

United States Senate

WASHINGTON, DC 20510

December 18, 2019

300200

ENTERED
Office of Proceedings
December 19, 2019
Part of
Public Record

The Honorable Ann D. Begeman
Chairman
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

The Honorable Patrick J. Fuchs
Vice Chairman
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

The Honorable Martin J. Oberman
Member
Surface Transportation Board
395 E Street Southwest
Washington, DC 20423

Dear Chairman Begeman, Vice Chairman Fuchs, and Commissioner Oberman:

I write to request that the Surface Transportation Board (STB or Board) reconsider its recent decision to terminate Docket No. EP 661 (Sub-No. 2), Fuel Surcharges (Safe Harbor) proceeding.

Over a decade ago, railroads began imposing onerous fuel surcharges on their shippers' traffic. Following extensive hearings, the Board ruled in 2007 that rail carriers could lawfully use their fuel surcharges only as a means to collect their actual incremental fuel cost increases. The Board also held that if carriers were collecting fuel surcharges in excess of their actual fuel cost increases, they were engaged in the deceptive, unlawful practice of using their fuel surcharges as profit centers. Following the Board's 2007 decision, then Board Chairman Nottingham committed to Congress that the Board would "aggressively use the authority granted to it by statute to stop unreasonable [fuel surcharge] practices."¹ I am concerned that this promise has gone unfulfilled.

In its first and only unreasonable fuel practice merits decision, the Board ruled in a 2013 decision that the defendant carrier had collected fuel surcharges on its agricultural commodity traffic over a five-year period that exceeded the carrier's actual incremental fuel cost increases by \$181 million. However, the Board found that this profiteering was permissible under the "safe harbor" fuel surcharge rules it adopted in 2007. In its 2013 decision, the Board expressed concerns that

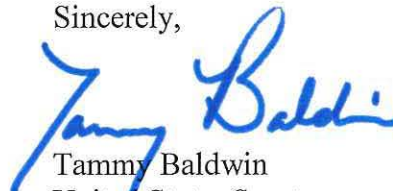
¹ *The Surface Transportation Board and Regulation Related to the Freight Railroad Industry Before the Subcommittee on Surface Transp. and Merchant Marine Infrastructure, Safety, and Security of the S. Comm. on Commerce, Science & Transp.*, 110th Cong. 16 (2007).

its fuel surcharge rules were permitting carriers to do exactly what the Board held in 2007 they should not be able to do – use fuel surcharges as profit centers – and stated it would promptly address these concerns in a new rulemaking proceeding, which it subsequently initiated.

In *Safe Harbor*, the Board received extensive comments from shippers of all major commodities urging the Board to make changes to its fuel surcharge rules to prevent carriers from continuing to use rail fuel surcharges as profit centers. The record in *Safe Harbor* closed in 2014. The Board took no action in *Safe Harbor* for several years, and then issued a decision on August 29, 2019 discontinuing the proceeding without taking remedial action “because the Board has been unable to reach a majority decision on what additional Board action should be taken.”

While I appreciate the difficulties that can occur when Board Members do not agree on a course of action, carriers’ continued use of fuel surcharges as profit centers is too important a consumer issue not to be thoroughly addressed and remediated by the Board. Therefore, I urge the Board to give careful consideration to the pending petition submitted by the Allied Shippers requesting the Board reconsider its decision to discontinue the *Safe Harbor* proceeding and, on reconsideration, to take appropriate actions to ensure that carriers cannot use rail fuel surcharges as deceptive, unlawful profit centers.

Sincerely,



Tammy Baldwin
United States Senator