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March 31, 2011

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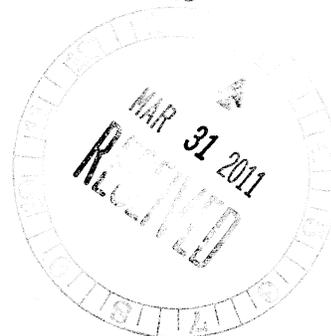
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VIA HAND DELIVERY

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001



Re: STB No. 42120, Cargill, Incorporated v. BNSF Railway Company

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding, please find an original and 10 copies of Cargill, Incorporated's Motion to Compel Discovery. Also enclosed for filing are three (3) copies of a compact disc containing the filing.

Please date stamp the extra copy of this cover letter and the enclosed filing and return them to our messenger. Thank you for your attention to this matter.

Respectfully submitted,

John H. LeSeur
An Attorney for
Cargill, Incorporated

Enclosures

cc: Counsel for BNSF Railway Company

229081

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CARGILL, INCORPORATED)
)
 Complainant,)
)
 v.)
)
 BNSF RAILWAY COMPANY)
)
 Defendant.)



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MOTION TO COMPEL DISCOVERY

CARGILL, INCORPORATED

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Dated: March 31, 2011

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CARGILL, INCORPORATED)	
)	
)	
Complainant,)	
)	
v.)	Docket No. 42120
)	
BNSF RAILWAY COMPANY)	
)	
)	
Defendant.)	
)	

MOTION TO COMPEL DISCOVERY

Pursuant to 49 C.F.R. § 1114.31, Complainant Cargill, Incorporated (“Cargill”) files this Motion to Compel Discovery from the Defendant BNSF Railway Company (“BNSF”). In support of this Motion, Cargill states as follows:

BACKGROUND AND SUMMARY

Cargill’s Complaint alleges, *inter alia*, that BNSF’s collection of fuel surcharges on Cargill’s common carrier traffic constitutes an unreasonable practice “because the general formula . . . [used] to calculate [those] fuel surcharges bears no reasonable nexus to, and overstates, the fuel consumption for the BNSF system traffic to which the surcharge is applied.” *Id.* at ¶ 6 (“Fuel Consumption Count”). Cargill’s Complaint also alleges that BNSF’s fuel surcharge collections on its common carrier traffic constitute an unreasonable practice because BNSF is “extract[ing] substantial

profits over and above its incremental fuel cost increases for the BNSF system traffic to which the surcharge is applied.” *Id.* at ¶ 7 (“Profit Center Count”).¹

The Board issued an order on January 4, 2011 directing that discovery in this case could commence. Cargill has served two sets of discovery requests on BNSF (dated January 11, 2011 and February 1, 2011). Copies of these requests are attached in *Appendices 1* and *2*. Cargill’s discovery inquiries consist primarily of requests for production (“RFP”) of documents. These requests seek information in BNSF’s possession directly related to Cargill’s Fuel Consumption and Profit Center Counts, including:

- Documents discussing how BNSF developed the component parts in the challenged mileage-based fuel surcharge formula, including studies and analyses BNSF relied upon when it first promulgated this formula (RFP Nos. 3-7);
- Documents discussing any considered updates, or changes made, in the initial formula design, including BNSF’s publication of the rebased mileage fuel surcharge (RFP Nos. 8, 18-23);
- Documents containing locomotive fuel cost and fuel consumption data and analyses (RFP Nos. 12, 13, 15-17, 29-36, 44);
- Documents addressing fuel surcharge revenues and profitability (RFP Nos. 10, 11 and 14);

¹ Cargill’s petition asking the Board to reconsider its decision to dismiss a third count in its Complaint (¶ 8, double-recovery) is pending before the Board.

- Documents containing traffic, revenue, and fuel surcharge data for shipments subject to the assailed fuel surcharges (RFP Nos. 24-28, 37-43);
- Documents produced, or related to, other litigations or proceedings involving claims that BNSF was collecting fuel surcharges in excess of its actual incremental fuel cost increases (RFP Nos. 45-53); and
- Documents relating to BNSF's use of a different mileage-based step-function formula for its coal traffic (RFP No. 9) and documents relating to BNSF's review of mileage-based fuel surcharges used by other rail carriers (RFP No. 54).

BNSF served its responses to these requests on February 1, 2011 and February 15, 2011. Copies of these responses are attached in *Appendices 3* and *4*. BNSF's responses start out by identifying 29 separately numbered "General Objections." Next, in response to each of Cargill's individual document production requests, BNSF incorporates these 29 "General Objections," along with additional specific objections, followed by a representation in some (but not in all) cases that "subject to and without waiving its specific and general objections" BNSF may produce some requested documents or responses.²

BNSF's "may produce" responses constitute a classic example of the long-discredited "hide-the-ball" strategy because BNSF has said it may produce responsive

² See BNSF RFP response Nos. 1, 3-8, 10-20, 22, 29-33, 35-37, 42-45, 47, 49, 50-51, 53-54.

documents, but has piled on so many opaque objections that it can pick and choose, *sub silentio*, what documents to produce:

This type of answer hides the ball. It leaves the [opposing party] wondering what documents are being produced and what documents are being withheld. Furthermore, it permits the defendant to be the sole arbiter of that decision.

Athridge v. Aetna Cas. & Sur. Co., 184 F.R.D. 181, 190 (D.D.C. 1998). In response to other document production requests, BNSF has cited its array of objections as the basis for objecting to any production.³

Cargill has endeavored to obtain additional information from BNSF on what BNSF plans to produce⁴ and, for some requests, BNSF provided some additional information but, for the most part, BNSF has not agreed to limit its plethora of objections. In order to facilitate proper discovery, Cargill respectfully requests that the Board enter an order overruling nine of BNSF's most egregious general objections. Cargill also requests that the Board direct BNSF to produce documents in response to several requests where BNSF has stated it will not produce any responsive documents.⁵

³ See BNSF Responses to RFP Nos. 9, 21, 23-28, 34, 38-41, 46, and 52.

⁴ Cargill has engaged in two meet and confer sessions with BNSF concerning BNSF's responses to Cargill's discovery requests and also engaged in other follow-up communications with BNSF concerning these responses.

⁵ Cargill notes that to date BNSF has produced documents responsive to only one of Cargill's discovery requests, but that response appears to contain extensive train record data.

ARGUMENT

The Board's discovery rules follow "generally those in the [Federal Rules of Civil Procedure]." *Simplified Standards for Rail Rate Cases*, STB Ex Parte No. 646 (Sub-No. 1) (STB served Sept. 5, 2007) at 68-69. Consistent with the Federal Rules, the Board's discovery rules afford parties "broad" rights⁶ to obtain discovery "regarding any matter . . . which is relevant to the subject matter involved in a proceeding" (49 C.F.R. § 1114.21(a)), subject, upon a proper showing, to appropriate protective conditions (*id.* § 1114.21(c)).

Also, as particularly pertinent here, both the Board and federal courts have taken a dim view of parties that engage in hide-the-ball discovery tactics. *See, e.g., Athridge*, 184 F.R.D. at 190 (condemning the use of hide-the-ball tactics in discovery in federal court proceedings);⁷ *Trailer Bridge, Inc. v. Sea Star Lines, LLC*, STB Docket No. WCC-104 (STB served Oct. 27, 2000) at 8 (condemning the use of hide-the-ball tactics in discovery in STB proceedings).

⁶ *Id.* at 69.

⁷ *Accord Kinectic Concepts, Inc. v. Convatec Inc.*, 268 F.R.D. 226, 248-249 (M.D. N.C. 2010); *Howard v. Sweetheart Cup Co.*, No. 00 C 648 (N.D. Ill. June 27, 2001) 2001 WL 721765 at *2-*3.

I.

**THE BOARD SHOULD OVERRULE BNSF'S
GENERAL OBJECTION NOS. 1, 6, 10, 13, 15, 22-23, AND 28**

● **General Objection No. 6.** In its General Objection No. 6, BNSF objects to producing any “information relating to BNSF’s internal management cost system or information derived from BNSF’s internal management cost system” on grounds that the requested information is not “relevant.” BNSF repeats this objection in responding to individual Cargill requests seeking documents related to BNSF’s analyses of locomotive fuel consumption,⁸ analyses of locomotive fuel costs,⁹ analyses of fuel surcharge profitability,¹⁰ and documents relating to BNSF’s development of the assailed mileage-based fuel surcharges.¹¹

BNSF’s management cost objection should be overruled in this case. In prior cases, carriers have either produced relevant fuel consumption studies, or been ordered to do so.¹² Such studies have never been deemed to involve “management costs.” Similarly, in cases where, as here, profitability is relevant, governing precedents

⁸ See RFP Nos. 12, 15

⁹ See RFP Nos. 13, 16, 17

¹⁰ See RFP Nos. 10, 14.

¹¹ See RFP No. 6.

¹² See, e.g., *Tex. Mun. Power Agency v. Burlington N. and Santa Fe Ry.*, 6 STB 573, 635 (2003) (referencing carrier fuel consumption study produced during discovery); *Omaha Pub. Power Dist. v. Burlington N. R.R.*, ICC Docket No. 38783 (ICC served Aug. 1, 1983) at 2-6 (ordering defendant carrier to produce “reports, tests or analyses . . . of locomotive fuel usage”).

do not permit carriers to hide behind a “management cost” defense to block discovery concerning a carrier’s internal calculation of the underlying profitability metrics – *i.e.*, costs and revenues.¹³

Overruling BNSF’s management cost objection is particularly critical in this case. If allowed to stand, BNSF’s objection would prevent Cargill, as well as the Board, from obtaining access to documents and information that may show, among other things, that BNSF’s management knew that its fuel surcharges were being used as a profit center; that the fuel consumption studies, if any, BNSF relied upon in setting its fuel surcharges were unsound; and that BNSF deliberately failed to inform this Board, and the public, that its fuel surcharges were substantially over-recovering its incremental fuel cost increases. The Board should not permit BNSF to evade production of such compellingly relevant documents.

- **General Objection No. 1.** In its General Objection No. 1, BNSF objects to producing documents that “contain confidential and commercially sensitive

¹³ See, e.g., *Increased Rates on Coal, L&N R.R. v. Louisville and Nashville R.R.*, ICC Docket No. 37063 (ICC served Aug. 22, 1990), 1990 WL 287825 at *1 (ordering the defendant carrier to produce internal management cost documents relevant to the “calculation of costs for the purpose of [developing] profitability analyses”); *Western Fuels Ass’n, Inc. v. Ill. Cent. Gulf R.R. Co.*, ICC Docket No. 40127 (ICC decided May 7, 1987), 1987 WL 98430 at *3 (ordering the defendant carrier to produce internal management cost data concerning “costs” and “revenues”); *San Antonio, Tex. v. Burlington N. R.R.*, Docket No. 36180 (ICC served Dec. 5, 1986), 1986 ICC Lexis 56 at *21-22 (defendant carrier ordered to produce internal management cost data relating to traffic profitability); *Ariz. Elec. Power Coop., Inc. v. Atchison, Topeka and Santa Fe Ry.*, ICC Docket No. 37437 (ICC served Oct. 23, 1986) at 5 (same).

information . . . relating to third parties.” *Id.*¹⁴ This objection should be overruled because the Board has entered a protective order in this case that calls for the production of confidential third party data. *See* Decision served June 24, 2010 at Appendix ¶ 7 (“[e]ach party is ordered to produce to the other party documents or information which, because of confidentiality provisions, cannot be produced without a Board order”).¹⁵

At the meet and confer sessions, BNSF stated that in some instances it planned on redacting the names of specific shippers from documents or taking other actions to redact information that could be used to identify specific shippers. Cargill has no objection to BNSF’s prudent use of redactions so long as Cargill can properly utilize the redacted information.

• **General Objection No. 10.** In its General Objection No. 10, BNSF objects to producing documents or information relating to specific shippers or specific movements on grounds that these documents or information are not relevant. *Id.*¹⁶ This objection clearly lacks merit. Many of Cargill’s document production requests seek clearly relevant information that may involve specific shippers or specific movements.

¹⁴ BNSF repeats this general objection in its specific objections to RFP Nos. 6, 10, 11, 12, 13, 15, 16, 17, 23, 26, 27, 28, 37, 38, 39, 45, 46, 47, 49 and 54.

¹⁵ *Accord Carolina Power & Light Co. v. Norfolk S. Ry.*, STB Docket No. 42072 (STB served Aug. 26, 2002) at 6 (purpose of protective order is to facilitate exchange of confidential information); *Ashley Creek Phosphate Co. v. Chevron Pipe Line Co.*, ICC Docket No. 40131 (Sub-No. 1), 1991 WL 108073 at *6 (same).

¹⁶ BNSF repeats this general objection in its specific objections to the requests referenced in footnote 14, above.

See, e.g., RFP Nos. 37, 38, 39 and 41 (seeking specified movement-specific traffic and revenue data); RFP Nos. 12, 15, and 17 (seeking fuel consumption data).

As discussed above, Cargill does not object to BNSF's redaction of the names of specific shippers in produced data so long as the redacted data can be practically used by Cargill. However, obtaining movement-specific traffic and revenue data is critical to Cargill for purposes of calculating BNSF's incremental fuel costs and BNSF's fuel surcharge revenues. Also, movement-specific data is likely to be responsive to most, if not all, of Cargill's other requests concerning fuel consumption and surcharge profitability analyses.

- **General Objection Nos. 13, 15, 22 and 23.** In these repetitive objections, BNSF objects to producing any documents relating to BNSF's rebased mileage fuel surcharge set forth in BNSF Rules Book 6100-A, tariff item 3376, section B. As Cargill has explained in detail in its letters to the Board dated February 14, 2011 ("*February 2011 Letter*") and March 4, 2011 ("*March 2011 Letter*"),¹⁷ BNSF published this new fuel surcharge tariff item after Cargill filed its Complaint, and later announced that it would be applying the new tariff item to traffic encompassed in Cargill's Complaint starting in March of 2011. Cargill's position was that this new tariff publication was encompassed within its Complaint; BNSF disagreed; and to address

¹⁷ Copies of these letters are appended in *Appendix 5*.

BNSF's asserted construction, Cargill filed a supplement to its Complaint to include a specific reference to item 3376, section B.

The Board should overrule BNSF's General Objection Nos. 13, 15, 22 and 23 because item 3376, section B is specifically included in the Supplement to Cargill's Complaint, so discovery concerning it is clearly permitted. Moreover, both item 3376, section B, and the tariff item that Cargill expressly referenced in its initial Complaint – item 3375, section B in BNSF Rules Book 6100-A – utilize a “1 to 4” step function; the fuel surcharge increases by \$0.01 per car-mile for each \$0.04 per gallon increase in the On-Highway Diesel Fuel (“HDF”) prices above a stated strike price. Documents related to BNSF's continued decision to rely on this step function clearly are relevant to the issues raised in this case even if Cargill had not amended its Complaint to expressly include item 3376, section B.

● **General Objection No. 28.** In its General Objection No. 28, BNSF objects to producing information or documents created “after Cargill filed its complaint on April 19, 2010.” This objection should be overruled because, as Cargill emphasized to the Board in its *February 2011 Letter* and in its *March 2011 Letter*, Cargill's Complaint applies to shipments moving *pendent lite*, and it is clear that BNSF has created relevant responsive information and documents after April 19, 2010, including, for example, records responsive to Cargill's traffic data requests for shipments moving after

April 19, 2010¹⁸ and requests related to BNSF's rebased fuel surcharge tariff item 3376, section B,¹⁹ which went into effect after April 19, 2010. *See February 2011 Letter* at 1-2. Cargill suggests an "end-date" for BNSF document creation be set at March 1, 2011 and that BNSF be precluded from utilizing in this case any discoverable documents created after that date.

In its General Objection No. 28, BNSF also objects to producing any information or documents created prior to January 1, 2005. Cargill's Instruction No. 11, requests that, unless otherwise specified in a particular request, responsive information or documents should be those created on and after January 1, 2003. BNSF explained at the meet and confer sessions that the January 1, 2005 cut-off date was selected because it was one year prior to the initial effective date of its item 3375 mileage-based tariff item (on January 1, 2006).

At the meet and confer sessions, Cargill explained that it had selected the January 1, 2003 date as it was six months prior to the date BNSF first began publishing HDF-based fuel surcharges in BNSF Rules Book 6100. *See id.* Item 3375C (effective June 1, 2003).²⁰ Other pertinent portions of BNSF's item 3375 mileage-based fuel surcharge were included in this June 1, 2003 tariff item. For example, the fuel surcharge strike price of \$1.25 per gallon HDF price was first set forth in this item. Responses to

¹⁸ *See, e.g.*, RFP Nos. 37-41.

¹⁹ *See, e.g.*, RFP Nos. 20, 21.

²⁰ *See* copy of tariff item 3375C in *Appendix 6*.

Cargill's requests concerning the derivation of that figure²¹ would necessarily include documents that pre-date January 1, 2005.

As a second example, the item 3375, section B fuel surcharge methodology assumes a linear relationship between increases in HDF fuel prices and increases in BNSF's incremental fuel costs – *i.e.*, the fuel surcharge increases by \$0.01 per car-mile for each \$0.04 per gallon increase in HDF prices above a \$1.25 per gallon HDF strike price. BNSF's fuel surcharges in effect prior to January 1, 2005 also assumed linear relationships between increases in HDF prices and increases in stated fuel surcharges, including tariff item 3375C, first effective on June 1, 2003, that provided for fuel surcharge increases of one-half of one percentage point for each \$0.04 per gallon increase in HDF prices above a \$1.25 per gallon HDF strike price. Responses to Cargill's requests concerning analyses and studies prepared by BNSF concerning the linear relationship between increases in HDF fuel prices and increases in BNSF's incremental fuel costs would necessarily include documents that pre-date January 1, 2005.²²

As a third example, item 3375C, effective on June 1, 2003, marked the date of the first BNSF fuel surcharge tariff to tie changes in BNSF's incremental fuel cost increases to changes in HDF prices, so BNSF's internal evaluation of that choice would also necessarily include documents that pre-date January 1, 2005.

²¹ See, *e.g.*, RFP Nos. 5 and 6.f.

²² See, *e.g.*, RFP Nos. 4 and 6.g.

Cargill also informed BNSF during the meet and confer process that information publicly disclosed in the pending *Rail Freight Fuel Surcharge Antitrust Litigation*²³ revealed that BNSF had begun consideration of mileage-based fuel surcharges well before January 1, 2005. *See id.*, Oct. 6, 2010 Hearing Transcript at 131-32 (Plaintiffs' counsel summarizes document showing "that in 2004, there was an internal discussion at BNSF about how customers might react better to a mileage-based fuel surcharge than a rate-based fuel surcharge") (copy in *Appendix 7*) (emphasis added). This information is relevant to Cargill's requests concerning the derivation of BNSF's mileage-based fuel surcharges.²⁴

The Board should overrule BNSF's objection to producing information or documents created prior to January 1, 2005 because this arbitrary cut-off date clearly excludes relevant information from discovery, and direct that BNSF provide documents and information created on or after January 1, 2003, unless otherwise specified in a specific Cargill request.

²³ *In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869, Misc. No. 07-489 (PLF) (D.D.C. cases consolidated Nov. 14, 2007) ("*Rail Freight Fuel Surcharge Antitrust Case*").

²⁴ *See, e.g.*, RFP Nos. 6 and 11.

II.

THE BOARD SHOULD OVERRULE BNSF'S TARIFF ITEM LIMITATION OBJECTION

While not included in its laundry list of “General Objections,” BNSF repeats in its responses to many Cargill requests a statement that BNSF objects to the request on grounds that the request seeks information or documents that do not involve the fuel surcharge “at issue” in this case or “that is the subject of this proceeding.”²⁵ In the meet and confer sessions, BNSF indicated that it deemed the fuel surcharge at issue in this case as the mileage-based fuel surcharge set forth in item 3375, section B. BNSF further indicated that if a specific reference was not included in a document to item 3375, section B, BNSF may not produce the document.

As discussed above, to address BNSF’s construction of Cargill’s Complaint as limited to item 3375, section B, Cargill filed a supplement to its Complaint to include as an assailed tariff item, the rebased mileage surcharge in item 3376, section B. Accordingly, BNSF’s Tariff Limitation Objection should be overruled to the extent BNSF continues to exclude production of requested items relating to the mileage-based surcharge set forth in item 3376, section B.

The Board should also overrule the Tariff Limitation Objection as it applies to other fuel surcharges that are, or have been, set forth in BNSF Rules Book 6100,

²⁵ See RFP Nos. 3, 4, 5, 9, 10, 14, 16, 21, 22, 23, 24, 25, 45, 46, 47, 48, 49, 51, 53 and 54. (Hereinafter, BNSF’s “Tariff Limitation Objection”)

including percent of price fuel surcharges – because documents or information that do not expressly reference the mileage-based fuel surcharge can contain relevant information, including documents responsive to Cargill’s requests concerning how BNSF decided to group traffic for fuel surcharge purposes (RFP No. 3); how BNSF decided the relationship between changes in HDF prices and changes in its incremental fuel cost increases was linear (RFP No. 4); how BNSF developed its \$1.25 per gallon HDF strike price (RFP No. 5); analyses used to determine the BNSF step function contained in its fuel surcharge program applicable to coal unit trains (RFP No. 9); analyses that BNSF has prepared that relate to the profitability of its fuel surcharges (RFP Nos. 10, 14); analyses that BNSF has prepared concerning BNSF’s cost of fuel (RFP No. 16); analyses BNSF has prepared concerning fuel surcharge rebasing (RFP Nos. 21, 22, 23); documents BNSF has produced in the *Rail Freight Fuel Surcharges Antitrust Case* that are relevant in this case (RFP Nos. 45, 46, 47, and 48); documents that relate to statements BNSF has publicly made in STB fuel surcharge proceedings (RFP Nos. 49, 51 and 53); and analyses that BNSF has prepared comparing its mileage-based fuel surcharges to those collected by other railroads (RFP No. 54).

III.

THE BOARD SHOULD ORDER BNSF TO PRODUCE DOCUMENTS RESPONSIVE TO SPECIFIED REQUESTS WHERE BNSF OBJECTED TO ANY PRODUCTION

In addition to making its litany of General and Specific Objections, BNSF also refused outright to produce any documents responsive to many of Cargill's requests, including Request for Production Nos. 9, 21, 23, 24-28, 34, 38-41, 45-47 and 52. Based on discussions at the meet and confer sessions, Cargill is not moving to compel responses to RFP Nos. 24-28, 34 and 38-41 since BNSF has represented sufficient data will be produced in response to other requests that is also responsive to these requests. Cargill reserves the right to move to compel responses to these requests if that becomes necessary after reviewing BNSF's promised production. Cargill does move now to compel BNSF to produce documents responsive to the remaining "object in full" requests:

- **RFP 9.** Cargill's RFP No. 9 asks BNSF to produce all analyses relating to the "rate of change" which BNSF developed for use in its mileage-based coal fuel surcharges – *i.e.*, a once cent increase in the fuel surcharge per mile for each 6 cent change in the HDF price per gallon over stated strike prices. BNSF objects to this request, and says it will not produce any documents, because the coal fuel surcharge is not challenged by Cargill in this proceeding.

BNSF is correct that Cargill is not challenging BNSF's coal fuel surcharge, but that does not mean documents relating to the rate of change BNSF uses for

calculating fuel surcharges on its coal traffic is not relevant to the issues raised in this case. Coal is shipped in unit trains, and Cargill's complaint encompasses traffic volumes for non-coal traffic that also moves in unit trains, so analyses relating to coal unit train fuel surcharge metrics are clearly relevant to the subject of different fuel surcharge metrics BNSF has applied on non-coal unit train traffic. Indeed, BNSF executives have testified before the Board that BNSF has considered utilizing unit train fuel surcharge metrics for non-coal unit trains.²⁶

- **RFP Nos. 21 and 23.** RFP No. 21 asks BNSF to produce documents relating to its rebasing of its mileage-based fuel surcharge in BNSF Rules Book Item 3376, subsection B, effective January 1, 2011 and RFP No. 23 asks BNSF to produce documents concerning the methodologies BNSF has considered to rebase the involved freight rates subject to the rebased fuel surcharge. BNSF objects to producing any documents responsive to RFP No. 21, citing its Tariff Limitation Objection, and objects to any production in response to RFP No. 23, citing its Tariff Limitation Objection, along with its General Objections to producing confidential material and shipper-specific data.

These objections should be overruled for the reasons stated in sections I and II above. Cargill has amended its Complaint to specifically include as an assailed tariff item, Item 3376, Section B, so discovery concerning the development and application of

²⁶ See Cargill's second discovery requests (appended in *Appendix 2* hereto, at Attachment 6, p. 264 (testimony of Tom Hunt, Public Hearing on Rail Fuel Surcharges, STB Ex Parte No. 661) (May 11, 2006).

this Item are clearly relevant; a protective order is in place to protect confidential information; and Cargill has no objections to prudent redactions of shipper-specific identifications as long as the redactions do not prevent Cargill from effectively utilizing the produced documents.

- **Antitrust Case RFP's.** In the *Rail Freight Fuel Surcharge Antitrust Case*, the Plaintiffs' have alleged, *inter alia*, that BNSF used its fuel surcharge program as a profit center by collecting fuel surcharges in excess of BNSF's incremental fuel cost increases. *See id.*, Second Consolidated Amended Class Action Complaint at ¶ 99 (filed Feb. 3, 2010) ("Defendants realized billions of dollars in revenues during the Class Period in excess of their actual increase in fuel costs from the specific customers on whom they imposed the surcharge."). The Court denied BNSF's motion to dismiss the Plaintiffs' case,²⁷ and the Plaintiffs have engaged in substantial discovery against BNSF.

Cargill carefully reviewed the materials in the public record in the *Rail Freight Fuel Surcharge Antitrust Case* and, based on that review, asked BNSF to produce existing documents produced or prepared in the antitrust case that are relevant to the profit center and fuel consumption allegations at issue in the instant case. These requests are set forth in Cargill's RFP Nos. 45, 46 and 47.

- **RFP No. 45.** RFP No. 45 identifies document requests in the *Rail Freight Fuel Surcharge Antitrust Case* that sought information relevant to the issues

²⁷ *See id.* (D.D.C. Nov. 7, 2008).

involved in the instant case, and requests BNSF to produce in this case responsive documents produced in the antitrust case.²⁸ At the meet and confer sessions, BNSF took the position that this request was not relevant because the fuel surcharges at issue in the antitrust case are percent-of-price fuel surcharges, not mileage-based fuel surcharges. However, the Plaintiffs' discovery requests are directed at "Rail Fuel Surcharges" which they define to include all forms of fuel surcharges (*i.e.*, both mileage- and percent-of-price-based surcharges) developed from January 1, 2000 through the present.²⁹ Moreover, if as the Plaintiffs' in the antitrust case allege, BNSF made a corporate decision to over-recover its incremental fuel cost increases using percent-of-price fuel

²⁸ The pertinent requests in *Rail Freight Fuel Surcharge Antitrust Case* identified by Cargill were the following requests in Plaintiffs' Second Request for Production to Defendant BNSF Railway Company: No. 2 (Rail Fuel Surcharges business plans, marketing plans and strategic plans); No. 3 (communications with investors concerning Rail Fuel Surcharges); No. 4 (internal meetings relating to Rail Fuel Surcharges); No. 23 (analyses of Rail Fuel Surcharges on BNSF profitability); Nos. 24, 34 and 35 (analyses of rail fuel costs); No. 28 (analyses of Rail Fuel Surcharges on rail industry profitability); Nos. 31 and 32 (analyses of fuel hedging strategies); No. 39 (documents concerning factors used to develop Rail Fuel Surcharges); No. 40 (documents relating to the choice of Rail Fuel Surcharges strike prices); No. 64 (documents identifying actual profits and profit margins); and No. 66 (organizational charts). A copy of these questions is included in *Appendix 2*, at Attachment 1.

²⁹ See Plaintiffs' Second Request for Production to Defendant BNSF Railway Company at 5 ("Rail Fuel Surcharge' means a separately-identified component of the total rate charged for rail freight transportation services that is called a 'fuel surcharge' or a 'rail fuel surcharge' or is otherwise identified as a stand-alone charge purportedly to recoup increases in the rail carrier's fuel costs"); *id.* at 11 ("[u]nless a different time period is specified, the time period relevant to these requests is January 1, 2000 to present").

surcharges, that fact is clearly relevant to the issue of whether BNSF made the same decision when developing its mileage-based fuel surcharges.³⁰

Cargill respectfully requests that the Board order BNSF to produce all documents Cargill has requested in response to Request No. 45, except for subpart 45(p) (organizational charts) which BNSF has agreed to produce.

○ **RFP No. 46.** Plaintiffs in the *Rail Freight Fuel Surcharge Antitrust Case* deposed several BNSF executives concerning BNSF's fuel surcharge practices. Cargill's RFP No. 46 requests copies of the deposition transcripts and exhibits. BNSF objects to this production for the same reasons it objects to producing documents responsive to RFP No. 45, and adds that the depositions are subject to a protective order in the antitrust case. The Board should overrule BNSF's objections to producing these deposition transcripts for the same reasons Cargill has requested the Board to overrule BNSF's objections to RFP No. 45. In addition, the protective order in this case should be sufficient to protect any confidential information BNSF disclosed during the involved depositions.

○ **RFP No. 47.** RFP No. 47 asks BNSF to produce all BNSF documents appended in an affidavit submitted by Plaintiffs' counsel in support of Plaintiffs' Motion for Class Certification in the *Rail Freight Fuel Surcharge Antitrust*

³⁰ With this request, BNSF also makes the same repetitive General Objections concerning time periods, confidentiality, and production of shipper-specific data that Cargill has already demonstrated should be overruled.

Case. Based on Plaintiffs' counsel summary of some of these documents in open court in the antitrust case on October 6 and 7, 2010, it appears that these documents contain highly relevant information concerning BNSF's use of fuel surcharges to over-recover its actual incremental fuel cost increases. BNSF should be ordered to produce them.

V.

SUMMARY OF RELIEF REQUESTED

Cargill respectfully requests that the Board to (i) overrule BNSF's General Objection Nos. 1, 6, 10, 13, 15, 22-23 and 28; (ii) overrule BNSF's Tariff Limitation Objection as it applies to Request Nos. 3-5, 9-10, 14, 16, 21-23, 45-49, 51, and 53-54; and (iii) direct BNSF to produce responsive documents to Cargill's RFP Nos. 9, 21, 23, 45, 46, and 47. Cargill also reserves the right to file additional motions to compel, or seek other relief from the Board, after reviewing BNSF's production.

Respectfully submitted,

CARGILL, INCORPORATED

By: John H. LeSeur 
Peter A. Pfohl
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Slover & Loftus LLP
1224 Seventeenth Street, N.W.
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(202) 347-7170
Attorneys for Complainant

OF COUNSEL:

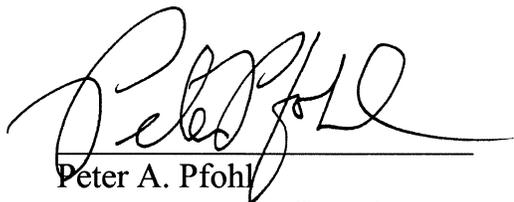
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington D.C. 20036

Dated: March 31, 2011

CERTIFICATE OF SERVICE

Pursuant to 49 C.F.R. § 1111.3, I hereby certify that I have this 31st day of March, 2011 caused to be served copies of the foregoing Motion to Compel Discovery on the following by hand delivery:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Linda S. Stein
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington DC 20036


Peter A. Pfohl
An Attorney for Complainant

APPENDIX 1

BEFORE THE
SURFACE TRANSPORTATION BOARD

CARGILL, INCORPORATED)	
)	
)	
Complainant,)	
)	
v.)	Docket No. 42120
)	
BNSF RAILWAY COMPANY)	
)	
Defendant.)	
)	

COMPLAINANT’S FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, Complainant Cargill, Incorporated (“Cargill”) submits the following First Set of Interrogatories and Requests for Production of Documents to Defendant BNSF Railway Company (“BNSF”).

Cargill requests that BNSF’s written objections, and BNSF’s written responses to Interrogatories, be served by January 26, 2011. Cargill also requests that copies of all responsive documents be produced and delivered to the offices of Slover & Loftus LLP, 1224 Seventeenth Street, N.W., Washington, D.C. 20036 on a rolling basis, with full production completed by February 25, 2011. Cargill is prepared to cooperate with BNSF to facilitate the expeditious production of documents with the minimum practicable burden.

I.

DEFINITIONS

The following defined terms are used herein (whether capitalized or not):

1. “Analyses” means any documents containing or consisting of studies, reports, memoranda, summaries, statistical compilations, presentations, reviews, audits, and other types of written, printed, or electronic submissions of information, and specifically includes all supporting hard-copy or electronic workpapers sufficient to replicate the analyses results.

2. “And,” “or,” and/or “each” shall be construed in the disjunctive or conjunctive as necessary in order to bring within the scope of each Interrogatory or Request all responsive information or documents which otherwise might be construed as outside the scope of the Interrogatory or Request.

3. “Assailed Tariff Item” means the fuel surcharge provision printed at BNSF Rules Book 6100-A, Item 3375E, Section B, initially effective January 1, 2006 as well as all successors thereto, including BNSF Rules Book 6100-A, Item 3376C, Section B, effective January 1, 2011, and all successors thereto (*see also* Definition No. 21 below).

4. “BNSF” means Defendant BNSF Railway Company, its present or former employees, agents, counsel, officers, directors, advisors, consultants, divisions, departments, predecessors, parent and/or holding companies, subsidiaries, or any of them, and all other persons acting (or who have acted) on its behalf.

5. “BNSF Rules Book 6100-A” means all issues of the document entitled “BNSF Rules Book 6100-A.”
6. “Cargill” means Complainant Cargill, Incorporated.
7. “Commodities to which the Assailed Tariff Item applies” means all of the commodities shipped via rail on the BNSF system to which the Assailed Tariff Item applies, has applied, or may be applied.
8. “Communication(s)” means the transmittal or exchange of information of any kind in any form.
9. “Destination” means the terminating rail station, whether on the BNSF or some other railroad, as specified on the waybill.
10. “Document(s)” means all writings or visual displays of any kind, whether generated by hand or electronic means, including, without limitation, photographs, lists, memoranda, reports, notes, letters, phone logs, e-mails, contracts, drafts, workpapers, computer printouts, computer tapes, telecopies, newsletters, notations, books, affidavits, statements (whether or not verified), speeches, summaries, opinions, studies, analyses, evaluations, statistical records, proposals, treatments, outlines, electronic or mechanical records, data or representations (including physical things such as computer disks), and all other materials of any tangible medium or expression, in BNSF’s current or prior possession, custody or control. A draft or non-identical copy is a separate document within the meaning of this term.
11. “FSAC” means the railroad Freight Station Accounting Code.
12. “HDF” means U.S. Retail On-Highway Diesel Fuel.

13. “Identify” or “describe” mean:
- (a) describe fully by reference to underlying facts rather than by reference to ultimate facts or conclusions of fact or law;
 - (b) where applicable, particularize as to time, place, and manner;
 - (c) set forth all relevant facts necessary to the complete understanding of the act, process, event, or thing in question;
 - (d) as to a person (as defined): name, business and residence address(es), last known telephone number, occupation, job title, and dates so employed; and, if not an individual, state the type of entity, last known address of its principal place of business, and the names of its officers and directors; to the extent that any of the above information is not available, please state all other available means of identifying and locating such person;
 - (e) as to a document (as defined): the type of document (letter, memorandum, printed version of an electronic mail message, printed version of a facsimile, etc.), the identity of the author or originator, the date authored or originated, the identity of each person to whom the original or a copy was addressed or delivered, the identity of such person known or reasonably believed by you to have present possession, custody, or control thereof, and a brief description of the subject matter thereof;
 - (f) as to a communication (as defined): the date of the communication, the type of communication (telephone conversation, electronic mail message, meeting, etc.), the place where the communication took place, the identity of the person who made the communication, the identity of each person who received the communication and of each person present when it was made, and the subject matter discussed; and

(g) as to a meeting: the date of the meeting, the place of the meeting, each person invited to attend, each person who attended, and the subject matter discussed.

