BEFORE THE SURFACE TRANSPORTATION BOARD

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

RAILROAD FUEL SURCHARGES (SAFE HARBOR)

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I. INTRODUCTION

Highroad Consulting, Ltd. (Highroad) is a transportation and logistics consulting firm that has been helping clients to develop effective strategies to reduce costs and to improve the efficiency of operations since 1996. Highroad focuses on surface transportation for domestic and international shipments. Our most distant client is in Beijing, the People's Republic of China; however, the preponderance of our work is in North America.

Highroad's clients include shippers, carriers, municipalities, trade associations, and other consulting firms and third-party logistics companies that sub-contract rail projects to our firm. Clients include small manufacturers and some large, brand name corporations, including some Fortune 500 companies.

In 2003, Highroad released a white paper, 2003 Rail Fuel Impact Study, with cost evidence that reported the railroads were over-recovering with their fuel surcharge programs. The study was featured in an article in *Traffic World* magazine.[1] Subsequently, shippers complained to the legislators and the STB, demanding an investigation of the railroads' fuel surcharge programs.

[1] "Following the Competition", by John Gallagher, Traffic World, July 14, 2003.

Highroad represented four clients at the hearing initiated by the STB, *STB Ex Parte 661, Rail Fuel Surcharges.* We presented testimony at the hearing with cost evidence that fuel surcharges on twenty representative moves were 4 – 5 times higher than the total fuel costs for the moves. In 2009, we updated the fuel surcharge study and confirmed that while there was some improvement, the Class I railroads continued to over-recover with their fuel surcharge programs.

Since the Board's decision in EP 661, Highroad has assisted numerous clients, developing successful fuel surcharge strategies for rail, intermodal, and motor carrier shipments. The primary objective of those strategies was to develop a fuel surcharge agreement that precluded over-recovery of fuel costs, but the fuel surcharges agreed to were fair to all parties.

Fuel surcharges continue to be a source of conflict between carriers and shippers, so we applaud the Board for initiating this proceeding and creating a forum for discussion of these very important issues.

II. BACKGROUND

The Board has instituted this advance notice of proposed rulemaking proceeding to give shippers, rail carriers, and other interested persons the opportunity to comment on whether the safe harbor provision of the Board's current fuel surcharge rules should be modified or removed.

In *STB Ex Parte 661, Rail Fuel Surcharges* the Board established as a "safe harbor" an index, Highway Diesel Fuel Index (HDF), for carriers to use to measure changes in fuel costs for the purposes of a fuel surcharge program. Although HDF tracks retail prices, and the index includes taxes not paid by wholesale buyers like the Class I railroads, the Board was persuaded that the HDF Index would accurately reflect changes in railroad fuel costs. For the purpose of calculating fuel surcharges, changes in railroad fuel costs are reflected in "incremental fuel costs," i.e., those fuel costs not embedded in the base rate.

In Cargill, the Board determined that, as measured by the HDF, BNSF's total incremental fuel costs for the traffic subject to the challenged fuel surcharge program only narrowly exceeded the fuel surcharge revenues collected by BNSF. However, if BNSF's incremental fuel costs were instead measured by the rail carriers' internal fuel costs, BNSF's fuel surcharge revenues would have exceeded incremental fuel costs by $181 million.

This occurred because the HDF did not precisely reflect changes in BNSF's internal fuel costs. The overall difference between the average retail price per gallon as reflected in the HDF Index and the lower wholesale price per gallon actually paid by BNSF increased more than it decreased over the five-year analysis period. This raised concern that the safe harbor provision could give rail carriers an unintended advantage.

The Board is seeking comments from the public on five key questions:

1. Should the safe harbor provision of Fuel Surcharges be modified or removed?
2. Are there problems associated with the Board's use of HDF as a safe harbor to judge the reasonableness of fuel surcharge programs?
3. Can any of the problems with the safe harbor be addressed through modification of it?
4. Is the phenomenon observed in Cargill an aberration.
5. Are the problems with safe harbor outweighed by its benefits?

