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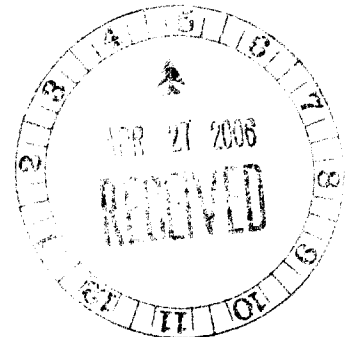
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April 27, 2006

BY HAND DELIVERY

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Attn: STB Ex Parte No. 661
1925 K Street, N.W., Room 711
Washington, D.C. 20423-0001



Re: Ex Parte No. 661, Rail Fuel Surcharges

Dear Secretary Williams:

Enclosed for filing in the referenced docket please find an original and ten copies of the Comments of the Concerned Captive Coal Shippers. The Comments include the argument of the Concerned Captive Coal Shippers' counsel and the Statement of Mr. James N. Heller. We have enclosed copies of these Comments in electronic form on three computer-readable disks in a Microsoft Word format.

Finally, we have enclosed an additional copy of these Comments to be date-stamped and returned to the bearer of this letter. Thank you for your attention to this matter.

Sincerely,

C. Michael Loftus
An Attorney for the Concerned Captive
Coal Shippers

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Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



RAIL FUEL SURCHARGES

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Ex Parte No. 661

**COMMENTS OF THE CONCERNED CAPTIVE
COAL SHIPPERS**

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**THE CONCERNED CAPTIVE
COAL SHIPPERS**

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Dated: April 27, 2006

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

RAIL FUEL SURCHARGES

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Ex Parte No. 661

**COMMENTS OF THE CONCERNED CAPTIVE
COAL SHIPPERS**

On March 14, 2006, the Surface Transportation Board ("Board") invited interested parties to submit comments on the subject of rail fuel surcharges. Ex Parte No. 661, Rail Fuel Surcharges (STB served March 14, 2006) ("Decision"). The Concerned Captive Coal Shippers ("Concerned Coal Shippers") hereby submit their Comments in response to that invitation. In support of its comments, the Concerned Coal Shippers are submitting the Statement of Mr. James N. Heller.

The Concerned Coal Shippers submit that the carriers' current fuel surcharge mechanisms constitute unreasonable practices and that the Board can and should declare that each of the major rail carriers' fuel surcharge mechanisms is unreasonable due to its failure to limit surcharge revenues on individual movements to levels that reflect the carriers' increased fuel costs for such movements. The Board should further declare that it will only view as reasonable fuel surcharge mechanisms that are "directly and closely correlated to increases in the cost of fuel for the particular movement to which the surcharge is applied." Decision at 2. Finally, the Board should declare that after a reasonable period to allow the railroads to convert to reasonable fuel

surcharge mechanisms, it will apply these policies in complaint cases that may be initiated to challenge application of fuel surcharge mechanisms.

IDENTITY AND INTEREST

The Concerned Coal Shippers include the following nine entities:

American Electric Power Service Corporation, Duke Energy Corporation, a Delaware corporation, Grand River Dam Authority, Intermountain Power Project, Lafayette Utilities System, Platte River Power Authority, Progress Energy, Inc., Seminole Electric Cooperative, Inc., and South Mississippi Electric Power Association. Each entity consumes coal to generate electricity, and relies upon rail carriers to transport that coal. Each, by virtue of its circumstances, has a strong interest in the subject matter of this proceeding.

(1) American Electric Power Service Corporation. AEP Service Corporation acts as agent for its American Electric Power ("AEP") electric generating affiliates in securing coal transportation services for more than 35 million tons of coal annually, at a cost of more than \$350 million. AEP, with more than 5 million American customers, is one of the country's largest investor-owned utilities, serving parts of 11 states. The service territory covers 197,500 square miles in Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia and West Virginia.

AEP owns and operates about 80 generating stations in the United States, with a capacity of more than 36,000 megawatts. Coal-fired plants account for 73 percent of AEP's generating capacity. One AEP electric generating company, AEP Texas North

Company, is the complainant in Docket No. 41191 (Sub-No. 1), which is currently Pending before the Board. Therein, AEP Texas North is challenging BNSF Railway Company's rates for service to the Oklaunion Station in Vernon, Texas.

(2) Duke Energy Corporation, a Delaware corporation. Duke Energy is a diversified energy company with a portfolio of natural gas and electric businesses, both regulated and non regulated, and an affiliated real estate company. Duke Energy supplies, delivers and processes energy for customers in North America and selected international markets. Duke Energy owns two regulated electric companies which use rail transportation: Duke Power Company LLC ("Duke Power") and PSI Energy, Inc. ("PSI"). Duke Power operates eight coal-fired electric generating stations, including one station (Marshall 2,090 MW) that is served by both Norfolk Southern Railway Corporation ("NS") and CSX Transportation, Inc. ("CSXT"), four stations that are served solely by NS (Allen - 1,140 MW, Belews Creek- 2,240 MW, Buck - 369 MW, and Dan River - 276 MW), and three stations that are served solely by CSXT (Cliffside - 760 MW, Lee - 370 MW, and Riverbend - 454 MW). PSI operates three coal-fired electric generating stations which use rail transportation, including one served by NS (Gibson - 3,340 MW), one served by CSXT (Cayuga - 1,062 MW), and one served by Canadian Pacific Railway (Wabash River - 860 MW). These eleven stations are capable of generating a total of 12,961 megawatts of energy.

(3) Grand River Dam Authority. The Grand River Dam Authority ("GRDA") is an agency of the state of Oklahoma, created by the Oklahoma Legislature in

1935. GRDA operates coal-fired electric generating facilities located near Chouteau, Mayes County, Oklahoma known as the "Coal-Fired Complex." This 1010-MW facility receives shipments of Powder River Basin coal via BNSF Railway Company and Union Pacific Railroad Company in interline service. Union Pacific is the only rail carrier that serves the Coal-Fired Complex. GRDA transmits and delivers wholesale electricity across its 24-county service area in Northeast Oklahoma to three customer classes: municipals, electric cooperatives and industries.

(4) Intermountain Power Project. Intermountain Power Agency ("IPA"), a political subdivision of the State of Utah, is the owner of the Intermountain Power Project ("IPP"). IPP is located in the great basin of western Utah near Lynndyl, Millard County, Utah. The project generates more than 13 million megawatt hours of energy each year from its two coal-fired units and serves approximately 2 million customers. The units have a total capacity of 1,900 MW Gross and consume over 6 million tons of coal per year.

IPP's generation rights are held, respectively, by the Los Angeles Department of Water and Power (44.6%), five California cities (30%), twenty-three municipal Utah purchasers (14%), six cooperative Utah purchasers (7%), and one investor-owned Utah purchaser (4%).

Rail service to IPP's generating station is provided solely by the Union Pacific Railroad Company.

(5) Lafayette Utilities System ("LUS"). LUS is a publicly-owned and operated utility serving the electric, water, wastewater, and telecommunications needs of more than 55,000 retail customers in Lafayette, Louisiana. LUS is a 50% owner of the 523 MW, coal-fired Rodemacher Generating Station in Boyce, Louisiana.

The Rodemacher co-owners collectively purchase approximately 2 million tons of coal annually for use at Rodemacher. All of this coal originates from the mines in Wyoming Powder River Basin. The only practical way to transport this coal from Wyoming to Rodemacher (a distance of over 1,500 miles) is by rail and the only carrier capable of serving the Rodemacher Station is Union Pacific.

(6) Platte River Power Authority. Platte River Power Authority is a political subdivision and public corporation of the State of Colorado which supplies the electricity used by the communities of Estes Park, Fort Collins, Longmont, and Loveland, Colorado. Its headquarters is located in Fort Collins, and it has facilities located primarily along the Front Range and the western slope of northern Colorado, in addition to a wind project at Medicine Bow, Wyoming. Platte River also provides surplus electricity and support services to other utilities in the western United States.