14. “Origin” means the rail station originating the loaded car, whether on the BNSF or some other railroad, as specified on the waybill.

15. “Person” means natural persons, corporations, institutions, partnerships, firms, joint ventures, associations, political subdivisions, or other legal entities, as the case may be.

16. “Pricing Document” means any document setting forth terms and conditions of the transportation of freight on BNSF, including but not limited to contracts, price authorities (private or public), and exempt shipment documents.

17. “Related,” “related to,” and “relating to” mean and include making a statement discussing, describing, referring to, reflecting, explaining, analyzing, or in any way pertaining to, in whole or in part, the subject matter of the Interrogatory or Request.

18. “SPLC” means the Standard Point Location Code.

19. “STCC” means the seven-digit Standard Transportation Commodity Code.

20. “Strike Price” means a base fuel price.

21. “Tariff Item 3376” means the fuel surcharge provision printed at BNSF Rules Book 6100-A, Item 3376C, Section B, effective January 1, 2011 and all successors thereto.

22. “Traffic to which the Assailed Tariff Item applies” means all of the rail traffic and shipments of commodities to which the Assailed Tariff Item applies, has

applied, or may be applied, including but not limited to all shipments made pursuant to a pricing document referring thereto.

II.

INSTRUCTIONS

BNSF is requested to conform to the following instructions in responding to these Interrogatories and Requests.

1. Each paragraph below shall operate and be construed independently.

Unless otherwise indicated, no paragraph limits the scope of any other paragraph.

2. Where these discovery requests seek data in a computer-readable format, machine-readable format, or in its native format, this data is defined as an electronic file which contains structured, relational data, and is managed within a commercially available and relational database system (for example Microsoft, Oracle, IBM) and is readable via commercially available and standard Microsoft Windows software API (Application Programming Interfaces) methods to include Open Database Connectivity (ODBC) implementations thereby making the data accessible independent of the host system.

If the source table is stored within a non-relational system, such as a “flat file,” or a custom system (not commercially available) provide the data in standard sequential or delimited text files. The text files will be MS-DOS or MS-Windows compatible text format

- a. For each computer file supplied provide:

- i. The name and description of the source database or other file from which the records in the computer file were selected (stating whether the file is an original extract from a line of business transactional or data warehouse computer system, or if the provided file is an extract, or report, created specifically for this request) including a graphic or textural representation of the database relational model for each system to include all named tables of data within the system's relational model, and for every table provide a list of fields, primary keys, foreign keys, list relational links to other tables and fields, and filters, if any, associated to the relational links. Include all related tables, and all fields within each included table. List the fields which define a unique record (row) for each table, or state if the table does not require unique row differentiators or primary keys. For code tables, provide the code, and associated data elements in a discreet list (no duplicates);
 - ii. A description of how the records in the file produced were selected;
 - iii. The original table names (no aliases), original field names, to match the provided systems' data structures within each computer program (in native software and text file) and intermediate file used in deriving the files produced if the files produced are flat files. If the files produced are commercially available relational database files, provide the method used and code (if code was created) used to export the data to this relational format, including the operating system and version under which the final text files or relational tables were produced; and
 - iv. A relational diagram defining relationships between tables, with all fields, listing primary keys, foreign keys, with each table or file provided as listed in the relational diagram. Also provide all table indexes, and index files, which define the index to be clustered or non-clustered.
- b. For each field in each computer database file provide a complete, standard data structure, including:
- i. The name of the field including its source table name, and if different from the LOB (line of business) or off-line

analytical system field name, provide all field name incarnations so that there is a linkage between the provided fieldname and the original source fieldname and source table, and source application/system. Also provide the “Synonymous Name,” that being a single word or multiple words that differ from the fieldname, but represents the same data element using alternative or more descriptive terminology. Also provide the “Context,” that being a designation or description of the application environment in which the data item (or field) is applied or from which it is originally derived (its origin);

- ii. The starting and ending positions of the field if the file is a non-delimited flat file, or if the file is delimited, verify that the delimiter is inserted at the end of each field and the delimiter is not contained, as data, within any data cell (provide row terminators and line feed codes), otherwise, if the provided data set is a relational database “table,” export the table structure into a separate ANSI SQL 92 code or text file;
- iii. A detailed definition of the field and whether this field is the record’s (or row’s) unique identifier, or it is one of many fields which create a unique row (list them);
- iv. A detailed description of the data in the field, including an explanation of what they are used for and also provide all related index files in SQL code format or text files, if any;
- v. The type of data in the field, i.e., whether numeric, character, alphanumeric, number of digits, number of significant digits, whether signed or unsigned (i.e., negatives allowed) and whether this field is Unicode, or contains any constraints, or requirements to be Non-Null, or non-blank;
- vi. If the values in a field are terms or abbreviations, a list of all terms or abbreviations used with detailed definitions of each and provide the approved domain (range of values if indeterminate) or list of values permitted if determinate. Also provide minimum and maximum values, including whether the values are Null, hidden, or specific ASCII or ISO codes. Include the character encoding or software vendor’s code page, for each table if any;

- vii. An indication of whether the data in the field are packed or compressed; and
- viii. If the data in the field are packed or compressed, the type of packing or compression:
 - (1) Zoned with low-order sign;
 - (2) Binary with LSB first;
 - (3) Binary with MSB first;
 - (4) Packed with high-order sign;
 - (5) Packed with low-order sign;
 - (6) Packed with no sign; and
 - (7) Other (specify and provide detailed instructions for unpacking).
- ix. If the data files and tables originate on a non-Microsoft Windows operating system, state the original operating system and convert to Microsoft Windows format.
- x. For data or other electronic information submissions where the source system does not have a 32-bit operating system, verify that all data and files are computer-readable on a 32-bit operating system.

3. If an answer or the production of any responsive document is withheld under 49 C.F.R. §1114.26(a) or §1114.30(a)(1) on the basis of a claimed privilege or attorney work product, then for each such answer or document, provide the following information: its date, type (*e.g.*, letter, meeting, notes, memo, etc.), author (note if author is an attorney), addressee(s)/recipient(s) (note if addressee(s) or recipient(s) is an attorney), general subject matter, and basis for withholding the information.

4. If the production of any requested document or answer to any interrogatory is withheld for claimed grounds other than privilege or attorney work product, state with specificity the basis for such withholding.

5. BNSF is requested to supplement its responses to these Interrogatories and Document Production Requests and produce responsive information or documents obtained or created at any time and is further requested to supplement its responses in the manner provided in 49 C.F.R. § 1114.29.

6. If a responsive document was, but is no longer, in BNSF's possession, custody or control, describe what disposition was made of it.

7. Please organize the documents produced in such a manner that Cargill may readily determine which documents are being produced by BNSF in response to each specific Document Production Request. If no document is produced in response to any specific Request, please so indicate in the response.

8. Color copies of documents are to be produced where color is necessary to interpret or understand the contents of the documents.

9. In the event BNSF objects to producing any documents on grounds that BNSF does not maintain the information described in the form or format requested by Cargill, please produce the documents which contain such information in whatever form or format BNSF does maintain such information.

10. Cargill reserves the right to file additional, supplemental, and/or follow-up Interrogatories, Document Production Requests, and other discovery, as necessary or appropriate.

11. Unless otherwise specified, these discovery requests cover the time period from January 1, 2003 to the present.

III.

INTERROGATORIES

1. Please describe the processes and inputs BNSF used to develop the general formula to calculate fuel surcharges set forth in the Assailed Tariff Item.
2. Please identify, by name, title, and address, the person(s) who have participated in developing the general formula to calculate fuel surcharges set forth in the Assailed Tariff Item.
3. Please identify, by name, title, and address, the persons(s) who are most knowledgeable about the comparison of fuel surcharge revenues collected by BNSF on traffic subject to a fuel surcharge with the actual incremental fuel costs incurred by BNSF on the same traffic subject to a fuel surcharge.
4. Please identify, by name, title, and address, the person(s) most knowledgeable about the fuel consumption characteristics of BNSF's locomotive fleet.
5. Please identify, by name, title, and address, the person(s) most knowledgeable about BNSF's fuel purchasing and fuel hedging practices.
6. Please identify, by name, title, and address, the person(s) most knowledgeable about BNSF's fuel costs.
7. Please identify, by name, title, and address, the person(s) most knowledgeable about BNSF's computerized traffic (revenue waybill) data; car movement

data; train movement data; fuel surcharge data; locomotive fuel consumption data; and financial reporting data related to fuel surcharges.

8. Please identify, by name, title and address, the person(s) most knowledgeable about any fuel savings realized through the implementation of BNSF's Fuel MVP Program, its predecessors and/or successors thereto, as well as any similar program.

9. Please identify any computer programs or models that have been used by BNSF to (a) download locomotive event recorder data from locomotives, and/or (b) process locomotive event recorder data for purposes of determining locomotive throttle position and/or fuel consumption.

10. Please identify by STCC code all commodities to which the Assailed Tariff Item applies.

11. Please identify by STCC Code and Origin-Destination pair all movements on BNSF's system of all commodities to which the Assailed Tariff Item applies.

12. For all traffic to which the Assailed Tariff Item applies that moves in interline service or is otherwise interchanged with another railroad, please describe the procedures used by BNSF to share the fuel surcharges collected with other railroads.

IV.

REQUESTS FOR PRODUCTION

1. Please produce all documents consulted, reviewed, relied upon, or otherwise utilized in answering the Interrogatories.
2. Please produce any documents identified in response to the Interrogatories.
3. Please produce all analyses relating to the grouping of BNSF's traffic into subsets (*e.g.*, agriculture, coal) to which different BNSF fuel surcharge programs and provisions apply.
4. Please produce all documents used to determine that the relationship between changes in HDF prices and changes in BNSF's incremental fuel costs is linear, including, but not limited to, any other relationship that was considered or evaluated by BNSF.
5. Please produce documents sufficient to show how and when BNSF's \$1.25 per gallon HDF fuel surcharge strike price was selected for application in BNSF Rules Book 6100-A, Item 3375C, effective June 1, 2003.
6. Please produce all documents relating to the development of the methodology for the calculation and imposition of the fuel surcharges described in the Assailed Tariff Item, as initially effective on January 1, 2006, including but not limited to:

- a. Documents related to the determination to calculate the surcharge based upon the loaded miles of a line-haul movement;
- b. Documents related to the selection of the HDF average price as the benchmark for the calculation of the surcharge;
- c. Documents which address the relationship, if any, between the revenues from the surcharge for any specific movement(s) or group(s) of movement(s) and changes in the actual cost to BNSF of the fuel consumed by the locomotives used in that (those) movement(s);
- d. Documents which address the relationship between the revenues from the fuel surcharge for any specific movement(s) and the changes in actual fuel costs to BNSF in excess of BNSF's strike price;
- e. Documents related to fuel consumption factors;
- f. Documents that relate to the use of a strike price of \$1.25 per gallon; and
- g. Documents used to determine the rate of change in the fuel surcharge mechanism set forth in the Assailed Tariff Item, including, but not limited to, documents used to determine that the fuel surcharge should increase/decrease by one cent for every four cent change in the HDF price per gallon.

7. Please produce all analyses relating to the determination of operational parameters common to all traffic to which the Assailed Tariff Item applies.

8. Please produce all documents related to any updates, modifications, or other changes (actual or potential) to the Assailed Tariff Item, including but not limited to any changes (actual or potential) to the methodology for the calculation and imposition of the fuel surcharges described therein.

9. Please produce all analyses used to determine that the rate of change in the fuel surcharge mechanism set forth in BNSF Rules Book 6100-A, Item 3381 or any of its successors, or in any other applicable BNSF fuel surcharge programs (past or present), should increase/decrease by one cent for every 6 cent change in the HDF price per gallon.

10. Please produce all analyses comparing revenues collected through the implementation of any BNSF fuel surcharge, including the Assailed Tariff Item, with (a) BNSF's actual cost of fuel; and/or (b) BNSF's cost of fuel above BNSF's strike price.

11. Please produce all analyses comparing any revenue collection assumptions BNSF utilized in developing the Assailed Tariff Item and actual fuel surcharge revenues.

12. Please produce all analyses comparing any fuel consumption assumptions BNSF utilized in developing the Assailed Tariff Item and actual locomotive fuel consumption.

13. Please produce all analyses comparing any fuel cost assumptions BNSF utilized in developing the Assailed Tariff Item and actual locomotive fuel costs.

14. Please produce all analyses concerning the impact (potential or actual) of any BNSF rail fuel surcharge, including the Assailed Tariff Item, on BNSF's profitability.

15. Please produce all analyses of fuel consumed by locomotives in BNSF service.

16. Please produce all analyses of (a) BNSF's actual cost of fuel and (b) BNSF's cost of fuel above BNSF's strike price.

17. Please produce all analyses of the fuel costs incurred by locomotives in BNSF service.

18. Please produce all analyses concerning BNSF's planned change (announced on August 5, 2008) that "[t]he Highway Diesel Fuel (HDF) price at which BNSF will assess a fuel surcharge on carload shipments -- the strike price -- will increase from \$1.25 per gallon to \$2.50 per gallon, and pricing for carload shipments will be adjusted to reflect the new strike price"¹ which was to become effective on January 15, 2009.

19. Please produce all analyses concerning BNSF's decision to abandon the plan to increase the HDF fuel surcharge strike price to \$2.50 per gallon referenced in Request for Production No. 18.

20. Please produce documents sufficient to show how and when BNSF's \$2.50 per gallon HDF fuel surcharge strike price was set for application in BNSF Rules Tariff 6100-A, Item 3376, as initially effective on January 1, 2009.

¹ See: <http://domino.bnsf.com/website/updates.nsf/f6877776a92049f086256b030057f789/f2742d1a4171da1c8625749c0050e2d4?OpenDocument>.

21. Please produce all analyses concerning BNSF's decision to increase the HDF fuel surcharge strike price at which BNSF assesses a fuel surcharge on carload shipments "from \$1.25 per gallon to \$2.50 per gallon beginning **January 2011.**"²

22. Please produce all analyses concerning any other possible rebasing of the Assailed Tariff Item or any other BNSF fuel surcharge not produced in response to Document Production Request Nos. 18, 19, 20, and 21.

23. Please produce all documents concerning the methodology and/or calculations BNSF contemplated, made, or will make to develop rate adjustments and/or new rates for movements to which Tariff Item 3376 applies to address the new \$2.50 per gallon HDF strike price.

24. Please produce all pricing documents applicable to Cargill's freight shipped from January 1, 2006 to the present.

25. Please produce all waybill, invoices or similar documents for all of Cargill's freight shipped from January 1, 2006 to the present.

26. Please produce all pricing documents applicable to all traffic to which the Assailed Tariff Item applied, and traffic was shipped, from January 1, 2006 to the present (other than documents produced in response to Document Production Request No. 24)

27. Please produce all waybill, invoices or similar documents for all traffic to which the Assailed Tariff Item applied and was shipped from January 1, 2006 to

² See: <http://domino.bnsf.com/website/updates.nsf/f6877776a92049f086256b030057f789/232b06c2a76808af8625776c006da426?OpenDocument>.

the present (other than documents produced in response to Document Production Request No. 25).

28. Please produce all analyses relating to the fuel surcharges set forth in any pricing document under which freight subject to the Assailed Tariff Item was shipped from January 1, 2006 through the present.

29. Please produce documents sufficient to show how BNSF records, tracks, analyzes, and reports fuel consumption for each locomotive moving over the BNSF, including locomotives utilized under run-through agreements.

30. Please produce all analyses regarding any fuel consumption reductions realized through the implementation of BNSF's Fuel MVP Program, any predecessors and/or successors thereto, as well as any similar program.

31. For each locomotive type operated by BNSF (including locomotives utilized under run-through agreements), please produce documents sufficient to show: the fuel consumption rate by locomotive throttle position; horsepower; capacity of fuel tanks in gallons; and weight.

32. Please produce documents sufficient to show the monthly total consumption of locomotive diesel fuel for each locomotive moving over the BNSF, including locomotives utilized under run-through agreements.

33. Please produce documents sufficient to show the monthly total gallons of locomotive diesel fuel dispensed at each BNSF-operated fueling facility.

34. Please produce documents sufficient to show the monthly total consumption of locomotive diesel fuel attributable to all traffic to which the Assailed Tariff Item applies from January 1, 2006 to the present.

35. Please produce documents sufficient to show the monthly average delivered price of locomotive diesel fuel that BNSF paid at each BNSF-operated fueling facility.

36. Please produce documents sufficient to show BNSF's average hedged price and volume of locomotive diesel fuel purchased for each week.

37. Please produce the databases, data warehouses, and computer programs (with all documentation related to these databases, data warehouses, and computer programs), in a computer-readable format, that include the information listed below for each movement handled by BNSF as originating, terminating, overhead, or single-line carrier for all traffic to which the Assailed Tariff Item applies from January 1, 2006 to the present:

- a. Consignee, Shipper, Payee, and/or Customer;
- b. The contract, agreement, tariff, or other pricing document that the shipment is billed under, including amendment and item number references;
- c. Waybill number and date;
- d. Commodity by STCC code;
- e. Origin city and state;
- f. Destination city and state;
- g. FSAC for the origin city and state for the railroad movement;
- h. FSAC for the destination city and state for the railroad movement;
- i. Origin SPLC;
- j. Destination SPLC;
- k. All railroads involved in the shipment;
- l. FSAC, city and state of interchanges, if applicable;

- m. For shipments that originated on BNSF's system, the date and time the shipment was originated;
- n. For shipments BNSF received in interchange, the on junction location and station number;
- o. For shipments BNSF received in interchange, the road received from;
- p. For shipments BNSF received in interchange, the date and time the shipment was interchanged;
- q. For shipments given in interchange, off junction location and station number;
- r. For shipments given in interchange, the road given to;
- s. For shipments given in interchange, the date and time the shipment was interchanged;
- t. For shipments terminated on BNSF's system, the date and time the shipment was terminated;
- u. Number of cars;
- v. Tons (Net);
- w. Tare weight;
- x. Total revenues from fuel surcharges;
- y. Portion of the revenues from surcharges received in Subpart (x) that are paid to BNSF;
- z. TOFC/COFC plan;
- aa. Car/trailer/container initial for each car/trailer/container used to move the shipment;
- bb. Car/trailer/container number for each car/trailer/container used to move the shipment;
- cc. If a trailer or container is used to move the shipment, the car initial and number used to move the trailer or container;
- dd. The train identification number of all trains used to move the shipment;
- ee. The number of locomotives, by train identification, by segment, used to move the shipment;
- ff. The total horsepower, by train identification, by line segment, used to move the shipment;
- gg. The total gross trailing tons, by train identification, by line segment, for all trains used to move the shipment;
- hh. The station locations where the traffic was interchanged between trains;
- ii. Total loaded movement miles;
- jj. Total empty movement miles;
- kk. Miles used to derive applicable fuel surcharges;
- ll. Applicable fuel surcharge rate and basis (*e.g.*, per mile);
- mm. Total loaded miles on BNSF's system(s);

- nn. Total empty miles on BNSF's system(s); and
- oo. AAR car-type code.

38. Please produce documents, in a computer readable format to the extent available, which contain information tracking and describing car, locomotive, and train movements from origin to destination for each car, locomotive, and train for all traffic to which the Assailed Tariff Item applies from January 1, 2006 to the present.

39. Please produce train movement data, in a computer readable format to the extent available, from origin to destination for all BNSF car and train movements and yard and hub operations for all traffic to which the Assailed Tariff Item applies from January 1, 2006 to the present.

40. Please produce, in computer readable format, the database(s) used to calculate the fuel surcharge for all traffic to which the Assailed Tariff Item applies from January 1, 2006 to the present.

41. Please produce all documents, including programs, decoders, and instructions, necessary to link the data produced in response to Requests for Production Nos. 37, 38, 39, and 40. Please include with this production a description of the relationship between the databases (*e.g.*, whether there is a 1:1 ratio between databases, or whether one can expect to link 100% of records in one file to another file).

42. Please produce documents sufficient to show any credits, debits, rebates, allowances or other price offsets related to the fuel surcharge imposed on any shipment(s) of freight identified in response to Request for Production No. 37.

43. Please produce documents sufficient to describe the computer databases and computer and/or telecommunications network infrastructure that record, collect, analyze and/or create specific train movement data, car movement data, fuel surcharge data, and locomotive fuel consumption data, including but not limited to graphical representations of the computer and/or network infrastructure.

44. Please produce documents sufficient to describe the infrastructure, capabilities, and databases included in BNSF's Enterprise Data Warehouse ("EDW"), including but not limited to documents sufficient to show how the EDW creates fuel efficiency scorecards as described in the Business Wire news release available at http://findarticles.com/p/articles/mi_m0EIN/is_2008_June_4/ai_n25476086/.

Respectfully submitted,

CARGILL, INCORPORATED

By:

John H. LeSeur 

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Washington, D.C. 20036

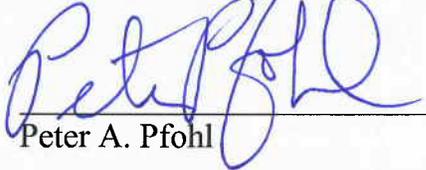
Dated: January 11, 2011

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify, that I have this 11th day of January, 2011 caused to be served copies of the above discovery requests by hand delivery upon outside counsel for Defendant BNSF Railway Company, as follows:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036



Peter A. Pfohl

APPENDIX 2

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CARGILL, INCORPORATED)	
)	
Complainant,)	
)	
v.)	Docket No. 42120
)	
BNSF RAILWAY COMPANY)	
)	
Defendant.)	

COMPLAINANT'S SECOND SET OF DISCOVERY REQUESTS

Pursuant to 49 C.F.R. §1114.30, Complainant Cargill, Incorporated (“Cargill”) submits the following Second Set of Discovery Requests to Defendant BNSF Railway Company (“BNSF”).

Cargill requests that BNSF’s written objections be served by February 15, 2011. Cargill also requests that copies of all responsive documents be produced and delivered to the offices of Slover & Loftus LLP, 1224 Seventeenth Street, N.W., Washington, D.C. 20036 on a rolling basis, with full production completed by February 25, 2011. Cargill is prepared to cooperate with BNSF to facilitate the expeditious production of documents with the minimum practicable burden.

I.

DEFINITIONS AND INSTRUCTIONS

Cargill hereby incorporates by reference, as if fully stated herein, the Definitions and Instructions contained in Complainant's First Set of Interrogatories and Requests for Production of Documents served on January 11, 2011 in this proceeding. In addition, the following defined term is used herein:

24. "*Rail Freight Fuel Surcharge Antitrust Litigation*" means the case docketed in the United States District Court for the District of Columbia as *In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869, Misc. No. 07-489 (PLF).

II.

DOCUMENT PRODUCTION REQUESTS

45. Please produce all documents provided in response to following document production requests set forth in the Direct Purchaser Plaintiffs' Second Request for Production to Defendant BNSF Railway Company (copy included in Attachment 1 hereto), certified as served in the *Rail Freight Fuel Surcharge Antitrust Litigation* on December 30, 2008, for the time period relevant to those production requests: (a) Request No. 2; (b) Request No. 3; (c) Request No. 4; (d) Request No. 23; (e) Request No. 24; (f) Request No. 26; (g) Request No. 27; (h) Request No. 28; (i) Request No. 31; (j) Request No. 32; (k) Request No. 34; (l) Request No. 35; (m) Request No. 39; (n) Request No. 40; (o) Request No. 64; and (p) Request No. 66.

46. Please produce a copy of each transcript(s) (including exhibits) for each BNSF officer or employee deposed in the *Rail Freight Fuel Surcharge Antitrust Litigation*.

47. Please produce a copy of all documents (a) bearing BNSF bates number designations (e.g., "BNSF-0367622") included in the exhibits to the Declaration of Sami H. Rashid in Support of Plaintiffs' Motion for Class Certification (executed March 18, 2010 and filed in the *Rail Freight Fuel Surcharge Antitrust Litigation*) (redacted public copy included in Attachment 2 hereto) and (b) all excerpts from BNSF deponent depositions included in the exhibits to the Declaration referenced in subpart (a) of this Document Production Request No. 47.

48. Please produce all documents produced in response to the subpoena filed in the *Rail Freight Fuel Surcharge Antitrust Litigation* on November 8, 2010 (copy of pertinent pages included in Attachment 3).

49. Please produce all documents that relate to each of the following statements made in the "Comments of BNSF Railway Company" dated October 2, 2006 and filed in STB Ex Parte No. 661, *Rail Fuel Surcharges* (copy included in Attachment 4):

- (a) "Since it began in 2001, the goal of BNSF's fuel surcharge has been to ensure that BNSF is compensated for increases in the cost that were not embedded in the transportation rate offered to the customer." (p.2);
- (b) "BNSF never intended that fuel surcharges be sources of additional operating income for the railroad." (p.2);

- (c) “After a great deal of discussion with its customers, as well as internal analyses, BNSF determined that altering its fuel surcharge methodology where practical was appropriate and responsive to customer concerns, and was in both BNSF’s and its customer’s commercial interests.” (p.3);
- (d) “BNSF continues to analyze the methodology by which it calculates the mileage and usage based fuel surcharge.” (p.4);
- (e) “BNSF’s goal is to collect fuel surcharges no higher than the additional cost of fuel, reflecting the operational requirements of each business unit.” (p.4);
- (f) “. . . BNSF remains committed to the general principle that customers should not pay more in fuel surcharges than the additional cost of the fuel for a given category of rail traffic.” (p.4);
- (g) “BNSF is committed to recovering its increased costs of fuel through fuel surcharges and not to over-collect.” (p.5);
- (h) “. . . the objective of BNSF’s fuel surcharge program is to recover the increase in BNSF’s fuel cost per gallon over the defined strike price of \$0.73 per gallon.” (p.16); and
- (i) “. . . [BNSF’s use of the] railroad’s unhedged cost of fuel above a strike price . . . [in making] rate decisions” (p.17).

50. Please produce all documents that relate to each of the following

bullet points set forth on page 6 of BNSF’s “Fuel Surcharge Briefing, STB Hearing, May 11, 2006” made in the Public Hearing in STB Ex Parte No. 661, *Rail Fuel Surcharges* (May 11, 2006) (copy included in Attachment 5):

- (a) “● Mileage based program reflects fuel usage” (p.6); and
- (b) “● Tables built on business unit fuel intensities (weight & speed)” (p.6).

51. Please produce all analyses that relate to the following statements made by Tom Hunt in the Public Hearing in STB Ex Parte No. 661, *Rail Fuel Surcharges* (May 11, 2006) (copy of pertinent transcript pages included in Attachment 6) :

- (a) “. . . why is the rate on the mileage-based program for grain greater than coal” (Tr. at 263);
- (b) “We’ve debated whether we should actually have two ag rates and that’s something I think we’ll consider in the future.” (Tr. at 264); and
- (c) “Over time, if we achieve significant efficiency, we should be adjusting the program to reflect that.” (Tr. at 270-71).

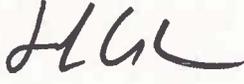
52. Please produce all documents that provide the basis for following statement made in the Declaration of Weldon E. Hale, executed on April 23, 2010 and filed in *BNSF Ry. Co. v. San Joaquin Valley Railroad Co.*, Case No. 1:08-CV-01086-AWI-SMS, United States District Court for the Eastern District of California (copy included in Attachment 7): “Fuel surcharges are accessorial charges, which are not part of the through rates charged to shippers.”

53. Please produce all analyses that relate to the following statement made by John Lanigan on October 19, 2005 at the Public Hearing in STB Ex Parte No. 658, *The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*, (copy of pertinent transcript pages included in Attachment 8): “We have different [fuel surcharge] tables for the different types of commodities, which take into account the average tons per train, the number of locomotives per train, etcetera” (Tr. at 306-07).

54. Please provide all analyses made by BNSF comparing any mileage based fuel surcharge used or considered by BNSF to any mileage based fuel surcharge used or considered by any other railroad.

Respectfully submitted,

CARGILL, INCORPORATED

By: John H. LeSeur 
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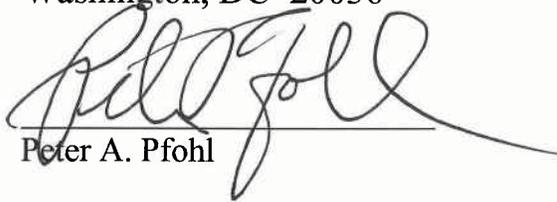
Dated: February 1, 2011

Attorneys for Complainant

CERTIFICATE OF SERVICE

I hereby certify, that I have this 1st day of February, 2011 caused to be served copies of the above discovery requests by hand delivery upon outside counsel for Defendant BNSF Railway Company, as follows:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036



Peter A. Pfohl

ATTACHMENT 1

Attachment 1

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

In re RAIL FREIGHT FUEL SURCHARGE
ANTITRUST LITIGATION

MDL Docket No. 1869

This document relates to

Misc. No. 07-489 (PLF)

ALL DIRECT PURCHASER CASES

**DIRECT PURCHASER PLAINTIFFS' SECOND REQUEST FOR PRODUCTION TO
DEFENDANT BNSF RAILWAY COMPANY**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, interim class counsel for the Direct Purchaser Plaintiffs (“Plaintiffs”) request that Defendant BNSF Railway Company (“BNSF”) respond to the following Request for Production within thirty (30) days following the date of service of these Requests, and produce all responsive documents, electronically stored information and things that are in its possession, custody or control on a rolling basis.

DEFINITIONS

These Requests For Production are subject to and incorporate the following definitions and instructions:

1. “AAR” means the Association of American Railroads, its board, committees, subcommittees, divisions, departments, predecessors or successors, and any of its present or former officers, directors, employees, members, representatives or any others acting on its behalf.

2. “AII” means the All Inclusive Index, published by the AAR.

3. “AIIIF” means the All Inclusive Index Less Fuel, published by the AAR.

4. “Consolidated Complaint” means the Consolidated Amended Class Action Complaint filed by Plaintiffs in the above-captioned action on April 15, 2008.

5. “Analyses” means any studies, reports, memoranda, summaries, statistical compilations, presentations, reviews, audits and other types of written, printed or electronic submissions of information.

6. “BNSF”, “you” or “your” means BNSF Railway Company, and any of its corporate parents, subsidiaries, affiliates, divisions, departments, predecessors or successors, and any of its present or former officers, directors, employees, members, representatives or any others acting on its behalf.

7. “Communication” means any exchange, transfer, or dissemination of facts or information, regardless of the means by which it is accomplished.

8. “Concerning”, “relate to” or “relating to” means containing, describing, discussing, embodying, commenting upon, identifying, incorporating, regarding to, evidencing, evaluating, summarizing, constituting, comprising or otherwise pertinent to the matter or any aspect thereof.

9. “Defendants” means CSX Transportation, Inc. (“CSX”), BNSF Railway Company (“BNSF”), Union Pacific Railroad Company (“UP”), and Norfolk Southern Railway Company (“NS”), individually or collectively, and any of their respective corporate parents, subsidiaries, affiliates, divisions, departments, predecessors or successors, and any of its present or former officers, directors, employees, members, representatives or any others acting on their behalf respectively.

10. “Document” means without limitation, the original and all non-identical copies of all items subject to discovery under Rule 34 of the Federal Rules of Civil Procedure. This definition includes, without limitation, electronically stored information (see also definition number 11 below), letters, correspondence, memoranda, legal pleadings, calendars, diaries, travel records, summaries, records of telephone conversations, telegrams, facsimile transmissions and receipts, notes, reports, compilations, notebooks, work papers, graphs, charts, blueprints, books, pamphlets, brochures, circulars, manuals, instructions, ledgers, drawings, sketches, photographs, videotapes, audiotapes, film and sound reproductions, sales, advertising and promotional literature, agreements, stored recordings, minutes or other records of meetings, all written or graphic records or representations of any kind, and mechanical representations of any kind.

11. “Electronically stored information” or “ESI” includes, without limitation, the following:

- a. information that is generated, received, processed, and recorded by computers and other electronic devices;
- b. internal or external web sites;
- c. output resulting from the use of any software program, including, without limitation, word processing documents, spreadsheets, database files, charts, graphs and outlines, electronic mail, AOL Instant MessengerTM (or similar instant messaging program) or bulletin board programs, operating systems, source code, PRF files, PRC files, batch files, ASCII files, and all miscellaneous media on which they reside and regardless of whether said electronic data exists in an active file, a deleted file, or file fragment;
- d. activity listings of electronic mail receipts and/or transmittals; and

e. any and all items stored on computer memories, hard disks, floppy disks, CD-ROM, magnetic tape, microfiche, or in any other vehicle for digital data storage or transmittal, such as, but not limited to, a personal digital assistant, e.g., Palm Pilot, Blackberry, or similar device, and file folder tabs, or containers and labels appended to, or relating to, any physical storage device associated with each original or copy of all documents requested herein.

12. “Meeting” means any gathering, assembly, convocation, encounter or contemporaneous presence of two or more persons (whether in person or by telephone, videoconference or other electronic means) for any purpose, whether planned, arranged, scheduled or not.

13. “NFTA” means the National Freight Transportation Association, and any of its board, committees, subcommittees, divisions, departments, predecessors or successors, and any of its present or former officers, directors, employees, members, representatives or any others acting on its behalf.

14. “Person” means any natural person, corporation, firm, company, sole proprietorship, partnership, joint venture, trust, association, institute, or other business, legal or government entity.

15. “Policy” or “practice” means any procedure or directive, whether written or unwritten, formal or informal.

16. “RCAF” means the Rail Cost Adjustment Fact published by the Surface Transportation Board, whether adjusted or unadjusted for productivity.

17. “Rail Freight Transportation Services” means the transportation of freight by a railroad whether the rates are set by private contracts or through other means exempt from rate

regulation under federal law, or are set by tariff publication or other means that are subject to regulation under federal law.

18. “Rail Fuel Surcharge” means a separately-identified component of the total rate charged for rail freight transportation services that is called a “fuel surcharge” or a “rail fuel surcharge,” or is otherwise identified as a stand-alone charge purportedly to recoup increases in the rail carrier’s fuel costs.

19. “Shippers” or “customers” mean those who purchased rail freight transportation services directly from Defendants.

20. The terms “all” and “each” shall be construed as “all and each.”

21. The terms “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

22. The use of the singular form of any word includes the plural and vice versa.

INSTRUCTIONS

1. You are requested to produce all documents in your possession, custody or control, regardless of the physical location of the documents.

2. All documents shall be produced in the same order as they are kept or maintained in the ordinary course of business. If any documents have been removed from the files in which they were found for purposes of producing them in response to these Requests, for each such document identify the file(s) in which the document was originally located.

3. You are requested to produce each document requested, together with all non-identical copies and drafts of such document.

4. If any requested document cannot be produced in full, you are to produce it to the extent possible, indicating which document, or portion of such document, is being withheld, and the reason that document, or portion of such document, is being withheld.

5. Documents attached to each other should not be separated when being produced in response to these Requests.

6. Color copies of documents are to be produced where color is necessary to interpret or understand the contents of the documents.

7. If no documents exist that are responsive to a particular Request, that fact should be stated in each of Defendant's responses to such Request.

8. Separately with respect to each piece of information called for by these Requests which is withheld under a claim of privilege or otherwise, provide an explanation of the claim being asserted and a detailed privilege log that contains at least the following information for each document that you withhold:

- a. State the date of the document;
- b. Identify each and every author of the document;
- c. Identify each and every person who prepared or participated in the preparation of the document;
- d. Identify each and every person who received the document;
- e. Identify each and every person from whom the document was received;
- f. Provide sufficient information relating to the document and the circumstances thereof to explain the claim of privilege or protection and to permit the adjudication of the propriety of the claim.

9. If a document or group of documents responsive to these Requests once existed, but has been destroyed or discarded, for each such document or group of documents, identify the document or group of documents, state when the document or group of documents was destroyed or discarded, state why the document or group of documents was destroyed or discarded, and identify the persons most knowledgeable about the contents of the document or group of documents and the circumstances under which the document or group of documents was destroyed or discarded.

