

BEFORE THE
SURFACE TRANSPORTATION BOARD

Ex Parte No. 661
RAIL FUEL SURCHARGES

Comments
submitted by
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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In its decision issued August 3, 2006 ("Decision"), the Surface Transportation Board ("Board") proposed to adopt several measures regarding railroad practices related to fuel surcharges. The Board's Decision stems from concerns voiced by many in the shipping community and follows a public hearing on the matter that the Board held on May 11, 2006. The Board's Decision discusses the basis under which the Board has jurisdiction to regulate fuel surcharges as a practice, and proposes to adopt four measures designed to ensure the practice of applying a fuel surcharge is reasonable. The Decision also proposes to partially revoke exemptions "to the extent [the Board] finds necessary to achieve the regulatory objectives of the statute." *See*, Decision at 3-4 and 7.

These Comments are submitted by The National Industrial Transportation League ("League") in response to the Board's request for comments on the proposals set out in the Decision. The League is an association of companies interested in transportation. Many of its members ship goods via rail. Rail fuel surcharges significantly affect the cost that users of the rail system must pay for rail transportation, and the League has been vitally interested in this

topic since fuel surcharges began to be collected by rail carriers in 2002, and even well before. As the Board is aware, the League entered into detailed discussions with each of the nation's Class I rail carriers in the months before the Board's proceedings leading up to the Decision, to encourage them to revise their fuel surcharge methodologies. BNSF, CN and CP made welcome changes to their fuel surcharge methodologies subsequent to those discussions in response to customer concerns, while other carriers declined to do so.

Moreover, the League participated actively in the Board's proceedings leading up to its Decision. Specifically, the League submitted written comments in response to the Board's Notice of Public Hearing issued on March 14, 2006 and the League testified at the Board's May 11, 2006 hearing.

The League strongly commends the Board for taking decisive steps to prevent unreasonable practices in fuel surcharges programs. However, the League also believes that the Board's Decision can be strengthened and improved, as described in these comments. The League applauds the Board for its proposals and appreciates the opportunity to submit the comments below for the agency's consideration. In that connection, the League notes that it has recently surveyed the members of its Rail Transportation Committee on various aspects of the Board's proposal. These comments reflect the views derived from that survey.

I. THE BOARD'S LEGAL AUTHORITY TO REGULATE THE APPLICATION OF FUEL SURCHARGES IS CLEAR

The Board clearly has statutory authority to regulate the reasonableness of a common carrier railroad's rates and practices. 49 U.S.C. § 10701(a) and § 10702. As the Board noted in its Decision, while its authority to regulate a railroad's rates is "limited to traffic over which the railroad has 'market dominance' ... there is no such limitation over [the Board's] authority to

address the reasonableness of a railroad's practices." Decision at 3, *citing* 49 U.S.C. § 10701(d)(1).

The Board accurately concluded in its Decision that the proposed measures do not seek to regulate a railroad's rates, but instead will only preclude certain unreasonable practices from being used in the application of fuel surcharge programs. The Board distinguishes its current proposal to regulate as a practice the manner in which railroads apply fuel surcharges, from the Interstate Commerce Commission's (ICC) attempt to regulate as a practice increased rates for carrying radioactive waste. Decision at 3-4.

The Board noted in its Decision that some parties have asserted that the Board cannot regulate fuel surcharges as a practice, but instead may only regulate fuel surcharges as a "rate" upon the finding of market dominance. These parties cite *Union Pacific R.R. v. ICC*, 867 F.2d 646 (D.C. Cir. 1989), where the ICC's attempt to regulate as a practice the increased rates charged by some railroads for transporting radioactive waste, was struck down by the D.C. Circuit. Decision at 3, *citing* *Union Pacific R.R.*.

As the Board notes, however, unlike the regulation reviewed in *Union Pacific R.R.*, the Board's current proposal does not seek to prescribe rates and order refunds. *Compare, Union Pacific*, 867 F.2d at 649. Indeed, the Board specifically states that it is not proposing to limit the total *amount* that a carrier can charge, but instead only seeks to restrict the *manner* in which fuel surcharges are applied. Decision at 4.

Moreover, in *Union Pacific R.R.*, the court noted that the ICC's analysis of the railroad rates had "all the earmarks of a rate proceeding." *Id.* at 3, *citing* *Union Pacific R.R.*, 867 F.2d 649. The current proposal and proceeding, however, bears no such resemblance. There have been no formal complaints filed with the Board against any railroad in this proceeding and the

Board's proceedings have not focused on specific rates for specific movements. Rather, the Board's consideration in this proceeding has been focused on the method of recovering increased fuel cost that may result in disproportionate surcharges being applied.

