

PUBLIC VERSION
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BEFORE THE
SURFACE TRANSPORTATION BOARD

2005
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WESTERN FUELS ASSOCIATION, INC.
and BASIN ELECTRIC POWER
COOPERATIVE, INC.

Complainants,

v.

BNSF RAILWAY COMPANY

Defendant.

215123

Docket No. 42088

ENTERED
Office of Proceedings

COMPLAINANTS' REPLY IN OPPOSITION
TO DEFENDANT'S MOTION TO STRIKE
AND FOR LEAVE TO FILE
LIMITED SURREBUTTAL

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CERTIFICATE OF SERVICE

SURREBUTTAL VERIFIED STATEMENT OF THOMAS D. CROWLEY

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v.	)	
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BNSF RAILWAY COMPANY	)	
	)	
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Docket No. 42088

**COMPLAINANTS' REPLY IN OPPOSITION
TO DEFENDANT'S MOTION TO STRIKE
AND FOR LEAVE TO FILE
LIMITED SURREBUTTAL**

Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively "WFA/Basin") submit this Reply to Defendant BNSF Railway Company's Motion to Strike and for Leave to File Limited Surrebuttal ("Motion"). BNSF's Motion was filed on October 20, 2005.

I.
SUMMARY

BNSF's Motion contains a half-hearted request to strike portions of WFA/Basin's Rebuttal evidence on grounds the evidence constitutes "improper rebuttal"¹

¹ See BNSF Motion at 1.

or is “erroneous.”² BNSF’s claims are baseless. BNSF’s real purpose appears to be to use its illegitimate Motion as a basis to submit new evidence to fill holes in, or to correct errors in, BNSF’s Reply evidence – deficiencies that WFA/Basin properly demonstrated in their Rebuttal evidence.

- Fuel Hedging. On Opening, WFA/Basin calculated the Laramie River Railroad³ (“LRR”) base fuel price as equaling BNSF’s fourth quarter 2004 (4Q04) system-average fuel price (which includes BNSF’s fuel hedging actions). On Reply, BNSF calculated asserted “actual” location-specific fuel prices. {
} WFA/Basin properly demonstrated in their Rebuttal evidence that BNSF’s asserted “actual” fuel prices did not include BNSF’s fuel hedging actions. BNSF now wants to submit surrebuttal evidence on why the Board should not consider hedged fuel costs in its SAC analysis.

- Issue Rate Forecasts. WFA/Basin forecast the initial Laramie River Station (“LRS”) rates using the Rail Cost Adjustment Factor unadjusted for productivity (“RCAF-U”). On Reply, BNSF claimed this procedure was improper, inter alia, because the RCAF-U, unlike BNSF’s tariff fuel surcharge, did not fully capture BNSF’s increased fuel costs. WFA/Basin properly demonstrated on Rebuttal that BNSF’s cost-recovery

² Id.

³ The LRR is WFA/Basin’s Stand-Alone Railroad (“SARR”).

traffic would generate revenues less than BNSF's variable costs for replicating the LRR service (i.e., { } in revenues versus { } in variable costs).

Remarkably, BNSF now claims that WFA/Basin's use of BNSF's Reply calculation is "erroneous" because the { } cost figure is too high. This is BNSF's own Reply cost calculation. BNSF proposes to present impermissible surrebuttal evidence to reduce the { } figure. BNSF's obvious purpose is not to correct its Reply cost calculations but to manipulate the calculations to produce a reduction in its LRR variable service cost calculations.

All of BNSF's newly tendered evidence is improper surrebuttal. However, if the Board is going to consider it, WFA/Basin present responsive Surrebuttal evidence. WFA/Basin request the Board to consider this evidence, and include it in the record, if the Board admits BNSF's Surrebuttal evidence. WFA/Basin's responsive Surrebuttal evidence demonstrates:

- Fuel Hedging. The Board has consistently set SARR base-period fuel prices at levels equaling the defendant carrier's system-average hedge-adjusted fuel prices for the base-period. BNSF offers no valid grounds for departing from this accepted procedure.

- Issue Rate Forecasts. BNSF's contention that application of the RCAF-U to LRS rates does not fully keep BNSF whole with respect to LRS movement-specific fuel cost charges is wrong. Similarly, BNSF's contention that its current fuel surcharge procedures do not vastly over-recover LRS movement-specific fuel cost increases is wrong.

- Current Fuel Surcharge Forecasts. The best forecast to project LRR fuel surcharges revenues is the EIA's AEO 2005 diesel fuel (distillate) forecast.

- New Fuel Surcharge Procedures. BNSF's new fuel surcharge should not apply to the LRS movements for the same reasons its current surcharge is inapplicable.

This surcharge is a component part of BNSF's unlawful rate adjustment procedure.

BNSF's new fuel surcharge also should not apply to the remaining LRR movements – all of which are interline LRR/residual BNSF movements – because BNSF's new fuel surcharge, by its own express terms, does not apply to interline movements.

- SARR Divisions. BNSF's Reply variable cost calculations – which BNSF used to calculate divisions on cross-over traffic – produced the wrong answer from BNSF's perspective. The Board should summarily reject BNSF's attempts to discredit and disavow the costing procedure it used on Reply to calculate LRR variable costs.

WFA/Basin's Surrebuttal evidence responding to BNSF's Surrebuttal evidence is set forth in the appended Surrebuttal Verified Statement of Thomas D. Crowley ("Crowley V.S.").

II. THE GOVERNING LEGAL STANDARDS

Under the Board's Stand-Alone Cost ("SAC") case procedural rules, a complainant shipper files opening SAC evidence, the defendant carrier files reply SAC evidence, and the shipper files rebuttal SAC evidence.⁴ The Board expects a shipper to

⁴ See 49 C.F.R. §1111.8.

file its entire SAC case-in-chief on opening.⁵ On reply, defendant carriers typically challenge many of the shipper's SAC assumptions and SAC cost calculations. Carriers also routinely present new SAC assumptions and new SAC cost calculations in their reply evidence. On rebuttal, a shipper can respond "to issues raised" in a carrier's reply filing.⁶

The Board's evidentiary procedures in SAC cases were summarized by the Board in PEPCO:⁷

The proponent of a SAC model sets the general parameters by which the reasonableness of a rate will be judged in its opening submission. The opponent, on reply, has an opportunity to attack the fundamental premises underlying the SAC model. On rebuttal, the proponent of the model may not alter the basic configuration of the stand-alone system developed in its opening evidence. However, this restriction does not require the proponent to anticipate in its opening evidence every possible defense or criticism of the SAC model. Rather, on rebuttal, the proponent may respond to the defenses and criticisms raised by introducing evidence to bolster its initial assumptions.

Id.

⁵ See General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, STB Ex Parte No. 347 (Sub No. 3) (STB served March 12, 2001) at 5.

⁶ 49 C.F.R. §1112.16. See also Bituminous Coal – Hiawatha, Utah to Moapa, Nevada, ICC Docket No. 37038 (ICC served Dec. 7, 1988) at 4 ("there is no bar to the presentation of new evidence on rebuttal, however, as long as it is responsive to the reply"); Duke Energy Corp. v. Norfolk Southern Ry., STB Docket No. 42069 (STB served Nov. 6, 2003) ("Duke/NS I") at 14-15 ("shipper may supply corrective evidence" on rebuttal where "the shipper shows the railroad's reply evidence is itself unsupported, infeasible or unrealistic").

