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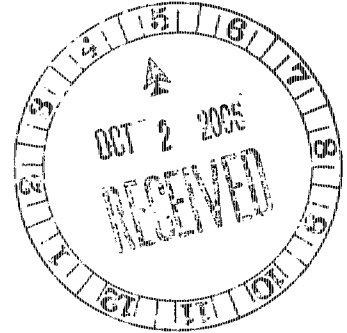
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October 2, 2006

Via HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423

217709



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

Dear Secretary Williams:

Enclosed for filing are the original and twenty copies of the Comments of BNSF Railway Company ("BNSF") submitted in response to the Board's August 3, 2006 decision in the above captioned matter.

Please date stamp the extra copy of this letter and return it with our messenger.

Sincerely,

A handwritten signature in black ink, appearing to read "Samuel M. Sipe, Jr." with a large, stylized flourish at the end.

Samuel M. Sipe, Jr.
Counsel for BNSF Railway Company

Enclosures

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Public Record

217709



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB EX PARTE NO. 661

RAIL FUEL SURCHARGES

COMMENTS OF BNSF RAILWAY COMPANY

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October 2, 2006

ATTORNEYS FOR
BNSF RAILWAY COMPANY

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE No. 661

RAIL FUEL SURCHARGES

COMMENTS OF BNSF RAILWAY COMPANY

BNSF Railway Company (“BNSF”) submits these comments in response to the August 3, 2006 decision of the Surface Transportation Board (the “Board”) in Ex Parte No. 661 regarding rail fuel surcharges (the “Decision”). In this filing, BNSF will offer the Board comments regarding BNSF’s current commercial fuel surcharge program and will also comment upon the Board’s various proposals and the nature of its authority to regulate fuel surcharges. BNSF appreciates that the Board has provided the opportunity to address these issues and shipper concerns, and supports the direction of the proposals to provide the Board and shippers more clarity and information concerning fuel surcharge methodologies.

I. BNSF’S COMMERCIAL APPROACH TO FUEL SURCHARGES

A. Background

At the outset, BNSF believes it is critically important to put into context the reasons why fuel surcharges have been necessary. Even though freight shipped by rail is the most fuel efficient mode of surface transportation, fuel is an absolutely essential cost component of the freight rail transportation system – it is needed to run the locomotives that pull trainloads of rail shipments, from consumer goods, to coal and grain. Simply put, there can be no modern freight railroad transportation without diesel fuel at this time. As the Board is aware, in recent years

unforeseen world events have drastically increased the absolute cost and price volatility of crude oil, at the same time as the cost of refining have risen significantly, all leading by necessity, to increases in the price and volatility in the price of diesel fuel. The price increases and price volatility of crude oil over the past few years follow a long period of stability for crude oil and diesel fuel prices. The cost of fuel for BNSF has increased 144% as an operating expense between 2001 and 2005, in comparison to an increase in all other costs of 25%.

Fuel surcharges are an accepted transportation industry method for recovering unanticipated changes in the cost of diesel fuel. These surcharges are levied by railroads, trucking companies, airlines and ocean shipping lines, all of which face the same challenge – ensuring that their freight transportation charges properly reflect the changing commodity price of diesel fuel. During the long period when fuel costs were stable, fuel surcharges were not necessary. When diesel fuel prices began to increase rapidly and experience volatile changes, BNSF needed to impose a surcharge to offset unanticipated increases in fuel costs. Since it began in 2001, the goal of BNSF's fuel surcharge has been to ensure that BNSF is compensated for increases in the cost that were not embedded in the transportation rate offered to the customer. BNSF never intended that fuel surcharges be sources of additional operating income for the railroad. Five years later, BNSF is still not collecting fuel surcharges on all of its traffic or fully recovering increased unhedged fuel costs.

As the Board is aware, BNSF, like other transportation companies, initially imposed fuel surcharges that were calculated by determining the increase in fuel costs over a baseline level, and assessed a fuel surcharge as a percent of the overall freight rate. The surcharge percentage is correlated to the cost of fuel in relation to the baseline, or strike price level. When diesel fuel

prices increase, the surcharge increases and when diesel fuel prices fall, the amount of the surcharge falls.