Platte River owns and operates the Rawhide Energy Station, a 270 MW coal-fired power plant, located north of Fort Collins, along with nearly 270 miles of transmission lines in northern Colorado. Platte River also has an 18% (154 MW) interest in the Yampa Project, consisting of Craig Station Units 1 and 2, a coal-fired plant located

near the town of Craig, approximately 130 miles west of Fort Collins on the western slope of Colorado.¹

The total annual coal consumption at Rawhide is approximately 1.4 million tons. BNSF provides the only rail service option for coal moving to the Rawhide Station, and currently provides such service pursuant to a rail transportation contract.

(7) Progress Energy, Inc. Progress Energy, headquartered in Raleigh, N.C., is a Fortune 250 diversified energy company with more than 24,000 megawatts of generation capacity and \$9 billion in annual revenues. The company's holdings include two electric utilities serving approximately 2.9 million customers in North Carolina, South Carolina and Florida. Progress Energy also includes nonregulated operations covering competitive generation, energy marketing, natural gas production, fuel extraction and broadband capacity.

Progress Energy's coal-fired plants include: (i) the two-unit, 392-MW Asheville Steam Plant at Skyland, N.C.; (ii) the two-unit, 316 MW Cape Fear Plant near Moncure, N.C.; (iii) the four-unit Crystal River steam complex, located near Crystal River, Fla., which includes two units built in the 1960s (Crystal River South, totaling 865 MW) and two units built in the 1980s (Crystal River North, totaling 1,437 MW); (iv) the three-unit, 407 MW H.F. Lee Plant near Goldsboro, N.C.; (v) the single-unit, 745 MW

¹ Craig Units 1 and 2 are jointly owned by Platte River, Tri-State Generation & Transmission, Inc., Xcel Energy, the Salt River Project and PacifiCorp. Tri-State is the project operating agent. The plant is adjacent to the Trapper Mine, which is the primary coal supplier for the plant and is jointly-owned by the participants.

Mayo Plant near Roxboro, N.C.; (vi) the single-unit, 174 MW H.B. Robinson Steam Plant near Hartsville, S.C.; (vii) the four-unit, 2,462 MW Roxboro Steam Plant near Roxboro, N.C.; (viii) the three-unit, 613 MW L.V. Sutton Steam Plant near Wilmington, N.C.; and (ix) the three-unit, 176 MW W.H. Weatherspoon Steam Plant near Lumberton, N.C. All of Progress Energy's coal-fired plants are served by rail. Three are served solely by NS, four solely by CSXT, and two jointly by NS and CSXT.

(8) Seminole Electric Cooperative, Inc. Seminole is a rural electric generation and transmission cooperative ("G&T") headquartered in Tampa, Florida. An estimated 1.6 million individuals and businesses rely on Seminole's 10 member distribution systems for their electric power. Seminole's members serve more than 800,000 meters in portions of 46 of Florida's 63 counties.

The primary energy resource serving Seminole's member systems is the Seminole Generating Station. This 1,300 megawatt, coal-fueled power station is located in Northeast Florida in Putnam County, on the St. Johns River, south of Jacksonville. It consumes approximately four million tons of coal and/or petroleum coke per year. The Seminole Station is served exclusively by CSXT. CSXT currently provides service to Seminole pursuant to a rail transportation contract.

(9) South Mississippi Electric Power Association ("SMEPA"). SMEPA is a rural electric power association formed for the purposes of generating and transmitting electric energy. SMEPA is headquartered in Hattiesburg, Mississippi, and provides wholesale electric energy to eleven member-owners. The member-owners, in

turn, are each rural electric distribution cooperatives who sell power to homes, farms, and businesses in Mississippi. SMEPA recovers its cost of providing electric energy through wholesale rates to its eleven members. Fuel costs, including the costs to transport fuel, are eventually passed on to the electric customers by the local cooperatives.

SMEPA owns and operates an electric generating facility at Richburg, Mississippi known as the Morrow Station. This 400 MW facility consists of two coal-burning electric generating units. The Morrow Station consumes approximately one million (1,000,000) tons of coal per year, and operates on a nearly continuous basis. Rail transportation is the only economical means of delivering large volumes of coal to the Morrow Station, and rail access to the Morrow Station is exclusively over the lines of NS. As such, SMEPA is captive to NS, and SMEPA has no other current transportation option for delivering its coal purchases. NS provides transportation service to SMEPA pursuant to a contract.

COMMENTS

The Concerned Coal Shippers commend the Board for its decision to consider whether application of the railroads' fuel surcharge mechanisms constitutes an unreasonable practice. The Concerned Coal Shippers have very serious concerns regarding the manner in which the Class I rail carriers have established their fuel surcharges, and submit that the current approaches are not reasonably related to the

incremental cost increases for fuel incurred by the railroads for specific traffic that is subject to the fuel surcharges.

The Concerned Coal Shippers respectfully request that the Board find that – to the extent that existing fuel surcharge mechanisms are not designed to recover revenues that reasonably reflect fuel cost impacts for specific movements – the application of such mechanisms will be found, upon complaint, to constitute an unreasonable practice that must be eliminated.

I. STB Jurisdiction

As the Board noted in its March 14, 2006 Decision, the Board has broad authority over the reasonableness of a railroad's practices. Decision at 2 (citing 49 U.S.C. § 10702(2) ("A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall establish reasonable – . . . (2) rules and practices on matters related to that transportation or service.")). In addition, Section 10704(a)(1) provides that "[w]hen the Board, after a full hearing, decides that a rate charged or collected by a rail carrier for transportation subject to the jurisdiction of the Board under this part, or that a classification, rule, or practice of that carrier, does or will violate this part, the Board may prescribe the maximum rate, classification, rule, or practice to be followed." *Id.* ("The Board may order the carrier to stop the violation."). Moreover, the agency may exercise its jurisdiction over unreasonable practices in the absence of any market dominance finding. Union Pacific R.R. v. ICC, 867 F.2d 646, 649 (D.C. Cir.

1989). The Board's approach to the western rail service crisis also supports the view that when endeavoring to resolve a transportation-related problem with widespread scope, the Board's jurisdiction is particularly broad. See, e.g., STB Service Order No. 1518, Joint Petition for Service Order (STB served Oct. 31 and Dec. 4, 1997, and Feb. 17 and 25, 1998).

In a recent decision, the Board observed that the inquiry into a potential unreasonable practice is – by virtue of the nature of the governing statute – a fact-based inquiry that must be tailored to the specific practice at issue:

The statute does not specifically define what constitutes an unreasonable practice. Rather, in view of the wide variety of situations that might arise, Congress has committed such determinations to the Board. The agency has developed no single test for judging whether a particular practice is unreasonable, leaving that fact-specific inquiry to a case-by-case analysis.

Docket No. 42092, WTL Rail Corp. – Petition for Declaratory Order and Interim Relief (STB served Feb. 17, 2006), at 6; see also Docket No. 42068, Capitol Materials Incorporated – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Ry. (STB served April 12, 2004), at 6 (“Whether a particular practice is unreasonable typically turns on the particular facts.”). Consequently, in light of Congress’ broad deference to the Board in implementing its statutory authority over unreasonable practices, the Board can approach the question of the propriety of railroad fuel surcharge practices with great latitude. The Board may clearly use its authority under

§§ 10702 and 10704 to determine whether the railroads' current fuel surcharge mechanisms constitute unreasonable practices.²

The Board also has unreasonable practice jurisdiction to the extent that the railroads' over-recovery of fuel cost increases on a movement-specific basis might raise issues of misrepresentation. Grain Land Coop v. Canadian Pacific Limited and Soo Line R.R. d/b/a CP Rail System (STB served Dec. 8, 1999), at 3-4 (denying a motion to dismiss Grain Land's unreasonable practice claim alleging that CP engaged in an unreasonable practice by misrepresenting that it would provide railroad-owned cars for Grain Land shipments); id. at 3 ("Grain Land responds that allegations of fraud and misrepresentation have been considered as unreasonable practices in several proceedings.") (citing Shippers Committee v. Ann Arbor R.R., 5 I.C.C.2d 856, 868 (1989), aff'd sub nom. Shippers Committee, OT-5 v. ICC, 968 F.2d 75 (D.C. Cir. 1992) and Buckeye Cellulose Corp. v. L&N R.R., 1 I.C.C.2d 767, 773 (1985), aff'd sub nom. Seaboard System R.R. v. ICC, 794 F.2d 635, 638 (11th Cir. 1986)); id. at 4 ("Carriers' car allocation practices, including those published in tariffs, can be found to be unreasonable

