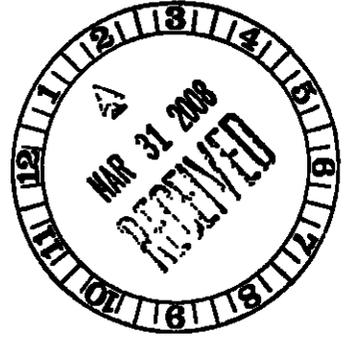


BEFORE THE
SURFACE TRANSPORTATION BOARD



221951

DAIRYLAND POWER COOPERATIVE,

Complainant,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant

Docket No. 42105

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UNION PACIFIC'S MOTION TO DISMISS

J MICHAEL HEMMER
LAWRENCE E. WZOREK
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
Telephone: (402) 544-3897
Facsimile: (402) 501-0129

LINDA J. MORGAN
MICHAEL L. ROSENTIAL
CHARLES H.P. VANCE
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000
Facsimile: (202) 662-6291

Attorneys for Union Pacific Railroad Company

March 31, 2008

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SURFACE TRANSPORTATION BOARD**



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 Complainant,

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UNION PACIFIC RAILROAD COMPANY,

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UNION PACIFIC’S MOTION TO DISMISS

Dairyland Power Cooperative (“Dairyland”) has improperly invoked the Surface Transportation Board’s unreasonable practice jurisdiction to challenge the level of fuel surcharge payments collected by Union Pacific Railroad Company (“UP”). Dairyland complains that the “payments exceed the incremental fuel cost increases UP has actually incurred in handling Dairyland’s traffic since January 1, 2006.” Compl. ¶ 9. However, a shipper seeking to challenge the level of a rail carrier’s surcharges must invoke the agency’s jurisdiction over unreasonable rates, not unreasonable practices. Accordingly, the Board must dismiss Dairyland’s Complaint.

Moreover, Dairyland could not successfully recast its Complaint as a rate reasonableness challenge for at least two reasons. *First*, the Board has no jurisdiction over a carrier’s rates unless the carrier “has market dominance over the transportation to which a particular rate applies.” 49 U.S.C. § 10701(d)(1) UP does not have market dominance because the challenged rate applies to the transportation of Powder River Basin (“PRB”) coal to Mississippi River terminals for movement by barge to Dairyland, and BNSF Railway transports PRB coal to Mississippi River terminals in competition with UP. Dairyland does not allege

market dominance in its Complaint, nor could it, because UP faces “effective competition from other rail carriers.” *Id.* § 10707(a). *Second*, even if Dairyland could allege market dominance, it still could not separately challenge the level of UP’s fuel surcharge; it could only challenge UP’s overall rate for line-haul transportation services. *See, e.g., Georgia Power Co. v. Southern Ry*, ICC Docket No. 40581 (ICC served Nov. 6, 1991).

Finally, the Board must dismiss Dairyland’s Complaint because, to the extent Dairyland does not seek to challenge UP’s fuel surcharge levels, any remaining unreasonable practice claims are precluded by the Board’s decision in *Rail Fuel Surcharges*, STB Ex Parte No. 661 (STB served Jan. 26, 2007). In *Rail Fuel Surcharges*, the Board ruled that “promulgating rate-based fuel surcharges is an unreasonable practice,” *id.* at 8, but indicated that a “mileage-based fuel surcharge” would provide “a reasonable nexus to fuel consumption,” *id.* at 9. The Board expressly declined to give retroactive effect to its ruling that charging a rate-based surcharge was an unreasonable practice because prior agency decisions had authorized rate-based fuel surcharges. *Id.* at 10. UP discontinued its rate-based surcharge and adopted a mileage-based surcharge in compliance with the Board’s *Rail Fuel Surcharges* decision. Accordingly, Dairyland cannot challenge UP’s promulgation of a mileage-based surcharge as an unreasonable practice, and it cannot obtain damages based on claims that UP’s former rate-based surcharge was an unreasonable practice.

I. Background.

Dairyland owns and operates three coal-fired generating stations: Alma, Genoa No 3, and Madgett. Compl. ¶ 2. Dairyland’s Complaint involves UP’s transportation of PRB coal destined for two of those stations, Alma and Genoa. *Id.*, ¶ 4.

