

**BEFORE THE UNITED STATES
SURFACE TRANSPORTATION BOARD**

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STB Ex Parte No. 661 (Sub-No. 2)

RAIL FUEL SURCHARGES (SAFE HARBOR)

OPENING COMMENTS OF CSX TRANSPORTATION, INC.

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CSX Transportation, Inc (“CSXT”) respectfully submits these Opening Comments in response to the Board’s Advance Notice of Proposed Rulemaking regarding the Safe Harbor provisions of its fuel surcharge rules. *See Rail Fuel Surcharges (Safe Harbor)*, STB Docket No. 661 (Sub-No. 2) Decision (served May 29, 2014) (“ANPRM” or “Notice”). CSXT believes a rulemaking to re-visit the safe harbor provision of the Board’s rules is unnecessary and would be unwise. The Board’s safe harbor provision serves important and valuable functions for carriers, shippers, and the public. Its use has enhanced transparency, and effectively addressed the Board’s concerns about any potential for customer confusion or misunderstanding about the operation of a rail carrier’s fuel surcharges.

The recent unreasonable practices challenge brought by shipper Cargill regarding a rail carrier’s fuel surcharge program, and the Board’s disposition of that challenge, demonstrated that the safe harbor provision is working as it was designed. *See Cargill, Inc. v. BNSF Railway Co.*, STB Docket No. 42120, Decision (served August 12, 2013). That case provides no reason to revisit the safe harbor provision of the Board’s fuel surcharge rules. Under the statutory regime enacted by Congress and authoritatively interpreted by federal courts, a shipper that believes the rail common carrier rates it has paid (including fuel surcharges or any other component of such rates) are unreasonable may bring a rate case. In these opening comments, CSXT briefly summarizes some important fundamental principles that it believes the Board should keep in mind as it conducts this inquiry and considers whether to commence a rulemaking proceeding.

FUNDAMENTAL PRINCIPLES

CSXT highlights below several fundamental principles and considerations that it submits should guide the Board’s consideration of any proposal to revise or change the safe harbor provision of its fuel surcharge rules.

First, the Board may evaluate the reasonableness of the amount of a common carrier rate established by a rail carrier only in a rate reasonableness proceeding. *See* 49 U.S.C. §§ 10701, 10702(a). The amount of a rail rate within the Board’s jurisdiction may not be adjudicated under the Board’s separate unreasonable practices authority. *See Union Pacific v. ICC*, 867 F.2d 646 (D.C. Cir. 1989).

Second, in today’s competitive transportation markets, shippers evaluate the entire “all-in” price of a transportation service, and not any specific portion or component of the total price charged by a transportation service provider. Thus, when choosing among transportation options, a shipper appropriately considers the total cost of each option, and is indifferent to what amount the provider may attribute to fuel costs or any other component of the total price. All else being equal, a shipper will select the transportation alternative offered at the lowest total price.¹ In competitive transportation markets, market forces constrain overall transportation prices. Therefore, even with respect to the reasonableness of the amount of a fuel surcharge (which could only be contested as part of a rate reasonableness challenge), the Board need not be concerned wherever adequate transportation competition exists—market forces will limit the overall price a shipper will need to pay and the overall price is the only price that matters.²

Third, the Board may not evaluate reasonableness of one component of a rate (such as a fuel surcharge) or prescribe a rate, or award reparations for a rate (or any component thereof)

¹ For example, assume a shipper has a choice of three transportation price options offered by three different transportation providers for otherwise identical service. Option A charges a base rate of \$8/ton and a fuel surcharge of \$2/ton, for a total price to the shipper of \$10/ton. Option B charges a base rate of \$10 a ton and a fuel surcharge of \$1/ton, for a total price of \$11/ton. And Option C charges a base rate of \$12/ton with no fuel surcharge. In that competitive market (assuming all else is equal), the shipper would choose Option A, because it results in the lowest total cost. The fact that the fuel component of the price is the highest for Option A does not matter to the shipper, because Option A offers the lowest total cost.

² The price discipline and efficiency imposed by competitive markets is the reason that Congress has limited the Board’s rate reasonableness jurisdiction to common carrier transportation over which the rail carrier has “market dominance.” *See* 49 U.S.C. §§ 10701(d), 10707.

found to exceed a maximum reasonable level, except in a rate reasonableness proceeding. *See Union Pacific*, 867 F.2d 646; *Rail Fuel Surcharges*, STB Ex Parte No. 661, Decision at 7 (served Jan. 26, 2007). Therefore, any challenge to a rail rate within the Board’s jurisdiction should consider the entire rate charged and collected by a carrier and not any single component of that rate in isolation. The fuel surcharge rules the Board established in Ex Parte 661 were intended to conform to the holding and limitations of *Union Pacific v. ICC*. *See Cargill* at 5, n.7. In promulgating and applying its fuel surcharge rules, the Board consistently has emphasized that it does not intend those rules to regulate or limit the total amount that a rail carrier could charge for providing rail transportation service. *See Cargill* at 2, 5; *Rail Fuel Surcharges* at 7.