10. Documents will be produced in a format to be agreed upon by the parties.

11. Unless a different time period is specified, the time period relevant to these Requests is January 1, 2000 through the present.

12. The obligation to provide the information sought by these requests for production is continuing within the requirement of Fed. R. Civ. P. 26(e).

REQUEST FOR PRODUCTION

1. All documents concerning the adoption and use of Rail Fuel Surcharges.

2. All business plans, marketing reports, and strategic plans concerning, in whole or in part, Rail Fuel Surcharges.

3. All communications with, including (but not limited) presentations to, investors (actual or prospective), management committees, corporate officers, executive committees or a board of directors (or subgroup thereof) concerning, in whole or in part, Rail Fuel Surcharges.

4. All documents concerning internal meetings and discussions relating to Rail Fuel Surcharges.

5. All documents concerning meetings and communications between and among two or more of the Defendants relating to Rail Fuel Surcharges, investments in new track, or bids or proposals to serve individual shippers.

6. Documents (including, without limitation, electronic transactional data) sufficient to show, for each rail freight shipment invoiced to a customer, (a) the invoice number; (b) the date of the invoice; (c) the shipper identification number; (d) the shipper's name, addresses, and phone numbers; (e) the date(s) of the rail freight transportation service; (f) the shipment origin; (g) the shipment destination; (h) the transaction price (i.e., the total price charged for shipment), (i) the base rate for shipment; (j) the Rail Fuel Surcharge, if any, imposed (as a percentage and as a dollar amount); (k) any other charge for fuel, including without limitation any charge included through the RCAF or the AII or any other cost escalation index; (l) any discounts, rebates, credits, debits, allowances, or price offsets applied to the Rail Fuel Surcharge or other charge for fuel; (m) any other discounts, rebates, credits, debits, allowances, or price offsets applied to the transaction; and (n) whether the freight shipment was rate regulated or unregulated.

7. All documents concerning the removal of fuel as a cost component of the AII or RCAF.

8. All documents concerning the development or adoption of the AILF, including (but not limited to) documents relating to the need for or desirability of the AILF.

9. All documents concerning the application of the AILF.

10. All documents concerning meetings and communications between and among two or more of the Defendants relating to the AILF, the AII or RCAF.

11. All documents concerning communications with the AAR or any of its members concerning the AILF, the AII or the RCAF.

12. All documents concerning any analyses of the number or percentage of your freight shipment contracts that included (or did not include) a provision applying the AII or the RCAF.

13. All documents concerning the organizational structure of the AAR, including (but not limited to) the Board, committees or subcommittees of the Board, other committees, subcommittees or any departments or divisions, and the members and employees of those groups.

14. Documents sufficient to identify all of your executives, directors, officers, employees or agents who serve or have served on the AAR Board, or committees or subcommittees of the AAR Board, including (but not limited to) the Network Efficiency Management Committee and its subordinate committees, or any other AAR committees, subcommittees, divisions or departments.

15. All documents concerning or describing your role or influence at the AAR.

16. All documents created by or for the AAR, or its Board, any committee, subcommittee, officers or personnel thereof, and concerning Rail Fuel Surcharges, the AII, the RCAF, or the AILF.

17. All documents concerning meetings and communications between you (or any other Defendant) and the AAR relating to Rail Fuel Surcharges or the AILF.

18. All documents concerning meetings and communications between you (or any other Defendant) and the AAR relating to rail productivity, profitability, tax burdens, pricing including (but not limited to) differential pricing, market structure and rail industry mergers, economic impact of the freight railroads of North America, railroad costs and the market share of individual railroads or of the rail industry compared with other modes of freight transportation.

19. All documents concerning meetings and communications between you (or any other Defendant) and any third party relating to Rail Fuel Surcharges or the AILF.

20. All documents concerning meetings and discussions of the AAR, within or outside of its offices, relating to Rail Fuel Surcharges or the AILF, including (but not limited to) minutes of any such meetings and any other documents provided during those meetings and discussions.

21. All documents concerning Surface Transportation Board's hearings and decision about Rail Fuel Surcharges, except for those documents covered by Request No. 2 of Plaintiffs' First Request for Production, dated March 14, 2008.

22. All documents concerning meetings and communications between and among two or more of the Defendants relating to the Surface Transportation Board's hearings and decision concerning Rail Fuel Surcharges.

23. All documents concerning any analyses of the potential or actual impact of Rail Fuel Surcharges on your profitability, including (but not limited to): (a) analyses of the amount of revenues generated by Rail Fuel Surcharges in comparison to your actual fuel costs; (b) analyses as to whether a rate-based Rail Fuel Surcharge produces more revenues than the AII or the RCAF or any other mileage-based or cost-based fuel surcharge (or any other type of such surcharge); and (c) all documents concerning business plans, planning analysis, budgets, forecasts, sales and profit projections relating to Rail Fuel Surcharges.

24. All documents concerning the amount of revenues and profits generated by Rail Fuel Surcharges, including (but not limited to) annual or monthly gross and net profits attributable to Rail Fuel Surcharges.

25. All documents concerning any analyses as to your potential or actual ability to offset, recoup or mitigate your fuel costs, including (but not limited to): (a) analyses of whether rate-based Rail Fuel Surcharges more accurately recoup actual fuel costs than the AII or the RCAF or any other mileage-based or cost-based Rail Fuel Surcharge (or any other type of such surcharge); (b) analyses of your ability to offset, recoup or mitigate your actual fuel costs both prior to and following the adoption of the AILF; and (c) analyses of your ability to offset, recoup or mitigate your actual fuel costs by utilizing the RCAF in contracts with shippers.

26. All documents concerning your actual fuel costs.

27. All documents concerning any analyses of your actual fuel costs.

28. All documents concerning any analyses of the potential or actual impact of Rail Fuel Surcharges on the profitability of the rail freight industry, or any of the Defendants, or any other third party.

29. All documents concerning the actual Rail Fuel Surcharges imposed by any of the other Defendants (or any other third party), both prior to 2003 and afterwards, and the method of calculation for those Rail Fuel Surcharges, including (but not limited to) any analyses of those Rail Fuel Surcharge programs.

30. All documents concerning any analyses of the fuel costs of any of the other Defendants (or any other third party).

31. All documents concerning any analyses of the use of fuel hedging strategies as a means of addressing fuel costs.

32. All documents concerning whether or not to use hedging strategies as a means of addressing fuel costs.

33. All documents concerning your decision whether or not to enter into hedging contracts with the Archer-Daniels-Midland Company or any other shipper.

34. All documents concerning any other methods you claim to use or have used to offset, recoup or mitigate your fuel costs (apart from Rail Fuel Surcharges and hedging strategies).

35. All documents concerning any analyses of improvements to your fuel efficiency.

36. All documents concerning your adoption and use of the WTI or HDF index.

37. All documents concerning any analyses about whether to base Rail Fuel Surcharges on the WTI index, the HDF index, or any other index.

38. All documents concerning meetings and communications between and among two or more Defendants which relate to the adoption and use of the WTI or HDF index.

39. All documents concerning the actual calculation of the Rail Fuel Surcharges you charged, including (but not limited to) documents identifying the factors considered and the reasons for selecting the calculation.

40. All documents concerning the trigger points for application and adjustment of the Rail Fuel Surcharge percentages you charged, including (but not limited to) documents identifying the factors considered and the reasons for selecting those trigger points.

41. All documents concerning your decision to implement and use a two-month time period between any change in the applicable (HDF or WTI) index and the resulting adjustment to the Rail Fuel Surcharges, including (but not limited to) documents identifying the factors considered and the reasons for selecting that time period.

42. All documents concerning the decision to publish and publication of your Rail Fuel Surcharges on your website.

43. All documents concerning policies or procedures of how and when to notify shippers of changes to the Rail Fuel Surcharges.
44. All documents used to notify shippers of changes to the Rail Fuel Surcharges.
45. All documents concerning meetings among Defendants at the NFTA and concerning Rail Fuel Surcharges, fuel costs, the AII, the AILF, the RCAF or the need to increase rates for or profitability of freight shipments.
46. All documents that you have submitted to or received from the AAR, NFTA or any other trade association concerning Rail Fuel Surcharges.
47. All documents concerning the statements made by John Lanigan referenced in paragraph 68 of the Consolidated Complaint.
48. All documents concerning the statements made by James R. Young referenced in paragraphs 4,10 and 11 of the Consolidated Complaint.
49. All documents concerning your policies and practices relating to long-term contracts with shippers.
50. All documents concerning any analyses of the benefits of entering into long-term contracts with shippers as opposed to shorter-term contracts, or of entering into shorter-term contracts as opposed to long-term contracts.
51. All written contracts for rail freight transportation that you entered into with shippers.
52. All documents concerning your policies and practices relating to the negotiation of Rail Fuel Surcharges with shippers, including (but not limited to) the application of discounts, rebates, credits, debits, allowances or other price offsets to the Rail Fuel Surcharges.
53. All documents concerning efforts by shippers to negotiate Rail Fuel Surcharges.

54. All documents concerning your policies and practices relating to the negotiation of rail freight prices with shippers.

55. All documents concerning your pricing plans, pricing policies, price lists, discounts, credits, debits, rebates, allowances or other price offsets (relating to Rail Fuel Surcharges, rates or otherwise).

56. All documents concerning meetings and communications between you and any shipper organizations relating to Rail Fuel Surcharges.

57. All documents concerning your use of “through rates” as referenced in paragraph 94 of the Consolidated Complaint, including (but not limited to) the move away from the use of such “through rates” and any analyses relating to the costs and benefits of moving away from such “through rates.”

58. All documents concerning competition in the market for rail freight transportation services, including (but not limited to) market studies, forecasts, surveys, analyses of competitors, sales personnel call reports, and attempts to win customers from competitors (and any losses of customers to competitors).

59. All documents concerning any barriers to entry into the rail freight transportation industry, including (but not limited to) any documents concerning the actual or projected cost of developing rail freight infrastructure (such as railroad tracks, stations, yards, and switching facilities), meeting regulatory standards, obtaining easements, or capturing market share from other Defendants or any other railroad company.

60. All documents concerning any analyses of rail capacity in the Rail Freight Transportation Services industry.

61. All documents concerning any other Defendants’ costs and pricing.

62. All documents concerning any analyses of your ability to implement price increases in your contracts with shippers.

63. All documents concerning rail freight transportation market shares (yours or other companies') as measured by car loads, tons, revenue or sales, or otherwise.

64. Documents sufficient to identify (on an annual basis) your actual profits and gross and net profit margins.

65. Documents sufficient to identify (on an annual basis) your corporate structure including, but not limited to, your officers and directors, subsidiaries and affiliated companies and your subsidiaries' and affiliated companies' officers and directors.

66. All organizational charts relating to your Rail Freight Transportation Services business.

67. All calendars and expense reports of officers, directors and other executives with responsibility for your Rail Freight Transportation Services business.

68. All documents concerning meetings and communications between you (or any other Defendant), or any shippers or investors (actual or prospective), about this litigation.

69. All written policies and procedures for the retention and/or destruction of documents.

70. All documents sufficient to access, utilize, interpret or understand any ESI you are producing in response to these Requests, including (but not limited to) the record layout of your ESI, the codes used in your ESI, and the operation of any equipment or software used to maintain, read, or utilize your ESI.

DATED: December 30, 2008

Respectfully submitted:

/s/ Stephen R. Neuwirth
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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies that on December 30, 2008, a copy of the foregoing document requests was served on counsel for BNSF Railway Company by electronic mail.

/s/ Sami H. Rashid
Sami H. Rashid

ATTACHMENT 2

Attachment 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN RE: RAIL FREIGHT FUEL SURCHARGE
ANTITRUST LITIGATION

MDL Docket No. 1869
Misc. No. 07-489 (PLF/JMF/AK)

This document relates to:

ALL CASES

**DECLARATION OF SAMI H. RASHID IN SUPPORT OF PLAINTIFFS' MOTION FOR
CLASS CERTIFICATION**

I, Sami H. Rashid, declare pursuant to 28 U.S.C. § 1746 as follows:

1. I am a member of the Bar of the State of New York and an associate in the law firm of Quinn Emanuel Urquhart & Sullivan, LLP, co-lead interim class counsel for the Direct Purchaser Plaintiffs in the above-captioned matter. I submit this declaration in support of Plaintiffs' Motion for Class Certification, dated March 18, 2010.

2. Attached hereto as RD Ex. 1 is a true and correct copy of a document bearing the Bates numbers CSXFSC000327518-19.

3. Attached hereto as RD Ex. 2 is a true and correct copy of a document bearing the Bates numbers BNSF-0511809-52.

4. Attached hereto as RD Ex. 3 is a true and correct copy of a document bearing the Bates numbers BNSF-0026751-53.

5. Attached hereto as RD Ex. 4 is a true and correct copy of a document bearing the Bates number UPFSC0030470.

6. Attached hereto as RD Ex. 5 is a true and correct copy of a document bearing the Bates numbers BNSF-0574516-624.

7. Attached hereto as RD Ex. 6 is a true and correct copy of the metadata to BNSF-0574516-624.

8. Attached hereto as RD Ex. 7 is a true and correct copy of exhibit 6 to the deposition of Michael Giftos, which took place on February 25, 2010.

9. Attached hereto as RD Ex. 8 is a true and correct copy of a document bearing the Bates numbers UPFSC0000542-43.

10. Attached hereto as RD Ex. 9 is a true and correct copy of a document bearing the Bates number UPFSC0147960.

11. Attached hereto as RD Ex. 10 is a true and correct copy of a document bearing the Bates number USM005647.

12. Attached hereto as RD Ex. 11 is a true and correct copy of a document bearing the Bates numbers AAR-E-00078595-620.

13. Attached hereto as RD Ex. 12 is a true and correct copy of a document bearing the Bates numbers UPFSC0000677-79.

14. Attached hereto as RD Ex. 13 is a true and correct copy of a document bearing the Bates numbers UPFSC0000675-76.

15. Attached hereto as RD Ex. 14 is a true and correct copy of a document bearing the Bates numbers UPFSC0195600-04.

16. Attached hereto as RD Ex. 15 is a true and correct copy of a document bearing the Bates number UPFSC0000544.

17. Attached hereto as RD Ex. 16 is a true and correct copy of a document bearing the Bates numbers UPFSC0260572-95.

18. Attached hereto as RD Ex. 17 is a true and correct copy of a document bearing the Bates numbers CSXFSC000000270-71.

19. Attached hereto as RD Ex. 18 is a true and correct copy of a document bearing the Bates numbers BNSF-0390248-50.

20. Attached hereto as RD Ex. 19 is a true and correct copy of a document bearing the Bates numbers BNSF-0330837-51.

21. Attached hereto as RD Ex. 20 is a true and correct copy of a document bearing the Bates number BNSF-0330836.

22. Attached hereto as RD Ex. 21 is a true and correct copy of a document bearing the Bates numbers BNSF-0027470-71.

23. Attached hereto as RD Ex. 22 is a true and correct copy of a document bearing the Bates number AAR-P-00000086.

24. Attached hereto as RD Ex. 23 is a true and correct copy of a document bearing the Bates number CSXFSC000000357.

25. Attached hereto as RD Ex. 24 is a true and correct copy of a document bearing the Bates numbers CSXFSC000000358-63.

26. Attached hereto as RD Ex. 25 is an insert sheet intentionally left blank.

27. Attached hereto as RD Ex. 26 is a true and correct copy of exhibit 10 to the deposition of Michael Giftos, which took place on February 25, 2010.

28. Attached hereto as RD Ex. 27 is a true and correct copy of exhibit 31 to the deposition of Clyde McIntyre, which took place on February 18, 2010.

29. Attached hereto as RD Ex. 28 is a true and correct copy of a document bearing the Bates number CSXFSC000040389.

30. Attached hereto as RD Ex. 29 is a true and correct copy of a document bearing the Bates numbers BNSF-0027614-21.

31. Attached hereto as RD Ex. 30 is a true and correct copy of a document bearing the Bates number UPFSC0000787.

32. Attached hereto as RD Ex. 31 is a true and correct copy of a document bearing the Bates numbers UPFSC0000788-90.

33. Attached hereto as RD Ex. 32 is a true and correct copy of a document bearing the Bates number UPFSC0000791.

34. Attached hereto as RD Ex. 33 is a true and correct copy of a document bearing the Bates numbers CSXFSC000135789-90.

35. Attached hereto as RD Ex. 34 is a true and correct copy of exhibit 23 to the deposition of Clyde McIntyre, which took place on February 18, 2010.

36. Attached hereto as RD Ex. 35 is a true and correct copy of a document bearing the Bates number BNSF-FSC000571.

37. Attached hereto as RD Ex. 36 is an insert sheet intentionally left blank.

38. Attached hereto as RD Ex. 37 is a true and correct copy of a document bearing the Bates number CSXFSC000040566.

39. Attached hereto as RD Ex. 38 is a true and correct copy of a document bearing the Bates numbers UPFSC0000839-41.

40. Attached hereto as RD Ex. 39 is a true and correct copy of a document bearing the Bates number UPFSC0000852.

41. Attached hereto as RD Ex. 40 is a true and correct copy of a document bearing the Bates numbers BNSF-FSC000572-73.

42. Attached hereto as RD Ex. 41 is a true and correct copy of a document bearing the Bates numbers NS001000006-10.

43. Attached hereto as RD Ex. 42 is a true and correct copy of a document bearing the Bates numbers NS001000283-87.

44. Attached hereto as RD Ex. 43 is a true and correct copy of a document bearing the Bates numbers NS001000240-41.

45. Attached hereto as RD Ex. 44 is a true and correct copy of a document bearing the Bates number UPFSC0037119.

46. Attached hereto as RD Ex. 45 is a true and correct copy of a document bearing the Bates number NS001000005.

47. Attached hereto as RD Ex. 46 is a true and correct copy of a document bearing the Bates numbers NS001000012-13.

48. Attached hereto as RD Ex. 47 is a true and correct copy of exhibit 25 to the deposition of Chuck Adams, which took place on March 4, 2010.

49. Attached hereto as RD Ex. 48 is a true and correct copy of a document bearing the Bates number UPFSC0001030.

50. Attached hereto as RD Ex. 49 is a true and correct copy of a document bearing the Bates number UPFSC0001031.

51. Attached hereto as RD Ex. 50 is a true and correct copy of a document bearing the Bates numbers NS001000354-56.

52. Attached hereto as RD Ex. 51 is an insert sheet intentionally left blank.

53. Attached hereto as RD Ex. 52 is an insert sheet intentionally left blank.

54. Attached hereto as RD Ex. 53 is a true and correct copy of a document bearing the Bates number UPFSC0183981, followed by a file produced in its native format.

55. Attached hereto as RD Ex. 54 is an insert sheet intentionally left blank.

56. Attached hereto as RD Ex. 55 is a true and correct copy of a document bearing the Bates number NS_010042321.

57. Attached hereto as RD Ex. 56 is a true and correct copy of a document bearing the Bates numbers UPFSC0001065-66.

58. Attached hereto as RD Ex. 57 is a true and correct copy of a document bearing the Bates numbers BNSF-FSC000486-87.

59. Attached hereto as RD Ex. 58 is a true and correct copy of a document bearing the Bates numbers NS001000373-74.

60. Attached hereto as RD Ex. 59 is a true and correct copy of exhibit 45 to the deposition of Donald Seale, which took place on February 26, 2010.

61. Attached hereto as RD Ex. 60 is a true and correct copy of a document bearing the Bates numbers NS_010005138-42.

62. Attached hereto as RD Ex. 61 is a true and correct copy of a document bearing the Bates numbers NS_010033266-72.

63. Attached hereto as RD Ex. 62 is a true and correct copy of a document bearing the Bates number CSXFSC000346798.

64. Attached hereto as RD Ex. 63 is a true and correct copy of exhibit 44 to the deposition of Michael Giftos, which took place on February 25, 2010.

65. Attached hereto as RD Ex. 64 is a true and correct copy of a document bearing the Bates numbers CSXFSC000000476-77.

66. Attached hereto as RD Ex. 65 is a true and correct copy of exhibit 18 to the deposition of Sam Kyei, which took place on March 4, 2010.

67. Attached hereto as RD Ex. 66 is an insert sheet intentionally left blank.

68. Attached hereto as RD Ex. 67 is a true and correct copy of a document bearing the Bates numbers AAR-000207-43.

69. Attached hereto as RD Ex. 68 is a true and correct copy of a document bearing the Bates numbers BNSF-0560330-34.

70. Attached hereto as RD Ex. 69 is a true and correct copy of a document bearing the Bates numbers AAR-000164-66.

71. Attached hereto as RD Ex. 70 is a true and correct copy of a document bearing the Bates numbers NS_010033487-89.

72. Attached hereto as RD Ex. 71 is a true and correct copy of a document bearing the Bates number USM005662.

73. Attached hereto as RD Ex. 72 is a true and correct copy of a document bearing the Bates number USM005663.

74. Attached hereto as RD Ex. 73 is a true and correct copy of a document bearing the Bates number USM005664.

75. Attached hereto as RD Ex. 74 is a true and correct copy of exhibit 27 to the deposition of Sam Kyei, which took place on March 4, 2010.

76. Attached hereto as RD Ex. 75 is a true and correct copy of exhibit 46 to the deposition of Sam Kyei, which took place on March 4, 2010.

77. Attached hereto as RD Ex. 76 is a true and correct copy of exhibit 26 to the deposition of Chuck Adams, which took place on March 4, 2010.

78. Attached hereto as RD Ex. 77 is a true and correct copy of a document bearing the Bates numbers NS_013001654-56.

79. Attached hereto as RD Ex. 78 is a true and correct copy of a document bearing the Bates numbers UPFSC0276428-30, followed by a file produced in its native format.

80. Attached hereto as RD Ex. 79 is a true and correct copy of a document bearing the Bates numbers UPFSC0001161-62.

81. Attached hereto as RD Ex. 80 is a true and correct copy of a document bearing the Bates number UPFSC0032168.

82. Attached hereto as RD Ex. 81 is a true and correct copy of exhibit 29 to the deposition of Sam Kyei, which took place on March 4, 2010.

83. Attached hereto as RD Ex. 82 is a true and correct copy of exhibit 55 to the deposition of Donald Seale, which took place on February 26, 2010.

84. Attached hereto as RD Ex. 83 is a true and correct copy of a document bearing the Bates numbers UPFSC0001181-82.

85. Attached hereto as RD Ex. 84 is a true and correct copy of exhibit 58 to the deposition of Donald Seale, which took place on February 26, 2010.

86. Attached hereto as RD Ex. 85 is a true and correct copy of a document bearing the Bates numbers NS_010074364-70.

87. Attached hereto as RD Ex. 86 is a true and correct copy of exhibit 26 to the deposition of Clyde McIntyre, which took place on February 18, 2010.

88. Attached hereto as RD Ex. 87 is a true and correct copy of exhibit 36 to the deposition of Clyde McIntyre, which took place on February 18, 2010.

89. Attached hereto as RD Ex. 88 is a true and correct copy of a document bearing the Bates numbers BNSF-0535033-35.

90. Attached hereto as RD Ex. 89 is a true and correct copy of a document bearing the Bates numbers BNSF-FSC000664-69.

91. Attached hereto as RD Ex. 90 is a true and correct copy of exhibit 11 to the deposition of Donald Seale, which took place on February 26, 2010.

92. Attached hereto as RD Ex. 91 is a true and correct copy of exhibit 31 to the deposition of Sam Kyei, which took place on March 4, 2010.

93. Attached hereto as RD Ex. 92 is a true and correct copy of a document bearing the Bates numbers CSXFSC000086525-26.

94. Attached hereto as RD Ex. 93 is a true and correct copy of exhibit 6 to the deposition of Donald Seale, which took place on February 26, 2010.

95. Attached hereto as RD Ex. 94 is a true and correct copy of exhibit 7 to the deposition of Donald Seale, which took place on February 26, 2010.

96. Attached hereto as RD Ex. 95 is a true and correct copy of a document bearing the Bates number NS001001039.

97. Attached hereto as RD Ex. 96 is a true and correct copy of a document bearing the Bates numbers NS_010035278-80.

98. Attached hereto as RD Ex. 97 is a true and correct copy of a document bearing the Bates numbers BNSF-0028962-9077.

99. Attached hereto as RD Ex. 98 is a true and correct copy of a document bearing the Bates numbers NS001000778-84.

100. Attached hereto as RD Ex. 99 is a true and correct copy of exhibit 33 to the deposition of Sam Kyei, which took place on March 4, 2010.

101. Attached hereto as RD Ex. 100 is a true and correct copy of a document bearing the Bates numbers NS001000861-62.

102. Attached hereto as RD Ex. 101 is a true and correct copy of a document bearing the Bates numbers BNSF-FSC000676-78.

103. Attached hereto as RD Ex. 102 is a true and correct copy of a document bearing the Bates numbers BNSF-FSC000679-82.

104. Attached hereto as RD Ex. 103 is a true and correct copy of a document bearing the Bates numbers BNSF-0490554-89.

105. Attached hereto as RD Ex. 104 is a true and correct copy of a document bearing the Bates numbers BNSF-0035381-86.

106. Attached hereto as RD Ex. 105 is a true and correct copy of a document bearing the Bates numbers NS001000573-79.

107. Attached hereto as RD Ex. 106 is a true and correct copy of exhibit 3 to the deposition of Chuck Adams, which took place on March 4, 2010.

108. Attached hereto as RD Ex. 107 is a true and correct copy of exhibit 38 to the deposition of Sam Kyei, which took place on March 4, 2010.

109. Attached hereto as RD Ex. 108 is a true and correct copy of a document bearing the Bates numbers BNSF-0029497-98.

110. Attached hereto as RD Ex. 109 is a true and correct copy of exhibit 40 to the deposition of Sam Kyei, which took place on March 4, 2010.

111. Attached hereto as RD Ex. 110 is a true and correct copy of exhibit 42 to the deposition of Clyde McIntyre, which took place on February 18, 2010.

112. Attached hereto as RD Ex. 111 is a true and correct copy of a document bearing the Bates number NS_010047460.

113. Attached hereto as RD Ex. 112 is a true and correct copy of exhibit 41 to the deposition of Sam Kyei, which took place on March 4, 2010.

114. Attached hereto as RD Ex. 113 is a true and correct copy of exhibit 10 to the deposition of Mark Draper, which took place on March 3, 2010.

115. Attached hereto as RD Ex. 114 is a true and correct copy of a document bearing the Bates numbers BNSF-0481756-73.

116. Attached hereto as RD Ex. 115 is a true and correct copy of a document bearing the Bates numbers AAR-000260-63.

117. Attached hereto as RD Ex. 116 is a true and correct copy of exhibit 8 to the deposition of Chuck Adams, which took place on March 4, 2010.

118. Attached hereto as RD Ex. 117 is a true and correct copy of exhibit 11 to the deposition of Chuck Adams, which took place on March 4, 2010.

119. Attached hereto as RD Ex. 118 is a true and correct copy of a document bearing the Bates number AAR-000358.

120. Attached hereto as RD Ex. 119 is a true and correct copy of a document bearing the Bates numbers UPFSC0001432-37.

121. Attached hereto as RD Ex. 120 is a true and correct copy of exhibit 42 to the deposition of Sam Kyei, which took place on March 4, 2010.

122. Attached hereto as RD Ex. 121 is a true and correct copy of a document bearing the Bates numbers BNSF-0031225-46.

123. Attached hereto as RD Ex. 122 is a true and correct copy of exhibit 26 to the deposition of Sam Kyei, which took place on March 4, 2010.

124. Attached hereto as RD Ex. 123 is a true and correct copy of a document bearing the Bates numbers UPFSC0042030-34.

125. Attached hereto as RD Ex. 124 is a true and correct copy of exhibit 27 to the deposition of Clyde McIntyre, which took place on February 18, 2010.

126. Attached hereto as RD Ex. 125 is a true and correct copy of a document bearing the Bates numbers NS001001082-84.

127. Attached hereto as RD Ex. 126 is a true and correct copy of exhibit 1 to the deposition of Mark Draper, which took place on March 3, 2010.

128. Attached hereto as RD Ex. 127 is a true and correct copy of exhibit 32 to the deposition of Chuck Adams, which took place on March 4, 2010.

129. Attached hereto as RD Ex. 128 is a true and correct copy of the December 12, 2005 *CEO Wire* interview of Wick Moorman.

130. Attached hereto as RD Ex. 129 is a true and correct copy of documents bearing the Bates numbers NS_010066633-35 and NS_010066636, each followed by a file produced in its native format.

131. Attached hereto as RD Ex. 130 is a true and correct copy of a document bearing the Bates numbers NS_013001781-82.

132. Attached hereto as RD Ex. 131 is a true and correct copy of exhibit 56 to the deposition of Donald Seale, which took place on February 26, 2010.

133. Attached hereto as RD Ex. 132 is a true and correct copy of a document bearing the Bates numbers BNSF-FSC000218-25.

134. Attached hereto as RD Ex. 133 is a true and correct copy of a document bearing the Bates numbers UPFSC0001667-68.

135. Attached hereto as RD Ex. 134 is a true and correct copy of a document bearing the Bates number UPFSC0423026.

136. Attached hereto as RD Ex. 135 is a true and correct copy of exhibit 45 to the deposition of Sam Kyei, which took place on March 4, 2010.

137. Attached hereto as RD Ex. 136 is a true and correct copy of a document bearing the Bates number NS001000130.

138. Attached hereto as RD Ex. 137 is a true and correct copy of the Written Statement of CSX, STB Ex Parte No. 661, April 27, 2006.

139. Attached hereto as RD Ex. 138 is a true and correct copy of a document bearing the Bates number NS_010054083.

140. Attached hereto as RD Ex. 139 is a true and correct copy of exhibit 3 to the deposition of Donald Seale, which took place on February 26, 2010.

141. Attached hereto as RD Ex. 140 is a true and correct copy of the Written Testimony of Robert M. Knight, Jr., STB Ex Parte No. 661, April 27, 2006.

142. Attached hereto as RD Ex. 141 is a true and correct copy of exhibit 29 to the deposition of Clyde McIntyre, which took place on February 18, 2010.

143. Attached hereto as RD Ex. 142 is a true and correct copy of exhibit 30 to the deposition of Clyde McIntyre, which took place on February 18, 2010.

144. Attached hereto as RD Ex. 143 is a true and correct copy of a document bearing the Bates number NS_010000494.

145. Attached hereto as RD Ex. 144 is a true and correct copy of the Comments of BNSF, STB Ex Parte No. 661, October 2, 2006.

146. Attached hereto as RD Ex. 145 is a true and correct copy of exhibit 3 to the deposition of Mark Draper, which took place on March 3, 2010.

147. Attached hereto as RD Ex. 146 is a true and correct copy of a document bearing the Bates numbers BNSF-0033700-17.

148. Attached hereto as RD Ex. 147 is a true and correct copy of Surface Transportation Board Decision, *Rail Fuel Surcharges*, STB Ex Parte No. 661, January 25, 2007.

149. Attached hereto as RD Ex. 148 is a true and correct copy of a document bearing the Bates numbers CSXFSC000182739-52.

150. Attached hereto as RD Ex. 149 is a true and correct copy of a document bearing the Bates numbers CSXFSC000160929-33.

151. Attached hereto as RD Ex. 150 is a true and correct copy of exhibit 17 to the deposition of Donald Seale, which took place on February 26, 2010.

152. Attached hereto as RD Ex. 151 is an insert sheet intentionally left blank.

153. Attached hereto as RD Ex. 152 is a true and correct copy of a document bearing the Bates numbers UPFSC0373988-99.

154. Attached hereto as RD Ex. 153 is an insert sheet intentionally left blank.

155. Attached hereto as RD Ex. 154 is an insert sheet intentionally left blank.

156. Attached hereto as RD Ex. 155 is an insert sheet intentionally left blank.

157. Attached hereto as RD Ex. 156 is a true and correct copy of a document bearing the Bates numbers BNSF-0535331-32.

158. Attached hereto as RD Ex. 157 is a true and correct copy of a document bearing the Bates numbers BNSF-0572444-47.

159. Attached hereto as RD Ex. 158 is a true and correct copy of a document bearing the Bates number NS_010067297, followed by a file produced in its native format.

160. Attached hereto as RD Ex. 159 is a true and correct copy of a document bearing the Bates numbers NS_010035994-6012.

161. Attached hereto as RD Ex. 160 is a true and correct copy of a document bearing the Bates numbers UPFSC0382351-52.

162. Attached hereto as RD Ex. 161 is a true and correct copy of portions of BNSF's 2006 Form 10-K.

163. Attached hereto as RD Ex. 162 is a true and correct copy of portions of CSX's 2006 Form 10-K.

164. Attached hereto as RD Ex. 163 is a true and correct copy of portions of Norfolk Southern's 2000 Annual Report.

165. Attached hereto as RD Ex. 164 is a true and correct copy of portions of Norfolk Southern's 2006 Form 10-K.

166. Attached hereto as RD Ex. 165 is a true and correct copy of portions of Union Pacific's 2004 Form 10-K.

167. Attached hereto as RD Ex. 166 is a true and correct copy of portions of Union Pacific's 2005 Form 10-K.

168. Attached hereto as RD Ex. 167 is a true and correct copy of portions of Union Pacific's 2006 Form 10-K.

169. Attached hereto as RD Ex. 168 is a true and correct copy of excerpts from the deposition of Chuck Adams, which took place on March 4, 2010.

170. Attached hereto as RD Ex. 169 is a true and correct copy of excerpts from the deposition of Mark Draper, which took place on March 3, 2010.

171. Attached hereto as RD Ex. 170 is a true and correct copy of excerpts from the deposition of Michael Giftos, which took place on February 25, 2010.

172. Attached hereto as RD Ex. 171 is a true and correct copy of excerpts from the deposition of Sam Kyei, which took place on March 4, 2010.

173. Attached hereto as RD Ex. 172 is a true and correct copy of excerpts from the deposition of Clyde McIntyre, which took place on February 18, 2010.

174. Attached hereto as RD Ex. 173 is a true and correct copy of excerpts from the deposition of Donald Seale, which took place on February 26, 2010.

175. Attached hereto as RD Ex. 174 is a true and correct copy of excerpts from the deposition of Michael Donnelly, which took place March 16, 2010.

176. Attached hereto as RD Ex. 175 is a true and correct copy of excerpts from the deposition of Michael Kaplan, which took place March 10, 2010.

177. Attached hereto as RD Ex. 176 is a true and correct copy of exhibit 1 to the deposition of Donald Seale, which took place on February 26, 2010.

178. Attached hereto as RD Ex. 177 is a true and correct copy of exhibit 4 to the deposition of Donald Seale, which took place on February 26, 2010.

179. Attached hereto as RD Ex. 178 is a true and correct copy of exhibit 31 to the deposition of Donald Seale, which took place on February 26, 2010.

180. Attached hereto as RD Ex. 179 is a true and correct copy of exhibit 3 to the deposition of Michael Giftos, which took place on February 25, 2010.

181. Attached hereto as RD Ex. 180 is a true and correct copy of exhibit 18 to the deposition of Donald Seale, which took place on February 26, 2010.

182. Attached hereto as RD Ex. 181 is a true and correct copy of exhibit 13 to the deposition of Michael Giftos, which took place on February 25, 2010.

183. Attached hereto as RD Ex. 182 is a true and correct copy of exhibit 14 to the deposition of Michael Giftos, which took place on February 25, 2010.

184. Attached hereto as RD Ex. 183 is a true and correct copy of exhibit 15 to the deposition of Michael Giftos, which took place on February 25, 2010.

185. Attached hereto as RD Ex. 184 is a true and correct copy of exhibit 16 to the deposition of Michael Giftos, which took place on February 25, 2010.

186. Attached hereto as RD Ex. 185 is a true and correct copy of exhibit 17 to the deposition of Michael Giftos, which took place on February 25, 2010.

187. Attached hereto as RD Ex. 186 is a true and correct copy of exhibit 19 to the deposition of Michael Giftos, which took place on February 25, 2010.

