

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**AMERICAN FUEL & PETROCHEMICAL )  
MANUFACTURERS, )  
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)  
vs. )  
)  
**BNSF RAILWAY COMPANY. )  
\_\_\_\_\_ )****

**NOR 42146**

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**REPLY TO MOTION TO DISMISS COMPLAINT**

Complainant American Fuel & Petrochemical Manufacturers (“AFPM”) hereby replies to Defendant BNSF Railway Company’s (“BNSF”) Motion to Dismiss the First Amended Complaint (“Motion”). For the reasons set forth below, the Board should deny the Motion in its entirety, as BNSF cannot meet the high bar for dismissal and the allegations in the First Amended Complaint demonstrate reasonable grounds for relief.

**INTRODUCTION**

This case presents plausible violations of the common carrier violation under 49 U.S.C. § 11101, and the bar on unreasonable practices, 49 U.S.C. § 10702(2), namely, an attempt by a railroad to unilaterally undermine the authority of the Department of Transportation to prescribe appropriate hazardous materials packaging standards. The attempt to do so runs afoul of the Board’s precedent and policies, and the Board should therefore allow this case to proceed to discovery.

On August 1, 2014, the Pipeline Hazardous Materials Agency (“PHMSA”), in coordination with the Federal Railroad Administration (“FRA”), issued a proposed rule titled,

“Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains.”<sup>1</sup> As the agency with primary authority for implementing the Hazardous Materials Transportation Act, 49 U.S.C. § 5101, *et. seq.*, PHMSA sought to update regulations on flammable materials transportation to account for the growth in crude oil and ethanol rail shipments.<sup>2</sup> PHMSA described its primary goal as a “system-wide, comprehensive approach” for balancing risks and benefits from rail transport of flammable materials.<sup>3</sup> In that vein PHMSA requested comments on a wide variety of measures. These included: a definition for a “high-hazard flammable train” to which certain regulatory requirements would apply,<sup>4</sup> coordination with state emergency responders,<sup>5</sup> routing of flammable materials shipments,<sup>6</sup> the classification of crude oil and ethanol under the hazardous materials regulations for packaging purposes,<sup>7</sup> and several operational controls for high-hazard flammable trains.<sup>8</sup>

Critical to this case, the agency also sought comments on construction and safety standards for tank cars used in flammable liquid service.<sup>9</sup> PHMSA specifically asked for input on its proposal to “stipulate a new tank car performance specification—the DOT Specification 117 tank car—that would be phased in over time depending on the packing group of the flammable liquid.”<sup>10</sup> This standard would apply not just to newly produced tank cars. PHMSA also proposed to “require existing cars to meet the same . . . performance standard as these new

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<sup>1</sup> 79 Fed. Reg. 45,015 (proposed Aug. 1, 2014).

<sup>2</sup> 79 Fed. Reg. at 45,017.

<sup>3</sup> 79 Fed. Reg. at 45,023.

<sup>4</sup> 79 Fed. Reg. at 45,040.

<sup>5</sup> 79 Fed. Reg. at 45,040-42.

<sup>6</sup> 79 Fed. Reg. at 45,042.

<sup>7</sup> 79 Fed. Reg. at 45,042-45.

<sup>8</sup> 79 Fed. Reg. at 45,045-51.

<sup>9</sup> 79 Fed. Reg. at 45,051-62.

<sup>10</sup> 79 Fed. Reg. at 45,052.

cars[.]” excluding one design element.<sup>11</sup> That proposal would entail retrofitting or ending the use of older tank car specifications used to transport crude oil, including the tank car at the heart of this case: the unjacketed or general purpose DOT-111.<sup>12</sup> At the time of the proposed rule, PHMSA estimated that the DOT-111 specification accounted for most available tank cars.<sup>13</sup> Yet PHMSA recognized that replacing the DOT-111 and other tank cars required careful consideration of the significant costs of retrofits.<sup>14</sup> Thus, PHMSA sought to strike a balance between “sufficient time for car owners to update the existing fleet” and “prioritizing the highest danger material.”<sup>15</sup>

To that end, the agency conducted a detailed, comprehensive cost-benefit analysis, much of which it devoted to the difficulties of the retrofit and phase-out schedule.<sup>16</sup> PHMSA was aware during this process that rail carriers desired to eliminate use of the DOT-111 as quickly as possible; BNSF leadership explained to the agency that they regretted not pushing for stricter tank car standards in earlier regulations prior to the boom in crude oil output.<sup>17</sup> Rail carriers, including BNSF, also informed the agency that they sought to use punitive surcharges to drive the DOT-111 out of crude oil service.<sup>18</sup> And in late 2014 BNSF announced a new tariff (“the

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<sup>11</sup> 79 Fed. Reg. at 45,058.

<sup>12</sup> See 79 Fed. Reg. at 45,043 tbl. 15, 45,058-60, 45,076 (proposed amendments to 49 C.F.R. §§ 173.241-43).

<sup>13</sup> See 79 Fed. Reg. at 45,059 tbl. 20.

<sup>14</sup> 79 Fed. Reg. at 45,060 (“A requirement to retrofit existing cars would be costly. Total costs could exceed \$30,000 per car.”).

<sup>15</sup> 79 Fed. Reg. at 45,061.

<sup>16</sup> See generally PHMSA, Final Regulatory Impact Analysis 141-92 (2015).

<sup>17</sup> See First Am. Compl. ¶ 13, Ex. B.

<sup>18</sup> See *id.* Ex. B; see also PHMSA, Final Regulatory Impact Analysis 24 n.28 (2015) (“In an effort to encourage the use of different tank cars, some rail carriers impose a surcharge on customers who offer crude oil in DOT111 tank cars.”).

