

**UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 661

RAIL FUEL SURCHARGES

**COMMENTS OF NORFOLK
SOUTHERN RAILWAY COMPANY**

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Norfolk Southern Railway Company (“NS”) hereby submits its Comments on the STB’s August 3, 2006 decision regarding fuel surcharges in STB Ex Parte No. 661. *See* Decision in STB Ex Parte No. 661, *Rail Fuel Surcharges* (served August 3, 2006) (“Decision”).

I. Overview.

We do not believe there is a need for the STB to regulate fuel surcharges. In our view, such regulation is commercially counterproductive, unnecessary, and bad public policy and could result in decreased capital investment by railroads, particularly insofar as the STB has proposed a partial revocation of all the commodity exemptions it has granted. If the STB nonetheless elects to regulate fuel surcharges, it should do so by adopting rules for regulated tariff traffic that apply prospectively only and that allow a smooth transition. The STB should also modify its proposed reporting requirements.

II. Regulation of Fuel Surcharges Unnecessarily Restricts Rail Marketing.

A. The record shows the role of fuel surcharges in the marketplace.

We participated in the STB Hearing on May 11, 2006 regarding fuel surcharges (“Hearing”) and made six major points:

- NS has struggled with the rapid, recent rise in the oil market that has affected a number of railroad costs, including diesel fuel, gasoline, and lubricants;
- NS adopted and twice modified its fuel surcharge program structured as a percent of the base rate in response to the recent rise in the oil market;¹

¹ In 2000, NS adopted its original fuel surcharge for public rate authorities for non-intermodal traffic, which applied whenever the price of West Texas Intermediate Crude Oil (“WTI”) was greater than \$28.00 for 30 consecutive Wall Street Journal publication days. At that point, the applicable fuel surcharge percentage was 2% of the line-haul rate. The applicable fuel surcharge increased or decreased by 2%

- NS will continue to monitor the oil market and make further changes to its fuel surcharge program if warranted;
- NS charges market rates—of which the surcharge is a component;
- NS' traffic has and continues to grow despite fuel surcharges; and
- NS must charge market rates to continue to grow our capacity to meet the nation's transportation needs.

NS Written Testimony, Ex Parte No. 661 Rail Fuel Surcharges, (submitted April 27, 2006) ("NS Written Testimony").

We believe that there is no sound economic or regulatory reason for the STB to act regarding fuel surcharges. NS' Written Testimony for the Hearing explained that we charge market-based total transportation rates: base rates plus fuel surcharges and other charges.² In particular, we reported that "[w]e use the market as our gauge when negotiating contract arrangements and when determining the appropriate level of our public rate authorities." NS Written Testimony at 14. We also explained that fuel

whenever the WTI price was above or below the next trigger point for 30 consecutive days. Trigger points were in \$5 increments. NS Written Testimony at 7-8.

On March 1, 2004, Norfolk Southern modified its fuel surcharge program for public rate authorities on non-intermodal traffic, under which the applicable fuel surcharge equaled 0.4% of the line-haul freight rate for every \$1.00, or portion thereof, in excess of a monthly average price of \$23.00 for WTI. The applicable fuel surcharge changes monthly. NS Written Testimony at 8-10.

On April 24, 2006, Norfolk Southern announced a new fuel surcharge program for public rate authorities for non-intermodal traffic in response to what it perceives as persistently higher oil prices. NS now applies a fuel surcharge of 0.3% of the line haul freight rate for every \$1.00, or portion thereof, in excess of a monthly average price of \$64.00 for WTI. The applicable fuel surcharge changes monthly. NS Written Testimony at 11-12.

NS' fuel surcharge for November will be 0%.

² Viewed through the commercial prism (which is how this proceeding must be viewed), a fuel surcharge is a rate. Accordingly the STB's powers are limited. Union Pacific R.R. v. ICC, 867 F.2d 646 (D.C. Cir. 1989). In a rate case in which the rate reasonableness of a fuel surcharge had not been specifically challenged, the STB did not need to rule on whether a fuel surcharge was a rate or a separate rule. Under the facts of that case, NS argued that the fuel surcharge was a separate rule. Of course, the shipper party argued that the fuel surcharge was a rate. Carolina Power & Light Co. v. Norfolk Southern Ry. Co., STB Docket No. 42072, at 6 (Served Oct. 20, 2004).

prices directly affect the marketplace for transportation services. Id. We further pointed out that NS' traffic continues to grow at its current total transportation rates. Id. We concluded that "a different fuel surcharge does not necessarily mean that customers' transportation bills will decline, which is not unusual when demand is so strong." Id.

B. Regulation of fuel surcharges would commercially disadvantage railroads versus other modes and would eliminate an effective market tool.

The STB has made it clear that it is "not proposing to limit the total amount that a carrier can charge," (Decision at 4), but by imposing numerous restrictions on what a railroad fuel surcharge may look like, the STB is placing railroads at a commercial disadvantage without any offsetting public policy gain. As the STB is well aware, fuel surcharges are ubiquitous. Other freight transportation modes have fuel surcharges, and there are no government regulations concerning what those modes can and cannot do with fuel surcharges.