² The Board has invoked its authority over unreasonable railroad practices on a number of occasions. See, e.g., Docket No. 42083, Granite State Concrete Co. v. Boston and Maine Corp. (STB served Sept. 15, 2003), at 5 ("The Board will commence a proceeding under 49 U.S.C. 11701(c) (sic) into whether BM/ST is failing to fulfill its common carrier service obligation and engaging in unreasonable practices."); Docket No. 42003, APL Land Transport Services, Inc. v. The Burlington Northern and Santa Fe Ry. (STB served July 14, 1999), at 11 (finding that BNSF's failure to satisfy tariff requirement to promptly return APL cars empty results in an unreasonable practice contrary to 49 U.S.C. 10702(2) and directing BNSF to "cease and desist from violating Item 454-B of the Mileage Tariff.").

car service practices under several statutory provisions, including section 10702.”) (citing Shippers Committee, *supra*, Allied Corp. v. Union Pacific R.R., 1 I.C.C.2d 480, 489-90, *aff’d sub nom. Allied Corp. v. ICC*, 779 F.2d 41 (3d Cir. 1985), Milmine Grain Co. v. Norfolk & W. Ry., 352 I.C.C. 575 (1976), and National Grain & Feed Assoc. v. BN R.R., 8 I.C.C.2d 421 (1992), *aff’d in part, remanded in part on other grounds*, National Grain & Feed Ass’n. v. ICC, 5 F.3d 806 (8th Cir. 1993)).

II. The Proper Basis for a Rail Fuel Surcharge

In its Decision, the Board sets forth the principles that should govern the evaluation of the reasonableness of a railroad’s practice in establishing a fuel surcharge. Specifically, the Board suggests that “to the extent that shippers are complaining of the railroad practice of labeling a rate increase as a fuel surcharge when the increase is not directly and closely correlated to increases in the cost of fuel for the particular movement to which the surcharge is applied, the Board arguably could consider that as a possible unreasonable practice.” Decision at 2 (emphasis added). The Board adds that the subject of the hearing is the question of “whether railroad fuel surcharges are being set in such a manner as to insure that they are used only to recover the increased cost of fuel for the particular movements to which the surcharge is applied . . .” *Id.* (emphasis added). Finally, the Board instructs the rail carriers to present testimony on “whether their fuel surcharges fairly reflect the increasing fuel costs of the particular movements to which they are applied.” *Id.* (emphasis added). Thus, in a single paragraph of its Decision, the

Board suggests three times that in order to be reasonable, a fuel surcharge must be directly related to the incremental cost of fuel for the “particular movements” to which the fuel surcharge applies.

The Concerned Coal Shippers strongly support the Board’s formulation of this standard and respectfully submit that this approach is consistent with the nature and history of authorized surcharges and ensures that fuel surcharges will not be utilized to force one group of shippers to cross-subsidize another group. The Concerned Coal Shippers further submit that the Board’s approach is therefore demonstrably superior to any proposed evaluation of the reasonableness of fuel surcharges that seeks to compare – on an aggregate basis – a railroad’s total revenues from fuel surcharges with its total fuel cost increases. Such an “aggregate” approach would be inconsistent with the cost recovery nature of a fuel surcharge which should “directly and closely” correlate to increases in the cost of fuel for the particular movement to which the surcharge is applied.

In particular, any effort to compare aggregate fuel surcharge revenues with aggregate fuel costs would force certain shippers to cross-subsidize service to any other shippers who may not be subject to fuel surcharges (e.g., shippers receiving service under contracts that for whatever reason are not subject to the railroads’ current fuel surcharge collection programs).

The Board’s focus upon the correlation between the revenues generated by the fuel surcharge mechanisms and the increased operating costs for fuel on a movement-by-movement basis is supported by both statutory transportation policy objectives and

Interstate Commerce Commission precedent. The National Rail Transportation Policy, as set forth at 49 U.S.C. § 10101(10), states that “[i]n regulating the railroad industry, it is the policy of the United States Government -- . . . (10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability.” (Emphasis added). The railroads’ fuel surcharge mechanisms effectively operate as rate increases “of general applicability,” and therefore contravene the expressed intention of Congress. They are (or appear to be) applied on a blanket basis, without differentiation, on all common carrier traffic and presumably to more recent vintage contract traffic. To the extent that the fuel surcharge mechanisms recover revenues in excess of the increased fuel costs for individual movements, they effect increases in the railroads’ profit margins on such movements in the nature of the very sort of general rate increases that Congress sought to avoid through this policy.

The Congressional policy set forth in § 10101(10) is consistent with another contemporaneous expression of Congressional policy regarding rail surcharges and the need to tie such surcharges to the specific costs incurred in providing the service in question. Specifically, under former § 10705a of Title 49, the Staggers Act authorized railroads to publish a “light density” branch line surcharge if, without such a surcharge, revenues from the line would not cover 110% of the variable costs of transporting traffic to or from the line, plus one hundred percent of the railroad’s “reasonably expected costs” of continuing to operate the line. See City of Cherokee v. ICC, 671 F.2d 1080, 1083 (8th Cir. 1982).

In setting forth this surcharge analysis, the Staggers Act ordered the Commission to develop a working definition of the “reasonably expected cost” standard for use in evaluating light density line surcharges. See former 49 U.S.C. § 10705a(b)(2) (“The Commission shall, within 120 days after the effective date of the Staggers Rail Act of 1980, complete a proceeding to define the term ‘reasonably expected costs’ as used in subparagraph (B) of this paragraph.”). The Commission complied with that Congressional directive by its decision in Reasonably Expected Cost, 365 I.C.C. 819, 834 (1981) (adopting final rules to define the term “reasonably expected costs” in connection with railroad surcharges on light-density lines). Those rules required carriers to provide the information necessary to calculate both the amount of reasonably expected costs and to allocate such costs reasonably as required by the statute:

A rail carrier may not apply a surcharge under this subsection that results in any shipper being required to bear more than a reasonable proportion of the reasonably expected costs of continuing to operate the line to which such surcharge applies.

. . .

If the Commission finds that a complaining shipper is being required to bear more than a reasonable proportion of the costs described in subparagraph (A) of this paragraph, the Commission may reallocate the surcharge among the traffic originating or terminating on the line to which the surcharge applies

Former 49 U.S.C § 10705a(b)(4)(A) & (C). That same policy against cross-subsidization should apply to the Board’s current analysis of the railroads’ fuel surcharge programs.

In Temporary Fuel Shortfall Recovery Surcharge, 365 I.C.C. 299, 301

(1981), the Commission addressed a situation where a railroad sought to impose a fuel surcharge on a coal movement that had not been in operation during the period of high fuel costs upon which the surcharge was based. The agency found application of the surcharge would be unlawful due to the absence of a correlation between the surcharge revenues and the increased fuel costs:

The surcharge, which became effective April 11, 1980,[] was intended to offset a revenue shortfall caused by rapid increases in railroad fuel costs between October 1, 1978 and September 30, 1979

. . . CPL has established that it moved no traffic (and thus did not require the railroads to incur increased fuel costs) during the fuel shortfall period

. . . [W]e conclude that CPL's traffic should not have been subject to this surcharge.

Id. at 299-301. This decision supports the principle that fuel surcharge expenses should be correlated directly to the service at issue, and a fuel surcharge is not proper where the revenues generated by application of the surcharge are not reasonably related to the cost incurred by the railroad for the movement. See also Ex Parte No. 311, Expedited Procedures for Recovery of Fuel Costs (ICC served June 15, 1979), at 2 (addressing a fuel surcharge mechanism affecting motor carriers and "emphasiz[ing] that the new procedures are for increased fuel costs only and may not be used to offset other costs. . . . If it is determined that carriers are taking surcharges greater than needed to offset

increasing owner-operator fuel costs, they will not be permitted to use this new Special Permission again.”).