Lastly, unlike the ICC's regulation of rates for the movement of radioactive waste, the Board's proposal will not be "manifested exclusively in the level of rates." The Board does not propose to set rates for any shipper, but simply proposes to prescribe reasonable practices to ensure that railroads only recoup the increased costs of fuel that are not reflected in the base rate.

The Board's own precedent supports the regulation of a fuel surcharge as a practice and not a rate. In *Parrish & Heimbecker, Inc. – Petition for Declaratory Order*, STB Docket No. 42031 (served May 26, 2000) ("P&H"), the Board held that "the assessment and collection of the \$200 per car light-density line surcharge constituted an unreasonable practice" under 49 U.S.C. 10702. The shipper in *P&H* asserted that the railroad could not lawfully collect contract-transportation fees as well as a surcharge tariff for light-density line movement. *Id.* at 8. The shipper further asserted that the attempt to collect a surcharge was equivalent to double-billing for services. *Id.* The railroad argued that the surcharge was a reasonable, fair and lawful way to recoup losses and avoid abandoning the light-density line. *Id.*

The Board noted in *P&H* that it had exclusive jurisdiction to determine the reasonableness of the practice of imposing a light-density surcharge. *Id.* at 16. In finding the imposition of a light-density surcharge was an unreasonable practice, the Board noted that permitting the railroad "to unilaterally impose a light-density line surcharge on top of the contract rates it negotiated for [contract] traffic" would undermine the certainty of the rail contract, in contrast to Congressional intent. *Id.*

Just as in *P&H*, the Board has exclusive jurisdiction to determine the reasonableness of carriers' practices in administering their current fuel surcharge programs. In *P&H* the Board prohibited the application of a surcharge as an unreasonable practice. In its August 3 Decision, the Board does not propose to ban fuel surcharges outright or even regulate the amount of the surcharge. Instead, the Board simply proposed to regulate the means by which a surcharge is applied.

Finally, the Board's decision to partially revoke exemptions to the extent necessary to ensure the proposed rules will apply to all traffic, whether regulated or exempted, was a correct and necessary step to ensure the regulatory objectives of the statute are met. The Board's discretion to revoke a portion or all or portions of exemptions is well established. *See*, 49 CFR Part 1039 and 49 U.S.C. § 10502(d).

II. THE BOARD IS CORRECT THAT RAIL FUEL SURCHARGE PROGRAMS MUST BE MORE CLOSELY LINKED TO THE ACTUAL INCREASED COST OF FUEL FOR INDIVIDUAL MOVEMENTS

The Board correctly held that it is not a reasonable practice for rail carriers to compute fuel surcharges as a percentage of existing rates. Decision at 4. The Board noted that a railroad's base rates are not cost-based. Therefore, tying the amount of a fuel surcharge to the rate results in two shippers' being charged "vastly different fuel surcharges," even where fuel costs associated with their movements are identical. *Id.*

The League strongly supports the Board's decision to require fuel surcharges to be tied to the "attributes of a movement that directly affect the amount of fuel consumed." *Id.* at 5. The Board proposed that the attributes should be either mileage alone, or weight and mileage. *Id.* Although a mileage- or a mileage-and-weight-based fuel surcharge may result in slightly higher fuel surcharge costs for some shippers, the increased cost for some is far outweighed by the

overall benefit that shippers will realize through the transparency and fairness of application of a new program.

Both a mileage-based and a weight-and-mileage-based surcharge method are far superior to a percentage-based fuel surcharge and both have a reasonable nexus to the fuel consumed for an individual movement. Although a weight-and-mileage-based fuel surcharge methodology may be more accurate than a mileage-only fuel surcharge, administering a weight-and-mileage-based fuel surcharge program might be difficult for shipments of the many commodities that are not weighed before shipment.

The League does not believe that perfect accuracy is cost-effective or probably even achievable in the context of a fuel surcharge program. As such, a fuel surcharge program should be based on attributes that have the greatest impact on fuel consumption and that can be measured with data that is readily available. The one attribute that effects fuel consumption the greatest and has readily available data is the total miles of a particular movement. While a weight-and-mileage-based surcharge may provide for greater accuracy, the cost and burden of managing such a program would far outweigh the potential benefits of slightly greater accuracy. The League therefore urges the Board to prescribe a mileage-based only fuel surcharge method.

To ensure shippers only pay for the increased cost of fuel needed for a specific move, the Board should permit carriers to apply a fuel surcharge for a particular move only to the shortest rail mileage on a carriers own system, not the actual rail mileage the rail car may travel on that system. This will ensure shippers are not forced to compensate a carrier for additional miles the carrier chooses for a move to increase its own operating efficiencies. To this end, the Board should require a carrier to use either a publicly-available mileage source or a mileage database that is available on the carrier's website. This will ensure shippers do not pay for fuel consumed

unnecessarily for its move, and also ensure that shippers have access to a railroad's mileage data for freight payment plans.

