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BEFORE THE
SURFACE TRANSPORTATION BOARD

RAIL FUEL SURCHARGES (SAFE HARBOR)

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

REPLY COMMENTS
OF
THE MERCURY GROUP
A Shipper-Based Mobile Energy Study Group

John Duncan Varda
Attorney for The Mercury Group

Of Counsel
DeWitt Ross & Stevens s.c.
2 E. Mifflin Street, Suite 600
Madison, WI 53703
T. 608-252-9311; F. 608-252-9243
jdvarda@dewittross.com

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IDENTIFICATION OF THE MERCURY GROUP

The Mercury Group is a shipper-based mobile energy study group focused on best practices and market innovations to reduce the energy consumption, energy costs and emissions associated with the movement of products to market. The Mercury Group previously filed Initial Comments in this docket.

REPLY COMMENTS

The "Opening Comments of CSX Transportation, Inc." ("CSX") in this docket state:

> [I]n 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.**

CSX Opening Comments at p. 2 (emphasis added).

To the contrary, many shippers are vitally and increasingly concerned about the energy and emissions required to move their freight. Today, based on fuel marketplace information and available technology, many leading shippers rely on market based fuel management, as an alternative to fuel surcharges, to directly pay their carriers the cost of fuel for transportation of their goods – annually over 7.2 million unique freight movements from across North America, including truckload and intermodal.[1] CSX's observation that shippers are "indifferent to what amount the provider may attribute to fuel costs" is demonstrably wrong. Shippers are not "indifferent":

> It is also worth noting that when transparency exists and fuel management is a visible part of the routing decision, then conversion from truckload to intermodal takes place at a much greater rate than it would otherwise. This is evident when one compares industry data, from the Association of American Railroads, that shows that intermodal growth in 2013 was 4.6% across the industry, to shippers utilizing the Breakthrough process who experienced 21.5% growth in their intermodal movements (see Chart 8).[2]

In 2006 when the Board sought comments in *Rail Fuel Surcharges*, STB Ex Parte No. 661 and subsequently adopted the HDF index Safe Harbor, Breakthrough's alternative to fuel surcharges was in its infancy. That had changed substantially by 2010. The marketplace

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[1] Initial Comments of The Mercury Group, in this docket, pp. 16-18. "Intermodal" has been limited to drayage segments as no Class I railroad has indicated a willingness to participate. The freight payments and related processes employed by Breakthrough Fuel LLC ("Breakthrough") are audited and certified as to their accuracy, annually.

[2] Initial Comments of The Mercury Group, in this docket, 7/11/2014, pp. 18-19. See Charts 8 and 9 on p. 19. Moreover, as for the "all-in" price, diesel has dropped 61 cents from its February, 2014 high. This drop has been reflected day-by-day in truckload pricing under market-based fuel management. Indexed fuel surcharges for rail, today, reflect only 12 cents of this drop. Thus, for this segment of truck-competitive freight, over much of this time, as a result of rail's reliance on fuel surcharges, the relative "all-in" price has been substantially and artificially distorted to the disadvantage of rail competitiveness. The more a pricing mechanism (fuel surcharges) is separated from the real market, the greater the distortion – in this example, to the distinct competitive disadvantage of rail.

alternative to indexed fuel surcharges was described by The Mercury Group in 2011 in written comments and oral testimony in *Review of Commodity, Boxcar and TOFC/COFC Exemptions*, STB Docket No. EP 704, and *Competition in the Railroad Industry*, STB Docket No. EP 705.

All of the Class I Railroads submitting initial comments in this current Docket, EP 661 Sub 2, were parties to STB Docket Nos. EP 704 and EP 705. Nonetheless, among their initial comments, one finds the following:

> There is no reason to believe that the benefits from the use of the HDF index in railroad fuel surcharges in terms of transparency, simplicity and ease of administration, have changed or diminished at all since the Fuel Surcharges decision.

BNSF Railway Company's Opening Comments ("BNSF"), 8/4/2014, at p. 7.

> Unless or until another index emerges as a superior proxy – **and CN knows of none** – the HDF Index should remain as a safe harbor.

Comments of Canadian National Railway Company ("CN"), 8/4/2014, at p. 4 (emphasis added).

> 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.

Comments of Union Pacific Railroad Company ("UP"), 8/4/2014, at p. 11.

