



September 29, 2006

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20006

217679

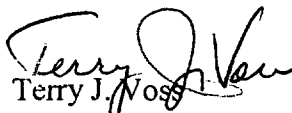


Re: Ex Parte No. 661
Rail Fuel Surcharges

Dear Secretary Williams:

Enclosed please find the comments of Ag Processing Inc regarding Ex Parte 661, Rail Fuel Surcharges.

Sincerely,


Terry J. Voss
Senior Vice President
Ag Processing Inc
Post Office Box 2047
Omaha, NE 68103-2047

cc: All parties of record

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Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD



EX PARTE NO. 661
RAIL FUEL SURCHARGES

COMMENTS OF AG PROCESSING INC

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Ag Processing Inc is a cooperative owned by 211 farmer-owned local cooperatives and six regional cooperatives. Ag Processing operates 14 facilities that process soybeans and corn, producing crude soybean oil and refined soybean oil, manufacturing methyl esters, and producing soybean meal, ethanol, and various co-products. Ag Processing also actively buys, stores, sells, and ships feed grains, domestically and for export. Ag Processing's membership is directly impacted by increases in the costs of rail transportation such as those brought about by fuel surcharges and has a continuing interest in the outcome of this proceeding.

Initially, Ag Processing believes that the Board should be complimented for its Decision of August 3, 2006, finding various fuel surcharge practices of the railroads to be unreasonable. Escalating fuel costs, which take their toll on all sectors of the economy

and private individuals, unfortunately have been seen by many railroads as an opportunity to exact greater profits from their customers in ways that are unrelated to the true fuel cost increases being experienced by railroads for the particular movements to which they have applied fuel surcharges. The Board was correct in observing that it is inappropriate to "label" something as a fuel surcharge that is not "limited to recouping increased fuel costs" over and above those already assumed in the freight rate.

Ag Processing is a member of National Grain and Feed Association ("NGFA") and is aware that NGFA is filing its own comments representing the views of Ag Processing and other NGFA members. Consequently, Ag Processing does not intend to merely reiterate the outlook of NGFA but instead to emphasize a limited number of points.

First, although the Board's Decision makes certain unequivocal findings, such as that it is an unreasonable practice for railroads to apply fuel surcharges as a percentage of the freight rate and in a manner that goes beyond recouping increased fuel costs not reflected in the freight rate, the Decision in other respects is more equivocal, leaving the timing of remedial action to the railroads' discretion. Ag Processing believes that the Board should not leave the timing of remedial action to the carriers.

Fuel surcharges using the methodology condemned by the Board began in approximately 2002. By 2004, the level of the fuel surcharges being assessed by all railroads had risen to the point where the surcharges had become a significant addition to freight rates and a serious burden on shippers. The concerns of shippers, such as Ag Processing and its members, repeatedly and emphatically were brought to the attention of the railroads and the Board. Most railroads totally spurned the shippers' requests for re-

lief from fuel surcharges that were not related to actual fuel cost increases for particular shipments. To its credit, BNSF Railway Company did reexamine and redesign certain of its fuel surcharge programs for grain and coal, although its solution fell short of the mark, at least for grain. Canadian National, Norfolk Southern, and Kansas City Southern made some alterations to their fuel surcharge programs, but continued to apply fuel surcharges against freight rates. But serious problems and inequities remain in the rail industry fuel surcharge structure. For example, although BNSF converted its fuel surcharge basis from a percentage of the freight rate to a mileage basis for grain and coal shipments, the grain mileage surcharge inexplicably is approximately 50 percent higher than the coal surcharge, even though many grain shipments, particularly on BNSF where grain shuttle trains are prevalent, move in essentially the same manner as coal shipments. Further, across all railroads, fuel surcharges currently continue to add between 5 and 20 percent to freight rates. Since 2004, railroads have employed the fuel surcharge practices found by the Board to be unreasonable to overcharge individual customers extensively.

