

**Before the
Surface Transportation Board
Washington, D.C.**

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Rail Fuel Surcharges	)	Ex Parte No. 661
	)	

**Comments of the
United States Department of Transportation**

Introduction

The Surface Transportation Board (“STB” or “Board”) instituted this proceeding in response to shipper concerns about fuel surcharges imposed by railroads. Specifically, the Board invited written submissions and held a public hearing in May that focused on fuel surcharges that are computed as a percentage of the base transportation rate, or that otherwise bear no direct relationship to the cost or consumption of fuel for individual shipments. Decision served August 3, 2006 (“Decision”) at 1-2. At the hearing rail carriers largely conceded that these surcharges were not tied to the actual fuel consumed in the transport of individual movements, but also maintained that overall they were still not recovering their increased fuel costs. Id. at 2-3.

In response, the STB has declared that rail fuel surcharges that are not in fact limited to recouping higher fuel costs would be impermissible as an unreasonable practice. Id. at 4; 49 U.S.C. § 10702.¹ This approach would include fuel surcharges

¹/ “A carrier should not identify a surcharge as a cost-recovery mechanism for a discrete portion of its costs unless the surcharge is directly tied to and limited to incremental changes in that particular cost for the

expressed as a percentage markup of rates, because where railroads engage in differential pricing such surcharges are not directly related to the fuel cost of the shipments. Id.

Further, the Board has proposed 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.” Id. at 5. Railroads could also devise “an alternative methodology, so long as it would have a reasonable nexus to the fuel consumption for the movement involved.” Id. The STB has sought comments on four measures designed to prohibit fuel surcharges that do not meet this standard. Id. at 1, 4-6. It has also proposed to revoke exemptions previously granted to various types of traffic to the extent necessary to effectuate this policy. Id. at 7.

DOT’s Position

The United States Department of Transportation (“DOT” or “Department”) supports the basic precept that, to the extent feasible, surcharges for traffic subject to the STB’s continuing oversight should only recoup specific costs to which they relate. Hence, DOT agrees with a number of the Board’s proposals with respect to this traffic. Specifically, we favor a prohibition on “double dipping”² and the imposition of a limited reporting requirement to ensure the transparency of relevant practices.³ Although railroads may view this requirement as burdensome, it would be helpful, at least for a

movement to which the surcharge is applied. In other words, railroads should not call a charge a fuel surcharge if it is designed to recover more than the incremental cost of fuel attributable to the movement involved.” Id. (footnote omitted).

^{2/} This refers to railroad practices that essentially recover fuel costs twice, first by surcharges and second by use of an index that already includes the cost of fuel. Id. at 5.

^{3/} Carriers would have to report monthly their total fuel costs and consumption, changes in fuel costs from the prior month, revenue tons for the month, and revenue tons to which fuel surcharges are applied. Id. at 6.

time, in order to encourage fairness and to instill public confidence that carriers are not in fact using fuel surcharges as a profit center.

The Department takes a different view with respect to the other STB proposals. The basic soundness of the effort to introduce fairness and transparency to the subject of fuel surcharges should not and need not provoke an overly regulatory response. Specifically, as discussed below DOT opposes overly prescriptive approaches regarding both fuel indexes and, more importantly, any notion that a movement-specific linkage between fuel costs and consumption must be established in every case. Most important of all, DOT opposes the proposed partial but sweeping revocation of existing exemptions.

A.) Fuel indexes

The STB has proposed that all rail carriers use a single benchmark fuel cost index. Id. at 6. The problem is that one size does *not* fit all when it comes to the price of fuel. Railroads purchase fuel at different times and places, and in different amounts. It would serve the Board's basic purpose, better accord with real world purchasing practices, and avoid an unnecessarily prescriptive mandate to allow carriers to use any index that closely correlates with their individual fuel costs.⁴ So long as the index relied upon is publicly available and clear, all parties are in position to assess the reasonableness of any fuel surcharges that result.

^{4/} We note that the Energy Information Administration produces more than just the one identified by the STB. There are different indexes to reflect fuel prices in different areas of the country. See, for example, http://tonto.eia.doe.gov/dnav/pet/pet_pri_dist_a_EPD2_PTA_cpgal_m.htm and http://tonto.eia.doe.gov/dnav/pet/pet_pri_gnd_a_epm0_pte_cpgal_w.htm.

B.) The “linkage” requirement

It is clear that any fuel surcharge designed to recover only a carrier’s increased fuel costs must be linked to the cost and consumption of fuel. However, DOT opposes any requirement that a shipment-by-shipment linkage be established in every case. Rather, we endorse the Board’s proposal to seek “a reasonable nexus to the fuel consumption for the movement involved.” *Id.* at 5.

There are a multitude of factors other than mileage or even ton-mileage that influence fuel consumption for a given shipment. These include type of service and speed (e.g., coal trains versus intermodal trains), terrain, and other circumstances (e.g., for interline traffic, the mileage traveled on other carrier systems may be unknown; for carload traffic, there may be differing numbers of classification yards or other handling of a given shipment that affect fuel use).⁵ Railroads should be free to weigh these factors in the calculation of appropriate surcharges, but so long as their approach overall is reasonable the process and factors used in arriving at a surcharge in a given case should be for the carriers and not the Board to decide. The Department submits that a policy requiring the establishment of a linkage to each and every shipment would be unduly burdensome and unreasonable, and we would oppose it.