B. BNSF's Mileage-Based Fuel Surcharge

BNSF has an overriding commitment to satisfy the concerns of its customers, and for some time BNSF had been aware of many customers' concerns with fuel surcharges that are based upon a percent of the freight rate. Many customers complained that because rail rates are demand-based, fuel surcharges based on a percent of the rate may not be directly correlated to the additional cost of fuel for differentially priced movements. Sharing a concern expressed by the Board, BNSF began exploring alternatives to the percent of the rate methodology. After a great deal of discussion with its customers, as well as internal analyses, BNSF determined that altering its fuel surcharge methodology where practical was appropriate and responsive to customer concerns, and was in both BNSF's and its customer's commercial interests. In April, 2005, BNSF announced that it was adopting a mileage and fuel-usage based fuel surcharge program beginning in January of 2006.

BNSF realized when it decided to adopt its mileage and fuel-usage based fuel surcharge program that it would require several months to implement this approach. Several BNSF internal information systems and processes needed to be altered, as well as comparable systems for BNSF's customers. All of these changes were time consuming and expensive. BNSF is pleased that the changes were made relatively smoothly, and the new surcharge methodology was implemented for coal and agricultural movements at the beginning of 2006. In the fourth quarter of 2005, it was decided not to proceed with implementing the mileage-based surcharge for industrial and consumer customers, largely because a majority of those customers expressed the desire to remain on the percentage-based system due in part to the required administrative and IT systems changes.

In its Decision, the Board asked railroads to adopt alternative fuel surcharges that bear a closer relationship to fuel used and noted that BNSF had been commended by several shippers for adopting its new mileage and fuel-usage surcharge program. BNSF believes that its mileage and fuel-usage based surcharge satisfies the concerns expressed in the Board's Decision.

C. Ongoing Efforts by BNSF to Refine its Fuel Surcharges

BNSF believes, based on nine months of experience with its mileage and fuel-usage based fuel surcharge, that this type of surcharge makes the best commercial sense for its customers and for the railroad. Accordingly, in light of the concerns expressed by the Board in its Decision about railroad fuel surcharges based on a percent of the freight rate, BNSF would like to take this opportunity to outline its goals with respect to its fuel surcharge programs.

First, as previously addressed at the Board's hearing last May on fuel surcharges, BNSF intends to expand the use of its mileage and usage based fuel surcharge to other business units and customers on a schedule and in the manner that makes the most business and commercial sense. On BNSF's website, it has informed customers that it is considering expanding the mileage and usage based fuel surcharge, but would not do so without 90 days written notice. No implementation date has been set for such changes.

BNSF continues to analyze the methodology by which it calculates the mileage and usage based fuel surcharge. BNSF's goal is to collect fuel surcharges no higher than the additional cost of fuel, reflecting the operational requirements of each business unit. It must be realized, however, that rail movements can be quite complex, with many factors (both planned and unplanned) affecting ultimate fuel usage, and there is a practical limit on how precisely BNSF can measure fuel usage on its traffic. However, BNSF remains committed to the general principle that customers should not pay more in fuel surcharges than the additional cost of the fuel for a given category of rail traffic.

Third, many shippers have expressed to BNSF and to the Board a concern that railroads are “double dipping,” in other words, collecting increased rates from shippers for fuel from fuel surcharges and also from rate adjustment provisions that automatically increase the underlying rail rates using an index that has a fuel cost component, such as the Rail Cost Adjustment Factor (“RCAF”). BNSF is committed to recovering its increased costs of fuel through fuel surcharges and not to over-collect. To this end, BNSF has used indices, since they have become available, that do not include a fuel component in its contracts that are subject to fuel surcharges. BNSF has endeavored to avoid any “double dipping” in the past and plans to continue such efforts in the future.

Fourth, BNSF is prepared to voluntarily use the fuel cost index, the Energy Information Association’s U.S. No. 2 Diesel Retail Sales by All Sellers, suggested by the Board as its fuel cost index for measuring surcharge levels, as long as this index has a high correlation to the diesel fuel consumed by BNSF. While BNSF is prepared to voluntarily use the measure suggested by the Board, BNSF does not believe it is appropriate for the Board to mandate any particular fuel cost index.