Fourth, and closely related, the scope of an unreasonable practices claim regarding fuel surcharges is limited to the question of whether a carrier’s application of a fuel surcharge mechanism constitutes a misrepresentation by the carrier, not whether the amount of the fuel surcharge component of a rail transportation rate is reasonable. *See Rail Fuel Surcharges* at 7. (“we are not limiting the total amount that a rail carrier can charge for providing rail transportation through some combination of base rates and surcharges. Rather, we are only addressing the manner in which railroads apply what they label a fuel surcharge.”).³

Fifth, there is no basis for a misrepresentation finding if a carrier fully discloses how it will determine and apply a fuel surcharge program and then applies that program in the manner it has described. The purpose of the fuel surcharge rules adopted in Ex Parte 661 is to ensure that a rail carrier’s representation of its FSC program is accurate. Accordingly, if a rail carrier represents in a common carrier tariff that it will use a particular fuel price index for fuel surcharge calculations; explains how it will apply that index to determine the fuel surcharge

³ Of course, any STB reasonable practices inquiry regarding a rail carrier’s fuel surcharges must be confined to common carrier, non-exempt traffic. Fuel surcharges on unregulated contract traffic and exempt traffic are not subject to the Board’s jurisdiction. *See* 49 U.S.C. §§ 10502, 10709.

component of a rate; and then implements that approach as it has stated it would, the carrier has accurately represented its approach and there could be no valid misrepresentation claim or finding. Because the Board has properly limited the scope of a fuel surcharge unreasonable practice inquiry to the question of whether a carrier has misrepresented its fuel surcharge mechanism, a carrier's accurate representation and consistent implementation of such a mechanism should preclude an unreasonable practice finding. If a rail carrier clearly discloses how its fuel surcharge mechanism will work and applies that mechanism in accordance with the stated terms, the Board has no basis for concern about misrepresentation.

Sixth, any fuel price index the Board might propose to use as a safe harbor or default index must have widespread acceptance by carriers and their customers. As the Board has noted, shipper commenters in Ex Parte 661 were nearly unanimous in advocating the adoption of a single uniform index that all carriers would be required to use in fuel surcharge calculations. *See, e.g., Rail Fuel Surcharges* at 11. And rail carriers and shippers were in general agreement "that the EIA Index accurately reflects changes in fuel costs in the rail industry." *Id.* Any alternative index that might be proposed as a new safe harbor should, at a minimum, have a similar level of credibility and acceptance by both shippers and carriers.

Seventh, if the Board were to propose any change to its rules governing fuel surcharge mechanisms, any such proposal must be *prospective only*. CSXT (and presumably other rail carriers governed by the Board's fuel surcharge rules) has developed and applied its fuel surcharge mechanisms and program to comply with, and in good faith reliance on, the Board's current rules, including the safe harbor provision. It would be both unfair and unlawful for the Board to propose any change to those rules that would apply retrospectively to practices a carrier followed in conformity with then-existing Board rules.

Finally, the Board should proceed carefully and cautiously before proposing any significant changes to its fuel surcharge rules. The numerous variables affecting fuel prices;

railroads' purchase and consumption of fuel in different circumstances and conditions and for different types of traffic; the Board's limited rate reasonableness jurisdiction; and a number of other factors would make it difficult to fashion a broad rule of general application that would be fair, easily administrable, and avoid creating market distortions and other unintended consequences. *See, e.g., Cargill* at 18 (C. Mulvey separate expression) (indicating that any proposal to remove safe harbor "goes far beyond" concerns raised in the single fuel surcharge case the Board has adjudicated, and warning against unintended consequences of abandoning safe harbor or use of HDF index). Because of the complexity and demonstrated potential for unintended negative consequences of broad pronouncements or changes to rules governing fuel surcharges, the Board should not propose any change in its fuel surcharge rules, and certainly not before studying the matter carefully, including whether to retain expert economists or consultants to study the issues and possibly make recommendations to the Board.

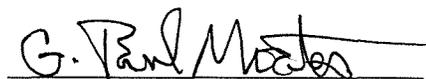
CONCLUSION

If the Board were to consider any course other than closing this proceeding with no further action—and it should not—CSXT urges it to proceed carefully and deliberately, and to adhere to the fundamental principles described in these comments.

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Respectfully submitted,



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