188. Attached hereto as RD Ex. 187 is a true and correct copy of exhibit 21 to the deposition of Michael Giftos, which took place on February 25, 2010.

189. Attached hereto as RD Ex. 188 is a true and correct copy of exhibit 4 to the deposition of Clyde McIntyre, which took place on February 18, 2010.

190. Attached hereto as RD Ex. 189 is a true and correct copy of exhibit 19 to the deposition of Donald Seale, which took place on February 26, 2010.

191. Attached hereto as RD Ex. 190 is a true and correct copy of exhibit 21 to the deposition of Donald Seale, which took place on February 26, 2010.

192. Attached hereto as RD Ex. 191 is a true and correct copy of exhibit 22 to the deposition of Donald Seale, which took place on February 26, 2010.

193. Attached hereto as RD Ex. 192 is a true and correct copy of exhibit 23 to the deposition of Donald Seale, which took place on February 26, 2010.

194. Attached hereto as RD Ex. 193 is a true and correct copy of exhibit 24 to the deposition of Donald Seale, which took place on February 26, 2010.

195. Attached hereto as RD Ex. 194 is a true and correct copy of exhibit 25 to the deposition of Donald Seale, which took place on February 26, 2010.

196. Attached hereto as RD Ex. 195 is a true and correct copy of exhibit 27 to the deposition of Donald Seale, which took place on February 26, 2010.

197. Attached hereto as RD Ex. 196 is a true and correct copy of exhibit 20 to the deposition of Michael Giftos, which took place on February 25, 2010.

198. Attached hereto as RD Ex. 197 is a true and correct copy of exhibit 24 to the deposition of Michael Giftos, which took place on February 25, 2010.

199. Attached hereto as RD Ex. 198 is a true and correct copy of exhibit 25 to the deposition of Michael Giftos, which took place on February 25, 2010.

200. Attached hereto as RD Ex. 199 is a true and correct copy of exhibit 12 to the deposition of Sam Kyei, which took place on March 4, 2010.

201. Attached hereto as RD Ex. 200 is a true and correct copy of exhibit 51 to the deposition of Donald Seale, which took place on February 26, 2010.

202. Attached hereto as RD Ex. 201 is a true and correct copy of exhibit 7 to the deposition of Michael Giftos, which took place on February 25, 2010.

203. Attached hereto as RD Ex. 202 is a true and correct copy of exhibit 32 to the deposition of Donald Seale, which took place on February 26, 2010.

204. Attached hereto as RD Ex. 203 is a true and correct copy of exhibit 9 to the deposition of Sam Kyei, which took place on March 4, 2010.

205. Attached hereto as RD Ex. 204 is a true and correct copy of exhibit 44 to the deposition of Donald Seale, which took place on February 26, 2010.

206. Attached hereto as RD Ex. 205 is a true and correct copy of exhibit 2 to the deposition of Donald Seale, which took place on February 26, 2010.

207. Attached hereto as RD Ex. 206 is a true and correct copy of exhibit 6 to the deposition of Chuck Adams, which took place on March 4, 2010.

208. Attached hereto as RD Ex. 207 is a true and correct copy of exhibit 6 to the deposition of Sam Kyei, which took place on March 4, 2010.

209. Attached hereto as RD Ex. 208 is a true and correct copy of exhibit 42 to the deposition of Donald Seale, which took place on February 26, 2010.

210. Attached hereto as RD Ex. 209 is a true and correct copy of exhibit 40 to the deposition of Michael Giftos, which took place on February 25, 2010.

211. Attached hereto as RD Ex. 210 is a true and correct copy of exhibit 35 to the deposition of Michael Giftos, which took place on February 25, 2010.

212. Attached hereto as RD Ex. 211 is a true and correct copy of exhibit 11 to the deposition of Sam Kyei, which took place on March 4, 2010.

213. Attached hereto as RD Ex. 212 is a true and correct copy of a document bearing the Bates numbers NS001000341-42.

214. Attached hereto as RD Ex. 213 is a true and correct copy of exhibit 35 to the deposition of Donald Seale, which took place on February 26, 2010.

215. Attached hereto as RD Ex. 214 is a true and correct copy of exhibit 53 to the deposition of Donald Seale, which took place on February 26, 2010.

216. Attached hereto as RD Ex. 215 is a true and correct copy of exhibit 36 to the deposition of Michael Giftos, which took place on February 25, 2010.

217. Attached hereto as RD Ex. 216 is a true and correct copy of exhibit 43 to the deposition of Donald Seale, which took place on February 26, 2010.

218. Attached hereto as RD Ex. 217 is a true and correct copy of exhibit 40 to the deposition of Donald Seale, which took place on February 26, 2010.

219. Attached hereto as RD Ex. 218 is a true and correct copy of exhibit 41 to the deposition of Michael Giftos, which took place on February 25, 2010.

220. Attached hereto as RD Ex. 219 is a true and correct copy of a document bearing the Bates numbers BNSF-0560330-34.

221. Attached hereto as RD Ex. 220 is a true and correct copy of exhibit 46 to the deposition of Donald Seale, which took place on February 26, 2010.

222. Attached hereto as RD Ex. 221 is a true and correct copy of a document bearing the Bates number AAR-000159.

223. Attached hereto as RD Ex. 222 is a true and correct copy of a document bearing the Bates numbers AAR-000207-43.

224. Attached hereto as RD Ex. 223 is a true and correct copy of exhibit 27 to the deposition of Sam Kyei, which took place on March 4, 2010.

225. Attached hereto as RD Ex. 224 is a true and correct copy of exhibit 29 to the deposition of Sam Kyei, which took place on March 4, 2010.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March 18, 2010 in New York, New York.


Sami H. Rashid

CERTIFICATE OF SERVICE

I, Sami H. Rashid, an attorney, certify that on March 18, 2010, I caused a true and correct copy of the foregoing declaration (and accompanying exhibits) to be served on counsel for Defendants.

/s/ Sami H. Rashid

Sami H. Rashid

ATTACHMENT 3

Attachment 3

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

In re RAIL FREIGHT FUEL SURCHARGE
ANTITRUST LITIGATION

MDL No. 1869

Misc. No. 07-489 (PLF/AK/JMF)

This Document Relates To:

ALL DIRECT PURCHASER CASES

**NOTICE OF SERVICE
OF SUBPOENA**

NOTICE IS HEREBY PROVIDED, under Federal Rule of Civil Procedure 45(b)(1) that Direct Purchaser Plaintiffs in the above-captioned action shall serve a subpoena for the production of documents on Berkshire Hathaway Inc. A copy of the subpoena is attached to this notice.

Dated: November 8, 2010

Respectfully submitted:

/s/ Michael D. Hausfeld
Michael D. Hausfeld, D.C. Bar #153742
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/s/ Stephen R. Neuwirth
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Interim Co-Lead Class Counsel for Direct Purchaser Plaintiffs

AO 88B (Rev. 06/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of Pennsylvania

In re Rail Freight Fuel Surcharge Antitrust Litig.)	
<i>Plaintiff</i>)	
v.)	Civil Action No. MDL No. 1869, Misc. No. 07-489
)	
<i>Defendant</i>)	(If the action is pending in another district, state where: District of Columbia)

**SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION**

To: Berkshire Hathaway Inc., through its registered agent, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801.

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See the attached Schedule A.

Place: Berger & Montague, P.C. (c/o Eric Cramer) 1622 Locust Street Philadelphia, PA 19103	Date and Time: 11/19/2010 9:00 am
--	--

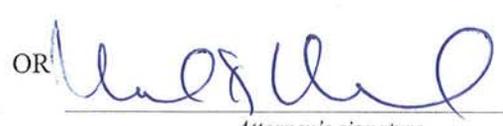
Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:
--------	----------------

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 11/08/2010

CLERK OF COURT

<p>_____ <i>Signature of Clerk or Deputy Clerk</i></p>	OR	 <p>_____ <i>Attorney's signature</i></p>
--	----	--

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Direct Purchaser Plaintiffs, who issues or requests this subpoena, are:

Michael D. Hausfeld, Hausfeld LLP, 1700 K Street NW, Suite 650, Washington, DC 20006 - mhausfeld@hausfeldllp.com - (202) 540-7200

DOCUMENTS SUBJECT TO SUBPOENA

1. All public and non-public documents reviewed, evaluated, analyzed, or otherwise considered in contemplation of the November 2, 2009 Merger Agreement between Berkshire Hathaway Inc. and Burlington Northern Santa Fe Corporation (“BNSF”) concerning the relationship between rail freight fuel surcharges and BNSF’s profitability, as well as all communications between Berkshire Hathaway Inc. and BNSF concerning the relationship between rail freight fuel surcharges and BNSF’s profitability.

ATTACHMENT 4

STEPTOE & JOHNSON LLP Attachment 4

ATTORNEYS AT LAW

Samuel M. Sipe, Jr.
202.429.6486
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www.steptoel.com

October 2, 2006

217709



Via HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423

Re: STB Ex Parte No. 661: Rail Fuel Surcharges

Dear Secretary Williams:

Enclosed for filing are the original and twenty copies of the Comments of BNSF Railway Company ("BNSF") submitted in response to the Board's August 3, 2006 decision in the above captioned matter.

Please date stamp the extra copy of this letter and return it with our messenger.

Sincerely,

Samuel M. Sipe, Jr.
Counsel for BNSF Railway Company

Enclosures

ENTERED
Office of Proceedings
OCT 2 - 2006
Part of
Public Record

217709



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 661

RAIL FUEL SURCHARGES

COMMENTS OF BNSF RAILWAY COMPANY

ENTERED
Office of Proceedings
OCT 2 - 2006
Part of
Public Record

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October 2, 2006

**ATTORNEYS FOR
BNSF RAILWAY COMPANY**

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE No. 661

RAIL FUEL SURCHARGES

COMMENTS OF BNSF RAILWAY COMPANY

BNSF Railway Company (“BNSF”) submits these comments in response to the August 3, 2006 decision of the Surface Transportation Board (the “Board”) in Ex Parte No. 661 regarding rail fuel surcharges (the “Decision”). In this filing, BNSF will offer the Board comments regarding BNSF’s current commercial fuel surcharge program and will also comment upon the Board’s various proposals and the nature of its authority to regulate fuel surcharges. BNSF appreciates that the Board has provided the opportunity to address these issues and shipper concerns, and supports the direction of the proposals to provide the Board and shippers more clarity and information concerning fuel surcharge methodologies.

I. BNSF’S COMMERCIAL APPROACH TO FUEL SURCHARGES

A. Background

At the outset, BNSF believes it is critically important to put into context the reasons why fuel surcharges have been necessary. Even though freight shipped by rail is the most fuel efficient mode of surface transportation, fuel is an absolutely essential cost component of the freight rail transportation system – it is needed to run the locomotives that pull trainloads of rail shipments, from consumer goods, to coal and grain. Simply put, there can be no modern freight railroad transportation without diesel fuel at this time. As the Board is aware, in recent years

unforeseen world events have drastically increased the absolute cost and price volatility of crude oil, at the same time as the cost of refining have risen significantly, all leading by necessity, to increases in the price and volatility in the price of diesel fuel. The price increases and price volatility of crude oil over the past few years follow a long period of stability for crude oil and diesel fuel prices. The cost of fuel for BNSF has increased 144% as an operating expense between 2001 and 2005, in comparison to an increase in all other costs of 25%.

Fuel surcharges are an accepted transportation industry method for recovering unanticipated changes in the cost of diesel fuel. These surcharges are levied by railroads, trucking companies, airlines and ocean shipping lines, all of which face the same challenge – ensuring that their freight transportation charges properly reflect the changing commodity price of diesel fuel. During the long period when fuel costs were stable, fuel surcharges were not necessary. When diesel fuel prices began to increase rapidly and experience volatile changes, BNSF needed to impose a surcharge to offset unanticipated increases in fuel costs. Since it began in 2001, the goal of BNSF's fuel surcharge has been to ensure that BNSF is compensated for increases in the cost that were not embedded in the transportation rate offered to the customer. BNSF never intended that fuel surcharges be sources of additional operating income for the railroad. Five years later, BNSF is still not collecting fuel surcharges on all of its traffic or fully recovering increased unhedged fuel costs.

As the Board is aware, BNSF, like other transportation companies, initially imposed fuel surcharges that were calculated by determining the increase in fuel costs over a baseline level, and assessed a fuel surcharge as a percent of the overall freight rate. The surcharge percentage is correlated to the cost of fuel in relation to the baseline, or strike price level. When diesel fuel

prices increase, the surcharge increases and when diesel fuel prices fall, the amount of the surcharge falls.

B. BNSF's Mileage-Based Fuel Surcharge

BNSF has an overriding commitment to satisfy the concerns of its customers, and for some time BNSF had been aware of many customers' concerns with fuel surcharges that are based upon a percent of the freight rate. Many customers complained that because rail rates are demand-based, fuel surcharges based on a percent of the rate may not be directly correlated to the additional cost of fuel for differentially priced movements. Sharing a concern expressed by the Board, BNSF began exploring alternatives to the percent of the rate methodology. After a great deal of discussion with its customers, as well as internal analyses, BNSF determined that altering its fuel surcharge methodology where practical was appropriate and responsive to customer concerns, and was in both BNSF's and its customer's commercial interests. In April, 2005, BNSF announced that it was adopting a mileage and fuel-usage based fuel surcharge program beginning in January of 2006.

BNSF realized when it decided to adopt its mileage and fuel-usage based fuel surcharge program that it would require several months to implement this approach. Several BNSF internal information systems and processes needed to be altered, as well as comparable systems for BNSF's customers. All of these changes were time consuming and expensive. BNSF is pleased that the changes were made relatively smoothly, and the new surcharge methodology was implemented for coal and agricultural movements at the beginning of 2006. In the fourth quarter of 2005, it was decided not to proceed with implementing the mileage-based surcharge for industrial and consumer customers, largely because a majority of those customers expressed the desire to remain on the percentage-based system due in part to the required administrative and IT systems changes.

In its Decision, the Board asked railroads to adopt alternative fuel surcharges that bear a closer relationship to fuel used and noted that BNSF had been commended by several shippers for adopting its new mileage and fuel-usage surcharge program. BNSF believes that its mileage and fuel-usage based surcharge satisfies the concerns expressed in the Board's Decision.

C. Ongoing Efforts by BNSF to Refine its Fuel Surcharges

BNSF believes, based on nine months of experience with its mileage and fuel-usage based fuel surcharge, that this type of surcharge makes the best commercial sense for its customers and for the railroad. Accordingly, in light of the concerns expressed by the Board in its Decision about railroad fuel surcharges based on a percent of the freight rate, BNSF would like to take this opportunity to outline its goals with respect to its fuel surcharge programs.

First, as previously addressed at the Board's hearing last May on fuel surcharges, BNSF intends to expand the use of its mileage and usage based fuel surcharge to other business units and customers on a schedule and in the manner that makes the most business and commercial sense. On BNSF's website, it has informed customers that it is considering expanding the mileage and usage based fuel surcharge, but would not do so without 90 days written notice. No implementation date has been set for such changes.

BNSF continues to analyze the methodology by which it calculates the mileage and usage based fuel surcharge. BNSF's goal is to collect fuel surcharges no higher than the additional cost of fuel, reflecting the operational requirements of each business unit. It must be realized, however, that rail movements can be quite complex, with many factors (both planned and unplanned) affecting ultimate fuel usage, and there is a practical limit on how precisely BNSF can measure fuel usage on its traffic. However, BNSF remains committed to the general principle that customers should not pay more in fuel surcharges than the additional cost of the fuel for a given category of rail traffic.

Third, many shippers have expressed to BNSF and to the Board a concern that railroads are “double dipping,” in other words, collecting increased rates from shippers for fuel from fuel surcharges and also from rate adjustment provisions that automatically increase the underlying rail rates using an index that has a fuel cost component, such as the Rail Cost Adjustment Factor (“RCAF”). BNSF is committed to recovering its increased costs of fuel through fuel surcharges and not to over-collect. To this end, BNSF has used indices, since they have become available, that do not include a fuel component in its contracts that are subject to fuel surcharges. BNSF has endeavored to avoid any “double dipping” in the past and plans to continue such efforts in the future.

Fourth, BNSF is prepared to voluntarily use the fuel cost index, the Energy Information Association’s U.S. No. 2 Diesel Retail Sales by All Sellers, suggested by the Board as its fuel cost index for measuring surcharge levels, as long as this index has a high correlation to the diesel fuel consumed by BNSF. While BNSF is prepared to voluntarily use the measure suggested by the Board, BNSF does not believe it is appropriate for the Board to mandate any particular fuel cost index.

Fifth, BNSF intends to comply with the Board’s request to provide certain information regarding its fuel use and costs as soon as BNSF can reasonably compile and forward the information to the Board. BNSF believes that much of the customer community’s concerns over fuel surcharges stem from misunderstandings and a lack of available data; the Board’s request for additional data to make BNSF’s fuel usage and surcharges more transparent will hopefully address some of these concerns. Since BNSF seeks only to recover its increased costs in fuel, BNSF believes that greater information and clarity will benefit the entire customer community.

In the discussion of legal issues that follows, BNSF offers comments on the Board's reporting requests that are intended to make reporting as useful as possible.

Finally, BNSF is aware that many shortline carriers are concerned that they are not receiving a portion of fuel surcharges collected by a connecting trunkline carrier. This is a complex issue, since in our case the financial relationship between BNSF and individual shortline partners is governed by specific, often longstanding contracts, which in many instances contain provisions that call for fixed payments per carload with their own escalators. However, BNSF is committed to working cooperatively with its shortline partners and will continue to work with its shortline partners to achieve mutually agreeable commercial solutions in these relationships, where possible.

D. Summary

BNSF recognizes the concerns of shippers regarding railroad fuel surcharges, and as explained, BNSF has been working to address these concerns since the surcharge was instituted. BNSF has voluntarily altered its fuel surcharge methodology for many customers, seeks to apply its new surcharge to additional customers and business units over time, and continues to review it to ensure that it meets BNSF's and its customers commercial and transportation needs. Accordingly, BNSF stands ready to work with its customers and the Board in the future to accomplish the goals described above.

II. LEGAL DISCUSSION

A. The Board Lacks Sufficient Authority to Regulate Fuel Surcharges in the Manners Proposed in its August 3, 2006 Decision

1. The Legal Effect of the Board's Decision Is Ambiguous and Does Not Constitute Valid Rulemaking

While BNSF intends to voluntarily respond to the Board's initiatives, the Decision and the Board's subsequent "Notice of Proposed Requirements Regarding Rail Fuel Surcharges"

published on August 10, 2006 in the Federal Register (“Notice”) are technically deficient because they fail to sufficiently apprise regulated entities of the nature and legal effect of these proposed regulatory changes to fuel surcharges. While the Board has sought public comment, the nature of what interested parties are commenting upon is unclear. It is difficult for a party to articulate meaningful commentary where the legal impact of the measures proposed is indeterminate. Regulated entities should not be required to speculate on the legal effect of a regulatory agency’s decision.

The Decision and Notice appear to indicate that the Board is proposing binding and new regulatory obligations, yet the Board stopped short of issuing a formal Notice of Proposed Rulemaking. The Notice sought comments on the proposed measures in the Federal Register, consistent with the informal rulemaking requirements outlined in the Administrative Procedure Act (“APA”). *See* 5 U.S.C. § 553(b). The Decision states (albeit in a footnote) that the Board may set “rules of general applicability” (Decision at 4 n.9) and both the Decision and Notice use mandatory and definitive language in describing the measures, *e.g.*, carriers “would be prohibited from” and “would be required to” (Decision at 1; Notice at 1-2). *See General Elec. Co. v. E.P.A.*, 290 F.3d 377, 383-4 (D.C. Cir. 2002).

The Decision and Notice do not state that the Board is engaging in legislative rulemaking. The Notice, entitled “Notice of proposed requirements regarding rail fuel surcharges” refers to “proposed measures” and “proposals” and only uses the term “proposed rules” in a clause certifying that the agency action would not have a significant impact on small entities. Notice at 1-2. Finally, the Notice does not identify revisions that would need to be made to the Code of Federal Regulations to implement the proposals. *See Telecommunications Research and Action Center v. F.C.C.*, 800 F.2d 1181, 1186 (D.C. Cir. 1986) (“[A]s has been

observed, “[t]he real dividing line between regulations and general statements of policy is publication in the Code of Federal Regulations.”). The Decision could conceivably be construed as a legislative rule, an interpretive rule, a declaratory order, or a general statement of policy, each with different legal consequences.

If the Board did intend to engage in legislative rulemaking, then the Notice does not satisfy Section 553(b) of the APA, which specifies that a Federal Register Notice must clearly state “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(1)-(3); 49 C.F.R. 1110.3(b). Because the Decision or Notice do not specify the very nature of the proceeding, they do not satisfy the procedural requirements or the purposes of the APA for binding legislative rules. *See National Mining Assoc. v. Mine Safety and Health Admin.*, 116 F.3d 520, 531 (D.C. Cir. 1997); *Citibank v. F.D.I.C.*, 836 F. Supp. 3, 7 (D.C. Cir. 1993); *National Tour Brokers Assoc. v. United States*, 591 F.2d 896 (D.C. Cir. 1978). Furthermore, the Notice does not even mention the Board’s proposal to partially revoke exemptions on traffic identified in 49 C.F.R. Part 1039, as is required by the APA.

2. The Board Cannot Consider Whether Specific Actions Constitute Unreasonable Practices Except Upon Complaint

The Decision found that two specific railroad actions are or would be unreasonable practices. The first is computing fuel surcharges as a percentage of existing rates and the second is the aforementioned “double dipping.” The Decision purports to prohibit railroads from engaging in either action.

Under the Interstate Commerce Act, the Board only has statutory authority to declare an action an unreasonable practice if it is acting on a specific complaint. Section 10702 requires railroads to establish reasonable “rules and practices” and Section 10704(a) vests the Board with

authority to determine whether a challenged practice is reasonable, but Section 10704(b) states that “[t]he Board may begin a proceeding under this section only on complaint.” There has been no complaint filed; Ex Parte 661 is a proceeding in which all interested parties have been invited to comment. There is also no evidentiary record. Thus, the Board has no statutory authority to find certain railroad actions to be unreasonable practices or to prohibit them in this proceeding. It could only do so in response to a specific complaint upon a full evidentiary record.

The Board acknowledges in its Decision that it does not have the power to award a remedy absent a complaint but asserts in footnote 9 that “[w]e may adopt rules of general applicability for future conduct to address an unreasonable practice, even though our authority to award shipper-specific remedies is limited to a formal complaint proceeding.”¹ This distinction suggests that the Board may regulate unreasonable practices on its own initiative so long as it does not award shipper-specific remedies. Congress, however specifically sought to limit such general steps by limiting the Board’s unreasonable practice jurisdiction to adjudicating specific complaints.

Furthermore, the courts have recognized that the ICC, now the Board, must be able to point to a specific delegation of authority in support of its rules and regulations in order to

¹ Decision at 4 n.9 (citing Mr. Sprout, Inc. v. United States, 8 F.3d 118, 128-129 (3d Cir. 1993) as analogous support). It should be noted that Mr. Sprout is not analogous to this proceeding. In that case, the ICC initially determined that its unreasonable practice jurisdiction did not extend to freight inspections, which the petitioners alleged resulted in fraudulent inspection reports. The court disagreed, concluding that inspection processes fit within the ICC’s longstanding interpretation of its jurisdiction to regulate the processing of loss and damage claims. The court also found that the ICC failed to adequately explain its departure from precedent and remanded the case to the ICC to determine whether the inspection reports were fraudulent. This case exhibits that the Board has the authority to issue rules and regulations regarding the *processing* of loss and damage claims, a subject that the Board had previously regulated. It does not suggest that the Board has the authority to require or prohibit particular railroad actions with respect to those loss and damage claims or, by analogy, with respect to fuel surcharges.

regulate in a particular area.² The Interstate Commerce Act, however, does not contain any specific statutory provision governing fuel surcharges, fuel recovery programs or other railroad actions relating to compensation for the costs of fuel.

As a final note, BNSF believes the intent of Congress has been to deregulate the railroad industry, and the Board should only intervene in railroad matters in the specific areas where Congress authorized regulation by law. The Board's approach in the Decision, followed to its logical extreme, would allow the Board (on its own initiative) to regulate virtually any commercial decision by any railroad by declaring such action an unreasonable practice.

B. A Fuel Surcharge Is Part of a Rate and Cannot Be Regulated as a Practice

Section 10701 of Title 49 authorizes the Board to regulate rates established by rail carriers only in the context of rate reasonableness proceedings, and only after the complainant has shown that the railroad is market dominant. The Board acknowledged in its Decision that a fuel surcharge is a portion of the total rate charged for rail transportation, and that the D.C. Circuit has previously struck down an ICC attempt to regulate a rate by calling it an unreasonable practice. Decision at 3-4 (discussing Union Pacific R.R. v. I.C.C., 867 F.2d 646 (D.C. Cir. 1989)). The Board also recognized this limitation in the March 14, 2006 Hearing Notice for Ex Parte No. 661 (the "Hearing Notice"). Nevertheless, the Board impermissibly

² See, e.g., Central Forwarding v. I.C.C., 698 F.2d 1266 (5th Cir. 1983). In Central Forwarding, the ICC adopted a mileage-based fuel surcharge program for motor carriers and required that licensed motor carriers who collected the surcharges compensate owner-operators for fuel costs actually incurred using a formula devised by the Commission. Modification of Motor Carrier Fuel Surcharge Program, Ex Parte No. 311 (Sub-No. 4), 365 I.C.C. 311 (1981). On review, the appellate court struck down the pass-through portion of the new program in which motor carriers were required to compensate owner-operators, finding that the ICC did not have authority to issue the rules. Specifically, the court found, among other things, that the ICC had no statutory authority to issue the pass-through provisions because it did not have authority to regulate compensation to owner-operators. The court did not strike down aspects of the fuel surcharge program that were authorized by existing statutory provisions.

attempts to regulate rail fuel surcharges under its unreasonable practices authority rather than treating them as part of the overall freight rate.

Contrary to the Board's reasoning, the commercial reality is that a fuel surcharge is part of the total rate charged for transportation and does not constitute a practice. In Mr. Sprout, the court upheld the ICC's ruling that a surcharge to cover litigation expenses could not be challenged as an unreasonable practice. 8 F.3d at 128. In another case involving light density line surcharges, the Board found that a "surcharge" is by definition part of the line-haul rate. Parrish & Heimbecker, Inc. – Petition for Declaratory Order, STB Docket No. 42031 (served May 25, 2001), 2001 STB LEXIS 508, *6, n.4 (citation omitted). And, as acknowledged in both the Decision and Hearing Notice, the Union Pacific court struck down the ICC's attempt to regulate a rate as an unreasonable practice when the focus of the ICC's inquiry was on the rate itself. 867 F.2d at 649.

The Board also discussed its concern that the railroads apply what is labeled a fuel surcharge when the surcharge "is not limited to recouping increased fuel costs that are not reflected in the base rate." Decision at 4. If it is this labeling practice that makes the fuel surcharge unreasonable, then a railroad could simply change the name of the surcharge and it would no longer be engaging in an unreasonable practice. The surcharge would then have to be challenged in a rate reasonableness proceeding as part of the total rate. Congress could not have intended to allow the Board to have jurisdiction over an element of a rate as a result of the title given to it by the railroad. Indeed, in order for the Board to reach a conclusion that a percent of rate computation is an unreasonable practice, the Board has to first make an analysis of base

rates and conclude that they are not entirely cost-based.³ This kind of rate analysis is not appropriate in the context of an unreasonable practice determination, as the decision in Union Pacific suggests.

C. Partial Revocation of Exemption

1. The Board Cannot Impose Fuel Surcharge Measures On Exempt Traffic Without First Meeting the Statutory and Agency Standards for Partial Revocation of the Class Exemptions

In its Decision, the Board has taken the extraordinary step of extending its proposed fuel surcharge measures to all classes of exempt traffic by declaring all class exemptions “partially revoke[d]” to the “extent necessary to apply the measures outlined here....” Decision at 7. Even if the Board had the authority to find that fuel surcharges on regulated traffic are unreasonable practices, this unprecedented, industry-wide partial revocation does not meet the substantive and procedural requirements for determining whether reregulation of exempted traffic is necessary and appropriate.

First, the Board has not complied with the established standards for revocation of a class exemption. The Interstate Commerce Act sets a higher standard for the reregulation of exempted traffic than for the initial deregulation of that traffic and requires an examination of whether the revocation is required by the Rail Transportation Policy set forth in 49 U.S.C. § 10101 (“RTP”). In the Decision, however, the Board has applied a *lower* (or *no*) standard for reregulation by simply pronouncing the class exemptions partially revoked.

The legal standards for revoking a class exemption were enunciated by the ICC in Rail General Exemption Authority – Miscellaneous Agricultural Commodities – Petition of G&T

³ Decision at 4. The Board glosses over the fact that this may not be true of all rail traffic.

I.C.C.2d 674, 682 (1992):

Congress has directed [the agency] to exempt rail service whenever regulation is not necessary to protect against abuse of market power. Therefore, the first thing we look at in assessing a petition to revoke an exemption is whether the carrier possesses substantial market power. If it does not, then there is generally no basis for revoking an exemption. If it does, then we focus on whether regulation is necessary to protect against carrier abuse of shippers as a result of such market power. Finally, in assessing whether regulation is necessary or appropriate, we address whether regulation or exemption would, on balance, better advance the objectives of the [RTP and the interest of the shipping public overall.

The Commission further emphasized that because “a revocation petition focuses on traffic that has been previously exempted from [] regulation on the basis of [the] agency’s conclusion that the marketplace itself is sufficiently competitive so as not to require continued government regulation[,] . . . the party seeking revocation has a burden of showing that [the agency’s] prior findings supporting the initial exemption were clearly wrong, or that changed circumstances require [the agency] to revisit them.” Id. at 677.

The revocation of the exemption in the Decision does not meet that burden. The Board has not assessed the railroads’ market power or shown any abuse resulting from such power with respect to exempt shippers. Instead the Board attempts to justify its partial revocation of the class exemptions by asserting that its proposal advances three provisions of the RTP – Paragraph (9) (to encourage honest and efficient management of railroads); Paragraph (13) (to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information), and Paragraph (14) (to encourage and promote energy conservation). Decision at 7. But finding that three objectives of the RTP could be served by reregulation is not sufficient analysis. “[A]

slightly adverse impact on one component of the NRTP does not necessarily indicate that reregulation is appropriate. Such a finding would have to be balanced against all of the other relevant NRTP factors, to determine whether revocation and reregulation are necessary . . . An element of this assessment may be the effect of the exemption (and potential revocation) on the rail industry and the shipping public overall.” G&T, 8 I.C.C.2d at 677.

In the proceedings establishing the class exemptions set out in 49 C.F.R. Part 1039, the ICC found that the railroads’ market share with respect to the exempted commodities was not sufficient to give them market power, that the commodities’ markets were highly competitive with market forces sufficient to protect shippers from abuses of market power, and that the exemptions would further the objectives of the RTP. The RTP provisions most commonly relied upon by the agency in finding that regulation was not necessary to protect shippers from abuse of market power were Paragraphs 1 through 5. Paragraph 9 (formerly 10) was also frequently cited in the context of “encourag[ing] honest and efficient rail management by enabling management to respond more quickly to changing market conditions.” Rail General Exemption Authority – Exemption of Grease or Inedible Tallow, Etc., Ex Parte No. 346 (Sub-No. 31), 10 I.C.C.2d 453, 459 (1994).

Even if applying the proposed fuel surcharge measures to some classes of exempt traffic would further the objectives of Paragraphs 9, 13 and 14⁴ of the RTP, that does not satisfy the requirements for revocation. An exemption does not have to advance all of the sometimes conflicting objectives of the RTP. The proper analysis is whether, on balance, the objectives of the RTP (and particularly those upon which the exemption was granted) are better advanced

⁴ In a proceeding where the ICC cited the RTP goal for energy conservation, it did not do so in the context used by the Board here, but rather with respect to reducing truck traffic. Rail General Exemption Authority -- Exemption Of Grease Or Inedible Tallow, Etc., Ex Parte No. 346 (Sub-No. 31), 10 I.C.C. 2d 453, 459 (1994).

through exemption or revocation for a given traffic class. The Board has not undertaken such an analysis and therefore has not performed the requisite balancing of RTP objectives.

Second, the Board cannot revoke the class exemptions with respect to fuel surcharges unless the revocation is based on substantial evidence on the record. In the Decision, the Board stated that its concerns about the reasonableness of the carriers' fuel surcharge programs "apply equally" to the large and varied traffic exempt from regulation, but that statement is based on the unsubstantiated, anecdotal assertions of a few shippers. There is no study or other substantial evidence showing that the programs are unreasonable with respect to all shippers within the exempted classes that would justify revocation of the class exemptions. There is no substantive evidence in the record on whether a fuel surcharge based on a percentage of the base rate does or does not reflect a reasonable relationship to fuel costs on all classes of exempt traffic, or whether market conditions for the various exempted commodities have changed such that railroads now exercise substantial market power over the traffic, or whether railroads have abused their market power, if in fact they possess such power. There is no evidence of particular harm to shippers of exempt traffic that would satisfy the standards for revocation. Nor has there been any showing that reregulation for shippers of the exempt commodities is necessary to promote those provisions of the RTP for which the exemptions were granted in the first place or any balancing of all pertinent RTP objectives to determine whether they are better advanced through exemption or regulation, including the effect of exemption (or potential revocation) on the railroad industry and the overall shipping public.

Finally, BNSF does not believe that the Board has complied with the intent of 49 U.S.C. § 10502, governing the granting and revoking of exemptions, where Congress intended that exemptions only be revoked upon request. Section 10502(b) sets forth the procedures for

granting exemptions, and states that the Board may “begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.”

Section 10502(d) sets forth the procedures for revoking an exemption and appears to permit the Board to act only upon a request for revocation and not on its own initiative. BNSF believes that it is entirely consistent with the goals of the statute for Congress, which favored deregulation, to have set a higher procedural burden for revoking an exemption than for granting an exemption.

Because the Board’s action in this proceeding does not meet the statutory and agency requirements for reregulation of exempt traffic, the Board’s revocation of the class exemptions to permit application of the fuel surcharge measures proposed in its Ex Parte 661 Decision is unlawful and has no force and effect.

D. Reporting

As stated in Part I above, BNSF intends to voluntarily comply with the Board’s reporting requests for basic fuel cost and surcharge information. However, if the Board’s goal is to allow the public to determine whether railroads such as BNSF are collecting more in fuel surcharge revenue than their increased fuel costs, then the data requested may not enable the Board or the public to so determine. Accordingly, BNSF respectfully suggests some alternative data that would clearly demonstrate changes in fuel costs compared to changes in fuel surcharge recoveries.

By way of background, the objective of BNSF’s fuel surcharge program is to recover the increase in BNSF’s fuel cost per gallon over the defined strike price of \$0.73 per gallon. The entry point of \$0.73 per gallon was based on competitive truck fuel surcharge entry points and historical prices of highway diesel fuel. BNSF’s price of \$0.73 per gallon is roughly equal to \$1.25 per gallon of highway diesel fuel. BNSF believes meaningful reporting should enable the user to calculate the amount of unhedged fuel costs above the threshold, compared to the amount

of fuel surcharge collected. A timing element also needs to be considered, due to the time lag in fuel prices used to assess certain fuel surcharges.

The Decision asks railroads to report increased or decreased fuel expenses on a month-over-month basis as well as monthly total revenue received from fuel surcharges. The variance in fuel costs from month to month shows fuel costs changes. Monthly fuel surcharge revenues measure the total amount of the fuel surcharges collected, which is a function of the amount of each individual surcharge plus how widespread the coverage of the charges are. Thus, the Decision implies that one could determine whether railroads “over recover” increased fuel costs by allowing a comparison of monthly changes in fuel costs to monthly revenues from fuel surcharges. But, as a practical matter, the two measures requested in the Decision are not related – a railroad could have total monthly fuel surcharge revenues that exceed the monthly increase in fuel costs but still not recover all of its fuel cost increase above the strike price.

