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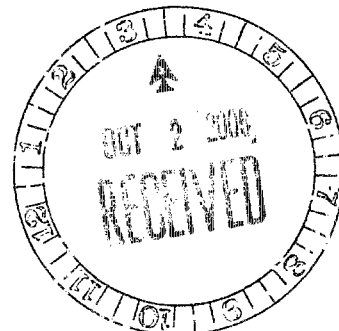
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October 2, 2006

HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001



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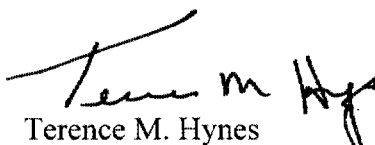
Re: Ex Parte No. 661 - Railroad Fuel Surcharges

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and twenty copies of the Comments of Canadian Pacific Railway Company. A diskette containing an electronic version of the Comments is also enclosed.

Please acknowledge receipt of the enclosed Comments for filing by date-stamping the enclosed extra copies and returning them via our messenger. If you have any questions, please contact the undersigned counsel.

Sincerely,


Terence M. Hynes

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB Ex Parte No. 661

RAIL FUEL SURCHARGES

**COMMENTS OF
CANADIAN PACIFIC RAILWAY COMPANY**

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Attorneys for Canadian Pacific Railway Company

Dated: October 2, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 661

RAIL FUEL SURCHARGES

**COMMENTS OF
CANADIAN PACIFIC RAILWAY COMPANY**

Pursuant to the Decision served in the above-captioned proceeding on August 3, 2006 the “*August 3 Decision*”), Canadian Pacific Railway Company and its U.S. subsidiaries, Soo Line Railroad Company and Delaware and Hudson Railway Company, Inc. (collectively “CPR”) submit the following Comments on the Board’s proposed requirements for rail fuel surcharges.

CPR believes that its existing fuel surcharge program is both reasonable and fair. CPR’s fuel surcharge tariffs are linked to publicly-available fuel cost indices and incorporate formulas that are simple to administer and easy for customers to understand. The different fuel surcharges applicable to CPR’s U.S. carload, intermodal and grain traffic take into account transportation characteristics that affect the amount of fuel consumed in handling each of those commodity groups. V.S. Szel at 8-10; Szel Tr. 290.¹ CPR currently collects a fuel surcharge on more than 90 percent of its U.S. business, and has implemented a policy requiring that a fuel surcharge be applied to the remaining traffic as soon as possible. Szel Tr. 284. CPR does not “double dip” – *i.e.*, it does not assess both a fuel surcharge and an RCAF-based fuel adjustment on the same traffic. In short, CPR’s current fuel surcharge program strikes a reasonable balance among the

¹ The testimony of witnesses who appeared at the hearing held on May 11, 2006 will be cited herein as “[witness name] Tr. [page].” Written submissions of parties to this proceeding will be cited as “V.S. [name] at ____.”

goals of simplicity, transparency and allocating fairly the rising cost of fuel among CPR's customers.

The Board's proposal to mandate a methodology for calculating rail fuel surcharges is improper as a matter of law and of sound transportation policy. Inflexible rules requiring that the level of fuel surcharges be tied to a particular index, and that carriers calculate the surcharge applied to particular shipments on the basis of distance (or distance and weight) alone, would impair the statutory right of carriers to establish rates for their transportation services. 49 U.S.C. § 10702. Imposing such requirements under the guise of addressing an alleged "unreasonable practice" would be inconsistent with both the D.C. Circuit's decision in *Union Pacific R. Co. v. ICC*, 867 F.2d 646 (D.C. Cir. 1989) ("*Union Pacific*") and the Board's prior pronouncements.² Moreover, the proposed rules are both unwarranted and ill-advised. CPR and other railroads compete with motor carriers and other modes of transportation in a dynamic marketplace. Rigid restrictions on the ability of railroads to adjust fuel surcharges in response to changing oil prices and market conditions would place them at a competitive disadvantage vis-à-vis other modes of transportation, whose fuel surcharges are not subject to regulation. While the Board may deem it appropriate to issue a policy statement or general guidelines regarding the type of fuel surcharge

² Both the ICC and the Board have recognized that the agency cannot use its authority over railroad "practices" to regulate the level of railroad rates. For example, in *National Grain and Feed Assn. v. Burlington Northern R.R. Co.*, 8 I.C.C.2d 421, 432 (1992) (emphasis added), *rev'd on other grounds sub nom. National Grain and Feed Assn. v. United States*, 5 F.3d 306 (8th Cir. 1993), the ICC recognized that a challenge to "the mechanism used to establish the rate levels" was, in essence, a rate reasonableness challenge. *See also DHX, Inc. v. Matson Navigation Co. and Sea-Land Service, Inc.*, STB Docket No. WCC-105, Decision served December 21, 2001, 2001 STB LEXIS 998, at *12 (2001) ("parties may not use the unreasonable practice provisions of the statute to bolster a weak rate case"); *Arizona Public Service Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, Docket No. 41185, Decision served July 21, 1997, 1997 STB LEXIS 169, *5 n.6 (Board refused to consider allegation that railroad's refusal to publish reasonable rates constituted an unreasonable practice, "as it is not different from the unreasonable rate claim").

practices it deems “reasonable,” it cannot (and should not) impose an inflexible fuel surcharge methodology in this proceeding.

