



NATIONAL COAL TRANSPORTATION ASSOCIATION

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May 22, 2020

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 reply 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 and coal-related products.

NCTA previously filed comments in this docket on December 17, 2019, and incorporates those comments by reference. NCTA supports AAR’s petition as a reasonable and appropriate step to ensure regulatory certainty for coal shippers and consumers. Prior regulatory proceedings on the “coal dust” issue have resulted in

industry standard operating procedures that provide ample environmental protection and a uniform approach to dust control measures.

That uniformity is threatened if the Surface Transportation Board (“Board”) fails to assert its authority under 5 U.S.C. 554 (e) and 49 U.S.C. 1321 to 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.

Regulatory certainty, including uniform application of compliance standards, is of paramount importance to NCTA members. Many of our members are recovering from bankruptcies and all of them are facing withering competition from other highly subsidized energy resources and a harsh regulatory environment. Organizations seeking increased regulations on coal have never been shy about publically sharing that their ultimate objective is the complete elimination of its use, while NCTA members and the users of coal nationwide maintain that it is an essential commodity providing reliable and affordable energy for the economic health and stability of the country.

Application of the CWA discharge prohibition and NPDES permitting program would provide an opportunity for coal opponents to create a patchwork of inconsistent regulation by states, inflicting massive complexity and costs on NCTA’s members who have already implemented costly dust mitigation practices as prescribed by the Board. Coal opponents may be motivated to seek these regulations not necessarily to protect against alleged environmental impacts of coal dust leakage, but rather for the purpose of inflicting costs that will further disadvantage coal generally. This inappropriate and unjustified use of regulatory authorities would significantly damage not only the coal industry, but also the railroad industry for which coal remains a major commodity and source of revenue.

Other commenters who have stated that the regulatory patchwork has not occurred yet are making an irrelevant argument. If CWA prohibitions and NPDES permitting

requirements are applied, a patchwork is inevitable given the wide range of state and local interests and water quality standards in the many areas crossed by the interstate rail network.

A federal court has already ruled that the CWA discharge prohibition applies to railcars in transit. This gives anti-coal activists the ability to bring lawsuits and seek wide-ranging injunctive remedies to regulate the operations of railroads, disrupt rail transportation, and inflict additional costs on coal as a resource. The fact that states have not yet issued NPDES permits for discharges from rail cars in transit is irrelevant to whether exercise of the Board's preemption authority is appropriate. The nature and scope of the NPDES permit program are well understood and not in dispute. The Board does not need to wait until actual permits are issued to know for a certainty that such permits would impose a patchwork of burdensome regulation that will vary from state to state.

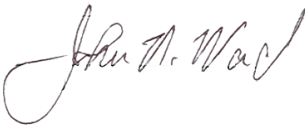
The Board should not wait for potentially irreversible damage to the coal industry to occur before taking action on this matter. The regulatory landscape surrounding coal is replete with examples of regulations that were later overturned (i.e. Mercury and Air Toxics Standards, as well as carbon emissions standards) but only after the industry paid for and implemented compliance measures that have inflicted permanent damage to the industry.

The Board clearly has authority to issue the requested declaratory order and often has outlined the scope of ICCTA preemption under 49 U.S.C. 10501(b). Two core functions of the Board are to implement the Rail Transportation Policy ("RTP"), as defined by Congress, and to serve as arbiter of disputes between different sectors of the rail industry. (See, e.g., Coal Dust Proceedings discussed in BNSF's Opening Comments at 9-17.) As set forth in AAR's Petition and Opening Comments, the application of the CWA to incidental discharges from rail cars would conflict with the Board's statutory role in governing relationships between carriers and shippers, guided by the RTP.

NCTA strongly encourages the Board to act now in issuing the requested declaratory order.

I certify that I have served copies of this document upon all parties of record in this proceeding, by email, consistent with 49 CFR 1104.12(a).

Respectfully submitted,



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