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**VIA ELECTRONIC FILING**

Ms. Cynthia Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
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ENTERED  
Office of Proceedings  
April 2, 2012  
Part of  
Public Record

Re: ***Cargill, Incorporated v. BNSF Ry. Co.***,  
STB Finance Docket 42120

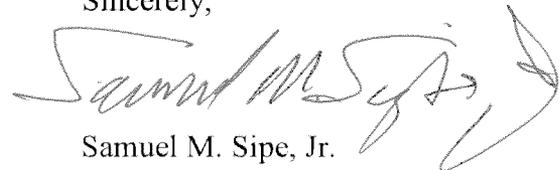
Dear Ms. Brown:

Enclosed for filing in the above-captioned matter is the Public version of BNSF Railway Company's ("BNSF") Final Brief on Liability Issues.

We are filing under separate cover the Highly Confidential version of BNSF's Final Brief on Liability Issues.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Samuel M. Sipe, Jr.

Enclosures

cc: Counsel of Record

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB Docket No. 42120**

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**CARGILL, INCORPORATED v. BNSF RAILWAY COMPANY**

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**BNSF RAILWAY COMPANY'S FINAL BRIEF  
ON LIABILITY ISSUES**

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## BNSF RAILWAY COMPANY'S FINAL BRIEF ON LIABILITY ISSUES

### I. Introduction

Pursuant to the Board's decision served on March 1, 2012, this is BNSF Railway Company's ("BNSF") final brief in the merits phase of this proceeding. For the reasons summarized in this introduction and set out more fully in the remainder of this brief, the Board should deny Cargill's unreasonable practice claim and dismiss its complaint.

BNSF was the first Class I railroad to adopt a mileage-based surcharge ("MBFSC"). BNSF designed its MBFSC to be a cost recovery mechanism, not a profit center. BNSF carefully monitored the performance of its MBFSC over time to make sure that it did not become a profit center as a result of changes in underlying economic or transportation conditions.

Cargill avoids any consideration of BNSF's fuel surcharge design decisions or whether BNSF acted reasonably in monitoring its fuel surcharge in a period of great economic volatility. Cargill contends that the only issue in the case is whether, in hindsight, the fuel surcharge generated *any* revenues in excess of incremental fuel costs. But this is an unreasonable practice case. In an unreasonable practice challenge to a fuel surcharge, the Board has explained that the complaining shipper must show that a carrier made a misrepresentation by calling a charge that was designed to be a profit center a "fuel" surcharge. The question of the truthfulness of a carrier's representations regarding a fuel surcharge cannot be answered by looking after-the-fact at how the surcharge performed using data that could not possibly have been available to the carrier at the time the fuel surcharge was designed. As reflected by the Board's "reasonable nexus" standard, railroads cannot be expected to predict with certainty the performance of their fuel surcharges and the market factors that may affect them over time. The inquiry in an

unreasonable practice case must focus on what the carrier knew or should have known and whether the carrier acted reasonably based on that knowledge.

The record shows that BNSF designed a fuel surcharge that was appropriately intended to recover only incremental fuel costs. The two questions posed by the Board in advance of briefing ask how the Board should assess the magnitude and timing of any “excess recovery” or “over recovery” of incremental fuel costs under a fuel surcharge. In this case, BNSF monitored the performance of the surcharge and never found a basis for concluding that the design was flawed. Nevertheless, the Board’s thoughtful questions raise important policy matters regarding the rail industry’s ability to capture likely ever-escalating fuel expenses in a practical and transparent way going forward.

As a matter of rational policy, the Board must give carriers substantial latitude in designing a fuel cost recovery mechanism. Indeed, the Board stated in *Fuel Surcharges III*<sup>1</sup> that it would “afford individual carriers the flexibility to devise fuel surcharge practices that work best for them, within the limits described herein.” *Fuel Surcharges III* at 10. Where, as here, a carrier has acted in good faith to design a simple and effective cost recovery mechanism, the Board’s “reasonable nexus” standard should not be used to punish a carrier for the failure to meet a standard of perfection.

Moreover, any consideration of “over recovery” must be consistent with the governing legal standard, which looks at the truthfulness of the carrier’s representation that the surcharge was designed only to recover incremental fuel costs associated with the traffic subject to that

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<sup>1</sup> For purposes of this brief, as in BNSF’s Reply Evidence and Argument filed October 24, 2011 (hereafter “BNSF Reply Evidence”), BNSF refers to the Board’s March 14, 2006 Notice in Ex Parte No. 661 as *Fuel Surcharges I*, the Board’s proposed rule in Ex Parte No. 661, issued on August 3, 2006, as *Fuel Surcharges II*, and the Board’s decision in Ex Parte No. 661, served January 26, 2007, as *Fuel Surcharges III*.

surcharge. Thus, the inquiry becomes whether there is evidence of a substantial and persistent over recovery that should have given the carrier reason to believe that the design of the surcharge needed to be changed. Here, BNSF carried out regular internal analyses of fuel cost recovery after its MBFSC was implemented. Those analyses confirmed the reasonableness of the fuel surcharge design.

BNSF's internal assessments of fuel cost recovery showed that the MBFSC performed well over time. Following the onset of the Great Recession, BNSF's internal analyses {

}<sup>2</sup> BNSF's experience was that this "spread" was a highly variable factor that could serve to increase or decrease the recovery of incremental fuel costs. The Board has strongly encouraged railroads to use the HDF index and expressly established a safe harbor for railroads that chose to use the HDF index as a proxy for their actual fuel costs in fuel surcharge mechanisms. When the effect of the "spread" between the HDF index and BNSF's internal fuel price is excluded from the recovery analysis, consistent with the Board's safe harbor, the recovery analyses demonstrate that BNSF's MBFSC did not recover more than BNSF's incremental fuel costs.<sup>3</sup> Therefore, BNSF reasonably concluded that the MBFSC continued to work as it was originally designed and that no fundamental changes needed to be made.

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<sup>2</sup> “{ }” indicate Highly Confidential material that has been redacted from the public version of the final brief.

<sup>3</sup> Cargill makes much noise about the supposed { } over recovery that Cargill calculated from BNSF's analysis of public data. But Cargill ignores BNSF's evidence that the entire { } difference between incremental fuel costs and surcharge revenues would

Cargill ignores the Board’s established reasonableness standards applicable to fuel surcharges because for Cargill this case is, and always has been, about damages. Cargill seeks a \$26.8 million payout for itself based on a challenge to the first rail fuel surcharge that voluntarily linked fuel cost recovery to mileage, a design feature that the Board endorsed in *Fuel Surcharges III*. But the evidence shows that BNSF acted reasonably and in good faith to design and maintain a fuel surcharge that only recovered incremental fuel costs. Cargill has failed to demonstrate otherwise. It has not met the Board’s unreasonable practice standard and its complaint must be dismissed.

