



**National Grain
and Feed Association**

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Before the U.S. Surface Transportation Board

STB Ex Parte No. 661 (Sub-No. 2)
RAIL FUEL SURCHARGES (SAFE HARBOR)

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Reply Comments
of
National Grain and Feed Association

October 15, 2014

The National Grain and Feed Association (“NGFA”) appreciates the opportunity to submit these Reply Comments in response to Opening Comments filed in with respect to the advance notice of proposed rulemaking issued on May 29, 2014 by the Surface Transportation Board (“Board”)

on whether the so-called “safe harbor” provision of the Board’s rail fuel surcharge rules should be modified or removed.

The NGFA, established in 1896, consists of more than 1,050 grain, feed, processing, exporting and other grain-related companies that operate more than 7,000 facilities and handle more than 70 percent of all U.S. grains and oilseeds. Its membership includes grain elevators; feed and feed ingredient manufacturers; biofuels companies; grain and oilseed processors and millers; exporters; livestock and poultry integrators; and associated firms that provide goods and services to the nation’s grain, feed and processing industry. The NGFA also consists of 26 affiliated State and Regional Grain and Feed Associations, has a joint operating and services agreement with the North American Export Grain Association, and has a strategic alliance with the Pet Food Institute.

The NGFA wishes to again commend the Board for instituting this proceeding, and stresses the importance of this matter to shippers and receivers of grains, oilseeds and processed agricultural products derived therefrom.

Predictably, rail carriers generally and collectively have responded to the Board’s inquiry by urging yet again that it retain the status quo, arguing that no changes be made to either the use of the Highway Diesel Fuel (HDF) index or the application of the “safe harbor” provision. Rail carriers generally argue that doing otherwise would undermine the “timeliness, accuracy, transparency, availability and neutrality” of the current approach. *Union Pacific Railroad (UP) Opening at 3.*

The NGFA continues to recommend that the Board not necessarily eliminate the use of the HDF index as a benchmark for measuring fuel costs. Further, after reviewing the railroad parties’ filings, the NGFA is not dissuaded from its Opening Comments’ strong recommendation that the Board either should eliminate or significantly modify the safe harbor rules so as not to immunize rail carriers that cannot adequately demonstrate a reasonable nexus between their fuel surcharge formulas and the net internal incremental fuel costs actually incurred.

Several railroad parties seemingly attempt to justify their position in this proceeding urging that the Board maintain the status quo based upon the view that it “has never expected or required fuel surcharges to recover a railroad’s fuel costs with absolute precision.” *BNSF at 2.* That is

not what the NGFA or other shipper organizations are advocating. Rather, we are urging the Board to reassess the safe harbor associated with the HDF index to ensure that individual carriers' fuel surcharges maintain the reasonable nexus to the index sought by the Board, and to empower the Board to take action when they don't.

Railroad parties also contend that the divergence between the HDF index and the net incremental fuel costs actually incurred by the carriers is an aberration, limited largely to the period of highly volatile diesel fuel prices occurring from 2006-10. *BNSF Railway Opening at 7*. However, that assertion is belied by evidence submitted in the Opening Comments of the NGFA, U.S. Department of Agriculture (USDA), National Industrial Transportation League (NITL) and other shipper parties. Indeed, the NGFA and USDA documented that from the second quarter of 2007 (when the Board's 2007 fuel surcharge decision became effective and the HDF index was implemented and granted safe harbor status) through the fourth quarter of 2012, the average quarterly growth in fuel surcharges assessed on grain shipments amounted to more than \$300 per car. That contrasts with data submitted by rail carriers to the Securities and Exchange Commission that showed an average growth in fuel costs of less than \$200 per car over the same time period. On average, this translates into a nearly \$120-per-car – or 62 percent – increase in rail fuel surcharges over-and-above the actual rail fuel costs reported on an industrywide basis for the eight-year period. Similarly, NITL provided information in its Opening Comments showing the disparity between rail fuel surcharge revenues garnered versus the fuel cost incurred by the four major U.S. Class I carriers for the period from the fourth quarter of 2007 through the first quarter of 2014. *NITL Opening at 7*.

