BEFORE THE
SURFACE TRANSPORTATION BOARD

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

RAIL FUEL SURCHARGES (SAFE HARBOR)

COMMENTS OF UNION PACIFIC RAILROAD COMPANY

GAYLA L. THAL
LOUISE A. RINN
REBECCA B. GREGORY
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
Phone: (402) 544-5291

MICHAEL L. ROSENTHAL
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 662-6000

Attorneys for Union Pacific Railroad Company

August 4, 2014

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

RAIL FUEL SURCHARGES (SAFE HARBOR)

COMMENTS OF UNION PACIFIC RAILROAD COMPANY

Union Pacific Railroad Company ("UP") submits this filing in response to the Board's request for comments on whether the safe harbor provision of the Board's current fuel surcharge rules should be modified or removed. *Rail Fuel Surcharges (Safe Harbor)*, EP 661 (Sub-No. 2) (STB served May 29, 2014). UP believes the Board should retain the current safe harbor provision.

The safe harbor provision was a balanced response to concerns expressed in *Rail Fuel Surcharges*. In that proceeding, shippers overwhelmingly supported the Board's proposal that railroads be required to use a uniform, publicly available index, namely the Energy Information Administration's On-Highway Diesel Fuel Price Index ("HDF Index"), to measure changes in fuel prices. All parties understood that use of a single, uniform index would never precisely reflect changes in the price that any one railroad pays for fuel. But shippers argued that use of a single, uniform fuel index "would better ensure accuracy, transparency and accountability." *Rail Fuel Surcharges*, EP 661, slip op. at 11 (STB served Jan. 26, 2007). While the Board ultimately did not mandate the use of the HDF Index because it recognized that, in the future, "a superior index [might] be identified," the Board encouraged railroads to adopt the HDF Index, which it found was the best publically available index, and it established a safe harbor for those that used the HDF Index. *Id.*

Seven years later, the HDF Index continues to be an appropriate index for measuring changes in railroad fuel prices. While it is still true that no publicly available index will precisely reflect changes in the price that any one railroad actually pays for fuel, the HDF Index continues to correlate closely with UP's fuel prices, and UP is unaware of a superior, publically available index.

UP understands the Board's concern about the HDF Index safe harbor, but UP also believes that any potential problems associated with the HDF Index safe harbor are outweighed by the continued benefits articulated in *Rail Fuel Surcharges*: timeliness, accuracy, transparency, availability, and neutrality. The continuation of the HDF Index safe harbor also has the added benefits of stability and ease of administration. Substitution of a new index would be costly for all concerned, and elimination of the safe harbor would likely lead to increased complex litigation over the boundaries of reasonable fuel surcharge programs.

In the sections below, UP discusses (i) why the Board's adoption of the HDF Index safe harbor was an appropriate response to issues raised in *Rail Fuel Surcharges*, (ii) why the HDF Index is still an appropriate index to measure changes in railroad fuel prices; and (iii) why the benefits of retaining the HDF Index safe harbor outweigh the Board's concern about spreads between railroads' actual fuel prices and the HDF Index.

I. The Board Established The HDF Index Safe Harbor In Response To Strong Shipper Support For Use Of A Uniform, Publicly Available Index.

In considering whether to modify or remove the HDF Index safe harbor, it is important to remember why the Board adopted the safe harbor in the first place. The Board adopted the HDF Index safe harbor in response to strong support by a wide variety of shippers for a requirement "that railroads apply a single, uniform index to measure changes in fuel prices." *Rail Fuel Surcharges*, slip op. at 11.

In the *Rail Fuel Surcharges* proceeding, the Board initially proposed to *require* that all Class I railroads use the HDF Index to measure changes in fuel prices. *See Rail Fuel Surcharges*, EP 661, slip op. at 6 (STB served Aug. 3, 2006). The proposal to mandate use of a uniform index received broad shipper support. For example:

- The National Industrial Transportation League urged the Board "to require all Class I railroads to use a single, uniform index to measure increases in fuel costs."[1]
- The American Chemistry Council similarly urged the Board to adopt "a single uniform index."[2]
- The Fertilizer Institute argued that "requir[ing] all Class I railroads to use a single, uniform index to measure increases in fuel costs is an important element necessary to ensure fuel surcharge programs are reasonable."[3]
- The National Grain and Feed Association supported use of "a uniform price series."[4]
- The Agricultural Retailers Association told the Board that "mandating a uniform index for measuring fuel-cost increases will . . . benefit the agriculture industry."[5]
- The Steel Manufacturers Association also was "supportive of the usage of a uniform index to measure increases in fuel costs."[6]
- Kennecott Utah Copper told the Board that "there is a need for uniformity in the index the railroads use" and that "a single index should be used by all of the Class I railroads."[7]
- Cargill agreed that the Board "needs to establish a single, uniform index to measure fuel cost increases."[8]

---

[1] Comments of the National Industrial Transportation League at 9, EP 661 (Oct. 2, 2006).

