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VIA E-FILING

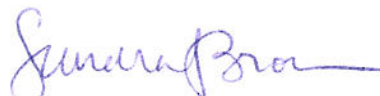
The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

**RE: Supplemental Comments of Ameren Energy Fuels & Services in
response to *Rail Fuel Surcharges*, Ex Parte No. 661**

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are the Supplemental Comments of Ameren Energy Fuels & Services.

Yours very truly,


Sandra L. Brown

SLB:bgh
Enclosure

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 661

REVIEW OF RAIL FUEL SURCHARGES

**SUPPLEMENTAL COMMENTS OF AMEREN ENERGY
FUELS AND SERVICES COMPANY**

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***ATTORNEYS FOR AMEREN ENERGY
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October 2, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 661

RAIL FUEL SURCHARGES

**SUPPLEMENTAL COMMENTS OF AMEREN ENERGY
FUELS AND SERVICES COMPANY**

I. INTRODUCTION

On March 14, 2006, the Surface Transportation Board (“Board” and “STB”) issued a notice of public hearing on rail fuel surcharges to be held on May 11, 2006, and invited interested parties to submit comments on railroad fuel surcharges (hereinafter “Notice”). Ameren Energy Fuels and Services Company (“AFS”) submitted written comments in response to the Notice on April 27, 2006 (hereinafter “AFS Comments”).¹ AFS also appeared and testified at the May 11 hearing. In a STB decision served August 3, 2006 in this proceeding, the Board has sought public comments on the Board’s proposals set out in the August 3 decision (hereinafter “Decision”). AFS hereby submits supplemental comments in response to the Board’s invitation.

First, AFS would like to commend the Board for taking action with respect to the contentious issue of fuel surcharges. AFS supports the Board in the following important findings contained in its Decision:

1. That the Board has jurisdiction under 49 U.S.C. §10702(2) to address the unreasonable practice “of applying what the railroads label a fuel surcharge in a

¹ The Identification and Interest of AFS can be found in AFS’ Comments filed with the Board on April 27. AFS’ comments filed herein are intended as a supplement to the AFS Comments and AFS will limit the repetition of issues except to the extent necessary to address the Board’s proposals as requested.

manner that is not limited to recouping increased fuel costs that are not reflected in the base rate.” Decision at 4.

2. That it is not a reasonable practice to compute fuel surcharges as a percentage of existing rates. Rather, a lawful surcharge must be “directly tied to and limited to the incremental changes in that particular cost for the movements to which the surcharge is applied. *Id.* at 4-5. Moreover, alternatives to tying a surcharge to an existing rate must “have a reasonable nexus to the fuel consumption of the movement involved.” *Id.* at 5.
3. That it is not a reasonable practice to adjust a rail rate using the Rail Cost Adjustment Factor (“RCAF”) and also assess a fuel surcharge. *Id.*
4. The Board also implicitly ruled that the price of West Texas Intermediate Crude Oil (“WTI Price”) is not an appropriate index upon which to base a fuel surcharge formula. *Id.* at 6.

In conjunction with the above findings, the Board sought public comments on several proposals “designed to preclude [the] unreasonable practice” of assessing what is labeled a fuel surcharge but that is not limited to recouping increased fuel costs not reflected in the base rate. Decision at 4. AFS’ supplemental comments address the Board’s proposals on fuel surcharges and discuss railroad fuel surcharges in general without focusing on a particular carrier.²

II. