BEFORE THE
SURFACE TRANSPORTATION BOARD

236819

ENTERED
Office of Proceedings
October 15, 2014
Part of
Public Record

RAIL FUEL SURCHARGES (SAFE HARBOR)

EX PARTE NO. 661 (SUB-NO. 2)

REPLY COMMENTS
OF THE DOW CHEMICAL COMPANY

Jeffrey O. Moreno
Nicholas J. DiMichael
David E. Benz
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 331-8800

Counsel for The Dow Chemical Company

October 15, 2014

BEFORE THE
SURFACE TRANSPORTATION BOARD

RAIL FUEL SURCHARGES (SAFE HARBOR)

EX PARTE NO. 661 (SUB-NO. 2)

REPLY COMMENTS OF THE DOW CHEMICAL COMPANY

The Dow Chemical Company ("Dow") hereby submits its Reply Comments in the above-captioned proceeding in response to the Advance Notice of Proposed Rulemaking ("ANPRM") issued by the Surface Transportation Board ("Board") on May 29, 2014.[1] As described below, there remains a serious need for the Board to further investigate whether railroads are truly recovering only their incremental fuel costs with their fuel surcharges. Nothing stated in the opening round of comments warrants modification of the key points raised by Dow in its Opening Comments. In the opening round, other parties either agreed with the issues raised by Dow or largely did not address them. Accordingly, the action advocated by Dow in its Opening Comments remains appropriate; the Board should institute a rulemaking proceeding wherein the Board engages in a more searching investigation of rail fuel surcharge programs, proposes taking a more active oversight role, and considers requiring that more information be filed by the railroads under 49 CFR § 1243.3.

---

[1] The due date for reply comments was revised by the Board in later decisions served on July 8, 2014 and August 22, 2014.

I. Background.

The Board began this proceeding in the aftermath of its 2013 decision in Cargill, Inc. v. BNSF Railway Company, STB Docket No. 42120 (served Aug. 12, 2013). In that decision, the Board found that BNSF's fuel surcharge program generated fuel surcharge revenue in excess of its actual incremental fuel cost. However, the Board also determined that the existence of the HDF Index safe harbor prevented the Board from acting upon that over-recovery. See Dow Opening at 5-7. Therefore, the Board invited public comment on a variety of issues, including whether the over-recovery in Cargill was an "aberration."[2]

In its Opening Comments, Dow showed that there are serious questions about whether the fuel surcharge programs of the major U.S. railroads are actually resulting in recovery of only their incremental fuel costs. Dow provided data suggesting that the aberration discovered in Cargill may actually be the symptom of more widespread fuel surcharge over-recovery, and that such over-recovery may implicate not just the HDF Index but also the strike price and/or the step function. Dow Opening at 7-8. For example, Dow explained that railroad fuel surcharges are an increasingly large revenue source for most railroads, and that the railroads' fuel surcharge revenue is growing more rapidly than railroad fuel cost. Dow Opening at 9 and 12-13. Despite a general lack of publicly available data, Dow showed that at least one railroad other than BNSF may be recovering funds from its fuel surcharge program far in excess of its incremental fuel cost. Dow Opening at 13-14. Dow also described how some fuel surcharge programs have remained unchanged for years despite the fact that railroads are continually becoming more fuel efficient. Dow Opening at 14-16.

[2] ANPRM at 2-3.

In the end, Dow explained how the lack of publicly available data prevents a definitive assessment of whether railroad fuel surcharge programs are specifically designed to recover only the respective railroad's incremental fuel cost. Dow Opening at 11 and 16. However, the data does raise serious questions that warrant further consideration. Dow requested that the Board institute a formal rulemaking proceeding to engage in a more searching investigation of rail fuel surcharge programs, propose taking a more active oversight role, and consider requiring that more information be filed by the railroads under 49 CFR § 1243.3. Dow Opening at 16-17.

II. Summary of Argument.

Nothing stated in the opening round of comments necessitates deviation from the relief requested by Dow in its Opening Comments. The concerns raised by Dow were largely not addressed by other parties and, to the extent they were addressed, the other commenting parties tended to agree with Dow. The evidence submitted by Dow and other parties suggests that there is a fundamental structural problem with the railroads' fuel surcharge programs.

In their Opening Comments, the railroad commenting parties generally emphasized their satisfaction with the status quo. In particular, the railroad parties (1) asserted that some variance between the HDF Index and internal railroad fuel costs is to be expected[3], and (2) requested that the HDF Index retain its "safe harbor" status[4]. The non-railroad parties, on the other hand, stated that the railroads' fuel surcharge programs remain problematic for a variety of reasons. For the most part, the non-railroad parties agree with Dow that further Board action is warranted.

---

[3] See, e.g., BNSF Railway Company ("BNSF") Opening at 7-8; Canadian National Railway ("CN") Opening at 4-5; Union Pacific Railroad Company ("UP") Opening at 7-9;

[4] See, e.g., BNSF Opening at 3; CN Opening at 3; CSX Transportation, Inc. ("CSXT") Opening at 1; UP Opening at 9-11;

III. Argument.

A. Evidence Shows That The Cargill Phenomenon Was Not An Aberration.

In its Opening Comments, Dow presented several types of evidence indicating that the BNSF over-recovery in Cargill was likely not an aberration. See Dow Opening at 7-16. Almost universally, the non-railroad parties that filed Opening Comments agree with Dow, and many supported their position with data. Concern about the Cargill result is not limited to shippers and shipper groups. For example, the U.S. Department of Agriculture stated that the "spread between fuel costs and [the] HDF Index is likely not an aberration." USDA Opening at 2. Other parties finding that the Cargill phenomenon was not an aberration, often with supporting data, include: Consumers United for Rail Equity ("CURE"), Highroad Consulting, Ltd. ("Highroad"), National Coal Transportation Association ("NCTA"), National Grain and Feed Association ("NGFA"), the Allied Shippers, The Mercury Group ("Mercury"), and the National Industrial Transportation League ("NITL").[5]

In contrast to the non-railroad parties, most of the railroad commenting parties simply stated that variance between an index and actual fuel costs was inevitable. The railroad parties' basic position seems to be two-fold: ignore the significant over-recovery in Cargill and contend that use of an index will always result in imprecision.[6] But this ignores the magnitude of both the over-recovery and imprecision in Cargill.

BNSF made the most effort to address the Board's Cargill question, asserting that the significant difference between BNSF's internal fuel costs and BNSF's fuel surcharge revenues during the 2006-2010 time period was merely the result of alleged unusual volatility in diesel

---

[5] CURE Opening at 4, 6, and 13; Highroad Opening at 5 and 12; NCTA Opening at 1; NGFA Opening at 5-6; Allied Shippers Opening at 3 and 40-42; Mercury Opening at 6-7; NITL Opening at 6-8.

[6] See, e.g., BNSF Opening at 7-8; CN Opening at 5; UP Opening at 7-8.

prices at that time. BNSF Opening at 9.[7] BNSF also provided some data allegedly showing that the HDF Index closely tracked certain BNSF data reported to the Board during the 2011-2013 time period.[8] The evidence offered by BNSF does not alleviate the concerns expressed by Dow and others in this proceeding. As Dow and others have stated, the specific revenues generated by a fuel surcharge program are determined not just by the index used, but also by the strike price and the step function.[9] The assertions made by BNSF in its Opening Comments also do nothing to address broader concerns about the increasing importance of fuel surcharge revenues or indications that fuel surcharge revenues may exceed actual incremental fuel costs across a wide swath of the rail industry.[10]

As mentioned above, BNSF contended that the HDF Index closely tracked certain BNSF data that was reported to the Board during the 2011-2013 time period.[11] However, the data reported to the Board is apparently not the same internal BNSF data on which the Cargill divergence rested.[12] Moreover, BNSF's focus on the HDF Index and certain data reported to the Board diverts attention from the crucial issue: whether BNSF's fuel surcharge program is truly recovering only BNSF's actual incremental internal fuel cost, which is the only lawful use of a fuel surcharge.[13] In any event, other commenting parties have submitted data that conflicts with