Parties are also encouraged to comment on any other matter that they believe bears on whether the safe harbor should be modified or removed.

In this document, we will respond to the Board's questions, and we will present evidence that the phenomenon observed in Cargill was not an aberration, that the use of the HDF as a safe harbor to judge the reasonableness of fuel surcharge programs is problematic as it contributes to over-recovery of incremental fuel cost increases. However, the Safe Harbor establishes a standard and there is no current alternative that would improve the processes. The Safe Harbor should be re-defined to remove the railroads' immunity and the railroads should be penalized if their fuel surcharge programs fail to comply with the Board's directive.

Further, we will present additional information that will support our request for the Board to re-open *STB Ex Parte 661, Rail Fuel Surcharges* so the railroads' fuel surcharge programs and the Board's fuel surcharge rules, which have been in effect for 12 years and 7 years, respectively, should be reviewed for potential change or termination.

III. A REVIEW OF THE PURPOSE OF THE RAILROADS' FUEL SURCHARGE PROGRAMS.

The Board, in its examination of BNSF's incremental fuel costs in Cargill determined that changes in the HDF Index did not precisely reflect changes in BNSF's internal fuel costs, and they expressed concern that the safe harbor provision could give the railroads an unintended advantage.[2] Understanding it was the Board's intent for the railroads to assess fuel surcharges that are more closely linked to the

[2] STB Decision, Docket No. EP 661 (Sub-No. 2), Rail Fuel Surcharges (Safe Harbor), pp. 2 – 3.

portion of its fuel costs attributable to the movement involved[3], and knowing that general indices would not reflect the fuel costs for specific shipments, there seemed to be a disconnect between the intent and the decision to establish the safe harbor. Therefore, if we are to develop a quality response to the Board's questions, and since the current fuel surcharge rules have been in effect for more than seven years, it is worth taking the time to look back at the original decision and to review the purpose of the fuel surcharges.

In a decision served August 3, 2006, the Board proposed to adopt several measures to address rail fuel surcharge practices. First, carriers would be required to develop a means of computing the surcharge that is more closely linked to the portion of its fuel costs attributable to the movement involved."[4]

In a later decision on January 25, 2007, the Board confirmed, "A fuel surcharge is a separately identified component of the total rate that is charged for the transportation involved, *purportedly to recoup increases in the carrier's fuel costs*."[5] (Italics and underscore for emphasis) The purpose of the fuel surcharges appears to be straight forward, i.e., fuel surcharges are to reflect fuel cost increases. However, I recalled a comment made by one of the Board members at the fuel surcharge hearing, that the purpose of the fuel surcharges is to allow the carriers to recover "*unanticipated*" increases in fuel costs. Since fuel costs have been stable in recent years and there have not been any "unanticipated" fuel cost increases, we decided to expand our review to determine the current purpose of the surcharges.

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[3] STB Ex Parte No. 661 Decision, January 25, 2007, p. 2.
[4] STB Ex Parte No. 661 Decision, January 25, 2007, p. 2.
[5] STB Ex Parte No. 661 Decision, January 25, 2007, p. 1.

From the very beginning, the Board confirmed that the surcharges are to be more closely linked to the fuel costs attributable to the movements involved.[6] Addressing the problems with calculating surcharges based on a percentage of the rate, the Board stated, a surcharge that is tied to the level of the base rate, rather than to fuel consumption for the movement to which the surcharge is applied, cannot fairly be described as merely a cost recovery mechanism.... If it is used instead as a broader revenue enhancement measure, it is mislabeled."[7]

The intent to establish fuel surcharge programs to reflect actual fuel cost increases for related movements was confirmed by the Board again and again. Whether the fuel surcharge is tied to the level of the base rate or to an index, it cannot be described as a cost recovery mechanism, and we will present evidence in Section IV that instead, the railroads' fuel surcharges have developed into revenue enhancement programs.

