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SERVICE DATE – AUGUST 14, 2007

## SURFACE TRANSPORTATION BOARD

### DECISION

STB Ex Parte No. 661 (Sub-No. 1)

### RAIL FUEL SURCHARGES

Decided: August 8, 2007

The Board is amending its regulations to require Class I Railroads to report certain data concerning fuel costs and fuel surcharges billed. In light of comments received, the proposed rule has been modified to reduce the reporting burden and increase the utility of the required report. The final rule, including the reporting form, will be codified as 49 CFR 1243.3, as set forth in the Appendix to this decision.

### BACKGROUND

The Board instituted this proceeding, in conjunction with its decision in Rail Fuel Surcharges, STB Ex Parte No. 661 (STB served Jan. 26, 2007), to solicit comments, pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* (PRA) and Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d)(3), regarding the Board's proposal to require all Class I (large) railroads to submit a monthly report containing the following information: (1) total monthly fuel cost; (2) gallons of fuel consumed during the month; (3) increased or decreased cost of fuel over the previous month; and (4) total monthly revenue from fuel surcharges. In Rail Fuel Surcharges, STB Ex Parte No. 661 (Sub-No. 1) (STB served Jan. 26, 2007), the Board sought comments regarding: (1) whether the particular collection of information described above is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate.

Comments were received from both shipper interests<sup>1</sup> and rail interests.<sup>2</sup> All but NS support the reporting requirement. Railroads suggest several ways to minimize their reporting burden. In contrast, shippers suggest additional data that they assert should be collected to increase the report's utility. No comments were received on burden estimates.

CN, CSXT, and UP suggest that the report be submitted quarterly, rather than monthly, to reduce the degree to which the data might be misinterpreted and to be consistent with reporting periods used by the Securities and Exchange Commission (SEC), as well as periods used by the STB for other reports. CSXT and UP also suggest that the deadline for submitting a report should be 30 days after the end of the reporting period (rather than 20 days, as proposed) to be more consistent with other STB reporting deadlines.

CN, CSXT, and UP also ask the Board to clarify whether the report is intended to include data on both regulated and unregulated traffic. CN and CSXT argue that it would be difficult to segregate revenue by tariff, exempt, or contract traffic, while UP states that aggregated reporting (at least as to revenue derived from its numerous separate/distinct fuel surcharge programs) may be more burdensome and may lead to confusion and misinterpretation. In addition, CSXT asks the Board to clarify whether reported rail fuel surcharge revenue should include all revenue earned/billed during the time period or only revenue collected, and whether reported fuel costs should include state fuel taxes.

NS opposes this reporting requirement, arguing that Class I railroads must already submit extensive financial reports to the SEC. NS also argues that a carrier that does not impose a fuel surcharge on STB-regulated traffic should be exempt from this reporting requirement because its report would have no relation to any Board function.

Shippers are generally concerned that the proposed Fuel Surcharge Report would not provide sufficient transparency to enable the Board and the public to monitor the fairness of the rail fuel-cost recovery practices. Additional data requested includes: fuel consumption per the same unit (whether mile, ton-mile, car-mile, etc.) used by the carrier to assess the fuel surcharge; total ton-miles and/or car-miles; total recovery of fuel costs, whether by fuel surcharge or any other means; commodity-specific data; and data that distinguishes between freight that is subject to fuel surcharges and freight that is not.<sup>3</sup>

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<sup>1</sup> Edison Electric Institute (EEI); National Grain and Feed Association (NGFA); North Dakota Grain Dealers Association (NDGDA); Snavely King Majoros O'Connor & Lee, Inc. (Snavely); and Total Petrochemicals, USA, Inc. (TOTAL).

<sup>2</sup> Canadian National Railway Company (CN); CSX Transportation, Inc. (CSXT); Norfolk Southern Railway Company (NS); and Union Pacific Railroad Company (UP).

<sup>3</sup> WCTL would further separate the data between interchange and non-interchange traffic and would require data on mis-aligned surcharge threshold recovery ( i.e., when the base rate for  
(continued...)

