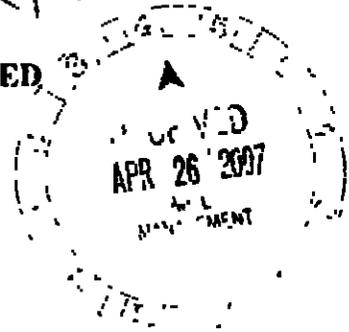


**EMERGENCY PETITION – EXPEDITED HANDLING REQUESTED**

219180



**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35021

**PETITION OF UNION PACIFIC RAILROAD COMPANY  
FOR A DECLARATORY ORDER**

**ENTERED  
Office of Proceedings**

**APR 26 2007**

**Part of  
Public Record**

**FEE RECEIVED**

**APR 26 2007**

**SURFACE  
TRANSPORTATION BOARD**

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**APR 26 2007**

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April 26, 2007

BEFORE THE  
SURFACE TRANSPORTATION BOARD



STB Finance Docket No 35021

PETITION OF UNION PACIFIC RAILROAD COMPANY  
FOR A DECLARATORY ORDER

INTRODUCTION

Pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721, Union Pacific Railroad Company (“UP”) hereby petitions the Surface Transportation Board (“Board”) to issue an order declaring that the Board’s decision requiring railroads to change their practice of computing rail fuel surcharges as a percentage of a base rate applies to traffic presently moving under Option 2 of UP’s Circular 111. *See Rail Fuel Surcharges*, STB Ex Parte No. 661 (STB served Jan 26, 2007) (“*Ex Parte 661*”)<sup>1</sup>

UP respectfully requests expedited handling of this petition so it may proceed to implement a new, mileage-based fuel surcharge program for traffic moving under Option 2. In order to comply with the Board’s decision in *Ex Parte 661*, UP has developed a mileage-based fuel surcharge for traffic moving under Circular 111. UP had intended to implement the change today. However, UP has determined that it has no choice but to delay implementation. One of UP’s customers has complained that the mileage-based surcharge will result in higher rates than the former rate-based surcharge. This customer contends that *Ex Parte 661* does not require UP

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<sup>1</sup> Copies of this petition are being provided, by electronic mail, to all shippers currently moving traffic under Option 2 of Circular 111.

The Board provided a summary description of Option 2 in *Kansas City Power & Light Co v Union Pacific Railroad Co*, STB Docket No 42095 (STB served Mar. 29, 2007) at 1-2.

to change the surcharge calculation for traffic moving under Option 2 and that, in fact, UP must continue to apply the rate-based mechanism that was in place when the customer signed its Option 2 Commitment Certificates.<sup>2</sup>

UP is in a perilous position and requires guidance from the Board. UP believes that *Ex Parte 661* requires a change in its method of calculating a fuel surcharge for traffic moving under Option 2 and that a failure to change its method could result in charges that it is engaged in an unfair practice under the agency's decision. At the same time, UP faces the very real threat that at least one customer will commence legal proceedings to require UP to apply its former, rate-based method to its traffic.

As the Board has recognized, railroads are entitled to recover the increased costs they incur from the rising price of fuel through the use of fuel surcharges. *See Ex Parte 661* at 1.<sup>3</sup> UP can recover its incremental fuel costs associated with traffic moving under Option 2 by using either a rate-based or a milcage-based fuel surcharge, as long as one method is uniformly applied to a group of traffic. However, UP will not be able to recover its costs if each shipper is allowed to choose the method that produces the lowest surcharge for itself. UP must be allowed to apply a single method to traffic moving under Option 2, and only the Board can declare

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<sup>2</sup> UP will not identify the customer in this filing to preserve its confidentiality and because the customer's identity is not relevant to the issues presented. However, UP reserves the right to respond to comments regarding this petition and will request a protective order if necessary. Ironically, the customer at issue participated in the *Ex Parte 661* proceeding and endorsed the Board's conclusion that computing fuel surcharges as a percentage of existing rates was an unreasonable practice.

<sup>3</sup> *See also Rail Fuel Surcharges*, STB Ex Parte No. 661 (STB served Mar. 14, 2006) at 1 ("The cost of fuel is a significant component of the operating costs of providing rail service, and railroads can reasonably be expected to devise methods to collect increases in those costs from their shippers").

whether UP is required to change its rate-based method to comply with the Board's ruling in *Ex Parte 661*

In order to protect UP's other Option 2 customers from the delay in implementing the new fuel surcharge occasioned by the need to seek declaratory relief, UP will establish a reserve to hold all fuel surcharge amounts it collects under the old program that are in excess of the amounts it would collect had it implemented the new program so that those amounts can be refunded if the Board agrees with UP's interpretation of *Ex Parte 661*.<sup>4</sup>