The practice of other regulatory agencies under other regulatory regimes supports the views and standards articulated by the Board in its Decision. In particular, the regulations of the Federal Energy Regulatory Commission (“FERC”) at 18 C.F.R. § 35.14, allow electric public utilities to include fuel adjustment clause (“FAC”) provisions in their rate schedules.³ In essence, these schedules allow electric utilities to automatically adjust their rates to reflect changes (both increases and decreases) in their cost of fuel and purchased power. However, FERC’s regulations contain several simple but effective safeguards to prevent the sort of over-recovery and cross-subsidy that is inherent in the railroads’ current fuel surcharge mechanisms.

First, the surcharge is calculated with reference to an explicit base period, and the surcharge is calculated on a basis per average kilowatt hour (kWh) of sales. *Id.*, § 35.14(a)(1). Thus, no kWh bears a disproportionate amount of the change in cost, recovery is permitted only as to rate schedules that contain the fuel clause adjustment, and over-recovery of total change and cross-subsidization of one customer by another is precluded. Toward that end, the utility must include “all kWh’s sold,” except for inter-

³ The public utility commissions of many states have similar provisions that govern the recovery of fuel and purchased power costs of electric utilities with respect to their retail sales.

system sales. Id., § 35.14(a)(3). Furthermore, the categories of costs that can be included in the surcharge calculation are explicitly limited. Id., § 35.14(a)(6)-(7). In addition, the utility must provide detailed cost support for the base cost of fuel and purchased power. Id., § 35.14(a)(9)(i). Thus, while the FAC may function as the equivalent of a surcharge, the recovery is explicitly tied to changes in the average cost of fuel, the volumes subject to the FAC are not subject to disproportionate recovery, the mechanism precisely tracks increases and decreases in the average cost of fuel, the mechanism operates as an explicit and exact pass-through, and there is no cross-subsidization.

The FERC regulations thus provide a sound template for how a proper and appropriate fuel surcharge mechanism should operate. Rather than operate as a profit-center, it should function as an explicit cost pass-through. Moreover, the full transparency of the FAC allows shippers to ascertain that they are forced to pay only a proportionate amount of the actual cost changes experienced by their provider.

III. The Testimony of Mr. James N. Heller

In his attached testimony, Mr. James N. Heller, an expert in rail transportation economics with considerable experience related to rail fuel surcharges, addresses the fundamental question posed by the Board in its Decision. Specifically, Mr. Heller documents the fact that the current fuel surcharge mechanisms imposed by Class I rail carriers on coal traffic are all designed to recover sums far greater than the

incremental costs associated with fuel needed to provide service to the particular shippers to whom the fuel surcharges apply.

Based upon his conservative analysis of example coal movements in the east and west, Mr. Heller observes that the current Class I fuel surcharge mechanisms are over-recovering the carriers' actual changes in fuel costs by as much as 265%. Mr. Heller derived his results by preparing a Uniform Rail Costing System ("URCS") analysis for each example movement (with traffic and operating characteristics selected by Mr. Heller on the basis of his experience in the industry and with the benefit of information provided on a confidential basis by members of the Concerned Captive Coal Shippers), and using that URCS analysis to ascertain the "actual" change in fuel costs between 2003 and 2005. In order to calculate the amount of the fuel surcharge applicable to the subject movements, Mr. Heller applied the average reported coal rate for the subject carriers less the fuel surcharge for a movement of the length selected by Mr. Heller as representative of an eastern or western coal movement.

Mr. Heller's conclusion that the Class I carriers are over-recovering their actual fuel costs on traffic subject to the fuel surcharges holds true both for fuel surcharges that are based upon the rate paid by the shipper (i.e., the UP, CSX, and NS fuel surcharges) and for fuel surcharges that are based upon the miles of haul for a particular shipment (i.e., the BNSF fuel surcharge).

The degree of over-recovery found by Mr. Heller on the basis of his URCS analysis becomes even more significant if one considers the impact of potential

contractual rate escalation mechanisms that rely, in part, upon a fuel component, and if one considers the impact of the carriers' fuel hedging activities. In light of these two considerations, there is good reason to believe that the carriers actually are enhancing profits through their existing fuel surcharge mechanisms by an even greater margin than suggested by Mr. Heller's examples. Moreover, the carriers' recent imposition of substantial fuel surcharges has coincided with a period of extraordinary increases in railroad rates on coal traffic. Of course, any recently established rates have been set in an environment in which the railroads are able to incorporate their awareness of the prevailing fuel costs in the levels of the contract or tariff rates themselves. This awareness undermines the basic premise of a fuel surcharge as a device used by the carriers to recover increased costs that are not otherwise recovered through the combination of the carriers' base rates and the relevant rate escalation mechanism. These facts therefore further compound the unfairness of the profit-enhancing nature of the surcharges and the burden and the difficulties experienced by coal shippers and give rise to an increased need for the Board to take affirmative action to ensure that carriers desist from imposing profit-enhancing rate increases on coal shippers under the guise of cost-based fuel surcharges.

Finally, Mr. Heller's testimony includes a number of suggestions regarding requirements for railroad data submissions to the Board. See Decision at 2 ("In this hearing, shippers and railroads are asked to comment on whether and how [the Board's] reporting requirements should be adjusted to provide rail customers with better

information on a carrier's fuel costs and the revenues collected through fuel surcharges."'). To that end, the Concerned Shippers request that the Board require each Class I railroad operating in the United States to report the following data (for its United States operations) to the Board on a quarterly basis:

- Total fuel surcharge revenues (in millions of dollars);
- Percentage of total traffic volume to which the full fuel surcharge applies;
- Percentage of total traffic volume to which a portion of the fuel surcharge applies;
- Total fuel costs, including the effects of hedging (in millions of dollars);
- Total fuel costs, excluding the effects of hedging (in millions of dollars);
- Net benefit (or net cost) associated with fuel hedging (in millions of dollars);
- Total fuel consumed (in millions of gallons);
- Average fuel cost (in dollars per gallon); and
- The change in each of these statistics from the previous quarter to the reporting quarter.

The availability of the foregoing information would greatly facilitate the ability of both shippers and the Board to evaluate the extent to which the railroads fulfill

the requirements for reasonable fuel surcharge programs. Decision at 2 (“Making this information publicly available should enable shippers to better identify and protect against inappropriate surcharges and to more reliably forecast their future transportation costs.”). As explained by Mr. Heller in his statement, with this information a coal shipper should be able to calculate the change in URCS fuel costs for its traffic in order to examine the relationship between such change in fuel costs and the fuel surcharge revenues on its traffic.

CONCLUSION

For the foregoing reasons, the Concerned Captive Coal Shippers respectfully request that the Board declare that the rail carriers’ current fuel surcharge mechanisms fail to correspond directly to the incremental fuel cost increases associated with the traffic to which the fuel surcharges apply, and as such, constitute what the Board views as unreasonable practices under 49 U.S.C. § 10702. The Board should further declare that only fuel surcharge mechanisms that do recover revenues that are reasonably related to the increased fuel costs on a movement-specific basis will be viewed as reasonable.

The Board should also establish a reasonable period (such as sixty days) to allow the railroads to convert to fuel surcharge mechanisms that meet the Board’s requirements. After the end of that period, relief setting aside any fuel surcharge mechanism that fails to satisfy the Board’s requirements and awarding damages for any

fuel surcharges paid on any individual movement in excess of the railroad's increased costs for fuel for such movement should be available upon complaint.