In addition to restricting railroads – large and small – in an area in which other modes have no restrictions, the proposal will eliminate an effective rail marketing tool. The majority of our traffic moves under transportation contracts. The rates and other terms are negotiated in the normal give-and-take of the marketplace. Determining a rate is far from simple and because getting it right is critical to our financial well being, we devote considerable time and resources to this task. Setting a market-based rate that will apply at a future date is even more difficult. We have found that a fuel surcharge structured such that as the price of oil rises the line haul rate increases by a given percentage allows us to enter into contracts more readily because such a mechanism

reflects, at least partially, the market advantage rail has over its primary competitor, the motor carrier, when oil prices rise.

Such a fuel surcharge is important to us because we do our best to establish market-based, not cost-based, prices. Cost-based pricing was long ago abandoned. The STB should not adopt proposals premised even indirectly on cost-based pricing. Reverting to such a discredited regulatory system would undermine the goals of the Staggers Rail Act of 1980.

C. Regulation of fuel surcharges will adversely affect contracting.

Although we recognize that the STB's proposal does not apply to terms agreed upon in a transportation contract, the practical effect of any STB rule is that it will make it difficult to have a fuel surcharge that does not conform substantially to the STB's standards. In the marketplace, any action by the STB will be deemed to be generally applicable to both tariff and contract traffic. NS has already been contacted by some shippers who have existing contracts with NS, who erroneously assert that NS must renegotiate contracts as a result merely of the STB issuing proposals related to fuel surcharges in tariffs. Moreover, the Alliance of Automobile Manufacturers is actively participating in this proceeding, perhaps because it expects any STB rules to apply to the contracts under which most of its members' traffic is shipped.³ The repercussions of any STB action will be further felt in contract negotiations as parties are already asserting rights to any new fuel surcharge arrangement, thus making it more difficult for us to use our current fuel surcharge mechanism to reflect more accurately what the market price should be over the course of the contract.

³ Comments of the Alliance of Automobile Manufacturers, Ex Parte 661, (filed Sept. 22, 2006).

D. The market says rail rates, including fuel surcharges, remain a bargain.

The fact that we continue to set records for the amount of traffic handled does not suggest to us that we are overcharging or somehow being unfair to our customers. Indeed, the increased traffic levels of the last several years suggest to us that customers view us as a bargain and would like the Board to make us an even bigger bargain. Indeed, despite the STB's narrow intent not to limit the total amount railroads can charge, some shipper parties' express intent is to have the STB restrict the total amount a railroad may charge through this rulemaking.⁴

E. These unintended consequences will adversely affect investment in rail capacity.

If railroads are unable to sustain their revenues because of the unintended consequences of regulatory action, our ability to invest in infrastructure to increase capacity will be diminished. In our written testimony for the Hearing, we highlighted that the U.S Department of Transportation estimated that the demand for freight transportation will increase by 55 percent by 2020 and that the American Association of State Highway and Transportation Officials projected that freight tonnage will grow by almost 57 percent between 2000 and 2020. NS Written Testimony at 15. Now is not the time to take actions that will be disincentives to railroads, capital markets, and shareholders to invest further in rail capacity.

⁴ See Comments of the Alliance of Automobile Manufacturers, Ex Parte 661, at 2 (filed Sept. 22, 2006) ("The Alliance is concerned that the railroads may intend to comply with the STB decision by rolling the current surcharges into their base rates . . ."); Comments of Steel Manufacturers Association, Ex Parte 661, at 2 (filed Sept. 26, 2006).

NS thinks it would be the wrong decision for the STB to intrude into the world of pricing by regulating fuel surcharges. The STB should not conclude that a fuel surcharge cannot (or at least should not) be used to construct market-based pricing. Nevertheless, because it appears the Board may be inclined to attempt to regulate fuel surcharges, we offer the subsequent comments on the elements of the Decision.

III. The STB Should Not Partially Revoke All Previously Granted Exemptions.

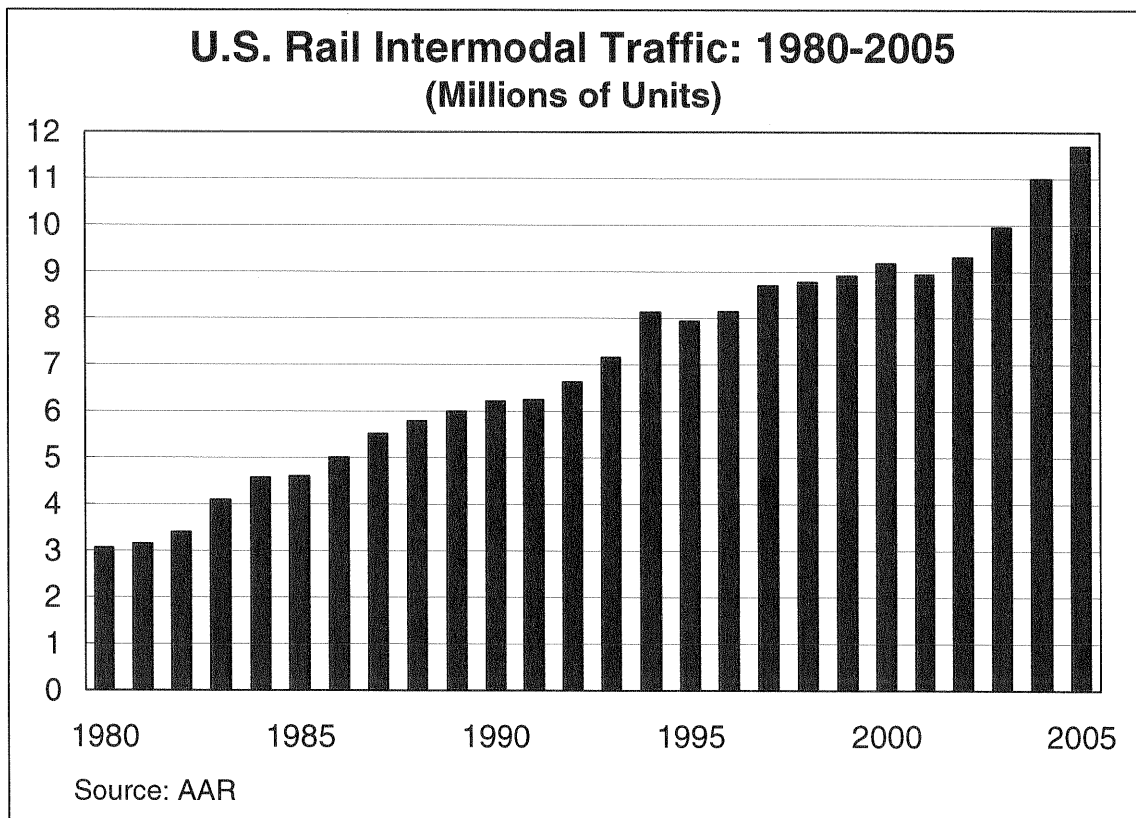
The STB should abandon the idea that it would partially revoke the commodity exemptions. There is no record to support a partial revocation of the intermodal exemption, and, from what we can determine, little record to support a partial revocation of any of the commodity exemptions. Such revocations are contrary to congressional intent that the agency exempt rail traffic from regulation to the “maximum extent possible” (49 U.S.C. 10502(a)) and would be the definition of re-regulation – subjecting to regulation again that which was once regulated but that the government chose no longer to regulate.⁵