**II. Cargill’s Claim Fails Because Cargill Seeks To Apply A Standard Of Absolute Precision That Is Both Inconsistent With The Board’s Established Precedent And Impossible For Any Carrier To Satisfy.**

In its Reply Evidence, BNSF demonstrated that Cargill had failed in its opening evidence to satisfy the standards established by the Board in prior unreasonable practice cases dealing with fuel surcharges. The core principle set out in the Board’s decisions in *Fuel Surcharges III*, *Dairyland* and *Cargill*<sup>4</sup> is that a surcharge mechanism can only be an unreasonable practice where it is labeled a fuel surcharge but is in fact designed by the carrier to be a profit center. Cargill insisted on opening that a fuel surcharge could be shown to constitute an unreasonable practice merely by the fact that it yielded an over-recovery – fuel surcharge revenues in excess of incremental fuel costs – as determined by an after-the-fact analysis. On rebuttal, Cargill stubbornly adhered to this incorrect standard of over-recovery, persisting in its claim that BNSF’s objectives in designing the surcharge are irrelevant and that the only question in the case

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be eliminated if BNSF’s internal fuel cost had maintained the same relationship with the HDF index price that existed at the outset of the MBFSC, instead of diverging from it to a somewhat greater degree over time.

<sup>4</sup> *Dairyland Power Coop. v. Union Pacific R.R. Co.*, STB Docket No. 42105 (served July 29, 2008) (“*Dairyland*”); *Cargill v. BNSF*, STB Docket No. 42129 (served January 4, 2011) (“*Cargill*”).

is whether, in retrospect, the fuel surcharge yielded any level of over-recovery. The Board should have no hesitation in concluding that Cargill has failed to satisfy the proper standard.

**A. The Misrepresentation Standard In An Unreasonable Practice Case Cannot Be Met Only With An After-The-Fact Showing of Over-Recovery.**

In its prior fuel surcharge decisions, the Board has articulated its standards for determining when a fuel surcharge can be found to be an unreasonable practice with an eye to distinguishing unreasonable practice claims from unreasonable rate claims. Recognizing that the D.C. Circuit's decision in *Union Pacific R.R. Co. v. I.C.C.*, 867 F.2d 646 (D.C. Cir. 1989) ("*Union Pacific*") does not allow a shipper to challenge the level of a fuel surcharge without satisfying the statutory market dominance prerequisite for a rate challenge, the Board has held that the critical element in determining whether a fuel surcharge is an unreasonable practice is the "truthfulness of the label given to the surcharge." *Cargill* at 2. Specifically, the Board has stated that "railroads should not call a charge a fuel surcharge if it is designed to recover more than the incremental cost of fuel attributable to the movement involved." *Fuel Surcharges II*, at 4-5.<sup>5</sup>

Determining whether a carrier was "truthful" in calling a charge a "fuel" surcharge necessarily entails a consideration of the carrier's objectives at the time it designed its fuel surcharge. If a carrier consciously designs a surcharge to be a fuel cost recovery mechanism, not a profit center, and makes reasonable design decisions to implement that cost-recovery objective, the carrier clearly acts "truthfully" in calling the surcharge a fuel surcharge. *Cargill* entirely avoids this inquiry. It bases its claim of unreasonableness solely on a supposed showing that

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<sup>5</sup> Moreover, the reasonableness of a carrier's design choices must be assessed based on the expected performance of the fuel surcharge as applied to the aggregate group of movements to which the surcharge is applied, as opposed to individual movements or subgroups of movements. *Cargill* at 5.

“the revenues [BNSF] was collecting under the assailed tariff item . . . exceeded BNSF’s actual incremental fuel cost increases on this traffic . . . , thus turning a cost recovery vehicle into an unlawful profit center.” Rebuttal Statement of Cargill at 1-2, filed November 23, 2011 (hereafter “Cargill Rebuttal”). This alleged showing of over-recovery on an after-the-fact basis cannot constitute a showing that BNSF *designed* the challenged MBFSC “to recover more than the incremental cost of fuel attributable to the movement involved.” *Dairyland* at 1.

Indeed, Cargill makes only a half-hearted attempt to refute BNSF’s extensive evidence presented on reply that BNSF designed its MBFSC to be a cost recovery mechanism and had no intent to use its fuel surcharge as a profit center. Instead, the thrust of Cargill’s argument is that by relying on its objectives in designing the fuel surcharge, “BNSF is grasping at straws.” Cargill Rebuttal at 4. However, the Board’s fuel surcharge jurisprudence makes clear that what makes a fuel surcharge *practice* unreasonable is the mislabeling of the surcharge as a cost recovery mechanism when the carrier knew or should have known that the surcharge has been designed to be a profit center. The Board has repeatedly stated that the issue in an unreasonable practices case is the truthfulness of a carrier’s representation that the charge is a “fuel” surcharge.<sup>6</sup> Cargill cannot simply walk away from this standard by claiming it does not exist.

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<sup>6</sup> In *Fuel Surcharges III*, the Board explained that the issue in an unreasonable practices case regarding fuel surcharges is whether “carriers [were] raising their rates on the *pretext* of recovering increased fuel costs.” *Fuel Surcharges III*, at 7 (emphasis added). Similarly, the Board explained that its concern about “mislabeling” is that it “appears designed to avoid the type of response a carrier would likely receive if it were to honestly inform a shipper that a higher rate was being imposed to recover not only the increased fuel cost of serving that shipper, but also the increased cost of fuel for another shipper’s traffic.” *Id.* By focusing on the truthfulness of a carrier’s representations, the Board sought to distinguish unreasonable practice cases from unreasonable rate cases, where the carrier’s state of mind is irrelevant. Because the FTC does not and need not make such a distinction, the FTC cases cited by Cargill at pages 38-39 of its Rebuttal for the proposition that intent does not have to be shown in a misrepresentation case are not relevant.