UP does not transport Southern PRB coal by rail to Alma or Genoa. Instead, UP transports the coal from the PRB to Mississippi River terminals for movement by barge to Alma

and Genoa. *Id.* The Cahokia Marine Terminal is the primary terminal used for PRB coal destined for Alma and Genoa. *Id.*, Ex. A, p. 1. UP is not the only rail carrier that can transport PRB coal destined for Alma and Genoa to Mississippi River terminals: BNSF Railway also transports coal from the PRB to Mississippi River terminals for movement beyond by barge, including the Cahokia Marine Terminal.¹

Since January 2006, UP has transported PRB coal destined for Alma and Genoa under terms and conditions set forth in UP Circular 111, Unit Train Coal Common Carrier Circular (“Circular 111”). Compl. ¶ 5. Those shipments are subject to the fuel surcharge for PRB coal trains set forth in UP’s Circular 6603-Series, which is incorporated by reference in Circular 111. *Id.*, ¶ 8.

UP’s method of calculating Dairyland’s fuel surcharge changed during the period covered by the Complaint. From January 2006 through April 25, 2007, UP charged Dairyland a rate-based fuel surcharge – *i e*, UP calculated the surcharge as a percentage of the line-haul freight charge for each shipment. *Id.*, Ex. A, p. 15. Beginning on April 26, 2007, however, UP

¹ See, e.g., BNSF Pricing Authority BNSF-90068, available at <http://newdomino.bnsf.com/website/prices.nsf/UnsecureAttachments/BNSF+90068>, Table A, Item 15 (demonstrating that BNSF provides service to Cahokia Marine Terminal for furtherance via barge); BNSF Coal Map, available at http://bnsf.com/markets/coal/pdf/coal_energy.pdf (demonstrating that BNSF serves Cahokia Marine Terminal and other Mississippi River barge terminals); Slay Industries Web Page for Cahokia Marine Service, available at <http://www.slay.com/cahokia.htm> (demonstrating that BNSF provides service to Cahokia Marine Terminal).

The Board may take official notice of matters of public record, including tariffs maintained by carriers. See, e.g., *City of Jersey City, et al – Petition for Declaratory Order*, STB Fin Docket No. 34818 (STB served Dec. 19, 2007), at 5 (Board properly considered information outside the record that was “sufficiently reliable and probative”); *DHX, Inc v Matson Navigation Co*, STB Docket No. WCC-105 (STB served May 14, 2003), at 6 n.7 (“DIIX’s argument that we may not take official notice of the tariffs maintained by SL and its successors is without merit.”), *pet for review demed sub nom DHX, Inc v STB*, 501 F.3d 1080 (9th Cir. 2007).

charged Dairyland a milcage-based surcharge – *i e*, UP calculated the surcharge based on the number of miles and number of cars for each shipment. *Id.*, Ex. C, p. 2.

UP adopted the milcage-based surcharge in response to the Board’s order in Ex Parte No. 661, *Rail Fuel Surcharges*. UP designed the new surcharge program “to fairly and equitably recover its incremental fuel costs based on milcage.”² UP developed the surcharge levels for various ranges of fuel prices by calculating the number of cents per mile per car such that, if UP could charge every one of its PRB coal customers that amount for each of their shipments, UP would recover the incremental fuel costs associated with all of its PRB coal traffic. Compl., Ex. C, p. 2; UP’s Answer ¶ 9. In other words, UP designed its mileage-based surcharge so that no PRB customer would be asked to pay more than its milcage-based share of UP’s incremental fuel costs.

II. Dairyland Cannot Challenge The Level Of UP’s Fuel Surcharges As An Unreasonable Practice.

Dairyland’s Complaint challenges the level of the “fuel surcharge payments UP has collected from Dairyland.” Compl. ¶ 9. Specifically, Dairyland complains that the payments are too high because they “exceed the incremental fuel cost increases UP has actually incurred in handling Dairyland’s traffic since January 1, 2006, under Circular 111.” *Id.* However, Dairyland may not invoke the Board’s unreasonable practice jurisdiction to challenge the level of fuel surcharges established by UP. If Dairyland is concerned about fuel surcharge levels, it must file a rate complaint and prove market dominance, and it must prove that its overall line-haul rate is unreasonable – it may not separately challenge UP’s charge for the incremental fuel costs associated with providing line-haul transportation service to Dairyland.

² Letter to Customers from Douglas J. Glass, UP Vice President & General Manage – Energy (Apr. 26, 2007), *available at* http://www.uprr.com/customers/energy/coal/glass_42607.shtml.

A. Dairyland's Challenge Involves "Rates," Not "Practices."

Dairyland is not the first shipper that has tried to circumvent the Interstate Commerce Act's market dominance requirement by framing a rate challenge as an unreasonable practice complaint, but that stratagem is precluded by the D.C. Circuit Court of Appeal's decision in *Union Pacific Railroad Co. v. Interstate Commerce Commission*, 867 F 2d 646 (D.C. Cir. 1989).