---

[7] BNSF also stated that it is "unrealistic to expect any fuel surcharge mechanism to precisely track fuel costs." BNSF Opening at 7.
[8] BNSF Opening at 9-10.
[9] See, e.g., Dow Opening at 2, 7-8, and 16; CSU Opening at 3-6; CURE Opening at 10-13; Allied Shippers Opening at 64-68; NITL Opening at 9-10.
[10] See, e.g., Dow Opening at 9-16.
[11] BNSF Opening at 9-10. Similarly, Dow conducted a regression analysis comparing the HDF Index to certain BNSF data reported to the Board. See Dow Opening at Ex. 4. However, Dow does not have access to the confidential internal BNSF cost data that was used in the Cargill case. See, e.g., Cargill at 7.
[12] See, e.g., Cargill at 7.
[13] Rail Fuel Surcharges, STB Ex Parte No. 661, slip op. at 4-5 (served Aug. 3, 2006).

BNSF's contention of correlation during the 2011-2013 time period. See, e.g., Allied Shippers Opening at 36-42.

CN largely ignored the disconnect unearthed in Cargill. Instead, CN merely stated that variations between any index and actual railroad fuel costs "are to be expected." CN Opening at 5. CSXT did not mention the Cargill disconnect at all, and limited itself to the blanket statement that Cargill "provides no reason to revisit the safe harbor." CSXT Opening at 1.

Finally, UP apparently analyzed its internal fuel costs and found that the "HDF Index has a strong correlation with UP's fuel prices."[14] Yet, at the same time, UP also took great care to emphasize the imprecision involved in use of the HDF Index. UP stated that "the existence of a spread between actual railroad fuel prices and the HDF Index is nothing new" and that it has long been understood that "the HDF Index would not precisely track the changes in actual railroad fuel prices." UP Opening at 7. The spread between UP's actual fuel costs and the HDF Index "changes constantly" in a "highly variable" and unpredictable manner. UP Opening at 7-8.[15]

With their talk of volatility, imprecision, and unpredictability, the railroad parties' position does little to mollify concerns about the demonstrated differences between fuel surcharge revenue and actual incremental railroad fuel costs. Combined with the Opening Comments of the non-railroad parties, the overwhelming weight of evidence suggests that the Cargill phenomenon was not an aberration.

B. There Are Widespread Concerns About Railroad Fuel Surcharge Programs.

In its Opening Comments, Dow explained that the revenue generated by any particular fuel surcharge program depends not just on the index used, but also on the other key elements of

[14] UP Opening at 7. UP did not submit any supporting data or calculations.
[15] UP did not submit any supporting data or calculations.

the program, such as the strike price and the step function. Dow Opening at 7-8. Dow also presented various data sources indicating that a more broad-based review of fuel surcharge programs is warranted. Dow Opening at 9-16. Other parties similarly raised broader concerns about the design, use, and oversight of railroad fuel surcharge programs,[16] thereby revealing that the Board's focus should be on more than just the HDF Index and whether or not it is afforded safe harbor status.

Dow respectfully requests that the Board take this opportunity to engage in a more widespread investigation of fuel surcharge programs.

C. The Board Should Examine Not Just The HDF Index, But Also Other Aspects Of Rail Fuel Surcharge Programs.

As Dow showed in its Opening Comments, fuel surcharges are an increasingly large source of revenue for the nation's railroads.[17] The ultimate cause(s) of the rise in fuel surcharge revenues cannot be definitely ascertained due to a lack of sufficient public information.[18] However, data assembled by Dow suggests that railroads are recovering fuel surcharge revenue far in excess of their incremental fuel cost.[19] Numerous other commenting parties reached similar conclusions based on different data sources.[20]

The wide variety of evidence submitted by Dow and other commenting parties indicates that further Board investigation of railroad fuel surcharges is warranted. The Board should examine whether fuel surcharges truly are being utilized in the manner that the Board envisioned

---

[16] See, e.g., CURE Opening at 2 and 10-13; Highroad Opening at 7-12; NCTA Opening at 1; Allied Shippers Opening at 3-5, 42-43, and 80-81; and NITL Opening at 9-10.
[17] Dow Opening at 12-13.
[18] Dow Opening at 7-8, 12, and 16.
[19] See, e.g., Dow Opening at 9-10 and 13-16.
[20] See, e.g., Colorado Springs Utilities ("CSU") Opening at 3-7 and 10; CURE Opening at 3-4 and 10-13; Highroad Opening at 5, 12, and 14; USDA Opening at 3 and 5-6; Allied Shippers Opening at 4-5, 29, and 75-81; and NITL Opening at 9-10.

in January 2007 when it issued its decision in Ex Parte No. 661, Rail Fuel Surcharges. The Board should also examine the other questions and concerns raised by the commenting parties in response to the ANRPM, foremost among them whether railroads are relying on fuel surcharges only for incremental increases in actual internal fuel costs.