Cargill contends that the carrier's objectives have no place in the Board's unreasonable practice standard for fuel surcharges because "under BNSF's [intent] test, the Board will be drawn into complex questions concerning a rail carrier's 'intent.'" Cargill Rebuttal at 4. But the Board should not back away from the standard it has adopted based on unsubstantiated claims that it will get bogged down trying to discern a carrier's subjective intent regarding its fuel surcharge. Some inquiry into the bases for a carrier's design decisions is unavoidable because the element of misrepresentation is essential to distinguishing an unreasonable practice case from a challenge to the level of a fuel surcharge. In any event, the Board's intentional mislabeling standard is not likely to require that the Board get into difficult issues of subjective intent. In this case, the objective evidence gleaned from documents produced in discovery makes clear what BNSF's goal was in designing its mileage based fuel surcharge. As BNSF's Executive Vice President and Chief Marketing Officer John Lanigan wrote in an internal e-mail, {

}<sup>7</sup> In addition to such objective indications of BNSF's fuel surcharge policy, it is clear on the face of BNSF's MBFSC that its design elements, including the miles-per-gallon ("MPG") element, are related to attributes of a movement that directly affect the amount of fuel consumed.<sup>8</sup>

While dismissing the concept of intent, Cargill acknowledges that consideration of the design elements of a fuel surcharge mechanism is part of the Board's unreasonable practice inquiry. But in Cargill's analysis, consideration of the fuel surcharge design elements is entirely derivative of Cargill's retrospective overcharge calculation. Instead of assessing the design

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<sup>7</sup> Exh. 1 to Verified Statement of John P. Lanigan (hereafter "Lanigan VS") included with BNSF's Reply Evidence; *see also* Lanigan VS at 2.

<sup>8</sup> In *Fuel Surcharges III*, no specific inquiry into intent was necessary because the Board concluded that on the face of it, the design elements of the percent-of-rate fuel surcharge were unrelated to fuel consumption on a particular movement.

elements of BNSF's MBFSC from the perspective of how BNSF believed they would work at the time BNSF designed its MBFSC, Cargill focuses solely on the results of its after-the-fact calculation of over recovery and claims that the over recovery is due to "design flaws." Cargill Rebuttal at 2.<sup>9</sup>

Notably, Cargill does not allege that BNSF's design elements themselves were inappropriate. It does not "challenge the factors used to calculate the surcharge on the ground that they are not attributes of a movement that directly affect the amount of fuel consumed." *Dairyland* at 6. Instead, Cargill contends that the *numerical values* BNSF assigned to its fuel surcharge design elements were wrong. For example, Cargill argues that BNSF's MPG design element should have been given a numerical value of 5.13 or 4.70, based on Cargill's after-the-fact calculations, instead of the value of 4 that BNSF selected in 2005 when it designed its MBFSC. This assertion is based solely on Cargill's after-the-fact calculations (which are inaccurate as discussed below) and not on any actual flaws in the design of the fuel surcharge or any evidence that BNSF acted unreasonably when it made those design decisions.<sup>10</sup>

#### **B. Cargill Persists In Treating This Case Like A Rate Case.**

Cargill's unwillingness to address the core issue of whether BNSF's fuel surcharge mechanism was designed to be a fuel cost recovery mechanism or intended to be a profit center underscores the fundamentally improper orientation of its case. Cargill's claim is, and always

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<sup>9</sup> If a railroad made reasonable design choices for a cost-recovery mechanism based on data that were available at the time the surcharge was designed, then the railroad did not make a "misrepresentation" when it described the fuel surcharge as a cost-recovery mechanism regardless of whether, in hindsight, that mechanism supposedly recovered more than the railroad's actual incremental costs.

<sup>10</sup> The cases cited by Cargill at page 42 of its Rebuttal are inapposite. BNSF is not arguing that the Board must accept BNSF's design choices without any consideration of the reasonableness of those choices. BNSF's argument is that BNSF made reasonable choices based on the facts and data available to it.

has been, an overcharge claim rather than an unreasonable practice claim. From the outset of this case, Cargill has signaled that its approach to demonstrating the unreasonableness of BNSF's challenged fuel surcharge would be to show that BNSF's fuel surcharge revenues are too high, *i.e.*, that fuel surcharge revenues exceed incremental fuel costs.<sup>11</sup> At the end of the day, Cargill's real claim is an overcharge claim and a claim for damages for those overcharges.

Such an approach might be appropriate in a case challenging the reasonableness of a rate (if the underlying overcharge analysis were correct, which is not the case here), but it does not satisfy the legal requirement for an unreasonable practices case. The Board has made clear that a finding of liability in an unreasonable practice fuel surcharge case is grounded on a theory of misrepresentation and cannot be premised exclusively on the existence of a supposed over-recovery.

### **III. The Board's Thoughtful Questions Raise Important Policy Issues And Are Best Answered On A Case-By-Case Basis By Referring To The Standards Contained In Established Board Precedent.**

In its March 1 order establishing a briefing schedule for this case, the Board posed the following questions which it asked the parties to address in their merits briefs:

1. Assuming that a fuel surcharge program need not produce revenues that match precisely the carrier's incremental fuel costs to be reasonable, what standard should the Board use, and what factor(s) should it consider, in determining what level of excess recovery would demonstrate an unreasonable practice?
2. Putting aside the issue of whether a fuel surcharge program was reasonable when designed, at what point in time would a carrier's over recovery of incremental fuel costs become an unreasonable practice?

Both questions ask about how the Board should assess the significance of different levels of "excess recovery" or "over recovery." While there is some overlap in the factors relevant to

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<sup>11</sup> See, e.g., Cargill Complaint filed April 19, 2010 at ¶¶6-8.

both questions, Question 1 appears to focus on the significance of “over recovery” in assessing the reasonableness of the fuel surcharge as designed, while Question 2 focuses on the significance of “over recovery” in evaluating the continued reasonableness of the fuel surcharge after it has been implemented. These questions raise important policy issues regarding the ability of rail carriers to practically and transparently capture fuel expenses going forward.

**1. Question 1 – The Board Should Look To Its Established Precedent For Factors To Consider When Judging The Design Of A Fuel Surcharge.**

The premise of Question 1 is that a fuel surcharge program need not produce revenues that match precisely the carrier’s incremental fuel costs to be reasonable. This premise, which is directly contrary to Cargill’s theory of the case, is well established in the Board’s prior fuel surcharge decisions. In *Dairyland*, the Board stated that “there are . . . practical reasons why we cannot expect a precise match between fuel surcharge revenues and increased fuel costs for any one shipper.” *Dairyland* at 5. In its Reply Evidence at 28-29, BNSF explained why the same is true for fuel surcharge revenues in the aggregate for the thousands of BNSF movements subject to the challenged MBFSC for a five year period, which is the scope of Cargill’s analysis. In its rebuttal submission, Cargill did not take issue with this explanation.

