

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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Comments

submitted by

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In an Advance Notice of Proposed Rulemaking served on May 29, 2014 (“ANPRM”), the Surface Transportation Board (“Board” or “STB”) solicited comments regarding its “safe harbor” for rail fuel surcharges. The existing “safe harbor” was promulgated by the Board in its decision in Ex Parte 661, Rail Fuel Surcharges, served January 26, 2007 (2007 Fuel Surcharges). In that 2007 Fuel Surcharges decision, the Board prohibited rate-based fuel surcharges as an unreasonable practice, but determined that the Highway Diesel Fuel Index (“EIA/HDF Index”)¹ would be a “safe harbor” upon which carriers could rely to measure changes in fuel costs for purposes of a fuel surcharge program. *Id.*, slip op. at 11. However, based on developments occurring since its 2007 Fuel Surcharges decision, the Board initiated this proceeding to determine if the safe harbor index should be modified or removed.

These Comments are submitted by The National Industrial Transportation League (“League”) in response to the Board’s ANPRM. The League is a national association

¹ The EIA/HDF Index is derived from the Energy Information Administration’s (“EIA”) U.S. No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon).

representing companies engaged in the transportation of goods in both domestic and international commerce. The League was founded in 1907 and currently has over 500 company members who range from some of the largest users of the nation's and the world's transportation systems, to smaller companies engaged in the shipment and receipt of goods. The majority of the League's members include shippers and receivers of goods; however, third party intermediaries, logistics companies, and other entities engaged in the transportation of goods are also members of the League. Many of the League's members ship goods by rail. Rail fuel surcharges significantly affect the prices that users of the rail system must pay for rail transportation, and as set forth in more detail below, the League has been vitally interested in this topic for many years. The League strongly commends the Board for initiating this inquiry.

I. BACKGROUND

The issue of rail fuel surcharges has had a significant history before the Board. The League has been an active participant from the beginning of the Board's formal fuel surcharge proceedings, and even before. In late 2001 and early 2002, the League, at the urging of the Board's Chairman and its staff, entered into discussions with individual rail carriers regarding their fuel surcharge programs. These discussions led to certain reforms by BNSF, CN and CP of their fuel surcharge programs.

In early 2006, after continued public concern, the Board began a proceeding to investigate the application of fuel surcharges by rail carriers. The League submitted written testimony on April 27, 2006. The League's testimony summarized the then-current state of rail fuel surcharges, noting that the various carriers used different indices to measure changes in fuel costs; different trigger points for application of a fuel surcharge in the rate; and different methods to increase the surcharge as the price of fuel increased. See, Ex Parte No. 661, Written

Testimony submitted by the League, dated April 27, 2006, pp. 7-9. Neither the basis nor the rationale for the different carrier's choices was clear or transparent. By comparing the increase in the carriers' surcharge revenue per car with the increase in fuel expense per car and other data, the League indicated that the carriers appeared to be substantially over-recovering their fuel costs. Id., pp. 12-19. Finally, the League laid out detailed principles that it believed should guide the Board in its consideration of this topic, and testified at the hearing called by the Board in May 2006. The League indicated that, while properly-structured rail fuel surcharges might be an appropriate method for recovering changes in a rail carrier's fuel costs, such fuel surcharges should be cost-based and reasonably related to the changes in a rail carrier's fuel costs. Id., pp. 2-3. The League also set forth a variety of other principles that should guide the Board in considering the carriers' practice of imposing rail fuel surcharges. Id., pp. 3-7.

On August 3, 2006, the Board issued a request for comments on proposals the Board set forth in that decision, in which it proposed, among other things, to require carriers to use the EIA/HDF Index in their fuel surcharge programs. In response, the League submitted comments on October 2, 2006, in which it strongly commended the Board for taking decisive steps to prevent unreasonable practices in carriers' fuel surcharge programs, but also noted that the Board's proposals could be "strengthened and improved." See, Comments of the National Industrial Transportation League dated October 2, 2006, p. 3. The League urged the Board to prescribe a mileage-based fuel surcharge program as a reasonable practice, and supported the Board's proposal to require all carriers to use a single, uniform index to measure changes in fuel costs. Id., pp. 8-9. At the time, the League believed that the Board's proposed EIA/HDF Index was "generally acceptable," id. at p. 9, but it also expressed concern that "over time, the index proposed by the Board may less accurately reflect the cost of fuel encountered by railroads."

Accordingly, the League urged the Board “to periodically review the index ultimately chosen to ensure the index reasonably reflects actual changes to the railroads’ cost of fuel.” Id., p. 10.²

In its 2007 Fuel Surcharges decision, the Board ruled that, while the EIA/HDF Index “is a reasonable index to apply to measure changes in fuel costs for purposes of a fuel surcharge program,” the Board declined to require the use of that index. Id., p. 11. The Board was concerned that it should not “hinder [its] ability to respond nimbly should a superior index be identified.” Id. Instead, the Board concluded that the reasonableness of the EIA/HDF Index justified its use as a “‘safe harbor’ upon which carriers can rely for an index.” Id. The Board indicated that use of an alternative index may be subject to challenge. Id.