It is particularly astonishing that the Decision suggests the STB would partially revoke the exemption for intermodal traffic because there is no record to support such a drastic action. NS’ Written Testimony for the Hearing did not even discuss our fuel surcharge program for intermodal traffic. No intermodal shipper appeared at the Hearing. No intermodal shipper filed written comments for the Hearing. No intermodal shipper requested the proposed action. To the contrary, Hub Group, Inc., one of the

⁵ See also, 49 U.S.C. 10101 (2)(Rail Transportation Policy is “to minimize the need for Federal regulatory control over the rail transportation system”).

largest intermodal companies in the nation has expressly asked the STB to abandon this proposal to revoke the intermodal exemption.⁶

In addition, revocation of the intermodal exemption could upset the competitive balance between railroads and trucks in the intermodal marketplace. Freed of regulatory constraints, rail intermodal competes with motor carriers and has been the single biggest growth story in railroading. Intermodal growth has been dramatic since it was deregulated in 1981⁷ as shown in the table below.



⁶ Comment of Hub Group, Inc., Ex Parte 661 (filed Sept. 27, 2006).

⁷ Improvement of TOFC/COFC Regulation, 364 I.C.C. 731 (1981), *aff'd in relevant part sub nom. American Trucking Ass'ns v. ICC*, 656 F.2d 1115 (5th Cir. 1981).

Despite that growth, motor carriers still dominate the overall freight market. According to the Bureau of Transportation Statistics, trucking moves 67% of freight measured by tons, compared to 16% for rail.⁸

Today, both trucks and rail intermodal are not subject to economic regulation – which permits them both to adapt readily to changes in the marketplace. If the STB revokes partially the intermodal exemption, rail intermodal will be restricted in how it can react to changes in the marketplace. Trucks will not. Thus, re-regulating rail intermodal and subjecting it to rules that are vastly different from those under which trucks operate would adversely affect railroads ability to price to the market – in violation of the Rail Transportation Policy. 49 U.S.C. 10101 (4) & (5). Revoking that exemption even partially to subject rail intermodal to re-regulation would interfere in rail's ability to compete and take trucks off our already constrained highways.

Moreover, re-regulation may adversely affect the resources railroads are willing to devote to intermodal. The exemption from regulation and the growth of intermodal are inextricably linked. If the STB is willing to subject part of the intermodal rate structure to regulation without any complaints from intermodal customers, it raises questions as to what other aspects of intermodal may become re-regulated. The existence of such questions could decrease a railroad's willingness to invest in intermodal as returns on that investment could be jeopardized if further re-regulation occurs. Given the incredible success story of the deregulation of intermodal and the need for railroads to expand their capacity to move containers and trailers, it strikes us as bad public policy for

⁸ Bureau of Transportation Statistics (USDOT) and U.S. Census Bureau, 2002 Commodity Flow Survey, United States Data, December 2004.

the government to decide that the time is ripe for intervention in the intermodal marketplace. This is a time to adhere to the old adage of “if it ain’t broke, don’t fix it.”

As to non-intermodal traffic, from what we can determine, there is little record to support a partial revocation of any of the commodity exemptions. A few rail customers that potentially ship exempted commodities submitted written comments for or appeared at the Hearing,⁹ but the record does not demonstrate whether they ship exempt commodities. Moreover, the record does not show which of the commodity exemptions might apply to their traffic. Despite the lack of information about whether and what commodities these parties ship, the STB suggests in its Decision that it will partially revoke all the commodity exemptions. Decision at 7.

Revocation of the commodity exemptions would alter the marketplace for traffic that railroads compete against other modes to carry because those other modes – trucks, airlines, and water carriers – charge fuel surcharges free from government intervention or regulation. As is the case with intermodal, such action could result in less investment in capacity improvements. If the STB is willing to revoke exemptions at the same time more and more of the traffic covered by those exemptions is moving by rail, rail management must question whether the STB is committed to allowing the market to determine rates to the maximum extent possible.

⁹ Although the Alliance of Automobile Manufacturers, which represents shippers of an exempted commodity, and the National Industrial Transportation League, some of whose members may ship exempted commodities, submitted written comments for or appeared at the Hearing, the only shippers who pay a freight bill and who may ship exempted commodities were Granite Rock, Potlatch Forest Products Corporation, US Steel Corporation, Kennecott Utah Copper Corporation, and Rand McNally and Company. None of their comments identify whether they ship an exempted commodity or which exemption applies to their traffic.

IV. Any Rules Should Have Prospective Application and Apply Only to Common Carrier Rates for Regulated Traffic.

The STB should clarify that its newly proposed rules for fuel surcharge programs – if finalized – would apply prospectively only to common carrier rate authorities issued after a date certain. That date should be established far enough into the future to permit railroads to devise and implement fuel surcharge programs that comply with whatever rules the STB might decide to finalize. Such a clarification would be fundamentally fair and would be consistent with the law and the STB’s precedent regarding the effect of an exemption.

In footnote 9 of the Decision, the STB acknowledges any rules should apply to future conduct. Footnote 9 of the Decision says the STB 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.” Decision at fn. 9 (emphasis added). This statement is consistent with both general legal principles and the Administrative Procedures Act (“APA”). Applying rules retroactively is strongly disfavored generally. Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208-9 (1988). More specifically if the Decision is an Advanced Notice of Proposed Rulemaking, the APA would require any rules the STB might adopt regarding the structure of fuel surcharge programs to apply prospectively. The term “rule” means “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 or describing the organization, procedure, or practice requirements of an agency” 5 U. S. C. § 551(4) (emphasis added). Thus, a rule can have legal consequences only for the future. Bowen, 488 U.S. at 217 (Scalia, J., concurring). Additionally, the APA provides that a rule must

be published in the Federal Register not less than 30 days before its effective date, which also makes rules forward looking. 5 U.S.C. 553(d).

Moreover, fundamental fairness requires a prospective application of any final STB action. For example, the STB suggests for the first time that railroads use a particular fuel price index – U.S No. 2 Diesel Retail Sales By All Sellers (Cents Per Gallon). Decision at 6. Certainly, railroads could not be expected to have complied with a standard that had never before been mentioned by the agency. Similarly, the STB acknowledges that it is executing an about-face from prior precedent regarding the reasonable structure of fuel surcharge programs. Specifically, the STB cites to a decision from the 1970s, when its predecessor last considered the propriety of various fuel surcharge regimes. Decision at 5 (citing Expedited Procedures for the Recovery of Fuel Costs, 350 I.C.C. 563 (1975)). The Decision observes that in the 1970's the ICC declined to require railroads to apply a mileage-based surcharge, which the STB now announces is its preferred methodology, in favor of allowing carriers to charge a percent of the base rate. *Compare* Decision at 5 with 350 I.C.C. at 570 (concluding a mileage-based formula “would cause more problems than it would solve” because not all rates are based on distance). Since we adopted a fuel surcharge in 2000 (and amended it twice), our fuel surcharge program has been structured consistent with this precedent.

If, notwithstanding the lack of a solid record, the general public policy favoring exemptions, and the benefits that have resulted from the exemptions previously granted, the STB pursues its proposal to revoke partially one or more of the commodity exemptions, any final decision by the STB regarding fuel surcharges can apply prospectively only from the date the STB partially revokes the exemption. Pejebscot

Indus. Park, Inc., d/b/a Grimmell Indus.--Petition for Declaratory Order, STB Finance Docket No. 33989, at 5-7 (Served May 15, 2003) (“Pejebscot”). Indeed, in Pejebscot, the STB held that “even if a carrier’s conduct would constitute a statutory violation during a period of regulation, the exemption bars regulatory relief during the period when the exemption is in force.” Id. at 6 (citing Consolidated Rail Corp. – Declaratory Order – Exemption, 1 I.C.C.2d 895 (1986), aff’d sub nom. G&T Terminal Packaging Co., Inc. v. Consolidated Rail Corp., 830 F.2d 1230, 1235 (3d Cir. 1987)).¹⁰

Finally, the STB’s proposed rules cannot apply to contracts. 49 U.S.C. 10709. Moreover, such rail transportation contracts cannot “be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.”¹¹ 49 U.S.C. 10709(c)(1).

Accordingly, the STB should announce in any final decision that the proposed change in the standard for evaluating fuel surcharge programs applies prospectively to common carrier rate authorities on regulated traffic issued on or after the date by which railroads must adopt a fuel surcharge program in compliance with that final decision, but at least 30 days after the effective date of a final action.

¹⁰ This decision makes perfect sense because holding a railroad liable for rates and practices engaged in while an exemption was in effect would be antithetical to the statute and would inject substantial confusion over what an exemption is.

¹¹ Such “part” includes the reasonable practices provision of 49 USC 10702.