Granted the quotes of BNSF, CN and UP are focused on alternatives to the HDF index and not alternatives to indexing. And, in that regard, their comments appear to differ little in their scope from those of other commenters. The Board, however, invited a wider range of comment:

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

Rail Fuel Surcharges (Safe Harbor), Docket No. EP 661 (Sub-No. 2), decision 5/29/2014, at p. 3 (emphasis added). It is hard to imagine anything that bears more directly on whether the Safe Harbor should be modified or removed than the marketplace offering alternatives to fuel surcharges that provide fuel information with absolute transparency,[3] enhance rail competitiveness, and enable important economic and other advantages responding to, *e.g.*: changes in on-highway fuel tax rates and policies; potential climate change and changes in emissions regulations; and growth of alternative in rail transportation.[4]

Myopia, inertia and other interests can give the status quo an exceedingly heavy grip. Thus, it is left to the Board to act on The Mercury Group's request that the Board act to encourage the rail industry to investigate, and monitor the rail industry's progress in moving to, market-based fuel programs which accurately represent the fuel efficiency and fuel costs of individual freight movements.

Market-based fuel management programs can do what no index and no indexed fuel surcharge program can do.

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[3] The word "transparency" used vis-à-vis the HDF Index (*e.g*, BNSF Opening Comments, 8/4/2014, at p. 2) means only relative to other indexes. "Transparency" in the market-based fuel management context means true or "absolute" transparency.

[4] Initial Comments of The Mercury Group, 7/11/2014, at pp. 16-19 (competitiveness) and pp. 9-3 (economic and other advantages).

CN, among others, recognizes the inherent limitations of indexing, the HDF Index and, implicitly, fuel surcharges *per se*:

> As CN and other parties have previously pointed out, given the complexities and dynamics of fuel acquisition by rail carriers and fuel consumption for individual shippers, a mileage-based fuel surcharge can reasonably capture variations in a carrier's internal fuel costs when tied to the HDF Index, but **no surcharge approach based on an index can be perfect**.
>
> Variations in individual carrier fuel costs versus any index are to be expected, and fuel **costs per car-mile can vary significantly** from shipper to shipper depending on weight, speed, intensity of local switching, empty return ratio, track conditions, geography, and overall operating conditions, **even for movements of the same commodity over the same distance**.

CN Comments, 8/4/2014, at pp. 4-5 (emphasis added). Market-based fuel management programs, however, are capable of accounting for such "variations" or "attributes" to the extent reasonably necessary to identify the energy consumed for individual, unique freight movements.[5]

CN is not alone in identifying and citing the significance of these "attributes":

> The Board should require that a fuel surcharge program contain those attributes that generally apply to a specific type of movement for a given set of shippers and that any particular movement be subject to the fuel surcharge program that is most descriptive of that movement.

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5 Comments of Western Coal Traffic League ("Allied Shippers") argue the historic and legal context and economic theory in favor relying on the Rail Cost Adjustment Factor ("RCAF") and minimizing reliance on fuel surcharges. Allied Shippers' Comments, 8/4/2014, pp. 12-15, 19, and 78-81. That option, however, for recognition of fuel costs, expands the one-month plus lag of the HDF indexed fuel surcharge process to the greater lag of the quarterly RCAF adjustment. In contrast, market-based fuel management provides recognition of fuel cost daily, in real time, providing the opportunity to manage energy consumption and costs in a timely manner. Initial Comments of The Mercury Group, in this docket, 7/11/2014, pp. 16-18.

Opening Comments of Colorado Springs Utilities ("Colorado Springs"), 8/4/2014, at p. 8.[6] Colorado Springs further explains:

> A fuel surcharge program should not be afforded safe harbor status simply because it utilizes a specific index (i.e. the [sic: HDF] Index). **Instead, the STB should review all attributes of a fuel surcharge program and require the railroads to demonstrate that the surcharge program design, how it is being applied, the fuel use, and the incremental revenue collected are reasonable.**

Colorado Springs, 8/4/2014, at p. 10 (emphasis added). Regarding both critical "attributes" and the "impossibility" of accounting for them through indexed fuel surcharges, the U.S. Department of Agriculture" ("USDA") commented:

> USDA believes devising an index that perfectly coincides with actual internal fuel costs is beyond the capability of the Board, shippers, or railroads. Complicating factors affecting fuel costs that have been mentioned previously include speed, intensity of local switching, empty return ratio, track conditions, geography, grade, curvature, drag and resistance, weather conditions, and overall operating conditions in addition to mileage. Many of these factors cannot be accounted for until after the movement is complete, **indicating the impossibility of devising a perfectly accurate index that can measure incremental fuel costs prior to the movement taking place**. As a result, **the burden rests not on the Board or interested parties to find a golden index nor on any specific index to perform without failure; the burden rests on individual rail carriers.**

USDA Comments, 8/4/2014, at p. 6 (emphasis added).

