

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 661 (Sub-No. 2)

RAIL FUEL SURCHARGES (SAFE HARBOR)

Digest:¹ The Board is instituting this advance notice of proposed rulemaking proceeding to give shippers, rail carriers, and other interested persons the opportunity to comment on whether the safe harbor provision of the Board’s current fuel surcharge rules should be modified or removed.

Decided: May 22, 2014

In Rail Fuel Surcharges (Fuel Surcharges), EP 661 (STB served Jan. 26, 2007), the Board inquired into and made findings regarding rail carrier practices related to fuel surcharges, i.e., a separately identified component of the total rate that is charged for the transportation involved and is designed to recoup increases in the carrier’s fuel costs. The Board prohibited rate-based fuel surcharges as an unreasonable practice and, as to the matter at issue here, established as a “safe harbor” an index upon which carriers could rely to measure changes in fuel costs for purposes of a fuel surcharge program. Id., slip op. at 11. That index was the Energy Information Administration’s (EIA)² U.S. No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon), which was and continues to be referred to as the Highway Diesel Fuel Index (HDF Index).³ Id. Although the HDF Index tracks retail fuel prices, which include taxes not paid by wholesale buyers like the Class I railroads, the Board was persuaded that the HDF Index “accurately reflects changes in fuel costs in the rail industry.” Id. (emphasis added). The Board noted that alternative indexes could be used but that they could be challenged as unreasonable on a case-by-case basis.⁴

¹ The digest constitutes no part of the decision of the Board, but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The EIA is an independent arm of the U.S. Department of Energy.

³ In the notice of proposed rulemaking issued in Fuel Surcharges, the Board had proposed to mandate use of the HDF Index to measure incremental fuel costs.

⁴ In a separate proceeding, the Board amended its regulations at 49 C.F.R. § 1243.3 to require Class I rail carriers to report on a quarterly basis certain data concerning fuel costs and fuel surcharges billed. See Rail Fuel Surcharges, EP 661 (Sub-No. 1) (STB served Aug. 14, 2007).

The changes in a rail carrier's fuel costs are reflected in its "incremental fuel costs" by which we mean those fuel costs, not embedded in the base rate, that the rail carrier seeks to recover through a fuel surcharge mechanism. A critical issue that arose in a complaint brought against BNSF Railway Company (BNSF) by Cargill, Incorporated (Cargill), a major shipper of agricultural products, was "how to measure BNSF's incremental fuel costs." Cargill, Inc. v. BNSF Ry. (Cargill), NOR 42120, slip op.at 7 (STB served Aug. 12, 2013.) Cargill argued that BNSF's mileage-based fuel surcharge program constituted an unreasonable practice, asserting that it extracted substantial profits on the traffic to which it applied. Cargill sought to show that BNSF's fuel surcharge revenues exceeded its incremental fuel costs by comparing BNSF's fuel surcharge revenue to its internal fuel costs.

To address Cargill's "Profit Center" claim, the Board had to decide how to calculate BNSF's incremental fuel costs. The Board determined that the "safe harbor" language in Fuel Surcharges dictated the answer. Specifically, the Board found, in part, that if rail carriers use the HDF Index to measure changes in their fuel costs for purposes of a fuel surcharge program, then under the safe harbor provision adopted in Fuel Surcharges, they "are entitled to rely on the HDF Index as a proxy to measure changes in their internal fuel costs." Id. at 14. Having created the safe harbor "to encourage use of the HDF Index" to measure changes in rail carrier fuel costs, id. at 9, the Board concluded that because BNSF had used the HDF Index in the fuel surcharge program at issue, the Board had to use that index as well to calculate BNSF's incremental fuel costs. Id. ("what the safe harbor means is that if a rail carrier uses the HDF Index [in its fuel surcharge program] to measure changes in its fuel costs, then that is how the Board will measure these changes as well, rather than by looking at evidence of changes in the rail carrier's internal fuel costs").⁵

Performing its own examination of BNSF's month-to-month incremental fuel costs over a five-year period, the Board determined that, as measured by the HDF Index, BNSF's total incremental fuel costs for the traffic subject to the challenged fuel surcharge program only narrowly exceeded the fuel surcharge revenues BNSF collected on that traffic. The Board observed, however, that if BNSF's incremental fuel costs were instead measured by the rail carrier's internal fuel costs, BNSF's fuel surcharge revenues would have exceeded its incremental fuel costs by \$181 million. Id. at 14. This occurred because changes in the HDF Index did not precisely reflect changes in BNSF's internal fuel costs. In particular, the "spread"—i.e., the overall difference between the average retail price per gallon as reflected in the HDF Index and the lower wholesale price per gallon actually paid by BNSF—increased significantly more than it decreased over the five-year analysis period.

This result concerned the Board. Pointing out that it had not rejected Cargill's Profit Center claim lightly, the Board noted that in Fuel Surcharges neither it nor any commenting party had foreseen a situation where the spread between a rail carrier's internal fuel costs and the HDF Index would diverge as it had in Cargill and that it was unclear if this recovery was a

⁵ The Board also rejected Cargill's claim that the general formula used to calculate the fuel surcharges bore no reasonable nexus to, and overstated, fuel consumption for the BNSF system traffic to which the surcharge was applied.

unique situation affecting BNSF during a period of high fuel price volatility or if it was, or was likely to have been, a more widespread phenomenon that could undermine the usefulness of the safe harbor provision. The Board expressed concern that the safe harbor provision could give rail carriers an unintended advantage: if a rail carrier's internal fuel costs rise relative to HDF Index prices, the rail carrier could revise its fuel surcharge level upward to ensure that it fully recovers its incremental fuel costs; on the other hand, if a rail carrier's internal fuel costs declined relative to HDF Index prices (as happened to BNSF), the rail carrier could leave its fuel surcharge level in place, creating a spread and excessive revenues. Id. at 17. This could allow a rail carrier to recover substantially more than its incremental internal fuel costs yet still be permissible under the safe harbor.

The Board found no evidence to suggest that BNSF had intentionally taken advantage of this aspect of the safe harbor. Nevertheless, because of the possibility of future abuse, the Board stated that it would give shippers, rail carriers, and other interested persons the opportunity to file comments on the issue.

We are seeking comments from the public on whether the safe harbor provision of Fuel Surcharges should be modified or removed. In particular, we seek comments on: whether or not the phenomenon that we observed in Cargill (a growing spread between a rail carrier's internal fuel costs and the HDF Index) was likely an aberration; whether there are problems associated with the Board's use of the HDF Index as a safe harbor in judging the reasonableness of fuel surcharge programs; whether any problems with the safe harbor could be addressed through a modification of it; and whether any problems with the safe harbor are outweighed by its benefits. Parties are also encouraged to comment on any other matter that they believe bears on whether the safe harbor should be modified or removed.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

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It is ordered:

1. Comments are due by July 14, 2014. Reply comments are due by August 12, 2014.
2. A copy of this decision will be served on the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.
3. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.