V. Any Rules Should Allow For a Smooth Transition.

The STB has proposed changing the way railroads bill hundreds of millions of dollars to thousands of their customers. In addition to avoiding retroactive application of any rules the STB elects to adopt, the STB needs to take steps to insure that the transition to whatever new rules the STB establishes is a smooth one. Some aspects of the proposed rules should not pose a problem. For example, requiring the use of a single EIA index and the prohibition against “double dipping” should not pose significant transition issues. However, there are several issues that the STB should be mindful of and address before the STB changes the fuel surcharge landscape.

A. Modifying NS’ billing systems for local NS traffic will take time.

NS does not have data systems in place today to apply automatically a mileage-based fuel surcharge. We have a billing system. We also have a different data system that includes mileage. The two are not linked and do not interface with one another today, as we do not establish mileage-based rates.¹² It will take some time and effort to integrate these systems to avoid manual handling to bill a mileage-based fuel surcharge on local NS traffic.

B. Other system modifications – for interline traffic and by customers – will also take time.

The STB should consider the many issues that will affect the ability of railroads – large and small – to implement a mileage-based fuel surcharge for interline

¹² NS has some tariffs in the public domain which provide point-to-point rates based on so-called “short line miles” or highway miles. But, NS does not have any tariffs or other rate authorities that price based on actual rail miles traveled.

traffic and that will affect the ability of customers to process efficiently mileage-based fuel surcharges on local and interline traffic. For example, there will almost certainly be data integrity and data sharing issues in implementing mileage-based fuel surcharges for inter-line rail movements. There is no industry mileage master, and even if there were, such a mileage master would not be very helpful to establish fuel surcharges based on actual miles because the same move can travel different routes from origin to destination. Further, NS' current computer systems are unable to match origins or destinations on another railroad with any of its existing mileage tables, and NS does not have any mileage information for any of the approximately 125 handling lines or for any of the switching lines with which it interchanges traffic. This is not an insignificant matter. For example if NS had been required to use a mileage-based fuel surcharge, NS would have had manually to assess a fuel surcharge on approximately 30,000 waybills for inter-line traffic for the month of June.

The public record and the record in this proceeding demonstrate that at least some customers will have similar challenges. Only one railroad –BNSF– has attempted a mileage based fuel surcharge, and the obstacles it has faced should be considered before the STB mandates the general adoption of a mileage-based fuel surcharge. The public record suggests the difficulty in devising such a program, converting computer programs from fuel surcharges that are a simple percent of the rate calculation to individually applicable surcharges, explaining the new system to customers, and permitting customers to change their computer systems. BNSF first announced its intent to move to a mileage-based fuel surcharge on March 29, 2005, after

what was clearly a substantial effort given the level of detail in the announcement.¹³ That fuel surcharge was to apply to coal, grain, intermodal, automotive, and carload traffic. BNSF did not implement its mileage-based fuel surcharge until nine months later. Even then, it implemented a mileage-based fuel surcharge only for its local grain and coal traffic. In an October 20, 2005 press release, John Lanigan, BNSF's executive vice president and chief marketing officer said: "[S]ome customers need more time to make adjustments to their own information systems to accommodate the new program."¹⁴ To our knowledge, BNSF still has not implemented a mileage-based fuel surcharge for traffic other than its local coal and grain traffic.

The limited record in this proceeding to date reflects that the difficulties BNSF's customers faced will exist if the STB adopts its proposed rules. Specifically, some customers are concerned about their ability to update their computer systems. Roseburg Forest Products – an actual shipper, not an association – expresses its concern that "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."¹⁵ Despite such

¹³ Available at http://www.bnsf.com/media/news/articles/2005/03/2005_03_29a.html.

¹⁴ Available at <http://www.bnsf.com/media/news/articles/2005/10/2005-10-20b.html>. The difficulties for shippers in implementing BNSF's mileage-based fuel surcharge are discussed in the Comments of Highroad Consulting, Ltd., Ex Parte 661 (filed Sept. 28, 2006), Comments of Barilla America, Inc., Ex Parte 661 (filed Sept. 28, 2006), Comments of Illinois Brick Co., Ex Parte 661 (filed Sept. 28, 2006), Comments of CRI/Criterion, Ex Parte 661 (filed Sept. 27, 2006), Comments of the Montana Wheat and Barley Commission, et al., Ex Parte 661, at 4 (filed Sept. 21, 2006), Comments of the Goodyear Tire & Rubber Co., Ex Parte 661 (filed Sept. 25, 2006), Comments of San Joaquin Refining Co., Ex Parte 661 (filed Sept. 25, 2006), Comments of Stora Enso North America Corp, Ex Parte 661 (filed Sept. 25, 2006), Reagent Chemical & Research Inc., Ex Parte 661 (filed Sept. 21, 2006), and Afton Chemical Corp., Ex Parte 661 (filed Sept. 19, 2006).

¹⁵ Comments of Roseburg Forest Products, STB Ex Parte 661, at 3 (filed Sept. 21, 2006).

customers' concerns, the STB has gathered no record about the potential costs customers would incur from a move to mileage-based fuel surcharges.¹⁶

NS recognizes the difference between one railroad changing to a mileage-based fuel surcharge and the STB mandating such a change for all railroads. But at the very least, BNSF's experience and the comments filed in this proceeding should provide some guidance for how complex and time consuming and potentially expensive a process it may be for railroads and customers to adjust to a fuel surcharge program adopted in compliance with the rules outlined in the Decision.

Accordingly, we request that, if the STB moves toward adoption of rules, the STB account for the complexity and potential cost to all parties by giving Class I railroads, short line railroads, and rail customers adequate time from the date of a final STB decision to adopt fuel surcharge programs for their local traffic in compliance with any final STB action. The STB should also set some reasonable period of time for railroads to implement a mileage-based fuel surcharge for interline traffic.