IV. HISTORICAL DATA AND COST EVIDENCE REVEALS THE RAILROADS CONTINUE TO OVER-RECOVER WITH THEIR FUEL SURCHARGE PROGRAMS.

One of the questions posed by the Board is whether or not the phenomenon observed in Cargill (a growing spread between a rail carrier's internal fuel costs and the HDF Index) was an aberration. Based on our experience analyzing fuel surcharge programs and developing fuel surcharge strategies for clients, we were confident that

[6] Decision served August 3, 2006, the Board proposed to adopt several measures to address rail fuel surcharge practices. First, carriers would be required to develop a means of computing the surcharge that is more closely linked to the portion of its fuel costs attributable to the movement involved."[6]

[7] STB Ex Parte No. 661 Decision, January 25, 2007, p. 5.

we knew the answer to that question, but the challenge was to gather evidence that proves the phenomenon observed in Cargill was not an aberration.

All of the data gathered and the results of our analysis of the costs prove there are problems with the Board's use of the HDF Index as a safe harbor in judging the reasonableness of fuel surcharge programs if the intent is to allow the carriers to only recover "incremental fuel costs," i.e., those fuel costs not embedded in the base rate.

Initially, we planned to focus our analysis on the four primary Class I railroads, Burlington Northern Santa Fe (BNSF), CSX Corporation (CSXT), Norfolk Southern (NS), and Union Pacific Railroad (UP), since revenues for those carriers comprise 91.3% of total rail revenues in the U.S.[8] However, Norfolk Southern does not assess fuel surcharges on regulated traffic. Therefore, our analysis in this section of this report focuses on BNSF, CSXT, and UP.

The rail fuel surcharge programs were first announced in 2002. However, the railroads have since revised their fuel surcharge programs. Concurrent with adoption of the revised fuel surcharge indexes, the railroads increased rates, rolling fuel surcharge revenues into the rates with the apparent objective to mitigate potential loss of fuel surcharge revenues. Therefore, based on the Board's direction when calculating incremental fuel cost increases, we used the effective dates of the railroads' current fuel surcharge programs as the base years.[9] BNSF's current fuel

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[8] AAR Class I Railroad Statistics, Type of Freight Carried for 2012.

[9] "The changes in a rail carrier's fuel costs are reflected in its "incremental fuel costs" by which we mean those fuel costs, not embedded in the base rate that the rail carrier seeks to recover through a fuel surcharge mechanism." STB Decision Docket No. EP 661 (Sub-No.2), May 22, 2014, p. 2.

surcharge index became effective January, 2011; CSXT's current index was effective April, 2007[10]; and UP's current fuel surcharge index was effective April, 2007.

Sources of data used for our analysis include:

- U.S. No. 2 Diesel Retail Prices (Dollars Per Gallon).
- Fuel costs for years 2006 – 2013 as reported in the railroads' Annual Reports Financial Data, Form R-1 reports to the STB.
- Fuel surcharge revenues:

  BNSF – Years 2005, 2006, 2007, annual 10-K reports. Years 2008 – 2013, Quarterly Fuel Surcharge Reports filed with the STB.

  CSXT – Years 2008 – 2013, Quarterly Fuel Surcharge Reports.

  NS – Years 2006, 2007 as reported in the 2008 10-K report.

  UP – Years 2006 – 2007, annual 10-K reports; years 2008 – 2013, Quarterly Fuel Surcharge Reports.

The table below shows the change in the total fuel costs, the fuel surcharge revenues, and the HDF Index for the base years vs. 2013 (CSXT did not start reporting fuel surcharge revenues until the fourth quarter, 2007).

[10] CSX very recently announced a revised fuel surcharge, changing he strike price to $3.75, to be effective January 1, 2015. Analysis of CSXT's fuel surcharge program herein focuses on the fuel surcharge program that is currently in effect.