Respectfully submitted,

THE CONCERNED CAPTIVE
COAL SHIPPERS

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Dated: April 27, 2006

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Attorneys & Practitioners

**STATEMENT OF
JAMES N. HELLER**

**Submitted to
U.S. Surface Transportation Board**

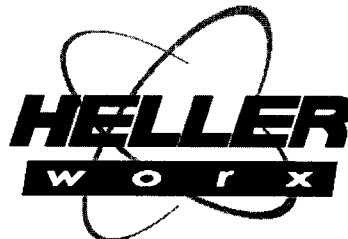
**On Behalf of
Concerned Captive Coal Shippers Group**

Ex Parte No. 661, Rail Fuel Surcharges

By

**James N. Heller
President
Hellerworx, Inc.**

April 27, 2006



**Hellerworx, Inc. 4803 Falstone Avenue
Chevy Chase, MD 20815
301-654-1980**

STATEMENT OF JAMES N. HELLER ON BEHALF OF CONCERNED CAPTIVE COAL SHIPPERS GROUP

I. Background and Purpose

Hellerworx, Inc. is submitting this statement on behalf of the Concerned Captive Coal Shippers Group ("Group") before the STB under Ex Parte No. 661, Rail Fuel Surcharges. The purpose of this statement is to analyze the manner in which rail fuel surcharges are currently being implemented for specific coal movements and to compare the fuel surcharge revenues received by the involved carriers for those movements with the incremental fuel costs incurred by the carriers as a result of higher diesel fuel costs. This statement also recommends that the STB collect additional data from the Class I railroads to clarify the relationship between additional fuel costs incurred and fuel surcharge revenues collected.

II. Conclusions

Based upon the results of my analysis, the following are my conclusions:

1. For three typical coal movements, the rail carriers involved are recovering far more revenue under the fuel surcharge mechanism from shippers than they are incurring as a result of the increase in diesel fuel prices. The three examples are designed to show a typical eastern movement and two typical western movements, one using a revenue-based surcharge and the second using the recently implemented BNSF mileage-based surcharge. The amounts of over-recovery for the three examples are shown in the following table.

Movement Type	Surcharge Type	Over-Recovery
Eastern	Revenue-Based	265%
Western	Revenue-Based	84%
Western	Mileage-Based	127%

Although the amount of the over-recovery will vary based upon the parameters of the movements evaluated, I believe that these results are representative, and that in general, the railroads' fuel surcharge mechanisms do over-recover the incremental fuel costs associated with a substantial number of coal movements.

2. In addition to the fuel surcharge mechanism, the carriers are also recovering supplemental "fuel-related" revenues because of the escalation of the diesel fuel

component of the Rail Cost Adjustment Factor, Unadjusted for productivity or RCAF (U) index. Between the first quarter of 2003 and the fourth quarter of 2005, increases in fuel costs caused the RCAF (U) index value to increase by approximately 10.7%. This 10.7% is in addition to the over-recovery under the fuel surcharge programs. In other words, the carriers would have received up to another 10.7% of the movement revenue as a result of the escalation of the fuel component of the RCAF (U).

3. To the extent that the rail carriers have engaged in successful hedging programs, they may mitigate the increase in diesel fuel charges. The impact of these hedging programs is responsible for a portion of the disparity between the actual fuel price increases¹ shown in the examples and the fuel surcharge revenues.
4. Excerpts included in this report from various railroad financial documents indicate that the fuel surcharge mechanisms: have contributed substantially to railroad profits; for some carriers during various time periods have more than covered the increase in all carrier fuel costs even though the surcharges have been applied to only a portion of the carriers' traffic; and, are causing the amount by which fuel surcharge revenues exceed the actual fuel costs to keep growing over time.
5. Based upon my review and analysis as to the question that the Board has raised in this proceeding; namely, whether the current railroad fuel surcharge mechanisms are being set in such a manner as to insure that they are used only to recover the increased cost of fuel for the particular movements to which the surcharge is applied, I have concluded that those mechanisms are not operating in a proper manner. It is my opinion that it is administratively feasible for the railroads to apply fuel surcharge mechanisms that would be far more appropriately tailored to incremental fuel costs of specific movements. I have not been asked to develop such a mechanism, nor have the carriers made the data available to allow me to do so. Stated simply, it is my opinion that a fuel cost surcharge should be what it purports to be, that is, a means to recover movement specific incremental fuel cost increases, rather than a means to substantially increase railroad profits.
6. The STB should require that the carriers report quarterly (and compare to the prior quarter) information as described more specifically in Part III.E of this statement regarding the carriers' fuel surcharge revenues and costs, their traffic subject to fuel surcharges, and the impact of their fuel hedging activities. This information could be used by the STB to determine whether the fuel surcharge mechanisms as currently implemented by each of the carriers are matching changes in fuel costs, or are acting as another mechanism for differential pricing.

¹ Actual fuel prices reported by the carriers include benefits from hedging.

III. Analysis

The analysis is divided into the following sections:

- A. **Methodology:** Discusses the approach to gathering and analyzing the information in this report.
- B. **Comparison of Fuel Surcharge Revenues and Increased Fuel Costs:** Analyzes three sample coal movements involving both eastern and western carriers and two fuel surcharge mechanisms for the period 2003-2005.
- C. **Changes in RCAF (U) Fuel Component:** Analyzes how the RCAF fuel cost component has changed between 2003 and 2005.
- D. **Impact of Fuel Hedging and Fuel Surcharge Programs:** Provides examples from carriers and analysts as to how railroad hedging and fuel surcharge programs have affected fuel costs.
- E. **Reporting Mechanisms:** Recommends reporting data that would make more transparent the effects of the fuel surcharge program.

A. Methodology

This report was developed using:

- Information provided by members of the Concerned Captive Coal Shipper group about the operating parameters of their coal traffic;
- Information on typical movement parameters based upon my experience with rail coal movements;
- Movement parameters which I developed based upon the first two items;
- The Phase III URCS² model and Phase II data tables;
- Fuel surcharge information published by the carriers;
- RCAF (U) and All-Inclusive Index materials from the AAR and STB;
- Railroad Annual and 10-K reports;
- Analyst reports on rail carriers; and
- Various trade press articles.

The movement parameters and the URCS model were used to develop the movement specific fuel costs for the example movements. Average rates for coal movements coupled with typical movement distances and the various carriers' specific fuel surcharge mechanisms were used to develop the surcharge revenues.

² Uniform Rail Costing System

B. Comparison of Fuel Surcharge Revenues and Increased Fuel Costs

This section calculates the changes in fuel costs and fuel surcharge revenues for three example movements.

1. Example NS Movement

This sample NS movement (see Attachment 1) was assumed to reflect a typical central Appalachian coal haul of 350 miles for a 100 car unit train using railroad supplied steel gondolas. I used URCS to calculate the 2003 fuel cost for this move. I then used NS-reported average fuel prices for 2003 and 2005 to estimate the comparable fuel cost for the move in 2005. From these amounts, I calculated the actual increase in the fuel cost for the movement to be \$0.33/ton.³ If this movement were subject to the NS published monthly fuel surcharges for 2003 and 2005, then NS's increased revenue between 2003 and 2005 would be \$1.20 per ton.⁴ Thus for the sample movement NS would be collecting from the shipper under the fuel surcharge mechanism 265% more than the actual increase in fuel costs.

2. Example BNSF Movement – Revenue Based Surcharge

Prior to January 1, 2006, BNSF used a fuel surcharge mechanism similar to UP's where the fuel surcharge was multiplied by the revenue from the movement. This sample BNSF movement (see Attachment 2) reflects a typical Powder River Basin (PRB) coal haul to Chicago of 1150 miles for a 135 car unit train using private aluminum gondolas carrying 120 tons per car. Using the same methodology as I used for the NS movement above, I calculated the actual increase in the fuel cost for the movement at \$0.77/ton. Using a methodology comparable to that which I used for the above NS example, I calculated BN's increased revenue between 2003 and 2005 to be \$1.42/ton. Thus under the fuel surcharge mechanism BNSF would be collecting 84% more from the shipper than the actual increase in fuel costs.

3. Example BNSF Movement – Mileage Based Surcharge

Effective January 1, 2006, BNSF switched to a mileage based fuel surcharge mechanism for coal movements where the fuel surcharge was multiplied by the distance of the movement. This BNSF movement (see Attachment 3) used

³ Note that my methodology assumes no change in the fuel productivity of the move between 2003 and 2005. It thus overstates the fuel cost increase to the extent that the railroad achieved any increase in fuel productivity for the move.

⁴ For this calculation I have assumed that the base rate for this movement in 2005, per ton mile, is the NS system average for coal, less the average fuel surcharge. I have applied the average of the NS fuel surcharge percentages for 2003 and 2005.

identical parameters to those used in the prior BNSF calculation. The surcharge amount was calculated using URCS costs for the years 2003 and 2005, applying what the BNSF reported as its average actual fuel costs, and assuming that the mileage-based surcharge was then in effect. The actual increase in the fuel cost for the movement based on these assumptions was identical to that under the revenue-based surcharge case or \$0.77/ton. At the Highway Diesel Fuel (HDF) prices that were used to calculate BNSF's revenue-based fuel surcharges during each month of 2005, the average mileage-based fuel surcharge that would have been applicable to BNSF coal movements during 2005 would have been \$0.1825/car-mile, or \$1.75/ton for the 1,150-mile sample movement. Thus for this typical movement BNSF would be collecting from the shipper under the fuel surcharge mechanism 127% more than the actual increase in fuel costs. In this typical example, BNSF actually recovers more under its new mileage-based surcharge program than it did under the revenue based program; however this will not always be the case⁵.

All three of these examples illustrate that for typical eastern and western movements, the actual revenues generated under the various fuel surcharge mechanisms recover substantially more than the carriers' actual fuel cost increases. I have also reviewed the CSX and UP fuel surcharge mechanisms and found that they are similar to the example fuel surcharges in all material respects and also would over-recover the incremental costs associated with specific coal movements.

Over time as older coal transportation contracts roll over, the carriers will have an opportunity to implement fuel surcharges through contracts that currently lack such provisions or through tariffs. In addition, the current strong pricing environment is allowing carriers to substantially increase rates for coal movements. These new rates will likely be substantially higher than the rates in existing contracts. Since revenue-based fuel surcharge mechanisms apply as a percentage of a given rate, an increase in that rate will automatically compound the over-recovery of actual fuel costs in a dramatic manner.

C. Changes in RCAF (U) Fuel Component

The Rail Cost Adjustment Factor - Unadjusted for Productivity ["RCAF (U)"] is commonly used to adjust the rail rates under coal transportation contracts. Contracts may use 100% or a fraction (e.g. 80%) of the RCAF (U) to adjust the rail rate for changes in input costs. The rationale for using less than 100% of the RCAF (U) may be that the rail rate involves recovery of fixed costs that will not vary over the life of the contract, it is a

⁵ Under the revenue-based fuel surcharge, the amount which the shipper pays is directly related to the rail rate. In the example, the average BNSF rail rate is 8.9 mills excluding the fuel surcharge (see Attachment 3). As rail contracts rollover and new contracts are signed at higher mill rates the amounts collected under the revenue-based fuel surcharge may exceed the amounts collected under the distance based version of the fuel surcharge. In the example, the distance based fuel surcharge is \$1.75/ton which is equivalent to a fuel surcharge of 1.52 mills/ton-mile for an 1150 mile movement. At a 13.83% fuel surcharge, the average mill rate (excluding the fuel surcharge) would need to be in excess of 11 mills for the revenue based method to yield a higher fuel surcharge than the mileage based approach.

means of allowing for some productivity sharing, or it may simply be negotiated as part of the rate package.

Because both the weightings for the various components of the RCAF(U) and the values of the indexes for each component change over time, determining what causes the fuel component of the RCAF to shift is a bit complex. Based on the RCAF (U) and All-Inclusive Index (Less Fuel) index values published by the Association of American Railroads, I have calculated the escalation in the fuel component of the RCAF (U) between the first quarter of 2003 and the fourth quarter of 2005. The results show that over this period, the RCAF (U) changed by 19.0%. If the index had not included fuel, it would have changed by only 8.3%. Therefore, 10.7% of the index movement (56%) was fuel driven.

In addition to any increased revenues from the fuel surcharge mechanism, carriers with contracts that applied the full RCAF (U) mechanism would have received additional fuel related revenue equivalent to 10.7% of the rate. As an example of the potential impact of this factor, if the sample movements were subject to rate adjustment based on 100% of RCAF-U, that factor would add a further amount of over \$ 1.00/ton to the over-recovery of fuel price increases based on the surcharge formulas.

D. Impact of Fuel Hedging and Surcharge Programs

In the recent past, most of the Class I railroads operating in the United States have engaged in programs where they “hedge” their fuel positions. The carriers by nature will be “short” fuel meaning that they will need to buy fuel to conduct their operations. Recognizing the volatility in diesel fuel prices, carriers have entered into transactions that have the effect of limiting the amounts that they pay when fuel prices rise sharply. A portion of the amount by which the fuel surcharges over-compensate the railroads for fuel price increases is attributable to such transactions.

However, revenues from fuel surcharges are increasing rapidly as fuel prices increase, rates increase, and the fuel surcharges are applied to an increasing volume of traffic. The increasing use of fuel surcharge mechanisms has decreased the need for hedging. The following comments from the carriers and financial analysts indicate the effectiveness of fuel surcharge and fuel hedging programs and their impact on railroad financial performance. They also indicate the increasing revenues generated over time by the surcharges, supporting the data in the examples shown previously.

- “Three of the top four class I railroads have significant portions of their expected 2005 fuel requirements hedged, the exception being Union Pacific. Combined with fuel surcharges, hedging should significantly mitigate the pressure of high fuel prices in 2005.”⁶

⁶ RailForce “Fitch: Healthy Economy Should Fuel U.S. Rail Performance in 2005” December 7, 2004

- “BNSF ...remains one of the best hedged rails, with 50% of its fuel needs hedged in 3Q05, and 27% of its needs hedged in 2006 at rates averaging about \$1 per gallon, nearly 60%-70% below market rates”⁷.
- According to BNSF’s 2005 10-K report to the SEC, BNSF’s fuel costs increased by \$866 million between 2003 and 2005. Over the same period, BNSF’s fuel surcharge revenues increased by approximately \$990 million. The increase in fuel surcharge revenues exceeded the increase in fuel costs by approximately \$124 million or 14%.
- In March 2006, BNSF reported that “revenue for the fourth quarter of 2005 included fuel surcharges of \$424 million compared with \$150 million in the fourth quarter of 2004.”⁸
- “Fuel hedging is being phased out at a few rails, including NS and CSX as surcharges recoup most of the cost increase.”⁹
- In March 2006, CSX reported that “nearly 55% of revenues have some form of fuel surcharge attached, with the company expecting to add 6% - 7% per year, although the company believes it is fully covered with respect to its fuel cost exposure.”¹⁰
- As reported in its 2005 10-K report to the SEC, NS said fuel surcharges accounted for approximately one-third of its overall revenue increase of \$1.2 billion between 2004 and 2005 (or about a \$400 million increase in revenue). Over the same period, NS’s fuel expenses increased by \$278 million. Therefore, the increase in NS’s fuel surcharge revenue during 2005 exceeded the increase in fuel costs by approximately \$122 million, or 44%. Furthermore, as of the end of 2005, fuel surcharge provisions applied to only about 85% of NS’s total revenues.
- According to UP’s 2005 10-K, UP’s fuel costs increased by \$709 million between 2004 and 2005, which slightly exceeded the \$687 million increase in fuel surcharge revenues.
- However, UP also reported recently that “The record revenue per car is a result of the railroad’s fuel cost recovery program, which allowed UP to charge higher rates on about 90 percent of its business when fuel prices rose. About 13 percent of UP’s business will be up for repricing in 2006, so railroad officials expect to be able to add fuel price protection to more contracts and increase rates to match the current market.”¹¹

⁷ Merrill Lynch: Rail and Truck Transport Thoughts Sept 13, 2005

⁸ Locomotive Engineers and Trainmen News March 2006

⁹ Merrill Lynch: Rail and Truck Transport Thoughts Sept 13, 2005

¹⁰ Merrill Lynch: Estimate Change, CSX Corporation, March 27, 2006

¹¹ Reuters “Union Pacific Profit Up on Record Volumes” April 20, 2006

- UP Chief Financial Officer Robert Knight recently said the company has increased the number of customers now paying fuel surcharges, but added that the company is still well short of having 100 percent of customers paying them.¹²

These reports indicate that the fuel surcharge mechanism is an increasing contributor to carrier profits. If the current fuel surcharge programs were to be applied to all traffic, then in combination with the escalation in the fuel component of the RCAF (U) they would further exacerbate the carriers' collections of fuel surcharge revenues in excess of incremental fuel costs.

E. Reporting Mechanisms

Over the past two years, fuel surcharges have rapidly become a very substantial part of the railroad industry's total revenue. For example, BNSF's fuel surcharge revenues have grown from \$110 million (or 1.2% of BNSF's total revenue) in 2003 to approximately \$1.1 billion (or 8.5% of BNSF's total revenue) in 2005¹³. However, there is currently only scattered and limited data available regarding how this significant increase in freight rates relates to actual changes in fuel costs. It is currently left to each railroad's discretion to decide what data they will report relating to fuel surcharge revenues and fuel costs, and when and where it will be reported. This makes it difficult for either the shipper community or the STB to assemble complete, standardized, and timely data showing how fuel surcharge revenues relate to fuel costs on an ongoing basis.

In order to make this data more accessible on a timely basis, I recommend that each Class I railroad operating in the United States be required to report the following data to the STB (for its U.S. operations) on a quarterly basis:

- Total fuel surcharge revenues (in millions of dollars)
- Percentage of total traffic volume to which the full fuel surcharge applies
- Percentage of total traffic volume to which a portion of the fuel surcharge applies
- Total fuel costs, including the effects of hedging (in millions of dollars)
- Total fuel costs, excluding the effects of hedging (in millions of dollars)
- Net benefit (or net cost) associated with fuel hedging (in millions of dollars)
- Total fuel consumed (in millions of gallons)
- Average fuel cost, in dollars per gallon

Fuel surcharge revenues have grown rapidly over the past two years, and will likely continue to change rapidly and significantly in the future due to the volatility of

¹² Reuters "Union Pacific Profit Up on Record Volumes" April 20, 2006,

¹³ Source: BNSF 2005 10-K.

fuel prices. By acting as a clearinghouse for the data referenced above, the Board would enable all of the interested parties to make a more systematic, timely, and objective assessment of the extent to which the railroads' fuel surcharge programs are actually tracking changes in fuel costs.

IV. Qualifications

Jamie Heller is the founder and president of Hellerworx, Inc. Hellerworx was developed to provide strategic and economic consulting services to electric generators, energy producers and transportation companies.

Mr. Heller has worked for numerous electric generators, coal companies and transportation companies on issues related to coal, and coal transportation. (See resume attached).

RESUME OF JAMES N. HELLER

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Current Position

Jamie Heller is the founder and president of Hellerworx, Inc. Hellerworx was developed to provide strategic and economic consulting services to electric generators, coal and energy producers and transportation companies. Mr. Heller is an expert in coal, energy, environmental and transportation issues. His specialties include coal market analysis, transportation market analysis, electric utility planning, electric power market analysis, analysis of environmental compliance options, utility fuel procurement, energy property valuation, and litigation support. Mr. Heller has served as an arbitrator, and as an expert witness before various state commissions, federal district and state courts, arbitration panels in the U.S. and overseas, the Surface Transportation Board and the Federal Energy Regulatory Commission. He has made numerous speeches and presentations before various conferences and seminars in the U.S. and abroad. His comments have appeared in various trade publications.

Consulting Specialties

Strategic planning. Transportation procurement planning. Transportation management studies. Providing litigation and regulatory support. Conducting market assessments and forecasts. Negotiating fuel and transportation agreements. Estimating fuel production and transportation costs. Fuel price and transportation rate forecasting. Evaluating alternative Clean Air Act compliance strategies. Siting new energy facilities. Performing reserve acquisition analyses. Evaluating equipment purchases. Energy supply planning.

Prior Professional Experience

- **PA Consulting (October 2000-July 2002). Senior Partner.** As Senior Partner within the PA Management Group worked on launching the Environmental and Resource Analytics practice within PA. The practice provided strategic and analytical services to clients in the electric generation, coal and transportation markets; performed various studies and modeling activities related to compliance with environmental regulations; and conducted environmental risk assessments. The principal areas of focus were environmental compliance with Clean Air Act standards, providing fuel and environmental analyses in support of electric

generating unit asset acquisition and financing activities, and a major effort to support Firestone Tire in its dispute with Ford Motor Company and NHTSA.

- **Hagler Bailly (October 1998-October 2000). Senior Vice President.** Served as head of Hagler Bailly's fuels and environment practice area and an expert in coal, energy, and transportation issues. His activities supported the firms forecasting and analysis of electric power, fuel and transportation markets and various clean air compliance issues. In October 2000, PA Consulting purchased Hagler Bailly.
- **Fieldston Company, Inc. and Fieldston Publications, Inc. (1981-1998). Founder and President.** Founded The Fieldston Companies in 1981 to provide energy and transportation consulting services to the energy supply, transportation and electric utility sectors. The 60+ person staff provided expert assistance to the fuels supply, transportation and electric generation industries in hundreds of commercial matters. The publication staff developed and published leading business periodicals in the coal, rail transportation and environmental fields. A joint venture company, Fieldston Transportation Services, provided rail transportation and railcar maintenance services to various shippers and short line rail carriers. In 1998, Mr. Heller sold the consulting and publishing companies to Hagler Bailly, and the transportation services company to DTE.
- **Teknekron, Inc. of Berkeley, Calif. (1979-1980). Senior Analyst.** Strategic planning, market analyses, rail merger studies, transportation market analysis and rate estimation, plant siting, and public policy development.
- **Energy and Environmental Analysis, Inc. (1975-1979). Director of Management Studies.** Directed coal market and transportation studies for railroads and coal producers. Conducted economic evaluation of air and water regulations. Developed energy efficiency plans. Clients included U.S. Department of Energy, Executive Office of the President, U.S. Presidential Commission on Coal, U.S. Congress Office of Technology Assessment, and various coal producers.
- **Office of Water Quality Planning and Standards (U.S. Environmental Protection Agency) (1972-1975). Section Chief.** Developed and promulgated industrial water pollution control guidelines.

Books

James N. Heller and Charles A. Mann. *Coal and Profitability: An Investor's Guide*. McGraw-Hill, 1979.

James N. Heller. *Coal Transportation and Deregulation: An Impact Analysis of the Staggers Act*. Serif Press and the Energy Bureau, 1984.

Education

Harvard Business School — Master of Business Administration, 1972

Northwestern University — Bachelor of Science, Electrical Engineering, 1970

Honors

Member, Eta Kappa Nu and Tau Beta Pi Engineering Honorary Societies

Attachment 1 **Estimate of 2003 and 2005 Fuel Costs vs Fuel Surcharge Recovery for NS Movements of Central Appalachian Coal**

Movement Distance: 350 miles
 Cars per Train: 100
 Tons of Coal per Car: 100 (railroad steel gondolas)
 Tons of Coal per Train: 10000
 Tare Weight of Cars (tons): 30
 No other adjustments to URCS Phase III system average parameters.