BNSF submits that the important information for the Board and for customers is data that will permit the comparison of a railroad’s unhedged cost of fuel above a strike price (on which BNSF bases rate decisions) with that railroad’s total fuel surcharge revenue. This comparison would allow the public to see whether a railroad recovers more than its unhedged increased cost of fuel from fuel surcharges. Accordingly, BNSF suggests that the Board implement reporting of data that would allow the public to clearly see this difference. A table showing suggested data elements and example figure is included below:

Line No.	Description	Thousands Except Price Per Gallon
1	Total Fuel Expense (excluding fuel hedge) (a)	\$800,000
2	Gallons Fuel Consumed	400,000
3	Strike Price per Gallon	\$0.73

4	Base Fuel Expense (line 2 times line 3)	\$292,000
5	Total Fuel Expense above Base (line 1 less line 4)	\$508,000
6	Revenue from Fuel Surcharges	\$400,000
7	Fuel Expense not Recovered from Fuel Surcharge (line 5 less line 6)	\$108,000
8	Fuel Surcharge in Excess of Fuel Expense (if line 6 > line 5)	\$0

(a) Fuel is defined as including function 67 locomotive fuels in addition to all other fuel used for railroad operations and maintenance, including motor vehicles and power equipment as well as fuel surcharges paid.

BNSF does not believe that including reporting on Class II and III railroads is meaningful in light of the unique contractual nature of these shortline-specific relationships. As discussed in Part I, above, for BNSF, specific contacts typically contain rail line specific payments and escalators, with negotiated offsetting provisions with individual handling carrier shortlines that were agreed to via arm's length negotiations. In the fall of 2005, BNSF offered each of its handling carrier shortline partners a revised fuel surcharge proposal with a per car surcharge provision. Implementation, however, is subject to such shortline specific negotiation, such that pattern reporting could be misleading or impractical.

With respect to the frequency of reporting, BNSF suggests that reports be filed quarterly and annually in line with SEC reporting requirements. More than half of BNSF's business entails calculating fuel surcharge on a two month lag, as opposed to based on current market prices. By reporting quarterly, this would provide a more representative view of BNSF's fuel surcharge recovery.

Finally, with respect to the definition of fuel expense, BNSF agrees that such a definition should include function 67 locomotive fuels in addition to all other fuel used for railroad operations and maintenance, including motor vehicles and power equipment. However, BNSF

does note that while it has accurate data sources for overall fuel costs, BNSF will be required to estimate gallon usage and threshold prices for certain categories in railroad operation and maintenance. This type of fuel use accounts for less than five percent of total fuel use, and any estimates would have a *de minimis* effect on the reporting accuracy. BNSF also believes fuel surcharges paid for such services as contracted drayage services or delivery of materials used in the operation of the railroad should be included in fuel expense.

E. Fuel Cost Index

As stated above, BNSF is open to voluntarily using the fuel cost index proposed by the Board in the Decision, assuming appropriate correlation to the cost of BNSF's diesel fuel. However, BNSF does not believe that it is appropriate for the Board to mandate any particular index for the railroad industry in general. BNSF believes that a regulatory mandate of a particular fuel cost index is tantamount to the Board regulating the structure and extent of individual rate offerings and attempting to alter or require use of particular provisions in rail transportation contracts.

F. Contracts

The Board did not address the impact on contracts in its Decision. The statute is clear that the Board does not have the authority to regulate contracts, and therefore the Board's proposals should have no application to transportation contracts. We suggest that the Board so clarify in any subsequent decision in this proceeding.

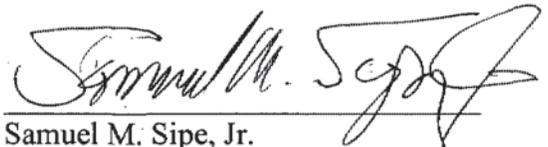
G. Conclusion

As discussed in this filing, BNSF believes that fuel surcharges are integral parts of the rate and service relationship with each customer. BNSF has voluntarily taken significant steps to adjust its fuel surcharge methodologies to respond to customer concerns expressed to the Board, and intends to continue to do so. BNSF is concerned, however, that the Board's proposals to

alter fuel surcharge programs through regulation are unnecessary and interfere with the traditional initiatives of carriers, and believes the Board's proposals as presented would go beyond the Board's statutory and regulatory powers.

BNSF appreciates that the Board has provided the opportunity to address these issues and shipper concerns and supports the direction of the proposals to provide the Board and shippers more clarity and information concerning fuel surcharge methodologies. BNSF believes that its initiatives have worked to address customer's concerns, and is committed to continuing those efforts and efforts to address the Board's concerns. In particular, BNSF believes its initiatives are providing our coal and agricultural customers with an appropriate fuel surcharge that is consistent with the Board's proposals. Too much regulatory rigidity, however, could hamper BNSF's ability to adapt its programs to particular customers and business areas.

Respectfully submitted,



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Dated: October 2, 2006

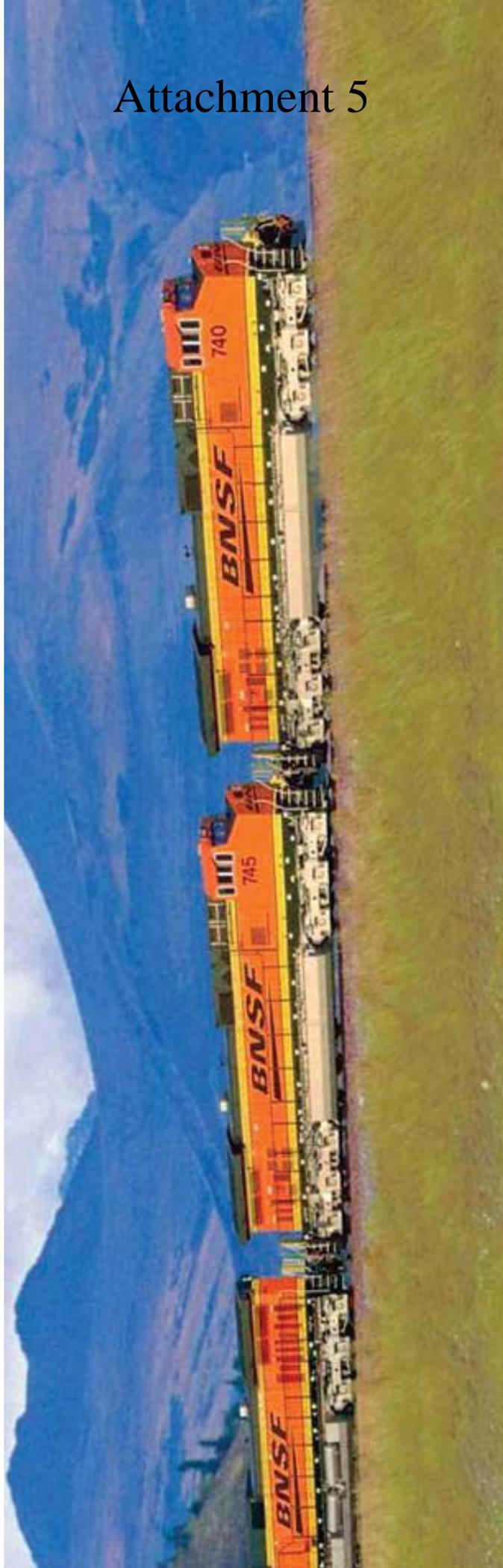
ATTORNEYS FOR
BNSF RAILWAY COMPANY

ATTACHMENT 5

Burlington Northern Santa Fe Corporation

Fuel Surcharge Briefing STB Hearing

May 11, 2006



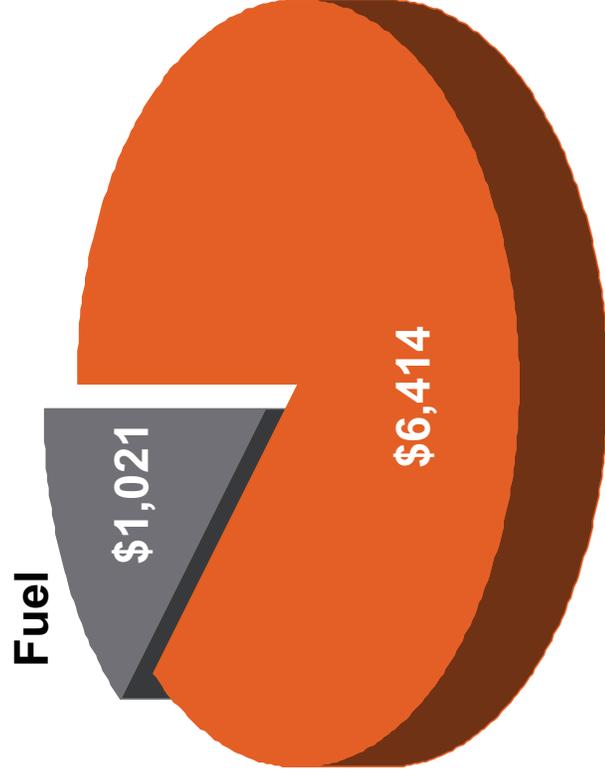
BNSF Fuel Surcharge Program - Overview

- **Objective - recover the increase in fuel expense**
- **In response to**
 - **High cost of fuel**
 - **Fuel price volatility**

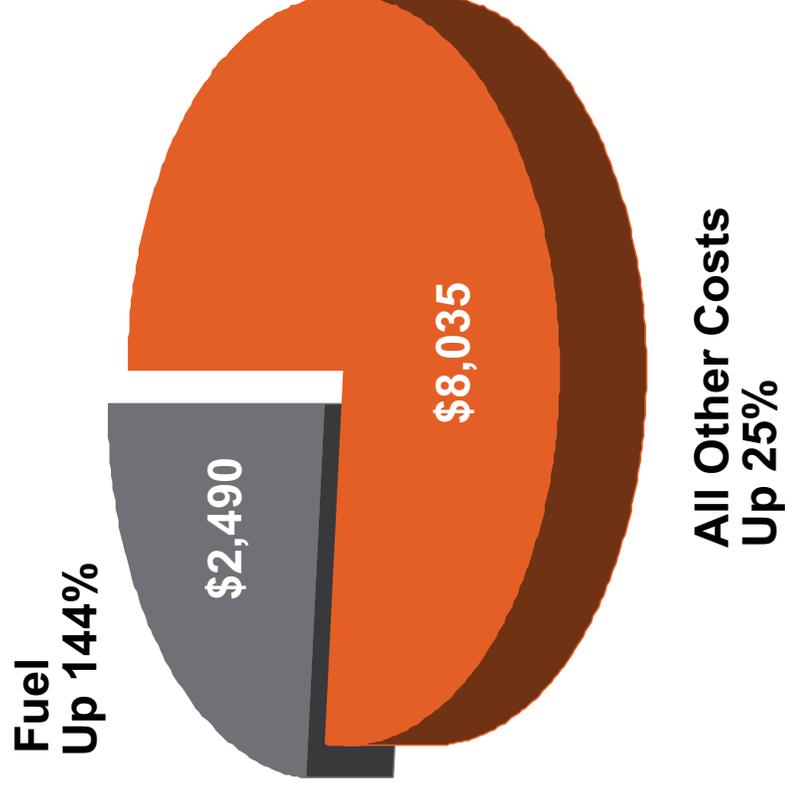
Fuel expense has become a much higher expense for BNSF

\$ Millions

Operating Expenses 2001



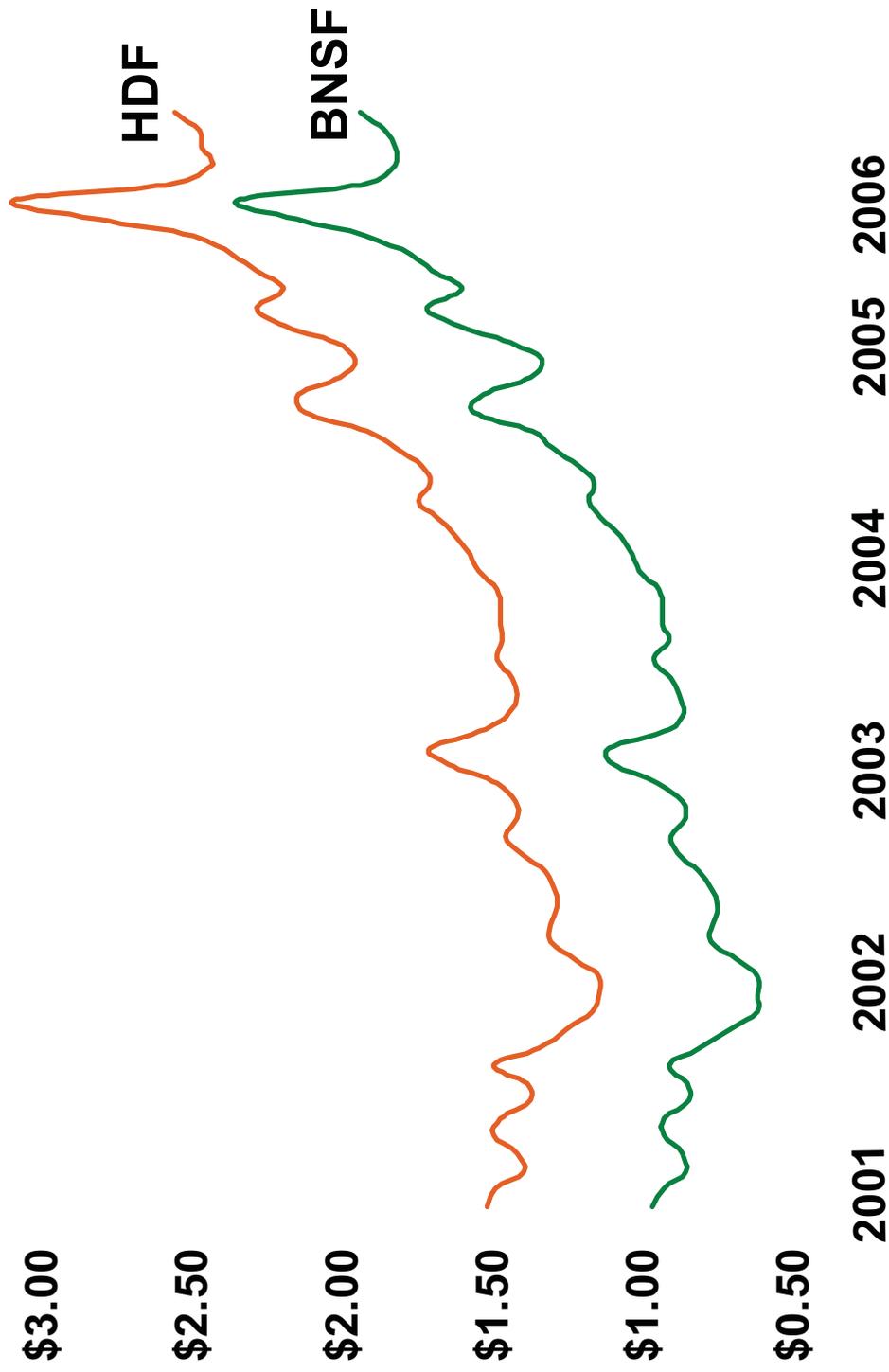
Operating Expenses 2005



Fuel expense excludes hedges

Fuel Price Volatility

Highway Diesel Fuel vs. BNSF Diesel Fuel



Hedging is independent of fuel surcharge

- **A risk mitigation activity**
 - **Hedges – current commitments for future fuel prices**
 - **Sometimes beneficial / sometimes detrimental**
 - **2005 – fuel expense reduced by 21% due to hedging**
 - **1998 – fuel expense increased by 13% due to hedging**
 - **Existing favorable hedges expire within one year**
- **Many customers hedge in their business operations**

History of BNSF Fuel Surcharge Program

- **Truck fuel surcharge program widely accepted**
- **Original program modeled after truck**
- **Entry point based on historical average cost of highway diesel fuel**
- **Percent of freight bill for convenience**
- **Lower percent of freight bill than truck**

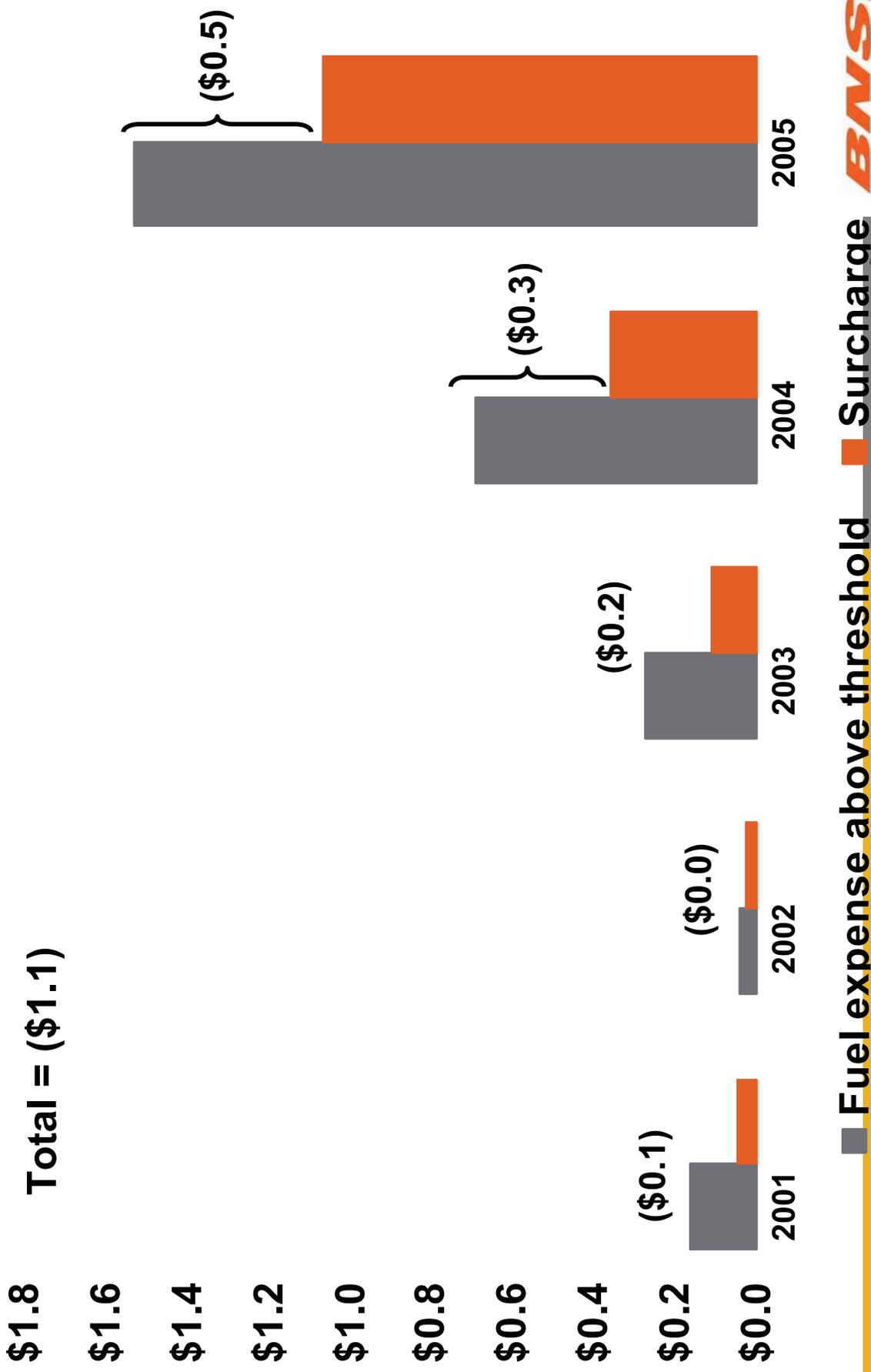
Mileage Based Program

- Mileage based program reflects fuel usage
- Tables built on business unit fuel intensities (weight & speed)
- Mileage table based on rail miles
- Coal and agricultural products – January 1, 2006
 - Responsive to customer concerns
 - Did not convert consumer and industrial products based on customer feedback

Are we Profiting from Fuel Surcharge?

Cumulative under recovery of \$1.1 billion for last 5 years

\$ Billions



BNSF Fuel Surcharge - Conclusions

- **Implemented to cover escalating fuel costs**
- **Not fully recovering fuel cost above threshold**
- **Responsive to customer concerns in the marketplace**
- **Mileage based surcharges are most appropriate**

Fuel surcharge tables publicly available

The screenshot shows the BNSF website interface in a Microsoft Internet Explorer browser. The address bar displays the URL: http://www.bnsf.com/markets/intermodal/fuel_surcharge_revenue.html. The website features a navigation menu with categories: ABOUT BNSF, PROSPECTIVE CUSTOMER, MARKETS & SERVICES, CUSTOMER TOOLS, INVESTORS, MEDIA, SUPPLIERS, COMMUNITIES, EMPLOYEES & RETIREES, and CAREERS. The main content area is titled "Intermodal Revenue-based Fuel Surcharge" and includes a table of fuel surcharge rates.

Intermodal Revenue-based Fuel Surcharge
[Intermodal Fuel Surcharge \(main page\)](#)

BNSF Intermodal Revenue-based Fuel Surcharge
 This is the current Intermodal Fuel Surcharge program. The table reflects the weekly average HDF price and the associated BNSF Intermodal fuel surcharge.

In the future, when the Mileage-based fuel surcharge program is implemented, this table will only be applicable only for BNSF joint-line (through) shipments and BNSF local shipments will be applicable to the Mileage-based Fuel Surcharge tables. Prior to implementing the Mileage-fuel surcharge program, at least 90 days notice will be provided. (See the definition of joint-line in the [BNSF-Intermodal Rules and Policies Guide](#).)

BNSF Intermodal Revenue-based Fuel Surcharge	
U.S. National/Average Highway Diesel Fuel Price Range	BNSF Intermodal Fuel Surcharge
\$0.00 - \$1.239	0.0%
\$1.24 - \$1.279	1.0%
\$1.28 - \$1.319	1.5%
\$1.32 - \$1.359	2.0%
\$1.36 - \$1.399	2.5%
\$1.40 - \$1.439	3.0%
\$1.44 - \$1.479	3.5%
\$1.48 - \$1.519	4.0%

ALSO SEE...

- BNSF Mexico
- Economic Development
- Coiled Metal
- Fuel Surcharge
- Glossary
- How Intermodal Works
- Load & Ride Solutions
- Rules & Policies Guide
- Service Schedules
- ValueTrax

- Details are available at BNSF.com

SM

BMSF



ATTACHMENT 6

Attachment 6

UNITED STATES OF AMERICA

+ + + + +

SURFACE TRANSPORTATION BOARD

PUBLIC HEARING

RAIL FUEL SURCHARGES

EX PARTE 661

+ + + + +

THURSDAY, MAY 11, 2006

+ + + + +

The Public Hearing convened in Hearing Suite 760, 1925 K Street, N.W., Washington, D.C. 20423-0001, pursuant to notice at 9:00 a.m., Chairman Douglas Buttrey presiding.

SURFACE TRANSPORTATION MEMBERS PRESENT:

DOUGLAS BUTTREY Chairman
FRANCIS MULVEY Vice Chairman

PANELISTS:

GOVERNOR BRIAN SCHWEITZERA
TERRY WHITESIDE, WHEAT & BARLEY COMMISSIONS
STEVEN STREGE NORTH DAKOTA GRAIN DEALERS

ASSOCIATION

DAN MACK NATIONAL GRAIN & FEED
ASSOCIATION
JUDY GILLIES THE FERTILIZER INSTITUTE
ERIC WILKEY TRANSPORTATION, ELEVATOR, &
GRAIN MERCHANTS ASSOCIATION
TERRY VOSS AG PROCESSING
GEORGE TELFER ALLIANCE OF AUTOMOBILE
MANUFACTURERS/DAIMLER
CHRYSLER

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JAY ROMAN	AMEREN ENERGY FUELS & SERVICES/ESCALATION CONSULTANTS
THOMAS CROWLEY	WESTERN COAL TRAFFIC LEAGUE
PETER PFOHL	WESTERN COAL TRAFFIC LEAGUE
BILL MOHL	ENTERGY CORPORATION
THOMAS WILCOX	THE AES CORPORATION
AMES HELLER	CONCERNED CAPTIVE COAL SHIPPERS
MICHAEL LOFTUS	CONCERNED CAPTIVE COAL SHIPPERS
STEPHEN POCSIK	TOTAL PETROCHEMICALS USA, INC.
MICHAEL MCBRIDE	TOTAL PETROCHEMICALS USA, INC./EDISON ELECTRIC INSTITUTE
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JOHN FICKER	THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
CURT WARFEL	THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
THOMAS SCHICK	AMERICAN CHEMISTRY COUNCIL
CHARLES LINDERMAN	EDISON ELECTRIC INSTITUTE
TOM HUNT	BNSF RAILWAY COMPANY
JAMES FOOTE	CANADIAN NATIONAL RAILWAY CO.
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CHRISTOPHER JENKINS	CSX TRANSPORTATION
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ROBERT KNIGHT	UNION PACIFIC RAILROAD CO.
ROBERT DINGMAN	OIL CREEK & TITUSVILLE LINES
TOM O'CONNOR	SNAVELY KING MAJOROS O'CONNOR & LEE, INC.
MAZHAR ALI AWAN	TRANSPORTATION ECONOMICS, INC.
SANDRA DEARDEN	HIGHROAD CONSULTING, LTD.
MICHAEL BEHE	FREIGHT RESOURCES NETWORK, LLC.

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1 panel. Excuse me. I didn't mean to use the word
2 panel. Vice Chairman Mulvey and I will be asking
3 questions as we have in the other situations.

4 The first witnesses will be with BNSF
5 Railway Company. We'd ask them to come forward
6 please. We'll take the railroads one at a time.

7 Thank you very much. You're welcome to
8 proceed.

9 MR. HUNT: Good afternoon, Chairman
10 Buttrey and Vice Chairman Mulvey.

11 I'm Tom Hunt. I'm the CFO with Burlington
12 Northern Santa Fe and I appreciate you providing me
13 with the opportunity to speak on this important topic
14 for BNSF.

15 So, let me address a few key points of our
16 fuel surcharge program.

17 First of all, the objective of the BNSF
18 fuel surcharge program is to recover the increase in
19 fuel expense and the fuel surcharge program is in
20 response to the high cost of fuel and also the high
21 price volatility. The fuel surcharges are common in
22 many other type of industries such as steamship lines,

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1 utilities, trucking, barges and as was published in
2 the Wall Street Journal last week, we've lawn services
3 and pizza delivery companies instituting fuel
4 surcharges.

5 The next slide shows that from 2001 to
6 2005 fuel expenses increased approximately \$1.5
7 billion which is a compounded annual growth rate of 25
8 percent and this is more than four times the rate of
9 increase in all of our other expenses during this same
10 time period.

11 This slide illustrates three points.
12 First, fuel has been steadily rising. Second, the
13 price of fuel is very volatile and third, there is a
14 high correlation between highway diesel fuel price and
15 BNSF cost of fuel and the biggest difference between
16 the highway diesel fuel and the BNSF cost is taxes and
17 we use the highway diesel fuel as the fuel surcharge
18 program bench mark because it's a widely accepted
19 public statistic.

20 But, several have claimed that by using
21 highway diesel fuel we're over recovering as opposed
22 to our own cost and this is not correct as we're

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1 measuring the change over time and unless the spread
2 between the two prices widens significantly which it's
3 clearly not doing on that graph, there's no over
4 recovery occurring.

5 And let's talk about our hedging program
6 because that's come up through a number of people's
7 discussion today and as it says in the headline of
8 this slide, hedging is independent of fuel surcharge.

9 Hedging is a cost containment strategy, a
10 risk containment strategy where you lock in a future
11 price or a future range of prices. It's like
12 purchasing insurance and deciding what your deductible
13 should be and what you're limits should be on your
14 property insurance policy. But, there is no free
15 lunch and as shown on the bullets up there, if prices
16 rise, you win. If prices fall, you lose and in 2005,
17 our fuel expense was reduced by 21 percent due to
18 hedging. However, in 1998 when fuel prices were low,
19 our fuel expense was actually increased by 13 percent
20 due to hedging and we, in 1998, did not receive any
21 compensation from our customers for that increase in
22 fuel expense and, therefore, shortfall in

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1 profitability relating to our hedging activities.

2 And finally, many of our customers are in
3 commodity businesses and they're clearly familiar with
4 hedging strategies.

5 Well, let's get into the details of the
6 actual surcharge program. The history of our program,
7 and this is before the mileage-based program which
8 started this year, was that the truck fuel surcharge
9 program is widely accepted and recognized and we
10 originally used a percent of freight bill primarily
11 because it was easy to administer and the entry point
12 was adopted based on historical average cost of
13 highway diesel fuel which as we saw earlier has a high
14 correlation to BNSF's price per gallon of the diesel
15 fuel we consume and finally, BNSF charges a lower
16 percent of the freight bill than the truck surcharges.

17 Well, starting in the first of this year,
18 we moved to a mileage-based program for certain groups
19 and let's talk about that because there's been a lot
20 of commentary today about that program.

21 Well, first of all, a mileage-based
22 program reflects fuel usage and the tables are built

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1 on a business unit by business unit basis for fuel
2 intensity and the mileage table is based upon rail
3 miles and the intent of our mileage-based program is
4 to only recover our cost above threshold and align the
5 surcharge with fuel consumption. The mileage-based
6 program was initiated for non-interline traffic for
7 coal and agricultural commodities on January 1st, 2006
8 as a response to our customer concerns. Interline
9 moves on these two commodities still move on a
10 revenue-based surcharge because of the shared movement
11 and therefore, the shared billing between the various
12 carriers.

13 Consumer and industrial products, our
14 remaining two business units, were not converted to
15 mileage-based upon customer concerns and customer
16 feedback and we expect consumer and industrial
17 products to convert to a mileage-based program over
18 time and if they don't, then we intend to make
19 adjustments to avoid for the potential of over
20 recovery resulting from the compounding effect of rate
21 increases.

22 Let's actually look at the numbers from

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1 BNSF's perspective and these numbers you can actually
2 tie back to our 10K filed with the SEC. The question
3 is are we over recovering and the answer no, not in
4 any year from 2001 to 2005 nor for the five-year
5 period and if you see the number up in sort of the
6 upper left-hand corner, you can see that we have under
7 recovered over that five-year period by \$1.1 billion.
8 Now, this is BNSF fuel expense absent the hedge
9 compared to the recoveries from fuel surcharges.

10 Also, some assert that we over recover in
11 one line of business and in effect, subsidize others
12 and for the five-year period and for the year 2005,
13 all four of our business units fell short of
14 recovering their cost of fuel.

15 Three of the business units in 2005
16 recovered a significant amount, i.e., 75 percent or
17 more of the increase in fuel above base while coal,
18 the other business unit, recovered well under 50
19 percent above its base.

20 So, fuel surcharge is clearly not a profit
21 center at BNSF.

22 But, as I stated earlier, we will continue

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1 to monitor the program and over time do not intend to
2 over recover while still administering a workable
3 program and if we find on a business unit basis over
4 time we are over recovering, we will make adjustments
5 to the program.

6 So, in conclusion, BNSF's fuel surcharge
7 was implemented to cover escalating fuel cost. BNSF
8 is not fully recovering fuel cost above the base
9 price. BNSF has reacted to customer concerns in the
10 marketplace and BNSF believes that a mileage-based
11 fuel surcharge is the most reasonable and appropriate
12 approach.

13 And finally, all of the details of our
14 surcharge program are readily available on our website
15 BNSF.com.

16 Now, that's the end of my slides, but I do
17 have a couple of comments and I modified some of the
18 comments that I made based upon some of the testimony
19 that I've heard this morning, but I do want to touch
20 on two other points that have been brought up this
21 morning and I'm sure they would be things that are
22 clearly on your mind in -- to other people's questions

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1 on them as we've gone through the morning and the
2 early part of the afternoon.

3 First of all, why is the rate on the
4 mileage-based program for grain greater than coal?
5 Let me give you a couple of things. First of all,
6 I'll start by saying the mileage-based program has
7 only been in effect for four months. So, therefore,
8 we're still working through what I'll call the start
9 up of a new methodology. But, there are clear
10 differences in the business model for coal versus ag.

11 Difference one, coal moves exclusively in
12 unit train operation. Ag moves some in unit train and
13 some in single car movement.

14 Second is speed. Coal typically moves at
15 the slowest speed on the railroad while ag moves at a
16 variety of speeds sometimes depending on which train
17 it's on and therefore, the higher the speed,
18 typically, the more horsepower you have. Horsepower
19 being locomotive power and therefore, the more fuel
20 intensity you have.

21 The third activity that causes a
22 difference between the two is the switching

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1 activities, i.e., activities in the yards where
2 there's fuel being consumed, but not real mileage
3 being added. Coal incurs very little switching
4 activity. Ag, especially, the non-unit train
5 agricultural movements, rather, incur switching
6 activities and then finally weight, which was brought
7 up by one of the individuals earlier, especially on
8 the empty moves. Moving the aluminum cars back as
9 opposed to unit grain trains back clearly causes a
10 difference.

11 So, I think really the question is not so
12 much why is coal different than ag, but is ag unit
13 train different than ag single car and we have one ag
14 rate. We've debated whether we should actually have
15 two ag rates and that's something I think we'll
16 consider in the future, but right now, we just have
17 the one rate.

18 But, those are the differences between
19 coal and ag businesses which cause ag to be more fuel
20 intensive than coal.

21 The second thing I'd like to comment on is
22 this whole issue of RCAF and rail cost adjustment

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1 factor. First of all, we have very few contracts, I
2 mean we're talking a very small percentage that
3 actually have a full RCAF and fuel surcharge on them.

4 But, from our perspective, RCAF is not
5 really the best recovery methodology and the best
6 match anyway because RCAF is a nationwide average that
7 doesn't reflect the higher fuel usage of a long
8 distance carrier like BNSF.

9 And secondly, as was indicated in the last
10 panel, the weights aren't necessarily reflective of
11 the current weighting of fuel cost especially for a
12 long haul carrier like BNSF. It really doesn't
13 reflect the volatility and the quickness of the
14 movement.

15 Then thirdly, there are timing differences
16 and estimations differences that the previous panels
17 have talked about.

18 And finally, many of our contracts only
19 provide for a percent recovery of RCAF as opposed to
20 full RCAF.

21 And so, when you add all that up, RCAF has
22 woefully under recovered for us and we don't believe

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1 that there should be any double counting here at all.
2 Actually, we believe the best model should be a
3 mileage-based fuel surcharge coupled with an index
4 that describes an all inclusive less fuel index which
5 would be RCAF absent fuel and we think that's the best
6 model and that would address the concerns of most of
7 the parties that spoke on that topic today.

8 So, that's the extent of my prepared
9 comments. I'd be ready to answer to questions unless
10 you want to ask questions as a panel.

11 CHAIRMAN BUTTREY: We're not going to do
12 a panel.

13 MR. HUNT: Okay.

14 CHAIRMAN BUTTREY: We'll just ask the
15 questions individually.

16 MR. HUNT: That would be just fine.

17 CHAIRMAN BUTTREY: There's been a lot made
18 about who's paying this and who's not paying this and
19 we've heard a little bit of everything really.

20 Do you have any idea what percentage of
21 your traffic is not paying the fuel charge because
22 there's a contract or for some other reason?

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1 MR. HUNT: We disclose our effectiveness
2 rate and we did it on the last analyst call at around
3 75 percent expecting we do about 80 percent by the end
4 of this year.

5 As I indicated through 2005, the business
6 units that clearly had fairly high recovery were coal,
7 or I'm sorry, ag, industrial and consumer products.
8 Coal is the one that clearly is significantly under
9 recovery.

10

11 MR. HUNT: And that's because of contracts.

12 CHAIRMAN BUTTREY: And you can
13 unequivocally state for us today that the fuel
14 increase that you're trying to recover is not the fuel
15 increase that you're losing under contract?

16 MR. HUNT: Are you saying a cross subsidy
17 between the two?

18 CHAIRMAN BUTTREY: Right.

19 MR. HUNT: No, each of the business units
20 and again, from my perspective, you know, we're
21 looking at this on a business unit by business unit
22 basis, each one of them under recovered last year.