Concurrently, in a decision in Ex Parte No. 661 (Sub-No. 1), the Board proposed a variety of reporting requirements for carriers. Also, in a decision served August 14, 2007 in that sub-proceeding, the Board rejected a variety of shipper-proposed reporting requirements.

Finally, in 2013, the Board issued a decision in the Docket No. NOR 42120, Cargill, Inc. v. BNSF Ry., served August 12, 2013 (“Cargill”), a case in which a shipper challenged the application of BNSF’s fuel surcharge as an unreasonable practice. In that decision, the Board ruled that the complainant must show that “the general formula used to calculate fuel surcharges bears no reasonable nexus to the fuel consumption for the traffic to which the surcharge is applied,” citing its decision in NOR 42105, Dairyland Power Cooperative v. Union Pacific Railroad Company, served July 29, 2008. Cargill, at p. 3. However, the Board ruled that, if the

² This recommendation echoed the League’s Written Testimony submitted in connection with the Board’s Spring 2006 hearing, in which the League indicated that carriers should undertake regular reviews of their fuel surcharge program to determine whether those programs are reasonably tracking their fuel costs, and if carriers fail to undertake such a review and if distortions or inequities do occur, the “Board should use its regulatory authority to insure that fuel surcharge programs are fair to both the carriers and to users of the rail system.” League April 27, 2006 Written Testimony, p. 7.

carrier uses the EIA/HDF Index (which BNSF did), the Board must use the EIA/HDF index to measure incremental changes in fuel costs, since the Board had determined in its 2007 Fuel Surcharges decision that the EIA/HDF index was a “safe harbor” on which carriers could rely. Id. However, the Board also noted with some concern, that BNSF’s fuel surcharge revenue actually exceeded its internal costs by \$181 million over a five-year period. Id., at p. 14. Thus, the Board indicated that it would seek public comment on whether changes to the safe harbor provision are warranted. Id.

The Board’s decision in Cargill precipitated this ANPRM proceeding, in which the Board has asked whether the spread between a rail carrier’s internal fuel costs and the EIA/HDF index as seen in Cargill was an aberration; whether there are problems associated with the Board’s use of the EIA/HDF index as a safe harbor in judging the reasonableness of a fuel surcharge program; and whether problems can be addressed through modification or elimination of the safe harbor provision.

II. NITL COMMENTS

A. **There is Clear Evidence that the EIA/HDF Index Is Not Closely Tracking the Carriers’ Incremental Cost of Fuel.**

This proceeding is a direct outgrowth of the Board’s consideration of the issues in the Cargill case, in which the Board reviewed extensive data produced in litigation covering fuel revenue and expense for one of the four major United States rail carriers over a five-year period, from January 1, 2006 through December 31, 2010. In that case, the Board found that, even ignoring gains from fuel hedging and locomotive unattributable and non-locomotive fuel costs, BNSF’s fuel surcharge revenues exceeded its incremental fuel costs by some \$181 million over the five-year period. Cargill, slip op. at 14. The Board’s decision was not a “snapshot” of a single year, or from a small carrier, but rather involved a comprehensive analysis of fuel cost

data over a substantial period of time from a major U.S. carrier. Thus, the League believes that the information developed in the Cargill decision by itself leads to a rational conclusion that the EIA/HDF Index may not be accurately tracking incremental fuel expenses in the manner that the Board believed that it did and would continue to do when the Board issued its 2007 Fuel Surcharge decision. Since the Board’s 2007 Fuel Surcharge decision provides a major defense against any challenge to a carrier’s fuel surcharge program, it is incumbent on the Board, when confronted with such evidence as was developed in the Cargill case, to investigate whether the EIA/HDF index still justifies its status as a “safe harbor,” or whether a modified EIA/HDF index or another index should be prescribed in its stead.

The Cargill decision is not the only indication that carriers are over-recovering their fuel cost. The firm of Escalation Consultants, in its July 2014 edition of Rail Price Advisor, has examined the percent difference in surcharge revenue and fuel expense for the four major U.S. carriers for the period from the fourth quarter of 2007 through the first quarter of 2014. The results are shown below:

Percent Difference in Surcharge Revenue and Fuel Expense for Major US Railroads (4Q2007-1Q2014)			
	% Change In Surcharge Revenue Per Car	% Change In Fuel Expense Per Car	Difference
BNSF	40.0%	16.7%	23.2%
CSXT	59.3%	26.9%	32.4%
NS	29.2%	29.8%	-0.6%
UP	71.0%	9.6%	61.3%

This data clearly suggests that the carriers' fuel surcharge programs are generally over-recovering fuel costs.³ While this data does not specifically indicate whether the EIA/HDF Index is the cause of that over-recovery or whether other factors are causing the over-recovery (e.g., the strike price, the miles per gallon assumption and the incremental mileage charge, the mileage methodology, or other factors), this data indicates that the Board has good reason to initiate an inquiry into the EIA/HDF index, especially given the legal consequences and protections afforded the carriers by the "safe harbor" provision.