Price Authority”) that clearly imposed a \$1,000 penalty on each unjacketed DOT-11 used to ship crude oil.<sup>19</sup>

Yet PHMSA did not look only to the interests of the rail carriers when assessing its options. Instead, the agency concluded that it could not justify the near-term elimination of the DOT-111. “[A]n immediate ban,” it noted, “is not a reasonable alternative because affected industries could not replace rail cars immediately and would not be able to immediately switch to other transportation modes. This would cause supply chain disruptions, increased shipping costs, and increased reliance on trucks to make up for lost transport capacity[,]” with all the attendant environmental and safety costs.<sup>20</sup> PHMSA thus “recognize[d] the need to upgrade the rail car fleet, but found that a targeted phase-out of the DOT-111 tanks cars was the most prudent and protective approach.”<sup>21</sup> In its final rule, PHMSA in fact *extended* its phase-out timeline for DOT-111s in flammable liquid service.<sup>22</sup> Based on packing group, general purpose DOT-111s could be used until 2018-2025.<sup>23</sup> Congress amended this schedule to remove the packing group distinctions in the Fixing America’s Surface Transportation (“FAST”) Act, Pub. L. No. 114-94, 129 Stat. 1312, 1596-97 (2015). Under Section 7304 of the FAST Act, general purpose DOT-111 tank cars could remain in service for crude oil shipments through January 1, 2018, without the need for retrofits. *See id.*

Despite this regulatory and political consensus on the continued use of DOT-111s, BNSF used its Price Authority to punish the use of an otherwise federally-authorized tank car, and the

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<sup>19</sup> *See* First Am. Compl. ¶ 9, Ex. A.

<sup>20</sup> PHMSA, Final Regulatory Impact Analysis 59 (2015).

<sup>21</sup> *Id.*

<sup>22</sup> Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 80 Fed. Reg. 26,643, 26,738 tbl. EA1 (May 8, 2015).

<sup>23</sup> *See id.*

DOT-111 penalty took effect on January 1, 2015.<sup>24</sup> AFPM therefore brought suit against BNSF in the District Court for the Southern District of Texas, alleging a single claim for violation of BNSF's common carrier obligation under the Interstate Commerce Commission Termination Act ("ICCTA").<sup>25</sup> BNSF moved to dismiss for lack of subject matter jurisdiction, for failure to state a claim, or to dismiss to allow the Board to exercise primary jurisdiction.<sup>26</sup> AFPM replied that the District Court could and should exercise its jurisdiction and that AFPM had stated a common carrier claim.<sup>27</sup> The District Court ruled that it lacked subject matter jurisdiction over AFPM's claim and dismissed without prejudice.<sup>28</sup> The District Court's brief analysis of its subject matter jurisdiction relied primarily on the D.C. Circuit's decision in *Union Pacific Railroad Co. v. ICC*, 867 F.2d 646, 649 (D.C. Cir. 1989).<sup>29</sup>

AFPM has now filed a complaint with the Board alleging an unreasonable practice claim, 49 U.S.C. § 10702(2), in addition to a common carrier claim under § 11101(a).<sup>30</sup> BNSF answered, and AFPM subsequently filed the operative complaint (the First Amended Complaint) to add references to the FAST Act.<sup>31</sup> The First Amended Complaint describes a \$1,000 penalty levied by BNSF on each DOT-111 used in crude oil shipment completely unrelated to any other aspects of the movement.<sup>32</sup> This penalty is intended to, and does, breach BNSF's common carrier obligation by precluding access to the rail system for crude oil shippers using DOT-111s and by

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<sup>24</sup> First Am. Compl. ¶ 9, Ex. A.

<sup>25</sup> See Motion at Attachment A (Complaint, *Am. Fuel & Petrochemical Mfrs. v. BNSF Rwy. Co.*, No. 4:15-cv-682 (S.D. Tex. Mar. 13, 2015), ECF No. 1).

<sup>26</sup> See Motion at Attachment C (Def.'s Mot. to Dismiss, *Am. Fuel & Petrochemical Mfrs. v. BNSF Rwy. Co.*, No. 4:15-cv-682 (S.D. Tex. June 26, 2015), ECF No. 12).

<sup>27</sup> See Motion at Attachment C (Pl.'s Resp. to Def.'s Mot. to Dismiss, *Am. Fuel & Petrochemical Mfrs. v. BNSF Rwy. Co.*, No. 4:15-cv-682 (S.D. Tex. July 31, 2015), ECF No. 18).

<sup>28</sup> See Motion at Attachment B (Order, *Am. Fuel & Petrochemical Mfrs. v. BNSF Rwy. Co.*, No. 4:15-cv-682 (S.D. Tex. Mar. 1, 2016). ECF No. 30).

<sup>29</sup> See *id.* at 6-7.

<sup>30</sup> See Complaint ¶¶ 19-28.

<sup>31</sup> See First Am. Compl.

<sup>32</sup> See *id.* ¶ 12.

collaterally attacking the comprehensive tank car regulatory regime created by PHMSA and Congress.<sup>33</sup> The penalty constitutes an unreasonable practice for the same reasons.<sup>34</sup> The First Amended Complaint seeks to preclude BNSF from imposing the penalty through the Price Authority.<sup>35</sup>

BNSF has moved to dismiss the First Amended Complaint. The Motion presents three primary arguments: that the First Amended Complaint must comply with rate reasonableness pleading requirements,<sup>36</sup> that the District Court's Order precludes any independent consideration by the Board of this case,<sup>37</sup> and that AFPM has not stated a claim for either a violation of the common carrier obligation or for an unreasonable practice.<sup>38</sup> The Board should reject each of those arguments.

### ARGUMENT

Motions to dismiss formal complaints are disfavored and rarely granted. *Entergy Arkansas, Inc. & Entergy Servs., Inc.*, STB Docket No. 42104, slip op. at 3 (served Dec. 30, 2009). The Board may grant such a motion only if the complaint “does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b). This requires that the moving party demonstrate that the complaint presents no facts that, if proven, result in a violation of the law. *See Trailer Bridge, Inc. v. Sea Start Lines, LLC*, STB Docket No. WCC-104, 1999 WL 1133302, at \*2 (served Dec. 10, 1999). The Board construes all allegations in the light most favorable to the complainant. *E.g., Sierra Pac. Power Co. & Idaho Power Co. v. Union Pac. R.R. Co.*, STB Docket No. 42012, slip op. at 4 (served Jan. 26, 1998).

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<sup>33</sup> *See id.* ¶¶ 13-17, 20-26.

<sup>34</sup> *See id.* ¶¶ 27-29.

<sup>35</sup> *See id.* at page 11.

<sup>36</sup> *See Motion* at 7-8, 12-13.

<sup>37</sup> *See id.* at

<sup>38</sup> *See id.* at 14-17.

**I. THIS CASE DOES NOT REQUIRE RATE REASONABLENESS PROCEDURES.**

The basic thrust of the Motion is that the First Amended Complaint seeks review of the reasonableness of BNSF's total rates; that premise forms the foundation of each of BNSF's three arguments.<sup>39</sup> But BNSF is mistaken. Taken as a whole, the allegations in the First Amended Complaint fit far more comfortably into the Board's well-crafted precedent on the unreasonable application of penalties, which may be reviewed without need for the full suite of rate reasonableness procedures. Nor, as BNSF claims, is the Board precluded from considering those issues by the District Court's order.