C.) Partial revocation of exemptions

DOT strongly opposes the proposed partial revocation of previously granted exemptions from regulation. On the basis of the record compiled to date, this action would be an unwarranted departure from existing law and policy. Congress affirmatively

^{5/} Even BNSF Railway Company, apparently the only railroad to employ a mileage-based fuel surcharge, applies this methodology only to grain and coal movements and not to other types of traffic. *Id.* at 2 note 1.

directed that the exemption authority contained in the Staggers Rail Act be used whenever continued regulation is not necessary. Exemption from Regulation for Boxcar Traffic, 367 I.C.C. 424, 432 (1983). That command remains intact today. 49 U.S.C. § 10502(a).

Moreover, the fundamental premise for every exercise of this authority was that competition -- intramodal, intermodal, product, or geographic -- for the traffic in question was pervasive, rendering regulation unnecessary to carry out national rail transportation policy and protect against abuse of market power. See, e.g., 367 I.C.C. at 433-35; Improvement of TOFC/COFC Regulation, 364 I.C.C. 731, 732-35 (1981). That premise was validated separately for each commodity or equipment type, and only after a careful examination of all the relevant facts. Id. The result is that most rail traffic (including shipments moving under contract) is now exempt from regulation. See also 49 C.F.R. Parts 1039 and 1090. There has been no finding, or even a suggestion, that marketplace forces no longer determine the appropriate level of rates and service for all or any part of this traffic.

Indeed, the evidence of record is that competition continues to prevent railroads from imposing fuel surcharges on all shipments. Decision at 3.⁶ That is to be expected in a marketplace in which individual motor, rail, and other surface carriers decide whether and to what extent to attempt to pass on higher costs for fuel or other costs. The methods by which these surcharges are calculated, like their very existence, is left to the interplay of competitive factors. In the absence of evidence of market shortcomings, that

^{6/} Their application only to captive traffic reflects differential pricing in action. Id. In addition, parties to rail contracts have also been free to determine for themselves whether to allow for fuel or other surcharges.

is as it should be. Even a partial revocation of long-standing exemptions -- particularly in response to what may be only a temporary spike in fuel prices -- is unwarranted in these circumstances.⁷

The Board's proposal, however, would override the dynamics of the freight rail sector of the economy and intrude upon an apparently competitive marketplace in harmful ways. First, proposing to revoke existing exemptions *en masse* for this purpose contrasts markedly with the procedures employed to support the establishment of each exemption in the first place. DOT is aware of no basis for this disparate treatment, and is concerned that it trivializes the significance and import of those exemptions. Second, in the context of exempt cargo movements, any restriction on surcharge methodologies, including the flexible approach discussed above, would unnecessarily and significantly cabin railroad discretion. Third, and perhaps more substantively, so tightly connecting fuel costs and consumption to each surcharge would seem to effectively require railroads to recoup from each shipment either all or none of their attendant higher fuel costs. Otherwise, recovery of more or less than the full amount from a given shipper would leave a carrier vulnerable to a complaint that a surcharge that is not "directly tied to and limited to incremental changes in that particular cost for the movement to which the surcharge is applied." Decision at 4 (footnote omitted). Finally, imposing such

⁷/ At the time of the public hearing in May, the fuel index proposed by the Board in this proceeding stood at 289.7. See <http://tonto.eia.doe.gov/dnav/pet/hist/ldr001w.htm>. When the Decision was released in early August the index had reached 298. Id. By September 25, however, the index had fallen to 259.5 Id. Although the STB's proposed approach may be appropriate for rail fuel surcharges generally applicable to nonexempt traffic, the potentially transitory nature of the recent fuel price increase is additional grounds not to proceed with any partial revocation of exemptions.

securing traffic from their motor carrier and other competitors, which are not subject to these mandates.

Conclusion

For traffic within the Board's ongoing regulatory jurisdiction, the Department supports the STB's proposals regarding proscribed "double dipping" and limited reporting requirements. DOT opposes the mandatory use of a single fuel index and the requirement for a shipment-by-shipment "linkage" in every case between fuel costs and surcharges as regards this traffic. The Board should insist instead only upon a "reasonable nexus."

The vast majority of traffic carried by rail is exempt from the STB's ongoing regulations by dint of the superiority of competitive forces over government oversight in determining appropriate levels of rates and services. Those exemptions were granted only after a thorough evaluation of all relevant considerations in each case found that competition was robust. There has been no demonstration that market forces affecting any commodity or other category within the universe of exempt traffic are now inadequate to the task with respect to fuel surcharges. In these circumstances the Department strongly urges the STB not to partially revoke existing exemptions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rosalind A. Knapp", with a stylized flourish at the end.

ROSALIND A. KNAPP
Acting General Counsel

October 2, 2006