[2] Comments of the American Chemistry Council at 3, EP 661 (Oct. 2, 2006).

[3] Comments of the Fertilizer Institute at 3, EP 661 (Oct. 2, 2006).

[4] Comments of National Grain and Feed Association at 6, EP 661 (Sept. 29, 2006).

[5] Comments of Agricultural Retailers Association at 1, EP 661 (Oct. 2, 2006).

[6] Comments of the Steel Manufacturers Association at 2, EP 661 (Sept. 26, 2006).

[7] Comments of Kennecott Utah Copper Corp. at 4, EP 661 (Oct. 2, 2006).

[8] Comments of Cargill Inc. at 4, EP 661 (Oct. 2, 2006).

The vast majority of shippers also agreed that the benefits of using a uniform index outweighed the risk of imprecision. The Fertilizer Institute summed up the benefits:

> [R]equiring the use of a uniform index will ensure the availability of accurate cost information, increase transparency, and provide for ease of administration of fuel surcharges for shippers and for railroads . . . .[9]

These sentiments were echoed by others, including the Edison Electric Institute:

> The point is less about achieving perfection (which may be unattainable, in any event) and more so about achieving clarity, consistency, and a resolution of the acrimony that has developed between and among carriers and shippers over this issue.[10]

Most shippers also supported the Board's proposal to require use of the HDF Index in particular. The parties knew that using the HDF Index involved a particular risk of imprecision: the index measures changes in retail fuel prices, while railroads generally buy fuel at wholesale prices. But they recognized that the HDF Index "should provide a consistent and well known

---

[9] Comments of the Fertilizer Institute at 3.

[10] Comments of Edison Electric Institute at 2 n.1, EP 661 (Apr. 2, 2007). Other shipper parties identified a similar list of benefits. *See, e.g.*, Comments of Agricultural Retailers Association at 1 ("[t]ransparency and accountability" and "improved confidence in the rail industry"); Comments of the American Chemistry Council at 3 ("transparency and wide availability"); Comments of the National Industrial Transportation League at 9 ("ensur[ing] railroads do not apply a fuel cost index that has no relation to changes in fuel costs" and "ensur[ing] the availability of accurate cost information").

measure of the change in the wholesale price changes experienced by the railroads."[11] Even shippers that proposed other indices agreed that the HDF Index would be acceptable.[12]

The Board's own analysis also supported use of the HDF Index. In initially proposing to prescribe use of the HDF Index, the Board explained that it had considered several other indices and concluded that the HDF Index was "the best index available":

> We believe the best index available is the EIA's "U.S. No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon)." EIA is an independent statistical arm of the Department of Energy, created by Congress for the express purpose of providing policy-neutral data and forecasts. The index we propose to adopt is the most broad based fuel index published by EIA. In addition, the index is consistent with other fuel indices. It has a .997 correlation with the EIA Refiner Prices of Petroleum Products to End Users and has a .998 correlation with the Association of American Railroads' fuel cost index. Finally, there is minimal lag in this index. It is available with a 1-month lag, whereas other indices can lag 2 or 3 months behind the cost increases they measure.

Rail Fuel Surcharges, EP 661, slip op. at 6 (STB served Aug. 3, 2006) (footnote omitted).

While the Board ultimately decided not to require use of the HDF Index, it expressly encouraged railroads to adopt the HDF Index, and it gave them a powerful incentive: it ruled that use of the HDF Index would provide them with a "safe harbor," while "any alternative index used may be challenged as unreasonable on a case-by-case basis." *Rail Fuel Surcharges*, slip op. at 11. The Board explained that any alternative index "should meet or exceed the standards of

---

[11] Comments of E.I. du Pont de Nemours and Company at 2, EP 661 (Oct. 2, 2006); *see also, e.g.*, Comments of ASHTA Chemicals, Inc. at 3, EP 661 (Oct. 2, 2006); Comments of South Carolina Electric and Gas Company at 4, EP 661 (Oct. 2, 2006); Comments of the Steel Manufacturers Association at 2; Comments of CEMEX, Inc. at 4, EP 661 (Oct. 2, 2006); Comments of the American Chemistry Council at 3; Comments of the Fertilizer Institute at 3. UP also accepted the Board's choice of the HDF Index. *See* Comments of Union Pacific Railroad Company at 3, EP 661 (Oct. 2, 2006).

[12] *See* Comments of Kennecott Utah Copper Corp. at 4-5; Comments of the National Industrial Transportation League at 9;.

accuracy, transparency, availability, and neutrality" of the HDF Index, and "should closely correlate with other indices." *Id.* The Board's announcement provided an efficient way to promote the use of the best publically available index.