**A. The First Amended Complaint is Properly Construed as a Challenge to the Manner in Which BNSF Applies a Surcharge, Not to the Level of a Total Rate.**

This case does not require rate reasonableness procedures<sup>40</sup> because the Board should not construe the penalty on DOT-111 tank cars as a challenge to the *level* of BNSF's total rates. Congress has granted the Board authority to define the contours of the term "rate" in the applicable sections of the ICCTA and its own regulations,<sup>41</sup> and the Board has done so in a functional, purpose-driven manner that compels a denial of BNSF's motion. As relevant here, the Board has established that it will not apply rate reasonableness requirements to claims against the application of a surcharge so long as (1) the surcharge is a separately identifiable component of the carrier's total rate and (2) relief for those claims does not entail setting the precise level of the carrier's total rates. *See Rail Fuel Surcharges*, STB Ex Parte No. 661, slip op. at 2 (served Mar.

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<sup>39</sup> *See id.* at 7 ("AFPM's complaint is a challenge to the rates contained in a price authority covering transportation of crude oil[.]"); *see id.* at 15 ("AFPM is challenging the reasonableness of BNSF rates, not pursuing a common carrier violation."); *see id.* at 16 ("[T]he Amended Complaint is all about – and only about – BNSF rates.")

<sup>40</sup> *See, e.g.*, 49 C.F.R. § 1111.1(a) (providing pleading requirements for rate reasonableness challenges).

<sup>41</sup> *See* 49 U.S.C. § 10702 (requiring reasonable rates and practices); *see id.* § 10707 (laying out market dominance prerequisites to rate reasonableness challenges); *see also* 49 C.F.R. § 1111.1(a).

14, 2006). The penalty on DOT-111s described in the First Amended Complaint satisfies both criteria.

*1. Separately Identifiable*

The Board has expressly recognized its authority to regulate surcharges through mechanisms other than rate reasonableness procedures. *See, e.g., Parrish & Heimbecker, Inc.—Pet’n for Declaratory Order*, STB Docket No. 42031, slip op. at 10 (served May 26, 2000) (finding a per-car surcharge to be an unreasonable practice). And in the Ex Parte 661 proceedings, the Board has also recently clarified when it will exercise that regulatory authority over surcharges. As the Board explained, “[a] surcharge is a *separately identified* component of the total rate that is charged for the transportation involved.” *Rail Fuel Surcharges*, STB Ex Parte No. 661, slip op. at 2 (served Mar. 14, 2006) (emphasis added). “Separately identifiable” does not mean merely that the charge is listed as a separate line item in a tariff or in a separate document. Rather, the Board can take, and has taken, a functional view of when a surcharge can be separately identified from a rate under the circumstances. *See, e.g., Parrish & Heimbecker, Inc.*, STB Docket No. 42013, slip op. at 11 (holding that a surcharge was an unreasonable practice even though it did not “relate[] to any separately identifiable service” and was “assessed solely in connection with line-haul movements and form[s] *part of, or an addition to*, the line-haul rate” (emphasis added)). In part, this is because the term “rate” is itself used loosely and with shifting meanings. *See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 248 (D.C. Cir. 2013) (“Together, the fuel surcharge and base rate constitute the total rate paid (sometimes called the “all-in” rate).”); *see also Dairyland Power Coop. v. Union Pac. R.R. Co.*, STB Docket No. 42105, slip op. at 3 (served July 29, 2008) (denying a motion to dismiss an unreasonable practice claim even though the Board described a fuel surcharge as a “component” of a carrier’s “rates”). But, more importantly, the ability to identify the surcharge as a separate

economic action is a prerequisite to the other criterion for distinguishing rate reasonableness challenges: the Board's ability to order some relief that does not set the exact level of the carrier's total rates. AFPM does not challenge

## 2. *Relief Other than Setting the Level of Total Rates*

Congress circumscribed rate reasonableness challenges to situations in which a carrier has "market dominance," which means a lack of effective competition. 49 U.S.C. § 10707(a)-(b). Congress's choice of that standard signals its intent to target the problem of monopoly pricing through rate reasonableness challenges. *See Ariz. Pub. Serv. Co. v. United States*, 742 F.2d 644, 650-51 (D.C. Cir. 1984). It is no surprise, then, that the requirements for rate reasonableness challenges embrace a detailed analysis of the carrier's revenue, its variable costs, and the effects of inter- and intramodal competition for the particular shipment at issue. *See* 49 U.S.C. § 10707(d); *see also E.I. DuPont De Nemours & Co. v. CSX Transp., Inc.*, STB Docket No. 42099, slip op. at 2-19 (served June 30, 2008). If the complainant prevails, that technical, all-encompassing analysis results in a very particular form of relief, namely, the maximum total rate a carrier may charge for a particular movement. *See, e.g., E.I. DuPoint De Nemours & Co.*, No. 42099, slip op. at 19-20. The Board may prescribe that maximum rate in terms of a revenue-to-variable cost ratio. *See, e.g., id.*; *see also Rate Regulation Reforms*, STB Ex Parte No. 715, slip op. at 4 (served July 18, 2013).

But neither the core problem of monopoly pricing nor the need for a complete description of market conditions exists where the complainant challenges not the level of a particular charge but the broader "circumstances of its imposition[.]" *Decaurt Cty. Comm'rs v. Cent. R.R. Co. of Ind.*, STB Docket No. 33386, slip op. at 21-22 (served Sept. 29, 2000) (distinguishing between an unreasonable practice claim and a challenge to the level of a charge). For that reason, the Board took pains to distinguish the purpose and results of its decision on fuel surcharges in Ex

Parte 661 from any rate reasonableness challenge—and from the D.C. Circuit’s *Union Pacific* decision that is the primary authority cited by BNSF.<sup>42</sup>

The Board initiated its investigation of fuel surcharges after shipper complaints that carriers did not tie these charges to the cost of fuel, despite the obvious implication otherwise in the term “fuel surcharge.” *See* Ex Parte No. 661, slip op. at 2 (served Mar. 14, 2006). Concerned about the deceptive and misleading nature of the label given to these surcharges, the Board sought to determine whether they constituted an unreasonable practice under 49 U.S.C. § 10702(2). *Id.* Rail carriers that imposed such charges objected that the Board could not lawfully regulate such charges, absent a finding of market dominance, “because fuel surcharges are *part of the total rate charged* and thus cannot be considered as a practice.” *Rail Fuel Surcharges*, STB Ex Parte No. 661, slip op. at 3 (served Aug. 3, 2006) (emphasis added). And, as in this case, those carriers pointed to *Union Pacific Railroad Co. v. ICC*, 867 F.2d 646 (D.C. Cir. 1989), as a bar to the Board’s authority. *See* Ex Parte No. 661, slip op. at 3 (served Aug. 3, 2006). BNSF, for its part, “argue[d] that Congress could not have intended for [the Board] to regulate an individual component of a rate based solely upon the label given to it by the railroad as a fuel surcharge.” *Rail Fuel Surcharges*, STB Ex Parte No. 661, slip op. at 7 (served Jan. 26, 2007).