Changes in Annual Fuel Costs vs Fuel Surcharges

($000)

BNSF	Fuel Cost - 2011	FSC - 2011	HDF Index - 2011
	4,103,558	2,663,383	3.388
	Fuel Cost - 2013	FSC - 2013	HDF Index - Current
	4,318,571	2,911,766	3.884
	Δ Fuel Cost	Δ FSC	Δ HDF Index
	215,013	**248,383**	**0.496**
	% Δ Fuel Cost	% Δ FSC	% Δ HDF Index
	105.24%	**109.33%**	**114.64%**
CSXT	Fuel Cost - 2007	FSC - 2007	HDF Index - 2007
	1,210,313		2.834
	Fuel Cost - 2013	FSC - 2013	HDF Index - Current
	1,546,648	1,149,912	3.884
	Δ Fuel Cost	Δ FSC	Δ HDF Index
	336,335	**1,149,912**	**1.05**
	% Δ Fuel Cost	% Δ FSC	% Δ HDF Index
	127.79%	**#DIV/0!**	**137.05%**
UP	Fuel Cost - 2007	FSC - 2007	HDF Index - 2007
	2,973,954	1,478,000	2.834
	Fuel Cost - 2013	FSC - 2013	HDF Index - Current
	3,446,691	2,596,109	3.884
	Δ Fuel Cost	Δ FSC	Δ HDF Index
	472,737	**1,118,109**	**1.05**
	% Δ Fuel Cost	% Δ FSC	% Δ HDF Index
	115.90%	**175.65%**	**137.05%**

The table above gives us a high level view of what occurred over a 3 - 7 year time frame:

- BNSF fuel costs increased 105.24% vs the base year, while the fuel surcharge revenues increased 109.33%, and the HDF Index increased 114.64%.
- CSXT fuel costs increased 127.79% vs the base year and the HDF Index increased 137.05%.
- UP fuel costs increased 115.9% vs the base year; fuel surcharge revenues increased 175.65%; and the HDF index increased 137.05%.

Concerned that the total dollar amounts reported and inserted into this table do not take into consideration any changes in volumes, we developed a second table based on costs and revenues per ton-mile, which shows the progression of the fuel costs per ton-mile, and the fuel surcharge revenues per ton-mile, between the base year and the end of 2013. In every case, with application of the HDF Index, fuel surcharge revenues increased at a greater rate vs fuel costs. Of significance is UP's fuel surcharge revenues which increased 192.19% over six years while fuel costs only increased 126.62%.

	BNSF						
Year	Cost per TM ($)	Δ from prev yr	% Δ Cost per TM	FSC rev p TM ($)	Δ from prev yr	% Δ FSC per TM	HDF Index
2006	4.27	n/a	n/a	2.66	n/a	n/a	2.467
2007	4.88	0.61	114.24%	2.73	0.07	102.64%	2.485
2008	6.72	1.84	137.73%	4.88	2.15	179.04%	3.308
2009	3.81	-2.91	56.72%	2.07	-2.81	42.32%	2.292
2010	4.54	0.73	119.07%	3.04	0.98	147.22%	2.845
2011	6.33	1.79	139.42%	4.11	1.07	135.06%	3.388
2012	6.49	0.16	102.50%	4.29	0.18	104.34%	3.833
2013	6.39	-0.09	98.57%	4.31	0.03	100.61%	3.909
Δ from base year 2011 to year-end 2013 →		0.07	101.03%		0.20	104.98%	

	CSXT						
Year	Cost per TM ($)	Δ from prev yr	% Δ Cost per TM	FSC rev p TM ($)	Δ from prev yr	% Δ FSC per TM	HDF Index
2006	4.39	n/a	n/a	???	n/a	n/a	2.728
2007	4.89	0.50	111.33%	???			2.834
2008	6.85	1.96	140.02%	4.81			4.084
2009	3.72	-3.13	54.31%	1.43	-3.38	29.69%	2.220
2010	4.91	1.19	131.89%	2.41	0.98	168.80%	3.059
2011	6.83	1.93	139.26%	4.61	2.20	191.40%	4.064
2012	6.84	0.01	100.08%	5.01	0.40	108.73%	4.115
2013	6.82	-0.01	99.82%	5.07	0.06	101.18%	3.930
Δ from year 2008* to year-end 2013 →		-0.02	99.65%		0.27	105.52%	

