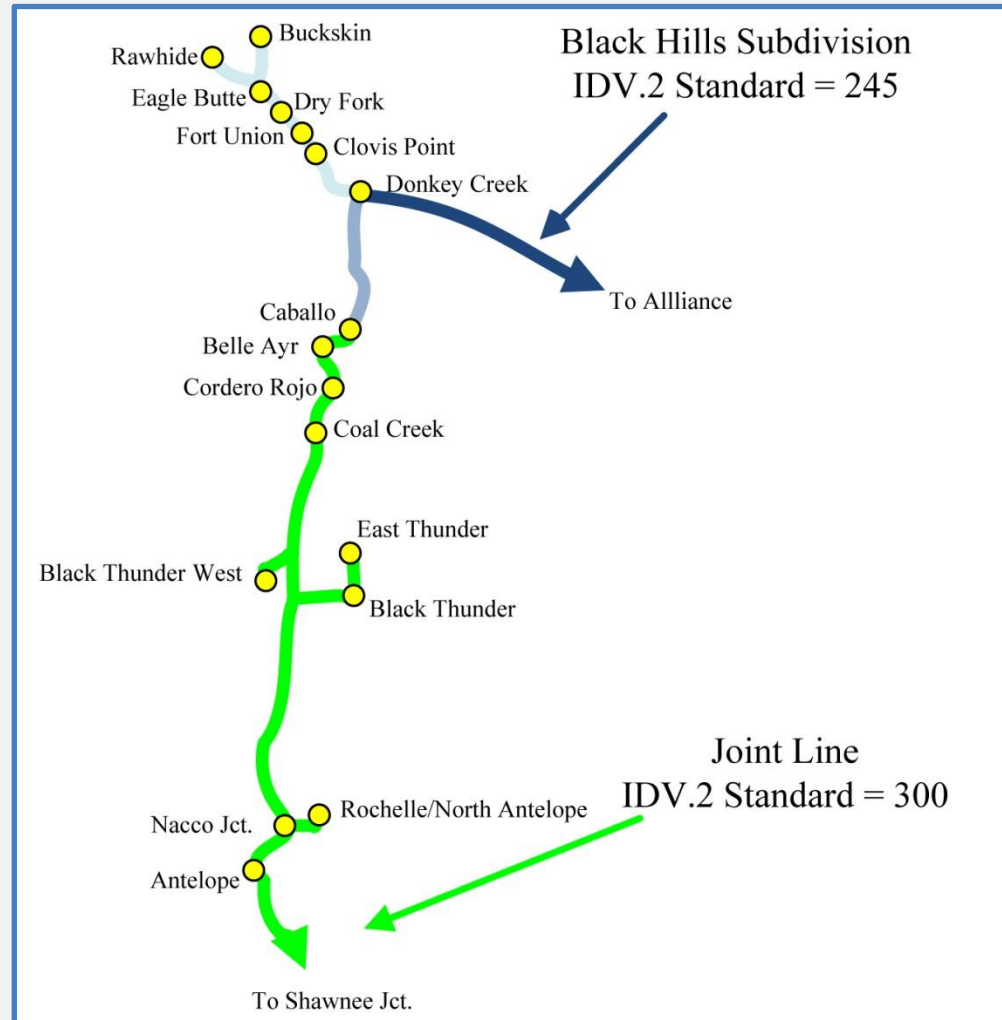
# BNSF Joint Line Operating Rule

- Joint Line Owned 50/50 by BNSF/UP
- BNSF controls Joint Line operations under the BNSF/UP Joint Line Agreement
- BNSF Adopts Joint Line Operating Rule (General Order 19)
- “[B]ecause UP operates over the Joint Line . . . we have issued a Joint Line operating rule, applicable to . . . UP, that incorporates the coal dust emissions standard set forth in BNSF’s [Coal Dust Tariff].” (V.S. Bobb, March 16, 2010, p. 6)

# BNSF Coal Dust Tariff Black Hills Subdivision

- BNSF Price List Book 6041-B, Item 101
- Issued May 27, 2009
- Applies to trains moving over BNSF's Black Hills Subdivision
- Establishes same train profiling requirements
- Establishes maximum IDV.2 emission standard of 245 units, effective Nov. 1, 2009

# BNSF Coal Dust Tariff



## STB PROCEEDINGS

- AECC files petition at STB in October of 2009 (Finance Docket No. 35305)
- Asks STB to declare that Coal Dust Tariff is unreasonable practice
- Proceeding is opened up for public participation
- WCTL, NCTA, EEI, APPA, NRECA, other shippers join-in, as does UP and other major railroads

