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May 28, 2008

BY HAND

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-00001

ENTERED
Office of Proceedings

MAY 29 2008

Part of
Public Record

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

Dear Secretary Quinlan:

Dairyland's letter dated May 27, 2008 actually refutes Dairyland's assertion that *Rail Fuel Surcharges* prohibits a carrier from collecting a fuel surcharge that exceeds "the actual increase in fuel costs for handling the particular traffic to which the surcharge applies." Letter from John H. LeSeur, Esq., to Hon. Anne K. Quinlan, dated May 22, 2008, p. 2.

Dairyland's letter relies on the Board's statement that increasing rates through a fuel surcharge, "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." *Rail Fuel Surcharges* at 7 (emphasis added).

However, requiring a "correlation" is very different from requiring that fuel surcharges precisely reflect incremental fuel cost increases. The Board rejected the stricter rule as "impractical." *Id* at 9.¹ Instead, it held that a fuel surcharge program "must be based on the attributes of a movement that directly affect the amount of fuel consumed" *Id*

¹ As Union Pacific explained in its Motion to Dismiss, such a rule also would be contrary to binding precedent. *See* Motion to Dismiss at 5-8.

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In other words, "there must be a reasonable nexus to fuel consumption." *Id* The Board also indicated that use of mileage-based surcharges would satisfy its "reasonable nexus" or "correlation" test because "[m]ileage is one of the primary factors that affects fuel consumption." *Id*. In fact, the Board expressly contrasted mileage-based and rate-based surcharges, explaining that, unlike mileage, "the base rate often does not closely correlate with fuel consumption." *Id*

Because Dairyland does not dispute that Union Pacific is applying a mileage-based fuel surcharge program and it cannot maintain an unreasonable practice claim based on allegations that the surcharges exceed Union Pacific's actual incremental fuel costs, the Board should dismiss the Complaint. If Dairyland believes its rate levels are unreasonable, its recourse is to file a complaint that properly invokes the Board's rate reasonableness jurisdiction.

Sincerely,



Michael L. Rosenthal

cc John H. LeScur, Esq. (Counsel for Dairyland)