Fifth, BNSF intends to comply with the Board’s request to provide certain information regarding its fuel use and costs as soon as BNSF can reasonably compile and forward the information to the Board. BNSF believes that much of the customer community’s concerns over fuel surcharges stem from misunderstandings and a lack of available data; the Board’s request for additional data to make BNSF’s fuel usage and surcharges more transparent will hopefully address some of these concerns. Since BNSF seeks only to recover its increased costs in fuel, BNSF believes that greater information and clarity will benefit the entire customer community.

In the discussion of legal issues that follows, BNSF offers comments on the Board's reporting requests that are intended to make reporting as useful as possible.

Finally, BNSF is aware that many shortline carriers are concerned that they are not receiving a portion of fuel surcharges collected by a connecting trunkline carrier. This is a complex issue, since in our case the financial relationship between BNSF and individual shortline partners is governed by specific, often longstanding contracts, which in many instances contain provisions that call for fixed payments per carload with their own escalators. However, BNSF is committed to working cooperatively with its shortline partners and will continue to work with its shortline partners to achieve mutually agreeable commercial solutions in these relationships, where possible.

D. Summary

BNSF recognizes the concerns of shippers regarding railroad fuel surcharges, and as explained, BNSF has been working to address these concerns since the surcharge was instituted. BNSF has voluntarily altered its fuel surcharge methodology for many customers, seeks to apply its new surcharge to additional customers and business units over time, and continues to review it to ensure that it meets BNSF's and its customers commercial and transportation needs. Accordingly, BNSF stands ready to work with its customers and the Board in the future to accomplish the goals described above.

II. LEGAL DISCUSSION

A. The Board Lacks Sufficient Authority to Regulate Fuel Surcharges in the Manners Proposed in its August 3, 2006 Decision

1. The Legal Effect of the Board's Decision Is Ambiguous and Does Not Constitute Valid Rulemaking

While BNSF intends to voluntarily respond to the Board's initiatives, the Decision and the Board's subsequent "Notice of Proposed Requirements Regarding Rail Fuel Surcharges"

published on August 10, 2006 in the Federal Register (“Notice”) are technically deficient because they fail to sufficiently apprise regulated entities of the nature and legal effect of these proposed regulatory changes to fuel surcharges. While the Board has sought public comment, the nature of what interested parties are commenting upon is unclear. It is difficult for a party to articulate meaningful commentary where the legal impact of the measures proposed is indeterminate. Regulated entities should not be required to speculate on the legal effect of a regulatory agency’s decision.

The Decision and Notice appear to indicate that the Board is proposing binding and new regulatory obligations, yet the Board stopped short of issuing a formal Notice of Proposed Rulemaking. The Notice sought comments on the proposed measures in the Federal Register, consistent with the informal rulemaking requirements outlined in the Administrative Procedure Act (“APA”). *See* 5 U.S.C. § 553(b). The Decision states (albeit in a footnote) that the Board may set “rules of general applicability” (Decision at 4 n.9) and both the Decision and Notice use mandatory and definitive language in describing the measures, *e.g.*, carriers “would be prohibited from” and “would be required to” (Decision at 1; Notice at 1-2). *See General Elec. Co. v. E.P.A.*, 290 F.3d 377, 383-4 (D.C. Cir. 2002).

The Decision and Notice do not state that the Board is engaging in legislative rulemaking. The Notice, entitled “Notice of proposed requirements regarding rail fuel surcharges” refers to “proposed measures” and “proposals” and only uses the term “proposed rules” in a clause certifying that the agency action would not have a significant impact on small entities. Notice at 1-2. Finally, the Notice does not identify revisions that would need to be made to the Code of Federal Regulations to implement the proposals. *See Telecommunications Research and Action Center v. F.C.C.*, 800 F.2d 1181, 1186 (D.C. Cir. 1986) (“[A]s has been

observed, “[t]he real dividing line between regulations and general statements of policy is publication in the Code of Federal Regulations.””). The Decision could conceivably be construed as a legislative rule, an interpretive rule, a declaratory order, or a general statement of policy, each with different legal consequences.