## STB Proceedings

- BNSF supports Coal Dust Tariff, claims that its application can reduce PRB train coal dust emissions by 85%
- Shippers oppose Coal Dust Tariff, claim among other things that it is not supported by sound science
- UP supports “voluntary” compliance by its shippers with Coal Dust Tariff, but says it will oppose specified efforts by BNSF to enforce the Tariff/Operating Rule standards against UP shippers

## November 5, 2010 STB Decision

- Coal Dust Tariff emission standards initially slated to go into effect on November 1, 2009
- In October 2009, BNSF voluntarily extends this effective date, ultimately, to October 1, 2010
- In September 2010, AECC, WCTL, APPA, NRECA, EEI ask STB to stay October 1, 2010 effective date
- On November 5, 2010, STB denies stay request based on BNSF representations that BNSF will not enforce the tariff without first giving shippers 60 days advance notice

## November 5, 2010 STB Decision

- “In its reply, BNSF states that . . . it has committed to providing at least 60-days notice before undertaking any [enforcement] measures . . . . Hence, there is no imminent, irreparable harm to any shippers given that shippers face no current possibility of a sanction for noncompliance.” (p. 3)

## STB March 3, 2011 Decision Overview

- BNSF can adopt reasonable, cost-effective loading rules
- Coal Dust Tariff is not a reasonable, cost-effective loading rule and therefore its publication is an unreasonable practice
- STB urges parties to “collaborate to develop a solution” to coal dust train emissions (p. 14)



# STB March 3, 2011 Decision

## Reasons Why Coal Dust Tariff is Unreasonable

- IDV.2 standards not supported by sound science:
  - Side-by-side tests show “one monitor had 31% higher readings than the other” (p. 13)
  - Monitors do not measure “coal dust deposited on tracks” (p. 13)
  - BNSF failed to “provide the computer program it uses to convert E-Sampler data into IDV.2 values” (p. 13)

# STB March 3, 2011 Decision Reasons Why Coal Dust Tariff is Unreasonable

- No proven compliance method
- No “safe harbor” provision
  - “Under a safe harbor, shippers that use an approved emission control method contained in the tariff would be considered in compliance with the tariff” (p. 12)

# STB March 3, 2011 Decision

## Reasons Why Coal Dust Tariff is Unreasonable

- No stated enforcement provisions
- “[T]he tariff does not explain what consequences coal shippers would face if they are found to have tendered loaded coal cars to the railroad that subsequently released coal dust during transport.” (p.14)

## STB March 3, 2011 Decision Undecided Issues

- Application of BNSF Dust Coal Tariff/Operating Rule to UP trains
- Pass-through/sharing of compliance costs by allowance tariff or other means
- Liability for consequences of surfactant spraying
- Reasonableness of profiling requirements

## STB March 3, 2011 Decision Directions to Parties

- “Rather than using this decision to define a specific, government-approved approach to the problem at hand, we expect that railroads and their customers will collaborate to develop a solution that guarantees that loaded rail cars are fit for safe travel, while also ensuring that commodity spillage during transit is minimized.”  
(p.14)

## BNSF Revised Coal Dust Tariff

- BNSF Price List 6041-B, Item 100
- Issued July 14, 2011, Corrected July 20, 2011
- Applies to “all coal cars loaded at [PRB] mines by shippers whose coal transportation is subject to this Rules Book”
- Contains new emission/safe harbor standards

## BNSF Revised Coal Dust Tariff New Emission Standard

- “Effective October 1, 2011, shippers loading coal at any PRB mine must take measures to load coal in such a way that any loss in transit of coal dust from the shipper’s loaded coal cars will be reduced by at least 85 percent . . . .”
- “At least 30 days prior to loading of cars for shipment by BNSF, a Shipper shall provide BNSF with written notice of compliance efforts.”

# BNSF Revised Coal Dust Tariff New Safe Harbor Standard

- Shipper deemed to be in compliance with 85% reduction requirement, if it
  - Profiles trains in accordance with prior profiling standard and
  - Properly applies one of three “acceptable topper agents” or
  - Obtains BNSF’s approval to use another topper agent or another method of coal dust suppression



## BNSF-Approved Topper Agents

Topper Agents	Concentration Rate per Car	Total Solution Applied Per Railcar
Nalco Dustbind Plus	2.0 gal	20 gal
Midwest Soil-Sement	1.25 gal	18.75 gal
AKJ CTS-100	1.36 gal	15 gal

## BNSF's Asserted Rationale For Its Selection Approved Topper Agents

- “An acceptable topper agent is one that has been shown to reduce coal dust loss in transit by 85%. In recent tests carried out in the PRB, three topper agents [Nalco Dustbind Plus, Midwest Soil-Sement and AKJ CTS-100] meet this criteria when properly applied.” (BNSF Rules Book 6041-B, Revised Item 100)