The Board needs to be sensitive to balance the need for greater accuracy with the need for administrative feasibility. A significant number of rail shippers have arrangements with carriers by which rail charges are self-invoiced. A fuel surcharge methodology adopted by a carrier, therefore, needs to be transparent in order to permit the shipper either to audit the carrier's charge or to calculate the charge that is to be initially paid the carrier. Rail carriers and shippers should be given a reasonable amount of time to revise their systems in accordance with the Board's final decision in this proceeding, since substantial work will need to be done to reprogram automated payment systems.

The League does not believe that the Board should permit carriers to devise other fuel surcharge methods, even where the method has a "reasonable nexus" to the fuel consumption for the movement involved. The League believes that mileage-only fuel surcharges are currently the only practical options for ensuring that fuel surcharges have a "reasonable nexus" to the fuel consumption of a particular movement. Furthermore, permitting each railroad to create fuel surcharges that are not based on one of these methods will result in even greater multiplicity of methods for determining fuel surcharges, resulting in difficulties of administration for many shippers. Lastly, permitting railroads to devise different methods of applying fuel surcharges would weaken one of the goals of the Decision, that is, to assist the Board in monitoring fuel surcharge programs. *See*, Decision at 6.

Some parties may assert that the dynamics of railroad movements make it difficult to ensure that a mileage-based system is entirely accurate. While a mileage-based fuel surcharge program will not be completely accurate in all cases, a mileage based-system much more

accurately reflects the increased cost of fuel for a particular movement than does a rate-based system that has no nexus to the cost of fuel for a particular move. Furthermore, although fuel consumption can vary based on topography, speed and weight of the train, these factors are generally less important than distance (at least under relevant ranges practically experienced by carriers), and consideration of these factors in all cases would make the administration of a fuel surcharge program unreasonably difficult.

III. THE BOARD CORRECTLY PROPOSES TO REQUIRE CARRIERS TO USE A UNIFORM INDEX TO MEASURE INCREASES IN FUEL COSTS

The League supports the Board's proposal to require all Class I railroads to use a single, uniform index to measure increases in fuel costs. Decision at 6. The Board's authority to require railroads to base fuel surcharges on a uniform basis is tied to the Board's authority to require reporting of fuel costs by the railroads. The rail transportation policy ("RTP") set forth at 49 U.S.C. § 10101 states that it is the policy of the United States Government to encourage the honest and efficient management of railroads. By requiring all railroads to utilize one index, the Board will ensure railroads do not apply a fuel cost index that has no relation to the changes in fuel costs. *See*, 49 U.S.C. § 10101(9). Furthermore, requiring the use of a uniform index will ensure the availability of accurate cost information, in furtherance of paragraph (13) of the RTP. *See*, 49 U.S.C. § 10101(13).

The League believes that the Board's choice of the EIA's No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon) is generally acceptable, although the EIA's U.S. Diesel Fuel Industrial Price by All Sellers (Cents Per Gallon) might also be an acceptable index.

However, the Board may want to investigate the effect of new Environmental Protection Agency ("EPA") regulations on the Retail Index, at least for the future. These new regulations require on-road diesel to have a low sulfur content. Because the current supply of low-sulfur

diesel is somewhat uncertain, the price has been volatile. Since similar regulations for locomotives have only been proposed by the EPA and have not been adopted, rail carriers may not be affected by this phenomenon. Thus, over time, the index proposed by the Board may less accurately reflect the cost of fuel encountered by railroads. Accordingly, the League urges the Board to periodically review the index ultimately chosen to ensure the index reasonably reflects actual changes to the railroads' cost of fuel.

IV. THE LEAGUE STRONGLY URGES THE BOARD TO ESTABLISH RULES FOR THE APPLICATION OF FUEL SURCHARGES TO INTERLINE MOVES

The Board should utilize this proceeding to develop rules for the proper application and distribution of fuel surcharges for interline moves. Based on the survey mentioned earlier, the League urges the Board to require fuel surcharges for interline moves to be applied based on the rules of each railroad for the miles of the movement for which a particular railroad is responsible. Thus, if one carrier handles sixty percent of an interline move, that carrier's fuel surcharge should apply for sixty percent of the total move, while the fuel surcharge for the remaining forty percent of the move would be based upon the surcharge of the remaining carrier(s). In other words, the settlement carrier on an interline move should apply each participating carrier's individual fuel surcharge to the portion (calculated on a publicly-available mileage basis) of the movement that is handled by each carrier.