If the Board did intend to engage in legislative rulemaking, then the Notice does not satisfy Section 553(b) of the APA, which specifies that a Federal Register Notice must clearly state “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(1)-(3); 49 C.F.R. 1110.3(b). Because the Decision or Notice do not specify the very nature of the proceeding, they do not satisfy the procedural requirements or the purposes of the APA for binding legislative rules. See National Mining Assoc. v. Mine Safety and Health Admin., 116 F.3d 520, 531 (D.C. Cir. 1997); Citibank v. F.D.I.C., 836 F. Supp. 3, 7 (D.C. Cir. 1993); National Tour Brokers Assoc. v. United States, 591 F.2d 896 (D.C. Cir. 1978). Furthermore, the Notice does not even mention the Board’s proposal to partially revoke exemptions on traffic identified in 49 C.F.R. Part 1039, as is required by the APA.

2. The Board Cannot Consider Whether Specific Actions Constitute Unreasonable Practices Except Upon Complaint

The Decision found that two specific railroad actions are or would be unreasonable practices. The first is computing fuel surcharges as a percentage of existing rates and the second is the aforementioned “double dipping.” The Decision purports to prohibit railroads from engaging in either action.

Under the Interstate Commerce Act, the Board only has statutory authority to declare an action an unreasonable practice if it is acting on a specific complaint. Section 10702 requires railroads to establish reasonable “rules and practices” and Section 10704(a) vests the Board with

authority to determine whether a challenged practice is reasonable, but Section 10704(b) states that “[t]he Board may begin a proceeding under this section only on complaint.” There has been no complaint filed; Ex Parte 661 is a proceeding in which all interested parties have been invited to comment. There is also no evidentiary record. Thus, the Board has no statutory authority to find certain railroad actions to be unreasonable practices or to prohibit them in this proceeding. It could only do so in response to a specific complaint upon a full evidentiary record.

The Board acknowledges in its Decision that it does not have the power to award a remedy absent a complaint but asserts in footnote 9 that “[w]e may adopt rules of general applicability for future conduct to address an unreasonable practice, even though our authority to award shipper-specific remedies is limited to a formal complaint proceeding.”¹ This distinction suggests that the Board may regulate unreasonable practices on its own initiative so long as it does not award shipper-specific remedies. Congress, however specifically sought to limit such general steps by limiting the Board’s unreasonable practice jurisdiction to adjudicating specific complaints.

Furthermore, the courts have recognized that the ICC, now the Board, must be able to point to a specific delegation of authority in support of its rules and regulations in order to

¹ Decision at 4 n.9 (citing Mr. Sprout, Inc. v. United States, 8 F.3d 118, 128-129 (3d Cir. 1993) as analogous support). It should be noted that Mr. Sprout is not analogous to this proceeding. In that case, the ICC initially determined that its unreasonable practice jurisdiction did not extend to freight inspections, which the petitioners alleged resulted in fraudulent inspection reports. The court disagreed, concluding that inspection processes fit within the ICC’s longstanding interpretation of its jurisdiction to regulate the processing of loss and damage claims. The court also found that the ICC failed to adequately explain its departure from precedent and remanded the case to the ICC to determine whether the inspection reports were fraudulent. This case exhibits that the Board has the authority to issues rules and regulations regarding the *processing* of loss and damage claims, a subject that the Board had previously regulated. It does not suggest that the Board has the authority to require or prohibit particular railroad actions with respect to those loss and damage claims or, by analogy, with respect to fuel surcharges.

regulate in a particular area.² The Interstate Commerce Act, however, does not contain any specific statutory provision governing fuel surcharges, fuel recovery programs or other railroad actions relating to compensation for the costs of fuel.

As a final note, BNSF believes the intent of Congress has been to deregulate the railroad industry, and the Board should only intervene in railroad matters in the specific areas where Congress authorized regulation by law. The Board's approach in the Decision, followed to its logical extreme, would allow the Board (on its own initiative) to regulate virtually any commercial decision by any railroad by declaring such action an unreasonable practice.

