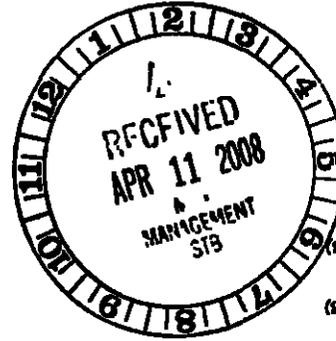


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SLOVER & LOFTUS

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N.W.
WASHINGTON, D. C. 20036-3003



TELEPHONE
(202) 347-7170

FAX
(202) 347-3619

WRITER'S E-MAIL

jhl@sloverandloftus.com

WILLIAM L SLOVER
C MICHAEL LOFTUS
JOHN H LE SEUR
KELVIN J DOWD
ROBERT D ROSENBERG
CHRISTOPHER A MILLS
FRANK J. PERKOLIZZI
ANDREW B KOLESAR III
PETER A PFOHJ
DANIEL M JAFFE
STEPHANIE M PISANELLI
JOSHUA M HOFFMAN

April 11, 2008

OF COUNSEL
DONALD G AVERY

VIA HAND DELIVERY

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: STB Docket No. 42105, *Dairyland Power
Cooperative v Union Pacific Railroad Company*

Dear Ms. Quinlan:

Enclosed for filing in the above-referenced proceeding, please find an original and ten (10) copies of each (1) Dairyland's Reply in Opposition to Union Pacific's Motion to Dismiss and (2) Dairyland's Reply in Opposition to Union Pacific's Motion for a Protective Order.

We have included an extra copy of each of these filings. Please indicate receipt by time-stamping this copy and returning them with our messenger.

Sincerely,

John H. LeSeur

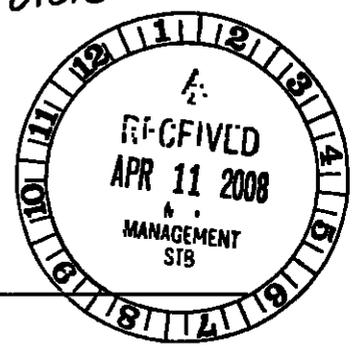
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Public Record

Enclosures
cc: UP Counsel

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DAIRYLAND POWER COOPERATIVE)	
)	
Complainant,)	
)	
v.)	Docket No. 42105
)	
UNION PACIFIC RAILROAD COMPANY)	
)	
Defendant.)	

**DAIRYLAND'S REPLY IN OPPOSITION TO
UNION PACIFIC'S MOTION TO DISMISS**

ENTERED
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Public Record

John H. LeSeur
Frank J. Pergolizzi
Peter A. Pfohl
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

Attorneys for Dairyland Power
Cooperative

Dated: April 11, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



DAIRYLAND POWER COOPERATIVE)	
)	
Complainant,)	
)	
v.)	Docket No. 42105
)	
UNION PACIFIC RAILROAD COMPANY)	
)	
Defendant.)	

**DAIRYLAND’S REPLY IN OPPOSITION TO
UNION PACIFIC’S MOTION TO DISMISS**

Complainant Dairyland Power Cooperative (“Dairyland”) submits this Reply in Opposition to the Motion to Dismiss (“Motion”) filed by the Defendant Union Pacific Railroad Company (“UP”) on March 31, 2008. In support hereof, Dairyland states as follows:

SUMMARY

UP’s Motion is the first in a series of pleadings UP has filed in this case that have a common goal: preventing the Board from investigating Dairyland’s Complaint that UP is extracting unlawful fuel surcharges on Dairyland’s coal traffic moving from the Wyoming Powder River Basin to Mississippi River terminals for movement beyond to Dairyland’s Alma and Genoa generating stations.¹ Dairyland plans

¹ In addition to filing its Motion, UP has refused to agree upon a procedural schedule and asked the Board to issue a protective order blocking all of Dairyland’s discovery.

to present substantial evidence demonstrating that UP is unlawfully utilizing its rail fuel surcharge procedures to extract substantial profits on the issue traffic. Both the Board, and Members of Congress, have repeatedly warned railroads not to use fuel surcharges as a profit center.² UP has not gotten the message.