⁷ Potomac Elec. Power Co. v. CSX Transportation, Inc., STB Docket No. 41989 (STB served Nov. 24, 1997) at 3

In some cases, the Board has granted a carrier's post-rebuttal motion to strike, or granted a carrier's post-rebuttal motion to file surrebuttal, where the Board concluded the shipper's rebuttal "significantly redesign[s] its SARR"⁸ or makes "a significant change in [its] case-in-chief."⁹ In other cases, the Board has denied a carrier's request to strike rebuttal evidence, or to file post-rebuttal evidence, where a shipper has filed proper rebuttal.¹⁰

In cases where the Board has permitted a party to file surrebuttal evidence it has also frequently permitted the other party to file an appropriate reply in order to obtain a full and complete record.¹¹

III. **ARGUMENT**

BNSF's claims that WFA/Basin submitted "improper" or "erroneous" rebuttal evidence are wrong. Accordingly, BNSF's Motion should be dismissed. If the Board disagrees, WFA/Basin respectfully request that the Board also consider, and

⁸ See Duke/NS I at 15 (citing standard).

⁹ See, Arizona Elec. Power Coop., Inc. v. Burlington Northern and Santa Fe Ry., STB Docket No. 40258 (STB served Nov. 19, 2003) at 4 (citing standard).

¹⁰ See, e.g., PEPCO, supra at 3; Duke/NS (STB served March 25, 2003) at 2.

¹¹ See, e.g., STB Docket No. 42057, Pub. Serv. Co. of Colorado d/b/a Xcel Energy v. Burlington Northern and Santa Fe Ry., Complainant's Reply to the BNSF's Motion for Leave to File Limited Surrebuttal Evidence (dated June 26, 2003); SMS Rail Service, Inc. – Petition For Declaratory Order, STB Docket No. 34483 (STB served Jan. 24, 2005) (STB accepts response to surrebuttal statement); Union Pacific R.R. – Abandonment Exemption – In Rio Grande and Mineral Counties, CO, STB Docket No. AB-33 (Sub-No. 132X) (STB served June 22, 2004) at 3 (same).

include in the record, the appended Surrebuttal Verified Statement of Thomas D. Crowley.

A. WFA/BASIN'S REBUTTAL
EVIDENCE CONCERNING SAC
FUEL HEDGING ISSUES WAS PROPER

WFA/Basin's Rebuttal evidence on fuel hedging was proper because it responded to fuel price issues raised in BNSF's reply filing.

1. The Record Evidence

In their Opening SAC evidence, WFA/Basin modeled the LRR. The LRR fuels most locomotives at its Guernsey Yard. The issue traffic locomotives are fueled at LRS. WFA/Basin's Opening evidence demonstrated that LRR would receive all fuel deliveries at the Guernsey Yard by pipeline and receive all fuel deliveries at LRS by tanker truck.¹²

WFA/Basin also calculated on opening that the LRR would pay \$1.141 per gallon for fuel delivered to Guernsey and LRS in the fourth quarter of 2004 (4Q04). This figure equaled BNSF's publicly reported 4Q04 system average price of fuel which, in turn, reflected BNSF's fuel hedging activities. WFA/Basin's Opening Narrative states in pertinent part:

¹² See WFA/Basin Opening Narr. at III-D-8.

The LRR's locomotive fuel costs are based on BNSF's average cost per gallon of diesel fuel (including handling, taxes and hedge effect) of \$1.141 per gallon as reported in BNSF's Report to Investors for the fourth quarter of 2004.¹³

In its Reply, BNSF disputed WFA/Basin's evidence concerning the feasibility and cost of pipeline fuel deliveries to Guernsey. BNSF's Reply operating plan proposed that the LRR would obtain fuel via the same combination of pipeline and tanker truck deliveries BNSF was currently employing to fuel trains at Guernsey and LRS.¹⁴ BNSF also claimed that the LRR would pay 4Q04 delivered fuel prices at Guernsey and LRS equal to BNSF's asserted "actual" 4Q04 delivered fuel prices at these locations.¹⁵

{

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}¹⁶

On Rebuttal, WFA/Basin responded to BNSF's Reply evidence. In their Rebuttal evidence, WFA/Basin demonstrated that BNSF's critique of WFA/Basin's proposed fuel delivery procedures was meritless. WFA/Basin also responded to BNSF's

¹³ Id. at III-D-7.

¹⁴ See BNSF Reply Narr. at III.D-10 to III.D-11.

¹⁵ Id.

¹⁶ Id. at III.D-9.

contention that under BNSF's proposed fuel delivery procedures, BNSF's LRR location-specific delivered fuel costs {
}

As noted above, BNSF calculated its location-specific fuel costs {
} WFA/Basin's Rebuttal evidence
demonstrated that this { } did not adjust BNSF's asserted "actual" fuel prices for
BNSF's acknowledged fuel hedging activities. {
}

Thus, WFA/Basin's Rebuttal evidence demonstrated that, regardless of
whether the Board adopted WFA/Basin's or BNSF's fuel delivery methods, {
}

2. BNSF's Erroneous Contentions

BNSF argues that WFA/Basin's Rebuttal evidence on fuel hedging should
be stricken because WFA/Basin allegedly "presented an entirely new and different
argument in support of its use of system average fuel prices."¹⁷ BNSF's argument is
clearly wrong.

¹⁷ BNSF Motion at 7.

In their Opening and Rebuttal evidence, WFA/Basin used the same 4Q04 LRR fuel price per gallon – \$1.141. This price, as WFA/Basin consistently explained on Opening and Rebuttal, equaled BNSF’s 4Q04 system average fuel price per gallon, “including handling, taxes and hedge effect.”¹⁸ Thus, this is not an instance where WFA/Basin in any way, shape or form changed their Opening fuel price evidence.

In its Reply, BNSF argued that under BNSF’s proffered fuel delivery procedure, the LRR would pay 4Q04 fuel prices at Guernsey and LRS equal to BNSF’s “actual” delivered fuel costs at these locations. On Rebuttal, WFA/Basin demonstrated that these location-specific fuel prices are overstated because BNSF’s calculations did not factor-in BNSF’s fuel hedging. WFA/Basin’s fuel hedging evidence is perfectly permissible rebuttal evidence because it responded to an issue raised in BNSF’s Reply evidence – i.e., the level of BNSF’s location-specific fuel prices – and “demonstrat[ed] the railroad’s reply evidence is itself unsupported.”¹⁹

WFA/Basin’s Rebuttal evidence also points out a glaring hole in BNSF’s Reply evidence – the fuel prices BNSF asserts as its actual location-specific prices are not the actual hedge-adjusted prices BNSF pays for fuel. BNSF acknowledges as much in its proffered Surrebuttal evidence. Therein, BNSF does not claim its location-specific prices reflect the price BNSF actually paid for fuel, as adjusted for BNSF’s hedging activities.

¹⁸ WFA/Basin Rebuttal Narr. at III-D-13.

¹⁹ See Duke/NS STB Docket No. 42069 (STB served Nov. 6, 2003) at 14-15.

Instead, BNSF asks the Board to consider its newly tendered evidence on why “a real-world railroad’s hedging activity should not be included at all in a SAC analysis.”²⁰

BNSF had the opportunity to present its Surrebuttal SAC hedging evidence on Reply. BNSF was clearly on notice at that time that WFA/Basin were using BNSF system average fuel costs of \$1.141 per gallon “including handling, taxes and hedge effect” as the LRR’s 4Q04 fuel costs. BNSF could have, had it chosen to do so, argued on Reply that hedged fuel costs should not be used in a SAC analysis, but BNSF chose not to do so.²¹ Having made that choice, BNSF should not be allowed to rehabilitate its own flawed Reply evidence through Surrebuttal.

B. WFA/BASIN’S REBUTTAL EVIDENCE
CONCERNING ISSUE RATE FORECASTS WAS PROPER

WFA/Basin’s response to BNSF’s Reply evidence concerning LRS rate forecasts was proper because it responded to issues raised in BNSF’s Reply filing.

1. The Record Evidence

BNSF’s published LRS tariff rates contain initial rates effective in 4Q04. These initial rates are subject to a complex adjustment procedure that contains fixed rate increases, fuel surcharges and RCAF-U (minus fuel) adjustments. On Opening, WFA/Basin demonstrated that BNSF’s proposed rate adjustment procedure was

²⁰ BNSF Motion at 7.