B. A Fuel Surcharge Is Part of a Rate and Cannot Be Regulated as a Practice

Section 10701 of Title 49 authorizes the Board to regulate rates established by rail carriers only in the context of rate reasonableness proceedings, and only after the complainant has shown that the railroad is market dominant. The Board acknowledged in its Decision that a fuel surcharge is a portion of the total rate charged for rail transportation, and that the D.C. Circuit has previously struck down an ICC attempt to regulate a rate by calling it an unreasonable practice. Decision at 3-4 (discussing Union Pacific R.R. v. I.C.C., 867 F.2d 646 (D.C. Cir. 1989)). The Board also recognized this limitation in the March 14, 2006 Hearing Notice for Ex Parte No. 661 (the "Hearing Notice"). Nevertheless, the Board impermissibly

² See, e.g., Central Forwarding v. I.C.C., 698 F.2d 1266 (5th Cir. 1983). In Central Forwarding, the ICC adopted a mileage-based fuel surcharge program for motor carriers and required that licensed motor carriers who collected the surcharges compensate owner-operators for fuel costs actually incurred using a formula devised by the Commission. Modification of Motor Carrier Fuel Surcharge Program, Ex Parte No. 311 (Sub-No. 4), 365 I.C.C. 311 (1981). On review, the appellate court struck down the pass-through portion of the new program in which motor carriers were required to compensate owner-operators, finding that the ICC did not have authority to issue the rules. Specifically, the court found, among other things, that the ICC had no statutory authority to issue the pass-through provisions because it did not have authority to regulate compensation to owner-operators. The court did not strike down aspects of the fuel surcharge program that were authorized by existing statutory provisions.

attempts to regulate rail fuel surcharges under its unreasonable practices authority rather than treating them as part of the overall freight rate.

Contrary to the Board's reasoning, the commercial reality is that a fuel surcharge is part of the total rate charged for transportation and does not constitute a practice. In Mr. Sprout, the court upheld the ICC's ruling that a surcharge to cover litigation expenses could not be challenged as an unreasonable practice. 8 F.3d at 128. In another case involving light density line surcharges, the Board found that a "surcharge" is by definition part of the line-haul rate. Parrish & Heimbecker, Inc. – Petition for Declaratory Order, STB Docket No. 42031 (served May 25, 2001), 2001 STB LEXIS 508, *6, n.4 (citation omitted). And, as acknowledged in both the Decision and Hearing Notice, the Union Pacific court struck down the ICC's attempt to regulate a rate as an unreasonable practice when the focus of the ICC's inquiry was on the rate itself. 867 F.2d at 649.

The Board also discussed its concern that the railroads apply what is labeled a fuel surcharge when the surcharge "is not limited to recouping increased fuel costs that are not reflected in the base rate." Decision at 4. If it is this labeling practice that makes the fuel surcharge unreasonable, then a railroad could simply change the name of the surcharge and it would no longer be engaging in an unreasonable practice. The surcharge would then have to be challenged in a rate reasonableness proceeding as part of the total rate. Congress could not have intended to allow the Board to have jurisdiction over an element of a rate as a result of the title given to it by the railroad. Indeed, in order for the Board to reach a conclusion that a percent of rate computation is an unreasonable practice, the Board has to first make an analysis of base

rates and conclude that they are not entirely cost-based.³ This kind of rate analysis is not appropriate in the context of an unreasonable practice determination, as the decision in Union Pacific suggests.

C. Partial Revocation of Exemption

1. The Board Cannot Impose Fuel Surcharge Measures On Exempt Traffic Without First Meeting the Statutory and Agency Standards for Partial Revocation of the Class Exemptions

In its Decision, the Board has taken the extraordinary step of extending its proposed fuel surcharge measures to all classes of exempt traffic by declaring all class exemptions “partially revoke[d]” to the “extent necessary to apply the measures outlined here....” Decision at 7. Even if the Board had the authority to find that fuel surcharges on regulated traffic are unreasonable practices, this unprecedented, industry-wide partial revocation does not meet the substantive and procedural requirements for determining whether reregulation of exempted traffic is necessary and appropriate.

First, the Board has not complied with the established standards for revocation of a class exemption. The Interstate Commerce Act sets a higher standard for the reregulation of exempted traffic than for the initial deregulation of that traffic and requires an examination of whether the revocation is required by the Rail Transportation Policy set forth in 49 U.S.C. § 10101 (“RTP”). In the Decision, however, the Board has applied a *lower* (or *no*) standard for reregulation by simply pronouncing the class exemptions partially revoked.

