



**THOMPSON
HINE**

March 2011

TRANSPORTATION UPDATE

STB Finds BNSF Coal Dust Tariff Unreasonable

BNSF Railway Company's coal dust tariff was deemed unreasonable in a long-awaited **Surface Transportation Board (STB) decision** released on March 3, 2011 that provides some guidance for shippers of coal from the Powder River Basin (PRB). BNSF's tariff mandated that coal trains leaving the PRB area should not exceed a certain airborne dust standard, and required shippers to take any steps necessary to meet the standard without providing direction on how to do so. BNSF has stated that the tariff is necessary because of maintenance problems and increased wash-out risk caused by accumulations of coal dust on the rail lines in the PRB area.

In its decision, the STB agreed that coal dust presents a "serious problem for operational integrity" along rail lines. It also agreed that BNSF could establish rules requiring shippers to take reasonable measures to address the coal dust problem, and that it was reasonable for BNSF to conclude that containing coal dust in railcars is better than having to remove it from the PRB rail lines. However, the STB found the particular measures adopted by BNSF in Tariff-6041-B unreasonable in violation of 49 USC § 10702 because the tariff creates too much uncertainty. There is no way for shippers to know if their coal trains meet the standard even after taking such steps as applying a chemical surfactant to the tops of loaded coal cars. In light of this finding, the STB expects shippers and the railroad to work in a collaborative fashion to revise the coal dust tariff. The STB also expressed disappointment that BNSF had not revised its tariff to include a "safe harbor," so it is likely that any revised tariff will include such a provision so that shippers who follow certain steps can be assured of tariff compliance.

In the wake of this new guidance from the STB, it is expected that other railroads may implement similar coal dust tariffs.

FOR MORE INFORMATION

For more information, please contact:

Karyn A. Booth 202.263.4108
Sandra L. Brown 202.263.4101
Jeffrey O. Moreno 202.263.4107

Karyn.Booth@ThompsonHine.com
Sandra.Brown@ThompsonHine.com
Jeff.Moreno@ThompsonHine.com

If you do not wish to receive future communications by email, please send an email with "unsubscribe" in the subject line to Unsubscribe@ThompsonHine.com.

This advisory may be reproduced, in whole or in part, with the prior permission of Thompson Hine LLP and acknowledgement of its source and copyright. This publication is intended to inform clients about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in it without professional counsel.

This document may be considered attorney advertising in some jurisdictions. Some of the design images and photographs in this document may be of actors depicting fictional scenes.

© 2011 THOMPSON HINE LLP. ALL RIGHTS RESERVED.

ATLANTA

CINCINNATI

CLEVELAND

COLUMBUS

DAYTON

NEW YORK

WASHINGTON, D.C.

ATTORNEY ADVERTISING