²¹ WFA/Basin also used BNSF’s 4Q04 hedge-adjusted system-average fuel prices to calculate LRS variable costs. BNSF’s Rebuttal evidence addressed this evidence. See BNSF Rebuttal Narr. at II-21 to II-22. Therein, BNSF argued that its hedged system-average costs should not be used for variable cost purposes.

unreasonable and unlawful. For Discounted Cash Flow (“DCF”) purposes, WFA/Basin projected the initial LRS tariff rates using the RCAF-U.

On Reply, BNSF contended, inter alia, that WFA/Basin’s use of the RCAF-U to forecast LRR tariff rates was impermissible because “the RCAF-U has not kept pace with BNSF’s dramatic increases in fuel costs.”²² BNSF also argued that its tariff fuel surcharge procedure – unlike the RCAF-U – is intended to “allow BNSF to recover its fuel costs.”²³

On Rebuttal, WFA/Basin responded to BNSF’s fuel surcharge claims by making two demonstrations. First, WFA/Basin demonstrated that the RCAF-U does fully capture BNSF’s fuel cost increases. Secondly, WFA/Basin demonstrated that BNSF’s tariff fuel surcharge procedure vastly over-recovers BNSF’s actual fuel cost increases.

2. BNSF’s Erroneous Contentions

BNSF claims that WFA/Basin’s fuel surcharge evidence is impermissible rebuttal that “could have and should have been submitted on opening.”²⁴ BNSF’s claim that WFA/Basin presented improper fuel surcharge Rebuttal evidence is as baseless as BNSF’s claim that WFA/Basin submitted improper fuel hedging evidence on Rebuttal.

BNSF injected the issue of fuel cost recovery in its Reply evidence. As discussed above, BNSF objected to WFA/Basin’s use of the RCAF-U to forecast LRS tariff revenues on grounds, inter alia, that “the RCAF-U has not kept pace with BNSF’s

²² BNSF Reply Narr. at III.A-28.

²³ Id.

²⁴ BNSF Motion at 3.

dramatic increases in fuel costs” and that BNSF’s tariff fuel surcharge “is intended to allow BNSF to recover its fuel costs.”²⁵

WFA/Basin’s Rebuttal evidence shows that the RCAF-U has in fact “kept pace” with BNSF’s fuel price increases and that BNSF’s fuel surcharge tariff vastly over-recovers BNSF’s fuel cost increases. The evidence is clearly permissible rebuttal because it “responds to issues raised in [BNSF’s] reply statement”²⁶ and demonstrates that BNSF’s “reply evidence is itself unsupported.”²⁷ WFA/Basin also emphasize that they used the same methodology on both Opening and Rebuttal to project LRS tariff revenues – the RCAF-U – and relied upon the same demonstration on both Opening and Rebuttal to support the use of the RCAF-U as the appropriate means to forecast the initial LRS tariff rates for DCF purposes.²⁸

In Duke/NS, the Board rejected an attempt by a defendant carrier to improperly submit new evidence after the record had closed. As stated by the Board:

The record must close at some point. Absent a clearly defined cut-off point that is observed by all, one party or the other could always point to some new piece of data to bolster its arguments. Both parties in a rate reasonableness proceeding have ample opportunity to support their case in their scheduled evidentiary submissions.

²⁵ BNSF Reply Narr. at III.A-28.

²⁶ See C.F.R. §1112.6.

²⁷ Duke/NS I at 14.

²⁸ See WFA/Basin Opening Narr. at III-A-13 to III-A-14; WFA/Basin Reply Narr. at III-A-18 to III-A-21.

Id. (STB served March 25, 2003) at 2. The Board should follow Duke/NS here and reject BNSF's belated efforts to rehabilitate its flawed Reply evidence.

C. WFA/BASIN'S REBUTTAL EVIDENCE
CONCERNING LRR FUEL SURCHARGE
PROJECTIONS WAS PROPER

In their SAC filings, both WFA/Basin and BNSF projected LRR cross-over traffic revenues. These projections included, for some movements, application and projection of LRR fuel surcharge revenues. Both WFA/Basin and BNSF calculated LRR surcharge revenues using the same surcharge procedures that BNSF currently applies on the involved traffic. These procedures determine the applicable surcharges by reference to EIA's published On-Highway Diesel Fuel ("HDF") prices.

On Opening, WFA/Basin utilized EIA's forecast of the diesel fuel (distillate) index to project LRR fuel surcharge revenues over the 20 year DCF period.²⁹ On Reply, BNSF projected these revenues using an "RCAF Fuel" index.³⁰ On Rebuttal, WFA/Basin demonstrated, using historical data, that the EIA forecast had better tracked changes in the HDF prices than BNSF's RCAF-Fuel index.³¹

WFA/Basin's Rebuttal evidence is proper because it responded to BNSF's evidence and demonstrated why its forecast approach was better. BNSF's Surrebuttal

²⁹ See WFA/Basin Op. Narr. at III-A-12.

³⁰ See BNSF Reply Narr. at III.A-61

³¹ See WFA/Basin Rebuttal Narr. at III-A-27 to III-A-29.

evidence attempts to show that WFA/Basin's Rebuttal demonstration is incorrect.

However, BNSF's Surrebuttal evidence demonstrates the exact opposite.³²

D. WFA/BASIN'S REBUTTAL EVIDENCE
PROPERLY RELIED UPON BNSF'S
CURRENT FUEL SURCHARGE PROCEDURES

BNSF claims in its proffered Surrebuttal evidence that BNSF plans to change from its current "percentage" fuel surcharge methodology to a new "mileage"-based methodology. This change, BNSF opines, will be effective on January 1, 2006 and will apply to BNSF single-line traffic. BNSF goes on to submit another completely revised set of DCF calculations – never before seen by WFA/Basin – that incorporates BNSF's proposed new fuel surcharge procedures.³³

BNSF argues that WFA/Basin's Rebuttal evidence should have used BNSF's new fuel surcharge procedures because these procedures were first posted on BNSF's website on August 8, 2005.³⁴ However, if that was true, BNSF could have included the revised surcharge procedures in a post-Reply³⁵ supplemental filing, or as part

³² See Crowley Surrebuttal V.S. at 14-15.

³³ This is the fourth time in this case that BNSF has submitted new DCF calculations. BNSF submitted Opening DCF calculations, Reply DCF calculations, a post-Reply "errata" set of DCF calculations, and now its proposed Surrebuttal DCF calculations.

³⁴ See BNSF Motion at 11-12. In fact, BNSF had announced in March of 2005 that it planned to implement a new fuel surcharge procedure. See WFA/Basin Surrebuttal electronic workpaper "BNSF March Announcement.pdf." However, BNSF did not publicly release its proposed new methodology until August 8, 2005.

³⁵ BNSF filed its Reply evidence on July 20, 2005.

of the extensive “errata” filing BNSF made on August 25, 2005 – a filing in which BNSF submitted new DCF model runs.

Also, all LRR shippers currently subject to BNSF’s fuel surcharges were (and are) paying fuel surcharges under a pricing authority that expressly incorporates the fuel surcharge procedures set forth in BNSF Rules Book 6100-series, Item 3380. That Item continues to apply the same percentage-based fuel surcharge procedures that were in effect before the record closed. Thus, from a pricing standpoint, the only fuel surcharge that has been – and continues to be – in effect is that set forth in Item 3380.

BNSF may impose the fuel surcharge procedures set forth in its August 8, 2005 website notice. Or it may not. The website states BNSF’s new “Fuel Surcharge Table will be subject to periodic review.”³⁶ WFA/Basin utilized the best evidence available to it while the record was open and, as the Board observed in Duke/NS, “[t]he record must close at some point.”³⁷

Also, as discussed in the appended verified statement, BNSF’s new fuel surcharge is not applicable to any LRR movements. By its terms, the new surcharge does not apply to interline movements and all LRR movements except the LRS movement, are interline movements. The new surcharge also will not apply to the LRS movements (for

³⁶ See WFA/Basin Surrebuttal electronic workpaper “BNSF Fuel Surcharge Table.pdf.”