The legal standards for revoking a class exemption were enunciated by the ICC in Rail General Exemption Authority – Miscellaneous Agricultural Commodities – Petition of G&T

³ Decision at 4. The Board glosses over the fact that this may not be true of all rail traffic.

I.C.C.2d 674, 682 (1992):

Congress has directed [the agency] to exempt rail service whenever regulation is not necessary to protect against abuse of market power. Therefore, the first thing we look at in assessing a petition to revoke an exemption is whether the carrier possesses substantial market power. If it does not, then there is generally no basis for revoking an exemption. If it does, then we focus on whether regulation is necessary to protect against carrier abuse of shippers as a result of such market power. Finally, in assessing whether regulation is necessary or appropriate, we address whether regulation or exemption would, on balance, better advance the objectives of the [RTP and the interest of the shipping public overall.

The Commission further emphasized that because “a revocation petition focuses on traffic that has been previously exempted from [] regulation on the basis of [the] agency’s conclusion that the marketplace itself is sufficiently competitive so as not to require continued government regulation[,] . . . the party seeking revocation has a burden of showing that [the agency’s] prior findings supporting the initial exemption were clearly wrong, or that changed circumstances require [the agency] to revisit them.” Id. at 677.

The revocation of the exemption in the Decision does not meet that burden. The Board has not assessed the railroads’ market power or shown any abuse resulting from such power with respect to exempt shippers. Instead the Board attempts to justify its partial revocation of the class exemptions by asserting that its proposal advances three provisions of the RTP – Paragraph (9) (to encourage honest and efficient management of railroads); Paragraph (13) (to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information), and Paragraph (14) (to encourage and promote energy conservation). Decision at 7. But finding that three objectives of the RTP could be served by reregulation is not sufficient analysis. “[A]

slightly adverse impact on one component of the NRTP does not necessarily indicate that reregulation is appropriate. Such a finding would have to be balanced against all of the other relevant NRTP factors, to determine whether revocation and reregulation are necessary . . . An element of this assessment may be the effect of the exemption (and potential revocation) on the rail industry and the shipping public overall.” G&T, 8 I.C.C.2d at 677.

In the proceedings establishing the class exemptions set out in 49 C.F.R. Part 1039, the ICC found that the railroads’ market share with respect to the exempted commodities was not sufficient to give them market power, that the commodities’ markets were highly competitive with market forces sufficient to protect shippers from abuses of market power, and that the exemptions would further the objectives of the RTP. The RTP provisions most commonly relied upon by the agency in finding that regulation was not necessary to protect shippers from abuse of market power were Paragraphs 1 through 5. Paragraph 9 (formerly 10) was also frequently cited in the context of “encourag[ing] honest and efficient rail management by enabling management to respond more quickly to changing market conditions.” Rail General Exemption Authority – Exemption of Grease or Inedible Tallow, Etc., Ex Parte No. 346 (Sub-No. 31), 10 I.C.C.2d 453, 459 (1994).

Even if applying the proposed fuel surcharge measures to some classes of exempt traffic would further the objectives of Paragraphs 9, 13 and 14⁴ of the RTP, that does not satisfy the requirements for revocation. An exemption does not have to advance all of the sometimes conflicting objectives of the RTP. The proper analysis is whether, on balance, the objectives of the RTP (and particularly those upon which the exemption was granted) are better advanced

⁴ In a proceeding where the ICC cited the RTP goal for energy conservation, it did not do so in the context used by the Board here, but rather with respect to reducing truck traffic. Rail General Exemption Authority -- Exemption Of Grease Or Inedible Tallow, Etc., Ex Parte No. 346 (Sub-No. 31), 10 I.C.C. 2d 453, 459 (1994).

through exemption or revocation for a given traffic class. The Board has not undertaken such an analysis and therefore has not performed the requisite balancing of RTP objectives.

