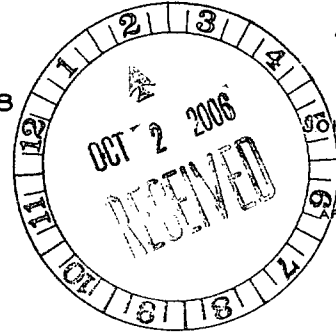


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October 2, 2006

217692

VIA HAND DELIVERY

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

Re: STB Ex Parte No. 661 – Rail Fuel Surcharges

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Public Record

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 Edison Electric Institute." Also enclosed is a diskette containing the Comments.

Respectfully submitted,

Michael F. McBride

Michael F. McBride

Attorney for Edison Electric Institute

Enclosure

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

SURFACE TRANSPORTATION BOARD

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Office of Proceedings
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Ex Parte No. 661

RAIL FUEL SURCHARGES



COMMENTS OF EDISON ELECTRIC INSTITUTE

Pursuant to the Board's Decision issued August 3, 2006 ("August 3 Decision"), in the above-referenced proceeding, Edison Electric Institute ("EEI") hereby files its comments on the Board's Decision.

Interest of EEI

EEI is the association of U.S. investor-owned electric utilities and international affiliates and associates worldwide. EEI's U.S. members serve 97 percent of all customers served by the shareholder segment of the U.S. electric industry and 71 percent of all electricity customers in the United States, and generate almost 60 percent of the electricity produced by U.S. electric generators. EEI frequently represents its U.S. members before state and federal agencies, courts, and legislators in matters of common concern, including before the STB.

EEI members' retail rates are regulated by state utility commissions in virtually every state in the nation, and their wholesale rates are regulated by the Federal Energy Regulatory Commission. Such regulation often includes mechanisms for determining the prudence of fuel procurement procedures, assessment of how well the utilities have used financial mechanisms (such as hedging mechanisms) to reduce price risk to their customers, as well as mechanisms for recovery of fuel costs. As such, EEI members have the same interest as railroads in recovering the costs of fuel. At the same time, EEI members and other electric utilities typically are allowed to recover only the cost of fuel in their rates.

General Comments on STB's August 3 Decision

In general, EEI wishes to commend the STB for its August 3 Decision as representing several steps in the direction of fairness, transparency, and resolving the issues associated with rail fuel surcharges in a comprehensive, thoughtful manner. EEI provides these Comments to assist the Board by clarifying where EEI believes the Board was correct, and where the Board should revise or alter its approach.

EEI applauds the selection of the U.S. Department of Energy's Energy Information Administration's ("EIA") "U.S. No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon) ("DOE EIA Index")," form as the basis of a uniform index for measuring fuel cost increases. EIA's work and data is widely respected throughout the energy industry and will provide a basis for fair and transparent calculations. However, now that the Board has "re-weighted" the Rail Cost Adjustment Factor ("RCAF") to accurately reflect the cost of fuel in the overall costs of the railroads¹, it may be simpler and more accurate to simply declare that the railroads may adjust rates in accordance with the increases or decreases in the RCAF without being found to have engaged in an unreasonable practice. EEI further believes that the STB is correct in determining that linkage must be established between the actual transportation movement, fuel costs, and a fuel surcharge fee, in order to demonstrate that railroads are not over-recovering for their fuel costs.

In the state-by-state review of electric industry fuel costs, regulators are very careful to ascertain that the utilities are not over charging customers. In that spirit, EEI is gratified by the STB's announcement that it would prohibit the railroads from assessing a fuel surcharge in

¹ Quarterly Rail Cost Adjustment Factor, Ex Parte No. 290 (Sub-No. 5)(2006-4) (served September 20, 2006), Appendix A, Line 2 (showing fuel now to be 16.0% of the railroads' total costs).

addition to adjusting base rates using a mechanism with a fuel component such as the STB's RCAF.

The Board should enforce its decision by requiring railroads to quote rates that do not "double-dip" for their fuel costs. Otherwise, the Board's rulings will be for naught, as railroads will continue to engage, in effect, in the very unreasonable practices that the Board has rightly determined to be unlawful.