VI. Other Comments on the Proposed Rules.

A. "Double dipping" prohibition should be clarified.

The Decision states that the STB wants 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." Decision at 5. Although NS seldom publishes a tariff that

¹⁶ At this time, there is no record regarding the costs to Class I railroads, short line railroads, or customers of implementing a mileage-based fuel surcharge. Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005) (finding rulemaking process flawed for not taking into account the costs of the proposed rules).

contains both a fuel surcharge and a general escalation clause, there is a question as to how a railroad could comply with this “double-dipping” rule while employing a widely accepted index as a rate escalator. The widely accepted indices include a fuel component. NS therefore requests the STB to provide one or more safe harbors, i.e. escalation clauses that would not constitute “double dipping” if included in a tariff that also includes a fuel surcharge.

B. Standard fuel cost index acceptable for non-intermodal traffic.

The Decision states that the STB seeks to require all railroads to use a single index to measure increases in fuel costs. Specifically, the STB suggests the Energy Information Agency’s “U.S. No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon).” Decision at 6. For the limited amount of traffic to which this proposal would apply (i.e. regulated traffic moving under common carrier rates), NS has no objection to this proposal for non-intermodal traffic. But it should be noted that mandating this index for intermodal traffic when trucks use the cost of on-highway diesel as the index for their fuel surcharges, (the same index NS currently uses for its fuel surcharge on intermodal traffic) seems to place regulatory uniformity before commercial utility. NS believes it is better public policy to have railroads use for intermodal traffic the same index that motor carriers use.

C. STB should clarify the status of its proposal.

NS has provided comments in response to the Decision in Ex Parte 661 despite the fact that it is unclear what the Decision is. That uncertainty raises questions

about the legal authority for the STB's proposals in the Decision and about what the next steps should be.

The Decision appears to be an Advanced Notice of Proposed Rulemaking.¹⁷ This view is supported by the STB's apparent intent eventually to create rules (*see* Decision at fn. 9, in which the Decision asserts that the STB 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") coupled with the STB's failure to call the Decision or the Federal Register Notice a "Notice of Proposed Rulemaking" and the absence of any proposed regulatory language, such as one would expect in a Notice of Proposed Rulemaking.

NS therefore respectfully requests that the STB clarify that the Decision is an Advanced Notice of Proposed Rulemaking.¹⁸ In accordance with the Administrative Procedure Act, the STB's next step should be to issue a Notice of Proposed Rulemaking with propose rules and proposed regulatory language to amend the Code of Federal Regulations so that parties may comment meaningfully on any proposed regulatory language.

¹⁷ The Decision is insufficient to be a Notice of Proposed Rulemaking because the STB has not complied with the requirements of 5 U.S.C. 553(b). In particular, Federal Register Notice at 71 Fed. Reg. 45,900-01 (2006), lacks any "reference to the legal authority under which the rule is proposed."

¹⁸ The Decision is not an expression of the STB's intent to issue a general policy statement because such a statement cannot impose obligations such as reporting requirements on a party. American Bus Association v. United States, 627 F.2d 525 (D.C. Cir. 1980). Nor is the Decision a declaratory order with respect to any issue, such as whether a fuel surcharge calculated as a percent of the rate is an unreasonable practice. Aside from the fact that it is unclear whether the STB could issue an order regarding the reasonableness of a practice absent a complaint (49 U.S.C. 11701(a)), legislative rules of general applicability can be adopted only after proper notice and comment (*see e.g.*, Lincoln v. Vigil, 508 U.S. 182, 196 (1993)). Prior to the Decision, there was no notice that the STB might consider new rules regarding fuel surcharges or what those rules might be, and there was no opportunity to comment on any proposed rules.

VII. The Reporting Requirements Should Be Modified.

In any final decision, the STB should limit the monthly reporting requirements to data related to regulated tariff traffic and should therefore revise its form for monthly reporting accordingly.¹⁹

As we have observed before, a contract results from negotiations. The give and take of those negotiations produces a total transportation rate, which is a rate, plus other charges, including a fuel surcharge. Customers and railroads make trade-offs in these individual negotiations that result in a variety of different fuel surcharge arrangements. In light of this commercial reality, any attempt to compare fuel surcharge revenues derived from contracts with cost increases cannot be meaningful.

Indeed, hundreds of millions of dollars – the majority of the fuel surcharges we collect – are on moves governed by transportation contracts. We do not believe it would be sound public policy for the Board to suggest that it is either valid or meaningful to compare revenue from one of many terms in a contract to one of many costs to handle traffic moving under contract.

To assist the Board in finding a workable reporting mechanism for regulated tariff traffic, NS has included (1) as Appendix A to these comments a revised form for reporting on regulated tariff traffic and (2) as Appendix B to these comments NS' reporting on this revised form for the month of August. Appendix B was completed as follows with all dollar amounts or gallons rounded to the nearest whole number.

¹⁹ We believe there are broad arrays of railroad expenses that increase as the price of oil increases. In our view, focusing solely on diesel fuel understates the expenses a railroad incurs when oil prices increase.