The Board can dismiss a complaint only if the complaint “does not state reasonable grounds for investigation and action.” 49 U.S.C. §11701(b). Under governing Board precedent, motions to dismiss are “disfavored . . . and rarely granted.”³ UP’s Motion provides no grounds for the Board to make an exception to this general rule. In its Motion, UP argues that Dairyland’s Complaint should be dismissed as a matter of law because (1) carriers can collect rail fuel surcharges from a shipper that exceed the incremental fuel cost increases the carrier incurs in providing service to the shipper;

² See Rail Fuel Surcharges, STB Ex Parte No. 661 (STB served March 14, 2006) at 2 (“March 2006 Notice”); id. (STB served August 3, 2006) at 3-5 (“August 2006 Decision”); id. (STB served January 26, 2007) at 6-10 (“January 2007 Decision”) (collectively, “Rail Fuel Surcharges”); Hearing on Economics, Service, and Capacity in the Freight Railroad Industry before the S. Subcomm. on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security of the Comm. on Commerce, Science & Transportation, 110th Cong. (June 21, 2006) (opening statement of Senator Lott expressing concerns about possible railroad profiteering on fuel surcharges); Hearing on the Surface Transportation Board and Regulation Related to Railroads before the S. Subcomm. on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security of the Comm. on Commerce, Science and Transportation, 110th Cong. webcast excerpt (1:43.24) (Oct. 23, 2007) (statement of Senator Rockefeller expressing similar concerns) (“Regulation Related to Railroads Hearing”).

³ See Garden Spot & Northern Ltd. Partnership and Indiana Hi-Rail Corp. -- Purchase and Operate -- Indiana Rail Road Co. Line Between Newtom and Browns, IL, ICC Finance Docket No. 31593 (ICC served Jan. 5, 1993), 1992 WL 389440 at *2.

(2) the legality of rail fuel surcharge payments cannot be considered under the Board's reasonable practice jurisdiction; and (3) shippers cannot institute individual complaint actions challenging the reasonableness of particular rail fuel surcharge practices.⁴ The Board considered, and rejected, each of these contentions in Rail Fuel Surcharges.

Indeed, while styled as a motion to dismiss, UP's Motion is really an impermissible collateral attack on the Board's rulings in Rail Fuel Surcharges. If UP wants to overturn Rail Fuel Surcharges, it must ask the Board to reopen the proceeding and present supporting evidence under the standards set forth at 49 U.S.C. §722(c). For now, the Board must deny UP's Motion since Dairyland's Complaint clearly sets forth "reasonable grounds for investigation and action." 49 U.S.C. §11701(b).

ARGUMENT

I.

RAILROADS CANNOT LAWFULLY COLLECT RAIL FUEL SURCHARGES THAT EXCEED MOVEMENT-SPECIFIC INCREMENTAL FUEL COST INCREASES

Dairyland's Complaint alleges that UP's fuel surcharge, as applied to the issue traffic, constitutes an unreasonable practice because the fuel surcharge revenue UP is collecting exceeds UP's incremental fuel cost increases incurred in providing the service. Paragraph 9 of Dairyland's Complaint states:

⁴ UP also claims that, if the Board does not dismiss Dairyland's Complaint, Rail Fuel Surcharges precludes Dairyland from obtaining any relief for shipments moving prior to April 26, 2007. As discussed below, the Board clearly has the authority to order relief for Dairyland's pre-April 26, 2007 shipments, and Rail Fuel Surcharges does not preclude the Board from ordering such relief.

The fuel surcharge payments UP has collected from Dairyland under Circular 111 and Circular 6603 constitute an unreasonable practice under 49 U.S.C. §10702(2) because these payments exceed the incremental fuel cost increases UP has actually incurred in handling Dairyland's traffic since January 1, 2006 under Circular 111.