In addition, EEI and TOTAL ask the Board to direct that the report reference a single fuel index and a single, objective source of railroad miles. Snively asks the Board to direct that the fuel surcharge data also be reported in the Waybill Sample (in the accessorial field) and to clarify that “total fuel cost” should exclude gains or losses from fuel hedging.

The proposed rule was submitted to OMB for review as required under the PRA, 5 U.S.C. 3507(d) and 5 CFR 1320.11. No comments were received from OMB, which has tentatively approved the reporting requirement, pending publication and review of the final rule. OMB has 60 days to review the final rule. The Board will publish a separate notice of OMB’s final action. This collection has been assigned Control Number 2140-0014.<sup>4</sup>

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10702, the Board has authority to address the reasonableness of a rail carrier’s practices. The Board also has specific authority under 49 U.S.C. 11145(a)(1) to require regulated rail carriers to file annual, periodic, and special reports with the Board. In adopting this rule to require the Report of Fuel Cost, Consumption, and Surcharge Revenues, we hope to bring some transparency to the use of fuel surcharges by rail carriers. These reports will provide an overall picture of the use of fuel surcharges and will permit the Board to monitor the current fuel surcharge practices of Class I carriers.

### Scope of the Report

As a number of commenters point out, the proposed rule requires clarification regarding the scope of the data that the report is intended to cover. We therefore clarify that the four line items originally proposed are intended to reflect aggregate data on fuel costs and fuel surcharge revenue. Although the underlying ruling adopted in STB Ex Parte No. 661—that the use of rate-based calculations to determine a fuel surcharge is an unreasonable practice—is applicable only to regulated traffic, several carriers argue that it would be unduly burdensome to require railroads to segregate the fuel costs and revenue for regulated traffic. We can discern no practical method for allocating fuel costs for regulated traffic alone. Therefore, we will not require railroads to segregate fuel costs.

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the fuel surcharge is below the fuel cost in the underlying rail rate, so that the carrier is “double-dipping”), as well as the amount of fuel surcharge credits provided to shippers for months in which fuel costs fall below the level at the time the existing rate was established. Snively argues that additional reporting would not burden carriers because they already submit fuel cost data to the Association of American Railroads as part of the Rail Cost Adjustment Factor.

<sup>4</sup> Unless reapproved, OMB approval for this report expires 3 years after the date of approval of the final rules.

However, upon further reflection and review of the comments received, we believe that carriers should be required to segregate and separately report the total fuel-surcharge revenue collected from regulated traffic. Our decision to require these data is consistent with our concerns, as detailed in our decisions in STB Ex Parte No. 661, regarding the potentially disparate impact of fuel surcharges on regulated shippers. Requiring these additional data, as urged by several commenters, will increase the utility of the report as a tool for monitoring the use of these surcharges on regulated traffic and should not unduly burden reporting railroads. This information should be readily available to reporting railroads because railroads bill shippers on an individual basis. If in practice this added requirement is more burdensome for a carrier than we anticipate, that carrier may bring that to our attention by seeking an individual exemption.

We also clarify that the costs reported in lines 1 and 3 should include state fuel taxes, and that the revenue reported in line 4 should be the revenue billed in that period rather than the revenue collected in that period.

#### Who Must Report

All Class I carriers, even those that impose no fuel surcharges on regulated traffic, will be required to submit this report. This approach will better enable the Board to monitor industry-wide fuel surcharge practices. Moreover, unregulated traffic includes traffic that has been exempted under 49 U.S.C. 10502. Were these reports to suggest that a carrier was imposing fuel surcharges that over-recovered for its actual fuel costs, a shipper could file a complaint asking the Board to investigate and revoke an exemption under section 10502(d).

#### Frequency and Due Date of Reports

Based on the comments received, we will require these reports to be submitted on a quarterly basis, due 30 days after the end of the reporting period. As the railroads point out, these changes will make this reporting requirement more consistent with other financial reporting to the Board and to the SEC. These changes will decrease the reporting burden on carriers while retaining the utility of the reports. The aggregated nature of the data, combined with the longer reporting interval, will provide a more useful and reliable regulatory tool for monitoring the relationship between changes in revenues and costs.