The Board rejected both arguments. *Union Pacific* did not apply because the Board did not propose “to limit the *total amount* that a carrier can charge, through a combination of base rates and surcharges, for providing rail transportation.” Ex Parte No. 661, slip op. at 4 (served Aug. 3, 2006) (emphasis added). The Board instead sought only to restrict how carriers “apply[] what [they] label a fuel surcharge in a manner that” was fundamentally deceptive to shippers. *Id.* That meant three particular forms of relief: barring carriers from applying fuel surcharges tied to

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<sup>42</sup> *See* Motion at 12-13, 16.

a percentage of base rates, barring recovery of fuel costs through both the surcharge and base rates, and requiring the use of an index for changes in fuel costs. *See* Ex Parte No. 661, slip op. at 6-11 (served Jan. 25, 2007). These solutions clearly demonstrate that the Board was not concerned ““exclusively [with] the level of [carrier] rates[.]”” Ex Parte No. 661, slip op. at 3 (served Aug. 3, 2006) (quoting *Union Pac. R.R. Co.*, 867 F.2d at 649). And, in response to BNSF’s objection that identify any separate component of a rate produced an unlawful rate cap, the Board responded that “railroads [that] wish to raise their rates may do so, subject to the rate reasonableness requirement . . . , but they may not impose those increases on their customers on the basis of a misrepresentation.” Ex Parte No. 661, slip op. at 7 (served Jan. 26, 2007).

The import of Ex Parte 661 should be plain: rate reasonableness procedures do not apply where the Board can identify a surcharge as a separate component of a total rate and where any necessary remedy does not prescribe a maximum amount that may be charged as an “all-in” or “total” rate.<sup>43</sup> But this does not mean that the Board may not regulate the circumstances under

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<sup>43</sup> If, despite Ex Parte 661, the Board concludes that its law on separately identifiable surcharges is not compatible with the D.C. Circuit’s decision in *Union Pacific*, the Board may nevertheless adopt extend Ex Parte 661 to this case. “A court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). The *Union Pacific* decision does not satisfy that requirement as to its holding that the “so-called ‘practice’” in that case was “manifested *exclusively* in the level of rates that customers charged.” 867 F.2d at 649. For one thing, it is not even clear that the court based its decision on a construction of a statute. The court explained that the ICC had all but admitted that it had undertaken a rate reasonableness investigation, a fact made obvious by the ICC’s discussion of R/VC ratios. *See id.* In that sense, *Union Pacific* can be explained as holding that the ICC simply failed to follow its own regulations and procedures in its final decision. *Cf. Houghtling v. United States*, 114 Fed. Cl. 149, 158-59 (2013) (reviewing, without the need for statutory interpretation, the Army’s administrative actions for compliance with its own procedural regulations). But even if *Union Pacific* can be read as a holding on the meaning of statutes governing rates, it still does not hold that its result follows from the *unambiguous* terms of the statute. *Union Pacific* did not purport to define the meaning of “rate” or “practice;” it instead explicitly left open the scope of these terms. *See* 867 F.2d at 649. Nor does the opinion deploy any of the “traditional tools of statutory construction” that one would expect in a *Chevron*

which the carrier applies that surcharge, and the Board has ratified that power in later challenges to individual fuel surcharges. In *Dairyland*, for instance, the Board remarked that a complainant would impermissibly challenge the level of a fuel surcharge when it sought to prove an excess over the carrier’s actual fuel costs. Docket No. 42105, slip op. at 5. Yet, even though the shipper pleaded exactly that theory, the Board still denied the carrier’s motion to dismiss because the shipper might show that the surcharge had been applied in a manner generally—and unreasonably—disconnected from fuel prices. *Id.* at 6. Compare that decision to the Board’s dismissal of Cargill’s “double recovery” claim against a fuel surcharge, a theory that the carrier recovered for the same costs twice through its surcharge *and* its base rate. *See Cargill, Inc. v. BNSF Rwy. Co.*, STB Docket No. NOR 42120, slip op. at 5-6 (Jan. 4, 2011). Proving that theory required more than examination of the surcharge in isolation: It also necessitated “deconstruct[ing]” the shipper’s entire “base rate” to identify double-recovery *Id.* at 6. That inquiry would present serious “practical concerns” because the Board would need to identify and analyze every component of the base rate, not just the surcharge. *Id.* And at that point the Board would need, in effect, to conduct a full-bore rate reasonableness proceeding. The carrier would no longer be free to set its total rates. Not so here.

### 3. *Application to the First Amended Complaint*

If the Board construes the factual allegations in the light most favorable to Complainant, as it must, it will conclude that the First Amended Complaint identifies a surcharge on DOT-111 tank cars that is readily separated from BNSF’s total rates and that resolution of the railroad’s

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“step one” holding. *See Chevron, U.S.A, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). At most, *Union Pacific* held that the ICC arbitrarily selected one of several permissible interpretations of its organic statutes when it failed to justify the sudden change in its view. But that sort of holding does not preclude an agency from later adopting the same interpretation after a sufficient explanation. *See Brand X Internet Servs.*, 545 U.S. at 981 (“Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act.”).

authority to use surcharges to preclude the use of DOT-authorized hazmat packaging is a distinct issue, separate from the reasonableness of the total rate charged by the railroad. The Board has previously recognized per-car surcharges as separately identifiable items, *see, e.g., Parrish & Heimbecker, Inc.*, Docket No. 42031, slip op. at 2, and the First Amended Complaint alleges a plain, obvious charge on each DOT-111 tank car used to ship crude oil. The penalty applies only to general purpose DOT-111s,<sup>44</sup> and the penalty amounts to a \$1,000 surcharge on each general purpose DOT-111 used to ship petroleum, irrespective of any other aspect of the movement.<sup>45</sup> The penalty is also easily discerned from the face of the Price Authority itself; it is in fact even more apparent than BNSF's own fuel surcharge, which is defined in the Price Authority only through an oblique reference to another document.<sup>46</sup> Of 31 movements of crude oil listed in the Price Authority, each displays a cost of shipping in general purpose DOT-111s exactly \$1,000 higher than other cars.<sup>47</sup> If a surcharge on the DOT-111s is not obvious from that remarkable consistency, it will never be possible to identify such a charge. Indeed, BNSF effectively admits that the Price Authority reflects a \$1,000 surcharge on unjacketed DOT-111s.<sup>48</sup> And PHMSA also recognized carrier penalties on general purpose DOT-111s as discrete surcharges.<sup>49</sup> At the very least, the distinctive nature of the DOT-111 penalty is a question of fact that should be adjudicated after discovery.