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1 CHAIRMAN BUTTREY: Across the board?

2 MR. HUNT: Yes, all four business units.

3 CHAIRMAN BUTTREY: Okay. If the indexing
4 methodology that might be adopted in the future was
5 something other than what you're using today, what
6 would you recommend as an alternative?

7 MR. HUNT: I think something that has a
8 high correlation to the fuel we consume and that --
9 remember the slide that showed the two lines going in
10 parallel. Something that has a high correlation and
11 if it was something that actually was, you know, an
12 off-highway diesel fuel that was a published
13 statistic, I think there's two things that have to be
14 there, high correlation and public visibility.

15 You know, as long as we find something
16 like that, I think it's fine. I think, you know, pure
17 oil is not the best because it doesn't include the
18 refining component.

19 VICE CHAIRMAN MULVEY: Thank you. Your
20 company began to view the RCAF as an inadequate method
21 by which to recapture the increased fuel cost.
22 Couldn't you have petitioned the Board for a change in

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1 the way RCAF is calculated?

2 MR. HUNT: I imagine we could have.
3 That's probably a bit of, I'll say, almost a
4 regulatory question. I'm not a regulatory attorney.

5 What we have done is we have calculated an
6 index that essentially mirrors RCAF and therefore, is
7 the all inclusive less fuel and then put the fuel
8 surcharge with that and in most of our contracts that
9 are coming up, that's what we actually are using.

10 VICE CHAIRMAN MULVEY: So, you have the
11 RCAF with the fuel taken out of it.

12 MR. HUNT: Right.

13 VICE CHAIRMAN MULVEY: And then put on the
14 surcharge. So --

15 MR. HUNT: Correct.

16 VICE CHAIRMAN MULVEY: -- in your
17 estimation, you're not double dipping in any of these
18 contracts?

19 MR. HUNT: That's correct and as I said
20 before, there are a very small percentage of contracts
21 that have I'll say a full RCAF and fuel surcharge and
22 that was known at the time we negotiated the contracts

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1 with the customers and that's a small percentage.

2 VICE CHAIRMAN MULVEY: There's been some
3 charge that the fuel surcharge program does not
4 account for efficiency gains. That the railroads
5 achieve tremendous efficiency gains as they're putting
6 in newer locomotives, replacing the older, less fuel
7 efficient ones.

8 Is there any way to factor in the fuel
9 efficiency gains or do you think that that's being
10 done?

11 MR. HUNT: I think over time that needs to
12 be accounted for. I would also say that fuel
13 efficiency is something that moves at almost a fairly
14 glacial pace. A 1 percent improvement in efficiency
15 in a year is a big deal. You know, so it's -- the
16 locomotive -- you think about the turnover in the
17 fleet. We've got over 5,000 over the road locomotives
18 on our property and probably over 6,000 in total
19 counting the road switchers and all that and in a big
20 year, we get 300 new ones. So, it moves at a slow
21 pace.

22 Over time if we achieve significant

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1 efficiency, we should be adjusting the program to
2 reflect that.

3 VICE CHAIRMAN MULVEY: You can understand
4 how the shippers feel though. In a sense, some
5 shippers feel that look, you've signed these contracts
6 with other shippers where you've agreed to not levy
7 any fuel surcharges and now, you're coming to us to
8 raise our rates effectively or institute these
9 practices for us to cover the costs of serving others
10 and you can see why the shippers would consider this
11 to be unfair. You made these deals and you signed
12 these contracts. Why shouldn't you bear the burden of
13 the errors in signing contracts that don't allow you
14 to recover all of your costs?

15 MR. HUNT: And I'd say we do bear the
16 burden of that. That's why in my comments earlier I
17 said coal recovering well less than 50 percent.

18 The place where we have contracts that are
19 longer term where we've not had I'll say rollover and
20 therefore, an opportunity to negotiate a fuel
21 surcharge is really in coal and that's where we are
22 under recovery and when we think about, you know, the

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1 fuel surcharge I talked about, a 75 percent
2 effectiveness, that the vast majority of that 25
3 percent difference exists within the coal business
4 group. So, I think we are absorbing that.

5 VICE CHAIRMAN MULVEY: In one of your
6 charts, the bar chart, titled Cumulative Under
7 Recovery. Fuel expense above threshold. What is a
8 threshold?

9 MR. HUNT: Well, I'll give you the exact
10 answer.

11 VICE CHAIRMAN MULVEY: Is that yes.

12 MR. HUNT: Seventy-three cents BNSF or
13 it's about \$1.25 highway diesel fuel.

14 VICE CHAIRMAN MULVEY: And that's 2001
15 based?

16 MR. HUNT: Yes, it's --

17 VICE CHAIRMAN MULVEY: I was trying to
18 figure out, why the word threshold was used instead of
19 a particular time or a particular number.

20 MR. HUNT: Our surcharge program is the
21 same for all customers and it's highway diesel fuel
22 and then it starts at \$1.25 and ratchets up from

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1 there.

2 VICE CHAIRMAN MULVEY: But, that suggests
3 that an off-highway diesel fuel would be better
4 because it doesn't take into account a lot of the
5 other charges that are put in highway diesel fuel.
6 How do you feel about that?

7 MR. HUNT: Back to the question earlier,
8 I think as long as we find an index that has a high
9 correlation to what we burn and is publicly available
10 and agreeable to all parties, I have no problem with
11 that.

12 VICE CHAIRMAN MULVEY: Thank you.

13 MR. HUNT: Yes.

14 VICE CHAIRMAN MULVEY: Doug.

15 CHAIRMAN BUTTREY: I don't have anything
16 else.

17 VICE CHAIRMAN MULVEY: Thank you very
18 much.

19 MR. HUNT: Thank you.

20 CHAIRMAN BUTTREY: Our next witness is
21 Canadian National. Good afternoon.

22 MR. FOOTE: Good afternoon, Mr. Chairman,

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ATTACHMENT 7

Attachment 7

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10 Attorneys for Plaintiff
 BNSF Railway Company, a Delaware Corporation

11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE EASTERN DISTRICT OF CALIFORNIA

13
 14 BNSF Railway Company, a Delaware
 15 Corporation,
 16 Plaintiff,
 17 v.
 18 San Joaquin Valley Railroad Company, a
 California Corporation, Tulare Valley
 19 Railroad Company, a Nevada Corporation,
 20 Defendants.

Case No. 1:08-CV-01086-AWI-SMS

Case Type: Declaratory Judgment/Contract

DECLARATION OF WELDON E. HALE

21
 22 Weldon E. Hale declares as follows:

23 1. I am BNSF's Director of Shortline Development. In that capacity
 24 I am responsible for the management of the commercial and contractual relationship with a
 25 number of our handling-carrier shortlines, one of which is San Joaquin Valley Railroad
 26 Company (SJVR). My job includes administration of the fuel surcharge sharing program with
 27 SJVR. I am familiar with BNSF's fuel surcharge program.

ATTACHMENT 8

SURFACE TRANSPORTATION BOARD

+ + + + +

THE 25TH ANNIVERSARY OF THE STAGGERS RAIL ACT OF 1980: A REVIEW AND LOOK AHEAD		STB Ex Parte No. 658
--	--	-------------------------

Room 760
 Mercury Building
 1925 K Street, N.W.
 Washington, D.C. 20423

Wednesday,
 October 19, 2005

The above-entitled matter came on for hearing pursuant to notice at 9:00 a.m., Roger Nober, Chairman, presiding.

BEFORE:

THE HONORABLE ROGER NOBER	Chairman
THE HONORABLE W. DOUGLAS BUTTREY	Vice Chairman
THE HONORABLE FRANCIS P. MULVEY	Commissioner

1 profit center for the railroads. My understanding is
2 that the fuel surcharges are designed to be cost
3 recovering.

4 And my question is do any of the railroads
5 right now cover all of their increased fuel costs
6 through the fuel surcharges? Is anybody covering the
7 total cost of increased fuel?[panelists No] So fuel
8 surcharges still fall short of the cost.

9 They should be based on cost, agreed.
10 And, obviously, one based on mileage is probably more
11 closely related to cost than one based on the waybill.
12 But it would even be better if they were ton-mile-
13 based taking into accounts such things as terrain.

14 Has anybody looked at a ton-mile-based
15 fuel surcharge taking into account terrain
16 differences?

17 MR. LANIGAN: What we have done with our
18 fuel surcharge program, the mileage-based fuel
19 surcharge program, is it inherently takes that into
20 consideration. We have different tables for the
21 different types of commodities, which take into
22 account the average tons per train, the number of

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1 locomotives per train, etcetera, so we believe that we
2 have built that into our mileage-based fuel surcharge
3 tables.

4 COMMISSIONER MULVEY: So it's not simply
5 mileage-based?

6 MR. LANIGAN: That's correct.

7 COMMISSIONER MULVEY: Okay. Positive
8 train control is something that has been looked at for
9 quite some time and many have suggested that positive
10 train control, if fully implemented, would greatly
11 improve railroad safety but, almost as important, also
12 improve railroad productivity. One recent study by
13 Zeta-Tech out of Philadelphia suggests a payback
14 period on positive train control of less than two
15 years, about 18 months, and that's not even taking
16 into account the safety benefits.

17 I know the industry historically has pooh-
18 poohed the idea of positive train control as being
19 cost ineffective based upon earlier studies, but has
20 the industry or any of you as individual railroads
21 looked again at positive train control today to see
22 whether or not it may make more sense for the

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APPENDIX 3

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CARGILL, INCORPORATED)	
)	
)	
Complainant,)	
)	
v.)	Docket No. 42120
)	
BNSF RAILWAY COMPANY)	
)	
Defendant.)	
)	

**BNSF’S OBJECTIONS AND RESPONSES TO CARGILL’S FIRST SET OF
INTERROGATORIES AND DOCUMENT REQUESTS**

Pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, Defendant BNSF Railway Company (“BNSF”) hereby responds and objects to the Complainant’s First Set of Interrogatories and Requests for Production of Documents (“Cargill’s First Requests”) served on January 11, 2011.

**GENERAL OBJECTIONS AND
OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS**

The following general objections and objections to definitions and instructions are made with respect to Cargill’s First Requests.

1. BNSF objects to Cargill’s First Requests to the extent they seek documents that contain confidential and commercially sensitive information or other sensitive nonpublic information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904.

2. BNSF objects to Cargill’s First Requests to the extent they seek disclosure of documents that are protected by the attorney-client privilege, work product doctrine, and/or any

other appropriate privilege or doctrine. Any production of privileged or otherwise protected documents is inadvertent and shall not constitute a waiver of any claim of privilege or other protection.

3. BNSF objects to Cargill's First Requests to the extent they seek production of "all documents" or "all analyses" relating to matters described in particular requests on grounds that those requests are overly broad and unduly burdensome in light of the broad scope of Cargill's discovery requests and the length of the discovery period in this proceeding. BNSF will conduct a search for responsive, non-privileged materials to the extent reasonably available that is commensurate with the schedule in this proceeding.

4. BNSF objects to Cargill's First Requests to the extent they seek production of information or documents in computer-readable format to the extent that production in such format would be an unduly burdensome and oppressive task.

5. BNSF objects to Cargill's First Requests to the extent they seek databases and computer programs rather than responsive information contained in the databases and computer programs on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery.

6. BNSF objects to Cargill's First Requests to the extent they request information relating to BNSF's internal management cost system or information derived from BNSF's internal management cost system on grounds that such requests seek highly sensitive information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. BNSF further objects to such requests on grounds that they are beyond the permissible scope of discovery.

7. BNSF objects to Cargill's First Requests to the extent they seek information that

is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery.

8. BNSF objects to Cargill's First Requests to the extent they call for the production of documents or information already in Cargill's possession or control, that are publicly available, or that can be obtained by Cargill with no more burden than would be imposed on BNSF to obtain and produce such documents or information.

9. BNSF objects to Cargill's First Requests to the extent they call for production of documents or information relating to the portion of interline movements not provided by BNSF on the grounds that such information is overly broad, irrelevant, and outside the scope of the proceeding.

10. BNSF objects to Cargill's First Requests to the extent they call for production of documents or information relating to specific shippers or specific movements on grounds that it is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this unreasonable practices case.

11. The following responses are based on information known at this time through reasonable investigation under the circumstances and given the time frame involved. BNSF expressly reserves the right to supplement its responses in light of further investigation, including pursuant to 49 C.F.R. § 1114.29.

12. BNSF objects to the definition of "Analyses" as vague to the extent it includes "other types of written, printed, or electronic submissions of information." BNSF further objects to the definition of "Analyses" on grounds that it is overbroad and unduly burdensome to the

extent it includes “all supporting hard-copy or electronic workpapers sufficient to replicate the analyses results.”

13. BNSF objects to the definition of “Assailed Tariff Item” to the extent it includes BNSF Rules Book 6100-A, Item 3376C, Section B, effective January 1, 2011, and all successors thereto, as overly broad, irrelevant, and outside the scope of this proceeding.

14. BNSF objects to the definition of “BNSF” on the basis that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery to the extent it requires the production of documents that are not in the possession, custody, or control of BNSF, including, for example, documents in the possession of former employees, directors, consultants, and all other persons acting (or who have acted) on BNSF’s behalf. BNSF further objects to the definition of “BNSF” to the extent it includes “parent and/or holding companies” as overly broad, unduly burdensome, and neither relevant nor reasonably calculated to lead to the discovery of relevant evidence.

15. BNSF objects to the definition of “BNSF Rules Book 6100-A” as irrelevant, overly broad, and outside the scope of this proceeding to the extent it includes issues of the Rules Book outside the relevant time period of the case.

16. BNSF objects to the definition of “Commodities to which the Assailed Tariff Item applies” to the extent it includes commodities to which the challenged BNSF fuel surcharge “may be applied” on grounds that it is vague and ambiguous. BNSF further objects to this definition to the extent it suggests that exempt traffic to which the Assailed Tariff Item applies is subject to any claim for relief.

17. BNSF objects to the definition of “Destination” to the extent it includes the portion of interline movements that terminate on “some other railroad” and are not provided by

BNSF as overly broad, irrelevant, and outside the scope of this proceeding.

18. BNSF objects to the definitions of “document(s)” and “related,” “related to,” and “relating to” on grounds that they are overly broad, unduly burdensome, and beyond the scope of permissible discovery. BNSF further objects to these definitions to the extent they include materials that are not in BNSF’s possession, custody, or control.

19. BNSF objects to the definitions of “identify” and “describe” to the extent that they seek any information about BNSF employees other than the employee’s name and current title on grounds that they are overly broad and unduly burdensome, and they seek information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

20. BNSF objects to the definition of “Origin” to the extent it includes the portion of interline movements that originate on “some other railroad” and are not provided by BNSF as overly broad, irrelevant, and outside the scope of this proceeding.

21. BNSF objects to the definition of “Strike price” as vague and ambiguous.

22. BNSF objects to the definition of “Tariff Item 3376” as irrelevant because that Tariff Item was adopted after the complaint was filed and is outside the scope of this proceeding.

23. BNSF objects to the definition of “Traffic to which the Assailed Tariff Item applies” to the extent it includes rail movements to which the Assailed Tariff “may be applied, including but not limited to all shipments made pursuant to a pricing document referring thereto” as vague, ambiguous, overly broad, and unduly burdensome. BNSF further objects to the extent “Traffic to which the Assailed Tariff Item applies” includes rail movements subject to BNSF Rules Book 6100-A, Item 3376C, Section B, effective January 1, 2011, as overly broad and irrelevant because that Tariff Item was adopted after the complaint was filed and is outside the scope of this proceeding.

24. BNSF objects to Instruction Number 2 on grounds that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery to the extent it requires BNSF to provide detailed information or descriptions about data produced in computer readable-format. BNSF further objects to Instruction Number 2 on grounds that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery to the extent it seeks computer programs and intermediate files used in deriving responsive data. BNSF further objects to Instruction Number 2 to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery.

25. BNSF objects to Instruction Number 3 on grounds that it is overly broad and unduly burdensome to the extent it seeks information that is not necessary to enable Cargill to assess the grounds for the withholding of a document.

26. BNSF objects to Instruction Number 6 on grounds that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery.

27. BNSF objects to Instruction Number 7 on grounds that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery.

28. BNSF objects to Instruction Number 11 to the extent it seeks information or documents created before January 1, 2005, or after Cargill filed its complaint on April 19, 2010, on grounds that such requests are overly broad and unduly burdensome, and seek information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

29. BNSF incorporates these General Objections and Objections to Definitions and Instructions into each Response below as if fully set forth therein.

RESPONSES AND OBJECTIONS TO INTERROGATORIES

Interrogatory No. 1:

Please describe the processes and inputs BNSF used to develop the general formula to calculate fuel surcharges set forth in the Assailed Tariff Item.

BNSF's Response: Subject to and without waiving its general objections, BNSF will produce responsive, non-privileged documents from which information sought in Interrogatory Number 1 can be obtained.

Interrogatory No. 2:

Please identify, by name, title, and address, the person(s) who have participated in developing the general formula to calculate fuel surcharges set forth in the Assailed Tariff Item.

BNSF's Response: Subject to and without waiving its general objections, the following current BNSF employees participated in developing the general formula to calculate the BNSF mileage-based fuel surcharge: Samuel Kyei, Chief Economist, Finance Planning & Control, Marketing - Marketing Support; Brian Large, Director, Engineering Services, Engineering - Engineering Services; and Gary Shoop, Manager, Economic Forecast & Analysis, Finance Planning & Control, Marketing - Marketing Support.

Interrogatory No. 3:

Please identify, by name, title, and address, the persons(s) who are most knowledgeable about the comparison of fuel surcharge revenues collected by BNSF on traffic subject to a fuel surcharge with the actual incremental fuel costs incurred by BNSF on the same traffic subject to a fuel surcharge.

BNSF's Response: BNSF objects to this Interrogatory to the extent it seeks information regarding a fuel surcharge provision other than the one at issue in this proceeding on grounds that it is overly broad, unduly burdensome, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving its specific and general objections, BNSF identifies the following individuals as being

knowledgeable about the specified issue to the extent it relates to the fuel surcharge at issue:

Paul B. Anderson, Vice President, Marketing - Marketing Support; and Michael Wade, Director, Equipment Utilization.

Interrogatory No. 4:

Please identify, by name, title, and address, the person(s) most knowledgeable about the fuel consumption characteristics of BNSF's locomotive fleet.

BNSF's Response: Subject to and without waiving its general objections, BNSF identifies the following individual as being knowledgeable about the fuel consumption characteristics of BNSF's locomotive fleet: Matt Feldman, General Director, Strategic Studies, Finance.

Interrogatory No. 5:

Please identify, by name, title, and address, the person(s) most knowledgeable about BNSF's fuel purchasing and fuel hedging practices.

BNSF's Response: Subject to and without waiving its general objections, BNSF identifies the following individuals as being knowledgeable about BNSF's fuel purchasing and fuel hedging practices: David Burr, AVP, Fuel & Risk Management, Finance.

Interrogatory No. 6:

Please identify, by name, title, and address, the person(s) most knowledgeable about BNSF's fuel costs.

BNSF's Response: Subject to and without waiving its general objections, BNSF identifies the following individuals as being knowledgeable about BNSF's fuel costs: David Burr, AVP, Fuel & Risk Management, Finance.

Interrogatory No. 7:

Please identify, by name, title, and address, the person(s) most knowledgeable about BNSF's computerized traffic (revenue waybill) data; car movement data; train movement data; fuel surcharge data; locomotive fuel consumption data; and financial reporting data related to fuel surcharges.

BNSF's Response: Subject to and without waiving its general objections, BNSF identifies the following individuals as being knowledgeable about the specified issues: Jolene Miller, General Director, Revenue Management-Financial Services, Accounting (“computerized traffic (revenue waybill) data”); Janet Galassi, Director, Technology Services-System Development (“car movement data” and “train movement data”); Paul B. Anderson, Vice President, Marketing - Marketing Support (“fuel surcharge data”); Matt Feldman, General Director, Strategic Studies, Finance (“locomotive fuel consumption data”); and Stacey Brewer, General Director - Capital Investment Accounting & Reporting (“financial reporting data related to fuel surcharges”).

Interrogatory No. 8:

Please identify, by name, title and address, the person(s) most knowledgeable about any fuel savings realized through the implementation of BNSF's Fuel MVP Program, its predecessors and/or successors thereto, as well as any similar program.

BNSF's Response: Subject to and without waiving its general objections, BNSF identifies the following individual as being knowledgeable about the specified issue: Alex Dalton, Manager, Operating Practices - Fuel Conservation, Technical Training/Rules.

Interrogatory No. 9:

Please identify any computer programs or models that have been used by BNSF to (a) download locomotive event recorder data from locomotives, and/or (b) process locomotive event recorder data for purposes of determining locomotive throttle position and/or fuel consumption.

BNSF's Response: Subject to and without waiving its general objections, BNSF uses programs designed by Wabtec Corporation and Wi-tronix, LLC to download and process locomotive event recorder data wirelessly from locomotives.

Interrogatory No. 10:

Please identify by STCC code all commodities to which the Assailed Tariff Item applies.

BNSF's Response: Subject to and without waiving its general objections, BNSF will

produce responsive, non-privileged data from which information sought in Interrogatory Number 10 can be obtained to the extent such data is reasonably available.

Interrogatory No. 11:

Please identify by STCC Code and Origin-Destination pair all movements on BNSF's system of all commodities to which the Assailed Tariff Item applies.

BNSF's Response: Subject to and without waiving its general objections, BNSF will produce responsive, non-privileged data from which information sought in Interrogatory Number 11 can be obtained to the extent such data is reasonably available.

Interrogatory No. 12:

For all traffic to which the Assailed Tariff Item applies that moves in interline service or is otherwise interchanged with another railroad, please describe the procedures used by BNSF to share the fuel surcharges collected with other railroads.

BNSF's Response: Subject to and without waiving its general objections, BNSF states as follows. There are many different variations on the procedures used to share fuel surcharge revenue with other railroads. The following are two basic approaches that have been used: (1) where joint rates are established and the originating carrier is responsible for collecting the fuel surcharge associated with the through movement, the originating carrier divides the fuel surcharge revenue between the two carriers; (2) where two interline carriers establish rates under the Association of American Railroads accounting mechanism known as "Rule 11," each railroad collects the fuel surcharge revenue, if any, corresponding to its portion of the movement. There is also a range of arrangements regarding the sharing of fuel surcharge revenue with short-line railroads.

RESPONSES AND OBJECTIONS TO REQUESTS FOR PRODUCTION

Request for Production No. 1:

Please produce all documents consulted, reviewed, relied upon, or otherwise utilized in answering the Interrogatories.

BNSF's Response: Subject to and without waiving its general objections, BNSF will produce responsive, non-privileged materials.

Request for Production No. 2:

Please produce any documents identified in response to the Interrogatories.

BNSF's Response: BNSF states that it did not identify any specific documents in response to the Interrogatories. BNSF will produce responsive, non-privileged materials referenced in the responses.

Request for Production No. 3:

Please produce all analyses relating to the grouping of BNSF's traffic into subsets (*e.g.*, agriculture, coal) to which different BNSF fuel surcharge programs and provisions apply.

BNSF's Response: BNSF objects to this Request on the grounds that it is irrelevant, overly broad, and unduly burdensome to the extent it seeks information relating to BNSF fuel surcharge provisions other than the one at issue in this proceeding. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials regarding the BNSF fuel surcharge that is the subject of this proceeding, if any.

Request for Production No. 4:

Please produce all documents used to determine that the relationship between changes in HDF prices and changes in BNSF's incremental fuel costs is linear, including, but not limited to, any other relationship that was considered or evaluated by BNSF.

BNSF's Response: BNSF objects to this Request to the extent it is based on an assumption, the source of which is not identified. BNSF further objects to this Request to the extent it seeks documents unrelated to the development of the BNSF fuel surcharge that is the subject of this proceeding on grounds that it is irrelevant, overly broad, and unduly burdensome.

Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials regarding the BNSF fuel surcharge that is the subject of this proceeding, if any.

Request for Production No. 5:

Please produce documents sufficient to show how and when BNSF's \$1.25 per gallon HDF fuel surcharge strike price was selected for application in BNSF Rules Book 6100-A, Item 3375C, effective June 1, 2003.

BNSF's Response: BNSF objects to this Request to the extent it seeks documents concerning BNSF fuel surcharge provisions that are not challenged in the Complaint on grounds that the Request is overly broad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF further objects to this Request that it seeks documents created before January 1, 2005, on grounds that the Request is overly broad, unduly burdensome, and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 6:

Please produce all documents relating to the development of the methodology for the calculation and imposition of the fuel surcharges described in the Assailed Tariff Item, as initially effective on January 1, 2006, including but not limited to:

- a. Documents related to the determination to calculate the surcharge based upon the loaded miles of a line-haul movement;
- b. Documents related to the selection of the HDF average price as the benchmark for the calculation of the surcharge;

- c. Documents which address the relationship, if any, between the revenues from the surcharge for any specific movement(s) or group(s) of movement(s) and changes in the actual cost to BNSF of the fuel consumed by the locomotives used in that (those) movement(s);
- d. Documents which address the relationship between the revenues from the fuel surcharge for any specific movement(s) and the changes in actual fuel costs to BNSF in excess of BNSF's strike price;
- e. Documents related to fuel consumption factors;
- f. Documents that relate to the use of a strike price of \$1.25 per gallon; and
- g. Documents used to determine the rate of change in the fuel surcharge mechanism set forth in the Assailed Tariff Item, including, but not limited to, documents used to determine that the fuel surcharge should increase/decrease by one cent for every four cent change in the HDF price per gallon.

BNSF's Response: BNSF objects to this Request on grounds that the reference to "imposition of the fuel surcharges" is vague and undefined. BNSF further objects to this Request to the extent it seeks information relating to BNSF's internal management costing system or information derived from BNSF's internal management cost system on grounds that such information is irrelevant and beyond the permissible scope of discovery. BNSF objects to Subsections (c) and (d) to the extent they seek shipper-specific or movement-specific materials on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of a contractual obligation to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this unreasonable practices case. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 7:

Please produce all analyses relating to the determination of operational parameters common to all traffic to which the Assailed Tariff Item applies.

BNSF's Response: BNSF objects on grounds that the reference to “determination of operational parameters common to all traffic” is vague and undefined. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 8:

Please produce all documents related to any updates, modifications, or other changes (actual or potential) to the Assailed Tariff Item, including but not limited to any changes (actual or potential) to the methodology for the calculation and imposition of the fuel surcharges described therein.

BNSF's Response: BNSF objects to this Request on grounds that the reference to “imposition of the fuel surcharges” is vague and undefined. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 9:

Please produce all analyses used to determine that the rate of change in the fuel surcharge mechanism set forth in BNSF Rules Book 6100-A, Item 3381 or any of its successors, or in any other applicable BNSF fuel surcharge programs (past or present), should increase/decrease by one cent for every 6 cent change in the HDF price per gallon.

BNSF's Response: BNSF objects to this Request because it seeks documents concerning BNSF fuel surcharge provisions that are not the subject of this proceeding on the grounds that such information is irrelevant, overly broad, unduly burdensome, and beyond the scope of this proceeding.

Request for Production No. 10:

Please produce all analyses comparing revenues collected through the implementation of any BNSF fuel surcharge, including the Assailed Tariff Item, with (a) BNSF's actual cost of fuel; and/or (b) BNSF's cost of fuel above BNSF's strike price.

BNSF's Response: BNSF objects to this Request to the extent it seeks documents concerning "any BNSF fuel surcharge" that is not the subject of this proceeding on grounds that such information is irrelevant, overly broad, unduly burdensome, and beyond the scope of this proceeding. BNSF objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information relevant to this unreasonable practices case. BNSF further objects to this Request to the extent it seeks information relating to BNSF's internal management costing system or information derived from BNSF's internal management cost system on grounds that such information is irrelevant and beyond the permissible scope of discovery. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials regarding the BNSF fuel surcharge that is the subject of this proceeding, if any.

Request for Production No. 11:

Please produce all analyses comparing any revenue collection assumptions BNSF utilized in developing the Assailed Tariff Item and actual fuel surcharge revenues.

BNSF's Response: BNSF objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive

information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information relevant to this unreasonable practices case. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 12:

Please produce all analyses comparing any fuel consumption assumptions BNSF utilized in developing the Assailed Tariff Item and actual locomotive fuel consumption.

BNSF's Response: BNSF objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information relevant to this unreasonable practices case. BNSF further objects to this Request to the extent it seeks analyses or other information relating to BNSF's internal management cost system or information derived from BNSF's internal management cost system on grounds that such information is irrelevant and beyond the permissible scope of discovery. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 13:

Please produce all analyses comparing any fuel cost assumptions BNSF utilized in developing the Assailed Tariff Item and actual locomotive fuel costs.

BNSF's Response: BNSF objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information relevant to this unreasonable practices case. BNSF further objects to this Request to the extent it seeks analyses or other information relating to BNSF's internal management cost system or information derived from BNSF's internal management cost system on grounds that such information is irrelevant and beyond the permissible scope of discovery. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 14:

Please produce all analyses concerning the impact (potential or actual) of any BNSF rail fuel surcharge, including the Assailed Tariff Item, on BNSF's profitability.

BNSF's Response: BNSF objects to this Request on grounds that the reference to "profitability" is vague and undefined. BNSF further objects to this Request on grounds that it is neither relevant nor likely to lead to the discovery of admissible evidence to the extent it seeks documents relating to "any BNSF rail fuel surcharge," which includes provisions that are not challenged in the Complaint and thus are beyond the scope of permissible discovery. BNSF further objects to this Request to the extent it seeks information relating to BNSF's internal management cost system or information derived from BNSF's internal management cost system on grounds that such information is irrelevant and beyond the permissible scope of discovery. Subject to and without waiving its specific and general objections, BNSF will conduct a

reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials regarding the BNSF fuel surcharge that is the subject of this proceeding, if any.

Request for Production No. 15:

Please produce all analyses of fuel consumed by locomotives in BNSF service.

BNSF's Response: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome to the extent it seeks "all analyses of fuel consumed by locomotives in BNSF service." BNSF objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information relevant to this unreasonable practices case. BNSF further objects to this Request to the extent it seeks analyses or other information relating to BNSF's internal management cost system or information derived from BNSF's internal management cost system on grounds that such information is irrelevant and beyond the permissible scope of discovery. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 16:

Please produce all analyses of (a) BNSF's actual cost of fuel and (b) BNSF's cost of fuel above BNSF's strike price.

BNSF's Response: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome to the extent it seeks "all analyses" of "BNSF's actual cost of fuel." BNSF

further objects to this Request to the extent it seeks analyses relating to a BNSF fuel surcharge that is not the subject of this proceeding on grounds that such information is irrelevant, overly broad, unduly burdensome, and beyond the scope of this proceeding. BNSF objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information relevant to this unreasonable practices case. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials regarding the BNSF fuel surcharge that is the subject of this proceeding, if any.

Request for Production No. 17:

Please produce all analyses of the fuel costs incurred by locomotives in BNSF service.

BNSF's Response: BNSF objects to the Request on grounds that the reference to "fuel costs incurred by locomotives" is vague and undefined. BNSF further objects to this Request on grounds that it is overly broad and unduly burdensome to the extent it seeks "all analyses of the fuel costs incurred by locomotives in BNSF service." BNSF further objects to this Request to the extent it seeks analyses or other information relating to BNSF's internal management cost system or information derived from BNSF's internal management cost system on grounds that such information is irrelevant and beyond the permissible scope of discovery. BNSF objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could

violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information relevant to this unreasonable practices case. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 18:

Please produce all analyses concerning BNSF's planned change (announced on August 5, 2008) that "[t]he Highway Diesel Fuel (HDF) price at which BNSF will assess a fuel surcharge on carload shipments -- the strike price -- will increase from \$1.25 per gallon to \$2.50 per gallon, and pricing for carload shipments will be adjusted to reflect the new strike price"¹ which was to become effective on January 15, 2009.

BNSF's Response: BNSF objects to this Request to the extent it seeks "analyses concerning BNSF's planned change" as vague and undefined. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 19:

Please produce all analyses concerning BNSF's decision to abandon the plan to increase the HDF fuel surcharge strike price to \$2.50 per gallon referenced in Request for Production No. 18.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 20:

Please produce documents sufficient to show how and when BNSF's \$2.50 per gallon HDF fuel surcharge strike price was set for application in BNSF Rules Tariff 6100-A, Item 3376,

¹ See: <http://domino.bnsf.com/website/updates.nsf/f6877776a92049f086256b030057f789/f2742d1a4171da1c8625749c0050e2d4?OpenDocument>.

as initially effective on January 1, 2009.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 21:

Please produce all analyses concerning BNSF's decision to increase the HDF fuel surcharge strike price at which BNSF assesses a fuel surcharge on carload shipments "from \$1.25 per gallon to \$2.50 per gallon beginning January 2011."²

BNSF's Response: BNSF objects to this Request to the extent it seeks information relating to a BNSF fuel surcharge provision that is not the subject of this proceeding on the grounds that it is irrelevant, overly broad, unduly burdensome, and beyond the scope of this proceeding.

Request for Production No. 22:

Please produce all analyses concerning any other possible rebasing of the Assailed Tariff Item or any other BNSF fuel surcharge not produced in response to Document Production Request Nos. 18, 19, 20, and 21.

BNSF's Response: BNSF objects to this Request to the extent it seeks documents concerning "any other BNSF fuel surcharge" that is not the subject of this proceeding on grounds that such information is irrelevant, overly broad, unduly burdensome, and beyond the scope of this proceeding. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials regarding the BNSF fuel surcharge that is the subject of this proceeding, if any.

² See: <http://domino.bnsf.com/website/updates.nsf/f6877776a92049f086256b030057f789/232b06c2a76808af8625776c006da426?OpenDocument>.

Request for Production No. 23:

Please produce all documents concerning the methodology and/or calculations BNSF contemplated, made, or will make to develop rate adjustments and/or new rates for movements to which Tariff Item 3376 applies to address the new \$2.50 per gallon HDF strike price.

BNSF's Response: BNSF objects to this Request to the extent it seeks documents concerning "any other BNSF fuel surcharge" that is not the subject of this proceeding on grounds that such information is irrelevant, overly broad, unduly burdensome, and beyond the scope of this proceeding. BNSF objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information relevant to this unreasonable practices case .

Request for Production No. 24:

Please produce all pricing documents applicable to Cargill's freight shipped from January 1, 2006 to the present.

BNSF's Response: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome to the extent it seeks "all pricing documents applicable to Cargill's freight shipped." BNSF further objects to this Request to the extent it seeks information on movements that were not assessed the fuel surcharge at issue in this case. BNSF further objects to this Request to the extent it calls for the production of documents or information already in Cargill's possession or control, that are publicly available, or that can be obtained by Cargill with no more burden than would be imposed on BNSF to obtain and produce such documents or information. BNSF further objects to this Request to the extent it seeks information that is duplicative of information sought in Request Number 37.

Request for Production No. 25:

Please produce all waybill, invoices or similar documents for all of Cargill's freight shipped from January 1, 2006 to the present.

BNSF's Response: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome to the extent it seeks "all waybill, invoices or similar documents for all of Cargill's freight shipped." BNSF further objects to this Request to the extent it seeks information on movements that were not assessed the fuel surcharge at issue in this case. BNSF further objects to this Request to the extent it calls for the production of documents or information already in Cargill's possession or control or that can be obtained by Cargill with no more burden than would be imposed on BNSF to obtain and produce such documents or information. BNSF further objects to this Request to the extent it seeks information that is duplicative of information sought in Request Number 37.

Request for Production No. 26:

Please produce all pricing documents applicable to all traffic to which the Assailed Tariff Item applied, and traffic was shipped, from January 1, 2006 to the present (other than documents produced in response to Document Production Request No. 24).