I. COMMENTS ON THE BOARD’S SPECIFIC PROPOSALS

A fuel surcharge “is a separate identified component of the total rate that is charged for the transportation involved.” Ex Parte No. 661, *Rail Fuel Surcharges*, Decision served March 14, 2006 (“*March 14 Decision*”) at 2. The Board has acknowledged that it “cannot use its authority over the reasonableness of a carrier’s practices to regulate the level of a carrier’s rates.” *Id.* See *Union Pacific*. Given this limitation on its jurisdiction over carrier “practices,” the Board has indicated that “we are not proposing to limit the total amount that a carrier can charge, through a combination of base rates and surcharges, for providing rail transportation.” *August 3 Decision* at 4.

However, the Board’s proposals go well beyond providing guidance regarding the type of fuel surcharge practices that might be deemed “unreasonable,” and affirmatively prescribe a methodology for calculating rail fuel surcharges. In addition to declaring that fuel surcharges should be “directly tied to and limited to the incremental changes in that particular cost for the movements to which the surcharge is applied,” the *August 3 Decision* proposes to “require that fuel surcharges be tied to . . . those attributes of a movement that directly affect the amount of fuel consumed: either mileage alone or, preferably, weight and mileage.” *August 3 Decision* at 5 (emphasis added).³ The Board also proposes to “require all Class I railroads to use a single, uniform index [the U.S. No. 2 Diesel Retail Sales by All Sellers (cents per gallon) published by

³ The *August 3 Decision* suggests (at 5) that railroads would have “discretion to devise an alternative methodology, so long as it would have a reasonable nexus to the fuel consumption for the movement involved.” However, the decision does not define the scope of the “discretion” that carriers might have in setting their fuel surcharges.

EIA] to measure increases in fuel costs.” *August 3 Decision* at 6. Collectively, these requirements would essentially prescribe the maximum level of fuel surcharges as well as the method by which carriers must allocate rising fuel costs among their customers. Such requirements, if adopted, would usurp the carriers’ statutory right, in the first instance, to determine the level of their rates, and exceed the Board’s authority to regulate “unreasonable practices.”

A. Linkage Requirement

The Board proposes to “require that fuel surcharges be tied not to the level of the base rate, but to those attributes of a movement that directly affect the amount of fuel consumed: either mileage alone or, preferably, weight and mileage.” *August 3 Decision* at 5. For the reasons discussed above, imposing such an inflexible standard for calculating fuel surcharges constitutes “ratemaking” in violation of the principles set forth in *Union Pacific*.

Moreover, a fuel surcharge formula based solely upon the distance (or weight and distance) of a particular shipment is not likely to produce an accurate and fair allocation of fuel costs among individual shippers. A variety of factors in addition to mileage and weight determine the “fuel intensity” of particular movements. For example, the speed at which a train is operated has a substantial effect on the amount of fuel consumed in moving that train. As CPR witness Szel testified, the higher velocity required to meet intermodal service schedules results in intermodal trains consuming more fuel than comparable carload or grain trains operating over the same lines. Szel Tr. 291-292, 294-296. Likewise, trains with a higher ratio of horsepower to trailing tons (*i.e.*, those that require more motive power to meet service requirements) burn more fuel than trains with lower motive power requirements traveling over the same distance, even at the same speed. *Id.* Physical parameters such as grade, curvature, drag and resistance, and weather conditions likewise affect the amount of fuel consumed by

particular trains. The type of train service in which a shipment is handled and the amount of switching or intermediate car handling required in connection with a particular shipment can also impact the amount of fuel consumed in providing service to individual customers.⁴

The testimony of other parties supports the notion that fuel consumption can be influenced by a broad range of movement characteristics in addition to mileage and weight. UP witness Knight testified that fuel cost is a function of “weight, distance, terrain, weather conditions, equipment type and other factors.” Knight Tr. 323. John Gohmann, President of Minnesota Commercial Railway Company (“MCRC”) and of the Small Railroad Business Owners of America, likewise states that fuel cost depends upon a variety of factors including train speed, train length, grade and curvature, wind drag and weather. *See* MCRC Comments filed August 16, 2006 at 2. BNSF witness Hunt revealed that the “mileage-based” fuel surcharges applied by BNSF to certain traffic are not, in fact, based exclusively on distance, but take into account other important train and service characteristics. In explaining why BNSF’s fuel surcharge for grain traffic was higher than its surcharge on coal, Mr. Hunt indicated that those surcharges take into account not only mileage, but also (1) the fact that coal moves exclusively in unit train service, while grain does not; (2) the higher speeds (and horsepower requirements) for trains in which some grain shipments are handled; and (3) the greater amount of switching required in connection with grain traffic. *See* Hunt Tr. 262-264.