Estimated Change in Fuel Cost for 2003-2005:

(costs are in \$/trainload unless otherwise stated)	Unadjusted URCS Variable Operating Cost	Portion of This Cost Attributable to Fuel (based on examination of detailed URCS tables)		Adjustment 1: Divide by General Overhead Factor Used to Mark Up Direct Fuel Costs		Adjustment 2: Divide by URCS Variability Factor for Fuel		Adjusted URCS Estimate of 2003 Fuel Costs		Actual Average NS Fuel Cost for 2003 (\$/gallon) ¹		Actual Average NS Fuel Cost for 2005 (\$/gallon) ¹		% change for 2003-2005		Movement-Specific Estimate of 2005 Fuel Costs		Estimated Change in Fuel Costs	
		Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost	Unadjusted URCS Variable Operating Cost
LUM portion	\$3,857	54.3%	\$2,094	1,30018	0.92253	\$1,746	\$1,746	\$1,746	\$1,746	\$0.807	\$1.416			75.5%		\$7,667	\$3,298		
GTM portion	\$9,266	31.1%	\$2,882	1,30018	0.92253	\$2,403	\$2,403	\$2,403	\$2,403							\$0.77	\$0.33		
SEM portion	\$2,183	8.2%	\$179	1,30018	0.62256	\$221	\$221	\$221	\$221							2.19	0.94		
Total (\$/trainload)			\$5,155			\$4,370	\$4,370	\$4,370	\$4,370										
Total (\$/ton)						\$0.44	\$0.44	\$0.44	\$0.44										
Total (mills per ton-mile)						1.25	1.25	1.25	1.25										

Estimated Fuel Surcharge Revenue and Fuel Cost Recovery for 2003-2005:

NS Fuel Surcharge Applicable to Coal Traffic During 2005 (average of monthly published surcharges) ¹		NS Fuel Surcharge Applicable to Coal Traffic During 2003 (average of monthly published surcharges) ²		Change in Fuel Surcharge		Estimated 2005 Base Rate ³		Estimated Change in Fuel Surcharge Revenue		Estimated Change in Fuel Costs		Estimated Over (or Under) Recovery of Fuel Costs	
12.70%	1.83%	10.87%	31.7 mills per ton-mile	3.44	0.94	2.50	\$0.88	265.3%					
			\$/ton	\$1.20	\$0.33								

Notes:

- Source: NS Financial Reviews for 4Q2003 and 4Q2005
- Source: NS website.
- Base rate estimate of 31.7 mills per ton-mile for NS = NS system average coal rate of 35.7 mills per ton-mile (shown in NS's 4Q2005 Financial Review) / (1.127 - division backs out average published fuel surcharge for 2005)

Attachment 2 **Estimate of 2003 and 2005 Fuel Costs vs Fuel Surcharge Recovery for Typical PRB Coal Movement on BNSF** (based on BNSF's published fuel surcharges applicable to coal movements during 2005)

Movement Distance: 1150 miles (approx distance from PRB to Chicago)

Cars per Train: 135

Tons of Coal per Car: 120 (private aluminum gondolas loaded to 286,000 lbs. gross)

Tons of Coal per Train: 16200

Tare Weight of Cars (tons): 23

No other adjustments to URCS Phase III system average parameters.

Estimated Change in Fuel Cost for 2003-2005:

	Unadjusted URCS Variable Operating Cost	Portion of This Cost Attributable to Fuel (based on examination of detailed URCS tables)	Unadjusted URCS Estimate of 2003 Fuel Costs	Adjustment 1: Divide by General Overhead Factor Used to Mark Up Direct Fuel Costs	Adjustment 2: Divide by URCS Variability Factor for Fuel	Adjusted URCS Estimate of 2003 Fuel Costs	Actual Average BNSF Fuel Cost for 2003 (\$/gallon) ¹	Actual Average BNSF Fuel Cost for 2005 (\$/gallon) ¹	% change for 2003-2005	Movement- Specific Estimate of 2005 Fuel Costs	Estimated Change in Fuel Costs
(costs are in \$/trainload unless otherwise stated)											
LUM portion	\$18,294	57.4%	\$10,501	1.15929	0.95775	\$9,457	\$0.901	\$1.397	55.0%	\$35,162	\$12,484
GTM portion	\$35,046	40.9%	\$14,334	1.15929	0.95775	\$12,910				\$2.17	\$0.77
SEM portion	\$2,767	8.3%	\$230	1.15929	0.63735	\$311				1.89	0.67
Total (\$/trainload)			\$25,064			\$22,678					
Total (\$/ton)						\$1.40					
Total (mills per ton-mile)						1.22					

Estimated Fuel Surcharge Revenue and Fuel Cost Recovery for 2003-2005:

	BNSF Fuel Surcharge Applicable to Coal Traffic During 2005 (average of monthly published surcharges) ²	BNSF Fuel Surcharge Applicable to Coal Traffic During 2003 ³	Change in Fuel Surcharge	Estimated 2005 Base Rate ³	Estimated Change in Fuel Surcharge Revenue	Estimated Over (or Under) Recovery of Fuel Costs
Change in Fuel Surcharge	13.83%	0.00%	13.83%	8.9 mills per ton-mile \$10.24 /ton	1.23 \$1.42	0.56 \$0.64 83.7%
Percentage Over-Recovery (or Under-Recovery) of Fuel Costs						

Notes:

1. Source: BNSF 10-K's.
2. Source: BNSF website
3. Base rate estimate of 8.9 mills per ton-mile for BNSF = BNSF system average coal rate of 10.1 mills per ton-mile (shown in BNSF's 4Q2005 Financial Review) / (1.1383 - division backs out average published fuel surcharge for 2005)

Attachment 3 **Estimate of 2003 and 2005 Fuel Costs vs Fuel Surcharge Recovery for Typical PRB Coal Movement on BNSF** (applies mileage-based surcharge program effective 1/1/2006 to 2005 fuel prices)

Movement Distance: 1150 miles (approx distance from PRB to Chicago)

Cars per Train: 135

Tons of Coal per Car: 120 (private aluminum gondolas loaded to 286,000 lbs. gross)

Tons of Coal per Train: 16200

Tare Weight of Cars (tons): 23

No other adjustments to URCS Phase III system average parameters.

Estimated Change in Fuel Cost for 2003-2005:

(costs are in \$/trainload unless otherwise stated)	Unadjusted URCS Variable Operating Cost	Portion of This Cost Attributable to Fuel (based on examination of detailed URCS tables)	Unadjusted URCS Estimate of 2003 Fuel Costs	Adjustment 1: Divide by General Overhead Factor Used to Mark Up Direct Fuel Costs		Adjustment 2: Divide by URCS Variability Factor for Fuel		Adjusted URCS Estimate of 2003 Fuel Costs	Actual Average BNSF Fuel Cost for 2003 (\$/gallon) ¹	Actual Average BNSF Fuel Cost for 2005 (\$/gallon) ¹	% change for 2003-2005	Movement-Specific Estimate of 2005 Fuel Costs	Estimated Change in Fuel Costs
LUM portion	\$18,294	57.4%	\$10,501	1.15929	0.95775	0.95775		\$9,457	\$0.901	\$1.397	55.0%	\$35,162	\$12,484
GTM portion	\$35,046	40.9%	\$14,334	1.15929	0.95775	0.95775		\$12,910				\$2.17	\$0.77
SEM portion	\$2,767	8.3%	\$230	1.15929	0.63735	0.63735		\$311				1.89	0.67
Total (\$/trainload)			\$25,064					\$22,678					
Total (\$/ton)								\$1.40					
Total (mills per ton-mile)								1.22					

Estimated Fuel Surcharge Revenue and Fuel Cost Recovery for 2003-2005:

Change in Fuel Surcharge	BNSF Fuel Surcharge Applicable to Coal Traffic During 2005 (\$/ton) ²	BNSF Fuel Surcharge Applicable to Coal Traffic During 2003 (\$/ton)	Change in Fuel Surcharge (\$/ton)	Estimated 2005 Base Rate		Estimated Change in Fuel Revenue	Estimated Change in Fuel Costs	Estimated Over (or Under) Recovery of Fuel Costs
	\$1.75	\$0.00	\$1.75	N/A	mills per ton-mile	1.52	0.67	0.85
					\$/ton	\$1.75	\$0.77	\$0.98
Percentage Over-Recovery (or Under-Recovery) of Fuel Costs								127.0%

Notes:

1. Source: BNSF 10-K's.
2. Source: Calculated based on applying 2006 mileage-based surcharge to 2005 fuel prices published on BNSF website.

Attachment 4 Escalation of Fuel Component of RCAF (U)

	RCAF (U)	All-Inclusive Index Less Fuel (incl. Forecast Error Adjustment)	% Change in Escalation of Fuel Component of RCAF (U)
1Q2003	0.996	100.4	
4Q2005	1.185	108.7	
% Change	19.0%	8.3%	10.7%

VERIFICATION

I, JAMES N. HELLER, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on April 24 2006



JAMES N. HELLER