³⁷ Duke/NS (STB served Nov. 6, 2003) at 14-15.

DCF purposes) because BNSF's tariff rate adjustment procedures (including the fuel surcharge) constitute unreasonable practices in this case.³⁸

E. WFA/BASIN'S REBUTTAL EVIDENCE
CONCERNING LRR DIVISIONS WAS PROPER

WFA/Basin properly utilized BNSF's Reply LRR variable cost evidence to demonstrate, on Rebuttal, that BNSF's LRR divisions calculations were impermissibly low.

1. The Record Evidence

In their Opening evidence, WFA/Basin calculated LRR cross-over divisions using the Board-approved Modified Straight Mileage Prorate ("MSP") methodology. On Reply, BNSF objected to WFA/Basin's use of MSP and asked the Board to adopt either its avoidable cost divisions proposal or its "modified" MSP proposal. In their Rebuttal evidence, WFA/Basin demonstrated that BNSF's criticisms of the MSP method had no basis in fact or law. Accordingly, WFA/Basin continued to use the MSP method to set cross-over divisions on LRR cross-over traffic.

WFA/Basin also introduced substantial Rebuttal evidence demonstrating why BNSF's proposed LRR cross-over traffic divisions methodologies were fatally flawed. One WFA/Basin demonstration used BNSF's own R/VC ratio evidence. The ICC ruled in Nevada Power II,³⁹ and the Board reaffirmed in Duke/NS I, that it is not permissible to set SARR cross-over traffic divisions "down close to variable cost levels."

³⁸ See Crowley Surrebuttal V.S. at 13 n.32.

³⁹ Bituminous Coal – Hiawatha, Utah to Moapa, Nevada, 10 I.C.C. 2d 259 (1994).

Duke/NS I at 18-19. On Rebuttal, WFA/Basin demonstrated – using BNSF’s own variable cost evidence – that both BNSF methods flunked the Nevada Power II and Duke/NS I contribution tests.

In its Reply evidence, BNSF maintained that the LRR’s “avoidable cost” divisions on LRR cross-over traffic equaled “BNSF’s URCS variable costs.”⁴⁰ BNSF calculated that these URCS variable costs – and the LRR’s divisions – equaled {
} in 2005. On Rebuttal, WFA/Basin demonstrated that the LRR’s cross-over traffic R/VC ratio equaled 1.00 under BNSF’s avoidable cost divisions approach {
}

WFA/Basin made a similar R/VC calculation using BNSF’s modified MSP approach. On Reply, BNSF calculated that the LRR’s divisions under BNSF’s modified MSP approach equaled {
} in 2005.⁴¹ On Rebuttal, WFA/Basin demonstrated, using BNSF’s own Reply revenue and cost evidence, that BNSF’s modified MSP approach produced an R/VC ratio of less than 1 {
} for LRR cross-over traffic.⁴²

2. BNSF’s Erroneous Contentions

WFA/Basin’s Rebuttal evidence demonstrates – using BNSF’s own cost and revenue data – that BNSF’s proposed divisions methods produce impermissibly low results. This is clearly proper rebuttal. BNSF claims, however, that the Board should

⁴⁰ See BNSF Reply Narr. at III.A-49.

⁴¹ Id. at III.A-57.

⁴² See WFA/Basin Rebuttal Narr. at III-A-43.

accept BNSF's Surrebuttal evidence because, BNSF opines, WFA/Basin R/VC ratio calculations are "erroneous."⁴³

If the Board adopts BNSF's proposed standard for surrebuttal – the asserted submission of "erroneous" evidence – the record in SAC cases will never close.

Moreover, the "erroneous" evidence BNSF claims WFA/Basin tendered consists of R/VC ratios calculated using BNSF's own Reply revenue and variable cost calculations. This is clearly not "erroneous" evidence. Instead, BNSF is improperly attempting to discredit its own Reply evidence.⁴⁴

In its proffered Surrebuttal evidence, BNSF launches into a convoluted discussion wherein BNSF maintains that its own Reply calculation of BNSF's variable costs for providing LRR service in 2005 – { } – is "overstated"⁴⁵ because, BNSF now claims, it mistakenly included LRR/BNSF interchange costs in its Reply cost calculations. This was no mistake. BNSF developed LRR variable costs utilizing URCS Phase III costing with the Ex Parte No. 399 costing adjustments. This procedure clearly requires interchange costs for interline traffic.⁴⁶ In fact, BNSF is desperately attempting

⁴³ BNSF Motion at 15.

⁴⁴ The Board ruled in TMPA that it is improper for a shipper, on rebuttal, "to alter opening evidence that has not been challenged." See Texas Municipal Power Agency v. Burlington Northern and Santa Fe Ry., STB Docket No. 42056 (STB served March 24, 2003) at 125. The Board should apply the corresponding rule here – i.e., it is improper for a carrier to tender surrebuttal evidence "to alter [reply] evidence that has not been challenged." Id.

⁴⁵ See Klick/Fisher V.S. at 17.

⁴⁶ See Crowley V.S. at 19-20.

to revise downward on its own Reply variable cost evidence in light of WFA/Basin's Rebuttal demonstrations.

**IV.
CONCLUSION**

For the reasons set forth above, WFA/Basin respectfully request that the Board deny BNSF's Motion and deny BNSF's request for leave to file surrebuttal evidence. Alternatively, if the Board grants BNSF's request for leave to file surrebuttal evidence (in whole or in part), WFA/Basin request that the Board consider, and include in the record, the corresponding portions of the appended Surrebuttal Verified Statement of Thomas D. Crowley.

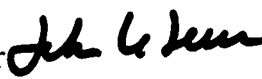
Respectfully submitted,

WESTERN FUELS ASSOCIATION, INC.
and BASIN ELECTRIC POWER
COOPERATIVE, INC.

OF COUNSEL:

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1224 Seventeenth Street, N.W.
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Dated: November 9, 2005

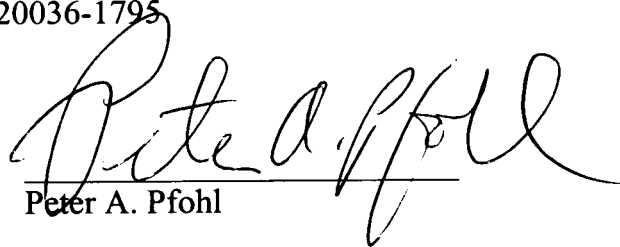
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2005, I caused copies of the foregoing Reply to Defendant BNSF Railway Company's Motion to Strike and for Leave to File Limited Surrebuttal of Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. to be served by hand delivery on counsel for BNSF, as follows:

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Peter A. Pfohl

WESTERN FUELS ASSOCIATION, INC.	)	
and BASIN ELECTRIC POWER	)	
COOPERATIVE, INC.	)	
	)	
Complainants,	)	
	)	
v.	)	Docket No. 42088
	)	
BNSF RAILWAY COMPANY	)	
	)	
Defendant.	)	
	)	

My name is Thomas D. Crowley. I am President of the economic consulting firm L.E. Peabody & Associates, Inc. I have previously submitted testimony in this proceeding on behalf of Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively “WFA/Basin”). My qualifications are set forth at pp. V-9 to V-11 of WFA/Basin’s Opening Narrative filed on April 19, 2005.

On October 20, 2005, Defendant BNSF Railway Company (“BNSF”) filed a Motion to Strike and for Leave to File Limited Surrebuttal (“Motion”). WFA/Basin’s counsel explain why BNSF’s Motion should be denied. I have been asked by WFA/Basin’s counsel to respond to BNSF’s Surrebuttal evidence in the event the Board decides to consider it. BNSF’s Surrebuttal evidence is contained in a joint Verified

Statement submitted by BNSF witnesses Klick and Fisher (“Klick/Fisher V.S.”).