BNSF's Response: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome to the extent it seeks "all pricing documents applicable to all traffic to which the Assailed Tariff Item applied, and traffic was shipped." BNSF objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information relevant to this unreasonable practices case. BNSF further objects to this Request to the extent it calls for the production of documents or information that are

publicly available and can be obtained by Cargill with no more burden than would be imposed on BNSF to obtain and produce such documents or information. BNSF further objects to this Request to the extent it seeks information that is duplicative of information sought in Request Number 37.

Request for Production No. 27:

Please produce all waybill, invoices or similar documents for all traffic to which the Assailed Tariff Item applied and traffic was shipped from January 1, 2006 to the present (other than documents produced in response to Document Production Request No. 25).

BNSF's Response: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome to the extent it seeks "all waybill, invoices or similar documents for all traffic to which the Assailed Tariff Item applied and traffic was shipped." BNSF objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information relevant to this unreasonable practices case. BNSF further objects to this Request to the extent it seeks information that is duplicative of information sought in Request Number 37.

Request for Production No. 28:

Please produce all analyses relating to the fuel surcharges set forth in any pricing document under which freight subject to the Assailed Tariff Item was shipped from January 1, 2006 through the present.

BNSF's Response: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome to the extent it seeks "all analyses relating to the fuel surcharges set forth in any pricing document." BNSF objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive

information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information relevant to this unreasonable practices case.

Request for Production No. 29:

Please produce documents sufficient to show how BNSF records, tracks, analyzes, and reports fuel consumption for each locomotive moving over the BNSF, including locomotives utilized under run-through agreements.

BNSF's Response: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome to the extent it seeks documents concerning "each locomotive moving over the BNSF, including locomotives utilized under run-through agreements." Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 30:

Please produce all analyses regarding any fuel consumption reductions realized through the implementation of BNSF's Fuel MVP Program, any predecessors and/or successors thereto, as well as any similar program.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 31:

For each locomotive type operated by BNSF (including locomotives utilized under run-through agreements), please produce documents sufficient to show: the fuel consumption rate by locomotive throttle position; horsepower; capacity of fuel tanks in gallons; and weight.

BNSF's Response: BNSF objects to this Request to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in

the format requested, or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery. BNSF further objects to this Request to the extent it seeks confidential, commercially sensitive, and proprietary information of third parties. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged and non-proprietary materials, if any.

Request for Production No. 32:

Please produce documents sufficient to show the monthly total consumption of locomotive diesel fuel for each locomotive moving over the BNSF, including locomotives utilized under run-through agreements.

BNSF's Response: BNSF objects to this Request on the grounds that it is overly broad and unduly burdensome to the extent it seeks documents regarding the monthly total consumption of locomotive diesel fuel for "each locomotive" moving over the BNSF. BNSF further objects to this Request to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials by locomotive type, if any.

Request for Production No. 33:

Please produce documents sufficient to show the monthly total gallons of locomotive diesel fuel dispensed at each BNSF-operated fueling facility.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. BNSF further objects to this Request to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 34:

Please produce documents sufficient to show the monthly total consumption of locomotive diesel fuel attributable to all traffic to which the Assailed Tariff Item applies from January 1, 2006 to the present.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery.

Request for Production No. 35:

Please produce documents sufficient to show the monthly average delivered price of locomotive diesel fuel that BNSF paid at each BNSF-operated fueling facility.

BNSF's Response: BNSF objects to this Request on grounds that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. BNSF further objects to this Request to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested,

or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 36:

Please produce documents sufficient to show BNSF's average hedged price and volume of locomotive diesel fuel purchased for each week.

BNSF's Response: BNSF objects to this Request to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery. BNSF further objects to this Request on grounds that the reference to "average hedged price and volume" is vague and unclear. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 37:

Please produce the databases, data warehouses, and computer programs (with all documentation related to these databases, data warehouses, and computer programs), in a computer-readable format, that include the information listed below for each movement handled by BNSF as originating, terminating, overhead, or single-line carrier for all traffic to which the Assailed Tariff Item applies from January 1, 2006 to the present:

- a. Consignee, Shipper, Payee, and/or Customer;
- b. The contract, agreement, tariff, or other pricing document that the shipment is billed under, including amendment and item number references;
- c. Waybill number and date;
- d. Commodity by STCC code;

- e. Origin city and state;
- f. Destination city and state;
- g. FSAC for the origin city and state for the railroad movement;
- h. FSAC for the destination city and state for the railroad movement;
- i. Origin SPLC;
- j. Destination SPLC;
- k. All railroads involved in the shipment;
- l. FSAC, city and state of interchanges, if applicable;
- m. For shipments that originated on BNSF's system, the date and time the shipment was originated;
- n. For shipments BNSF received in interchange, the on junction location and station number;
- o. For shipments BNSF received in interchange, the road received from;
- p. For shipments BNSF received in interchange, the date and time the shipment was interchanged;
- q. For shipments given in interchange, off junction location and station number;
- r. For shipments given in interchange, the road given to;
- s. For shipments given in interchange, the date and time the shipment was interchanged;
- t. For shipments terminated on BNSF's system, the date and time the shipment was terminated;
- u. Number of cars;
- v. Tons (Net);
- w. Tare weight;
- x. Total revenues from fuel surcharges;
- y. Portion of the revenues from surcharges received in Subpart x that are paid to BNSF;
- z. TOFC/COFC plan;
- aa. Car/trailer/container initial for each car/trailer/container used to move the shipment;
- bb. Car/trailer/container number for each car/trailer/container used to move the shipment;
- cc. If a trailer or container is used to move the shipment, the car initial and number used to move the trailer or container;
- dd. The train identification number of all trains used to move the shipment;
- ee. The number of locomotives, by train identification, by segment, used to move the shipment;
- ff. The total horsepower, by train identification, by line segment, used to move the shipment;
- gg. The total gross trailing tons, by train identification, by line segment, for all trains used to move the shipment;
- hh. The station locations where the traffic was interchanged between trains;

- ii. Total loaded movement miles;
- jj. Total empty movement miles;
- kk. Miles used to derive applicable fuel surcharges;
- ll. Applicable fuel surcharge rate and basis (*e.g.*, per mile);
- mm. Total loaded miles on BNSF's system(s);
- nn. Total empty miles on BNSF's system(s); and
- oo. AAR car-type code.

BNSF's Response: BNSF objects to this Request as overly broad and unduly burdensome to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery. BNSF objects to this Request as overly broad and unduly burdensome to the extent it seeks production of databases or computer programs rather than responsive information contained in the databases and computer programs. BNSF further objects to this Request as overly broad and unduly burdensome to the extent it requests all documentation related to the designated databases. BNSF objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information relevant to this unreasonable practices case. BNSF further objects to this Request to the extent it calls for production of documents or information relating to the portion of interline movements not provided by BNSF on grounds that such information is overly broad, irrelevant, and outside the scope of the proceeding. BNSF further objects to subparts (a), (e), (f), and (aa) to the extent they seek shipper-specific information about movements handled under contract on grounds that such

information would disclose commercially sensitive information that, if produced, could result in violation of a contractual obligation to third parties. BNSF further objects to subpart (cc) on grounds that it relates to traffic that is not within the scope of this proceeding. BNSF further objects to subparts (k), (x) (ii), (jj), and (nn) of this Request on grounds that they seek information that is not maintained by BNSF, not maintained by BNSF in the format requested, or that would require a special study to develop the requested information on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery. BNSF objects to subparts (ee), (ff), (gg), and (hh) as overly broad and unduly burdensome for the period from 2006 through 2009 to the extent that the information sought in these subparts is not reasonably available. Subject to and without waiving its specific and general objections, BNSF will produce responsive, non-privileged data relating to relevant movements to the extent such data are reasonably available.

Request for Production No. 38:

Please produce documents, in a computer readable format to the extent available, which contain information tracking and describing car, locomotive, and train movements from origin to destination for each car, locomotive, and train for all traffic to which the Assailed Tariff Item applies from January 1, 2006 to the present.

BNSF's Response: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. BNSF objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information relevant to this unreasonable practices case. BNSF further objects to this Request to

the extent it calls for production of documents or information relating to the portion of interline movements not provided by BNSF on grounds that such information is overly broad, irrelevant, and outside the scope of the proceeding. BNSF further objects to this Request to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery.

Request for Production No. 39:

Please produce train movement data, in a computer readable format to the extent available, from origin to destination for all BNSF car and train movements and yard and hub operations for all traffic to which the Assailed Tariff Item applies from January 1, 2006 to the present.

BNSF's Response: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. BNSF objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information relevant to this unreasonable practices case. BNSF further objects to this Request to the extent it calls for production of documents or information relating to the portion of interline movements not provided by BNSF on grounds that such information is overly broad, irrelevant, and outside the scope of the proceeding. BNSF further objects to this Request to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly

burdensome, and beyond the permissible scope of discovery.

Request for Production No. 40:

Please produce, in computer readable format, the database(s) used to calculate the fuel surcharge for all traffic to which the Assailed Tariff Item applies from January 1, 2006 to the present.

BNSF's Response: BNSF objects to this Request as overly broad and unduly burdensome to the extent it seeks production of databases or computer programs rather than responsive information contained in the databases and computer programs, which is being produced in response to Request Number 37.

Request for Production No. 41:

Please produce all documents, including programs, decoders, and instructions, necessary to link the data produced in response to Requests for Production Nos. 37, 38, 39, and 40. Please include with this production a description of the relationship between the databases (*e.g.*, whether there is a 1:1 ratio between databases, or whether one can expect to link 100% of records in one file to another file).

BNSF's Response: BNSF incorporates its objections to Request Nos. 37, 38, 39, and 40 into its response to Request Number 41 as if fully stated herein. BNSF further objects to this Request to the extent it seeks production of computer programs on grounds that such requests are beyond the permissible scope of discovery. BNSF further objects to this Request on grounds that it is overly broad and unduly burdensome. BNSF further objects to this Request to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such a request is overly broad, unduly burdensome, and beyond the permissible scope of discovery.

Request for Production No. 42:

Please produce documents sufficient to show any credits, debits, rebates, allowances or other price offsets related to the fuel surcharge imposed on any shipment(s) of freight identified in response to Request for Production Number 37.

BNSF's Response: BNSF incorporates its objections to Request Number 37 as if fully stated herein. Subject to and without waiving its specific and general objections, BNSF will produce responsive, non-privileged data relating to relevant movements in the format in which such data are available to the extent such data are reasonably available.

Request for Production No. 43:

Please produce documents sufficient to describe the computer databases and computer and/or telecommunications network infrastructure that record, collect, analyze and/or create specific train movement data, car movement data, fuel surcharge data, and locomotive fuel consumption data, including but not limited to graphical representations of the computer and/or network infrastructure.

BNSF's Response: BNSF objects to the Request to the extent it concerns "specific train movement data" and "car movement data" on grounds that such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. BNSF objects to this Request to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such a request is overly broad, unduly burdensome, and beyond the permissible scope of discovery. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials sufficient to describe computer databases regarding "fuel surcharge data" and fuel consumption data, if any.

Request for Production No. 44:

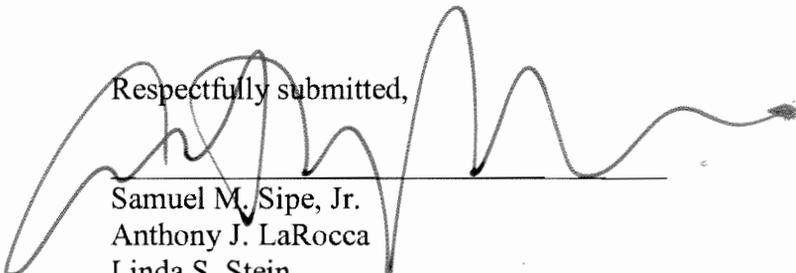
Please produce documents sufficient to describe the infrastructure, capabilities, and databases included in BNSF's Enterprise Data Warehouse ("EDW"), including but not limited to documents sufficient to show how the EDW creates fuel efficiency scorecards as described in the Business Wire news release available at http://findarticles.com/p/articles/mi_m0EIN/is_2008_June_4/ai_n25476086/.

BNSF's Response: BNSF objects to this Request to the extent it seeks information that

is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such a request is overly broad, unduly burdensome, and beyond the permissible scope of discovery. BNSF further objects to this Request to the extent it seeks information that is not related to the fuel efficiency scorecards on grounds that such a request is overly broad and unduly burdensome, and such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials related to the fuel efficiency scorecards, if any.

Richard E. Weicher
Jill K. Mulligan
Adam Weiskittel
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

Respectfully submitted,



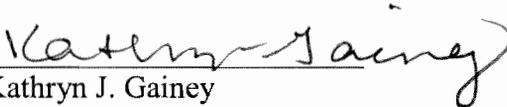
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Attorneys for BNSF Railway Company

CERTIFICATE OF SERVICE

I hereby certify, that I have this 1st day of February, 2011 caused to be served copies of the above BNSF's Objections and Responses to Cargill's First Set of Interrogatories and Document Requests by e-mail and First Class mail upon counsel for Cargill, Incorporated, as follows:

John H. LeSeur
Peter A. Pfohl
Daniel M. Jaffe
Stephanie M. Adams
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036


Kathryn J. Gaaney

APPENDIX 4

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CARGILL, INCORPORATED)	
)	
)	
Complainant,)	
)	
v.)	Docket No. 42120
)	
BNSF RAILWAY COMPANY)	
)	
Defendant.)	
)	

**BNSF’S OBJECTIONS AND RESPONSES TO CARGILL’S SECOND SET OF
DISCOVERY REQUESTS**

Pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, Defendant BNSF Railway Company (“BNSF”) hereby responds and objects to the Complainant’s Second Set of Discovery Requests (“Cargill’s Second Requests”) served on February 1, 2011.

**GENERAL OBJECTIONS AND
OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS**

The following general objections and objections to definitions and instructions are made with respect to Cargill’s Second Requests.

1. BNSF incorporates by reference, as if fully stated herein, the General Objections and Objections to Definitions and Instructions contained in BNSF’s Objections and Responses to Cargill’s First Set of Interrogatories and Document Requests served on February 1, 2011, in this proceeding.
2. BNSF objects to Cargill’s deadline for document production of February 25, 2011. BNSF’s search for responsive documents is ongoing, and non-privileged, responsive

materials will be produced as quickly as reasonably possible under the circumstances.

3. BNSF incorporates these General Objections and Objections to Definitions and Instructions into each Response below as if fully set forth therein.

RESPONSES AND OBJECTIONS TO REQUESTS FOR PRODUCTION

Request for Production No. 45:

Please produce all documents provided in response to following document production requests set forth in the Direct Purchaser Plaintiffs' Second Request for Production to Defendant BNSF Railway Company (copy included in Attachment 1 hereto), certified as served in the *Rail Freight Fuel Surcharge Antitrust Litigation* on December 30, 2008, for the time period relevant to those production requests: (a) Request No. 2; (b) Request No. 3; (c) Request No. 4; (d) Request No. 23; (e) Request No. 24; (f) Request No. 26; (g) Request No. 27; (h) Request No. 28; (i) Request No. 31; (j) Request No. 32; (k) Request No. 34; (l) Request No. 35; (m) Request No. 39; (n) Request No. 40; (o) Request No. 64; and (p) Request No. 66.

BNSF's Response: BNSF objects to this Request on grounds that it seeks production of information regarding BNSF's fuel surcharges that are not at issue in this case on grounds that such a request is overly broad and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF further objects to this Request to the extent it seeks production of documents created before January 1, 2005, on grounds that the Request is overly broad and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF further objects to this request to the extent it seeks materials containing shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of contractual obligations to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this unreasonable practices case. BNSF incorporates its general and specific objections to the Direct Purchaser Plaintiffs' Second Request for Production as if fully stated herein. BNSF further objects to this Request to the extent it calls for production of

documents or information that are responsive to particular document requests on grounds that such a request is overly broad, unduly burdensome, and beyond the scope of permissible discovery. BNSF further objects to this Request as overly broad and duplicative on grounds that it overlaps to a substantial extent with Cargill's First Set of Discovery Requests. Subject to and without waiving its specific and general objections, BNSF notes that it will be reviewing documents produced in the *Rail Freight Fuel Surcharge Antitrust Litigation* for responsiveness to the requests BNSF did not object to in Cargill's First Set of Discovery Requests, and many of the documents produced as a result of that review will also be responsive to this request. In addition, BNSF will produce organizational charts responsive to subpart (p) of this Request.

Request for Production No. 46:

Please produce a copy of each transcript(s) (including exhibits) for each BNSF officer or employee deposed in the *Rail Freight Fuel Surcharge Antitrust Litigation*.

BNSF's Response: BNSF objects to this Request on grounds that it seeks production of materials produced by parties other than BNSF that are subject to a protective order entered by the Court in the case *In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL No. 1869, Misc. No. 07-489 (PLF) (JMF). BNSF further objects to this Request on grounds that it seeks production of information regarding BNSF's fuel surcharges that are not at issue in this case on grounds that such a request is overly broad and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF further objects to this Request to the extent it seeks information regarding events that occurred or documents created before January 1, 2005, on grounds that the Request is overly broad and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF further objects to this request to the extent it seeks materials containing shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to

third parties that, if produced, could result in the violation of contractual obligations to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this unreasonable practices case.

Request for Production No. 47:

Please produce a copy of all documents (a) bearing BNSF bates number designations (e.g., “BNSF-0367622”) included in the exhibits to the Declaration of Sami H. Rashid in Support of Plaintiffs’ Motion for Class Certification (executed March 18, 2010 and filed in the *Rail Freight Fuel Surcharge Antitrust Litigation*) (redacted public copy included in Attachment 2 hereto) and (b) all excerpts from BNSF deponent depositions included in the exhibits to the Declaration referenced in subpart (a) of this Document Production Request No. 47.

BNSF’s Response: BNSF objects to this Request on grounds that it seeks production of information regarding BNSF’s fuel surcharges that are not at issue in this case on grounds that such a request is overly broad and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF further objects to this Request to the extent it seeks production of documents created before January 1, 2005, on grounds that the Request is overly broad and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF further objects to this request to the extent it seeks materials containing shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of contractual obligations to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this unreasonable practices case. BNSF further objects to this Request as overly broad and duplicative of non-privileged, responsive materials that are being produced in response to Cargill’s other document requests as indicated in BNSF’s Objections and Responses. Subject to and without waiving its specific and general objections, BNSF notes

that it will be reviewing documents produced in the *Rail Freight Fuel Surcharge Antitrust Litigation* for responsiveness to the requests BNSF did not object to in Cargill's First Set of Discovery Requests, and documents produced as a result of that review may also be responsive to this request.

Request for Production No. 48:

Please produce all documents produced in response to the subpoena filed in the *Rail Freight Fuel Surcharge Antitrust Litigation* on November 8, 2010 (copy of pertinent pages included in Attachment 3).

BNSF's Response: BNSF objects to this Request to the extent it seeks documents that are not in its possession, custody and control. BNSF objects to this Request on grounds that the reference to "profitability" in the subpoena is vague and undefined. BNSF further objects to this Request on grounds that it is neither relevant nor likely to lead to the discovery of admissible evidence to the extent it seeks documents relating to "rail fuel surcharges," which include BNSF's fuel surcharge provisions that are not challenged in the Complaint and thus are beyond the scope of permissible discovery. BNSF objects to the definition of "Berkshire Hathaway Inc." in the subpoena on the grounds that it is overly broad and unduly burdensome insofar as it includes parties or entities that are not relevant to this proceeding. Subject to and without waiving its specific and general objections, BNSF states that no documents were produced in response to the subpoena.

Request for Production No. 49:

Please produce all documents that relate to each of the following statements made in the "Comments of BNSF Railway Company" dated October 2, 2006 and filed in STB Ex Parte No. 661, *Rail Fuel Surcharges* (copy included in Attachment 4):

- (a) "Since it began in 2001, the goal of BNSF's fuel surcharge has been to ensure that BNSF is compensated for increases in the cost that were not embedded in the transportation rate offered to the customer." (p.2);
- (b) "BNSF never intended that fuel surcharges be sources of additional

- operating income for the railroad.” (p.2);
- (c) “After a great deal of discussion with its customers, as well as internal analyses, BNSF determined that altering its fuel surcharge methodology where practical was appropriate and responsive to customer concerns, and was in both BNSF’s and its customer’s commercial interests.” (p.3);
 - (d) “BNSF continues to analyze the methodology by which it calculates the mileage and usage based fuel surcharge.” (p.4);
 - (e) “BNSF’s goal is to collect fuel surcharges no higher than the additional cost of fuel, reflecting the operational requirements of each business unit.” (p.4);
 - (f) “... BNSF remains committed to the general principle that customers should not pay more in fuel surcharges than the additional cost of the fuel for a given category of rail traffic.” (p.4);
 - (g) “BNSF is committed to recovering its increased costs of fuel through fuel surcharges and not to over-collect.” (p.5);
 - (h) “... the objective of BNSF’s fuel surcharge program is to recover the increase in BNSF’s fuel cost per gallon over the defined strike price of \$0.73 per gallon.” (p.16); and
 - (i) “... [BNSF’s use of the] railroad’s unhedged cost of fuel above a strike price ... [in making] rate decisions....” (p.17).

BNSF’s Response: BNSF objects to this Request on grounds to the extent it seeks disclosure of documents that are protected by the attorney-client privilege, work product doctrine, and/or any other appropriate privilege or doctrine. BNSF further objects to this Request to the extent it seeks disclosure of shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of contractual obligations to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this unreasonable practices case. BNSF further objects to this Request to the extent it seeks production of information regarding BNSF’s fuel surcharges that are not at issue in this case on grounds that such a request

is overly broad and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF further objects to this Request as overly broad and duplicative of non-privileged, responsive materials that are being produced in response to Cargill's other document requests as indicated in BNSF's Objections and Responses. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials regarding the BNSF fuel surcharge that is the subject of this proceeding, if any.

Request for Production No. 50:

Please produce all documents that relate to each of the following bullet points set forth on page 6 of BNSF's "Fuel Surcharge Briefing, STB Hearing, May 11, 2006" made in the Public Hearing in STB Ex Parte No. 661, *Rail Fuel Surcharges* (May 11, 2006) (copy included in Attachment 5):

- (a) "• Mileage based program reflects fuel usage" (p.6); and
- (b) "• Tables built on business unit fuel intensities (weight & speed)" (p.6)

BNSF's Response: BNSF objects to this Request on grounds to the extent it seeks disclosure of documents that are protected by the attorney-client privilege, work product doctrine, and/or any other appropriate privilege or doctrine. BNSF further objects to this Request as overly broad and duplicative of non-privileged, responsive materials that are being produced in response to Cargill's other document requests as indicated in BNSF's Objections and Responses. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials, if any.

Request for Production No. 51:

Please produce all analyses that relate to the following statements made by Tom Hunt [sic] in the Public Hearing in STB Ex parte No. 661, *Rail Fuel Surcharges* (May 11, 2006) (copy

of pertinent transcript pages included in Attachment 6):

- (a) "... why is the rate on the mileage-based program for grain greater than coal" (Tr. at 263);
- (b) "We've debated whether we should actually have two ag rates and that's something I think we'll consider in the future." (Tr. at 264); and
- (c) "Over time, if we achieve significant efficiency, we should be adjusting the program to reflect that." (Tr. at 270-71).

BNSF's Response: BNSF objects to this Request to the extent it seeks production of information regarding BNSF's fuel surcharges that are not at issue in this case on grounds that such a request is overly broad and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF objects to this Request on grounds to the extent it seeks disclosure of documents that are protected by the attorney-client privilege, work product doctrine, and/or any other appropriate privilege or doctrine. BNSF further objects to this Request as overly broad and duplicative of non-privileged, responsive materials that are being produced in response to Cargill's other document requests as indicated in BNSF's Objections and Responses. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials regarding the BNSF fuel surcharge that is the subject of this proceeding, if any.

Request for Production No. 52:

Please produce all documents that provide the basis for following statement made in the Declaration of Weldon E. Hale, executed on April 23, 2010 and filed in *BNSF Ry. Co. v. San Joaquin Valley Railroad Co.*, Case No. 1:08-CV-01086-AWI-SMS, United States District Court for the Eastern District of California (copy included in Attachment 7): "Fuel surcharges are accessorial charges, which are not part of the through rates charged to shippers."

BNSF's Response: BNSF objects to this Request on grounds that the quoted statement is limited to the context of a confidential contract between BNSF and a short-line railroad that is

unrelated to Cargill's claims in this case and relates to the terms of that unrelated confidential contractual arrangement and therefore the Request seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF further objects to this Request to the extent it seeks disclosure of documents that are protected by the attorney-client privilege, work product doctrine, and/or any other appropriate privilege or doctrine. BNSF further objects to this Request to the extent it seeks production of documents that contain confidential and commercially sensitive information or other sensitive nonpublic information on grounds that, if produced, could result in the violation of contractual obligations to third parties.

Request for Production No. 53:

Please produce all analyses that relate to the following statement made by John Lanigan on October 19, 2005, at the Public Hearing in STB Ex Parte No. 658, *The 25th Anniversary of the Staggers Rail Act of 1980: A Review and Look Ahead*, (copy of pertinent transcript pages included in Attachment 8): "We have different [fuel surcharge] tables for the different types of commodities, which take into account the average tons per train, the number of locomotives per train, etcetera" (Tr. at 306-07).

BNSF's Response: BNSF objects to this Request to the extent it seeks production of information regarding BNSF's fuel surcharges that are not at issue in this case on grounds that such a request is overly broad and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF objects to this Request on grounds to the extent it seeks disclosure of documents that are protected by the attorney-client privilege, work product doctrine, and/or any other appropriate privilege or doctrine. BNSF further objects to this Request as overly broad and duplicative of non-privileged, responsive materials that are being produced in response to Cargill's other document requests as indicated in BNSF's Objections and Responses. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials regarding the

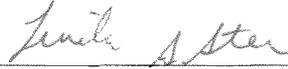
BNSF fuel surcharge that is the subject of this proceeding, if any.

Request for Production No. 54:

Please provide all analyses made by BNSF comparing any mileage based fuel surcharge used or considered by BNSF to any mileage based fuel surcharge used or considered by any other railroad.

BNSF's Response: BNSF objects to this Request to the extent it seeks documents concerning "any mileage based fuel surcharge used or considered by BNSF" that is not the subject of this proceeding on grounds that such information is irrelevant, overly broad, unduly burdensome, and beyond the scope of this proceeding. BNSF further objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of contractual obligations to third parties or could violate 49 U.S.C. § 11904, and that such information is neither relevant nor reasonably calculated to lead to the discovery of information that is relevant to this unreasonable practices case. Subject to and without waiving its specific and general objections, BNSF will conduct a reasonable search for responsive materials that is commensurate with the discovery period in this case, and BNSF will produce responsive, non-privileged materials regarding the BNSF fuel surcharge that is the subject of this proceeding, if any.

Respectfully submitted,



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Linda S. Stein
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1330 Connecticut Avenue, N.W.
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(202) 429-3000

Dated: February 15, 2011

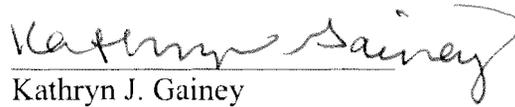
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BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

Attorneys for BNSF Railway Company

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of February, 2011, caused to be served copies of the above BNSF's Objections and Responses to Cargill's Second Set of Discovery Requests by e-mail and First Class mail upon counsel for Cargill, Incorporated, as follows:

John H. LeSeur
Peter A. Pfohl
Daniel M. Jaffe
Stephanie M. Adams
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
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Kathryn J. Gainey

APPENDIX 5

SLOVER & LOFTUS LLP

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WRITER'S E-MAIL:

February 14, 2011

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: STB No. 42120, Cargill, Incorporated v. BNSF Railway Company

Dear Ms. Brown:

Cargill, Incorporated ("Cargill") filed its Complaint in this case with the Board on April 19, 2010. Paragraph 5 of the Complaint defines the "Assailed Tariff Item" as Item 3375L, Section B and all predecessor and successor iterations:

5. BNSF invoices, and Cargill pays, a fuel surcharge on common carrier transportation services provided by BNSF to Cargill. This surcharge is set forth currently in BNSF Rules Book 6100-A, Item 3375L, Section B (a copy of which is appended in Exhibit A hereto) and is incorporated by reference in BNSF's common carrier pricing authorities applicable to Cargill's traffic. Item 3375L, Section B, and its predecessor and successor iterations, shall hereinafter be referred to as the "Assailed Tariff Item."

Item 3375L is a mileage-based fuel surcharge with a strike price of \$1.25 per gallon.

On December 17, 2010, Defendant BNSF Railway Company ("BNSF") published a notice on its website (copy in Attachment 1) stating that "BNSF's strike price for our fuel surcharge program will be reset from \$1.25 per gallon to \$2.50 per gallon beginning January 2011" and "[t]ariff changes for Agricultural Products customers are targeted for early March 2011." BNSF has also published a tariff item, currently set forth

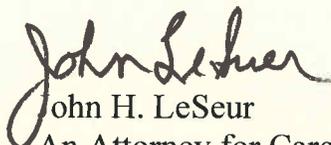
Cynthia T. Brown
February 14, 2011
Page 2

in BNSF Rules Book 6100-A, Item 3376D, Section B (copy in Attachment 2), that contains a mileage-based fuel surcharge with a strike price of \$2.50 per gallon.

While Cargill believes that Item 3376D, Section B (or any other rebased fuel surcharge that might be applied to its common carrier traffic) is a "successor" to Item 3375L, Section B, Cargill hereby expressly supplements its Complaint to include Item 3376C, or any other fuel surcharge tariff item (regardless of its numerical designation) that is applied to its common carrier shipments.

Cargill requests that this letter and Attachments 1 and 2 be included in the record for this proceeding

Respectfully submitted,


John H. LeSeur
An Attorney for Cargill, Incorporated

Enclosures

cc: Counsel for BNSF Railway Company



Ag Marketing Pricing News

12/17/2010

Ag Fuel Surcharge Implementation - Clarification

BNSF's strike price for our fuel surcharge program will be reset from \$1.25 per gallon to \$2.50 per gallon beginning January 2011. **Tariff changes for Agricultural Products customers are targeted for early March 2011. Please refer to the \$1.25 per gallon fuel surcharge rates until the tariff revision is published. Contracts will be addressed as they renew.**

Tables reflecting the new strike price and other program details are available on the BNSF website at <http://www.bnsf.com/customers/fuel-surcharge/>.

If you have any questions, please call your representative.

Your business is important to us. Thank you for choosing BNSF as your transportation service provider.

If you have any questions, please send an e-mail to Customer.Notifications@bnsf.com



**BNSF RAILWAY COMPANY
BNSF RULES BOOK 6100-A
(Cancels BNSF Rules Book 6100)**

**CONTAINING
RULES, REGULATIONS AND SPECIAL CHARGES
GOVERNING
THE TRANSPORTATION OF FREIGHT
ON
BNSF RAILWAY COMPANY
IN
THE UNITED STATES, MEXICO AND CANADA
AND
REGULATIONS GOVERNING CURRENCY EXCHANGE ON TRAFFIC
FROM, TO AND BETWEEN STATIONS IN CANADA
AND
CAR HIRE ON TRAFFIC TO OR FROM MEXICO**

For explanation of abbreviations / reference marks, see Item 110

ALSO APPLICABLE ON INTRASTATE TRAFFIC

ISSUED DECEMBER 29, 2000

EFFECTIVE JANUARY 1, 2001

Issued by J. C. Engstrom, P. O. Box 961069, Ft. Worth, TX 76161-0069

BNSF Rules Book 6100 – A***Item 3376-D - Charge – Carload Percentage Based and Mileage Based Fuel Surcharge (\$2.50 Strike Price)
Issued December 1, 2010 – Effective January 1, 2011 (Increase)***

General – Refer to Item 3374 for General Rules and Methodology for calculating the fuel surcharge.

- **Section A** of this item contains the Percentage Based Fuel Surcharge
- **Section B** of this item contains the Mileage Based Fuel Surcharge

Section A: Percentage Based Fuel Surcharge :

Application - Applies on the following carload shipments:

- EXEMPT shipments, not moving under contracts/private price authorities (except as otherwise provided):
 - For a list of Exempt Commodities, please refer to 49 CFR 1039, which is available online at: http://www.access.gpo.gov/nara/cfr/waisidx_00/49cfr1039_00.html
 - Including shipments in boxcars.
- Or, Shipments moving under contracts/private price authorities with an effective date of 1/1/2011 or after unless otherwise stated.
- Or, Shipments moving under price authorities referring specifically to this item (3376 Section A).
- Except Agricultural Commodities. For a list of agricultural commodities, please refer to BNSF web page at [Agricultural Commodities](#).

A fuel surcharge applies as shown in the Fuel Surcharge Table in this section.

When the U. S. Average Price of Retail On-Highway Diesel Fuel (HDF) monthly average equals or exceeds \$2.50 per gallon;

- A positive fuel surcharge will apply on the applicable linehaul freight charges.
- The fuel surcharge will be included as a separate line item on the invoice for freight charges for each shipment.

When the U. S. Average Price of Retail On-Highway Diesel Fuel (HDF) monthly average is less than \$2.50 per gallon and equals or exceeds \$1.25 per gallon;

- When BNSF is the collecting carrier of linehaul freight charges, a negative fuel surcharge will apply only on BNSF's portion of the linehaul freight charges unless otherwise stated.
- A negative fuel surcharge will not be assessed to other carriers' portions of the linehaul freight charges, and their portions will not be included in the calculation.
- The negative fuel surcharge will be included as a deduction in a separate line item on the invoice for freight charges for each shipment.
- When BNSF is not the collecting carrier of linehaul freight charges, no negative fuel surcharge will apply.

(Item continued on next page)

BNSF Rules Book 6100 – A

**Item 3376-D – Charge- Carload Percentage Based and Mileage Based Fuel Surcharge (\$2.50 Strike Price)
(Item Continued)****Section A: Percentage Based Fuel Surcharge**

Carload Percentage Based Fuel Surcharge Table			
Time Pe riods Average Price of HDF Between	Applicable Fuel Surcharge	Time Periods Average Price of HDF Between	Applicable Fuel Surcharge
Each \$0.05 HDF per gallon decrease thereafter to \$1.25	Decrease 0.5%	\$2.90 to \$2.949	4.5%
\$1.70 to \$1.749	-7.5%	\$2.95 to \$2.999	5.0%
\$1.75 to \$1.799	-7.0%	\$3.00 to \$3.049	5.5%
\$1.80 to \$1.849	-6.5%	\$3.05 to \$3.099	6.0%
\$1.85 to \$1.899	-6.0%	\$3.10 to \$3.149	6.5%
\$1.90 to \$1.949	-5.5%	\$3.15 to \$3.199	7.0%
\$1.95 to \$1.999	-5.0%	\$3.20 to \$3.249	7.5%
\$2.00 to \$2.049	-4.5%	\$3.25 to \$3.299	8.0%
\$2.05 to \$2.099	-4.0%	\$3.30 to \$3.349	8.5%
\$2.10 to \$2.149	-3.5%	\$3.35 to \$3.399	9.0%
\$2.15 to \$2.199	-3.0%	\$3.40 to \$3.449	9.5%
\$2.20 to \$2.249	-2.5%	\$3.45 to \$3.499	10.0%
\$2.25 to \$2.299	-2.0%	\$3.50 to \$3.549	10.5%
\$2.30 to \$2.349	-1.5%	\$3.55 to \$3.599	11.0%
\$2.35 to \$2.399	-1.0%	\$3.60 to \$3.649	11.5%
\$2.40 to \$2.449	-0.5%	\$3.65 to \$3.699	12.0%
\$2.45 to \$2.499	0.0%	\$3.70 to \$3.749	12.5%
\$2.50 to \$2.549	0.5%	\$3.75 to \$3.799	13.0%
\$2.55 to \$2.599	1.0%	\$3.80 to \$3.849	13.5%
\$2.60 to \$2.649	1.5%	\$3.85 to \$3.899	14.0%
\$2.65 to \$2.699	2.0%	\$3.90 to \$3.949	14.5%
\$2.70 to \$2.749	2.5%	\$3.95 to \$3.999	15.0%
\$2.75 to \$2.799	3.0%	\$4.00 to \$4.049	15.5%
\$2.80 to \$2.849	3.5%	\$4.05 to \$4.099	16.0%
\$2.85 to \$2.899	4.0%	Each \$0.05 HDF per gallon increase	Additional .5%

(Item continued on next page)

BNSF Rules Book 6100 – A**Item 3376-D – Charge - Carload Percentage Based and Mileage Based Fuel Surcharge (\$2.50 Strike Price)
(Item Continued)****Section B: Mileage Based Fuel Surcharge:**

Application - Applies on the following carload shipments:

- Regulated shipments (except as otherwise provided):
 - When an Item covering BNSF Fuel Surcharge refers to Regulated Commodities, it refers to all commodities except those that are EXEMPT; for a list of EXEMPT commodities, please refer to 49 CFR 1039, which is available online at: http://www.access.gpo.gov/nara/cfr/waisidx_00/49cfr1039_00.html
 - Excluding shipments in boxcars.
- Or Agricultural Commodities (including regulated and exempt shipments). For a list of agricultural commodities, please refer to BNSF web page at [Agricultural Commodities](#). See Geographical Definitions and Exceptions below.
- Or Shipments moving under pricing authorities referring specifically to this item (3376 Section B).