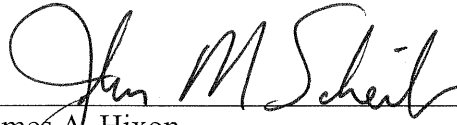
- Line 1 is calculated by multiplying (1) NS' total diesel fuel costs for the month of August by (2) a fraction equal to NS' total revenues from regulated tariff traffic for the month of August divided by NS's total revenues for the month of August (this fraction is hereinafter referred to as "the percent of regulated tariff traffic"). NS has not included fuel costs other than for diesel fuel.
- Line 2 is calculated by multiplying (1) NS' total number of gallons consumed in the month of August by (2) the percent of regulated tariff traffic. In addition to diesel, NS has included only gasoline gallons purchased through NS' Material Management group. NS has not included fuel gallons other than for diesel fuel.
- Line 3 is calculated first by completing the calculation for Line 1 for both the month of July and August and then subtracting the result of the Line 1 calculation for August from the result of the Line 1 calculation for July. (To calculate Line 1 for July, the percent of regulated tariff traffic is calculated by multiplying NS' total diesel fuel costs for the month of July by a fraction equal to NS' total revenues from regulated tariff traffic for the month of July divided by NS's total revenues for the month of July.)
- Line 4 is revenue NS collected in the month of August from fuel surcharges on rate authorities issued by NS. Fuel surcharge revenue from traffic moving on NS, but pursuant to rate authorities issued by another carrier, are not included because NS does not control the fuel surcharge assessed on such movements and there are data integrity issues for such traffic, including whether the traffic is contract traffic or tariff traffic.
- Line 5 is calculated by multiplying (1) the total fuel surcharge collected by NS in the month of August for shipments that NS is responsible for billing the customer and that involve a Class II or Class III carrier by (2) the percent of regulated tariff traffic.
- Line 6 is calculated by multiplying (1) the portion of the total fuel surcharge collected by NS in the month of August for shipments that NS is responsible for billing the customer and that involve a Class II or Class II carrier that NS passed along to the Class II or Class III carrier by (2) the percent of regulated tariff traffic.
- Lines 7 and 8 are calculated by multiplying NS' total ton-miles of freight revenue for the month of August by the percent of regulated tariff traffic for the month of August. Because NS applies a fuel surcharge to all its regulated tariff traffic, the ton miles of freight revenue in Lines 7 and 8 are the same.

VIII. Summary.

In sum, STB regulation of fuel surcharges is unnecessary, commercially restrictive, and bad public policy. The STB's proposed partial revocation of the intermodal exemption is unsupported, and it is not apparent to us that there is much of a record to support the STB's proposal partially to revoke any, much less all of the commodity exemptions.

However, if the STB is intent on regulating fuel surcharges to any extent, any rules its adopts should (1) apply prospectively only; (2) apply only to common carrier rates on regulated traffic; (3) provide a reasonable amount of time for Class I railroads, short line railroads, and customers to implement such rules; (4) clarify what indices could be used in conjunction with fuel surcharges and not constitute "double-dipping"; and (5) if the STB partially revokes the intermodal exemption, permit the use of on-highway diesel as the appropriate index for fuel surcharges on intermodal traffic. The STB should also modify its proposed reporting requirements. In all events, the STB must clarify the status of its Decision, and if it is a rulemaking, propose language for such rules.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John M. Scheib", is written over a horizontal line.

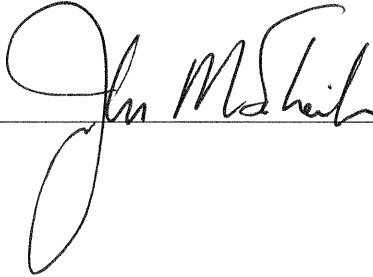
James A. Hixon
George A. Aspatore
John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

Counsel to Norfolk Southern Railway Co.

Dated: October 2, 2006

Certificate of Service

I hereby certify that on this 2nd day of October 2006, I caused a copy of the foregoing **“Comments of Norfolk Southern Railway Company”** to be served upon all parties on the service list for this proceeding by first class mail or more expeditious method of delivery.



A handwritten signature in cursive script, appearing to read "John M. Stahl", is written over a horizontal line. The signature is fluid and stylized, with the first letter of the first name being a large capital 'J'.

APPENDIX A

RAILROAD NAME _____

**MONTHLY REPORT OF
FUEL COST, CONSUMPTION AND FUEL SURCHARGE
REVENUES**

FOR THE MONTH OF _____ 20__

Instructions

The report shall contain data for the current month only. Cost and revenues are defined as accrued or earned this month. The report shall be filed with the Surface Transportation Board on or before 20 days after the end of the month.

LINE NO	Report all data in thousands	
	(a)	(b)
1	Total fuel cost for regulated tariff traffic ¹	
2	Gallons of fuel consumed to move regulated tariff traffic ²	
3	Increased or decreased cost of fuel to move regulated tariff traffic ³	
4	Revenue from fuel surcharges on regulated tariff traffic ⁴	
5	Revenue from fuel surcharges collected on joint shipments of regulated tariff traffic with Class II and III railroads ⁵	
6	Revenue reported in line 4 from fuel surcharges shared with Class II and III railroads ⁶	
7	Ton-miles of freight revenue from regulated tariff traffic - road service fuel surcharge applied to ⁷	
8	Total ton-miles of freight revenue from regulated tariff traffic – road service ⁸	

APPENDIX A

¹ Includes freight, yard and work train locomotives, but not passenger locomotives. Show cost of fuel charged to train and yard service (function 67-Loco. Fuels). Include all other fuel used for railroad operations and maintenance, including motor vehicles and power equipment not charged to function 67-Loco. Fuels (calculate the cost consistent with the instructions for function 67). For purposes of this report, an acceptable method to calculate fuel costs for regulated tariff traffic is to multiply total fuel costs by a fraction equal to revenues from regulated tariff traffic divided by total revenues.

