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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

_____)
CARGILL, INCORPORATED)
)
Complainant,)
)
v.)
)
BNSF RAILWAY COMPANY)
)
Defendant.)
_____)

Docket No. 42120

**ENTERED
Office of Proceedings
FEB 7 - 2011
Part of
Public Record**

**BNSF'S REPLY TO CARGILL'S PETITION
FOR PARTIAL RECONSIDERATION**

BNSF Railway Company ("BNSF") hereby responds in opposition to Cargill Inc.'s Petition for Partial Reconsideration ("Petition"), filed January 24, 2011.

In its Petition, Cargill does not challenge the findings or conclusions that the Board reached in dismissing Cargill's Double Recovery Claim. Instead, Cargill seeks permission "to replead its Double Recovery Claim in a manner that conforms to the Board's ruling in the Order." Petition at 4. The premise of Cargill's Petition is that the Board dismissed its Double Recovery Claim because of a pleading deficiency, namely that Cargill failed to couch the Double Recovery Claim in terms of an alleged "misrepresentation." However, Cargill ignores most of the Board's discussion of the Double Recovery Claim in the January 4, 2011 decision. The Board dismissed Cargill's Double Recovery Claim because of fundamental flaws in that Claim that cannot be remedied merely by dressing up the Claim with an allegation of misrepresentation. In particular, Cargill's Double Recovery Claim was properly dismissed by the Board because it is, at heart, a challenge to the level of rates charged to Cargill that cannot be maintained as an

unreasonable practice claim. Moreover, the Board found that Cargill had not pointed to any use by BNSF of an escalator or index that contains a fuel cost component in its base tariff and therefore failed to state a claim for “double dipping” in the manner contemplated by the Board’s 2007 decision in *Rail Fuel Surcharges*, Ex Parte No. 661 (STB served Jan. 26, 2007).

Repleading to add allegations of misrepresentations would do nothing to cure these defects that the Board found in Cargill’s Double Recovery Claim. Accordingly, Cargill’s request for permission to replead that claim should be denied.

I. BACKGROUND

Cargill’s Double Recovery Claim was set out in Paragraph 8 of its April 19, 2010 Complaint. In Paragraph 8, Cargill alleged that BNSF is “double recovering the same incremental fuel cost increases BNSF has incurred in providing service to Cargill by (i) setting the base rates on Cargill traffic to include recovery of fuel prices higher than the BNSF fuel strike price of \$0.73 per gallon implicit in the [fuel surcharge] and (ii) by increasing the Cargill base rates (including the fuel component in the base rates) [while] requiring Cargill to pay . . . the fuel surcharge.” Complaint, ¶8. The essence of the claim was that BNSF improperly recovered incremental fuel costs incurred in providing Cargill’s transportation service twice – once in the base rate and again in the fuel surcharge.

In its May 28, 2010 Motion for Partial Dismissal, BNSF asked the Board to dismiss Cargill’s Double Recovery Claim on grounds that it is a “frontal assault on railroad rate-setting couched in terms of an unreasonable practice claim and it is a clear violation of the principles set out in [*Union Pacific Railroad Co. v. I.C.C.*, 867 F.2d 646 (D.C. Cir. 1989) (“*Union Pacific*)].” Motion for Partial Dismissal at 8. In *Union Pacific*, the United States Court of Appeals for the District of Columbia Circuit ruled that regardless of the label used to describe a complainant’s

cause of action, a challenge that is directed to the level of a rate charged cannot be brought as an unreasonable practices claim. *Union Pacific*, 867 F.2d at 649. BNSF further explained that the Double Recovery Claim violated the Board's conclusion in *Dairyland Power Cooperative v. Union Pacific Railroad Co.*, STB Docket No. 42105 (served July 29, 2008) ("*Dairyland*"), that the Board will not entertain challenges to fuel surcharges that focus on the alleged over-recovery of incremental fuel costs incurred in handling an individual shipper's traffic.

