

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Ex Parte No. 661

RAIL FUEL SURCHARGES

**COMMENTS OF
U.S. CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.**

INTRODUCTION

These Comments on the practices of railroads involving the application of fuel surcharges as a percentage of a base rate are offered by the U.S. Clay Producers Traffic Association, Inc. ("Clay Producers" or "Association"). Earlier this year, Clay Producers submitted a written statement for consideration during the public hearings leading up the Board's August 3, 2006 decision. Clay Producers applaud the Board for its recognition that it is an unreasonable practice for a railroad to impose a fuel surcharge which fails to represent the actual, or approximate, increased cost of fuel for a specific movement to which it is applied, regardless of contract, common or exempt transportation classification of the involved traffic.

IDENTITY OF CLAY PRODUCERS

Clay Producers is a non-profit association of companies involved in the mining and processing of a mineral resource generically called "clay". Members of the Association ship clay in all modes of transportation, but primarily by rail, from Georgia, South Carolina and Tennessee

origins to numerous industries throughout the United States, Canada, Mexico, and the world. The Association was formed over 50 years ago to provide information to members concerning the transportation of clay, and also as a forum for discussion of developments and information concerning regulation by governing authorities affecting the transportation of clay. The Association has also historically represented the interests of its members in transportation matters before regulatory agencies, such as this Board. The members of the Clay Producers, parties to these Comments, represent approximately 95% of the industry in terms of total clay shipments and move approximately 11 million tons of clay annually from a relatively concise geographic area in Georgia, South Carolina and Tennessee. The traffic moves by mainly by rail and is captive to the railroads due to the bulk nature of the commodity originating from such a small geographic area. Clay is a regulated commodity and although much of it is transported by rail pursuant to exempt rail transportation contracts. However, due to the true nature of shipper/carrier bargaining seen in the now prevalent uniform publically offered rail transportation contracts in use today, even exempt transportation requires regulatory oversight to ensure that railroads engage in fair and reasonable business practices.

**A FUEL SURCHARGE WHICH DOES NOT REFLECT THE ACTUAL
INCREASED COSTS ASSOCIATED WITH A RATED MOVEMENT
AMOUNTS TO MISREPRESENTATION AND AS SUCH IS AN
UNREASONABLE PRACTICE**

Clay Producers agree with the Board's findings of unreasonableness reflected in the August 3, 2006 Decision. When a charge is labeled as a "fuel surcharge" and the rail industry describes the rationale for the charge as arising solely due to the increased cost of fuel, shippers are entitled to assume that the charge is not a disguised rate increase. Across the rail industry,

fuel surcharges have been set forth in tariffs, contracts and circulars. While the narrative explanations defining the charges vary, the common factor is that these charges are labeled as "fuel surcharges", a term which carries a natural implication that the charge bears a reasonably close relation to the increased costs associated with the service provided. However, as has become apparent to many shippers as the result of this proceeding, percentage-of-revenue based fuel surcharges do not accurately reflect the increased fuel costs associated with their movements and the labeling of these charges as "fuel surcharges" is a form of misrepresentation.

While the Association has not commissioned an expert study of the degree to which the recovery of additional fuel costs is exaggerated in all of the various fuel surcharge provisions, nevertheless, there is some indication from many of its members that the degree of exaggeration is extreme. These observations are from sophisticated high volume rail shippers who are familiar with rail costing software tools widely available to the transportation community but who only became aware of the true nature of windfall profits being generated from fuel surcharges after the publicity generated by the opening of this procedure. One member pointed out that the fuel surcharges seen on an illustrative movement was three times the total fuel component and that when just fuel cost increases were isolated by the software, the actual increase fuel cost was exaggerated in the fuel surcharges by a factor of ten (10).

STB IS TO BE COMMENDED IN RECOGNIZING THAT IT HAS JURISDICTION TO REDRESS WIDESPREAD UNREASONABLE PRACTICES OF RAILROADS APPLIED TO BOTH EXEMPT AND NON-EXEMPT RAIL TRANSPORTATION.