The proposed mileage/weight formula for allocating fuel surcharges ignores all of these important differences between rail shipments. Under the Board’s proposal, two shipments of equal weight moving the same distance would pay the same fuel surcharge, regardless of any

⁴ The Board’s URCS costing system recognizes these cost differences by applying an adjustment based upon the type of train service – single car, multi-car or unit train – involved in a subject movement.

differences in the type of train service provided, the speed required to meet the customer's service requirements, the terrain over which the shipments move, or the amount of switching and/or car handling required in connection with each shipment. Such a result is inconsistent with the Board's stated objective of encouraging carriers to develop fuel surcharges that are "closely linked to the increases in the portion of [a carrier's] fuel costs that is attributable to the movement to which the fuel surcharge is applied." *August 3 Decision* at 1.

The *August 3 Decision* suggests that a carrier would have "discretion" to apply an alternative surcharge methodology if it can demonstrate that the methodology has a "reasonable nexus to the fuel consumption for the movement involved." *August 3 Decision* at 5. This statement is insufficient to assure that carriers will have flexibility to consider relevant factors in addition to distance and weight in setting their fuel surcharges. Absent more explicit guidance from the Board, disputes between carriers with shippers over any fuel surcharge methodology that is not based exclusively on mileage and weight are inevitable. In order to avoid such disputes, the Board should explicitly state that, in setting fuel surcharges, railroads are permitted to consider any operating characteristics that affect fuel consumption, including (but not limited to) distance, weight, commodity and equipment type, train speed, train length, type of service provided, locomotive requirements, grade and curvature, drag and resistance, switching and car handling requirements and other service characteristics.⁵

⁵ CPR does not advocate that the Board require railroads to incorporate all of these transportation characteristics into their fuel surcharge calculations. Rather, carriers should have discretion to develop fuel surcharge formulas that take into account relevant transportation characteristics, without unduly complicating the fuel surcharge calculation.

Finally, it is possible that some shippers will prefer that existing fuel surcharge tariffs continue to apply to their traffic.⁶ As CPR demonstrates below, implementation of the proposed mileage/weight-based standard for fuel surcharges would require it to make substantial (and very expensive) changes to its pricing, rating, freight bill accounting and interline accounting systems. Shippers may likewise face the prospect of incurring significant expense to adapt their freight rate accounting systems, and train their personnel, to implement a mileage-based fuel surcharge formula. Some may prefer that railroads continue to apply the existing fuel surcharges rather than incur the time and expense required to make such changes to their systems. The Board should not prohibit carriers from continuing to apply their existing fuel surcharge tariffs in those instances where a shipper has concurred with the continued use of those tariffs.

B. “Double-Dipping” Prohibition

Testimony at the May 11, 2006 hearing raised the possibility that some shippers may be paying both a fuel surcharge and a periodic rate increase based upon an index such as the Rail Cost Adjustment Factor (“RCAF”) that includes a fuel cost component. The Board has expressed the view that “such ‘double dipping’ would . . . be an unreasonable practice.” *August 3 Decision* at 5. Accordingly, the Board proposes to “prohibit the use of a fuel surcharge to recover increases in fuel costs to the extent those same increased costs are also recovered through the application of an escalator to the base rate that incorporates changes in fuel costs.” *Id.*

⁶BNSF witness Hunt indicated that BNSF did not extend its mileage-based fuel surcharges to consumer and industrial products traffic due to customer concerns about such a change. Hunt Tr. 260. *See also* Reply of J.T. Skeuse, Reagent Chemical & Research Co., filed September 21, 2006 at 2 (BNSF mileage-based fuel surcharge “was rejected by some shippers who believed they were not ready to administer surcharges based on miles.”)

As CPR witness Szel testified, CPR does not impose a tariff fuel surcharge on traffic that is already subject to another price adjustment mechanism that includes changes in the cost of fuel. Szel Tr. 284, 286-287. Accordingly, CPR does not oppose the Board's proposal to prohibit "double dipping."