* Base year 2007 fuel surcharge revenue not available

	UP						
Year	Cost per TM ($)	Δ from prev yr	% Δ Cost per TM	FSC rev p TM ($)	Δ from prev yr	% Δ FSC per TM	HDF Index
2006	5.01	n/a	n/a	2.86	n/a	n/a	2.728
2007	5.29	0.28	105.58%	2.63	-0.23	91.84%	2.834
2008	6.89	1.60	130.24%	4.13	1.50	157.00%	4.084
2009	3.57	-3.32	51.85%	1.26	-2.87	30.57%	2.220
2010	4.64	1.06	129.71%	2.31	1.04	182.64%	3.059
2011	6.37	1.74	137.46%	4.04	1.74	175.25%	4.064
2012	6.73	0.35	105.55%	4.99	0.95	123.46%	4.115
2013	6.70	-0.03	99.63%	5.06	0.07	101.33%	3.930
Δ from base year 2007 to year-end 2013 →		1.41	126.62%		2.43	192.19%	

It is important to note that these calculations are based on total ton-miles, including those for shipments that are exempt from regulation. Since the surcharges are to be more closely linked to the portion of the fuel costs attributable to the movements involved, this points to the fact that the railroads continue to over-recover with their current fuel surcharge programs and it is likely the phenomenon experienced in Cargill was not an aberration.

The HDF Index alone does not confirm the reasonableness of fuel surcharges – it is simply an increase mechanism. Strike prices set by the railroads may have been too low and/or the rate of the fuel surcharge increase too high. It has been our experience that amounts over-recovered from a single shipper can total millions of dollars. The designs of the fuel surcharge indexes are arbitrary on the part of the railroads and present opportunities for the railroads to develop fuel surcharge programs that more accurately reflect fuel cost increases, or to design fuel surcharge programs that develop into profit centers. The HDF Index alone does not confirm the reasonableness of fuel surcharges – it is simply an increase mechanism.

V. THE SAFE HARBOR IS PROBLEMATIC AT BEST AND ESTABLISHES A MECHANISM FOR THE RAILROADS TO CALCULATE FUEL SURCHARGES THAT ARE NOT RELEVANT TO THE BOARD'S DIRECTIVE IN RAIL FUEL SURCHARGES.

The railroads' fuel surcharge programs have been in effect for more than ten years, and the railroads' current fuel surcharge indexes have been in effect for 3 – 7 years. Given the length of time the surcharges have been in effect, we believe it is reasonable to expect that fuel costs would have increased absent a fuel crisis.

We do not believe it was the Board's intent to allow the railroads to recover 100% of the incremental increases in fuel costs over that extended time period yet, the fuel surcharge programs have more than covered the cost increases and some carriers' fuel surcharge revenues exceeded total fuel costs.

The Safe Harbor eliminates the railroads from responsibility to assess their fuel surcharge programs for accuracy and fairness; with the current rules all they are required to do is to apply the HDF Index. We acknowledge the fact that the railroads have revised their fuel surcharge programs. However, as evidenced by Union Pacific's data, the related rate increases mitigates any potential reasoning that the railroads decided to revise their programs so they are fair and reasonable. Instead the fuel surcharge programs continue to be revenue enhancement programs which are protected by the current rules.

Still, if the Safe Harbor is eliminated, the railroads would not have an approved index on which to base their fuel surcharge programs and the result could be diminished transparency and credibility of the fuel surcharge programs. However, the Board should redefine or modify the Safe Harbor to remove the immunity and to hold the railroads accountable for developing programs that comply with the Board's directive in STB Ex Parte 661, Rail Fuel Surcharges.

Ideally, the fuel surcharge programs will closely shadow changes in fuel costs. However, there should be a penalty if over-recovery occurs. Otherwise, the Board's directive and the fuel surcharge rules are impotent.