In its August 3rd Decision, the Board properly recognized that it had jurisdiction to redress unreasonable railroad practices even where applied in the context of exempt rail transportation

contracts. One could argue that when shippers voluntarily ship under an exempt rail transportation contract, they waive all statutory protections of the ICC Act. However, a more enlightened view recognizes that contract shippers still have the right to demand common carrier transportation and that a sophisticated shipper will still analyze the merits of contract versus common carrier rail transportation. When a railroad misrepresents its costs, it distorts this analysis and thereby interferes with a shipper's rights to choose common carrier service.¹ In this light, a practice associated with a rail contract could be seen as an element in a finding that the railroad failed to honor its common carrier obligations.

There is a degree of detrimental reliance suffered by shippers who reasonably assume that a charge labeled in tariff or contract as price escalator reflects actual cost increases. For instance, a shipper with the knowledge that a rate at one point in time may increase due to anticipated increases in the price of fuel may factor that knowledge into quoting a delivered price of its commodity based on the shipper's estimate that fuel costs are projected to rise 10 percent. However, even though the shipper may have accurately researched the cost elements of the rate and correctly predicted the future cost of fuel, its expectations would lead to a bad business action and financial loss if the railroad had exaggerated the impact in its fuel surcharge.

¹ In its Decision (Footnote 9), in defending its broad jurisdiction over the reasonableness of all rail traffic, the Board cites authority confirming its jurisdiction to adopt rules of general applicability for future conduct. However, aside from noting that shipper-specific remedies are limited to formal complaint proceedings, the Board stopped short of completely outlining the jurisdictional issues and remedies which would arise in such a proceeding. For instance, the Board should have commented on remedies available to a shipper served under a rail transportation contract who is harmed by fuel surcharge based misrepresentation. In such a situation, would any shipper-specific remedies be available for the agency or from civil courts?

Clay Producers applaud the Board's practical recognition that railroads and shippers should be able to discuss private-sector resolutions to practices alleged to be in violation of the Interstate Commerce Commission Termination Act. The problems caused by programs and policies which have gone astray could be more promptly and efficiently resolved if railroads more freely recognized the merits of jointly discussing problems with the shipper community. For instance, in this case, it can be credibly argued that labeling an increase as a fuel surcharge, when there is no correlation between the freight rate and fuel usage, is an unreasonable practice susceptible of causing great financial harm to the shipping community and constitutes a violation under 49 U.S.C. § 10701(2). Although the rail-shipper discussions of the subject stalled prior to the Board's opening of this proceeding, private-sector discussion and solutions to alleged unreasonable practices should be encouraged by the Board even in situations where no formal proceeding has been opened. Clay Producers encourage the Board to find that where a shipper or a group of shippers brings an alleged unreasonable practice to the attention of a railroad or a group of railroads, that the parties act consistent with their rights and duties under the Act when they explore private-sector solutions.

The scope of the Board's action covers not only common carrier rail movements, but also movements exempt from economic regulation by virtue of rail transportation contracts and commodity exemptions. Clay Producers agree that the Board has properly exercised its jurisdiction over exempt movements and urges the Board to further find that anti-trust protections apply not only to matters which are presently subject to a STB proceeding, but also apply to alleged unreasonable practices which have the potential of becoming subject to STB proceedings. While the fuel surcharge controversy affects all railroads and all shippers, Clay

Producers know there are also smaller disputes over perceived unreasonable practices which only affect small groups of shippers and carriers. The unjustified fear of anti-trust violations should not be cited by railroads as a shield to avoid discussions on private-sector solutions.

CONCLUSION

For all of the above reasons, Clay Producers urge the Board to reaffirm its finding that that continued use of percentage-of-revenue based fuel surcharges constitutes an unreasonable practice in violation of 49 U.S.C. § 10702(2). Clay Producers further urge the Board to find that:

1. where a shipper or a group of shippers brings an alleged unreasonable practice to the attention of a railroad or a group of railroads, that the parties act consistent with their rights and duties under the Act when they explore private-sector solutions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments is served on all parties of record, as they appear on the board's web published service list, by first class mail, postage pre-paid, in accordance with the Rules of Practice.

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