D. Fuel Efficiency Gains Must Be Taken Into Account.

Numerous commenting parties remarked that railroads have made, and continue to make, significant fuel efficiency gains, yet railroad fuel surcharge programs have not been adjusted to account for this reduction in railroad fuel consumption.[21] Dow raised nearly identical concerns in its Opening Comments.[22] As Dow and many parties stated, increases in fuel efficiency suggest, again, that the Board should require railroads to show that their fuel surcharge programs are designed to recoup only their actual incremental fuel cost.[23] Additionally, railroads should revise their programs as necessary in the future to account for ongoing fuel efficiency advances. As the Allied Shippers noted, railroad executives previously acknowledged that their fuel surcharge programs would need to change to incorporate fuel efficiency advances, yet many fuel surcharge programs have remained unchanged for five, six, or more years.[24]

E. The Railroads Should Provide More Information.

Data submitted by Dow in its Opening Comments highlighted numerous concerns and questions about the use of railroad fuel surcharge programs.[25] However, Dow was unable to

---

[21] See, e.g., AECC Opening at 15-16; CSU Opening at 6-7; NGFA Opening at 3 and 5; Allied Shippers Opening at 4 and 63-75; and Mercury Opening at 13-15 and 21.
[22] Dow Opening at 14-16.
[23] Dow Opening at 8 and 16-17. BNSF asserts that the Board's calculation in Cargill did not take into account BNSF's expenditures in acquiring fuel efficient locomotives. BNSF Opening at 9. If BNSF is asserting that locomotive acquisition costs are not included in its base transportation rates, BNSF should submit further data to support such an assertion.
[24] Allied Shippers Opening at 73-74.
[25] Dow Opening at 9-16.

reach definitive conclusions due to the insufficient public data available. The Board previously created a requirement that Class I railroads must submit certain fuel surcharge information on a quarterly basis.[26] This information is publicly available, but additional information is necessary to shed more light on whether railroad fuel surcharge programs are recovering only incremental fuel costs. Numerous other parties agree that the Board should require more information to be filed with the Board or otherwise made publicly available; this information could also include an affirmative duty on the part of each Class I railroad to show that its fuel surcharge is designed to recover (and is actually recovering) only the internal incremental cost of fuel.[27]

F. The Railroads Have Not Proven That Their Fuel Surcharge Programs Only Recover Incremental Fuel Cost.

The central question remains whether or not railroad fuel surcharge programs are generating revenue in excess of actual railroad incremental fuel cost. Although BNSF and UP referenced some data about their own fuel costs, the overwhelming weight of evidence offered in the opening round suggests that there is a fundamental structural problem with rail fuel surcharge programs resulting in revenue far in excess of railroad incremental fuel cost. This evidence warrants the commencement of a formal investigation and rulemaking proceeding, with examination of not just the safe harbor, but also the strike price, the step function, fuel efficiency, and the other issues mentioned herein.

IV. Conclusion.

For all the reasons stated above, Dow respectfully requests that the Board commence a rulemaking proceeding and engage in further investigation of railroad fuel surcharge programs to

---

[26] See Ex Parte No. 661 (Sub-No. 1) (served Aug. 14, 2007). See also 49 CFR § 1243.3.
[27] See, e.g., CSU Opening at 11-12; NGFA Opening at 4 and 8; USDA Opening at 5-6; Allied Shippers Opening at 5 and 76; and NITL Opening at 9.

ensure that such programs are linked to incremental fuel costs. Dow appreciates the opportunity to submit these Reply Comments.

Respectfully submitted,

Jeffrey O. Moreno
Nicholas J. DiMichael
David E. Benz
Thompson Hine LLP
1919 M Street, N.W., Suite 700
Washington, D.C. 20036
(202) 331-8800

Counsel for The Dow Chemical Company

October 15, 2014