The Board’s recognition that a precise match between revenues and incremental costs cannot be expected even under a well-designed fuel surcharge mechanism stems both from the various economic forces that affect fuel surcharge performance over time and from the fact that carriers must be granted some leeway in designing fuel surcharges so that they will be workable in the real world. As the Board stated in *Fuel Surcharges III* at 9:

[W]e are not precluding railroads from incorporating as many factors that affect fuel consumption as they wish in calculating fuel surcharges. Nor are we requiring them to incorporate every conceivable such factor, as we agree that would be impracticable.

The Board recognized that railroads need to strike a balance between precision on the one hand and transparency, simplicity and ease of administration on the other in the design of fuel surcharges. An insistence on absolute precision is impractical and unrealistic. The Board's "reasonable nexus" standard correctly acknowledges this reality.

Recognizing that some divergence from absolute precision in fuel surcharge performance is unavoidable, the question of what standards and factors the Board should use to determine what level of excess revenues might demonstrate an unreasonable practice is best answered by reference to the standards of reasonableness that the Board has already articulated in its prior fuel surcharge decisions. As explained above, the Board's misrepresentation standard requires inquiry into a carrier's objectives and the reasonableness of design decisions made to implement those objectives.

If a carrier intentionally designs a mechanism to function as a profit center, even a modest level of over recovery would tend to corroborate the carrier's improper intent and support a finding that the mechanism constituted an unreasonable practice. However, where the carrier's objective is to design a fuel surcharge that functions as a cost recovery mechanism, which is the case here, the Board's standard that the fuel surcharge should bear a "reasonable nexus" to fuel consumption governs the assessment of the reasonableness of the carrier's design choices. *Fuel Surcharges III* at 9. In framing the issue in terms of a "reasonable nexus," the Board clearly indicated that it did not expect that even a well-designed fuel surcharge would "produce revenues that match precisely the carrier's incremental fuel costs." But it also appears that when it articulated this standard, the Board did not believe that it was in a position to make a quantitative judgment applicable to all circumstances as to the precise point at which the nexus between fuel surcharge and fuel consumption would become unreasonable.

Consistent with the Board's general approach to resolving unreasonable practice claims based on the facts of individual cases, the question of whether a fuel surcharge was designed to have a "reasonable nexus" to fuel consumption could be addressed based on case specific evidence addressed to at least five factors. Those factors are:

(1) The facts known to the carrier at the time the surcharge was designed. Since the Board cannot expect railroads to be clairvoyant about the performance of volatile commodity markets over time, the reasonableness of the carrier's design decisions must be assessed based on information and estimates available to the carrier when the design decisions were made, not based on an after-the-fact analysis using data that were not available to the carrier at the time a fuel surcharge was designed.

(2) The need for simplicity and ease of administration. Railroads and shippers alike value simplicity and ease of administration, even if those objectives require some trade off with precision in fuel cost recovery.

(3) Adherence to STB precedent in fuel surcharge design. The Board has made it clear that mileage is a valid basis on which to design a fuel surcharge and that it is not necessary for a railroad to include all factors affecting fuel consumption in the surcharge design. The Board has also made it clear that in the interest of transparency, a railroad should use a public fuel price index (and specifically endorsed the HDF index) as opposed to internal fuel price data as the basis for assessing the surcharge.

(4) Traffic covered by the surcharge. The Board should not measure fuel surcharge performance on a customer-by-customer basis, but should continue to defer to the carrier's decisions about the traffic group to which the surcharge applies, consistent with the Board's statement in *Fuel Surcharges III* that it would "afford individual carriers the flexibility to devise

fuel surcharge practices that work best for them, within the limits described herein.” *Fuel Surcharges III* at 10. The Board has already stated that the reasonableness of the surcharge design should be assessed based on the traffic covered by the surcharge in the aggregate, not based on sub-groups or individual movements. *Cargill* at 5.

(5) Preserve incentives for fuel efficiency initiatives. The design of a fuel surcharge should preserve the incentives for carriers to make capital expenditures that will improve fuel efficiency. A related factor is discussed in more detail below in response to Question 2.

Additional factors would be relevant after the surcharge has been implemented, such as the performance of the surcharge over time, the specific elements of the surcharge design responsible for any over recovery, the impact of external economic forces, and the need to account for the additional costs associated with fuel efficiency initiatives. Those factors are discussed in more detail in response to Question 2, which expressly addresses the relevance of any over recovery that appears after the surcharge has been implemented.

**2. Question 2 – Any Judgment Of The Ongoing Performance Of A Fuel Surcharge Must Recognize A Complex Set Of Circumstances While Balancing Competing Considerations.**

The issue posed by Question 2 can be reframed in light of the Board’s reasonable nexus standard as follows: At what point in time should a carrier that has implemented a well-designed fuel surcharge become aware that its original objective is no longer being fulfilled and that the fuel surcharge cost recovery mechanism no longer bears a reasonable nexus to fuel consumption?

As a logical matter, it would seem that a fuel surcharge provision could be found unreasonable at that point in time when the carrier that assesses the fuel surcharge knows or should know that the surcharge no longer bears a reasonable nexus to fuel consumption. From that point in time forward, a carrier might be found to have intentionally mislabeled the

surcharge mechanism as a “fuel surcharge” by failing to make changes necessary to maintain the surcharge’s reasonable nexus to fuel consumption. This inquiry should be undertaken with reference to the five factors identified in response to Question 1, as well as the following four additional factors.

(6) The performance of the surcharge over time. BNSF’s experience is that the level of fuel surcharge revenue vis-à-vis estimated incremental fuel cost can vary over time. A short-term trend of over recovery may be followed by a period of under recovery, {  
 }, and such a pattern of mixed over- and under-recovery would not lead a reasonable person to conclude that the fuel surcharge lacked a reasonable nexus to fuel consumption. If a pattern of persistent and pronounced over recovery becomes apparent over a sufficiently long period of time, it would be appropriate to investigate the causes of such a pattern.