So, too, the First Amended Complaint does not seek relief that would require the Board to set the maximum level of BNSF's total rates. This dispute does not center on market

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<sup>44</sup> First Am. Compl. ¶ 8.

<sup>45</sup> *Id.* ¶¶ 9, 12.

<sup>46</sup> *See id.* Ex. A page 1.

<sup>47</sup> *See id.* Ex. A pages 5-7.

<sup>48</sup> Def.'s Answer to First Am. Compl. ¶¶ 9, 12, 29.

<sup>49</sup> *See PHMSA, Final Regulatory Impact Analysis 24 n.28 (2015)* (“In an effort to encourage the use of different tank cars, some rail carriers impose a surcharge on customers who offer crude oil in DOT111 tank cars.”).

dominance or monopoly pricing; it instead focuses on the penalty's impact on a federal agency's regulatory regime.<sup>50</sup> That interference with a carefully crafted agency policy, and its implications for BNSF's common carrier obligations, play the same role in this case that shipper deception played in Ex Parte 661. Unsurprisingly, then, AFPM does not seek to set a maximum rate that BNSF may charge on any of the movements identified in the Price Authority—even those with unjacketed DOT-111s.<sup>51</sup> AFPM seeks only to preclude the imposition of a discrete penalty directed at general purpose DOT-111s. A decision in favor of AFPM would not specify the level that BNSF could charge for any crude oil shipment, with a DOT-111 or otherwise, in terms of a revenue-cost ratio or a dollar amount.

Since that penalty can be easily identified, the requested relief does not require the complete “deconstruct[ion]” of all other components of BNSF's rates, *Cargill*, Docket No. NOR 42120, slip op. at 6, and does not require the in-depth analysis of BNSF's revenue and variable costs for each movement. AFPM's prayer is therefore consistent with—and in fact simpler than—the tripartite relief against deceptive fuel surcharges ordered under Ex Parte 661. *See* Ex Parte No. 661, slip op. at 6-11 (served Jan. 25, 2007). AFPM does not challenge the reasonableness of the \$1,000 aspect; it challenges only the premise that a railroad acts unreasonably when it uses *any* penalty to attempt to end the use of a federally authorized hazardous materials packaging. Moreover, the reasoning of Ex Parte 661, like the relief granted in later fuel surcharge cases, implies that some indirect impact on the carrier's revenue does not itself trigger the need for rate reasonableness procedures. Otherwise, any changes to fuel surcharges would have exceeded the Board's authority. The better rule is that rate reasonableness procedures are necessary only when the crux of the dispute requires a prescription of the carrier's

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<sup>50</sup> *See* Parts II-III, *infra*.

<sup>51</sup> *See* First Am. Compl. at page 20.

total rate. That is not the case here, and the Board should therefore reject BNSF's central argument in support of its motion, just as it rejected the same argument from BNSF in Ex Parte 661.

**B. Preclusion Principles Do Not Apply To The Claims or Issues in This Proceeding.**

In support of its attempt to frame this case as a rate reasonableness challenge, BNSF also argues that the District Court's decision precludes any other determination by the Board, and BNSF asserts both claim and issue preclusion. *See* Motion at 10-11. The Board can quickly move past BNSF's claim preclusion argument. A dismissal for lack of subject matter jurisdiction, like that of the district court, is not a final disposition on the merits of a claim—a critical element of claim preclusion. *See, e.g., Prakash v. Am. Univ.*, 727 F.2d 1174, 1182 (D.C. Cir. 1984). Thus, “[t]he basic rule that dismissal for lack of subject-matter jurisdiction does not preclude a second action on the same claim is well settled.” *Angelex Ltd. v. United States*, 123 F. Supp. 3d 66, 77-78 (D.D.C. 2015) (quoting 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4436 (2d ed. 2015)).

Issue preclusion is equally inappropriate here, but for two reasons. First, issue preclusion applies only where the issues are identical to those actually decided in earlier proceedings. *See, e.g., Santa Fe S. Pac. Corp.—Control—S. Pac. Transp. Co.*, STB Docket No. 30400 (Sub-No. 21), slip op. at 16 (served Dec. 10, 1996); *see also* 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure* § 4417 n.1 (2d ed. 2016) (“Issue preclusion applies only when the issue decided is the same as the issue presented in another action.”). There can be no question that the District Court did not decide the reasonableness of the surcharge as a *practice*: AFPM did not plead such a claim before the District Court,<sup>52</sup> and the District Court's

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<sup>52</sup> *See generally* Motion at Attachment A.

order never cites 49 U.S.C. § 10702(2).<sup>53</sup> Nor, without such a claim before it, did the District Court purport to decide what overlap exists between rates and practices under 49 U.S.C. § 10702, or how a surcharge might be characterized as an unreasonable practice under Ex Parte 661. As discussed in Part I.A, *supra*, the Board’s jurisprudence lays out nuanced distinctions between complaints about the level of total rates and those about a carrier’s practice of applying a discrete surcharge in a particular manner. The distinction between unreasonable practice claims and attacks on the level of rates forms the very core of the Ex Parte 661 rule. Those issues were simply never before the court and never decided. That court’s decision cannot, then, preclude litigation of AFPM’s unreasonable practice claim. *See Gen. Am. Transp. Corp. v. Indiana Harbor Belt R.R. Co.*, 3 I.C.C. 2d 599, 617 (1987) (rejecting preclusion where “[t]he claim or cause of action is different”).