On January 4, 2011, the Board issued a decision which, among other things, dismissed Cargill's Double Recovery Claim. The Board concluded that "Cargill's Double Recovery count fails to state a claim and that its approach contravenes the D.C. Circuit's ruling in *Union Pacific*." January 2011 Decision at 5. In its Petition for Reconsideration, Cargill does not dispute or ask for reconsideration of that finding; nor does Cargill challenge the rationale for the Board's dismissal of the Double Recovery Claim. Rather, Cargill seeks leave to amend its Complaint by adding an allegation of misrepresentation. For the reasons explained below, Cargill's Petition should be denied.

II. ARGUMENT

Cargill's Petition ignores critical portions of the Board's January 4, 2011 Decision regarding Cargill's Double Recovery Claim. Cargill asserts that "[t]he Board granted BNSF's motion to dismiss Cargill's Double Recovery Claim because it failed to include 'allegations of misleading or inconsistent representations to shippers.'" Petition at 4, citing the January 2011 Decision at 6. While the Board's decision noted the absence of allegations of misrepresentation, the Board's grounds for rejecting Cargill's Double Recovery Claim were broader and more fundamental. The Board did not dismiss Cargill's Double Recovery Claim due to a mere pleading defect but rather because that Claim cannot legitimately be brought as an unreasonable

practice claim. The defects in Cargill's Double Recovery Claim cannot be cured by dressing up the claim in the garb of misrepresentation.

A. The Board Properly Dismissed Cargill's Double Recovery Claim On Grounds That It Violated The Principles Set Out In *Union Pacific*.

Cargill's Double Recovery Claim focuses on the level of the rates charged to Cargill.

The essence of Cargill's Double Recovery Claim is that BNSF improperly recovers incremental fuel costs in both the base rate and in the fuel surcharge, leading to a double recovery of fuel costs. As the Board found, "the challenged 'practice' — allegedly recovering fuel costs in both base rates and fuel surcharges—is manifested exclusively in the level of rates that Cargill is charged, and thus may only be challenged as an unreasonable rate after a finding of market dominance." January 2011 Decision at 6.

Cargill does not propose to alter the focus of its Double Recovery Claim away from the double recovery of fuel costs. Instead, Cargill asks for permission to repackage its claim by adding allegations of misrepresentation. But adding allegations of misrepresentation would not alter the actual focus of Cargill's claim, which is addressed to the level of the rates that BNSF charged Cargill. As the D.C. Circuit ruled, when distinguishing between rate claims and unreasonable practice claims, "[t]he labeling notwithstanding, form must yield to substance." *Union Pacific*, 867 F.2d at 649. At heart, Cargill's Double Recovery Claim is a challenge to BNSF's alleged recovery of fuel costs in both the base rate and in the fuel surcharge. It would elevate form over substance to allow Cargill to convert what is essentially a complaint about BNSF's rates into an unreasonable practices claim by merely tacking on an allegation of misrepresentation.

The counter factual hypothetical set out by Cargill at pages 7-8 of its Petition makes clear that the focus of Cargill's Double Recovery Claim is the level of fuel cost recovery achieved

through adjustments to the base rate plus the assessment of a fuel surcharge.¹ Under Cargill's hypothetical, "[a]pplication of the AII-LF adjustor to the \$200 fuel component of the base rate produces a \$10 increase in the base fuel component ($\$200 \times .05$), an increase that is also captured by the \$50 fuel surcharge – i.e., a double recovery. . . ." Petition at 8. This example makes it clear that Cargill's Double Recovery challenge is not addressed to representations about rates or fuel surcharges. Under Cargill's hypothetical, BNSF would be improperly double-recovering incremental fuel costs even if BNSF applied an index to the base rate that did *not* account for fuel costs and even if BNSF accurately represented to its shippers that it was applying a rate adjustment index with no fuel component. According to Cargill, BNSF would be engaged in an unreasonable practice simply because it was recovering incremental fuel costs twice. As the Board correctly concluded in the *January 2011 Decision*, such a claim predicated on the level of recovery is precisely what *Union Pacific* prohibits.