The Board's Decision gives railroads certain options that they may exercise to bring their fuel surcharges into the realm of reasonableness. There is no indication by the Board, however, of when the railroads must make conforming changes. Meanwhile, they continue to employ unreasonable practices and over-assess fuel surcharges against individual shipments. Vast sums of money are being assessed on an annual basis by railroads who continue to engage in unreasonable practices as defined by the Board and those monies are coming out of the pockets of producers and processors such as Ag Processing and its members.

The railroad industry cannot be expected to make changes that conform to the Board's Decision voluntarily and promptly absent an incentive to do so. For one thing, as noted, the railroad industry has been averse to changes that will relieve individual shippers of excess fuel surcharge assessments, even though excesses have been clear and indefensible for years. The Board should set a prompt deadline for compliance by carriers with the Board's findings, and make it clear that carrier failure to meet that deadline will result in a favorable outlook by the Board toward complaints seeking refunds of fuel surcharges assessed in contravention of the Board's findings and guidelines.¹

Another aspect of the Board's Decision requiring amplification is the failure of the Decision to require fuel surcharge reporting and transparency for Class II and Class III railroads. The Board characterizes its proposed data reporting requirement as "so important that we are asking each Class I railroad to voluntarily provide this information while we are conducting this proceeding." Ag Processing agrees that data reporting is extremely important, and for that reason suggests that Class II and Class III railroads – but especially Class II railroads – should not be exempted from the reporting requirement. Small railroads are significant grain handlers in certain regions of the country. Ag Processing has facilities served by an affiliate of Dakota, Minnesota and Eastern Railroad, a Class II carrier. Ag Processing and its members have facilities served by Class III railroads. Ag Processing sees no valid reason why smaller railroads that elect to impose fuel surcharges and are otherwise bound by the Board's findings should not also be subject to the "important" reporting requirements of the Decision.

¹ Ag Processing is not conceding that a request for refunds based on the August 3 Decision would be improper, but is simply suggesting that the Board express its inclination to award refunds if carriers fail to institute fuel surcharge programs in full compliance with the Board's Decision by a date certain that is set by the Board.

Class II and Class III railroads similarly are not required to use the same index to measure increases in fuel costs as has been directed by the Decision for use by Class I railroads. Certainly, to the extent a smaller railroad elects to apply fuel surcharges based on a fuel cost index, it should be no more burdensome for that railroad to apply the same, uniform index as has been directed for use by Class I railroads. To further the Board's goal of limiting fuel surcharges to actual incremental fuel cost increases, *all* railroads should be held to a realistic cost index, which of necessity must exclude taxes that are not paid by railroads.

As a member of NGFA, Ag Processing has suggested that the index proposed in the Board's Decision – US No. 2 Diesel Retail Sales By All Sellers (Cents Per Gallon) – is a flawed index because, among other things, it is a retail index that includes taxes, whereas railroads do not have to pay diesel fuel taxes. The Board should not underestimate the distortive impact on fuel surcharging of employing a cost index that includes taxes not paid by railroads. State and Federal diesel fuel taxes are substantial. According to the American Petroleum Institute website, the national average for state diesel taxes was 28.8 cents per gallon in July 2006, and Federal taxes came to 24.4 cents per gallon.

One last matter requires comment. Recently, the price of West Texas crude oil fell below \$64.00 per barrel, which is the crude oil price that currently triggers the Norfolk Southern fuel surcharge program – that is, as the price of West Texas crude oil rises above \$64.00, the fuel surcharge increases. However, under the NS program, if West Texas crude oil drops below \$64.00, there is no reduction in the freight rate. The same principles are followed by other railroads, even though they have different “trigger” points. The Board should address this issue.

Respectfully submitted,

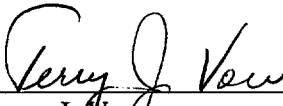
AG PROCESSING INC

By:
Terry J. Voss
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(402) 498-5579

Dated: September 29, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have, this 29th day of September, 2006, served a copy of the foregoing Comments of Ag Processing Inc on all parties of record, by first class mail, postage prepaid.



Terry J. Voss