Klick/Fisher address the following matters:

- A. Use of BNSF hedged fuel prices to calculate the Laramie River Railroad (“LRR”) fuel costs;
- B. Use of the RCAF-U to forecast the Laramie River Station (“LRS”) tariff rates;
- C. The proper index to forecast LRR fuel surcharge revenues;
- D. Inclusion of BNSF’s proposed new fuel surcharge procedures; and
- E. BNSF’s calculation of BNSF’s variable service costs on the LRR.

My response is set forth below.

A. FUEL HEDGING

On Opening, WFA/Basin submitted evidence demonstrating that the LRR would receive most fuel deliveries by pipeline at prices that would not exceed BNSF’s fourth quarter 2004 (“4Q04”) system-average fuel price – \$1.141 per gallon.¹

On Reply, BNSF claimed WFA/Basin’s proposed fuel delivery system was not feasible. BNSF proposed a fuel delivery system to LRR fueling points using the same pipeline and tank truck delivery systems BNSF currently employs for its real-world operations.² BNSF also claimed that the LRR’s delivered fuel prices to these fueling

¹ See WFA/Basin Opening Narr. at III-D-7.

² See BNSF Reply Narr. at III.D-11 to III.D-12.

points would equal BNSF's 4Q04 "actual" location-specific delivered prices to these locations.³ BNSF's 4Q04 location-specific prices {

}⁴

On Rebuttal, WFA/Basin presented evidence confirming the feasibility of its proposed LRR fuel delivery procedures. WFA/Basin also demonstrated that (i) BNSF's 4Q04 location-specific prices do not include BNSF's actual cost of fuel hedging and (ii) {

}⁵

On Surrebuttal, Klick/Fisher assert that "[t]he effects of a defendant's real world fuel hedging activity in a given quarter have no place in a long run SAC analysis."⁶ Klick/Fisher's assertion finds no support in the Board's recent Stand-Alone Cost ("SAC") case decisions. In these decisions, the Board has set the Stand-Alone Railroad's ("SARR") base period fuel costs at levels equal to the defendant carrier's system-average

³ Id. at III.D-11.

⁴ Id. at III.D-9.

⁵ See WFA/Basin Rebuttal Narr. at III-D-16 to III-D-18.

⁶ Klick/Fisher V.S. at 3.

fuel costs – costs that incorporate the defendant carrier’s fuel hedging actions.⁷

Indeed, BNSF itself has sponsored stand-alone cost evidence in several recent cases where BNSF has proposed to set SARR base period fuel costs at levels equal to BNSF’s hedge-adjusted system-average fuel costs during the same period.⁸ Thus, BNSF has not followed the new Klick/Fisher theory in several recent cases. In their verified statement, Klick/Fisher present assorted rationales for ignoring BNSF’s actual hedged-adjusted system-average fuel costs – none of which are correct.

- Klick/Fisher maintain that a SARR would not engage in hedging. They argue that a SARR, unlike a real-world railroad, faces no fuel risk because, under the Board’s Discounted Cash Flow (“DCF”) procedures, “future traffic and cost experience is assumed to have been projected with certainty.”⁹ This statement misstates SAC theory.

⁷ See Public Service Co. of Colorado D/B/A Xcel Energy v. Burlington Northern and Santa Fe Ry., STB Docket No. 42057 (STB served June 8, 2004) at 61 (“Xcel I”); Duke Energy Corp. v. Norfolk Southern Ry., STB Docket No. 42069 (STB served Nov. 6, 2003) at 69; Duke Energy Co. v. CSX Transportation, Inc., STB Docket No. 42070 (STB served Feb. 4, 2004) at 55; Carolina Power & Light Co. v. Norfolk Southern Ry., STB Docket No. 42072 (STB served Dec. 23, 2003) at 57; Texas Municipal Power Agency v. Burlington Northern and Santa Fe Ry., STB Docket No. 42056 (STB served Feb. 4, 2001) at 58.

⁸ See Xcel I, Complainant’s Rebuttal Narr. (Public Version) (filed May 19, 2003) at III-D-8 (noting that BNSF “accepts” Xcel’s use of system-average fuel prices); Otter Tail Power Co. v. Burlington Northern and Santa Fe Ry., STB Docket No. 42071, BNSF Reply Narr. (Public Version) (filed Oct. 8, 2003) at III-D-17 (BNSF utilizes its “system-wide average fuel cost experienced in 2002” as the initial SARR fuel price) (“Otter Tail”).

⁹ Klick/Fisher V.S. at 4.

For example, if “future traffic ... is assumed” there would be no reason for a SARR to have a marketing department.¹⁰ In fact, a SARR is intended to be a replacement carrier that faces the same market opportunities and risks as a real-world railroad. The Board’s DCF model projects, using the best forecast data available, how a SARR would respond to these market opportunities and risks. From a SAC theory perspective, a SARR certainly could and would engage in fuel hedge transactions, just as BNSF has done, when the SARR believed it advanced its corporate interests¹¹ and, more importantly, was able to demonstrate the economic benefits associated with the hedging activity using real world empirical evidence.

- Klick/Fisher argue “[t]he prospect of any net benefit from hedging in a particular year is far too speculative to be included in the SAC calculations.”¹² However, in the instant case, WFA/Basin and BNSF do not need to speculate about BNSF’s actual 4Q04 hedge-adjusted system average fuel price. That is known. BNSF reported this hedge-adjusted price in its quarterly 4Q04 Investment Report and in its 4Q04 10Q filing with the Securities and Exchange Commission.¹³

¹⁰ See e.g., Xcel I at 67 (discussing need for a SARR to have a marketing department).

¹¹ See Coal Rate Guidelines Nationwide, 1 I.C.C. 2d 520, 528 (1985) (SARR may use same production techniques as the incumbent carrier).

¹² Klick/Fisher V.S. at 5.

¹³ See WFA/Basin Rebuttal Narr. at III-D-18 n.12.

Also, BNSF reports its annual hedge-adjusted fuel costs in its Annual Report Form R-1. These hedge-adjusted costs are used to calculate BNSF's system-average Uniform Railroad Costing System ("URCS") fuel costs. The Board will be sliding down a slippery slope if it strays from the established URCS costing practice of using hedged fuel costs for regulatory purposes. For example, under Klick/Fisher's approach, total fuel costs paid for costing purposes (i.e., unhedged fuel costs) would not equal total fuel costs captured in URCS (i.e. hedged fuel costs). I am unaware of any instance where the Board, or its predecessor, the ICC, ever sanctioned use of such costing procedures.

- Klick/Fisher opine that BNSF engaged in successful fuel hedging in 4Q04 and further opine that it is unreasonable to assume the LRR would have been similarly successful in 4Q04.¹⁴ This is rank speculation. If BNSF could put in place a successful 4Q04 hedge program, there is no reason why the LRR, the replacement for BNSF, would not have done so, as well. Klick/Fisher also maintain that it is unlikely that the hedge benefit BNSF obtained in 4Q04 will "recur on an annual basis over the course of the next 20 years."¹⁵ This is a misguided and unsupported assertion.

¹⁴ See Klick/Fisher V.S. at 5-6.

¹⁵ Id.