In *Union Pacific*, railroads defended their rates for shipments of radioactive material by arguing that the rates reflected certain cost additives – *i e*, costs associated with the handling of radioactive material that were over and above regular train costs. *See id* at 648. Initially, the ICC concluded that most of the cost additives were unwarranted and that, by basing their rates on unwarranted additives, the railroads were “engag[ing] in an unreasonable practice with regard to the transportation of the commodities at issue.” *Id* at 649 (*quoting Commonwealth Edison Co v. Aberdeen & Rockfish R R*, 2 I.C.C.2d 642, 651 (1986)).

However, The D.C. Circuit reversed, ruling that the agency could not decide the case under its unreasonable practice jurisdiction and thereby avoid the issue of market dominance. *See id* The court observed that the ICC's analysis had “all the earmarks of a rate proceeding” because it was “largely focused on the reasonableness of the added costs on which the railroads' rates are predicated.” *Id*. The court concluded that, “labeling notwithstanding, form must yield to substance,” and that when “the so-called ‘practice’ is manifested *exclusively* in the level of rates that customers are charged,” the agency's regulation “falls squarely on the side of ‘rates.’” *Id*

Dairyland is asking the Board to follow a path that is expressly forbidden by *Union Pacific*. It seeks to have the Board use its unreasonable practice jurisdiction to determine whether UP's fuel surcharge levels reasonably reflect UP's added fuel costs – specifically,

whether its fuel surcharge payments to UP “exceed the incremental fuel cost increases that UP has actually incurred in handling Dairyland’s traffic since January 1, 2006 under Circular 111.” Compl. ¶ 9. Labels notwithstanding, Dairyland’s Complaint is about rates.

UP’s “so-called ‘practice’” of collecting fuel surcharge payments that exceed a “reasonable” measure – the incremental fuel cost increase UP has incurred in handling traffic for Dairyland – plainly “is manifested *exclusively* in the level of rates that customers are charged.” *Union Pacific*, 867 F.2d at 649. In *Rail Fuel Surcharges*, the Board recognized that a fuel surcharge is, by definition, a “component of the total rate that is charged for the transportation involved” and is manifested as “a higher rate.” *Rail Fuel Surcharges*, at 1, 7. The Board’s statement in *Rail Fuel Surcharges* is fully consistent with agency precedent in recognizing that surcharges “form part of, or an addition to, the line-haul rate.” *Parrish & Heimbecker, Inc – Petition for Declaratory Order*, 4 S.T.B. 866, 877 (2000), *see also Conrail Surcharge on Pulpboard*, 362 I.C.C. 740, 744 (1980) (“surcharges must be viewed as unilateral changes in the rates charged”).

In fact, ever since *Union Pacific*, the ICC and the Board have analyzed claims analogous to Dairyland’s – that is, claims that a carrier’s surcharges or other special charges were “unreasonable” because they exceeded the incremental costs the railroad actually incurred – as rate reasonableness claims. For example, in *Charges for “Order Of” Bills of Lading, Burlington Northern Railroad Co*, ICC Docket No. 40679 (ICC served Nov. 27, 1992), the ICC suspended a carrier’s tariff that imposed a \$125 surcharge for special bills of lading because the carrier “ignored the issue of rate reasonableness” in that “the carrier made no attempt to show

that the level of the charge is related to the costs it incurs, or is otherwise reasonable.” *Id.* at 3.³ Similarly, in *Decatur County Commissioners v. The Central Railroad Co. of Indiana*, STB Fin. Docket No. 33386 (STB served Sept. 28, 2000), the Board dismissed a claim that a carrier’s \$1,000 per car surcharge for rerouting traffic due to an embargo was punitive and unreasonable because the complainants “fail[ed] to make out even the barest essentials of a *prima facie* case of rate unreasonableness under 49 U.S.C. § 10701.” *Id.* at 22.

In accordance with well-established precedent, the Board must dismiss Dairyland’s Complaint because “rate disputes should not be addressed via a claim of unreasonable practice” *Western Fuels Ass’n v BNSF Ry*, STB Docket 42088 (STB served Sept. 10, 2007), at 5 (citing *Union Pacific*).

B. Dairyland Could Not Recast Its Complaint As A Rate Reasonableness Challenge.

Dismissal is also appropriate because Dairyland’s invocation of the Board’s unreasonable practice jurisdiction, rather than the agency’s rate reasonableness jurisdiction, cannot be regarded as a mere technicality. If Dairyland were to pursue a rate reasonableness challenge, this would be a very different case: Dairyland would be required to establish that UP has market dominance over the transportation at issue, and it also would be required to challenge the reasonableness of its overall line-haul rate, not just the fuel surcharge portion.

