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October 2, 2006

VIA HAND DELIVERY

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., 7th Floor
Washington, DC 20423-0001

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Office of Proceedings
OCT 2 - 2006
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Re: STB Ex Parte No. 661 – Rail Fuel Surcharges

Dear Mr. Williams:

In accordance with the Board's Decision issued August 3, 2006, in the above-referenced proceeding, enclosed for filing in the above-referenced proceeding are the original and ten copies of the "Comments of TOTAL PETROCHEMICALS, USA, INC." Also enclosed is a diskette containing the Comments.

Respectfully submitted,

Michael F. McBride

Michael F. McBride
Attorney for
TOTAL PETROCHEMICALS, USA, INC.

Enclosure

cc (w/encl.): All Parties of Record

SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 661

RAIL FUEL SURCHARGES

COMMENTS OF TOTAL PETROCHEMICALS USA, INC.

Pursuant to the Board's Decision issued August 3, 2006 in the above-referenced proceeding, TOTAL PETROCHEMICALS USA, INC. ("TPI") hereby files its comments on the Board's Decision.

Comments on Portions of the Decision

First, TPI agrees with the Board that it has the legal authority to act under its "unreasonable practice" jurisdiction, for the reasons stated in the Decision at 3-4.

Second, TPI agrees with the Board that it is unreasonable to impose a fuel surcharge as a percentage of the underlying rate, instead of some measure of the cost of fuel used on a per-car basis, as the Board concluded at 4-5. TPI disagrees with the Board, however, that it does "not have the authority, as some shippers have suggested, to order carriers to roll back charges across the board." Decision at 5 n.11. That is exactly what the Board may do, under its unreasonable-practice jurisdiction. If a carrier is engaged in an unreasonable practice, the Board has the authority, and we respectfully submit the duty, to order the carrier to cease and desist from engaging in the unreasonable practice. *E.g., Baltimore & Ohio R. Co. v. United States*, 305 U.S. 507, 524 (1951) ("The power, however, is in the Commission, whenever it is of the opinion that any practice is unjust, unreasonable, preferential or otherwise violative of the Act, to prescribe whatever practice will be just, fair and reasonable." [footnote omitted, in which the Court cited 49 U.S.C. § 15(1), the predecessor to the current 49 U.S.C. § 10704].)

Such an order does not constitute a maximum-rate order, as the Board may have implied, because the carrier may be able to charge the same rate as before, after eliminating the unreasonable practice.¹ Whatever the ultimate rate would be, higher, lower, or the same, the Board not only may, but we believe must, order a carrier to cease an unreasonable practice, and if that is being engaged in across-the-board, the remedy must be across-the-board.²

Third, the Board actually came to the appropriate conclusion in the next section of its Decision which supports the argument just made. As noted above, the Board appropriately concluded that "double-dipping," *i.e.*, charging twice for fuel by use of both an index containing fuel (such as the Board's Rail Cost Adjustment Factor), and a separate fuel surcharge on the same rate, is an unreasonable practice. Decision at 6. That being so, the Board proposed "to prohibit the use of a fuel surcharge to recover increases in fuel costs to the extent that those same increased costs are also recovered through the application of an escalator to the base rate that incorporates changes in fuel costs." *Id.* This is precisely the sort of "across-the-board" remedy that the Board is empowered to order, and TPI applauds the Board for doing so. But the same

¹ Even if it were assumed *arguendo* that the railroad charged the same total rate (with fuel surcharge) after it complied with an STB order or other requirement of law as it had charged before the STB's order, it is still important to correct the misapprehension applicable to some that the STB's authority would not permit it under those circumstances to act against the unreasonable practice without the filing of a rate complaint satisfying the STB's complex and expensive rate regulatory process. The Board may determine that the unreasonable practice was unlawful, without processing the complaint as a challenge to the reasonableness of the overall rate. In that manner, what has been unclear to some (*i.e.*, has the railroad overcharged particular shippers) could be made clear. Whether relief would be ordered for the shipper does not necessarily follow, but presumably would depend on all the facts and circumstances. If the shipper had any contractual rights, which generally require relief to be sought from a court or arbitration panel, action taken under this Board's statutory authority over tariffs may be instructive, but would not be binding.