Id. at 4.

UP argues that Dairyland's Complaint should be dismissed because it fails to assert a legally valid claim. According to UP, the fuel surcharge revenues it collects from a shipper can exceed the incremental fuel cost increases UP incurs in transporting the shipper's traffic. See UP Motion at 5, 12.⁵ The Board considered and rejected identical contentions raised by UP and other carriers (collectively, the "Railroads") in Rail Fuel Surcharges.

The Board initiated the Rail Fuel Surcharges proceeding because "the rail shipper community has voiced concerns that recent fuel surcharges collected by railroads are designed to recover amounts over and above increased fuel costs." March 2006 Notice at 1. In the subsequent proceedings before the Board, the Railroads argued that it was not an unreasonable practice for carriers to collect fuel surcharges that exceeded movement-specific incremental fuel cost increases. The Board disagreed.

⁵ Alternatively, UP contends that its current rail fuel surcharges are lawful because they recover only UP's "incremental fuel costs associated with all of its [Wyoming Powder River Basin] coal traffic." Motion at 5. The Board need not try to decipher UP's cryptic, and unsupported, factual allegations. In addressing a motion to dismiss, the Board views all factual allegations "in the light most favorable to [the] complainant." Albemarle Corp. v. Louisiana and North West Railroad Co., STB Docket No. 42097 (STB served Oct. 18, 2006) at 2.

In its August 2006 Decision, the Board concluded that it was an unreasonable practice for a carrier to collect fuel surcharges that exceeded “the incremental cost of fuel attributable to the movement involved”:

A carrier should not identify a surcharge as a cost-recovery mechanism for a discrete portion of its costs unless the surcharge is directly tied to and limited to the incremental changes in that particular cost for the movements to which the surcharge is applied. In other words, railroads should not call a charge a fuel surcharge if it is designed to recover more than the incremental cost of fuel attributable to the movement involved.

Id. at 4-5 (footnote omitted).

Similarly, the Board’s January 2007 Decision concluded that a carrier cannot lawfully collect fuel surcharges that exceed “the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied.” Id. at 6. The Board’s January 2007 Decision explained:

. . . the term “fuel surcharge” most naturally suggests a charge to recover increased fuel costs associated with the movement to which it is applied. If it is used instead as a broader revenue enhancement measure, it is mislabeled We believe that imposing rate increases [denominated fuel surcharges] . . . when 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, is a misleading and ultimately unreasonable practice.

Id. at 7.⁶

Dairyland's Complaint is correctly pled under the Board's Rail Fuel Surcharges standards. The Complaint properly alleges that UP's fuel surcharge collections exceed "the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied." Id. at 6.

**II.
THE BOARD HAS THE AUTHORITY
TO ADDRESS THE LEVEL OF RAIL FUEL SURCHARGES
UNDER ITS REASONABLE PRACTICE JURISDICTION**

UP argues that the Board cannot regulate the level of rail fuel surcharges under its reasonable practice jurisdiction codified at 49 U.S.C. §10702(2) (rail practices must be reasonable). Instead, UP argues that the exclusive remedy for any shipper challenging the level of a carrier's rail fuel surcharges is to file a maximum rate case. See 49 U.S.C. §10701(d)(1)(rates on market dominant rail traffic must be reasonable). See UP Motion at 5-8. The Railroads made the very same arguments in Rail Fuel Surcharges and the Board correctly rejected them.

In Rail Fuel Surcharges, the Board construed its authority to set maximum reasonable rates as applying in cases where a shipper challenges "the total amount that a carrier can charge, through a combination of base rates and surcharges" August 2006 Decision at 4; accord January 2007 Decision at 7. The Board also held that its

⁶ As is evident from this passage in the Board's January 2007 Decision, the Board did not, as UP contends, "implicitly reject[]" (Motion at 12) the standards set forth in the August 2006 Decision finding unlawful carrier fuel surcharge collections that exceed incremental fuel cost increases incurred on the involved traffic movement.

authority over unreasonable practices applied to remedying “misleading conduct” by carriers in the form of fuel surcharges that exceed “the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied.” January 2007 Decision at 7, 6.