B. Cargill Does Not And Cannot Allege The Type Of Misrepresentation That Might Support A Double Recovery Claim.

In *Rail Fuel Surcharges*, Ex Parte No. 661 (STB served Jan. 26, 2007), the Board stated that it would be an unreasonable practice for a railroad to apply "both an index that includes a fuel component and a fuel surcharge for the same movement to cover the same time period." *Rail Fuel Surcharges* at 11. The Board explained in the *January 2011 Decision* that the problem with such a practice is that the railroad would be making "inherently inconsistent representations: imposing a surcharge ostensibly as a way to recover the increased cost of fuel while at the same time justifying an increase in the base rate by referring to an index that explicitly accounted for the same increased cost of fuel." *January 2011 Decision* at 5.

¹ The hypothetical is counter-factual because BNSF does not apply any index or rate adjustment mechanism to Cargill's tariff rates.

The critical and essential factor in the unreasonable practice as defined by the Board in *Rail Fuel Surcharges* was the railroad's use of an index to escalate the base rate that included fuel cost increases while also applying a fuel surcharge to the base rate. Absent the use of an index containing a fuel component to escalate base rates, the application of a fuel surcharge to base rates that may be adjusted from time to time is not an unreasonable practice. As the Board subsequently explained in this case, "when a railroad imposes a fuel surcharge and also increases its base rate, but without express reference to an index that includes a fuel cost component, that railroad is not making inconsistent representations." *January 2011 Decision* at 5.

Cargill does not and cannot satisfy the critical element of an unreasonable practices claim that involves an alleged double recovery of fuel costs – the acknowledged use by the railroad defendant of an index that reflects fuel cost increases to adjust the base rate. Cargill does not allege, nor could it, that BNSF has adjusted base rates by means of an escalation provision or index that accounts for increased fuel costs. As the Board correctly observed: "Here, Cargill has pointed to no use by BNSF of any form of fuel escalator, index, or other cost adjustment mechanism in its base tariff that contains a fuel cost component. Rather, BNSF states, to the contrary, that '[n]ew rates are set from time to time by BNSF without express reference to costs.'" *January 2011 Decision* at 5-6 .

Cargill claims in its Petition that it seeks leave to amend its Complaint to respond to "guidance" provided in the *January 2011 Decision* "on how to properly plead its Double Recovery Claim." Petition at 6. In fact, the Board gave Cargill clear guidance – the Board will not entertain a Double Recovery Claim unless there is evidence of an express reference by the railroad defendant to an index used to escalate the base rate that includes fuel cost increases. Since BNSF set its base rates from time to time without any reference to any such cost-based

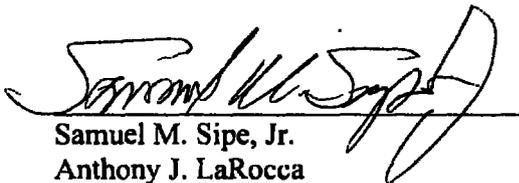
index, Cargill cannot possibly meet the "guidance" set out in the *January 2011 Decision*, and its Petition for leave to amend its Complaint should be denied.

III. CONCLUSION

For the reasons set out above, Cargill's Petition for Partial Reconsideration and the relief requested therein should be denied.

Respectfully submitted,

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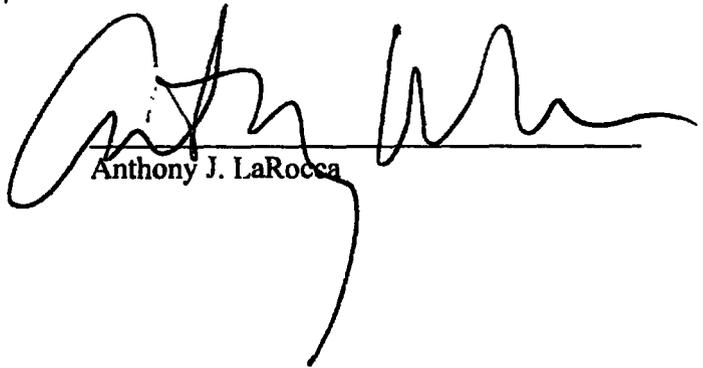
ATTORNEYS FOR DEFENDANT

February 7, 2011

Certificate of Service

I hereby certify that on this 7th day of February, 2011, I have served a copy of the foregoing Reply to Cargill's Petition for Partial Reconsideration on the following by hand delivery:

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