B. The Board Should Immediately Open a Proceeding to Compare the EIA/HDF Index To the Actual Internal Fuel Cost of Class I Carriers, and Should Adjust or Replace the Safe Harbor Where the Data Reveals That Actual Carrier Costs Are Diverging From the Index

Given the information available to the Board, it should immediately undertake a proceeding to compare the EIA/HDF Index to the actual fuel cost of Class I carriers, and should adjust the safe harbor, to the extent possible, or replace the safe harbor with an alternative index, where the data reveals that actual carrier costs are diverging from the index. At this time, the League has concerns with elimination of the safe harbor altogether, since it is very possible that carriers would return to the use of opaque and unjustified procedures in their fuel surcharge programs that would have to be challenged on a case-by-case basis by members of the shipping public. However, the League also strongly believes that it is not responsible or lawful for the Board to announce a "safe harbor" and then ignore whether the central assumption underlying that safe harbor – that the EIA/HDF Index actually tracks the carriers' incremental cost of fuel – is and remains true over time. More importantly, it should be incumbent on the rail carriers to justify the reasonableness of their fuel surcharge programs and shippers should not be required to

³ The Rail Price Advisor also details the over-recovery over each period of this time period, by carrier. See the following link: [July 2014 Rail Price Advisor Newsletter](#).

engage experts and incur high legal and economic consultant costs to determine a fair, accurate and appropriate fuel surcharge index.

In addition, the League believes that the Board should commit to an ongoing review, perhaps once every two or three years, to determine if the EIA/HDF Index, as potentially modified by the Board or any replacement index, continues to track each carrier's incremental cost of fuel over time, to insure that the "safe harbor" continues to be justified.

As part of this proceeding, the Board should request the carriers to provide additional data where it is needed, and should review and modify the data submitted quarterly under Ex Parte 661 (Sub-No. 1) to ensure that the Board has complete and accurate information to conduct its analyses on an ongoing basis. For example, properly-structured fuel surcharge programs should recognize meaningful differences in the fuel expense incurred by a carrier or carriers for different types of rail services and different types of shippers. The Board and others should have access to the data needed to determine whether a specific fuel surcharge program is reasonably reimbursing a carrier for changes in the incremental cost of its fuel. For example, the Board and others should have data on the number of cars actually subject to a fuel surcharge, so that the effectiveness and fairness of a fuel surcharge program can be evaluated.

C. In Addition to Determining the Accuracy of the EIA/HDF Index, the Board Should Consider Other Fundamental Elements of the Carriers' Fuel Surcharge Programs, To Insure That Such Programs Are "Reasonable" Under the Requirements of the Statute

Under the Board's existing rules, a carrier's use of the EIA/HDF Index provides a safe harbor for determining the carrier's incremental cost of fuel. However, as noted above, there are a number of other factors that might affect the reasonableness of a carrier's fuel surcharge program, such as the strike price, the mileage measure, the miles per gallon assumption, and the

derived incremental mileage charge.⁴ These elements are fundamental aspects of the existing fuel surcharge programs. Thus, in addition to examining the accuracy of the EIA/HDF index, the Board should consider these other aspects of the carriers' fuel surcharge programs, and should require the carriers to justify—up front—the reasonableness of these and any other key assumptions used in their overall fuel surcharge program. While shippers might still have reason to challenge the collection of a particular fuel surcharge as to their particular traffic, especially if that traffic differed from the general “run” of rail traffic, the Board should at least determine, in advance, whether the assumptions and analyses underlying these other fundamental factors are reasonable.

In the Cargill decision, for example, the Board reviewed data from BNSF showing that BNSF reasonably developed its 4 MPG assumption that it used in calculating its fuel surcharge. Cargill, slip op. at 15. The Board also reviewed BNSF's choice of a strike price, and found it reasonable. Id., p. 16. The League believes that any such assumptions that are determined to be valid by the Board should be subject to periodic review by the Board to ensure that such assumptions remain valid over time. Accordingly, the Board should review these key factors for all Class I carriers in its initial and periodic proceedings, to assure the shipping public that the

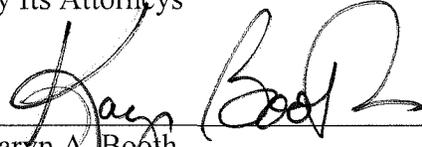
⁴ For example, even if a chosen index fairly accounts for incremental changes in fuel costs, if the strike price is set too low, the rail carrier will over-recover its total fuel costs.

fundamental assumptions developed and implemented by each of the nation's rail carriers for their fuel surcharge programs are reasonable.

Respectfully submitted,

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