(7) The specific elements of the FSC design causing over recovery. Depending on the specific design element(s) responsible for an over recovery, an adjustment to the surcharge design may or may not be appropriate. For example, BNSF’s MBFSC was designed using the HDF fuel price as the proxy for BNSF’s internal cost of fuel, {

}

However, the Board has made it clear that it expects carriers to use a public fuel price index in their fuel surcharges and it created a safe harbor for the use of the HDF index as a proxy for a railroad’s internal fuel price. *Fuel Surcharges III* at 11. If an over recovery is caused by a

carrier's use of the HDF mechanism, the existence of the over recovery could not be grounds for concluding that the fuel surcharge design had become unreasonable.

(8) External economic forces associated with varying levels of recovery. Changes in the pattern of fuel surcharge recovery can occur as a result of external economic forces that could not have been anticipated at the time a fuel surcharge was designed. This was the case with BNSF's MBFSC in 2008-2009. Enormous volatility in fuel prices and in the U.S. economy as a whole during these years made it impossible to draw any long-term conclusions about the performance of a fuel surcharge.

(9) Costs of fuel efficiency initiatives affect what is "recovery." A carrier's incremental fuel costs are significantly affected by capital expenditures to improve fuel efficiency that may not be reflected in cost recovery analyses. Capital expenditures for fuel efficiency initiatives should be taken into account in analyzing cost recovery to avoid eliminating the incentive that a carrier has to make investments in fuel efficiency initiatives. This would be consistent with the Rail Transportation Policy, which instructs the Board to "encourage and promote energy conservation." 49 U.S.C. §10101(14). In this case, BNSF showed that it incurred substantial fuel-related costs, including costs associated with fuel efficiency initiatives, that were not included in its internal fuel cost recovery analyses.<sup>12</sup> In assessing the reasonableness of fuel surcharges, the Board should continue to encourage carriers to make capital investments that will improve fuel efficiency.

In sum, identifying a point in time when a fuel surcharge mechanism no longer bears a reasonable nexus to fuel consumption would involve applying judgment to a complex set of

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<sup>12</sup> See Verified Statement of Paul B. Anderson, BNSF's Vice President, Marketing Support at 30 (hereafter "Anderson VS"); see also Verified Statement of BNSF's witness Mr. Fisher at 37-39 (hereafter "Fisher VS"). Both verified statements are attached to BNSF's Reply Evidence.

circumstances and balancing competing considerations. Moreover, for purposes of the current case, it is important to emphasize that the Board has not heretofore spelled out what level of excess recovery might result in a finding of no reasonable nexus. Based on prior Board decisions, BNSF – the first railroad to adopt voluntarily a mileage-based surcharge – had every reason to believe that a carefully designed mileage-based fuel surcharge would be found to be reasonable. Where the Board has endorsed the use of mileage-based fuel surcharges and has given no explicit guidance as to the point where a well-designed fuel surcharge would become an unreasonable practice, there would be no basis for finding that BNSF is liable for the payment of damages. BNSF acted in good faith to implement the Board’s fuel surcharge objectives. Even if the Board were to conclude in hindsight that BNSF’s fuel surcharge had crossed some unidentified line based on the level of historical cost recovery, the only appropriate relief would be injunctive relief.

#### **IV. BNSF Made Reasonable Design Choices And Carefully Monitored The Performance Of Its MBFSC After Implementation.**

As shown above, Cargill ignored the relevant legal standard in this unreasonable practice case, choosing to rest its liability case entirely on an after-the-fact quantitative analysis of the fuel cost recovery under the challenged fuel surcharge rather than an investigation of the reasonableness of BNSF’s design choices at the time those choices were made. Since Cargill, as the complainant, has the burden of proof, BNSF did not need to demonstrate the reasonableness of its design choices or of its monitoring of the MBFSC following implementation.

Nevertheless, BNSF submitted extensive, and largely unrebutted evidence on Reply showing that BNSF carefully designed the MBFSC to be a cost recovery mechanism and not a profit center, consistent with the legal standard established by the Board that “railroads should not call a charge a fuel surcharge if it is designed to recover more than the incremental cost of

fuel attributable to the movement involved.” *Fuel Surcharges II* at 4-5. BNSF’s evidence also shows that BNSF monitored the performance of the MBFSC over time to evaluate whether it retained its reasonable nexus to cost recovery. In short, the record shows that BNSF acted reasonably both in designing and implementing the fuel surcharge.

**A. The MBFSC Was Reasonably Designed.**

On Reply, BNSF sponsored verified statements of John P. Lanigan, BNSF’s Executive Vice President and Chief Marketing Officer and Paul B. Anderson, BNSF’s Vice President, Marketing Support, which described in detail BNSF’s objectives in designing the MBFSC and the bases for the numerous design decisions made to implement those objectives. As explained by Messrs. Lanigan and Anderson, BNSF decided in 2005 to adopt mileage-based fuel surcharges out of a desire to accommodate its shippers’ interest in a fair mechanism that was more directly tied to fuel costs than previous percent-of-rate fuel surcharges.<sup>13</sup> Mr. Lanigan made it clear to BNSF employees working on the design of the surcharge mechanisms that the overall goal of the mileage-based fuel surcharges was to recover BNSF’s incremental fuel costs and *not* to function as a profit center.<sup>14</sup> Cargill does not even attempt to rebut BNSF’s evidence on the cost recovery objective that was the basis of all decisions that BNSF made in designing the fuel surcharge.

BNSF also presented extensive evidence showing that its employees made reasonable design decisions in carrying out BNSF’s cost recovery objective based on the information available in 2005. While asserting that the reasonableness of BNSF’s design choices is irrelevant, Cargill makes a half-hearted attempt to show on pages 43-44 of its Rebuttal that BNSF knew in 2005 when designing the surcharge that some of its design choices would cause

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<sup>13</sup> Lanigan VS at 3-4; Anderson VS at 3-4.

<sup>14</sup> Lanigan VS at 5 and referenced exhibits.

an over recovery of BNSF's incremental fuel costs. As shown below, Cargill's criticisms are meritless.<sup>15</sup>

**1. BNSF Reasonably Adopted A Single Mileage-Based Fuel Surcharge For Carload Traffic Other Than Coal.**

As a preliminary matter, BNSF needed to determine what traffic groups would be subject to the new mileage-based fuel surcharge. Consistent with BNSF's objectives of simplicity and ease of administration, BNSF decided to adopt a single mileage-based fuel surcharge that would apply to all carload traffic, including agricultural products ("Ag") and industrial products ("IP"), other than unit train coal and taconite.<sup>16</sup>

Cargill criticizes BNSF's decision to combine Ag and IP traffic on grounds that {

}<sup>17</sup> Instead of creating separate Ag and IP fuel surcharges, BNSF considered breaking out

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<sup>15</sup> Also without merit are complaints by Cargill and its experts regarding the sufficiency of BNSF's document production. *See e.g.*, Cargill Rebuttal at 34 (BNSF "did not produce" regression). This is a barely disguised, irresponsible effort to prejudice the Board against BNSF's substantive arguments. In fact, BNSF produced a massive volume of discovery in this case – over 300,000 pages of documents and thousands of spreadsheets in electronic format. It is wrong for Cargill to suggest that BNSF held back any responsive documents that BNSF identified in its extensive search for materials responsive to Cargill's discovery requests.

