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April 2, 2007

VIA ELECTRONIC FILING

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: STB Ex Parte No. 661 – Rail Fuel Surcharges

Dear Mr. Williams:

In accordance with the Board's Decision served January 26, 2007, in the above-referenced proceeding, enclosed for filing is "Comments of TOTAL PETROCHEMICALS, USA, INC."

Respectfully submitted,



Michael F. McBride

Attorney for
TOTAL PETROCHEMICALS, USA, INC.

Enclosure

SURFACE TRANSPORTATION BOARD

Ex Parte No. 661

RAIL FUEL SURCHARGES

COMMENTS OF TOTAL PETROCHEMICALS USA, INC.

Pursuant to the Board's Decision served January 26, 2007, in the above-referenced proceeding, TOTAL PETROCHEMICALS USA, INC. ("TOTAL") hereby submits its comments.

TOTAL commends the Board for its recent findings that (a) railroads have overcharged for fuel, (b) it is "double-dipping" to charge for fuel via both the adjustment mechanism applied to a rate, and via a fuel surcharge, (c) a fuel surcharge, if appropriate, must be mileage-based, and (d) railroads must file information monthly with the Board about the price of the fuel used, the volume of fuel used, and the total cost of fuel.

TOTAL believes, however, the Board should have gone further. The Board should have directed use of a single index, so that there would be both (a) clarity (for the benefit of all parties, to avoid further disputes or litigation) and (b) consistency between and among railroads participating in joint hauls (so as to prevent disputes between the carriers concerning recovery of the total costs of fuel consumed in the haul). In this respect, TOTAL endorses the dissent of Vice Chairman Buttrey, and urges the other two Commissioners to reconsider their votes and to endorse a single index, for the reasons stated herein and by Vice Chairman Buttrey.¹

¹ TOTAL does not claim to know which single index is best, and therefore would endorse the use of any single index that the Board deems appropriate, such as the DOE EIA Index discussed by Vice Chairman Buttrey. The point is less about achieving perfection (which may be unattainable, in any event) and more so about achieving

Moreover, the Board should require that a single, objective source of railroad route miles be published, so that there is not confusion over such seemingly uncomplicated matters.²

TOTAL also believes that the Board should require the railroads to report their *total* recovery of fuel costs, whether by (1) adjustments to base rates, (2) RCAF or other rate-adjustment mechanisms, or (3) fuel surcharges. In 2006, for example, Norfolk Southern Railway Company ("NS") "rebased" its existing rates to adjust for fuel costs as if crude oil cost \$64/barrel, and announced that it would impose a fuel surcharge if the price of oil were above \$64/barrel. When NS did so, that seemingly meant that "rebased" rates charged by NS included the *entire* cost of diesel fuel, because crude oil is now, and has been for several months, below \$64/barrel.

In any event, whether NS did or did not recover *all* of its fuel costs through "rebasing" of existing rates in 2006, each railroad should be obliged to report, as part of the total revenues associated with recovery of fuel costs at each such railroad, not only its revenues associated with *direct* recovery of fuel costs, but also its *indirect* recovery of those costs through "rebasing" of its existing rates. Otherwise, the Board would permit "double-dipping" through yet another means.³

Also, the Board should have provided a simplified and expedited mechanism for parties to seek relief for over-recovery of fuel costs, under tariff movements. Lest any party wonder why TOTAL would advocate that railroads should not over-recover for their fuel costs, and that

clarity, consistency, and a resolution of the acrimony that has developed between and among carriers and shippers over this issue.

² Among the reasons that disputes arise over route miles is the fact that railroads, for their own reasons, often route cars or trains over a longer route than is necessary. Accordingly, it may be necessary, in the interests of resolving matters without undue cost or complexity, to adopt a single, objective, system of determining route miles, such as the use of the ALK system that is part of the Board's Waybill Sample.

³ This would not constitute a challenge to the lawfulness of existing rebased rates on NS, but rather a means of assuring the Board that NS is not "double-dipping." Accordingly, there would be no issue under the Interstate Commerce Act whether the Board could take this action, because the Board would not be making a determination about the lawfulness of rebased rates without the filing of a rate complaint and a determination of market dominance (as the statute requires).

there should be a mechanism for recovering overcharges on tariff movements, TOTAL believes that recovery of fuel costs, but not over-recovery, is appropriate for any American business, especially one such as the railroads, with their enormous market power.

The last point cannot be stressed enough. There is a widespread perception that large companies such as petrochemical companies or other large rail shippers are fully capable of protecting their interests with the railroads, because the firms are all large and have the resources to do so. That is completely flawed logic. If one entity has market power over the other, there is no way that the party without the market power can protect itself; that is the very reason that the Congress retained protection for shippers, large and small, in the Staggers Rail Act of 1980, and in the Interstate Commerce Commission Termination Act of 1995. Accordingly, there is no substitute for the Board to regulate the railroads in circumstances such as those that led to this proceeding. The very fact that railroads could systematically, and substantially, over-recover for their fuel costs is vivid proof of their market power, and the abuses of it that the railroads have committed.

Conclusion

TOTAL commends the Board for the steps it has taken thus far in this proceeding, except that it urges the Board to reconsider its decisions to (a) not require use of a single index by all railroads, (b) not provide a simple means by which the mileage on any given route is determined to avoid controversies, (c) not require railroads to report the recovery of their total fuel costs by whatever means (including rebasing of existing rates) so as to ensure that the railroads are not

over-recovering for the costs of their fuel, and (d) not create a simplified and expedited mechanism for recovery of amounts by which shippers were overcharged for tariff movements.

Respectfully submitted,



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