1. Dairyland Could Not Pursue A Rate Reasonableness Challenge Without Proving Market Dominance.

The *Union Pacific* decision emphasizes a critical distinction between pursuing an unreasonable practice claim and pursuing an unreasonable rate claim the agency “has no

³ The carrier had the burden of proof in certain types of tariff investigation and suspension proceedings that were eliminated by the ICC Termination Act. *See* former 49 U.S.C. § 10701a.

jurisdiction to inquire into the reasonableness of a challenged rate unless it first finds that the railroad enjoys market dominance over the shipments of the commodities in question.” *Union Pacific*, 867 F.2d at 649.

Board precedent confirms that a shipper must establish market dominance even when it challenges a surcharge or other special charge as unreasonably high. For example, in *Shenango Inc v Pittsburgh, Chartiers & Youghiogheny Railway*, 5 I.C.C.2d 995 (1989), the ICC dismissed a claim that a carrier’s charge for “special crew service” was “unreasonably high in relation to the cost of that service” once it concluded that the carrier did not have “market dominance over the rate in question.” *Id* at 1000. Similarly, in *Decatur County Commissioners*, in which the Board dismissed a challenge to a \$1,000 per car surcharge, it observed that complainants “failed to make a showing of market dominance . . . – a prerequisite to our consideration of a rate challenge.” *Decatur County Comm ’rs*, at 22.

Dairyland could not establish market dominance because UP faces “effective competition from other rail carriers.” 49 U.S.C. § 10707(a). As discussed above, UP does not serve Dairyland’s Alma and Genoa stations directly; instead, UP transports PRB coal to Mississippi River terminals for movement by barge to Alma and Genoa. Compl. ¶ 5. BNSF Railway transports PRB coal to Mississippi River terminals in competition with UP – an undisputable fact that is confirmed by BNSF’s published tariffs.⁴ The requirement that Dairyland establish market dominance would be fatal to any complaint challenging rates to Alma and Genoa

⁴ See note 1, *supra*

2. Dairyland Could Not Pursue A Rate Reasonableness Case Limited To The Fuel Surcharge.

In addition, Dairyland could not maintain a rate challenge to UP's fuel surcharge levels apart from its overall line-haul rate. Board precedent establishes that "separately stated rate factors or charges can be challenged independently only if they relate to separate and distinct services," as opposed to "the basic line-haul transportation service provided under the tariff" *Georgia Power*, at 11, *cf. Shenango*, 5 I.C.C. 2d at 999 (allowing challenge to a separate charge for a distinct "special crew service"). A fuel surcharge is not a separate rate for "distinct services." It is part of a single overall rate for "the basic line haul service provided under the tariff." Indeed, the Board recognized this fact in *Rail Fuel Surcharges* when it explained that a fuel surcharge is a "component of the total rate that is charged for the transportation involved." *Rail Fuel Surcharges*, at 1; *see also Parrish & Heimbecker*, 4 S.T.B. at 877 (surcharges "form part of, or an addition to, the line-haul rate").

* * *

Dairyland's Complaint should be dismissed because Dairyland cannot challenge UP's fuel surcharge levels as an unreasonable practice. If Dairyland wants to challenge the rates that result from UP's application of its fuel surcharge, it must file a rate complaint, in which case it must establish market dominance (an insurmountable hurdle given the presence of competition from BNSF) and prove that its overall line-haul rate is unreasonable (rather than the fuel surcharge levels).

III. The Board's *Rail Fuel Surcharge* Decision Precludes Claims That UP's Mileage-Based Surcharge Is An Unreasonable Practice And Precludes Recovery Of Damages Based On Claims That UP's Former Rate-Based Fuel Surcharge Was An Unreasonable Practice.

To the extent that Dairyland's Complaint does challenge UP's fuel surcharge practices rather than UP's fuel surcharge levels, it still must be dismissed in light of the Board's

decision in *Rail Fuel Surcharges*. The *Rail Fuel Surcharges* decision precludes Dairyland from claiming that a mileage-based fuel surcharge is an unreasonable practice, and it also precludes Dairyland from recovering damages based on claims that UP's former rate-based fuel surcharge was an unreasonable practice.

A. The Board's *Rail Fuel Surcharge* Decision Establishes That Promulgating A Mileage-Based Fuel Surcharge Program Is Not An Unreasonable Practice.

Dairyland cannot maintain a claim that UP's promulgation of its current fuel surcharge constitutes an unreasonable practice because Dairyland's Complaint shows that UP's current fuel surcharge program is a mileage-based surcharge. Compl. ¶ 8 & Ex. C.