Further, the NGFA believes the approach implemented by the Board to prevent a rail fuel surcharge program from becoming a “profit center” for a rail carrier needs to accommodate the potential for future periods of fuel-price volatility – when the risk of “overcharges” may be most acute.

Meanwhile, BNSF Railway asserts that “many shippers...strongly prefer a transparent and credible fuel surcharge mechanism to simplify their accounting processes” and argues that eliminating the safe harbor could “push railroads to consider eliminating fuel surcharges or use their internal fuel price data as the basis for calculating fuel surcharges instead of the HDF index,

thus eliminating the transparency that shippers have strongly desired and leading to more uncertainty regarding railroads' fuel cost recovery mechanisms." *BNSF Opening at 3.*

The NGFA does not agree. Instead, we believe that retaining the HDF index, but also requiring rail carriers to provide additional information to the Board and the public on their actual internal incremental fuel costs, is a reasonable safeguard and should not dissuade carriers from utilizing the HDF index to the extent a reasonable nexus exists between the two. Simply put, the NGFA believes requiring additional information could provide a reasonable and appropriate check-and-balance to monitor whether carriers are instituting fuel surcharges that over-recover the actual incremental fuel costs incurred.

This additional reporting would not be unduly burdensome. In its Opening Comments, the NGFA noted that railroads currently, in their filings of Quarterly Reports of Rail Fuel Surcharges, report the following data: 1) total fuel cost; 2) total gallons of fuel used; 3) total increase or decrease in the cost of fuel; 4) total revenues from fuel charges; and 5) revenue from fuel charges on regulated traffic. The NGFA urges the Board as part of this proceeding to require further delineation of each of these data sets by major commodity group (e.g., agricultural products, chemicals, coal, etc.).

In addition, the NGFA reiterates its previous recommendation that the Board require reporting of more granular, specific information by rail carriers within their filings of Quarterly Reports of Rail Fuel Surcharges for each major commodity group (e.g., agricultural products, chemicals, coal, etc.), as follows: 1) total fuel costs already recovered through their respective base-rate structures; 2) the difference between internal fuel costs recovered through base-rate structures and the amount collected through fuel surcharge revenues; and 3) any other relevant information that would limit, if not circumvent, the need to file a complaint under 49 U.S.C. § 10702(2) in order to ascertain whether a fuel surcharge formula that relies on the HDF Index is enabling the carrier to recover no more than its incremental incurred fuel costs.

The data provided through Quarterly Reports of Rail Fuel Surcharges should make determining whether and by how much a rail carrier's fuel surcharge program is over-recovering fuel costs more transparent than it is today. Conversely, relying on annual R-1 reports or lengthy rate complaints to gauge the reasonableness of fuel surcharge programs with the actual cost of fuel will insulate rail carriers from compliance with the Board's directive.

Further, given that rail carriers closely track their fuel expenses and publish fuel prices on a quarterly basis, we believe they easily could do so monthly. Requiring railroads to disclose their internal strike prices in their updated fuel surcharge formulas also would improve the transparency of their fuel surcharge programs.

Providing for more transparency in railroad-specific fuel surcharges would encourage better alignment between carriers' individual fuel-price component with other variables in the railroad's fuel surcharge programs, since those formulas are calibrated based upon railroad-specific fuel consumption rates and railroad-specific strike prices.

Finally, we reiterate that in this proceeding, the Board's paramount objective should be to prevent, to the maximum extent possible, fuel surcharges from becoming profit centers and sanctioning over-recovery of net incremental additional fuel costs actually incurred by carriers. If the latter occurs, the Board should be empowered to direct railroads to promptly refund overcharges to their rail customers.

Conclusion

The NGFA reiterates its recommendation that the safe-harbor standing currently accorded to the HDF index either be eliminated or modified significantly so as not to immunize railroads from responsibility and liability if they overcharge rail customers for the incremental fuel costs actually incurred by the carrier. We recommend additional, transparent reporting by carriers in the Quarterly Report of Rail Fuel Surcharges to enable the Board and rail customers to better track whether the objective of preventing unreasonable fuel surcharges is being achieved.

The NGFA appreciates the Board's consideration of the views and recommendations expressed herein, and looks forward to participating in further discussions on this important matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Randy Gordon". The signature is written in a cursive, flowing style.

Randall C. Gordon
President