### STATEMENT OF FACTS

In *Ex Parte 661*, the Board concluded that "computing rail fuel surcharges as a percentage of a base rate is an unreasonable practice," and it "direct[ed] carriers to change this practice." *Ex Parte 661* at 1. In response, UP expended substantial time and resources to develop two new, mileage-based fuel surcharge programs: one for traffic moving under UP Circular 111, and one for other regulated common carrier traffic. UP developed separate programs for the two categories of traffic for two reasons:

*First*, UP wanted to establish new base rates reflecting higher fuel costs in order to reduce the need to apply a fuel surcharge, but UP had already established rates on a going forward basis for traffic moving under the terms of Option 2 Commitment Certificates.<sup>5</sup>

*Second*, UP wanted the fuel surcharge programs to reflect factors that affect fuel consumption, and the two categories of traffic have different fuel consumption characteristics.<sup>6</sup>

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<sup>4</sup> Of course, UP expects that customers who would pay more under the new, mileage-based surcharge will be responsible for paying the additional amounts for shipments on or after April 26.

<sup>5</sup> For Circular 111 traffic, the fuel surcharge will apply once the Department of Energy Highway Diesel Fuel ("HDF") average price exceeds \$1.349 per gallon; for other traffic, a surcharge will not apply unless HDF average price exceeds \$2.299 per gallon.

(In fact, UP has used separate fuel surcharge programs for coal and carload traffic since November 1, 2004.)

UP designed the two programs in an effort to ensure that fuel surcharge revenues recovered under the Circular 111 program would cover incremental fuel costs of traffic moving under Circular 111, and surcharge revenues recovered under the other program would cover the incremental fuel costs of traffic moving under other regulated common carrier rates. In other words, UP's design sought to address, at least in part, the Board's concern that some shippers were being "forced to pay the increased fuel costs of other shippers." *Ex Parte 661* at 8

UP's new fuel surcharge programs were also designed to produce the same level of fuel cost recovery on average as UP's prior, rate-based programs. However, as the Board recognized in *Ex Parte 661*, an unavoidable effect of changing from a rate-based program to a mileage-based program has been to shift the impact of the surcharge among UP's customers so that it bears more heavily on customers with base rates that are relatively low on a per mile basis:

"Given that [a fuel surcharge program tied to the base rate] shifts greater responsibility for fuel recovery to shippers with higher rates, it is not surprising that a subset of customers (presumably those with lower base rates) favor retaining a percentage-of-the-base-rate approach." *Ex Parte 661* at 9 n.34.

UP announced the details of the new fuel surcharge programs on March 21, 2007. It was not until more than three weeks later that UP first received objections from a certain

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<sup>6</sup> For Circular 111 traffic, the initial fuel surcharge is \$0.02 per mile when the HDI average price exceeds \$1.349 per gallon, and it increases by \$0.01 per mile for each \$0.06 per gallon change in the HDI (see [http://www.uprr.com/customers/energy/coal/fsc\\_jjk\\_letter.shtml](http://www.uprr.com/customers/energy/coal/fsc_jjk_letter.shtml)); for other traffic, the initial fuel surcharge is \$0.05 per mile when the HDI average price exceeds \$2.299 per gallon, and it increases \$0.01 per mile each \$0.05 per gallon change in the HDI (see <http://www.uprr.com/customers/updates/2007/0321.shtml>).

customer that was shipping coal under Option 2 of Circular 111. As the Board had predicted, the objections came from a customer with base rates that are relatively low on a per mile basis.

One significant issue that the customer raised is that the Commitment Certificates the customer signed state that the fuel surcharge mechanism will be held constant for the term of the Certificate. Specifically, the Commitment Certificates provide:

"All of the Option 2 terms and conditions set forth in Circular 111 will be held constant for the term of this Certificate, as well as the Fuel Surcharge mechanism set forth in UP Circular 6603-Series at the time of Certificate receipt."

In fact, all UP's Option 2 Commitment Certificates signed prior to the Board's decision in *Ex Parte 661* contain that same provision.<sup>7</sup>

UP understood that the provision in question, like the rate terms under Option 2, was subject to the Board's jurisdiction. In other words, UP understood that, just as the Board could order UP to reduce base rates incorporated by reference in a Commitment Certificate if they were determined to be unreasonably high, the Board could order UP to change the fuel surcharge mechanism if it was determined to be an unreasonable practice. In fact, UP is the defendant in a case in which an Option 2 shipper has complained that its base rates are too high and the rate-based surcharge mechanism is an unreasonable practice. See *Kansas City Power & Light Company v. Union Pacific Railroad Company*, Docket No. 42095 ("KCPL").<sup>8</sup>

UP can recover its incremental fuel costs using either a rate-based or a mileage-based program, as long as one program is uniformly applied to all traffic moving under Option 2.

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<sup>7</sup> Option 2 Commitment Certificates signed prior to December 31, 2004, did not contain the words "Option 2," but that difference is not relevant to the issues in this petition.

<sup>8</sup> See Verified Complaint, *Kansas City Power & Light Company v. Union Pacific Railroad Company*, Docket No. 42095 (Oct. 12, 2005).