Suggestions to Require Additional Data

With the one exception noted above, we will not require carriers to submit additional data in this report.<sup>5</sup> The Fuel Surcharge Report is intended to provide an overall picture of the use of fuel surcharges; it is not intended as a substitute for evidence brought in an individual case.

Pursuant to 5 U.S.C. 605(b), the Board certifies that this action will not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Commencing with reports for the 3 months beginning October 1, 2007, and consistent with the reporting requirements adopted in this decision, Class I rail carriers shall submit a quarterly Report of Fuel Cost, Consumption, and Surcharge Revenues, which will be due 30 days after the end of each reporting period.
2. The regulations proposed in the Appendix will be published in the Federal Register.
3. This decision is effective November 12, 2007.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams  
Secretary

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<sup>5</sup> Any suggestion to add information on fuel surcharge data into the Waybill Sample would be more properly addressed in a petition for a rulemaking involving the Waybill Sample.

APPENDIX A

For the reasons set forth in the preamble, the Surface Transportation Board amends part 1243 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1243—QUARTERLY OPERATING REPORTS—RAILROADS

1. The authority citation for Part 1243 continues to read as follows:

Authority: 49 U.S.C. 721, 49 U.S.C. 11145.

2. Add a new § 1243.2 to read as follows:

§1243.3 Report of Fuel Cost, Consumption, and Surcharge Revenue.

Commencing with reports for the 3 months beginning October 1, 2007, all Class I railroads are required to file quarterly a Report of Fuel Cost, Consumption, and Surcharge Revenue, in accordance with the Board's reporting form. Such reports shall be filed, in duplicate, with the Office of Economics, Environmental Analysis, and Administration, Surface Transportation Board, Washington, DC 20423-0001, within 30 days after the end of the quarter reported.

APPENDIX B

OMB Control No. 2140-0014

Expires \_\_\_\_\_, 2010

RAILROAD NAME \_\_\_\_\_

**QUARTERLY REPORT OF  
FUEL COST, CONSUMPTION, AND SURCHARGE REVENUE  
FOR THE QUARTER ENDING \_\_\_\_\_, 20\_\_**

**Instructions:** The report shall contain data only for the reported quarter. Cost and revenue are defined as accrued or earned that quarter. The report shall be filed with the Surface Transportation Board on or before 30 days after the end of that quarter.

LINE NO	Data  (a)	Amount  (in thousands) (b)
1	Total fuel cost <sup>1</sup>	
2	Total gallons of fuel consumed <sup>1</sup>	
3	Total increase or decrease in cost of fuel <sup>2</sup>	
4	Total revenue from fuel surcharges <sup>3</sup>	
5	Revenue from fuel surcharges on regulated traffic	

I, the undersigned, \_\_\_\_\_, Title: \_\_\_\_\_, state that this report was prepared by me or under my supervision and that I have carefully examined it and on the basis of my knowledge, belief, and verification declare it to be full, true and correct.

<sup>1</sup> Include fuel for freight, yard and work train locomotives. Include fuel charged to train and yard service (function 67- Locomotive Fuels). Include all other fuel used for railroad operations and maintenance, including motor vehicles and power equipment not charged to function 67- Locomotive Fuels.

<sup>2</sup> Show the total increase or decrease in fuel cost over previous quarter.

<sup>3</sup> Show Fuel surcharges billed for all traffic (line 4) and for only regulated traffic (line 5).

**SUPPLEMENTAL INFORMATION ABOUT THE FUEL SURCHARGE REPORT**

The following information is provided in compliance with OMB requirements, pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq.:

Information in this report is intended to permit the Board to monitor the fuel surcharge practices of Class I carriers.

The estimated annual hourly, per respondent burden for filing this report is 12 hours.

This report is mandatory for Class I carriers.

Information collected through this report is published on the Board's website and is maintained by the agency for at least 2 years.

The display of a currently valid OMB control number for this collection is required by law. Under 5 CFR 1320.5(b), persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.