Second, the Board cannot revoke the class exemptions with respect to fuel surcharges unless the revocation is based on substantial evidence on the record. In the Decision, the Board stated that its concerns about the reasonableness of the carriers' fuel surcharge programs "apply equally" to the large and varied traffic exempt from regulation, but that statement is based on the unsubstantiated, anecdotal assertions of a few shippers. There is no study or other substantial evidence showing that the programs are unreasonable with respect to all shippers within the exempted classes that would justify revocation of the class exemptions. There is no substantive evidence in the record on whether a fuel surcharge based on a percentage of the base rate does or does not reflect a reasonable relationship to fuel costs on all classes of exempt traffic, or whether market conditions for the various exempted commodities have changed such that railroads now exercise substantial market power over the traffic, or whether railroads have abused their market power, if in fact they possess such power. There is no evidence of particular harm to shippers of exempt traffic that would satisfy the standards for revocation. Nor has there been any showing that reregulation for shippers of the exempt commodities is necessary to promote those provisions of the RTP for which the exemptions were granted in the first place or any balancing of all pertinent RTP objectives to determine whether they are better advanced through exemption or regulation, including the effect of exemption (or potential revocation) on the railroad industry and the overall shipping public.

Finally, BNSF does not believe that the Board has complied with the intent of 49 U.S.C. § 10502, governing the granting and revoking of exemptions, where Congress intended that exemptions only be revoked upon request. Section 10502(b) sets forth the procedures for

granting exemptions, and states that the Board may “begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.”

Section 10502(d) sets forth the procedures for revoking an exemption and appears to permit the Board to act only upon a request for revocation and not on its own initiative. BNSF believes that it is entirely consistent with the goals of the statute for Congress, which favored deregulation, to have set a higher procedural burden for revoking an exemption than for granting an exemption.

Because the Board’s action in this proceeding does not meet the statutory and agency requirements for reregulation of exempt traffic, the Board’s revocation of the class exemptions to permit application of the fuel surcharge measures proposed in its Ex Parte 661 Decision is unlawful and has no force and effect.

D. Reporting

As stated in Part I above, BNSF intends to voluntarily comply with the Board’s reporting requests for basic fuel cost and surcharge information. However, if the Board’s goal is to allow the public to determine whether railroads such as BNSF are collecting more in fuel surcharge revenue than their increased fuel costs, then the data requested may not enable the Board or the public to so determine. Accordingly, BNSF respectfully suggests some alternative data that would clearly demonstrate changes in fuel costs compared to changes in fuel surcharge recoveries.

By way of background, the objective of BNSF’s fuel surcharge program is to recover the increase in BNSF’s fuel cost per gallon over the defined strike price of \$0.73 per gallon. The entry point of \$0.73 per gallon was based on competitive truck fuel surcharge entry points and historical prices of highway diesel fuel. BNSF’s price of \$0.73 per gallon is roughly equal to \$1.25 per gallon of highway diesel fuel. BNSF believes meaningful reporting should enable the user to calculate the amount of unhedged fuel costs above the threshold, compared to the amount

of fuel surcharge collected. A timing element also needs to be considered, due to the time lag in fuel prices used to assess certain fuel surcharges.

The Decision asks railroads to report increased or decreased fuel expenses on a month-over-month basis as well as monthly total revenue received from fuel surcharges. The variance in fuel costs from month to month shows fuel costs changes. Monthly fuel surcharge revenues measure the total amount of the fuel surcharges collected, which is a function of the amount of each individual surcharge plus how widespread the coverage of the charges are. Thus, the Decision implies that one could determine whether railroads “over recover” increased fuel costs by allowing a comparison of monthly changes in fuel costs to monthly revenues from fuel surcharges. But, as a practical matter, the two measures requested in the Decision are not related – a railroad could have total monthly fuel surcharge revenues that exceed the monthly increase in fuel costs but still not recover all of its fuel cost increase above the strike price.

BNSF submits that the important information for the Board and for customers is data that will permit the comparison of a railroad’s unhedged cost of fuel above a strike price (on which BNSF bases rate decisions) with that railroad’s total fuel surcharge revenue. This comparison would allow the public to see whether a railroad recovers more than its unhedged increased cost of fuel from fuel surcharges. Accordingly, BNSF suggests that the Board implement reporting of data that would allow the public to clearly see this difference. A table showing suggested data elements and example figure is included below:

Line No.	Description	Thousands Except Price Per Gallon
1	Total Fuel Expense (excluding fuel hedge) (a)	\$800,000
2	Gallons Fuel Consumed	400,000
3	Strike Price per Gallon	\$0.73

4	Base Fuel Expense (line 2 times line 3)	\$292,000
5	Total Fuel Expense above Base (line 1 less line 4)	\$508,000
6	Revenue from Fuel Surcharges	\$400,000
7	Fuel Expense not Recovered from Fuel Surcharge (line 5 less line 6)	\$108,000
8	Fuel Surcharge in Excess of Fuel Expense (if line 6 > line 5)	\$0

(a) Fuel is defined as including function 67 locomotive fuels in addition to all other fuel used for railroad operations and maintenance, including motor vehicles and power equipment as well as fuel surcharges paid.