VI. THE BOARD SHOULD RE-OPEN EX PARTE 661, RAIL FUEL SURCHARGES.

We believe it would be reasonable and appropriate for the Board to conduct a review of the rail fuel surcharge programs, simply based on the fact the current rules have been in effect for more than seven years. However, there are some fundamental issues with the fuel surcharges that, we believe, emphasize the need for a review.

A. STB Fuel Surcharge Rule should apply to exempt traffic.

As mentioned earlier, Norfolk Southern does not have a mileage based fuel surcharge program; all of their fuel surcharges are based on a percent of the rates which the Board determined does not reflect the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied.[11]

On the surface, NS' policy not to apply mileage based fuel surcharges could give the appearance that shippers of regulated traffic benefit from that policy. However, that is not the case – instead, NS has developed a method to skirt the

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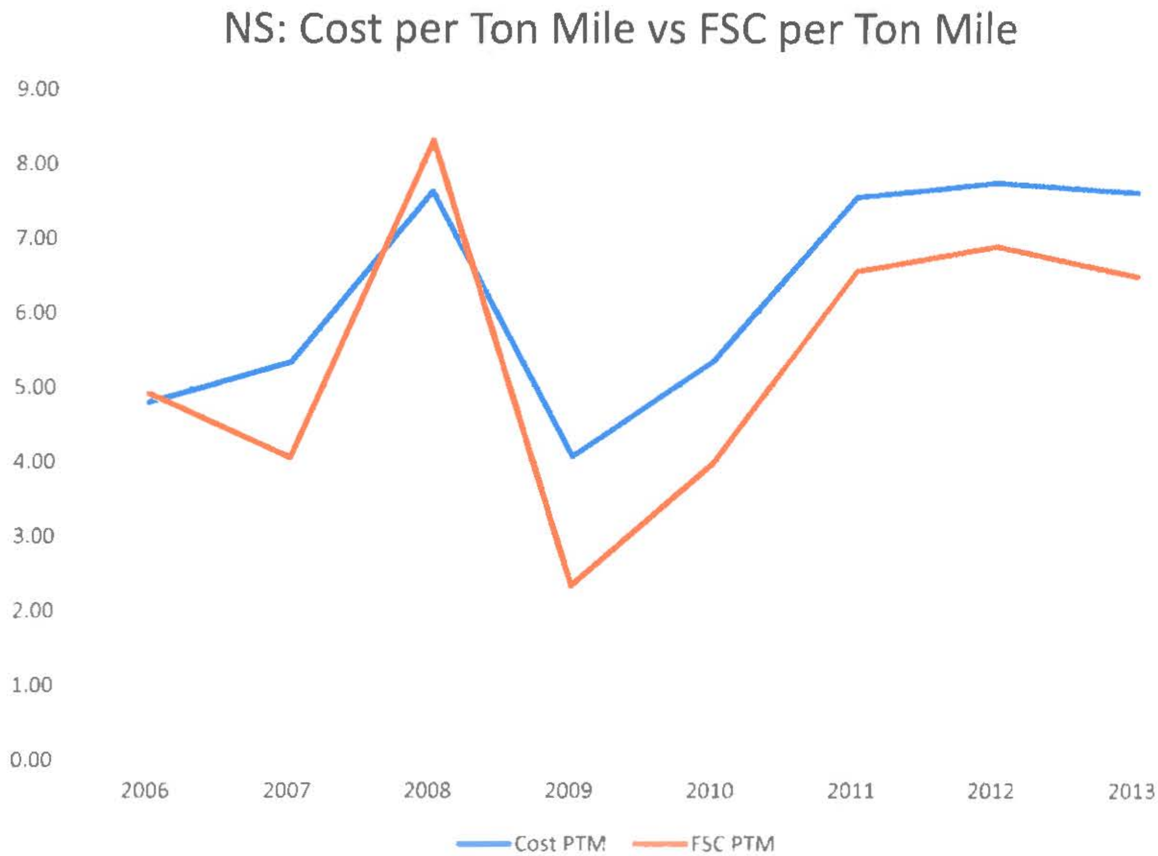
[11] "..... a surcharge that is tied to the level of the base rate, rather than to fuel consumption for the movement to which the surcharge is applied, cannot fairly be described as merely a cost recovery mechanism." STB EP_661_0, Rail Fuel Surcharges, p.5.

Board's directive and to retain fuel surcharge revenues that are tied to the level of the base rates. The method is simple:

1. NS proposes the rate(s) to the customer; some negotiation may occur but the customer is forced to accept NS' final decision as take-it-or-leave it, or to be forced to find alternatives because there would not be any applicable rate(s) via NS for the move(s).
2. The rate(s) are published in what those of us with industry experience would refer to as non-distribution tariffs, meaning they are private documents but, still, they are nothing more than electronic tariffs. Even though they are non-signatory documents, NS inserts a single word on the title page, "Contract", so the interpretation is the rates are exempt from regulation and the percentage based fuel surcharges apply.

The impact on NS fuel surcharge revenues is staggering as illustrated in the table and graph shown below. In 2006 and 2008, NS fuel surcharge revenues exceeded total fuel costs (in 2008 NS fuel surcharge revenues were 109% of NS total fuel costs). In 2011 and 2012, they recovered 88.9% of their total fuel costs, and fuel surcharge revenues for the most recent three years, 2011 through 2013, were 86.9% of NS <u>total</u> fuel costs.

NS						
Cost of Fuel ($)*	FS Revenue ($)*	Fuel Used (gal)*	TM*	Cost PTM	FSC PTM	Gal per TM
976,559	1,000,000	518,783	203,790	4.79	4.91	2.5457
1,044,341	792,000	497,624	195,954	5.33	4.04	2.5395
1,489,607	1,622,805	482,555	195,343	7.63	8.31	2.4703
645,304	369,562	392,541	158,520	4.07	2.33	2.4763
974,201	723,500	440,159	181,961	5.35	3.98	2.4190
1,446,934	1,255,521	473,888	191,713	7.55	6.55	2.4719
1,437,178	1,277,952	459,308	185,639	7.74	6.88	2.4742
1,473,183	1,253,933	476,304	193,552	7.61	6.48	2.4609



B. The Board should review the status of the fuel surcharge programs and whether or not continuation of the fuel surcharge programs is justified.

We submit it is time for a review of the status of fuel surcharge programs, and we request that the Board re-open STB Ex Parte No. 661, Rail Fuel Surcharges for an in-depth review of the current rules for potential change, including potential removal of immunity and penalties to be assessed if the carriers over-recover with their fuel surcharge programs.

Railroad fuel surcharge programs have been in effect since 2002, and the Board's fuel surcharge rules issued in EP-661-0, Rail Fuel Surcharges, have been in effect since 2007. It seems reasonable to assume that fuel costs would have increased absent a fuel crisis over a 7 – 12 year time frame.

Further, if the surcharge programs are to continue, we submit the rules should also apply to shipments that are currently exempt from regulation.

However, there are a number of reasons to question whether or not there is a continuing need for railroads' fuel surcharge programs. Fuel costs have been stable in recent years, so the railroads have not been challenged with unanticipated cost increases. Further, fuel surcharge revenues have been rolled into the rates, rates have since been increased and, as a result, the fuel surcharge revenues were also increased.

Initially when developing fuel surcharge strategies for several clients, we calculated fuel costs for the moves that applied in the fourth quarter 2002 as a base year. Therefore, before calculating the incremental cost increases, we applied the normal cost of inflation to the costs for the base year before calculating the incremental change in fuel costs. As a result, the surcharges were reduced by nearly 50%. We still use that methodology when basing the years on the effective date of the current index applied by the respective railroad but it is much more complex as we are required to consider other factors, including the impact of rolling fuel surcharge revenues into the rates.

Another question is whether the fuel surcharges are to be permanent or if the intent was to allow the railroads to address new and unanticipated cost increases.