Second, even if there is some overlap with the issues decided by the District Court, the Board has compelling reasons to conduct an independent determination of its own organic statute, and, indeed, an issue that goes to the core of its jurisdiction. The law of issue preclusion recognizes a clear exception that “[a] new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts *or by factors relating to the allocation of jurisdiction between them.*” Restatement (Second) of Judgments § 28(3) (1982) (emphasis added). The Restatement explains the conditions under which an independent determination of the issues is most appropriate:

[First, t]he scope of review in the first action may have been very narrow. Or[, second,] the legislative allocation of jurisdiction among the courts of the state may have been designed to insure that when an action is brought to determine a particular issue directly, it may only be maintained in a court having special competence to deal with it. In such instances, after a court has incidently determined an issue that it lacks jurisdiction to determine directly, the determination should not be binding when a second action is brought in a court

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<sup>53</sup> *See generally* Motion at Attachment B.

having such jurisdiction. The question in each case should be resolved in the light of the nature of litigation in the courts involved and the legislative purposes in allocating jurisdiction among the courts of the state.

*Id.* cmt. d.

As the agency responsible for implementing the ICCTA, the Board has a meaningfully wider scope of review than the District Court. Article III courts faced with a dispute between private parties over the construction of a statute have but one criterion to guide their decisions: the intent of Congress. *E.g., Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98, 101 (1937) (“[T]he object of all [statutory] construction . . . is to ascertain the legislative intent[.]”); *see also* 82 C.J.S. *Statutes* § 395 (“The fundamental rule of statutory construction is to ascertain and, if possible, give effect to the intention or purpose of the legislature[.]”). While courts may employ the “traditional tools of statutory construction[.]” they must avoid policy-driven interpretations. *Chevron, U.S.A, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). “Such policy arguments are more properly addressed to legislators or administrators, not to judges.” *Id.* at 864.

In contrast, “an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon . . . [its] views of wise policy to inform its judgments” about the statute. *Id.* at 865. Such an agency is not always compelled to select what a court would see as the “best” statutory interpretation.<sup>54</sup> *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron, U.S.A., Inc.*, 467 U.S. at 843 n.11, 843-44). The agency may instead select one of a number of permissible statutory constructions in “reconciling conflicting policies,” a task that “depend[s] upon more than ordinary knowledge[.]” *Chevron, U.S.A., Inc.* 467 U.S. at 844. That breadth of review is not available to a district court in deciding the best interpretation of a “rate” or “practice” under the

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<sup>54</sup> The Board’s orders enjoy the more capacious review provided by *Chevron*. *See, e.g., N. Am. Freight Car Ass’n v. STB*, 529 F.3d 1166, 1172 (D.C. Cir. 2008) (applying *Chevron* to the Board’s decision on an unreasonable practice claim).

ICCTA, and the Board should therefore make its own determination of those terms' meaning consistent with its policy expertise. *See Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans' Affairs*, 260 F.3d 1365, 1374 (Fed. Cir. 2001) (noting the propriety of relitigating issues of statutory interpretation where the agency had authority to exercise expert discretion).

Similarly, the unique "legislative allocation of jurisdiction" for rail regulation has given the Board a "special competence" not possessed by district courts. Restatement (Second) of Judgments § 28(3) cmt. d. That Congress gave the Board jurisdiction to adjudicate claims under 49 U.S.C. §§ 11101 and 10702 so that it might exercise a special expertise is beyond dispute. *Cf. Pittsburgh-Johnston-Altoona Express, Inc.-Pet'n for Declaratory Order*, 8 I.C.C. 2d 821, 826-27 (Feb. 12, 1990) (rejecting preclusive effect of a court decision where the agency had the authority to decide the issue "in the first instance" thanks to its "special expertise" (internal quotation marks omitted)). But that fact illustrates the compelling need for the Board to decide its own jurisdiction and policies. *See In re Toledo Edison Co.*, 5 N.R.C. 557, 561 (1977) ("[W]hen the legislative intent is to vest primary power to make particular determinations concerning a subject matter in a particular agency, a court's decision concerning that subject matter may be without binding effect upon that agency." (internal quotation marks omitted)). Without the ability to determine the meaning of its organic statutes, the Board risks the "ossification" of its regulatory system by courts lacking its holistic knowledge of the national rail system. *Brand X Internet Servs.*, 545 U.S. at 983. The Board itself (or its predecessor) has long recognized this risk. "[C]ollateral estoppel is not meant to create vested rights in decisions that have become obsolete or erroneous with time[.]" *Gen. Am. Transp. Corp.*, 3 I.C.C. 2d at 617 (alterations and internal quotation marks omitted). Notably, the Board's predecessor expressly recognized the "exception" to preclusion where an earlier decision "would be incompatible with

a legislative policy.” *Id.* (internal quotation marks omitted). An independent determination of its own regulatory principles, based on its special expertise, provides the only means of preserving the Board’s “flexibility and adaptability to changing needs and patterns of transportation[.]” *Id.*

Just so here. As discussed above, the Board has carefully crafted distinctions between surcharges and rates that are foundational to some of its regulatory schemes. Relying solely on the District Court’s eight-page order to control the issues in this case risks obliterating those distinctions. Indeed, BNSF acknowledged in the District Court proceedings that the Board should have the ultimate say on this dispute given its expertise and asked for an alternative holding that the District dismiss on primary jurisdiction grounds to effect that very result.<sup>55</sup> It is imperative that the Board preserve and refine the delineation of its authority articulated in Ex Parte 661, and it has every reason to do so given its broader scope of review, Congress’s allocation of jurisdiction to the Board, and the Board’s special competence in rail policy. *See* Restatement (Second) of Judgments § 28(3) cmt. d. The better conclusion—and that of the Restatement—is that the Board should independently determine the meaning and application of statutes Congress charged it to administer.<sup>56</sup> *Cf. Cal. High-Speed Rail Auth.—Pet’n for Declaratory Order*, STB Docket No. FD 35861, slip op. at 7 (served Dec. 12, 2014) (rejecting collateral estoppel on a question of statutory interpretation that the Board was “uniquely qualified” to decide as compared to a court (internal quotation marks omitted)). That conclusion is bolstered by the need to address issues of first impression in the common carrier claim, *see* Part II, *infra*.

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<sup>55</sup> *See* Motion at Attachment C, page 20 (“Unlike this Court, the STB has the institutional tools and expertise to consider the problem from a national perspective.” (quoting *The Chlorine Inst. v. Soo Line R.R.*, No. 14-cv-1029, 2014 WL 2195180, at \*3 (D. Minn. May 27, 2014))).

<sup>56</sup> If, as discussed in note 43, *supra*, the Board concludes that it should revisit its interpretation of its organic statutes despite *Union Pacific*, that decision also creates a strong need for the Board to determine the issues in this case on its own.