BNSF does not believe that including reporting on Class II and III railroads is meaningful in light of the unique contractual nature of these shortline-specific relationships. As discussed in Part I, above, for BNSF, specific contacts typically contain rail line specific payments and escalators, with negotiated offsetting provisions with individual handling carrier shortlines that were agreed to via arm's length negotiations. In the fall of 2005, BNSF offered each of its handling carrier shortline partners a revised fuel surcharge proposal with a per car surcharge provision. Implementation, however, is subject to such shortline specific negotiation, such that pattern reporting could be misleading or impractical.

With respect to the frequency of reporting, BNSF suggests that reports be filed quarterly and annually in line with SEC reporting requirements. More than half of BNSF's business entails calculating fuel surcharge on a two month lag, as opposed to based on current market prices. By reporting quarterly, this would provide a more representative view of BNSF's fuel surcharge recovery.

Finally, with respect to the definition of fuel expense, BNSF agrees that such a definition should include function 67 locomotive fuels in addition to all other fuel used for railroad operations and maintenance, including motor vehicles and power equipment. However, BNSF

does note that while it has accurate data sources for overall fuel costs, BNSF will be required to estimate gallon usage and threshold prices for certain categories in railroad operation and maintenance. This type of fuel use accounts for less than five percent of total fuel use, and any estimates would have a *de minimis* effect on the reporting accuracy. BNSF also believes fuel surcharges paid for such services as contracted drayage services or delivery of materials used in the operation of the railroad should be included in fuel expense.

E. Fuel Cost Index

As stated above, BNSF is open to voluntarily using the fuel cost index proposed by the Board in the Decision, assuming appropriate correlation to the cost of BNSF's diesel fuel. However, BNSF does not believe that it is appropriate for the Board to mandate any particular index for the railroad industry in general. BNSF believes that a regulatory mandate of a particular fuel cost index is tantamount to the Board regulating the structure and extent of individual rate offerings and attempting to alter or require use of particular provisions in rail transportation contracts.

F. Contracts

The Board did not address the impact on contracts in its Decision. The statute is clear that the Board does not have the authority to regulate contracts, and therefore the Board's proposals should have no application to transportation contracts. We suggest that the Board so clarify in any subsequent decision in this proceeding.

G. Conclusion

As discussed in this filing, BNSF believes that fuel surcharges are integral parts of the rate and service relationship with each customer. BNSF has voluntarily taken significant steps to adjust its fuel surcharge methodologies to respond to customer concerns expressed to the Board, and intends to continue to do so. BNSF is concerned, however, that the Board's proposals to

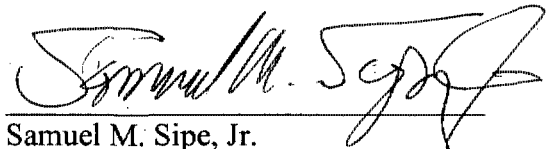
alter fuel surcharge programs through regulation are unnecessary and interfere with the traditional initiatives of carriers, and believes the Board's proposals as presented would go beyond the Board's statutory and regulatory powers.

BNSF appreciates that the Board has provided the opportunity to address these issues and shipper concerns and supports the direction of the proposals to provide the Board and shippers more clarity and information concerning fuel surcharge methodologies. BNSF believes that its initiatives have worked to address customer's concerns, and is committed to continuing those efforts and efforts to address the Board's concerns. In particular, BNSF believes its initiatives are providing our coal and agricultural customers with an appropriate fuel surcharge that is consistent with the Board's proposals. Too much regulatory rigidity, however, could hamper BNSF's ability to adapt its programs to particular customers and business areas.

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