## BNSF Super Trial

- “Recent tests” = Super Trial BNSF conducted in March-September 2010
- Super Trial consisted of calculating IDV.2 values on 1,518 trains treated with topical or body spray
- Super Trial also used “passive collectors” to collect dust emission data from 115 additional trains

## BNSF Super Trial

Topical Treatment	Topical Treatment Dust Reduction
Rantec Capture 3000L	73%
<input type="checkbox"/> Midwest SoilSement	92%
<input type="checkbox"/> AKJ CTS-100	85%
Freedom CTS-1000	75%
<input type="checkbox"/> Nalco DustBind Plus	93%

Source: Summary of BNSF/UP Super Trial 2010, Attachment 5.

# WCTL August 11, 2011 Petition Overview

- Requests Board take three actions:
  - Reopen Coal Dust Case (Finance Docket No. 35305)
  - Order BNSF to participate in non-binding mediation
  - Stay Revised Coal Dust Tariff pending mediation

## WCTL Request To Reopen

- STB may reopen the record in case at any time to address new evidence and changed circumstances
- BNSF's Revised Coal Dust Tariff constitutes new evidence and changed circumstances

## WCTL Request For Mediation

- STB has authority to order parties to participate in non-binding mediation
- Mediation necessary here because BNSF ignored Board directives to work collaboratively with its shippers to address coal dust emissions issues
- STB mediation can help avoid “Dust II” case

## Issues to Mediate

- Undecided issues from March 3, 2011 Decision:
  - Compliance costs; enforcement provisions; liability issues; profiling issues
- New issues:
  - Flaws in passive collector testing
  - Continued reliance on rejected IDV.2 monitoring system



## WCTL Request For Stay

- Party can obtain stay if it shows:
  - Likelihood of success on merits
  - Irreparable injury in absence of stay
  - No harm to opposing party
  - Public interest supports stay
- WCTL argued all criteria met

## Support For WCTL Petition

- NCTA, APPA, NRECA, EEI, CURE and AECC make filings at STB supporting WCTL Petition
- NCTA offers to facilitate Board-supervised mediation by arranging mediation sessions

## BNSF Reply

- STB orders BNSF to file a reply to WCTL's Petition
- BNSF files reply on Aug. 23, 2011 and opposes all WCTL relief requests
- However, BNSF states, it "is willing to commit, as it did in the prior coal dust proceeding, that it will give at least 60 days notice before it takes any enforcement action. . . . This commitment . . . eliminates any need for injunctive relief here." (p. 4)
- BNSF also states that it has adopted new Joint Line operating rule applying Revised Coal Dust Tariff standards to UP trains using the Joint Line

## UP Reply

- UP files reply on Aug. 26, 2011
- Like BNSF, UP opposes WCTL's Petition
- UP repeats its general support for coal dust mitigation rules, but opposes any application of those rules by BNSF "in a manner that interferes with Union Pacific's contractual or common carrier obligations to its customers." (p. 3)

## STB August 31, 2011 Decision

- STB denies request for stay
- Finds no threat of imminent irreparable injury based on BNSF's representation that it will give shippers 60 days advance notice of any enforcement actions
- Notes decision is consistent with result reached in its November 5, 2010 decision
- Also notes that shippers can obtain damages in "timely unreasonable practice complaint[s]" (p. 3).
- Says it will address WCTL's requests to reopen and for mediation in a separate decision

## Where Matters Stand Now

- WCTL's petition seeking reopening/mediation remains pending before Board
- WCTL's request is supported by all major coal shipper associations, opposed by BNSF and UP
- STB has denied WCTL's request to stay the Revised Coal Dust Tariff's effective date of October 1, 2011
- However, BNSF has informed the STB and its PRB shippers that it will not enforce the Revised Tariff without first giving shippers 60 days advance notice
- Ball is in the STB's court

## UP CIRCULAR 6603-C, Item 215

- Issued Sept. 8, 2011; effective Sept. 30, 2011
- Applies to UP PRB trains that are subject to contracts executed or issued prior to Sept. 30, 2011
- Shippers are “encouraged” to comply with BNSF’s Revised Coal Dust Tariff provisions
- If a Shipper “chooses” to comply, shipper is “requested” to notify UP by October 7, 2011

## UP Circular 6603-C, Item 216

- Issued Sept. 8, 2011, effective Sept. 30, 2011
- Applies to UP PRB trains subject to tariffs in effect on Oct. 1, 2011 and all contracts executed or issued after Sept. 30, 2011
- Shippers “must” comply with BNSF Revised Coal Dust Tariff standards “as soon as practicable”
- Shippers “must” notify UP of their compliance plans “no later than October 7, 2011”