A mileage-based method would permit shippers to more easily audit and confirm the application of a fuel surcharge. Indeed, the existence of interline movements is another reason why the Board should mandate a specific method that all railroads must use for fuel surcharges for various classes of movements, i.e., either mileage only or weight and mileage. As described above, all railroads should be required to adopt the method mandated by the Board. Such a rule would make the calculation of fuel surcharges for interline movements more transparent.

V. DOUBLE-DIPPING PROHIBITION

The Board noted in its Decision that some railroads may be charging twice for increased fuel costs by both charging a fuel surcharge and by adjusting rates based on an index such as RCAF. *Id.* at 5. The Board correctly concludes that such “double-dipping” is an unreasonable practice. *Id.* Accordingly, the Board proposed 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.*

The League strongly supports the Board’s proposal to prohibit such “double-dipping.” The League believes, however, that the Board should specify in more detail procedures that would insure that such double-dipping does not occur.

As the Board is aware, the Norfolk Southern Railway (“NS”) recently rebased its fuel surcharge and increased its rates, basing the new rates on West Texas Intermediary (“WTI”) at \$64 per barrel. Now that WTI has dropped below that level, NS has effectively “locked in” the \$64 price of fuel and is effectively collecting a fuel surcharge that does not reflect the increase in its cost of fuel since the NS implemented its original surcharge program several years ago, nor since the rebasing.

Thus, the League proposes that, when a carrier “rebases” its fuel surcharge to incorporate a price of fuel above the level at which that carrier originally set its fuel surcharge (i.e., the 2002-2004 base currently used in most carriers’ fuel surcharge programs), and the price of fuel drops below the “rebased” level, the Board should require railroads to provide a “negative fuel surcharge” (in the form of a credit against the rate charged) to reflect the decreased cost of fuel, down to the point of the original base.¹

¹ In the unlikely event that fuel would drop below the 2002-2004 base, the negative fuel surcharge should not go below that base.

VI. THE PROPOSED RULES CORRECTLY REQUIRE CARRIERS TO REPORT THEIR FUEL COSTS

The League agrees that it is important for the Class I railroads to provide the Board and shippers with information relating to fuel consumption and the cost of fuel. Accordingly, the League supports the Board's proposal to require monthly reporting for: total expenditures for fuel; total gallons of fuel consumed; the increase or decrease in the carrier's cost of fuel from the previous month; revenue tons for the month; and the revenue tons to which the fuel surcharge was applied.

The League believes that some additional reporting would be beneficial:

- 1). The Board should require carriers to report revenue ton-miles for the month and revenue ton-miles to which the fuel surcharge applies, not just revenue tons. If fuel surcharges are to be tied to miles, then it is imperative that reporting include mileage information.
- 2) The Board should require each carrier to provide the total dollars collected during the month via its fuel surcharge program.
- 3) The Board should require carriers to provide the information specified in the monthly reporting form attached to the decision for the first full calendar year after they established their current fuel surcharge program, in order to provide a base of information to which the current experience can be compared.
- 4) The League requests the Board to consider whether industry or commodity-specific reporting is possible. Such reporting would permit shippers to better calculate and understand fuel cost increases.
- 5) The League encourages the Board to add data fields to its Waybill Sample to better monitor fuel surcharge revenues.

VII. THE TREATMENT OF FUEL SURCHARGE FOR SHORTLINES

Short line rail carriers have been affected by the increased cost of fuel as much as, or sometimes more than, Class I rail carriers. Where a Class I carrier collects a fuel surcharge based upon an origin-to-destination rate (including a rate or charge by a Class II or III carrier), then it would be both equitable and a good business practice for the Class I carrier to share an appropriate portion of the fuel surcharge revenue with the Class II or Class III carrier. The Board should investigate the extent to which, if any, this does not occur, and should consider action to insure that the nation's Class II and Class III carriers remain financially healthy in the face of rising fuel prices.

VIII. CONCLUSION

The League strongly commends the Board for taking decisive steps to insure that rail fuel surcharge programs and practices are reasonable. In addition to the steps that it has proposed, the Board should adopt the proposals set out in these Comments, and other appropriate proposals suggested by other parties in this proceeding.

The League stands ready to assist the Board in further developing its proposals, and looks forward to assisting the Board and the rail industry in establishing a manageable and fair fuel surcharge program.

Respectfully submitted,

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By Its Attorneys

A handwritten signature in black ink, reading "Nicholas J. DiMichael". The signature is written in a cursive, flowing style.

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Dated: October 2, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have on this 2nd day of October, 2006, served a copy of the foregoing Comments on all parties of record, by first-class mail, postage prepaid.



Aimee DePew