However, UP will not be able to recover its incremental fuel costs if shippers are permitted to choose between the two programs on an individual basis in order to obtain the lowest rate

### ARGUMENT

UP believes it has correctly interpreted the Board's decision in *Ex Parte 661* as requiring that it discontinue the use of a rate-based fuel surcharge for traffic moving under Option 2. Specifically, UP believes that traffic moving under Option 2 rates is regulated common carrier traffic that is subject to the Board's decision in *Ex Parte 661*. See *Ex Parte 661* at 13 (decision applies "to regulated common carrier traffic").

UP explained in detail the basis for its position that traffic moving under Option 2 is common carrier traffic in its response to the Board's decision served July 27, 2006 in *KCPL*.<sup>9</sup> Notably, the shipper did not take issue with UP's position.<sup>10</sup> The Board appeared to confirm that it would treat traffic moving under Option 2 (at least traffic currently moving under Option 2) as common carrier traffic in its decision served in the *KCPL* proceeding on March 29, 2007, and in a Notice of Proposed Rulemaking served the same day. See *Interpretation of the Term "Contract" in 49 U.S.C. 10709*, STB Ex Parte No. 669 (STB served Mar. 29, 2007) at 6.

UP believes that the Board's decision in *Ex Parte 661*, by declaring that a rate-based fuel surcharge on regulated traffic is an unreasonable practice, overrides the provision in Option 2 Commitment Certificates that would otherwise require the fuel surcharge mechanism to be held constant for the term of the Certificate. UP sees no reason why the fuel surcharge would be any less subject to the Board's jurisdiction than the rate levels incorporated in the Certificate –

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<sup>9</sup> See Union Pacific's Brief in Response to Order to Show Cause at 2-8, *Kansas City Power & Light Company v. Union Pacific Railroad Company*, Docket No. 42095 (Sept. 25, 2006).

<sup>10</sup> See Reply Brief of Kansas City Power & Light Company at 3-4, *Kansas City Power & Light Company v. Union Pacific Railroad Company*, Docket No. 42095 (Oct. 10, 2006).

after all, the provision states that “[a]ll of the Option 2 terms and conditions will be held constant for the term of this Certificate.” As demonstrated by the *KCP L* case, shippers have not hesitated to challenge the surcharge mechanism as an unreasonable practice after signing a Commitment Certificate.

Moreover, shippers that are unhappy with UP’s new fuel surcharge program have the same avenues for seeking relief that were available under the prior program. They have the same right to file a rate complaint if they believe that their rates (including the fuel surcharge) are unreasonably high, or an unreasonable practice complaint if they believe that the new program is otherwise unlawful.

Ultimately, however, UP’s fundamental concern is to avoid the untenable position in which one subset of Option 2 shippers is claiming that UP must change its surcharge program while another subset claims that UP may not change its program. UP cannot satisfy both groups and still recover its incremental fuel costs.<sup>11</sup> As the Board recognized in *Ex Parte 661*, any change in carriers’ existing rate-based fuel surcharge programs will necessarily shift the impact of the surcharge from one subset of shippers to another. That unavoidable fact should not preclude UP from establishing and collecting an appropriate fuel surcharge. Any outcome that would prevent UP from recovering its incremental fuel costs through a sound fuel surcharge program would be inconsistent with the Board’s decision in *Ex Parte 661* and the Government’s policies to promote a safe, efficient rail transportation system by allowing carriers to earn adequate revenues, and to encourage and promote energy conservation. 49 U.S.C. §§ 10101(3)-(5), (14)

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<sup>11</sup> In fact, if UP tried to accommodate Option 2 shippers, it might then face complaints from non-coal shippers that they were being required to bear a disproportionate share of fuel costs.

## CONCLUSION

In order to avoid subjecting UP to potentially conflicting obligations that would prevent it from recovering its incremental fuel costs using a sound fuel surcharge program, the Board should issue an order declaring that its decision requiring railroads to change their practice of computing rail fuel surcharges as a percentage of a base rate applies to traffic moving under Option 2 of UP's Circular 111

Respectfully submitted,

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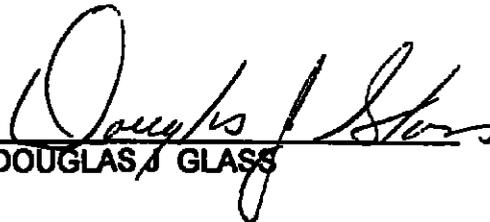
April 26, 2007

VERIFICATION

My name is DOUGLAS J GLASS I am Vice President & General  
Manager-Energy of Union Pacific Railroad Company

I declare under the penalty of perjury that the facts set forth in the  
foregoing Petition for Declaratory Order are true and correct Further, I certify that I am  
qualified and authorized to file this testimony.

Executed on this 26<sup>th</sup> day of April 2007

  
DOUGLAS J GLASS