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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 661

RAIL FUEL SURCHARGES

**COMMENTS OF
U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.**

The U.S. Clay Producers Traffic Association, Inc. ("Clay Producers" or "Association") submits comments on the issues noted in the March 14, 2006 Notice opening this Ex Parte proceeding on the subject of railroad imposed Fuel Surcharges. No one reasonably expects railroads to simply absorb the increased cost of fuel or assume the financial risks of the wild fluctuations of oil when it quickly swings between the mid-\$20 to mid-\$70 range. However, when a charge is labeled as a "Fuel Surcharge" and is represented as being designed to closely reflect fuel price fluctuations in today's volatile market, the ordinary meaning one normally ascribes to the label is that the additional charge will bear a reasonable relation to the actual increased fuel cost for the particular movement. In the short time since this proceeding was opened, a close examination of the impact of recent Fuel Surcharges experienced by Clay Producer members suggests that percentage-of-revenue based surcharges can overstate the actual additional fuel cost by a magnitude of 10 times. These observations lead Clay Producers to conclude that the STB should find the application of any additional charge labeled as a "Fuel

Surcharge" which is in fact calculated with reference to a percentage of a base rate is a form of misrepresentation which amounts to an unreasonable practice in violation of 49 U.S.C. § 10702(2).

IDENTITY AND INTEREST OF CLAY PRODUCERS

U.S. Clay Producers Traffic Association, Inc. is a non-profit association of producers of clay who are engaged in producing and shipping clay in all modes of transportation from Georgia, South Carolina and Tennessee origins to numerous industries throughout the United States, Canada, Mexico, and the world. The Association was formed over 50 years ago to provide information to members concerning the transportation of clay, and also as a forum for discussion of developments and information concerning regulation by governing authorities affecting the transportation of clay. The Association has also historically represented the interests of its members in transportation matters before regulatory agencies, such as this Board.

The members of the Clay Producers, parties to these Comments, represent approximately 95% of the industry in terms of total clay shipments and move approximately 11 million tons of clay annually from a relatively concise geographic area in Georgia, South Carolina and Tennessee to customers located throughout the United States, Canada, Mexico, and the rest of the world. Clay Producers' clay traffic is captive to the railroads due to the bulk nature of their shipments originating from such a small geographic area.

TRUTH IN LABELING

When a charge is labeled as a "Fuel Surcharge" and the rail industry describes the rationale for the charge as arising solely due to the increased cost of fuel, shippers are entitled to assume that the charge is not a disguised form of general rate increase. Across the rail industry,

Fuel Surcharges have been set forth in tariffs, contracts and circulars. While the narrative explanations defining the charges vary, the common factor is that these charges are labeled as "Fuel Surcharges", a term which carries a natural implication that the charge bears a reasonably close relation to the increased costs associated with the service provided. However, as has become apparent to many shippers as the result of this proceeding, percentage-of-revenue based Fuel Surcharges do not accurately reflect the increased fuel cost associated with their movements and the labeling of these charges as "Fuel Surcharges" is a form of misrepresentation.

While the Association makes no attempt to present a systematic study of the degree to which the recovery of additional fuel costs is exaggerated in all of the various Fuel Surcharge provisions, its members have seen demonstrations of rail cost software in which a comparison of the actual additional cost of fuel for sample shipments to the amount of a Fuel Surcharge overcharges the actual fuel cost increase by a factor of ten (10) times.

The detriment suffered by shippers in reliance on these misrepresentations is apparent on the recognition that underlying most shipments is an ongoing series of sales transactions between consignors and consignees which may factor in the transportation costs in computing a delivered price. For instance, in reliance on the general knowledge that a railroad will impose a fuel surcharge and based on the shipper's estimate that fuel costs are projected to rise 10 percent, in setting a delivered sales price for its product, a shipper may extract a reasonable approximation of the fuel component from the base rate¹ and factor in a 10 percent increase for the fuel component. However, when the shipper compares the increased indices of West Texas Crude to

¹ Given the ease of use and widespread availability of rail costing software which utilizes railroad costs compiled by the Board, a shipper could perform the type of fuel cost projection illustrated here.