The issue here is obtaining reasonable base levels for forecasting LRR fuel costs. What BNSF actually paid for fuel in 4Q04 is a reasonable, conservative base. Whether this base price, as adjusted over time using the Board's DCF procedures, produces fuel costs that are higher, or lower, than BNSF's actual fuel costs depends principally on what happens in future diesel fuel markets. As BNSF itself observes in its 2004 Annual Report, the price it pays for fuel is driven by the "market price" for fuel and "the effect [of its] hedging activities."¹⁶

BNSF's 4Q04 hedge-adjusted fuel price (\$1.141 per gallon) was – at that time – a record high for BNSF. This price exceeded BNSF's average fuel price over the prior ten calendar year quarters (\$0.860 per gallon) by 33%.¹⁷ In the first three quarters of 2005, BNSF's average fuel price has increased to \$1.30 per gallon, but many forecasters – including the Energy Information Administration ("EIA") in its Annual Energy Outlook 2005 ("AEO 2005") report – project that diesel fuel prices will soon decrease below 4Q04 price levels on a nominal dollar basis.¹⁸

Thus, using EIA's AEO 2005 diesel fuel forecasts, and assuming BNSF's hedging activities do not produce adverse results (i.e., they do not produce above-market

¹⁶ BNSF Annual Report (2004) at 16 (emphasis added).

¹⁷ See WFA/Basin Surrebuttal electronic workpaper "BNSF Fuel _ Investors.xls."

¹⁸ See EIA AEO 2005 Reference Case Forecast Table A-12. See WFA/Basin Rebuttal electronic workpaper "LRR Traffic and Revenues _ WFABasinRebuttal.xls," sheet "Non_RCAF_RateAdp."

price results), the LRR's overall fuel prices during the 20 year DCF period will most likely not be lower than BNSF's. Indeed, they will most likely be higher since the LRR starts with a high base fuel price (4Q04)¹⁹ and WFA/Basin adjusts the 4Q04 fuel/costs by the 0.59 RCAF (U) index – {

}
* * *

The Board has consistently accepted the use of hedge-adjusted fuel costs in prior SAC cases. Klick/Fisher offer no credible evidence why the Board should depart from its accepted practice in this case.

B. LRS TARIFF RATE FORECASTS

On Opening, WFA/Basin presented evidence demonstrating that BNSF's procedure to adjust LRS tariff rates was unlawful. For DCF purposes, WFA/Basin adjusted the LRS tariff rates based upon Global Insight's most recent RCAF-U forecast.²⁰

On Reply, BNSF argued that WFA/Basin's use of the RCAF-U to forecast LRS rates was improper because, among other things, it did not keep BNSF whole for

¹⁹ Use of such a high quarterly base price is conservative compared to approaches BNSF has advocated in prior cases. For example, in Otter Tail, Otter Tail used a base SARR fuel price equal to \$0.65 per gallon – the BNSF's hedge-adjusted 1Q02 system average fuel price. BNSF argued that the base price was substantially lower than BNSF's historical average fuel price between 1Q00 and 1Q03. To correct this asserted "aberration" BNSF proposed that the Board utilize BNSF's average fuel price in 2002 (\$0.73 per gallon). See Otter Tail, BNSF Reply Narr. (Public Version) (filed Oct. 8, 2003) at III-D-13 to III-D-17.

²⁰ See WFA/Basin Opening Narr. at III-A-13 to III-A-14.

increases in fuel costs BNSF incurred to provide LRS service.²¹ BNSF also opined that its tariff fuel surcharge procedure, unlike the RCAF-U, did keep BNSF whole for fuel cost increases on the LRS traffic.²²

On Rebuttal, WFA/Basin refuted BNSF's fuel related RCAF challenges.²³ In their Surrebuttal testimony, Klick/Fisher attempt to rehabilitate BNSF's flawed Reply evidence concerning the RCAF-U and its current fuel surcharge tariff.

1. RCAF Proof

In its Reply evidence, BNSF claimed that the RCAF-U "has not kept pace" with the fuel price increases BNSF was actually experiencing on the LRS traffic.²⁴ BNSF purported to prove this point by claiming that the price it paid for fuel for LRS trains in 2004 increased by { } whereas the RCAF-U increased by 7.2% in 2004.²⁵

On Rebuttal, WFA/Basin demonstrated that BNSF's "proof" was wrong because BNSF used the wrong LRS train fuel prices and because BNSF did not isolate the fuel price component in the RCAF-U. With these corrections, WFA/Basin showed that BNSF system-average fuel prices increased by { } whereas the fuel component

²¹ See BNSF Reply Narr. at III.A-27 to III.A-29.

²² Id. at III.A-28.

²³ See WFA/Basin Rebuttal Narr. at III-A-22 to III-A-23.

²⁴ BNSF Reply Narr. at III.A-28.

²⁵ Id.

in the RCAF-U increased by { }.²⁶

On Surrebuttal, Klick/Fisher attempt to rehabilitate BNSF's failed proof by claiming that the "weighting given to fuel in the RCAF index is too low for unit coal trains."²⁷ According to Klick/Fisher, "the RCAF-U index assumes that fuel is 12.1% of a railroad's costs" whereas, using either BNSF's or WFA/Basin's variable cost evidence, the "fully allocated costs indicate that fuel actually constitutes 16-19 percent of BNSF's total movement costs for unit coal trains."²⁸ Klick/Fisher's new proof is as faulty as BNSF's original proof.

Klick/Fisher's purported demonstration is based on so-called fully allocated costs. These costs, by definition, use arbitrary formulas to distribute fixed costs. Calculating fully allocated costs is a meaningless exercise if one is trying to measure whether or not movement-specific fuel costs are being recovered. The proper measure to use is variable costs, not fully allocated costs. Using a representative movement, the following table summarizes BNSF's fuel costs as a percentage of the Laramie River rate.

²⁶ See WFA/Basin Rebuttal Narr. at III-A-23.

²⁷ Klick/Fisher V.S. at 10.

²⁸ Id. at 9.

Surrebuttal Table 1
BNSF Variable Fuel Costs Per Ton as a
Percentage of the Laramie River 4Q04 Rate ^{1/}

	<u>Item</u> (1)	<u>BNSF Evidence ^{2/}</u>		<u>WFA/Basin Evidence ^{3/}</u>	
		<u>Amount</u> (2)	<u>Percent</u> (3)	<u>Amount</u> (4)	<u>Percent</u> (5)
1.	4Q04 Variable Fuel Cost Per Ton	{ }	{ }	{ }	{ }
2.	4Q04 Rate Less Fuel Cost Per Ton	{ }	{ }	{ }	{ }
3.	4Q04 Rate Per Ton	\$6.71	100.0%	\$6.71	100.0%

^{1/} Variable costs and rates for shipments from Dry Fork Mine to Laramie River Station.

^{2/} BNSF Rebuttal Exhibit II.A-1, page 3 of 6.

^{3/} WFA/Basin Rebuttal Exhibit II-A-8, page 1 of 15.

As shown in Surrebuttal Table 1 above, the LRS variable fuel costs for a representative movement (Dry Fork-to-LRS, 4Q04) equal { } of the 4Q04 rate level using WFA/Basin's variable cost evidence and { } of the 4Q04 rate level using BNSF's evidence. Both percentages are { } than the 12.1% included in the RCAF-U. Thus, contrary to Klick/Fisher's statements, the RCAF-U does not underweight fuel costs in the LRS movement.

The following example demonstrates that the RCAF-U more than compensates BNSF for its fuel cost changes. Assume the rate level equals \$10 per ton and fuel costs equal 5% of the rate or \$0.50 per ton. Next, assume fuel costs double, the other elements of the RCAF are unchanged, and there is an immediate pass through of the

fuel cost increase. Stated differently, by doubling the fuel costs and using the current RCAF weighting factors, the 4Q05 RCAF-U would increase by 14.5%. When 14.5% is applied to the \$10 rate, the rate increases by \$1.45 per ton to cover the doubling fuel costs. This obviously is an over-recovery of fuel costs, as a doubling of fuel costs for the issue movement would increase costs by \$0.50 per ton, from \$0.50 per ton to \$1.00 per ton. In this hypothetical example, the RCAF-U index more than compensates BNSF for increased fuel costs.