A fuel surcharge applies as shown in the Fuel Surcharge Table in this section.

When the U. S. Average Price of Retail On-Highway Diesel Fuel (HDF) monthly average equals or exceeds \$2.50 per gallon;

- A positive fuel surcharge will apply on the applicable linehaul freight charges.
- The fuel surcharge will be included as a separate line item on the invoice for freight charges for each shipment.

When the U. S. Average Price of Retail On-Highway Diesel Fuel (HDF) monthly average is less than \$2.50 per gallon and equals or exceeds \$1.25 per gallon;

- When BNSF is the collecting carrier of linehaul freight charges, a negative fuel surcharge will apply only on BNSF's portion of the linehaul freight charges unless otherwise stated.
- A negative fuel surcharge will not be assessed to other carriers' portions of the linehaul freight charges, and their portions will not be included in the calculation.
- The negative fuel surcharge will be included as a deduction in a separate line item on the invoice for freight charges for each shipment.
- When BNSF is not the collecting carrier of linehaul freight charges, no negative fuel surcharge will apply.

Geographical Definitions and Exceptions –

- For Agricultural Commodities only:
 - **Pacific North West (PNW)** export destinations will be grouped using Seattle, WA as destination upon which the mileage based fuel surcharge will be calculated for all whole grain (STCC 011) shipments from all BNSF origin states except California, Oregon, or Washington.
 - Export destinations will be as follows: **PNW Group:** Rivergate, OR, Portland, OR, Kalama, WA, Longview, WA, Seattle, WA, Tacoma, WA and Vancouver, WA. As an example, the fuel surcharge from Alton, ND to Vancouver, WA will be calculated using the miles from Alton, ND to Seattle, WA (1,496 miles).
 - **Texas Gulf** export facilities will be grouped using Houston, TX as the destination upon which the mileage based fuel surcharge will be calculated for all whole grain (STCC 011 and STCC 2041979) shipments.
 - Export destinations will be as follows: **Texas Gulf Group:** Beaumont, Corpus Christi, Galena Park, Galveston, Houston and Port of Brownsville, TX. Shipments must be unloaded at these destinations. As an example, the fuel surcharge from Wichita, KS to Galveston, TX will be calculated using the miles from Wichita, KS to Houston, TX (632 miles).

(Item continued on next page)

BNSF Rules Book 6100 – A

**Item 3376-D - Charge – Carload Percentage Based and Mileage Based Fuel Surcharge (\$2.50 Strike Price)
(Item Concluded)****Section B: Mileage Based Fuel Surcharge**

Carload Mileage Based Fuel Surcharge Table			
Price of HDF Between	Fuel Surcharge Cents per Mile	Price of HDF Between	Fuel Surcharge Cents per Mile
Each \$0.04 HDF per gallon decrease thereafter to \$1.25	Decrease 0.01 per mile	\$2.98 to \$3.019	0.13
\$1.90 to \$1.939	-0.14	\$3.02 to \$3.059	0.14
\$1.94 to \$1.979	-0.13	\$3.06 to \$3.099	0.15
\$1.98 to \$2.019	-0.12	\$3.10 to \$3.139	0.16
\$2.02 to \$2.059	-0.11	\$3.14 to \$3.179	0.17
\$2.06 to \$2.099	-0.10	\$3.18 to \$3.219	0.18
\$2.10 to \$2.139	-0.09	\$3.22 to \$3.259	0.19
\$2.14 to \$2.179	-0.08	\$3.26 to \$3.299	0.20
\$2.18 to \$2.219	-0.07	\$3.30 to \$3.339	0.21
\$2.22 to \$2.259	-0.06	\$3.34 to \$3.379	0.22
\$2.26 to \$2.299	-0.05	\$3.38 to \$3.419	0.23
\$2.30 to \$2.339	-0.04	\$3.42 to \$3.459	0.24
\$2.34 to \$2.379	-0.03	\$3.46 to \$3.499	0.25
\$2.38 to \$2.419	-0.02	\$3.50 to \$3.539	0.26
\$2.42 to \$2.459	-0.01	\$3.54 to \$3.579	0.27
\$2.46 to \$2.499	0.00	\$3.58 to \$3.619	0.28
\$2.50 to \$2.539	0.01	\$3.62 to \$3.659	0.29
\$2.54 to \$2.579	0.02	\$3.66 to \$3.699	0.30
\$2.58 to \$2.619	0.03	\$3.70 to \$3.739	0.31
\$2.62 to \$2.659	0.04	\$3.74 to \$3.779	0.32
\$2.66 to \$2.699	0.05	\$3.78 to \$3.819	0.33
\$2.70 to \$2.739	0.06	\$3.82 to \$3.859	0.34
\$2.74 to \$2.779	0.07	\$3.86 to \$3.899	0.35
\$2.78 to \$2.819	0.08	\$3.90 to \$3.939	0.36
\$2.82 to \$2.859	0.09	\$3.94 to \$3.979	0.37
\$2.86 to \$2.899	0.10	\$3.98 to \$4.019	0.38
\$2.90 to \$2.939	0.11	\$4.02 to \$4.059	0.39
\$2.94 to \$2.979	0.12	Each \$0.04 HDF per gallon increase	Additional \$0.01 per mile

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WRITER'S E-MAIL:

March 4, 2011

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: STB No. 42120, *Cargill, Incorporated v. BNSF Railway Company*

Dear Ms. Brown:

On April 19, 2010, Cargill, Incorporated (“Cargill”) filed a Complaint at the STB alleging that the mileage-based fuel surcharges it was paying BNSF Railway Company (“BNSF”) on Cargill’s common carrier traffic constituted an unreasonable practice. At the time the Complaint was filed, the assailed mileage-based fuel surcharge was set forth in BNSF Rules Book 6100-A, Item 3375L, Section B (“Assailed Tariff Item”). Cargill’s complaint also expressly “cover[ed] any changes to, or modifications of, the Assailed Tariff Item that BNSF may establish during the course of this proceeding” including “successor iterations.” Complaint ¶¶ 5, 9.

On February 14, 2011, Cargill filed a letter (“Cargill Letter”) supplementing its Complaint to include the rebased mileage fuel surcharge BNSF publicly announced it would be applying to the traffic encompassed by Cargill’s Complaint, starting in March of 2011. Cargill took this action after BNSF counsel informed Cargill counsel that BNSF did not believe that Cargill’s Complaint covered the rebased fuel surcharge tariff item. Cargill disagreed with BNSF’s interpretation, but supplemented its Complaint to address BNSF’s asserted concerns. On February 22, 2010, BNSF filed a letter (“BNSF Letter”) requesting that the Board treat Cargill’s letter as a legal nullity. *Id.* at 1. Cargill respectfully requests that the Board overrule BNSF’s objections, and in support hereof states as follows:

(1) BNSF claims that Cargill's Letter "contains no substantive allegations, no description of a cause of action, no indication as to whether or when any cause of action accrued, and no indication as to the type of relief Cargill seeks or the grounds for any relief." *Id.* at 1. In fact, Cargill's Letter clearly supplemented its Complaint by expressly stating that a "successor" iteration of the Assailed Tariff Item included BNSF's rebased fuel surcharge tariff (currently designated as BNSF Rules Book Item 3376D, Section B) or any other fuel surcharge tariff applied to its traffic during the pendency of its case. Cargill Letter at 2. Thus, Cargill clearly put BNSF on notice that the allegations in its Complaint, and the relief requested, applied to BNSF's rebased fuel surcharge. However, to put this hyper-technical objection to rest, Cargill is filing under separate cover a Supplement to its Complaint ("Supplement") that states in pleading terms what Cargill previously stated in its Letter.

(2) BNSF asserts that the fuel surcharge set forth in Item 3376 Section B is "a new surcharge program." BNSF Letter at 1. In fact, the fuel surcharge set forth in Item 3376 Section B is simply a rebased version of the fuel surcharge formula set forth in Item 3375 Section B. Both fuel surcharge formulas utilize a "1 to 4" step function – the fuel surcharge increases by \$0.01 per car-mile for each \$0.04 per gallon increase in the On-Highway Diesel Fuel prices above a stated strike price.¹

(3) BNSF asserts that its rebased fuel surcharge "did not exist when Cargill filed its Complaint." Letter at 1. That is true, but that is why most shippers that file complaints at the STB, including Cargill, expressly provide that their complaints apply to shipments moving *pendente lite* and to changed tariff designations made *pendente lite*. See, e.g., *Siemens-Allis, Inc. v. Aberdeen and Rockfish R.R.*, 1984 I.C.C. Lexis 505, at *14, ICC Docket No. 37810S (ICC served May 8, 1984) ("the Commission has traditionally accepted complaints which include relief for shipments moving *pendente lite*"); *AEP Tex. North Co. v. Burlington N. and Santa Fe Ry.*, STB Docket No. 41191 (Sub-No.1) (STB served March 19, 2004) (accepting a supplement to a verified complaint that addressed changed tariff designations, and changed tariff terms, published by the defendant carrier after the initial complaint was filed) ("*AEP-Texas*"); *Arizona Elec. Power Coop., Inc. v. BNSF Ry.*, STB Docket No. 42113 (Feb. 20, 2009 letter filing) (complainant shipper files a letter amending an amended complaint to cover new tariff terms published by the defendant carrier after the amended complaint was filed) ("*AEPCO Supplement*").

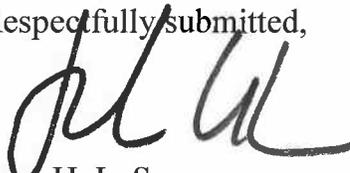
¹ BNSF acknowledges that this is not a "new" program in its December 17, 2010 notice to customers, where it states that "*our fuel surcharge program will be reset from \$1.25 per gallon to \$2.50 per gallon.*" See Cargill Letter, Attachment 1 (emphasis added).

(4) BNSF states that “Cargill cannot effectively amend or supplement its complaint simply by notice of its intent to do so.” BNSF Letter at 1. In fact, complainants in STB proceedings routinely amend or supplement their complaints “by notice.” See, e.g., *AEP-Texas, supra*; *AEPCO Supplement, supra*; *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121 (July 26, 2010, Oct. 4, 2010, Jan. 4, 2011, and Feb. 3, 2011 filings) (complainant shipper amends complaint four times by notice); *M&G Polymers USA, LLC v. CXT Transp., Inc.* (Aug. 16, 2010, Oct. 18, 2010 and Feb. 1, 2011 filings) (complainant shipper amends complaint three times by notice).

(5) If the Board concludes that a request or motion is necessary for Cargill’s Supplement to be accepted by the Board, Cargill hereby requests that the Board accept the attached Supplement. The Supplement does not expand the issues in this case, does not create a new cause of action, and does not harm BNSF in any way. It simply puts to rest BNSF’s misguided construction of Cargill’s Complaint as not applying to Cargill common carrier shipments that are or will be subject to new or revised fuel surcharge items published by BNSF during the pendency of Cargill’s case.

(6) The Board’s Rules of Practice are to be “construed liberally to secure just, speedy and inexpensive determination of the issues presented.” 49 C.F.R. § 1100.3. The Board’s acceptance of Cargill’s Supplement fulfills these objectives, as well as the related objective to avoid piecemeal litigation. *Siemens-Allis, supra*, 1984 I.C.C. Lexis 505, at *14 (“administrative efficiency dictates that a complainant should be permitted to add to or amend its complaint to include . . . subsequent related movements . . . [to] avoid the piecemeal filing of complaints that could otherwise occur”). Cargill should not have to file multiple complaints to address the same alleged unlawful practices, nor should BNSF be able to dictate the parameters of a shipper’s complaint simply through the numbering system it assigns to its tariff items after a shipper’s case is filed.

Respectfully submitted,



John H. LeSeur
An Attorney for Cargill, Incorporated

cc: Counsel for BNSF Railway Company

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

CARGILL, INCORPORATED)
15407 McGinty Road West)
Wayzata, Minnesota 55391-2398)

Complainant,)

v.)

Docket No. 42120)

BNSF RAILWAY COMPANY)
2650 Lou Menk Drive)
Fort Worth, Texas 76131-2830)

Defendant.)

SUPPLEMENT TO COMPLAINT

COMES NOW Cargill, Incorporated (“Cargill”) to file this Supplement to the Complaint Cargill filed on April 19, 2010 under 49 U.S.C. § 11701(b) seeking the prescription of reasonable fuel surcharge practices and monetary damages. In support hereof, Cargill states as follows:

1. In paragraph 5 of the Complaint, Cargill alleged that BNSF was invoicing, and Cargill was paying, a fuel surcharge on Cargill’s common carrier transportation services under a tariff denominated as BNSF Rules Book 6100-A, Item 3375L, Section B. Cargill defined this tariff item “and its predecessor and successor iterations” as the “Assailed Tariff Item.”

2. Cargill alleged in its Complaint that BNSF's collection of fuel surcharges under the Assailed Tariff Item for Cargill's common carrier traffic constituted an unreasonable practice under 49 U.S.C. § 10702(2) for the reasons set forth in paragraphs 6, 7, and 8 of the Complaint.

3. In paragraph 9 of its Complaint, Cargill stated that "[t]his Complaint covers any changes to, or modifications of, the Assailed Tariff Item that BNSF may establish during the course of this proceeding."

4. In its prayer for relief, Cargill requested, *inter alia*, that the Board investigate its Complaint; find that the assailed fuel surcharge practices are unreasonable; prescribe reasonable fuel surcharge practices; and award Cargill damages. Complaint at 4-5 (WHEREFORE ¶).

5. On December 17, 2010, Defendant BNSF Railway Company ("BNSF") published a notice on its website (copy in Attachment 1) stating that "BNSF's strike price for our fuel surcharge program will be reset from \$1.25 per gallon to \$2.50 per gallon beginning January 2011" and that "[t]ariff changes for Agricultural Products customers are targeted for early March 2011."

6. Cargill is an Agricultural Products customer of BNSF and pays fuel surcharges on common carrier transportation of Agricultural Products. *See* Complaint ¶ 4.

7. BNSF has published a tariff item, currently set forth in BNSF Rules Book 6100-A, Item 3376D, Section B (copy in Attachment 2), that contains a mileage-based fuel surcharge with a strike price of \$2.50 per gallon.

8. Counsel for BNSF has informed counsel for Cargill that BNSF does not believe the Complaint covers Item 3376D, Section B.

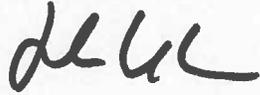
9. While Cargill believes that Item 3376, Section B (or any other rebased fuel surcharge that might be applied to its common carrier traffic) is a “successor” to Item 3375L, Section B, Cargill hereby expressly supplements its Complaint to include, as an “Assailed Tariff Item” under Paragraph 5 of the Complaint, Item 3376D Section B (including successor iterations), or any other rebased version of Item 3375L, Section B (regardless of its numerical designation) that is applied to Cargill’s common carrier shipments during the pendency of this case.

10. As supplemented, Cargill’s allegations of unreasonable practices set forth in paragraphs 6, 7, and 8 of its Complaint, as well as its prayer for relief, apply to the Assailed Tariff Item as supplemented in paragraph 9 above.

11. The Board dismissed paragraph 8 of Cargill’s Complaint in its decision served on January 4, 2010. Cargill’s petition seeking reconsideration of that decision is pending before the Board.

Respectfully submitted,

CARGILL, INCORPORATED

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OF COUNSEL:

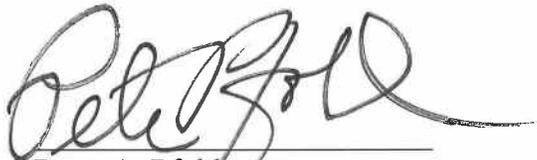
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington D.C. 20036

Dated: March 4, 2011

CERTIFICATE OF SERVICE

Pursuant to 49 C.F.R. § 1111.3, I hereby certify that I have this 4th day of March, 2011 caused to be served copies of the foregoing Supplement to Complaint on the following by hand delivery:

Samuel M. Sipe, Jr.
Anthony J. LaRocca
Linda S. Stein
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington DC 20036



Peter A. Pfohl
An Attorney for Complainant



Ag Marketing Pricing News

12/17/2010

Ag Fuel Surcharge Implementation - Clarification

BNSF's strike price for our fuel surcharge program will be reset from \$1.25 per gallon to \$2.50 per gallon beginning January 2011. **Tariff changes for Agricultural Products customers are targeted for early March 2011. Please refer to the \$1.25 per gallon fuel surcharge rates until the tariff revision is published. Contracts will be addressed as they renew.**

Tables reflecting the new strike price and other program details are available on the BNSF website at <http://www.bnsf.com/customers/fuel-surcharge/>.

If you have any questions, please call your representative.

Your business is important to us. Thank you for choosing BNSF as your transportation service provider.

If you have any questions, please send an e-mail to Customer.Notifications@bnsf.com



**BNSF RAILWAY COMPANY
BNSF RULES BOOK 6100-A
(Cancels BNSF Rules Book 6100)**

**CONTAINING
RULES, REGULATIONS AND SPECIAL CHARGES
GOVERNING
THE TRANSPORTATION OF FREIGHT
ON
BNSF RAILWAY COMPANY
IN
THE UNITED STATES, MEXICO AND CANADA
AND
REGULATIONS GOVERNING CURRENCY EXCHANGE ON TRAFFIC
FROM, TO AND BETWEEN STATIONS IN CANADA
AND
CAR HIRE ON TRAFFIC TO OR FROM MEXICO**

For explanation of abbreviations / reference marks, see Item 110

ALSO APPLICABLE ON INTRASTATE TRAFFIC

ISSUED DECEMBER 29, 2000

EFFECTIVE JANUARY 1, 2001

Issued by J. C. Engstrom, P. O. Box 961069, Ft. Worth, TX 76161-0069

BNSF Rules Book 6100 – A**Item 3376-D - Charge – Carload Percentage Based and Mileage Based Fuel Surcharge (\$2.50 Strike Price)
Issued December 1, 2010 – Effective January 1, 2011 (Increase)**

General – Refer to Item 3374 for General Rules and Methodology for calculating the fuel surcharge.

- **Section A** of this item contains the Percentage Based Fuel Surcharge
- **Section B** of this item contains the Mileage Based Fuel Surcharge

Section A: Percentage Based Fuel Surcharge :

Application - Applies on the following carload shipments:

- EXEMPT shipments, not moving under contracts/private price authorities (except as otherwise provided):
 - For a list of Exempt Commodities, please refer to 49 CFR 1039, which is available online at: http://www.access.gpo.gov/nara/cfr/waisidx_00/49cfr1039_00.html
 - Including shipments in boxcars.
- Or, Shipments moving under contracts/private price authorities with an effective date of 1/1/2011 or after unless otherwise stated.
- Or, Shipments moving under price authorities referring specifically to this item (3376 Section A).
- Except Agricultural Commodities. For a list of agricultural commodities, please refer to BNSF web page at [Agricultural Commodities](#).

A fuel surcharge applies as shown in the Fuel Surcharge Table in this section.

When the U. S. Average Price of Retail On-Highway Diesel Fuel (HDF) monthly average equals or exceeds \$2.50 per gallon;

- A positive fuel surcharge will apply on the applicable linehaul freight charges.
- The fuel surcharge will be included as a separate line item on the invoice for freight charges for each shipment.

When the U. S. Average Price of Retail On-Highway Diesel Fuel (HDF) monthly average is less than \$2.50 per gallon and equals or exceeds \$1.25 per gallon;

- When BNSF is the collecting carrier of linehaul freight charges, a negative fuel surcharge will apply only on BNSF's portion of the linehaul freight charges unless otherwise stated.
- A negative fuel surcharge will not be assessed to other carriers' portions of the linehaul freight charges, and their portions will not be included in the calculation.
- The negative fuel surcharge will be included as a deduction in a separate line item on the invoice for freight charges for each shipment.
- When BNSF is not the collecting carrier of linehaul freight charges, no negative fuel surcharge will apply.

(Item continued on next page)

BNSF Rules Book 6100 – A

**Item 3376-D – Charge- Carload Percentage Based and Mileage Based Fuel Surcharge (\$2.50 Strike Price)
(Item Continued)****Section A: Percentage Based Fuel Surcharge**

Carload Percentage Based Fuel Surcharge Table			
Time Pe riods Average Price of HDF Between	Applicable Fuel Surcharge	Time Periods Average Price of HDF Between	Applicable Fuel Surcharge
Each \$0.05 HDF per gallon decrease thereafter to \$1.25	Decrease 0.5%	\$2.90 to \$2.949	4.5%
\$1.70 to \$1.749	-7.5%	\$2.95 to \$2.999	5.0%
\$1.75 to \$1.799	-7.0%	\$3.00 to \$3.049	5.5%
\$1.80 to \$1.849	-6.5%	\$3.05 to \$3.099	6.0%
\$1.85 to \$1.899	-6.0%	\$3.10 to \$3.149	6.5%
\$1.90 to \$1.949	-5.5%	\$3.15 to \$3.199	7.0%
\$1.95 to \$1.999	-5.0%	\$3.20 to \$3.249	7.5%
\$2.00 to \$2.049	-4.5%	\$3.25 to \$3.299	8.0%
\$2.05 to \$2.099	-4.0%	\$3.30 to \$3.349	8.5%
\$2.10 to \$2.149	-3.5%	\$3.35 to \$3.399	9.0%
\$2.15 to \$2.199	-3.0%	\$3.40 to \$3.449	9.5%
\$2.20 to \$2.249	-2.5%	\$3.45 to \$3.499	10.0%
\$2.25 to \$2.299	-2.0%	\$3.50 to \$3.549	10.5%
\$2.30 to \$2.349	-1.5%	\$3.55 to \$3.599	11.0%
\$2.35 to \$2.399	-1.0%	\$3.60 to \$3.649	11.5%
\$2.40 to \$2.449	-0.5%	\$3.65 to \$3.699	12.0%
\$2.45 to \$2.499	0.0%	\$3.70 to \$3.749	12.5%
\$2.50 to \$2.549	0.5%	\$3.75 to \$3.799	13.0%
\$2.55 to \$2.599	1.0%	\$3.80 to \$3.849	13.5%
\$2.60 to \$2.649	1.5%	\$3.85 to \$3.899	14.0%
\$2.65 to \$2.699	2.0%	\$3.90 to \$3.949	14.5%
\$2.70 to \$2.749	2.5%	\$3.95 to \$3.999	15.0%
\$2.75 to \$2.799	3.0%	\$4.00 to \$4.049	15.5%
\$2.80 to \$2.849	3.5%	\$4.05 to \$4.099	16.0%
\$2.85 to \$2.899	4.0%	Each \$0.05 HDF per gallon increase	Additional .5%

(Item continued on next page)

BNSF Rules Book 6100 – A**Item 3376-D – Charge - Carload Percentage Based and Mileage Based Fuel Surcharge (\$2.50 Strike Price)
(Item Continued)****Section B: Mileage Based Fuel Surcharge:**

Application - Applies on the following carload shipments:

- Regulated shipments (except as otherwise provided):
 - When an Item covering BNSF Fuel Surcharge refers to Regulated Commodities, it refers to all commodities except those that are EXEMPT; for a list of EXEMPT commodities, please refer to 49 CFR 1039, which is available online at:
http://www.access.gpo.gov/nara/cfr/waisidx_00/49cfr1039_00.html
 - Excluding shipments in boxcars.
- Or Agricultural Commodities (including regulated and exempt shipments). For a list of agricultural commodities, please refer to BNSF web page at [Agricultural Commodities](#). See Geographical Definitions and Exceptions below.
- Or Shipments moving under pricing authorities referring specifically to this item (3376 Section B).

A fuel surcharge applies as shown in the Fuel Surcharge Table in this section.

When the U. S. Average Price of Retail On-Highway Diesel Fuel (HDF) monthly average equals or exceeds \$2.50 per gallon;

- A positive fuel surcharge will apply on the applicable linehaul freight charges.
- The fuel surcharge will be included as a separate line item on the invoice for freight charges for each shipment.

When the U. S. Average Price of Retail On-Highway Diesel Fuel (HDF) monthly average is less than \$2.50 per gallon and equals or exceeds \$1.25 per gallon;

- When BNSF is the collecting carrier of linehaul freight charges, a negative fuel surcharge will apply only on BNSF's portion of the linehaul freight charges unless otherwise stated.
- A negative fuel surcharge will not be assessed to other carriers' portions of the linehaul freight charges, and their portions will not be included in the calculation.
- The negative fuel surcharge will be included as a deduction in a separate line item on the invoice for freight charges for each shipment.
- When BNSF is not the collecting carrier of linehaul freight charges, no negative fuel surcharge will apply.

Geographical Definitions and Exceptions –

- For Agricultural Commodities only:
 - **Pacific North West (PNW)** export destinations will be grouped using Seattle, WA as destination upon which the mileage based fuel surcharge will be calculated for all whole grain (STCC 011) shipments from all BNSF origin states except California, Oregon, or Washington.
 - Export destinations will be as follows: **PNW Group:** Rivergate, OR, Portland, OR, Kalama, WA, Longview, WA, Seattle, WA, Tacoma, WA and Vancouver, WA. As an example, the fuel surcharge from Alton, ND to Vancouver, WA will be calculated using the miles from Alton, ND to Seattle, WA (1,496 miles).
 - **Texas Gulf** export facilities will be grouped using Houston, TX as the destination upon which the mileage based fuel surcharge will be calculated for all whole grain (STCC 011 and STCC 2041979) shipments.
 - Export destinations will be as follows: **Texas Gulf Group:** Beaumont, Corpus Christi, Galena Park, Galveston, Houston and Port of Brownsville, TX. Shipments must be unloaded at these destinations. As an example, the fuel surcharge from Wichita, KS to Galveston, TX will be calculated using the miles from Wichita, KS to Houston, TX (632 miles).

(Item continued on next page)

BNSF Rules Book 6100 – A

**Item 3376-D - Charge – Carload Percentage Based and Mileage Based Fuel Surcharge (\$2.50 Strike Price)
(Item Concluded)****Section B: Mileage Based Fuel Surcharge**

Carload Mileage Based Fuel Surcharge Table			
Price of HDF Between	Fuel Surcharge Cents per Mile	Price of HDF Between	Fuel Surcharge Cents per Mile
Each \$0.04 HDF per gallon decrease thereafter to \$1.25	Decrease 0.01 per mile	\$2.98 to \$3.019	0.13
\$1.90 to \$1.939	-0.14	\$3.02 to \$3.059	0.14
\$1.94 to \$1.979	-0.13	\$3.06 to \$3.099	0.15
\$1.98 to \$2.019	-0.12	\$3.10 to \$3.139	0.16
\$2.02 to \$2.059	-0.11	\$3.14 to \$3.179	0.17
\$2.06 to \$2.099	-0.10	\$3.18 to \$3.219	0.18
\$2.10 to \$2.139	-0.09	\$3.22 to \$3.259	0.19
\$2.14 to \$2.179	-0.08	\$3.26 to \$3.299	0.20
\$2.18 to \$2.219	-0.07	\$3.30 to \$3.339	0.21
\$2.22 to \$2.259	-0.06	\$3.34 to \$3.379	0.22
\$2.26 to \$2.299	-0.05	\$3.38 to \$3.419	0.23
\$2.30 to \$2.339	-0.04	\$3.42 to \$3.459	0.24
\$2.34 to \$2.379	-0.03	\$3.46 to \$3.499	0.25
\$2.38 to \$2.419	-0.02	\$3.50 to \$3.539	0.26
\$2.42 to \$2.459	-0.01	\$3.54 to \$3.579	0.27
\$2.46 to \$2.499	0.00	\$3.58 to \$3.619	0.28
\$2.50 to \$2.539	0.01	\$3.62 to \$3.659	0.29
\$2.54 to \$2.579	0.02	\$3.66 to \$3.699	0.30
\$2.58 to \$2.619	0.03	\$3.70 to \$3.739	0.31
\$2.62 to \$2.659	0.04	\$3.74 to \$3.779	0.32
\$2.66 to \$2.699	0.05	\$3.78 to \$3.819	0.33
\$2.70 to \$2.739	0.06	\$3.82 to \$3.859	0.34
\$2.74 to \$2.779	0.07	\$3.86 to \$3.899	0.35
\$2.78 to \$2.819	0.08	\$3.90 to \$3.939	0.36
\$2.82 to \$2.859	0.09	\$3.94 to \$3.979	0.37
\$2.86 to \$2.899	0.10	\$3.98 to \$4.019	0.38
\$2.90 to \$2.939	0.11	\$4.02 to \$4.059	0.39
\$2.94 to \$2.979	0.12	Each \$0.04 HDF per gallon increase	Additional \$0.01 per mile

APPENDIX 6



**BNSF RAILWAY COMPANY
BNSF RULES BOOK 6100-A
(Cancels BNSF Rules Book 6100)**

**CONTAINING
RULES, REGULATIONS AND SPECIAL CHARGES
GOVERNING
THE TRANSPORTATION OF FREIGHT
ON
BNSF RAILWAY COMPANY
IN
THE UNITED STATES, MEXICO AND CANADA
AND
REGULATIONS GOVERNING CURRENCY EXCHANGE ON TRAFFIC
FROM, TO AND BETWEEN STATIONS IN CANADA
AND
CAR HIRE ON TRAFFIC TO OR FROM MEXICO**

For explanation of abbreviations / reference marks, see Item 110

ALSO APPLICABLE ON INTRASTATE TRAFFIC

ISSUED DECEMBER 29, 2000

EFFECTIVE JANUARY 1, 2001

Issued by J. C. Engstrom, P. O. Box 961069, Ft. Worth, TX 76161-0069

Item 3375C - Charge – Fuel Surcharge, (Issued May 7, 2003 – Effective June 1, 2003) (Increase)

Shipments made under pricing documents referring hereto may be subject to a fuel surcharge, if applicable. When the U. S. Average Price of Retail On-Highway Diesel Fuel (HDF) for the month (Time Period) equals or exceeds \$1.25 per gallon a surcharge may be applied to the total freight charges for each shipment waybill dated on or after the 1st of the second following month. Such fuel surcharge shall be included on the bill for freight charges for each shipment. Miscellaneous and accessorial charges shall not be subject to the fuel surcharge.

Fuel Surcharge Rates (FSR) will be adjusted monthly. The Fuel Surcharge Table will be subject to periodic review.

FSR = See Table Below.

Where FSR = Fuel Surcharge Rate.

HDF = prior Time Periods U. S. Average monthly price of Retail On-Highway Diesel Fuel.

Time Period = second prior month.

The source for the price of HDF will be the U. S. Department of Energy’s, EIA Retail On-Highway Diesel Prices Report, whose weekly average price is available on their WebPages at: “<http://www/eia.doe.gov>”. Select “Gasoline and Diesel Fuel Update”. Then select “On Highway Diesel Prices” and the HDF prices are displayed.

Fuel Surcharge Table

<u>Time Periods Average Price of HDF Between</u>	<u>Applicable Fuel Surcharge</u>
\$1.25 to \$1.299	0.5%
\$1.30 to \$1.349	1.0%
\$1.35 to \$1.399	1.5%
\$1.40 to \$1.449	2.0%
\$1.45 to \$1.499	2.5%
\$1.50 to \$1.549	3.0%
\$1.55 to \$1.599	3.5%
\$1.60 to \$1.649	4.0%
\$1.65 to \$1.699	4.5%
\$1.70 to \$1.749	5.0%
\$1.75 to \$1.799	5.5%
\$1.80 to \$1.849	6.0%
\$1.85 to \$1.899	6.5%
\$1.90 to \$1.949	7.0%

Each \$0.05 per gallon increase thereafter, apply an additional 0.5%

Example:

For a Fuel Surcharge applied for shipments in the month of July, assuming the prior Time Period’s (May) average monthly price of HDF was \$1.556 Per Gallon. Therefore, July’s FSR would be 3.5%.

Thus, for each \$10.00 of freight charges applicable to a shipment referring hereto the Fuel Surcharge would be \$0.35.

APPENDIX 7

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: : Miscellaneous No. 07-489
: :
RAIL FREIGHT SURCHARGE : October 6, 2010
ANTITRUST LITIGATION : :
MDL NO. 1869 : 9:30 a.m.
. :

TRANSCRIPT OF CLASS CERTIFICATION HEARING
DAY 1
BEFORE THE HONORABLE PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE

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1 document, but this is something else. It's an internal
2 document. But it says: "It seems like if all merchandise
3 revenue per car increases are coming from fuel surcharges, I'm
4 not sure that Don Seale would be in agreement with having this
5 widely known." All four defendants recognized that these
6 so-called cost recovery surcharges were responsible, either
7 solely or primarily, for their increased profits.

8 So defendants can come, and they are going to attack
9 Professor Rausser for purported methodological flaws, for
10 purported this or that, but the fact is, their own documents
11 attribute the surge in profits that they experienced during this
12 period either solely or primarily to the fuel surcharge program
13 that they had agreed to.

14 And you can see that at the top of the page, this chart
15 looks a lot like the STB data we saw at the beginning of the day
16 today, that the downward trend in prices - this is all-in rail
17 freight prices - was halted when this conspiracy went into
18 effect, and profits started to rise, profits that they attribute
19 directly to this program.

20 Now, there are two additional points I would like to
21 just focus on before we get to Dr. Rausser's report. One is the
22 extent to which these defendants worked together to avoid
23 deviation from this conspiracy. One compelling example of this
24 is behind Tab 26. What we see there -- and I'm going to start
25 at the bottom of the page. What we see there is that in 2004,

1 there was an internal discussion at BNSF about how customers
2 might react better to a mileage-based fuel surcharge rather than
3 a rate-based fuel surcharge; in other words, you apply some
4 amount per mile traveled rather than just tacking a percentage
5 on to any base rate that you had already negotiated.

6 And there were internal discussions at BNSF where it
7 was said: Well, we can't do this without checking with the
8 other railroads. And in November 2004, there was a memo
9 reflecting those conversations which said, quote: "John Lanigan
10 shopped the concept of a mileage-based fuel surcharge with his
11 counterparts from the other roads at the NEMC, and they pushed
12 back, as expected." And indeed, in 2004, as it also occurred in
13 2003, this was not done. BNSF did not pursue this.

14 We see in April 2003, the same period when all of the
15 discussions we looked at earlier this morning were taking place,
16 there was an internal Union Pacific e-mail -- now, remember,
17 Union Pacific and BNSF are both western railroads, so
18 Mr. Wiseman's map about the need for interline connections
19 between the East and West doesn't apply here. It says: "Jim
20 Arnett from BNSF called and asked if I heard anyone discussing
21 charging a fuel surcharge on miles. I told him that I had not,
22 but that I would check with people who might have." And then we
23 see in the next exhibit quoted here, or cited here, that BNSF
24 abandoned a mileage-based approach and aligned its fuel
25 surcharge with UP's approach on May 7th, 2003.