II. Use Of The HDF Index As A Safe Harbor Continues To Be Appropriate.

The Board's concern about changes in the spread between actual railroad fuel prices and the HDF Index does not justify modifying or removing the HDF Index safe harbor. As was stated above, no publicly available fuel price index will precisely reflect changes in any one railroad's actual fuel prices. At best, such indices will correlate closely with those prices. The HDF Index has a strong correlation with UP's fuel prices. In the period from April 2007 through March 2014, the correlation co-efficient is .994. In the more recent period from January 2010 through March 2014, the correlation coefficient is slightly better: .995. This strong relationship demonstrates the continued reasonableness of maintaining the HDF Index safe harbor.

The Board first identified its concern about spreads in the *Cargill* case, which involved a dispute about BNSF Railway's fuel surcharges during the period from 2005 through 2010. *See Cargill, Inc. v. BNSF Ry.*, NOR 42120 (STB served Aug. 7, 2013). UP is not privy to the data presented in that case, but the existence of a spread between actual railroad fuel prices and the HDF Index is nothing new. Nor is it surprising that the spread could change over time.

When the Board established the HDF Index safe harbor in *Rail Fuel Surcharges*, it was well understood that the HDF Index would not precisely track the changes in actual railroad fuel prices.[13] It also was well understood that one reason for the difference is that the HDF Index

---

[13] *See* Comments of Ag Processing Inc. at 5, EP 661 (Sep. 29, 2006); Comments of Arkansas Electric Cooperative Corp. at 8-11, EP 661 (Oct. 3, 2006); Comments of North Dakota Grain Dealers Association at 4, EP 661 (Oct. 2, 2006); Comments of Cargill Inc. at 4; Comments of E.I. du Pont de Nemours and Company at 2; Comments of Kennecott Utah Copper Corp. at 4-5; Comments of National Grain and Feed Association at 6-7.

measures changes in retail prices for fuel, while railroads buy most of their fuel at wholesale prices. And it was well known that the spread between retail prices and wholesale prices could vary for a variety of reasons, especially during times of increasing or decreasing fuel prices.[14]

There are other reasons why the spread between the HDF Index and actual railroad fuel prices should change over time. For example, as the Department of Transportation noted in *Rail Fuel Surcharges*, railroads purchase fuel only in certain regions, but the HDF Index is a national index. *See Rail Fuel Surcharges*, slip op. at 11. This difference can have a varying impact on spreads. Railroads may be able to structure some of their fuel purchases to take advantage of regional market conditions or state-to-state differences in tax laws, but the regional nature of their purchases means that they may end up paying relatively higher prices at other times.

In UP's experience, the spread between the HDF Index and UP's fuel prices changes constantly, with larger variations occurring during periods when fuel prices are more volatile. This was the case in the period between UP's adoption of its mileage-based HDF surcharge for regulated traffic in April 2007 and the fourth quarter of 2010 – which includes a large part of the period that was at issue in *Cargill*. By contrast, from the first quarter of 2011 through the first quarter of 2014, fuel prices have been relatively more stable, and changes in the spread have been relatively smaller.

In both periods, however, directional changes in the spread were highly variable. From April 2007 through December 2010, the spread increased in 21 months and decreased in 23 months. From January 2011 through March 2014, the spread increased in 22 months and decreased in 16 months. During these periods the average spread slowly crept above the level

---

[14] *See, e.g.*, http://www.eia.gov/pub/oil_gas/petroleum/presentations/2001/factors_gasoline_prices/sld007.htm.

that existed when UP established its mileage-based HDF surcharge, although there were significant periods in 2007 and 2008 when the spread was below the original level. In short, the average appears to have increased over time, but that change is apparent only in retrospect: Given the high variability, there is no obvious way to predict whether the average spread will increase or decrease from one month to the next. Nor can UP predict whether the spread will move back towards earlier levels as the economy continues to recover or as oil and gas production increase within the United States. Given the lack of predictability, the concern expressed in the Board's Advance Notice that the safe harbor provision could give railroads the "unintended advantage" of being able to alter their fuel surcharge programs to take advantage of changes in the spread is unwarranted.

In short, the HDF Index continues to be "a reasonable index to apply to measure changes in fuel costs for purposes of a fuel surcharge program." *Rail Fuel Surcharges*, slip op. at 11. This is confirmed by the .994 correlation between the HDF Index and UP's actual fuel prices. Furthermore, the HDF Index remains a timely, accurate, transparent, publically available, and neutral source of data on changes in fuel prices. UP is not aware of another fuel price index that would better meet those criteria.