## II. THE FIRST AMENDED COMPLAINT STATES A CLAIM FOR A VIOLATION OF THE COMMON CARRIER OBLIGATION.

BNSF is a common carrier.<sup>57</sup> As such, it must provide rates and terms for its common carrier service and may not refuse a reasonable request for that service. 49 U.S.C. § 11101(a)-(b). BNSF also has a statutory obligation to transport hazardous materials, including crude oil, where the appropriate agencies have promulgated comprehensive safety regulations. *Eric Strohmeier & James Riffing—Acquisition & Operation Application—Valstir Indus. Track in Middlesex and Union Counties, N.J.*, STB Docket No. 35527, slip op. at 2 (served Oct. 20, 2011). Indeed, where other agencies have established “complete and comprehensive safety standards” for the particular movements “and have drafted regulations in accord with the best-known practicable means for securing safety while balancing the cost of safety with the need for economy,” the Board presumes that any additional safety measures imposed by a railroad on hazardous materials movements are unreasonable. *Consol. Rail Corp. v. ICC*, 646 F.2d 642, 650 (D.C. Cir. 1981) [hereinafter “*Conrail*”]; see also *C.F. Indus., Inc. v. Ind. & Ohio Rwy., Point Comfort & N. Rwy., & The Mich. Shore R.R.—Pet’n for Declaratory Order*, STB Docket No. FD 35517, slip op. at 5-6 (served Nov. 28, 2012). This presumption may be rebutted by proving only a handful of narrow factual situations.<sup>58</sup> *Conrail*, 646 F.2d at 651.

That presumption against additional safety measures arises under the facts alleged in the First Amended Complaint. The Board has recognized the primary jurisdiction of PHMSA and the FRA to regulate the safety of shipping flammable materials by rail, and at the same time the

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<sup>57</sup> Answer to First Am. Compl. ¶ 6 (“BNSF admits that . . . it is a common carrier[.]”).

<sup>58</sup> These situations are: (1) “that the agencies did not intend to establish comprehensive regulations to assure safe transportation . . . but rather hoped that other agencies or private industry would substantially supplement their regulations”; (2) that the “regulations were drafted without any knowledge of” the additional measures; (3) that “the railroads lacked any meaningful opportunity to present” the additional measures to the agency, or (4) that “some unusual or special conditions related to . . . [the] particular . . . railroad routes made imposition of [the measures] reasonable in their case.” *Conrail*, 646 F.2d at 651.

Board has recognized that those agencies' safety regulations are comprehensive. *See Canadian Nat'l Rwy. Co. & Grand Trunk Corp.—Control—EJ&E W. Co.*, SB Docket No. FD 3087 (Sub-No. 8), slip op. at 7, 7-8 n.22 (served May 15, 2015). And that recognition was eminently sound. It would strain credibility to construe the hazardous materials regulations, including those on the use of general purpose DOT-111s, as anything other than “complete and comprehensive.” In August 2014, PHMSA, in coordination with the FRA, issued a proposed rule to establish new safety measures for “high-hazard flammable trains,” defined initially as trains comprised of 20 or more carloads of flammable liquids, including crude oil.<sup>59</sup> The agencies described their goal as “a system-wide, comprehensive approach” to safety through (i) addressing the proper classification of flammable materials and shipments of those materials, (ii) a variety of operational controls on those shipments, and (iii) improvements to tank car design, including retrofits to existing DOT-111s.<sup>60</sup>

As to the last category, PHMSA took special care in its 336-page Regulatory Impact Analysis to consider the balance of costs and benefits of tank car modifications and retrofits.<sup>61</sup> But PHMSA emphatically concluded that it could not justify “an immediate ban or other discontinuance of all DOT-111 tank cars for crude [oil] and ethanol transport.”<sup>62</sup> Such a sharp change was not “a reasonable alternative because affected industries could not replace rail cars immediately and would not be able to immediately switch to other transportation modes. This would cause supply chain disruptions, increased shipping costs, and increased reliance on trucks to make up for lost capacity.”<sup>63</sup> So, balancing these costs to the supply chain against the benefits

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<sup>59</sup> 79 Fed. Reg. at 45,017.

<sup>60</sup> 79 Fed. Reg. at 45,023.

<sup>61</sup> *See* PHMSA, Final Regulatory Impact Analysis 141-92 (2015) (analyzing costs and benefits of tank car options).

<sup>62</sup> *See id.* at 59.

<sup>63</sup> *See id.*

of tank car modifications, PHMSA developed the DOT-111 phase-out schedule in the Final Rule.<sup>64</sup> The Final Rule on tank car standards for high-hazard flammable trains again noted the agencies’ “system-wide, comprehensive approach consistent with the risks posed by the bulk transport of hazardous materials by rail.”<sup>65</sup> And even after the agencies’ extensive analysis of the phase-out schedule, Congress layered its own policy judgments onto those of the agencies when it further modified that schedule in the FAST Act. That addition by Congress still protected the use of DOT-111s through 2018. Any concerns about the ultimate conclusions of these bodies should continue to be addressed through the legislative process or a rule-making petition—and only through those avenues.<sup>66</sup>

BNSF’s penalty on DOT-111s as described in the First Amended Complaint conflicts with this thorough regulatory regime for tank car modifications. Indeed, the First Amended Complaint alleges that the intent of the penalty is precisely to upset the balance of shipper and carrier interests crafted by the Executive and Legislative branches of government.<sup>67</sup> That intent is a question of fact that cannot be addressed on a motion to dismiss. But, if anything, the Notes from the Administrator’s Meeting with BNSF make clear that PHMSA understood BNSF’s goal as the elimination of the general purpose DOT-111 for crude oil shipments.<sup>68</sup> Yet PHMSA was aware of both potential costs to carriers and shippers from DOT-111s and the possibility of carrier surcharges on DOT-111s when analyzing its regulatory options.<sup>69</sup> So, too, did PHMSA consider the consequences of ending DOT-111 use immediately. And the agency nonetheless

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<sup>64</sup> *See id.* at 59-60.

<sup>65</sup> 80 Fed. Reg. at 26,645.

<sup>66</sup> For example, the American Association of Railroads filed a petition with PHMSA to initiate the proceedings that concluded with the updated tank car standards. *See Hazardous Materials: Rail Petitions and Recommendations To Improve the Safety of Railroad Tank Car Transportation (RRR)*, 78 Fed. Reg. 54,849, 54,854 (Sept. 6, 2013).