In its Complaint, Dairyland does not ask the Board to determine whether the “total amount” UP is collecting from Dairyland “through a combination of base rates and surcharges” is reasonable. Instead, Dairyland is asking the Board to determine whether UP is collecting fuel surcharges on the issue traffic that misleadingly exceed UP’s actual fuel cost increases. Dairyland’s Complaint clearly and correctly invokes the Board’s jurisdiction under 49 U.S.C. §10702(2) to consider and remedy these unreasonable rail practices.

Similarly, in Rail Fuel Surcharges, the Board rejected the Railroads’ contentions, repeated by UP in its Motion, that the 1989 decision in Union Pacific⁷ precludes the Board from utilizing its reasonable practice jurisdiction to address the level of rail fuel surcharges. The Board’s August 2006 Decision states in pertinent part:

Some railroad interests have claimed that the Board does not have authority to regulate fuel surcharges, absent a finding of market dominance, because fuel surcharges are part of the total rate charged and thus cannot be considered as a practice. They cite Union Pacific R.R. v. ICC, 867 F.2d 646, 649 (D.C. Cir. 1989), where the Board’s predecessor, the Interstate Commerce Commission (ICC), had concluded that certain railroads engaged in an unreasonable practice by attempting to avoid their

⁷ Union Pacific R.R. v. ICC, 867 F.2d 646, 649 (D.C. Cir. 1989).

common carrier duty to transport radioactive waste through increased rates designed to recover cost additives that the ICC regarded as unwarranted. 867 F.2d at 648. The reviewing court recognized that there can be a “conceptual overlap between railroads’ ‘practices’ and their ‘rates.’” 867 F.2d at 649. The court nonetheless struck down the ICC’s action because the “so-called ‘practice’ [was] manifested exclusively in the level of rates,” the ICC’s analysis had “all the earmarks of a rate proceeding,” and the ICC’s remedies consisted of rate relief (prescribed rates and refunds). Id. (emphasis in original).

Here, however, we are not proposing to limit the total amount that a carrier can charge, through a combination of base rates and surcharges, for providing rail transportation. Rather, we are only addressing what we believe is an unreasonable practice of applying what the railroads label a fuel surcharge in a manner that is not limited to recouping increased fuel costs that are not reflected in the base rate.

Id. at 3-4; accord January 2007 Decision at 7. The Board properly construed Union Pacific in Rail Fuel Surcharges, and the Board should adhere to its correct interpretation, not UP’s erroneous one.⁸

⁸ Since Dairyland has not invoked the Board’s maximum rate jurisdiction, UP’s contentions concerning the existence of this jurisdiction are moot. See Motion at 8-10. Dairyland does not need to establish market dominance, or establish other maximum rate case jurisdictional prerequisites, when seeking relief from UP’s unreasonable practices. See August 2006 Decision at 3.

**III.
THE BOARD HAS THE AUTHORITY
TO CONSIDER DAIRYLAND'S COMPLAINT**

UP argues that the Board lacks authority to adjudicate Dairyland's Complaint because UP has complied with the Board's ruling in Rail Fuel Surcharges to stop applying percentage of price fuel surcharges by April 26, 2007. According to UP, this action insulates its fuel surcharges from any further review by the Board. See UP Motion at 10-12. However, that clearly is not what the Board held in Rail Fuel Surcharges.

In Rail Fuel Surcharges, the Board found that the use of percentage of price fuel surcharges was an unreasonable practice because "a fuel surcharge program that increases all rates by a set percentage stands virtually no prospect of reflecting the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied." January 2007 Decision at 6. The Board directed that rail carriers stop using this form of fuel surcharge by April 26, 2007. However, contrary to UP's contentions, the Board did not rule that its order eliminating percentage of price fuel surcharges was the only remedy for unlawful rail fuel surcharge practices.