<sup>16</sup> Anderson VS at 4-6; Lanigan VS at 9-11.

<sup>17</sup> Anderson VS at 5. BNSF's workpapers show that {  
} *See* "Train Symbol Analysis.xlsx," worksheet "Cargill Ag."

Ag shuttle traffic from the carload fuel surcharge but concluded that the Ag shuttle trains should not be given different fuel surcharge treatment to {  
}, among other reasons.<sup>18</sup> These were reasonable decisions that were made with consideration of several factors, including fairness to Ag and IP shippers.

**2. The 4 MPG Assumption Underlying The Fuel Surcharge Mechanism Was Reasonable.**

The design feature at the heart of a mileage-based fuel surcharge is the assumption regarding the fuel consumption of the traffic covered by the surcharge on an MPG basis. BNSF did extensive analyses in 2005 of available data and concluded that a 4 MPG assumption best approximated the fuel consumption characteristics of Ag and IP traffic.<sup>19</sup> As explained below, subsequent analyses of historical data confirmed the reasonableness of a 4 MPG assumption.

Cargill criticizes this BNSF design decision, arguing that BNSF should have used a decimal-based MPG estimate rather than a whole number and that BNSF deliberately “rounded down” to 4 its MPG estimates “to insure that BNSF collected surcharge revenues that exceeded its projected actual incremental fuel cost increases.” Cargill Rebuttal at 43. Cargill’s claim ignores the record. Mr. Anderson explained that BNSF’s internal fuel consumption estimates were imprecise and that many sources of fuel cost were not reflected in those estimates, thus requiring some “rounding down” to ensure fuel cost recovery.<sup>20</sup> In addition, several estimates showing fuel consumption above 4 MPG were made using mileage calculations that were

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<sup>18</sup> Lanigan VS at 9-11.

<sup>19</sup> Anderson VS at 6-13.

<sup>20</sup> Anderson VS at 7-9; Lanigan VS at 6-7.

different from the mileage assumptions that would be used in assessing the fuel surcharge.<sup>21</sup>

When these factors were considered, BNSF concluded that a 4 MPG assumption was a reasonable basis for a fuel surcharge mechanism.<sup>22</sup> This assumption was confirmed by subsequent analyses.

### 3. The Use Of The HDF Index Was Reasonable.

Another central feature of BNSF's fuel surcharge was the use of the HDF index as the basis for determining the price of fuel at any given time. Consistent with the Board's own subsequent conclusion in *Fuel Surcharges III*, BNSF chose to use the HDF index since it was a public index that would allow customers to determine easily the fuel surcharge that would apply to their shipments.<sup>23</sup> Moreover, based upon BNSF's analyses, {

}<sup>24</sup>

Cargill does not directly criticize BNSF's decision to use the HDF index as the fuel price component of the challenged fuel surcharge. However, as discussed more fully below, Cargill argues that BNSF should have built into the MBFSC a mechanism that would adjust the surcharge revenues to account for changes between the HDF index and BNSF's internal fuel cost over time. As BNSF explained on Reply at 60-62, such an approach would have negated the transparency that the Board and BNSF sought to achieve by using a public index rather than internal fuel price data as the basis for determining fuel surcharge amounts. In any event, when

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<sup>21</sup> Anderson VS at 13.

<sup>22</sup> Anderson VS at 6-12; 19.

<sup>23</sup> Anderson VS at 14.

<sup>24</sup> Anderson VS at 14-15.

BNSF designed the fuel surcharge, it had no basis for knowing whether or how the existing spread between the HDF index and BNSF's internal fuel prices might change over time.

**B. BNSF's Post-Implementation Monitoring Of The MBFSC Demonstrated There Was No Design Flaw In The MBFSC That Caused The MBFSC To Become An Unreasonable Practice.**

BNSF knew when it designed the fuel surcharge that its design decisions had been based on estimates and that it could not predict with certainty how various factors affecting the fuel surcharge would behave in the future. Therefore, BNSF made careful, on-going efforts to measure the performance of the MBFSC over time to determine whether the fuel surcharge designed as a cost recovery mechanism was in fact recovering incremental fuel costs and not turning into a profit center.<sup>25</sup>

As noted previously, at the heart of the fuel surcharge is the MPG assumption. Within a year of implementing the fuel surcharge, BNSF began fuel consumption tests that validated the fuel consumption assumptions used to develop its MPG estimates.<sup>26</sup> In addition, each year after implementation, BNSF conducted a specific analysis of the prior year's data to assess the average MPG of the traffic covered by the surcharge. The data consistently showed that the 4 MPG assumption was reasonable, as the Table at page 41 of BNSF's Reply Evidence demonstrates.<sup>27</sup>

BNSF also conducted regular analyses of the revenues generated by the MBFSC compared to estimated incremental fuel costs for the corresponding period. These historical

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<sup>25</sup> Cargill's claim at page 44 of its Rebuttal that {

}

<sup>26</sup> BNSF Reply Evidence at 42; Anderson VS at 25-26.

<sup>27</sup> See also Anderson VS at 22-24.

analyses did not give BNSF any reason to believe that the MBFSC was consistently recovering more than BNSF's incremental fuel costs. {

}<sup>29</sup>

The year 2008 turned out to be a period of great economic turmoil. Fuel costs were extremely volatile, hitting unprecedented highs in the summer only to drop precipitously thereafter. By the latter part of 2008, the United States was in a Great Recession unlike any seen in this country since the 1930s.<sup>30</sup> The economic turmoil in 2008 led to some unexpected fuel surcharge performance. For example, due to the sudden unexpected drop in fuel costs, BNSF postponed in late 2008 a "rebase" of the MBFSC that had been announced earlier in the year.<sup>31</sup> In addition, {

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<sup>28</sup> Anderson VS at 29 and Anderson Exh. 20.

<sup>29</sup> Anderson VS at 28 and Anderson Exh. 21.