² For purposes of this report, an acceptable method to calculate gallons consumed for regulated tariff traffic is to multiply total gallons consumed by the railroad during the month by a fraction equal to revenues from regulated tariff traffic divided by total revenues.

³ Show the total increase or decrease in fuel cost attributable to regulated tariff traffic over previous month. That is, the difference between Line 1 for the current month and Line 1 from the prior month.

⁴ Show the total revenue from fuel surcharges on regulated tariff traffic that have rate authorities issued by the reporting railroad.

⁵ For purposes of this report, an acceptable method to calculate such revenue is to multiply the total fuel surcharge revenues collected for which the Class I railroad is responsible for billing the customer and that involve a Class II or Class III railroad by a fraction equal to revenues from regulated tariff traffic divided by total revenues.

⁶ For purposes of this report, an acceptable method to calculate such revenue is to multiply the portion of the total fuel surcharge collected by the Class I railroad for shipments that the Class I railroad is responsible for billing the customer and that involve a Class II or Class II railroad that the Class I passed along to the Class II or Class III railroad by the percent of regulated tariff traffic.

⁷ Show the revenue tons to which the fuel surcharge was applied. For purposes of this report, an acceptable method to calculate ton-miles of freight revenue for regulated tariff traffic to which a fuel surcharge applied is to multiply total ton-miles of freight revenue to which a fuel surcharge applied by a fraction equal to revenues from regulated traffic divided by total revenues.

⁸ For purposes of this report, an acceptable method to calculate ton-miles of freight revenue for regulated tariff traffic is to multiply total ton-miles of freight revenue by a fraction equal to revenues from regulated traffic divided by total revenues.

APPENDIX B

NORFOLK SOUTHERN RAILROAD

MONTHLY REPORT OF

FUEL COST, CONSUMPTION AND FUEL SURCHARGE

REVENUES

FOR THE MONTH OF AUGUST 2006

Instructions

The report shall contain data for the current month only. Cost and revenues are defined as accrued or earned this month. The report shall be filed with the Surface Transportation Board on or before 20 days after the end of the month.

LINE NO	Report all data in thousands	
	(a)	(b)
1	Total fuel cost for regulated tariff traffic ¹	\$4,635,252
2	Gallons of fuel consumed to move regulated tariff traffic ²	2,163,673
3	Increased or decreased cost of fuel to move regulated tariff traffic ³	(\$299,885)
4	Revenue from fuel surcharges on regulated tariff traffic ⁴	\$750,977
5	Revenue from fuel surcharges collected on joint shipments of regulated tariff traffic with Class II and III railroads ⁵	\$176,390
6	Revenue reported in line 4 from fuel surcharges shared with Class II and III railroads ⁶	\$50,073
7	Ton-miles of freight revenue from regulated tariff traffic - road service fuel surcharge applied to ⁷	883,799
8	Total ton-miles of freight revenue from regulated tariff traffic – road service ⁸	883,799

APPENDIX B

¹ Includes freight, yard and work train locomotives, but not passenger locomotives. Show cost of fuel charged to train and yard service (function 67-Loco. Fuels). Include all other fuel used for railroad operations and maintenance, including motor vehicles and power equipment not charged to function 67-Loco. Fuels (calculate the cost consistent with the instructions for function 67). For purposes of this report, an acceptable method to calculate fuel costs for regulated tariff traffic is to multiply total fuel costs by a fraction equal to revenues from regulated tariff traffic divided by total revenues.

² For purposes of this report, an acceptable method to calculate gallons consumed for regulated tariff traffic is to multiply total gallons consumed by the railroad during the month by a fraction equal to revenues from regulated tariff traffic divided by total revenues.

³ Show the total increase or decrease in fuel cost attributable to regulated tariff traffic over previous month. That is, the difference between Line 1 for the current month and Line 1 from the prior month.

⁴ Show the total revenue from fuel surcharges on regulated tariff traffic that have rate authorities issued by the reporting railroad.

⁵ For purposes of this report, an acceptable method to calculate such revenue is to multiply the total fuel surcharge revenues collected for which the Class I railroad is responsible for billing the customer and that involve a Class II or Class III railroad by a fraction equal to revenues from regulated tariff traffic divided by total revenues.

⁶ For purposes of this report, an acceptable method to calculate such revenue is to multiply the portion of the total fuel surcharge collected by the Class I railroad for shipments that the Class I railroad is responsible for billing the customer and that involve a Class II or Class II railroad that the Class I passed along to the Class II or Class III railroad by the percent of regulated tariff traffic.

⁷ Show the revenue tons to which the fuel surcharge was applied. For purposes of this report, an acceptable method to calculate ton-miles of freight revenue for regulated tariff traffic to which a fuel surcharge applied is to multiply total ton-miles of freight revenue to which a fuel surcharge applied by a fraction equal to revenues from regulated traffic divided by total revenues.

⁸ For purposes of this report, an acceptable method to calculate ton-miles of freight revenue for regulated tariff traffic is to multiply total ton-miles of freight revenue by a fraction equal to revenues from regulated traffic divided by total revenues.