Though we appreciate the observations (by CN, Colorado Springs, USDA and others) on critical "attributes" and inherent limitations of indexing and indexed fuel surcharges, The Mercury Group does not subscribe to the implied conclusion that focusing on a legal "burden" and other regulatory measures will provide a path to a better solution. For

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[6] "Comments submitted by The National Industrial Transportation League," 8/4/2014, at p. 9-10, express a similar view.

truckload and intermodal (non-rail segments), market-based fuel management came about from shippers and their carriers working together, producing outcomes in which shippers took on the principal risks of fuel cost volatility and costs of implementing market-based fuel management. To date, at a minimum over the last five years and millions of transactions, there are no known instances of litigation or significant dispute among shippers and carriers regarding market-based fuel management.

For these reasons, among others, The Mercury Group has proposed a transition period that would effectively extend the Safe Harbor to permit the Railroads and their shippers to explore implementing market-based fuel management programs to replace the Railroad industry's reliance on fuel surcharges.[7]

CONCLUSION AND FURTHER REQUESTED ACTION

We reiterate our previous recommendation for modifying the safe harbor rule in a staged manner.[8]

Further, market-based fuel management is based on accurate, objective data and processes and sharing of an in-depth understanding of the business intelligence provided by the data and processes; hence, The Mercury Group is "a shipper-based mobile energy study group".[9]

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[7] Initial Comments of The Mercury Group, 7/11/2014, pp. 19-22.

[8] Initial Comments of The Mercury Group, 7/11/2014, pp. 19-22.

[9] The Mercury Group operates under appropriate antitrust compliance guidelines.

Accordingly, as a further requested action, The Mercury Group requests that the Board consider holding, under the Board's auspices, a "study session" for the fuel surcharge stakeholders who have commented in this proceeding for an in-depth exchange on alternatives to indexed fuel surcharges, including market-based fuel management programs.

Respectfully submitted this 15th day of October, 2014.

DEWITT ROSS & STEVENS S.C.

By: John Duncan Varda

John Duncan Varda (#1014100)
jdvarda@dewittross.com

Two East Mifflin Street, Suite 600
Madison, WI 53703-2865
T. 608-255-8891; F 608-252-9243

ATTORNEYS FOR
THE MERCURY GROUP

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

AFFIDAVIT OF MAILING OF THE
REPLY COMMENTS OF THE MERCURY GROUP
A Shipper-Based Mobile Energy Study Group

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

The undersigned, being first duly sworn on oath, deposes and states that she is an employee in the office of DeWitt Ross & Stevens S.C., in the City of Madison, County of Dane, Wisconsin, and that on October 15, 2014, she deposited in the U.S. Mail at Madison, Wisconsin, a true and correct copy of the Reply Comments of The Mercury Group, A Shipper-Based Mobile Energy Study Group, dated October 15, 2014, to the following parties:

Chief Counsel for Advocacy
Office of Advocacy
U.S. Small Business Administration
409 3rd Street, SW
Washington, DC 20416

Jeffrey O. Moreno
Thompson Hine LLP
1919 M. Street, Ste. 700
Washington, DC 20036

Anthony J. Larocca
Steptoe & Johnson LLP
1330 Connecticut Ave. NW
Washington, DC 20036-1795

Theodore K. Kalick
Canadian National Railway Company
601 Pennsylvania Ave., NW
Ste. 500 North Building
Washington, DC 2004

George Luke
P.O. Box 1103, MC 1328
Colorado Springs, CO 80947

Steve Sharp
Consumers United for Rail Equity
6 Willow Oak Loop
Maumelle, AR 72113

G. Paul Moates
Sidley Austin LLP
1501 K. Street, NW
Washington, DC 20005

David Benz
Thompson Hine LLP
1919 M. Street, NW
Ste. 700
Washington, DC 20036

Sandra J. Dearden
Highroad Consulting, Ltd.
9011 Indianapolis Blvd., Ste. A
Highland, IN 46322

Thomas C. Canter
4 West Meadow Lark Ln. #100
Littleton, CO 80127-2798

Randall C. Gordon
1250 Eye Street NW, Ste. 1003
Washington, DC 20005-3922

Karyn A. Booth
Thompson Hine LLP
1919 M. Street, NW, Ste. 700
Washington, DC 20036

Edward Avalos
United States Department of Agriculture
1400 Independence Ave. SW
Washington, DC 20250

Michael L. Rosenthal
Covington & Burling
1201 Pennsylvania Ave. NW
Washington, DC 20004-2401

John H. Leseur
Slover & Loftus
1224 17th Street NW
Washington, DC 20036-3003

Eric Von Salzen
Mcleod, Watkinson & Miller
One Massachusetts Ave., NW
Ste. 800
Washington, DC 20001

Martha S. Olson
Martha S. Olson

Subscribed and sworn to before me this
15th day of October, 2014.

Deborah L. Blose
Deborah Blose, Notary Public, State of Wisconsin
My commission expires: 11/9/2014.

DEBORAH L. BLOSE
NOTARY
PUBLIC
STATE OF WISCONSIN