C. Appropriate Index of Fuel Cost Increases

The Board proposes to "require all Class I railroads to use a single, uniform index to measure increases in fuel costs." *August 3 Decision* at 6 (emphasis added). The index proposed by the Board is the "U.S. No. 2 Diesel Retail Sales by All Sellers (cents per gallon)" published by EIA (the "EIA Index"). *Id.*

The *August 3 Decision* does not explicitly identify the purposes for which carriers would be required to utilize the EIA Index. The Board states that the proposal is intended to "assist [it] in monitoring fuel surcharge practices." *Id.* This statement indicates that carriers would be required to use the EIA Index for purposes of preparing the proposed "Monthly Report of Fuel Cost, Consumption and Fuel Surcharge Revenues." It is less clear from the *August 3 Decision* whether the Board also intends to require carriers to incorporate the EIA Index into their fuel surcharge tariffs, so that month-to-month adjustments in fuel surcharges correspond to the increase (or decrease) in fuel costs as determined by EIA. To the extent that the Board intends to mandate use of the EIA Index in calculating monthly adjustments to fuel surcharges, this proposal impermissibly regulates the level of fuel surcharges by dictating the amount by which surcharges can be adjusted in a particular month. Moreover, because the EIA Index may not reflect a particular railroad's actual fuel cost experience, mandating use of that index could result in under recovery (or over recovery) of actual fuel expenses.

D. Proposed Reporting Requirements

The Board proposes to require all Class I railroads to submit monthly reports regarding their fuel costs, fuel consumption and fuel surcharge revenues. The specific categories of information that would be reportable include:

1. total expenditure for fuel⁷
2. total gallons of fuel consumed
3. increase/decrease in cost of fuel from prior month
4. revenue from fuel surcharges for the month
5. total revenue ton-miles (road service)
6. revenue ton-miles (road service) to which its fuel surcharge was applied
7. fuel surcharge revenue collected on interline traffic with Class II or III carriers
8. fuel surcharge revenues shared with Class II or III carriers

CPR objects to the proposed reporting requirements, for several reasons:

The proposed reports would provide little useful information to shippers. The data contemplated by the Board's proposal relate to a carrier's systemwide fuel consumption, fuel expense and fuel surcharge revenues. Such information would shed little (if any) light on the "fairness" of fuel surcharges paid by particular shippers. A carrier's surcharge tariff publications, which identify any differences in the surcharge rates applicable to different commodity groups, already provide information that is more useful to shippers.

The collection of data regarding the division of fuel surcharge revenues between Class I carriers and connecting Class II and Class III carriers would likewise serve little purpose. The allocation of freight revenues (including fuel surcharges) between interline carriers – whether on

⁷ Participants at the May 11 hearing were virtually unanimous in the view that the effects of fuel hedging strategies employed by individual carriers should not be taken into account in evaluating carriers' fuel costs. *See, e.g.,* Mack Tr. 71-72; Voss Tr. 73; Whiteside, Tr. 73; Hunt Tr. 258-259. Accordingly, the Board should clarify that the measure of "fuel costs" for purposes of the proposed regulations should exclude the effects of hedging. The effects of carrier productivity should likewise be excluded.

a “revenue divisions” basis or pursuant to a haulage agreement — is the product of private commercial agreement between those carriers. The basis upon which carriers agree to divide fuel surcharge revenues on a particular joint movement may reflect give-and-take on a variety of issues, including the allocation of other costs or capital investments, the division of the line-haul revenue for the movement and even the division of revenues on other movements. Railroads should not be required to make public information regarding their commercial arrangements with shortline carriers. Forced disclosure of such information could prejudice carriers in negotiating future haulage and divisions arrangements. In any event, it is doubtful whether information regarding the aggregate amount of fuel surcharge revenue that Class I railroads “share” with their Class II and Class III connections would shed light on the fairness of particular fuel surcharge divisions arrangements.

Moreover, it is well-established that haulage agreements are not subject to the Board’s jurisdiction.⁸ Because the Board may not regulate the economic terms of haulage arrangements between a Class I railroad and a connecting shortline carrier, it would serve no legitimate regulatory purpose to require Class I carriers to divulge information regarding the manner in which fuel surcharges (or revenues generally) are shared under such agreements. Nor is forced disclosure of information regarding the allocation of fuel surcharge revenue between Class I railroads and connecting shortlines on a “revenue divisions” basis warranted. While the Board nominally retains jurisdiction over the division of joint rates, it has not exercised that jurisdiction in the post-Staggers era — there has not been a complaint case involving revenue divisions since

⁸ See, e.g., Docket No. AB-124 (Sub.-No. 3), *Waterloo Ry. Co.—Adverse Abandonment* (Decision served May 6, 2003) (“Haulage agreements are not subject to our jurisdiction.”); Finance Docket No. 30918, *KNRECO, Inc., d/b/a Keokuk Junction Ry. Acquisition & Operation Exemption* (Decision served April 12, 1988).