<sup>67</sup> First Am. Compl. ¶ 13.

<sup>68</sup> *See* First Am. Compl. Ex. B. at page 2.

<sup>69</sup> *See* PHMSA, Final Regulatory Impact Analysis 22-24, 24 n.28 (2015).

pressed ahead with its own methods to address the rail car upgrade, thereby displacing the need for any additional actions by the Board or BNSF. PHMSA’s cost-benefit analyses, notably, do not account for independent shipper surcharges as either a substitute or complement to its tank car specifications. This case, then, presents a clear analogue to the presumptive violation in *Conrail*.

AFPM recognizes that *Conrail* did not address a surcharge and that the Board has held that a surcharge does not necessarily constitute a railroad’s refusal to provide common carrier service. *See N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, STB Docket No. NOR 42119, slip op. at 6 n.14 (served Mar. 12, 2015) [hereinafter “*NAFCA*”]. Even so, this case presents compelling circumstances for distinguishing *NAFCA* and extending *Conrail*. The Board should therefore hold that a clear intent to evade a common carrier service obligation through a surcharge, when coupled with an expert agency’s determination that such evasion will fundamentally threaten shipper access to transportation, describes an effective refusal of service in violation of 49 U.S.C. § 11101.

This rule comports with Board holdings in analogous contexts that it must examine intent to prevent evasion of its regulations and organic statutes. Most notably, the Board has looked to the intent and effect of surcharges when examining unreasonable embargoes—a close cousin to an outright refusal of service. *See Grain Land Coop. v. Canadian Pac. Ltd. & Soo Line R.R. Co.*, STB Docket No. 41687, slip op. at 6 (served Dec. 8, 1999) (“Evidence of an intent to improperly embargo Grain Land’s traffic could be used to support Grain Land’s common carrier obligation claim[.]”); *see also La. Railcar, Inc. v. Mo. Pac. R.R. Co.*, 5 I.C.C. 2d 542, 545 (July 28, 1989). So, too, has the Board looked to evidence of specific intent to downgrade deliberately in evasion of constraints on abandonment. *See Union Pac. R.R. Co.—Abandonment in Fremont & Teton*

*Cts.*, *ID*, ICC Docket No. AB-33 (Sub-No. 56), 1989 WL 246790, at \*2 (Oct. 31, 1989). Here as well BNSF seeks to evade its statutory duty through slightly less direct means.

The intent of a surcharge to eliminate DOT-111s may not suffice to show an effective refusal of service, but the concern about that intent should be magnified when the agencies tasked with regulating DOT-111s have concluded otherwise. *Cf. Conrail*, 646 F.2d at 650. In this particular case, the regulatory structure created by PHMSA, the FRA, and the FAST Act are meant to protect the very ability of shippers to continue to use legacy DOT-111 cars for a reasonable period of time. As PHMSA explained in its Regulatory Impact Analysis, an immediate ban on DOT-111s (or even excessively accelerating their phase-out) could cause severe disruptions to the supply of tank cars available for shipments of crude oil.<sup>70</sup> Even the Association of American Railroads warned of “premature scrapping of a large part of the existing [tank car] fleet, jeopardizing the reliable use of rail for crude oil . . . transport[.]”<sup>71</sup> Neither the agencies nor Congress found that dramatic a turn in policy to be acceptable. But that is precisely the intent, and likely effect, of BNSF’s surcharge on general purpose DOT-111s as alleged in the First Amended Complaint.<sup>72</sup> Without the protection of the phase-out schedule, many crude oil shippers may lose access to the rail system for substantial periods of time. That BNSF intends that very result should bring this case within the ambit of 49 U.S.C. § 11101.

The *NAFCA* decision did not address this critical interaction between a surcharge and a regulatory regime; it could not have done so because it expressly disclaimed the existence of such a regime under those circumstances. *See NAFCA*, Docket No. NOR 42119, slip op. at 6 (“[S]pent nuclear fuel is governed by an elaborate and comprehensive set of federal standards, while there are no federal safety standards explicitly governing lading residue on cars.”). It thus

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<sup>70</sup> PHMSA, Final Regulatory Impact Analysis 59 (2015).

<sup>71</sup> First Am. Compl. Ex. C at page 15.

<sup>72</sup> *Id.* ¶ 13; *see also id.* Ex. B at page 2.

cannot address the need to prevent evasion of other agencies' regulations, and it cannot extend the concept of a refusal of service to BNSF's surcharge on DOT-111s. But applying the intent standards used in embargo and abandonment proceedings to a common carrier violation is necessary in this particular instance to protect the core policy concerns of *Conrail*. The Board should therefore find that AFPM has stated a claim for a violation of 49 U.S.C. § 11101 and deny BNSF's Motion as to that claim.

### **III. THE FIRST AMENDED COMPLAINT STATES A CLAIM FOR AN UNREASONABLE PRACTICE.**

Railroads, including BNSF, must establish reasonable practices for providing their common carrier service. *See* 49 U.S.C. § 10702(2). The Board generally assesses the reasonableness of a practice by balancing its benefits and burdens. *See, e.g., C.F. Indus., Inc.*, Docket No. FD 35517, slip op. at 5-6 (served Nov. 28, 2012). But when a practice interferes with the complete and comprehensive safety regulations promulgated by other federal agencies, that practice should be considered presumptively unreasonable under the *Conrail* framework. *See id.* (noting that *Conrail* would apply if the practice intruded on the policy judgments of other agencies). That is because “evaluating whether and how a practice actually affects safety and security, as a factual matter, lies primarily within the expertise of other agencies.” *Id.*

The First Amended Complaint describes just such a presumptively unreasonable practice. As explained in Part II, *supra*, a complete and comprehensive regulatory regime governs the continued use of general purpose DOT-111s for the transport of crude oil products. Also as explained in in Part II, *supra*, BNSF's surcharge on those DOT-111s is meant to disrupt the nuanced policy judgments and policy-making process behind that regime.<sup>73</sup> The intent and effect of that penalty shifts the burden of proving its reasonableness to BNSF and demonstrates

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<sup>73</sup> *See* First Am. Compl. ¶¶ 12-13, 29; *see also id.* Ex. B at 2.

plausible grounds for further investigation. BNSF's Motion should therefore be denied as to the unreasonable practice claim.

### **CONCLUSION**

For the reasons stated above, AFPM requests that the Board deny the Motion in its entirety.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of July, 2016, I have caused a copy of the foregoing document to be served via electronic mail and first class mail to counsel for Defendant at the following address:

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