The Board's *Rail Fuel Surcharges* decision establishes that assessing mileage-based fuel surcharges is not an unreasonable practice. In *Rail Fuel Surcharges*, the Board held that assessing rate-based fuel surcharges is an unreasonable practice because there is "no real correlation between the rate increase and the increase in fuel costs for that particular movement to which the surcharge is applied." *Id.* at 7. The Board explained that "if a carrier chooses to use a fuel surcharge program, it must be based upon attributes of a movement that directly affect the amount of fuel consumed." *Id.* at 9. The Board plainly indicated that a mileage-based approach would meet its standards: "Mileage is one of the primary factors that affects fuel consumption." *Id.*

The Board did not require carriers to adopt mileage-based fuel surcharges, but it plainly indicated that instituting a mileage-based fuel surcharge program would be a reasonable response to its decision. *See id.* at 8 ("[S]everal railroads have expressed some willingness to develop a fuel surcharge program linked to mileage, which further indicates that such a task is feasible."); *id.* at 9 ("[A] mileage-based surcharge, although not perfect, more closely tracks changes in fuel costs for an individual shipment than does a rate-based fuel surcharge."); *id.* ("If

mileage is not the best indicator of the fuel consumption associated with the movements a shortline handles, it may choose to base its fuel surcharges on factors that are better correlated to the amount of fuel consumed.”). The Board plainly indicated that it was not demanding perfection: it required “a reasonable nexus to fuel consumption.” *Id.*

In adopting the “reasonable nexus” test, the Board implicitly rejected the standard Dairyland seeks to have the Board apply – that a shipper’s fuel surcharge payments should not “exceed the incremental fuel cost increases [the carrier] has actually incurred in handling [the shipper’s] traffic.” Compl. ¶ 9. Earlier in the *Rail Fuel Surcharges* proceeding, the Board suggested that promulgating a fuel surcharge would constitute an unreasonable practice “unless the surcharge is directly tied to and limited to the incremental changes in the particular cost for the movement to which the surcharge is applied.” STB Ex Parte No. 661 (STB served Aug. 3, 2006), at 4. In its final decision, however, the Board receded from that suggestion. The Board presumably recognized that it was one thing to require, as a general matter, that a fuel surcharge be based on factors that have a reasonable nexus with fuel consumption, but that it would be another thing to use its unreasonable practice jurisdiction to scrutinize overcharge claims on a case-by-case basis – in particular, the Board presumably recognized that the approach now being urged by Dairyland would cross the line drawn by *Union Pacific* and other agency precedent.

B. Dairyland Cannot Recover Damages Based On Claims That UP’s Former Rate-Based Fuel Surcharge Was An Unreasonable Practice.

The Board also must dismiss Dairyland’s Complaint to the extent it seeks to recover damages based on claims that UP’s former use of rate-based fuel surcharges was an unreasonable practice. Compl. ¶¶ 8, 9 & Wherefore Clause. The Board addressed this issue in *Rail Fuel Surcharges* and expressly declined shipper requests to give retroactive effect to its ruling that assessing a rate-based surcharge constitutes an unreasonable practice because prior

agency decisions had authorized rate-based fuel surcharges.. *See Rail Fuel Surcharges*, at 10. Accordingly, Dairyland's claim for damages relating to UP's former rate-based fuel surcharge program is precluded as a matter of law.

IV. Conclusion

The Board must dismiss Dairyland's Complaint for the reasons stated above, namely, (1) Dairyland cannot invoke the Board's unreasonable practices jurisdiction in an effort to challenge the level of its fuel surcharge payments, and (2) the Board's *Rail Fuel Surcharges* decision precludes claims that UP's current milcage-based fuel surcharge program constitutes an unreasonable practice and also precludes claims for damages allegedly resulting from UP's former rate-based program.

Respectfully submitted,



J. MICHAEL IEMMER
LAWRENCE E. WZOREK
Union Pacific Railroad Company
1400 Douglas Street
Omaha, Nebraska 68179
Telephone: (402) 544-3897
Facsimile: (402) 501-0129

LINDA J. MORGAN
MICHAEL L. ROSENTHAL
CHARLES H.P VANCE
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000
Facsimile: (202) 662-6291

Attorneys for Union Pacific Railroad Company

March 31, 2008

CERTIFICATE OF SERVICE

I, Michael L. Rosenthal, certify that on this 31st day of March, 2008, I caused a copy of Union Pacific's Motion to Dismiss to be served on counsel for Dairyland by email and first class mail.



Michael L. Rosenthal