² Among the ways that the Board could provide for railroads and shippers to solve the problem of a remedy for past overcharges, without resorting to a challenge at the STB or a complaint in court or arbitration, is the principle of set-off. There is no legal obstacle to a shipper setting off the amount it can show it has been overcharged against a current or future invoice (or invoices, if they are not large enough). In that fashion, if a railroad believes the shipper has set-off too much, it can challenge the shipper's quantification of the amount it is owed, and, if need be, commence an action to recover the amount unpaid if the railroad has a good-faith basis for so asserting. But by commenting favorably on such an informal approach (at least initially), the Board could actually facilitate a solution that most shippers and carriers could use without invoking the Board's processes or adding new cases to possibly overcrowded court dockets. Such a declaratory order would be another means within the powers of the STB to resolve the problem across-the-board.

authority can then be used to roll back increases based on improper fuel surcharges, whatever outcome that might have for the rate levels in question.

The important thing is for the Board to establish the proper approach to the problem, *i.e.*, eliminating overcharging for fuel on an individual rate and movement basis, and to provide complete relief for any such unreasonable practice.

Fourth, TPI agrees with the Board (Decision at 6) that use of the Department of Energy's Energy Information Administration's "U.S. No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon)" is a reasonably accurate measure of diesel fuel costs incurred by the railroads. While not perfect (because it reflects highway diesel costs, and railroads incur off-highway diesel costs), its correlation with the AAR fuel cost index is, as the Board noted, quite high (0.998). Moreover, there is only a one-month lag, as the Board noted (at 6).

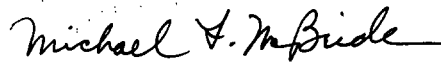
Fifth, the Board proposed reporting obligations "that would allow the Board and affected shippers to better monitor railroads' fuel surcharge practices." Decision at 6. The Board went on to say that "We believe that this is so important that we are asking each Class I railroad to voluntarily provide this information while we are conducting this proceeding." *Id.* TPI particularly applauds the Board for its observation that "Those who must bear that burden [*i.e.*, the increase in the price of fuel], whether it be the users of rail service or the members of the public who ultimately pay the costs, are entitled to understand the process of assessing those costs and apportioning them. The rate payers and the public are entitled to have that process carried out in a rational and equitable manner, and the disclosure of the information we seek is a necessary step in that process." *Id.* TPI is, in fact, such a user that pays the cost of fuel to make petrochemicals, and therefore is affected precisely in the same way as other users of rail service and of fuel.

But in another respect, TPI feels the sting of the railroads' overcharging for fuel to an even greater extent than do most other rail customers. Why? Because chemical shippers, such as TPI, pay some of the highest rates, on a revenue/variable cost or return basis, of all rail shippers. Therefore, by definition, fuel surcharges imposed on base rates as a percentage of those rates, as has been the railroads' practice to date, have cost TPI a substantial sum of money greater than they should have been required to pay.³

Conclusion

The Board is to be commended for issuing the Decision it did on August 3, 2006 in this proceeding. It should adhere to its rulings therein, except that it should provide an across-the-board remedy for past overcharges, either by simply ordering that the railroads may not retain amounts charged in excess of fuel costs, or by declaring that shippers may use set-off with the same carrier to recover past overcharges, with proof provided to the railroad. In the event of a dispute over the set-off that the railroad and shipper cannot resolve amicably, the railroad would then have the right to go to court to recover the unpaid amount(s).

Respectfully submitted,



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*Attorney for TOTAL PETROCHEMICALS
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October 2, 2006

³ TPI does not offer comments on the portion of the Board's Decision concerning exempt traffic (Decision at 7), because TPI generally does not ship exempt commodities or rely on exempt traffic, except to say that the Board should not hesitate to revoke exemptions granted in whole or in part where necessary to prevent unreasonable practices from continuing to occur.

SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 661

RAIL FUEL SURCHARGES

CERTIFICATE OF SERVICE

I hereby certify that I have served this 2nd day of October 2006, one copy of the foregoing "Comments of TOTAL PETROCHEMICALS, USA, INC." by first-class mail, postage prepaid upon all parties on the official service list.



Michael F. McBride