1981. *See Removal of Divisions of Rev. Regs.*, STB Ex Parte No. 637 (Sub.-No. 1) (Aug. 29, 2003) (citing *Increases in Freight Rates and Charges—1973*, 365 I.C.C. 193 (1981), as last division of revenue case on record). Indeed, in 2003 the Board repealed its regulations for divisions cases on the grounds that it would be “administratively inefficient” to retain regulations that had not been used in more than twenty years. *Id.* The Board’s “strong preference for private sector solutions over regulation” counsels against any fuel surcharge regulation that might impair future divisions negotiations between Class I carriers and connecting shortlines. *See* Docket No. 42078, *Norfolk Southern Ry. Co.—Petition for Declaratory Order*, (Decision served April 29, 2003); Docket No. SSR 100, *Association of American Railroads & American Shortline and Regional Railroad Assn.—Agreement*, (Decision served December 11, 1998) (“[P]rivate sector solutions are best.”). In short, there would appear to be little, if any, regulatory or commercial justification for requiring Class I railroads to compile and report data regarding the amount of fuel surcharge revenue paid to connecting Class II and Class III carriers. Collecting data relating to matters that the Board does not regulate is the epitome of unnecessary regulation, and contravenes Congress’s express directive that the Board minimize the burden on rail carriers of developing and maintaining information in connection with STB proceedings. *See* 49 U.S.C. § 10101 (13).

Compliance with the Board’s proposed reporting requirements would be very time consuming and costly. As discussed in greater detail in Part II below, CPR does not have in place information systems that enable it to capture the data contemplated by the Board’s proposal. In order to develop that information (and to implement a mileage-based fuel surcharge program), CPR would need to make substantial changes to its pricing, rating, freight accounting

and interline accounting systems.⁹ The cost of such modifications alone would amount to millions of dollars. In addition, the ongoing process of preparing and filing monthly fuel reports would impose significant costs on CPR and other Class I carriers. The limited benefit resulting from dissemination of the requested information does not justify the substantial expense associated with the proposed monthly reporting requirement.

If the Board nevertheless decides to impose a fuel surcharge reporting obligation on Class I railroads, it should modify the proposed requirements in several respects. First, the Board should eliminate the requirement that Class I railroads report separately their fuel surcharge revenues on interline traffic involving Class II and Class III carriers, and the division of those surcharge revenues. Second, the Board should require that periodic fuel reports be filed quarterly, rather than monthly. A quarterly reporting requirement would balance the interests of shippers (and the Board) in having access to relatively current information regarding railroad fuel surcharge practices and the National Transportation Policy goal of minimizing the burden and expense on rail carriers of developing and reporting such information. *See* 49 U.S.C. § 10101 (13). Finally, as discussed in Part II, the Board must provide sufficient time for the carriers to develop the information systems necessary to capture the required data.

II. IF THE PROPOSED REQUIREMENTS ARE ADOPTED, THE BOARD MUST AFFORD CARRIERS A REASONABLE PERIOD OF TIME TO IMPLEMENT THE NEW REGULATIONS.

For the reasons discussed in Part I, the Board should not adopt regulations that would require all railroads to calculate fuel surcharges on the basis of mileage (or mileage and weight) nor should it require Class I carriers to report their fuel expense, fuel consumption and fuel

⁹ Based upon the dearth of responses to the Board's request for voluntary monthly fuel reports pending the issuance of final rules, it would appear that other railroads face similar challenges.

surcharge revenues every month. However, if the Board decides to impose such requirements, it must provide a sufficient period for CPR and other carriers to adapt their business processes and information systems to implement those regulations. A shift from a simple “percent of base freight rate” methodology for calculating fuel surcharges to a formula based upon distance, weight and (possibly) other operating characteristics would require carriers to modify their pricing, rating, freight accounting and interline accounting systems to reflect new – and more complex – methodologies for calculating fuel surcharges. Similar modifications would have to be made to the industry’s Interline Settlement System (ISS) and EDI systems. It would require months to develop and implement such system improvements.

As an initial matter, adoption of a mileage (or mileage/weight) based standard for calculating fuel surcharges would require the industry (or the STB itself) to develop a “master” database of rail mileages between points throughout North America. Absent a universally accepted standard for measuring the distance between rail-served origins and destinations, disputes between carriers and shippers (and among carriers participating in interline shipments) regarding the correct mileage to be applied to individual shipments are inevitable. The development of a master mileage database will require cooperation among all rail carriers, and could take months to accomplish. A database of agreed weights for different car and/or shipment types would also be desirable.