2. Fuel Surcharge Cost Recovery

In its Reply, BNSF also claimed that use of the RCAF-U was improper because its fuel surcharge tariff, unlike the RCAF-U, “allow[ed] BNSF to recover its fuel costs.”²⁹ On Rebuttal, WFA/Basin demonstrated that in 4Q04, WFA/Basin paid fuel surcharges in 4Q04 that exceeded BNSF’s increased fuel costs by 559%.³⁰

Klick/Fisher endeavor to shore-up BNSF’s flawed Reply evidence by claiming that WFA/Basin improperly measured BNSF’s actual fuel cost changes (which include hedging). Klick/Fisher claim that BNSF’s unhedged location-specific costs should apply. I disagree for the reasons discussed above and for the reasons set forth in

²⁹ BNSF Reply Narr. at III.A-28.

³⁰ See WFA/Basin Rebuttal Narr. at III-A-23 and WFA/Basin Rebuttal Exhibit III-A-3. In its Surrebuttal, BNSF correctly points out that WFA/Basin used the wrong 4Q04 base rate. This correction however has little impact on the answer – it simply reduces BNSF’s over-recovery of fuel costs from the 559% to 513%. See Surrebuttal Exhibit __ (TDC-1).

WFA/Basin's Rebuttal Narr. at III-D-13 to III-D-21 (discussing why hedged fuel costs should be used). However, for present purposes I note that even Klick/Fisher's mistaken restatement shows that BNSF's fuel surcharge revenues exceed LRS fuel costs by

{ }³¹

C. FORECASTING LRR FUEL SURCHARGE REVENUES

In its Opening and Rebuttal evidence, WFA/Basin forecast revenues for the LRR traffic movements over the twenty year DCF period. On { } of these movements, the LRR rates were subject to BNSF's current percentage based fuel surcharge tariff.³² This surcharge is pegged to changes in the average price of Retail-On-Highway Diesel Fuel ("HDF"), as calculated by EIA.³³

On Opening, WFA/Basin projected future LRR fuel surcharge revenues for the affected movements using EIA's AEO 2005 forecast of diesel fuel (distillate) price changes.³⁴ On Reply, BNSF projected fuel surcharges using a different index – the

³¹ BNSF Surrebuttal Exhibit No. 2.

³² BNSF also applies the fuel surcharge to the LRS movement. However, WFA/Basin demonstrated that BNSF's LRS tariff rate adjustment procedure (including the fuel surcharge) was unreasonable. For DCF purposes, WFA/Basin forecasted the initial LRS tariff rates using the RCAF-U. See WFA/Basin Rebuttal Narr. at III-A-18 to III-A-23.

³³ See WFA/Basin Opening Narr. at III-A-12.

³⁴ See WFA/Basin Opening electronic workpaper "LRR Traffic and Revenue _ WFA BasinOpening.xls," sheet "Non_RCAF_RateAdj."

“RCAF Fuel” forecast.³⁵ On Rebuttal, WFA/Basin continued to use the EIA’s AEO 2005 diesel fuel (distillate) forecast. WFA/Basin also introduced Rebuttal evidence demonstrating why use of the EIA 2005 forecast was superior to use of the BNSF’s RCAF Fuel forecast. This evidence included WFA/Basin’s Rebuttal Exhibit III-A-4. This Exhibit shows that, historically, the EIA diesel fuel (distillate) index tracked actual changes in the EIA’s HDF price index better than the RCAF Fuel Index used by BNSF.³⁶

In their Surrebuttal, Klick/Fisher claim that WFA/Basin’s Rebuttal Exhibit III-A-4 is “misleading.”³⁷ The Exhibit is not misleading at all – it simply demonstrates that, on a historical basis, the EIA diesel fuel (distillate) index has tracked EIA’s HDF index better than the RCAF-Fuel Index used by BNSF. Klick/Fisher offer no contrary proof.

Instead, Klick/Fisher want to present a different comparison that purports to show, using dated forecast data, that the RCAF-Fuel Index forecasts EIA’s actual HDF prices better than EIA’s diesel fuel (distillate) index forecast. Klick/Fisher attach Surrebuttal Exhibit No. 3 in support of their position.³⁸

³⁵ See BNSF Reply Narr. at III.A-61.

³⁶ WFA/Basin Rebuttal Narr. at III-A-27 to III-A-29 and WFA/Basin Rebuttal Exhibit III-A-4.

³⁷ Klick/Fisher V.S. at 13.

³⁸ Id. at 14-15.

Klick/Fisher Surrebuttal Exhibit No. 3 incorrectly compares a forecast of nominal RCAF-U fuel indexes to a forecast of real EIA fuel prices (in 2000 dollars). This is obviously a mistake. As shown in my Surrebuttal Exhibit __ (TDC-2), when the EIA forecast is changed to reflect nominal dollars, the EIA forecast, and the RCAF-U index forecast, produce similar results for the involved time period.

WFA/Basin explained at III-A-27 to III-A-29 of their Rebuttal Narrative why the Board should utilize the EIA's AEO 2005 diesel fuel (distillate) forecast to project HDF diesel fuel prices. Nothing in BNSF's Surrebuttal supports a different answer.

D. NEW FUEL SURCHARGE PROCEDURES

BNSF currently calculates fuel surcharges on a "percentage" basis using the procedure set forth in Item 3380 of BNSF Rules Book 6100-A. BNSF proposed, in a Customer Letter dated August 8, 2005, to switch to a new "mileage" based surcharge, effective as of January 1, 2006.³⁹ According to the Customer Letter, BNSF will apply its new mileage-based surcharge on BNSF single-line BNSF movements. The Customer Letter states that the current percentage surcharge procedures will remain in effect for interline movements.⁴⁰

³⁹ A copy of this letter is appended in my Surrebuttal Exhibit __ (TDC-3).

⁴⁰ See BNSF Customer Letter (dated Aug. 8, 2005).

Klick/Fisher claim that WFA/Basin's Rebuttal challenge to BNSF's fuel surcharge calculation is "particularly misleading" because WFA/Basin did not address BNSF's proposed new mileage-based surcharge proposal.⁴¹ This contention is ridiculous. WFA/Basin's Rebuttal evidence responded to the fuel surcharge evidence BNSF submitted on Reply. If BNSF planned to change its Reply evidence, it was incumbent on BNSF to do so before WFA/Basin filed its Rebuttal (on Sept. 30, 2005) – but BNSF chose not to do so.

Klick/Fisher proceed to apply BNSF's proposed new fuel surcharge methodology to { } LRR movements – the LRS movement and { } other tariff movements.⁴² BNSF's change has a significant impact on BNSF's calculation of LRS movement revenues. The LRS revenues, under Klick/Fisher's Surrebuttal calculations, are reduced from { } million to { } million – a reduction of { }⁴³ Klick/Fisher's changes reduce BNSF's revenue calculations on the other { } tariff movements by { }⁴⁴

⁴¹ See Klick/Fisher V.S. at 11.

⁴² BNSF does not apply its proposed new fuel surcharge procedure to { } contract movements – movements for which both WFA/Basin and BNSF project DCF revenues using BNSF's current fuel surcharge procedures. See WFA/Basin Rebuttal electronic workpaper "LRR Traffic and Revenue_WFABasin Rebuttal.xls."

⁴³ See WFA/Basin Surrebuttal electronic workpaper "Difference_Rev_Reply Errata Surrebuttal.xls."

⁴⁴ Id.

Application of the new fuel surcharge procedure has no impact on WFA/Basin's forecast of the LRS movement revenues since WFA/Basin – unlike BNSF – do not include the surcharge in their forecast of LRS revenues.⁴⁵ Application of the proposed new surcharge to the remaining { } tariff movements would reduce WFA/Basin's revenue projections for these movements by { } – if these surcharges apply.⁴⁶

As discussed above, BNSF's new fuel surcharge procedures do not apply to interline movements.⁴⁷ Since all LRR/BNSF movements are interline movements (except for the LRS movement), BNSF's new mileage-based surcharges should not apply to LRR/BNSF interline movements.