<sup>30</sup> BNSF Reply Evidence at 43-44.

<sup>31</sup> Anderson VS at 33-34. BNSF had decided to rebase in light of some customers' preference for an MBFSC with a higher strike price that would reduce the fuel surcharge portion of total freight charges. {

}

<sup>32</sup> Anderson VS at 28.

}<sup>33</sup> Thus, there was no basis for BNSF to conclude, in 2009, looking at historical data for 2008, that the existing MBFSC design needed to be changed.

By 2010, the economy and fuel prices had begun to stabilize somewhat. {

}<sup>36</sup>

In the absence of any design flaw, BNSF did not believe that any change in fuel surcharge design was called for. Nevertheless, in mid-2010, BNSF decided to “rebase” the fuel surcharge by increasing the HDF price at which fuel surcharges would be assessed. Under the new program, which went into effect on January 1, 2011, no fuel surcharge revenue would be generated at all until the HDF price of fuel reached \$2.50 per gallon.<sup>37</sup> This change in the fuel surcharge dramatically reduced the amount of fuel surcharge revenue.

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<sup>33</sup> Anderson VS at 28-29.

<sup>34</sup> BNSF Reply Evidence at 44; Anderson VS at 29.

<sup>35</sup> Anderson VS at 29-30.

<sup>36</sup> Anderson VS at 30.

<sup>37</sup> Anderson VS at 34-35.

In short, BNSF's careful monitoring of the MBFSC showed that it continued to be a reasonable cost recovery mechanism.

**C. Mr. Fisher's Recovery Analysis Confirms That the MBFSC Did Not Over Recover.**

BNSF's witness Mr. Fisher showed in his verified statement that an objective recovery analysis, done using BNSF's reported R-1 data and the Board's URCS costing model, confirms the conclusion BNSF reached using its internal data – there was no design flaw in the MBFSC. First, Mr. Fisher showed that a straightforward analysis of BNSF's URCS costs confirms the reasonableness of the 4 MPG assumption at the heart of the fuel surcharge mechanism.<sup>38</sup>

Second, consistent with BNSF's internal analyses, Mr. Fisher showed that the small over recovery under his URCS-based analysis was entirely due to the fact that the fuel price index used in the MBFSC – the HDF – does not precisely track BNSF's actual fuel costs, although it is highly correlated with those costs.<sup>39</sup> Since the Board established a safe harbor for railroads using the HDF index, Mr. Fisher excluded the effect of the growing spread between BNSF's internal fuel cost and the HDF index from the recovery results. As Mr. Fisher demonstrated in Table 10 of his verified statement at page 43, reproduced below, when the changes over time in the spread between BNSF's internal fuel price and the HDF is excluded from the analysis, it is clear that there has been no over recovery.

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<sup>38</sup> BNSF Reply Evidence at 65; Fisher VS at 7.

<sup>39</sup> Fisher VS at 39-43.

**Fisher Table 10**  
**Fuel Cost Recovery, MBFSC Traffic**

	Cargill	Corrected
2006	{ }	{ }
2007	{ }	{ }
2008	{ }	{ }
2009	{ }	{ }
2010	{ }	{ }
<b>2006-2010 Total</b>	{ }	{ }

**V. The Recovery Analysis Sponsored By Cargill Is Useless As A Basis For Determining Whether BNSF’s Fuel Surcharge Was An Unreasonable Practice.**

In light of the misrepresentation standard for an unreasonable fuel surcharge practice, the inquiry in a case such as this must focus on what the rail carrier knew or should have known about the recovery of fuel costs under the challenged fuel surcharge. Applying that approach here, there is no basis for finding that BNSF’s fuel surcharge was an unreasonable practice when designed or that it became an unreasonable practice after implementation.

Cargill’s purported showing that BNSF’s MBFSC was an unreasonable practice relies entirely on the recovery analysis sponsored by Cargill’s consultants Messrs. Crowley and Mulholland. For the reasons explained previously, Cargill’s approach makes no sense. In effect, Cargill has developed a fuel surcharge in 2011, based on data available only in 2011, and then claimed that BNSF should have been prescient and started applying this invented surcharge in 2006. Further, Cargill’s purported “fixes” to BNSF’s MBFSC are completely arbitrary because they are confined to a single point in time and would never give the “right” answer at any other point in time.

Even if the record did not include evidence on what BNSF actually knew about fuel cost recovery, Cargill’s recovery analysis is useless in determining what BNSF *should have known*, because BNSF would never have carried out a fuel cost recovery analysis in the non-intuitive

and result-oriented way sponsored by Messrs. Crowley and Mulholland. Neither the Board nor any litigant in proceedings before the Board has carried out a fuel cost analysis using such a convoluted approach and the Board could not reasonably have expected a rail carrier to assess fuel cost recovery using such an approach.

In addition, the Crowley/Mulholland recovery analysis has multiple flaws that render its conclusions unreliable. Given the limited length of this final brief, it is not possible to address all of the arguments that Cargill made on rebuttal in support of its recovery analysis, but the key arguments are addressed below.

**Non-Locomotive Fuel Costs.** Cargill improperly excludes non-locomotive costs from its recovery analysis arguing that “[t]he assailed fuel surcharges involve fuel consumption by locomotives.” Cargill Rebuttal at 26. This claim has no foundation. BNSF never stated that the MBFSC was limited to recovery of locomotive fuel costs, and the Board never stated that fuel surcharges must be so limited. While non-locomotive fuel costs may not be directly associated with the miles of a particular movement, those costs nevertheless must be recovered and it is reasonable to include those costs in assessing the performance of a cost recovery mechanism that is based on miles. Indeed, when the Board ordered railroads to report fuel cost data following *Fuel Surcharges III*, the Board specifically instructed the railroads to “include all other fuel used for railroad operations and maintenance, including motor vehicles and power equipment. . . .”<sup>40</sup>

Cargill also makes a number of convoluted and contradictory arguments to the effect that non-locomotive fuel costs are or should be recovered only through base rates. Cargill Rebuttal at 26. The short answer to these arguments is that the Board has made it clear that it does not intend to get into a deconstruction of base rates to determine what portion of a carrier’s

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<sup>40</sup> See Appendix B “Quarterly Report of Fuel Cost, Consumption, and Surcharge Revenue,” *Rail Fuel Surcharges*, STB Ex Parte No. 661 (Sub-No. 1) (served Aug. 14, 2007).

incremental fuel costs is or should be included in base rates. *Cargill* at 6. In assessing fuel cost recovery under a fuel surcharge, it is appropriate to include the incremental costs of *all* fuel that BNSF consumed, in non-locomotive uses as well as in locomotives.