CPR and other railroads would also be required to make substantial changes to their pricing, rating and freight accounting systems. The automated systems that CPR uses to develop price quotations would have to be modified to apply a fuel surcharge based upon the distance that each shipment would travel (and perhaps other operating characteristics) rather than a percentage of the base rate. Accounting for weight, terrain and other movement-specific

operating characteristics in calculating the applicable fuel surcharge would add a great deal of complexity to the current pricing system. The process for developing prices for interline shipments would be even more complicated, particularly if different connecting carriers replace the currently universal “percent of base rate” formula with a variety of new methodologies. Similar modifications would have to be made to CPR’s systems for invoicing and collecting freight revenue from the shipper, as well as the ISS system used to allocate freight revenues on interline traffic. In particular, the ISS system would need to be able to take account of, and apply correctly, the specific fuel surcharge formulas adopted by each railroad (which, under current practice, would apply to any interline traffic originating on that carrier’s lines). Because CPR’s pricing and freight accounting systems are linked to other CPR internal business processes, the modified systems would need to be integrated and tested carefully to ensure that the changes mandated by the Board’s new regulations did not adversely impact other CPR information systems.

Implementing the changes contemplated by the *August 3 Decision* would be especially complicated for CPR given the large volume of cross-border traffic that it handles. The majority of the rail traffic handled by CPR in the United States moves over portions of CPR’s lines in both the United States and Canada. This traffic includes movements originating at a point in Canada and moving to a point in the United States; traffic originating at a point in the United States and moving to a point in Canada; traffic moving between points in Canada via CPR’s lines in the United States; and traffic moving between points in the United States via CPR’s lines in Canada. CPR’s United States domestic and cross-border intermodal and carload traffic are currently covered by the same fuel surcharge tariffs that govern CPR’s domestic Canadian intermodal and carload business. CPR would be required to develop and publish separate fuel

surcharge tariffs for United States domestic intermodal and carload shipments, and its pricing, freight accounting and interline accounting systems would have to be modified to take account of potentially different fuel surcharge methodologies applied to CPR's U.S. and Canadian traffic.

Developing the systems necessary to support the Board's proposed reporting requirements would be similarly complicated and burdensome. As CPR indicated in its fuel report submitted on September 20, 2006, it does not presently maintain several categories of data that it would be required to report under the Board's proposal, nor does it currently have in place information systems that would enable it to generate such information. For example, CPR does not compile segmented information relating to the amount of fuel surcharge revenue attributable to the United States and Canadian portions of its cross-border traffic. Nor does CPR measure (on a ton-mile basis) the portion of its traffic to which a fuel surcharge is applied. CPR's current information systems are not capable of isolating that information for its U.S. operations. CPR likewise does not currently have systems in place that would enable it to capture the amount of fuel surcharge revenue collected by CPR, and shared with connecting Class II or Class III railroads, in connection with interline shipments involving those carriers.

CPR estimates that the modifications to its pricing, rating, freight accounting and interline accounting systems necessitated by the Board's proposals would require at least 270 days to implement, and could cost many millions of dollars (depending upon the complexity of the final requirements).¹⁰ The required systems cannot be designed until the Board issues regulations (or guidelines) governing the calculation of fuel surcharges and the specific fuel cost,

¹⁰ The current economic boom in the Province of Alberta has resulted in a severe shortage of trained professionals in several disciplines, including information technology. As a result, the cost of obtaining the services of IT professionals would be extraordinarily high in the current environment.

fuel consumption and fuel surcharge information that carriers will be required to report to the Board on a periodic basis. In addition to designing and deploying the necessary information systems, carriers must train their employees in using the new programs. Ongoing compliance with the proposed regulations would require CPR to create several additional permanent positions. Railroads would also need to coordinate with their customers to assure that the carriers' new information systems interface smoothly with those developed by shippers in response to the new fuel surcharge rules.¹¹ Therefore, CPR requests that the Board afford carriers no less than 270 days to implement any changes mandated by the Board in this proceeding.

III. FUEL SURCHARGE REGULATIONS PROMULGATED BY THE BOARD IN THIS PROCEEDING MUST BE PROSPECTIVE ONLY.

There is a well-established presumption against retroactive application of agency rules. “[A] statutory grant of legislative rulemaking authority [to an agency] will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). Neither the provisions of ICCTA under which the Board is purporting to act nor the Administrative Procedure Act confers retroactive rulemaking authority on the Board. *See* 49 U.S.C. § 10701(a), 10702; 5 U. S. C. § 551(4). To the contrary, the APA expressly defines an agency rule as “the whole or a part of an agency statement of general or particular applicability and future effect, designed to implement, interpret, or prescribe law or policy” 5 U. S. C. § 551(4) (emphasis added).