III. The Benefits Of Retaining The HDF Index Safe Harbor Outweigh The Board's Concern About Changing Spreads.

The benefits of retaining the HDF Index safe harbor are the same as those articulated when the safe harbor was adopted. The HDF Index is well-known, publicly available, and timely, and it is recognized as accurate, transparent, and neutral. It meets all of the goals articulated in *Rail Fuel Surcharges*. Additionally, railroads and shippers have invested time and money in developing administrative systems and processes that are based upon the HDF Index, and they have gained familiarity with the performance of the HDF Index.

The alternatives are less clear, and they introduce potential new problems and significant costs. For example, the Board could require railroads to rebase their fuel surcharge programs periodically. But unless the Board can predict when the spread will change, in which direction, and for how long – which is likely to be impossible, given the variability discussed above – the Board would need to use an arbitrary rule. And frequent rebasing would be guaranteed to create significant administrative costs for both railroads and shippers, who would have to reprogram billing, budgeting, and forecasting systems to reflect new rate and fuel surcharge levels, with little or no benefit.

The Board also could modify the safe harbor provision to encourage use of a different index. However, the same concerns identified above apply – namely, increased administrative costs with little or no benefit. Additionally, the new index well might give rise to similar or greater concerns over time.

A third alternative is that the Board could eliminate the concept of a safe harbor entirely. In that case, however, the Board also would have to eliminate the requirement that railroads use a fuel index that meets or exceeds "the standards of accuracy, transparency, availability, and neutrality" of the HDF Index. *Rail Fuel Surcharges*, slip op. at 11. The Board could not require that railroads use a publicly available index – the only type of index that could ever meet or exceed the HDF Index's standards of "accuracy, transparency, availability, and neutrality" – but hold them liable when the index fails to precisely reflect changes in their actual fuel prices, as will inevitably happen with any publically available index. Of course, use of a publicly available index was important to the vast majority of shippers according to their comments in *Rail Fuel Surcharges*, so now encouraging use of non-public indices seems like a solution that would be a sharp departure from the general consensus.

Moreover, the availability of a safe harbor makes great sense. Safe harbors are commonly used to provide some measure of certainty and reduce litigation costs where laws or regulations incorporate subjective standards. In the absence of any safe harbor, disputes over fuel surcharges likely would increase at the Board, even if railroads continued using public indices. The lack of a safe-harbor would also create unfair asymmetry. With the benefit of hindsight, shippers readily could file claims when changes in the indices overstated changes in rail fuel prices, secure that railroads could not file claims when the situation was reversed. *Cf. Burlington Northern Inc. v. U.S.*, 459 US 131, 141-42 (1982). Because railroads are subject to damage claims only if they use an "unreasonable" index, *see Rail Fuel Surcharges*, slip op. at 11, identifying a certain method of compliance that requires use of the best known available index, is far preferable to relying solely on an uncertain, case-by case approach. *Cf. Ark. Elec. Coop. Corp. – Petition for Declaratory Order*, FD 35305, slip op. at 12 (STB served Mar. 3, 2011) ("A cost effective safe harbor could go a long way to address our concern that the current tariff does not provide shippers with a certain method of compliance."). In this respect, the HDF safe harbor not only fairly balances the interests of accuracy and transparency, but also reduces unnecessary litigation and the associated burdens on parties and the Board by providing parties with clear guidance on how to comply with the rules.

CONCLUSION

The HDF Index continues to be "a reasonable index to apply to measure changes in fuel costs for purposes of a fuel surcharge program." *Rail Fuel Surcharges*, slip op. at 11. While UP remains open to the possibility that a different index could be used, UP is unaware of any other index that would satisfy the objectives of timeliness, accuracy, transparency, availability, and neutrality and better correlate with UP's fuel prices. Moreover, as discussed above, modifying or removing the safe harbor would impose large costs on and create uncertainty for all parties but deliver no clear benefits. Accordingly, UP believes the benefits of maintaining the current HDF Index safe harbor outweigh any concerns. The current HDF Index safe harbor strikes the right balance on the multitude of concerns raised by the parties in *Rail Fuel Surcharges*.

Respectfully submitted,

GAYLA L. THAL
LOUISE A. RINN
REBECCA B. GREGORY
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
Phone: (402) 544-5291

MICHAEL L. ROSENTHAL
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Phone: (202) 662-6000

Attorneys for Union Pacific Railroad Company

August 4, 2014

VERIFICATION

I, Mark J. Draper, Manager - Economic Research and Analysis for Union Pacific Railroad Company ("UP"), declare under penalty of perjury that I have read the foregoing Comments of Union Pacific Railroad Company and that the facts and information regarding the correlation and changes in spread between UP's fuel price and the HDF Index set forth in Part II on pages 7, 8 and 9 are true and correct, to the best of my knowledge, information, and belief. Further, I certify that I am qualified and authorized to file this Verification.

Executed on August 4, 2014.

Mark J. Draper