**Fixed Locomotive Fuel Costs.** *Cargill* also argues that the portion of fuel costs that URCS treats as “fixed” costs should be excluded from any recovery analysis. *Cargill Rebuttal* at 23-25. URCS does not treat all locomotive fuel costs as “variable.” A small portion of locomotive fuel costs is treated as “fixed” by the URCS costing model in the sense that those costs are not considered to vary with changes in the level of traffic. *Fisher VS* at 28-31. However, the amount of BNSF’s non-variable or “fixed” URCS locomotive fuel costs clearly changes with changes in the price of fuel. When BNSF’s price of fuel increases, the “fixed” portion of BNSF’s locomotive fuel costs also goes up.

*Cargill* relies on a word game to exclude these increased fuel costs that BNSF indisputably incurs when fuel prices increase. *Cargill* claims that when the Board stated that a railroad should be entitled to recover its “incremental” costs, the Board really meant to say that a railroad should only recover its “variable” costs as measured by URCS. The source for *Cargill*’s semantic argument that “incremental” means “variable” is Investopedia.com.<sup>41</sup> The argument has no merit. When the price of fuel increases above BNSF’s strike price, the “incremental” fuel costs that BNSF experiences are BNSF’s total increased fuel costs, not just a portion of the increased fuel costs that URCS considers variable.<sup>42</sup>

**Hedging.** *Cargill* incorporates the effects of hedging by using BNSF’s post-hedge fuel prices in its recovery analysis. *Cargill Rebuttal* at 27. As BNSF explained in its Reply at 54-55,

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<sup>41</sup> *Crowley/Mulholland Rebuttal VS* at 28, n. 66.

<sup>42</sup> *Cargill* bootstraps its semantic argument with additional arguments to the effect that non-variable locomotive costs should be recovered in base rates. *Cargill Rebuttal* at 24. Those arguments are flawed for the reasons discussed above.

however, hedging is a financial risk management tool that, by its nature, produces uncertain results. The success (or failure) of financial hedging provides no meaningful information at all about the reasonableness of the design of a fuel surcharge. It therefore makes no sense to include the results of hedging in a fuel cost recovery analysis.

**Variable Locomotive Costs.** In calculating the variable portion of BNSF's locomotive fuel costs, Messrs. Crowley/Mulholland came up with a particularly convoluted approach that expressly over-rides the standard, system-average approach of URCS with several movement-specific adjustments. Mr. Fisher explains in detail why the results of the Crowley/Mulholland analysis are meaningless and substantially understate BNSF's URCS variable locomotive costs for the traffic covered by the MBFSC. There is not sufficient space to go into the details of Mr. Fisher's URCS analysis in the context of this final brief, but the issues are fully addressed in Mr. Fisher's reply verified statement at 11-28.

**The Board's Safe Harbor.** Finally, any recovery analysis used to assess the reasonableness of a railroad's fuel surcharge must account for the safe harbor that the Board established for the use of the HDF index. If the cause of any apparent over recovery is an increased divergence over time between the rail carrier's internal fuel price and the HDF index, that difference cannot be the basis for a finding the fuel surcharge is an unreasonable practice.

Cargill seeks to deflect consideration of the safe harbor by characterizing the safe harbor as a "phantom fuel" defense. *See, e.g.,* Cargill Rebuttal at 46. But BNSF is not arguing that its incremental fuel costs include amounts paid for "phantom fuel." BNSF's argument is that any over recovery that results from an increase in the spread between BNSF's internal fuel cost and the HDF index price over time cannot result in an unreasonable practices finding because the Board expressly established a safe harbor for the use of the HDF. To the extent Cargill directly

addresses the meaning of the Board's safe harbor, it disingenuously claims that the safe harbor only goes to the use of the HDF index as a fuel price index in a fuel surcharge versus some other index. But the Board clearly stated that a railroad may use the HDF in its fuel surcharge as a proxy for the railroad's internal fuel price. *Fuel Surcharges III* at 11. The Board did not want railroads to base the fuel surcharge on internal data that would not be transparent to shippers. *Id.* Indeed, the Board expressly rejected the argument made by Mr. Crowley that the HDF should not be used as a proxy for a railroad's internal fuel price data. BNSF Reply Evidence at 61-62. With its dismissive "phantom fuel" argument, Cargill is trying to re-litigate an approach that the Board has expressly rejected.

The Board's adoption of the safe harbor was an important element of its *Fuel Surcharges III* decision. The Board should not countenance a recovery methodology that reads the safe harbor out of existence, as Cargill proposes to do.

**VI. Cargill Has Not Established That It Is Entitled To Any Relief Associated With The Rebased MBFSC That Went Into Effect In 2011.**

As explained above, the MBFSC challenged by Cargill was rebased in January 2011 and has a different strike price than the challenged MBFSC. Cargill made no effort to show that the rebased MBFSC constitutes an unreasonable practice in either its opening or rebuttal evidence. Cargill does not even mention the rebased MBFSC in its rebuttal legal argument. Cargill does not request any relief associated with the rebased MBFSC, either in the form of injunctive relief or damages.

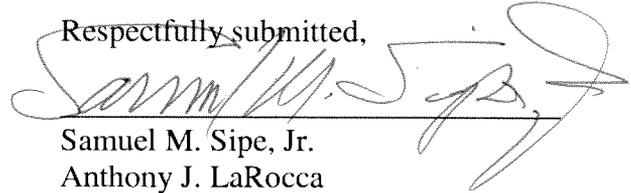
Unlike Cargill's counsel, Mr. Crowley does address the rebased MBFSC. He does not show how the rebased MBFSC supposedly over recovers fuel costs but instead argues that by rebasing BNSF has baked the over recovery of fuel costs into the base rate. Crowley/Mulholland

VS at 59-61. However, the STB has explained that it cannot and will not analyze the base rate to determine whether there is an over recovery of fuel costs. *Cargill* at 6.

**VII. Conclusion**

For the reasons explained above, Cargill has failed to establish that the challenged fuel surcharge is an unreasonable practice. The Board should dismiss Cargill's complaint.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on this 2<sup>nd</sup> day of April, 2012, I have served a copy of the foregoing BNSF Railway Company's Final Brief on Liability Issues on the following by hand delivery and in pdf format via e-mail:

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