Specific Comments on Portions of the August 3 Decision

1. EEI 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.

2. EEI 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. EEI 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 immediately. *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 would not constitute an order prescribing a maximum reasonable rate, as the Board may have implied, because the carrier is not barred from attempting to collect the former fuel surcharge revenues from a particular customer by raising its common carrier

transportation rates pursuant to applicable rules, subject to a determination of reasonableness under the Board's rate standards.² Whatever the ultimate rate would be, higher, lower, or the same, the Board not only may, but 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.³

3. The Board came to an 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 RCAF), 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 EEI applauds the Board for doing so. But the same authority can and should then be used to

² Even if a railroad elected to try and collect revenues from an unlawful surcharge prospectively by raising transportation rates, and that action resulted in the filing of a rate complaint, it is important to correct the misapprehension some may have that the STB's authority would not permit it under those circumstances to act against the unreasonable practice. The Board may determine that the unreasonable practice was unlawful for transportation that preceded the rate increase independent of the rate complaint proceeding, because there is no time bar on the Board acting to prohibit an unreasonable practice. 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.

³ 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.

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 across-the-board for any such unreasonable practice.

4. EEI 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). However, a simpler solution, rather than use a new fuel index, may be to simply use the Board's own RCAF which would eliminate the need for a separate fuel surcharge methodology. The RCAF includes the railroads' actual fuel costs (when adjusted for forecast error), especially now that it has been "re-weighted" by the STB to reflect the increased proportion of fuel in the mix of the railroads' overall costs. Use of the RCAF would also solve the problem of adjustments for different base rates which were established at different times, by using only the increase (or decrease) in the RCAF since the time of the establishment of the base rate as the appropriate change in the rate to reflect accurately all of the railroads' actual costs, including fuel.

5. 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.* EEI 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.* EEI members are, in fact, such users who pay the cost of fuel to make electricity, and therefore are affected precisely in the same way as other users of rail service and of fuel.

We note here that railroads have already informed the Board, in this proceeding, that they cannot produce much of the data that the Board ordered them to produce. We have no basis for challenging those representations, but assuming they are true, the solutions we have advocated herein would resolve the problem. The Board should either declare that rate changes that are equivalent to those that would be produced by applying the RCAF (which has data reflecting the railroads' actual fuel costs included in it) with no added fuel surcharge would not constitute an unreasonable practice, or direct that the DOE's EIA "U.S. No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon)" Index be used as a proxy for the railroads' actual costs of fuel in another escalation factor that is applied to rates (because of the railroads' inability to provide the data required by the Board). However, the former avoids implementation issues (by adjusting base rates, once established, by the quarterly RCAF changes published by the Board), whereas the latter potentially raises difficult implementation issues involving whether the DOE EIA Index is used only as part of the adjustment factor (for the fuel component of whatever adjustment mechanism is used by the railroad) and what base fuel cost is used (which could vary depending on the date of the establishment of the base rate).⁴

⁴ EEI does not offer comments on the portion of the Board's Decision concerning exempt traffic (Decision at 7), because EEI members generally do not ship exempt commodities or rely on exempt

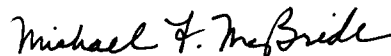
Conclusion

The Board is to be commended for issuing the Decision it did on August 3, 2006 in this proceeding. The Board should make the remedies it prescribes immediately effective. The Board should also insist that the railroads file information sufficient to demonstrate their actual fuel costs, or that they follow the substitute procedures suggested herein (use of the RCAF with no fuel surcharge or use of the DOE's EIA No. 2 Diesel Fuel Index applied only to fuel costs) in lieu of actual data.

Given the Board's finding that "double dipping" is an unreasonable practice, the Board should take further steps to assure that railroads quote rates without "double-dipping" for their actual fuel costs.

The Board 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 Edison Electric Institute

October 2, 2006

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.

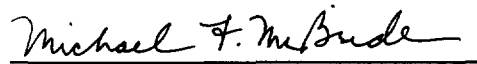
SURFACE TRANSPORTATION BOARD

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 Edison Electric Institute" by first-class mail, postage prepaid upon all parties on the official service list.


Michael F. McBride