⁴⁵ See WFA/Basin Opening Narr. at III-A-13 to III-A-14, WFA/Basin Rebuttal Narr. at III-A-22. In these filings, WFA/Basin demonstrated that BNSF's LRS tariff rate adjustment procedures (including its percentage fuel surcharge) produced approximately \$500 million in additional unlawful payments over the 20 year DCF period. If BNSF's new mileage-based fuel surcharge procedures are substituted as of January 1, 2006 for BNSF's current percentage-based procedures, the additional unlawful payments approximate \$283 million over the 20 year DCF period. See Surrebuttal Exhibit __ (TDC-4). This calculation equals {

}

⁴⁶ See my Surrebuttal Exhibit __ (TDC-4).

⁴⁷ See BNSF Customer Letter (dated Aug. 8, 2005) at 1.

E. LRR R/VC RATIO EVIDENCE

On Rebuttal, WFA/Basin demonstrated – using cost and revenue evidence BNSF submitted on Reply – that BNSF’s modified MSP divisions methodology⁴⁸ produced on average a R/VC ratio for LRR cross-over traffic of approximately { } in 2005. This ratio was based on BNSF’s Errata Reply calculation of LRR revenues for cross-over traffic in 2005 using its modified MSP divisions approach { } divided by BNSF’s Reply calculation of the BNSF’s 2005 URCS variable costs for LRR cross-over traffic { }⁴⁹

In their Surrebuttal evidence, Klick/Fisher claim that WFA/Basin’s { } cost calculation is “overstated” because it included “substantial interchange cost[s].”⁵⁰ BNSF’s arguments in this regard are a transparent and a disingenuous attempt to mislead the Board by manipulating its own evidence. BNSF submitted this variable cost study on Reply to quantify Dr. Kalt’s approach for calculating LRR cross-over revenues. On Rebuttal, WFA/Basin explained why it was rejecting the BNSF’s URCS-based avoidable cost methodology for calculating the LRR revenue division for cross-over traffic and WFA/Basin’s arguments are not repeated here. WFA/Basin utilized BNSF’s avoidable cost evidence to demonstrate that BNSF’s alternate method for

⁴⁸ BNSF’s Modified MSP method reduces the origin and destination mileage blocks from 100 miles to 25 miles.

⁴⁹ See WFA/Basin Rebuttal Narr. at III-A-43.

⁵⁰ See Klick/Fisher V.S. at 16.

allocating cross-over revenues based on MSP with 25-mile blocks for originating and terminating traffic did not generate sufficient revenue for the LRR to cover BNSF's avoidable costs.

The avoidable cost approach utilized by BNSF on Reply calculated BNSF URCS variable costs "for the LRR cross-over traffic using Ex Parte No. 399 costing assumptions employed by the Board in preparing its costed waybill."⁵¹ BNSF applied the Ex Parte No. 399 costing procedures for handling unit coal train shipments by utilizing the STB's URCS Phase III costing program.

On Rebuttal, and as noted above, WFA/Basin demonstrated that BNSF's application of Ex Parte No. 399 procedures produced variable costs that are greater than revenues. In Surrebuttal, BNSF attempts to revise its variable cost evidence so that total variable costs are less than revenues. BNSF's new variable cost evidence creates a contradiction in BNSF's own analysis – a contradiction that BNSF reluctantly admits in its Surrebuttal evidence.⁵²

The way BNSF reduced total variable costs in its Surrebuttal was by excluding the variable costs associated with interchanging cross-over traffic between the LRR and the residual incumbent BNSF. BNSF did not explain where these interchange costs went or who was responsible for them. Rather, BNSF simply eliminated the costs in

⁵¹ See BNSF Reply Narr. at III.A-49.

⁵² See Klick/Fisher V.S. at 17 n. 31 where BNSF admits to submitting contradictory evidence.

order to get its desired result. Also, BNSF made no attempt to adjust its variable cost calculations to include other unit train adjustments, e.g., locomotive spare margin, actual locomotive investment, etc. that would have had the opposite impact on total variable costs that it calculated and the conclusions that it reached in its Surrebuttal.

The Board should reject BNSF's revised calculation of variable costs submitted on Surrebuttal because the evidence is improperly submitted and because the variable costs are improperly calculated.

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, THOMAS D. CROWLEY, verify under penalty of perjury that I have read the foregoing Verified Statement of Thomas D. Crowley, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.


Thomas D. Crowley

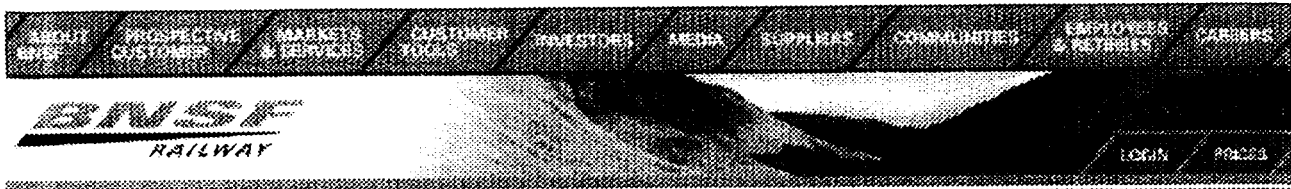
Sworn to and subscribed before me
this day of November 8, 2005.

Anthony V. Evanshaw III
Anthony V. Evanshaw III
Notary Public for the State of Virginia

My Commission expires: September 30, 2007

Surrebuttal Exhibit __ (TDC-1)
Redacted

Surrebuttal Exhibit __ (TDC-2)
Redacted



CustomerLetter

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Customer Updates are designed to inform BNSF customers of new developments or changes relating to BNSF products, services, tools, prices or facilities.

To: All BNSF Customers

08/08/2005

BNSF's Mileage-Based Fuel Surcharge

August 8, 2005

Dear Valued BNSF Customer:

For a number of years, BNSF has assessed a fuel surcharge based on a percentage of a customer's freight bill. The fuel surcharge allows BNSF to recover a portion of its increased expense when the price of diesel fuel increases significantly. The fuel surcharge percentage changes as diesel fuel prices change.

In response to feedback from our customers, BNSF announced in March the railroad industry's first mileage-based fuel surcharge program, to take effect Jan. 1, 2006. The effective date was set to allow customers and BNSF adequate time to design and implement systems changes.

In this era of tight transportation capacity, rapidly rising fuel prices and fuel-price volatility, BNSF believes a mileage-based fuel surcharge program is the most direct and accurate method of reflecting the impact of fuel price changes on BNSF and our valued customers.

The mileage-based fuel surcharge will apply to BNSF local movements and to the BNSF portion of Rule 11 shipments. Joint-rate interline movements with other Class I railroads will continue to be covered by BNSF's existing percentage fuel surcharge due to current interline billing systems and practices.

Mileage-based fuel surcharge tables have been developed for five types of service:

- Coal Unit Trains
- Automotive
- All Other Carload
- Trailers
- Containers

The coal unit train surcharge will be based on BNSF rail mileage between origin and destination points; all other fuel surcharges will be based on highway mileage as shown in the Household Goods Carriers' (HHG) Mileage Guide available through Rand McNally's MileMaker® database. The fuel surcharge tables will be based on the On-Highway Retail Diesel Fuel (HDF) prices published by the Energy Information Administration of the U.S. Department of Energy.

The mileage-based fuel surcharge tables are attached to this e-mail message, along with some frequently asked questions and answers to those questions. BNSF appreciates your business, and we look forward to working with you to implement this improved fuel-surcharge program. Please contact your Marketing Representative if you have questions about the new program.

Sincerely,



08-08_Comparison Example - % to Mileage-Based FSC.doc 08-08_Customer FAQs.doc 08-08_Mileage Rate Tables 2005-08-01 paginated.xls

If you have any questions, please send an email to customerinterface@bnsf.com

Surrebuttal Exhibit __ (TDC-4)
Redacted