



# NATIONAL COAL TRANSPORTATION ASSOCIATION

8181 Arista Place, Suite 100, Broomfield, CO 80021

December 17, 2019

Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20423-0001

**Re: Finance Docket No. 36369 Association of American Railroads – Petition for Declaratory Order**

Dear Ms. Brown:

The National Coal Transportation Association (“NCTA”) submits the following comments in support of the petition for declaratory order FD 36369 filed by the Association of American Railroads (AAR) on November 27, 2019.

NCTA is a national organization consisting of electric utilities, coal producers, and entities that have an interest in the production and transportation of coal for the purposes of generating safe and reliable electricity for consumers nationwide. This group includes entities that produce, repair, and manage all facets of railcar components parts and systems, and also those entities that provide services and products for various operations and environmental compliance requirements at the power plant site. NCTA members have a continuing interest in the direct and ancillary costs of operating and maintaining a modern fleet of railcars to transport coal.

The AAR is seeking a declaratory order from the Surface Transportation Board (Board) to eliminate uncertainty pursuant to its authority under 5 U.S.C. 554 (e) and 49 U.S.C. 1321. AAR asks that the Board find that 49 U.S.C. 10501 (b) preempts the application of the Clean Water Act’s (CWA) discharge prohibition and the National Pollutant Discharge Elimination System (NPDES) permitting regime to discharges

incidental to the normal operation of rail cars in transit. This petition seeks an order from the Board that application of the CWA to regulate the leakage of coal dust from passing trains into navigable waters is preempted by the ICC Termination Act (ICCTA).

NCTA understands that the petition is directed to litigation that the State of Washington initiated against BNSF Railway (BNSF) in 2013 alleging violations of the CWA regarding coal cars in transit. Plaintiffs sought injunctive relief that would prohibit BNSF from operating rail cars that release any amount of coal or petroleum coke particles to jurisdictional waters and sought to require BNSF to append covers to all rail cars carrying coal, and replace the current fleet of coal cars with new cars that meet certain specifications. The case was settled in 2017 before addressing the issue of ICCTA preemption raised by BNSF.

Prior to this litigation, NCTA participated in the Board proceeding in 2009 that examined tariff rules established by the BNSF that were designed to limit the amount of coal dust that can be emitted by trains of open top hopper rail cars transporting coal over certain railroad lines leaving the Powder River Basin (PRB). The proceedings resulted in certain coal dust mitigation requirements established by the BNSF (and eventually adopted by the Union Pacific Railroad) that shifted the burden of controlling coal dust from rail cars in transit to the customer. After a challenge of the BNSF's Coal Loading Rule by several coal shippers and producers, including NCTA and its members, the Board upheld the enforceability of this rule subject to a minor modification known as the "safe harbor" provision in place since January 2014. This provision gave shippers a guarantee of compliance with the rule if coal cars were loaded in compliance with the BNSF's published load profile template and if one of eight approved-in transit dust suppressant agents were applied to the loaded cars, or if the shipper could demonstrate, together with load profiling, another method of coal dust suppression as long as it reduced coal dust losses in transit by 85%. Without this "guarantee of compliance," coal shippers could be subject to severe financial penalties, delays and associated increased costs.

While there is no known effort at this time to extend the CWA to apply to movements of coal outside of the litigation described in the AAR's Petition, NCTA members are greatly concerned that without the Board's declaratory order in the ICCTA issue that there exists risk and uncertainty regarding the potential application of the CWA discharge prohibition and a NPDES permitting regime.

NCTA coal shippers include utility customers who transport coal for the purposes of generating electricity. Utilities are of a unique class of shippers in that they have invested a significant amount of their own capital in the power plant infrastructure that supports the delivery of coal by rail, and in the ownership, leasing and control of massive fleets of privately owned rail car equipment. NCTA utility members also spend millions on annual maintenance and repairs of their rail infrastructure and rail car fleets. These rail car fleets represent about 45% of coal cars in service in the eastern U.S. and close to 90% of the coal cars in service in the western U.S.

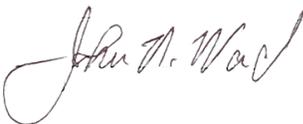
While the result of the Board's decision in Finance Docket No. 35557: Reasonableness of BNSF Railway Coal Dust Mitigation Tariff Provisions was not ideal as it shifted the burden of control and added significant unrecoverable costs to the coal shippers, the shippers and producers have nonetheless complied with the tariff provisions and have worked with the railroads to implement the ongoing mitigation and control of coal dust from rail cars in the PRB region. The additional cost of controlling coal dust from coal cars per the Board's decision continues to impact the delivered cost of coal for shippers, the marketability of coal supply for the producers, and ultimately impacts the utility energy strike price as it competes in the marketplace. However, having the safe harbor provision in place in the tariff and its guarantee of compliance is significant for shippers as it provides assurance that their coal supply can to be transported in a safe, reliable manner without the imposition of financial penalty pertaining to the CWA's discharge prohibition.

However, NCTA is aware that in 2016 a federal district court held that rail cars in transit are subject to CWA's discharge prohibition. The case was settled before the court

addressed whether the preemption provision of the ICCTA would preempt application of the CWA's discharge prohibition. There exists uncertainty regarding whether this provision would preempt application of the CWA's discharge prohibition and a new permitting regime administered by states and the U.S. EPA. Because a determination pursuant to the CWA's discharge prohibition was never established, there is a risk that owners or operators of rail cars in transit; specifically coal rail cars could face potential administrative, civil, or criminal liability under the CWA and be subject to potential injunctive relief directed at rail operations. Requiring the rail industry and coal shippers to obtain permits from each state through which they travel and comply with a variety of permit requirements is clearly contradictory with the Board's exclusive jurisdiction over rail transportation. The additional cost and risk of litigation to the shippers and carriers if they became subject to the CWA discharge prohibition would be considerable and could create a crippling effect in this industry that is already struggling with financial difficulties, competing energy market forces and public policy headwinds.

NCTA supports the AAR in its petition seeking a declaration from the Board that the application of the CWA's discharge prohibition to incidental discharges from rail cars in transit and the creation of new permitting regimes under the NPDES program be preempted. This would be a welcome action by the Board to the NCTA coal shipper community to have the protection and assurance that such an order would provide.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "John N. Ward".

John N. Ward  
Executive Director, National Coal Transportation Association  
8181 Arista Place, Suite 100, Broomfield, CO 80021  
Phone: 801-560-9801 \* Email: john@movecoal.org

Submitted: December 17, 2019