Investopedia defines a surcharge as, "A fee or other charge that is added to the cost of a good or service. A surcharge is typically added to an existing tax, and may not be included in the stated price of a good or service. *It may be a temporary measure to defray the cost of increased commodity pricing, such as with a fuel surcharge,* or it may be permanent." (Italics and underscore for emphasis)

It is a general perception in the shipping community that the fuel surcharge programs were to be a temporary solution to allow the railroads to address the fuel crisis. However, the fuel surcharge programs have been in effect for an extended time frame. Further, because the railroads have rolled fuel surcharge revenues into rates, the surcharges will have a long term (and indefinite) impact on rail costs since the fuel surcharge portion of the rates are included in the rate increases.

Currently, the fuel surcharge rules do not apply on exempt traffic. This in itself causes us to question if the fuel surcharge programs actually serve a purpose since the railroads currently have the legal right to increase rates on 20-days' statutory notice and they already have the flexibility to cover any potential spike in fuel costs.

These are only a few examples of topics to consider if the Board re-opens the fuel surcharge proceeding. Again, we believe it is reasonable and appropriate for the Board to conduct a periodic review of the status of the fuel surcharge programs and related rules considering the length of time the fuel surcharges have been in effect.

Fuel surcharge indexes have been revised and fuel surcharge revenues rolled into the rates, and we already have transparency with the Quarterly Fuel Surcharge Reports filed by the carriers, so that is not an issue. One can easily conclude from the Quarterly Fuel Surcharge Reports that the railroad fuel surcharge programs are over-recovering, yet the railroads are allowed to continue to over-recover with the surcharge programs. Further, when they do, there is no penalty for not complying with the Board's decision.

To be fair to the railroads, we submit it is extremely difficult, if not impossible, to comply with the Board's directive to design fuel surcharge programs that accurately reflect incremental changes in fuel costs for particular movements. This is a topic that has been analyzed again and again, and the realization that there is probably not an ideal solution comes at a time when fuel costs are stable and the basic reason behind the fuel surcharge programs has developed into a moot issue.

Some shippers have expressed concern that if the surcharge programs are terminated, the railroads will simply increase rates to retain fuel surcharge revenues, and that is a likely topic to be discussed if the Board re-opens the fuel surcharge proceeding. We submit there is no graceful way for the railroads or the shippers to exit the current situation because of the railroads' focus on revenue growth and shareholder value, and the shippers' need to control costs and to be market competitive. However, since the fuel surcharge programs are no longer needed and have developed into nothing more than revenue enhancement programs, then they should be terminated. One can only hope market conditions (global and domestic) will be the primary concern of the carriers when constructing rates and planning subsequent rate increases.

VII. SUMMARY

The Safe Harbor has contributed to the over-recovery of incremental fuel cost increases. It eliminates the railroads from responsibility to assess their fuel surcharge programs for accuracy and fairness; with the current rules all they are required to do is to apply the HDF Index and the fuel surcharge programs continue to be revenue enhancement programs which are protected by the current rules.

Still, if the Safe Harbor is eliminated, the railroads would not have an approved index on which to base their fuel surcharge programs and the result could be diminished transparency and credibility of the fuel surcharge programs. Therefore, at least for the present time, we recommend preservation of the HDF as a cost increase mechanism.

However, if the fuel surcharge programs are to continue, the rules should also apply to shipments that are currently exempt from regulation and the Board should redefine or modify the Safe Harbor to remove the immunity and to hold the railroads accountable for developing programs that comply with the Board's directive in STB Ex Parte 661, Rail Fuel Surcharges. Further, there should be a penalty if over-recovery occurs.

Finally, we submit the Board should re-open STB Ex Parte 661, Rail Fuel Surcharges to review the relevance of the surcharge programs and to confirm if surcharges are to be permanent or if the purpose of the fuel surcharge programs was to give the railroads the ability to address unanticipated increases in fuel costs which resulted from our nation's fuel crisis. If permanent, then the rules warrant in-depth review. On the other hand, if the surcharges were intended to be temporary in nature, then the Board should determine if there is a current and continuing need for the railroads' fuel surcharge programs.

Respectfully submitted,

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