¹¹ *See also* Comments of Roseburg Forest Products, filed September 21, 2006 at 3 (“We are concerned that the shippers and payors of freight will need time to get rating systems set up that will accurately capture how much will need to be paid in fuel surcharges.”)

The reasonableness of the level of any carrier's fuel surcharges may be determined only on a case-by-case basis under 49 U.S.C. 10704 and the Board's rate regulations. *August 3 Decision* at 5, n.11. A fuel surcharge can be found "unreasonable" only upon the filing of a complaint by a shipper, a showing that the railroad is market dominant and that the entire rate paid by the shipper (including both the base rate and the fuel surcharge) exceeds a reasonable level under the applicable rate methodology.

The *August 3 Decision* acknowledges that the Board may not adjudicate in this proceeding the reasonableness of the level of past or existing rail fuel surcharges, or "order carriers to roll back surcharges across the board." *August 3 Decision* at 5, n.11. *See id.* at 3-4. Rather, the Board "may adopt rules of general applicability for future conduct to address an unreasonable practice. . . ." *Id.* at 4, n.9 (emphasis added). Accordingly, if the Board promulgates regulations regarding the calculation of railroad fuel surcharges, its order doing so should provide that those regulations apply prospectively only.

IV. THE RECORD DOES NOT SUPPORT THE BOARD'S PROPOSAL TO REVOKE IN PART PREVIOUSLY APPROVED CLASS EXEMPTIONS.

The Board states that its concerns regarding the reasonableness of railroad fuel surcharge practices apply to those commodities that have previously been exempted from regulation pursuant to 49 U.S.C. § 10502. *August 3 Decision* at 7. Therefore, the Board proposes to revoke in part all previously granted commodity class exemptions "to the extent necessary to apply the measures outlined here to the classes of traffic identified at 49 C.F.R part 1039." *Id.* CPR strongly opposes an "across the board" revocation of all commodity exemptions for the purpose of subjecting movements of those commodities to the proposed fuel surcharge requirements.

Section 10502(d) authorizes the Board to revoke an exemption when it finds that "application in whole or in part of a provision of [Title 49] to the person, class or transportation

is necessary to carry out the transportation policy of section 10101 of this title.” 49 U.S.C. § 10502(d). However, prior STB/ICC decisions establish that an exemption should not be revoked unless the party seeking revocation affirmatively demonstrates that formal regulation is necessary to carry out the Rail Transportation Policy. The Board has consistently held that “[t]he party seeking revocation has the burden of proof, and petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted.”¹²

The record does not support the Board’s sweeping proposal to revoke in part all of its prior decisions exempting various commodities from regulation. Neither the testimony at the May 11 hearing nor the written submissions of parties to this proceeding articulate “reasonable, specific concerns” that would warrant revisiting en masse the agency’s prior exemption rulings.¹³ In particular, the record does not support revocation of the highly successful TOFC/COFC class exemption. To the contrary, Hub Group, Inc., a major intermodal shipper, strongly opposes the Board’s proposal:

¹² *Minnesota Commercial Ry.* at 35 (emphasis added). See also Finance Docket No. 34503, *Timber Rock Railroad, Inc. – Lease Exemption – The Burlington Northern and Santa Fe Ry. Co.*, (served October 7, 2004) at 2; Finance Docket No. 33326 *et al.*, *I&M Rail Link LLC – Acquisition and Operation Exemption – Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway*, 2 S.T.B. 167 (1997), *aff’d sub nom. City of Ottumwa v. STB*, 153 F.3d 879 (8th Cir. 1998) (“*I&M Rail Link*”); *American Rail Heritage, Ltd d/b/a Crab Orchard & Egyptian Railroad, et al. v. CSX Transportation, Inc.*, (served June 16, 1995) (“*Crab Orchard*”) at 3-4.

¹³ The only witness who even mentioned the possibility of revoking existing class exemptions at the May 11 hearing was a consultant (not a shipper). Deardon Tr. 380. Ms. Deardon’s remark, which was made in passing at the end of her testimony, was not supported by any facts or other evidence, nor did she specify which class exemptions (if any) ought to be revoked. In any event, a consultant lacks standing to request revocation of a class exemption.

Whereas the STB may have a role in keeping intermodal traffic flowing at gateways, it should not inject itself in how prices are structured or set in the intermodal market. We request that you abandon the proposal to revoke the intermodal exemption.

Letter from D. Yeager to Hon. Vernon Williams, dated September 19, 2006. The record is similarly devoid of evidence that would support revocation of the exemptions applicable to other specific commodities listed at 49 C.F.R. § 1039 – much less an across-the-board revocation of all commodity class exemptions.