the increase in the fuel component of a move, it may be seen that the impact of a percentage-of-revenue based Fuel Surcharge is multiplied many times above the actual cost increase incurred by the railroad. **Clay Producers believe that railroads applying percentage-of-revenue surcharges are in some instances recovering 10 to 12 times the amount of their experience cost increase on certain movements.**

A shipper who accurately projects a \$1.00 increase in fuel costs, and relies on the assumption that a railroad Fuel Surcharge would directly relate to these actual costs, ends up being surprised when a railroad imposes a \$10.00 Fuel Surcharge. In this case, the shipper would suffer a substantial loss because it reasonably relied on the assumption that a term labeled as a "Fuel Surcharge" would have direct relation to actual increases in fuel cost.

Since railroad cost data is publically available and the fuel component of every rate could be easily determined, accurate methods of tracking the actual additional fuel costs exist. There is no reason to allow railroads to label a percentage-of-revenue based increase as a "Fuel Surcharge" when the charges may only bear a remote relation to actual increases in fuel costs. To do so would be to countenance continued misrepresentation. The Board could easily remedy the problem by prescribing a uniform formula which would be used whenever a railroad wishes to apply what is labeled as a "Fuel Surcharge".

STB JURISDICTION

Clay Producers applaud the Board's practical recognition that railroads and shippers should be able to discuss private-sector resolutions to practices alleged to be in violation of the Interstate Commerce Commission Termination Act. One railroad, BNSF, has publically stated

on its Fuel Surcharge FAQs Web page that percentage-of-revenue based Fuel Surcharges are unfair:

[Q: Are] Fuel surcharges based on percent of per-car revenue are unfair to shippers since there is no correlation between the freight rate and fuel useage.

[A:] We agree. That's one of the reasons we are moving to a mileage-based fuel surcharge.

<http://www.bnsf.com/tools/prices/fuelsurcharge/faqs.html#1> The problems caused by programs and policies which have gone astray could be resolved if railroads more freely recognized the merits of jointly discussing problems with the shipper community. For instance, in this case, it can be credibly argued that labeling an increase as a Fuel Surcharge, when there is no correlation between the freight rate and fuel usage, is an unreasonable practice susceptible of causing great financial harm to the shipping community and constitutes a violation under 49 U.S.C. § 10701(2). Private-sector solutions should be encouraged by the Board and not be dodged by railroads' purported fears of anti-trust laws.

The scope of the Board's action covers not only common carrier rail movements, but also movements exempt from economic regulation by virtue of rail transportation contracts and commodity exemptions. Clay Producers agree that the Board has properly exercised its jurisdiction over exempt movements and urges the Board to find that anti-trust protections apply not only to matters which are presently subject to a STB proceeding, but also apply to alleged unreasonable practices which have the potential of becoming subject to STB proceedings. While the Fuel Surcharge controversy affects all railroads and all shippers, Clay Producers know there are also smaller disputes over perceived unreasonable practices which only affect small groups of shippers and carriers. Fear of anti-trust violations should not be cited by railroads as a shield to avoid discussions on private-sector solutions.

CONCLUSION

For all of the above reasons, Clay Producers urge the Board to find that continued use of percentage-of-revenue based Fuel Surcharges constitutes an unreasonable practice in violation of 49 U.S.C. § 10702(2). Clay Producers further urge the Board to direct the parties to negotiate and propose for Board prescription, a uniform national formula for additional charges labeled as "Fuel Surcharges" having the following characteristics:

1. Through the use of national railroad cost averages, require that all rates separately list a reasonable approximation of the actual fuel cost component of any rate upon which a Fuel Surcharge is to be applied; and,
2. Identify a standard fuel escalator index to be applied to the fuel cost component identified above.

Respectfully submitted,

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Dated: April 24, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 2006, I have served a copy of the foregoing Comments on all parties of record, as they appear on the board's web published service list, by first class mail, postage pre-paid, in accordance with the Rules of Practice.

/s/ Vincent P. Szeligo
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