The Board acknowledged in Rail Fuel Surcharges "that our authority to determine whether any particular fuel surcharge applied by a specific railroad is an unreasonable practice, and to award damages on that basis, is limited to proceedings begun on complaint." Id. at 8. The Board also acknowledged that if a shipper believes "any particular revised fuel surcharge program is being administered in a manner that

constitutes an unreasonable practice, it may file a complaint with the Board.” Id. at 10. That is exactly what Dairyland has done, and is permitted to do, under the Board’s Rail Fuel Surcharges decision.

If the Board denies UP’s Motion, and affords Dairyland the opportunity to properly present its case, Dairyland’s evidence will clearly demonstrate that UP’s fuel surcharge collections on the issue traffic vastly exceed the incremental fuel cost increases UP has incurred in providing the service. As the Board knows, the Board’s Rail Fuel Surcharges decisions, by themselves, awarded no refunds to rail shippers. The Board’s Chairman has informed Congress that the Board has not awarded any fuel surcharge refunds because no shipper has filed a complaint asking for refunds.⁹ Dairyland has now presented the Board with such a complaint. The Board is required to conduct a full hearing on Dairyland’s Complaint.¹⁰ It may not summarily dismiss it, as UP moves.

IV.

DAIRYLAND CAN OBTAIN RELIEF ON SHIPMENTS THAT MOVED PRIOR TO APRIL 26, 2007

Finally, UP argues that if the Board does not grant its Motion, the Board should dismiss Dairyland’s claims for relief on issue traffic shipments moving prior to April 26, 2007. According to UP, this relief is barred because the Board abolished

⁹ Regulation Related to Railroads Hearing, webcast excerpt (1:43.24) (statement of Chairman Nottingham) (“the simple reason we have not ordered refunds in the fuel surcharge area is that we have not received a single complaint requesting refunds”).

¹⁰ See 49 U.S.C. § 10704(a)(1) (Board is to decide properly pled unreasonable practice claims “after a full hearing”).

percent of price fuel surcharges as of April 26, 2007, and did not make this ruling “retroactive.” UP Motion at 11-12. UP’s contentions are wrong because they ignore the operative allegations in Dairyland’s Complaint.

Dairyland does not allege in its Complaint that it is entitled to relief because UP applied a percentage of price fuel surcharge to the issue traffic. Rather, Dairyland alleges that it is entitled to relief because UP is collecting fuel surcharge revenues on the issue traffic that exceed the incremental fuel cost increases UP is incurring in providing the service. This practice, which the Board condemned in Rail Fuel Surcharges as unlawfully deceptive,¹¹ is just as unlawfully deceptive when applied to shipments moving before April 26, 2007 as it is to shipments moving after April 26, 2007. Dairyland is clearly entitled to obtain relief on all issue traffic shipments subject to UP’s unlawful practices, including shipments moving prior to April 26, 2007.

¹¹ See, e.g., January 2007 Decision at 7 (railroads “mislead their customers” and “misrepresent” the truth when they collect fuel surcharges that exceed movement-specific incremental fuel cost increases).

CONCLUSION

For the reasons set forth above, Dairyland respectfully requests that the Board deny UP's Motion.

Respectfully submitted,

John H. LeSeur 

Frank J. Pergolizzi

Peter A. Pfohl

Slover & Loftus

1224 Seventeenth Street, N.W.

Washington, D.C. 20036

Attorneys for Dairyland Power
Cooperative

Dated: April 11, 2008

CERTIFICATE OF SERVICE

I hereby certify that this 11th day of April, 2008, I served a copy of Dairyland's Reply in Opposition to Union Pacific's Motion to Dismiss by hand delivery on designated outside counsel for UP, as follows:

Michael L. Rosenthal
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004


Peter A. Pfohl