CPR urges the Board not to adopt this proposal, or any rule or policy providing for summary revocation of class exemptions. Rather, the Board should consider any petition seeking partial revocation of a commodity class exemption on a case-by-case basis. Only if such a petition presents evidence supporting a “reasonable, specific” basis for finding that revocation is necessary to carry out the goals of the Rail Transportation Policy should the Board even consider revoking a previously approved class exemption.

V. ANY FUEL SURCHARGE REGULATIONS ADOPTED BY THE BOARD SHOULD APPLY ONLY TO TARIFF SHIPMENTS.

The Board does not have jurisdiction over transportation contracts between railroads and shippers. 49 U.S.C. § 10709(c)(1). *See* Docket No. 42095, *Kansas City Power & Light Co. v. Union Pacific R. Co.* (served July 27, 2006) (“KCP&L”) at 1. Transportation performed under a contract is not subject to any provision of ICCTA (including the “unreasonable practices” provisions of Section 10704). Indeed, the Staggers Act “expressly removed all matters and disputes arising from contracts from the ICC’s (and now the Board’s) jurisdiction.” *KCP&L* at 2.

Moreover, the Board has expressly disavowed authority to regulate terms set forth in railroad tariffs to the extent that such tariffs are incorporated by reference into a Section 10709 rail transportation contract. In Docket No. 41510, *H.B. Fuller v. Southern Pacific*

Transportation Co. (served August 22, 1997), the Board dismissed rate and unreasonable practices claims based upon tariff provisions that were incorporated by reference into a contract, stating that:

In this case, the transportation was performed under contract, even though the terms of the contract refer to the carrier's tariff. Thus, even if, as SP alleges, the referenced tariffs would have applied generally to storage and demurrage charges, the Board would not have jurisdiction over services provided under contracts incorporating those tariffs. The contract, even though it may rely on the tariff for certain terms, reflects the bargain of the parties. The fact that the parties may have chosen to incorporate tariff terms into their contract does not make transportation under the contract subject to regulation. Rather, the referenced tariff terms became contract terms for purposes of transportation performed under the contract. As such, issues regarding the breach, or precise construction of those terms will have to be resolved in an appropriate court of law.

H.B. Fuller, Decision served August 22, 1997 at 3. *See also* Docket No. 41995, *Wisconsin Central Ltd. – Petition for Declaratory Order Certain Rates and Practices of the B& O Chicago Terminal Railroad Company and CSX Transportation, Inc.* (served June 20, 2001) at 4-5; Docket No. 33582, *Cross Oil Refining & Marketing, Inc. v. Union Pac. R.R. Co.* (served Oct. 27, 1998) (“Rail contracts can incorporate tariff terms and still be outside the Board’s jurisdiction”).

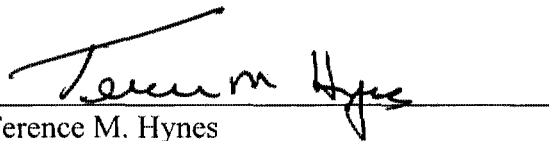
Accordingly, the Board should make clear that any regulations it promulgates in this proceeding do not apply to fuel surcharges assessed pursuant to a Section 10709 rail transportation contract, even if the subject contract incorporates by reference the railroad’s fuel surcharge tariff.

CONCLUSION

The Board’s proposal to require all railroads to adopt mileage/weight-based methodologies for calculating fuel surcharges, and to measure changes in fuel costs based upon the EIA Index, would effectively prescribe the level of railroad fuel surcharges. Both *Union*

Pacific and this agency's own prior decisions recognize that such "rate" regulation, under the guise of addressing an alleged "unreasonable practice," is not permitted. The proposed requirements would usurp the statutory right of carriers to establish rates for their transportation services, and would place railroads at a disadvantage in competing with motor carriers and other modes of transportation. The monthly fuel reporting requirement, while well-intended, is not likely to provide information that would be particularly useful to shippers in evaluating the fairness of fuel surcharges. At the same time, rail carriers would incur substantial costs to develop the information systems required to comply with the proposed regulations, to train personnel to utilize those systems and to implement the proposed rules on an ongoing basis. CPR respectfully submits that the Board ought to reconsider the need for, and desirability of, regulations that dictate the manner in which rail carriers may respond in the marketplace to the rising cost of fuel.

Respectfully submitted,



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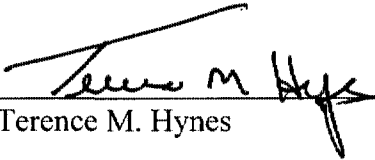
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Dated: October 2, 2006

CERTIFICATE OF SERVICE

I hereby certify this 2nd day of October 2006 that I have served all parties of record in this proceeding by first class mail, postage prepaid.


Terence M. Hynes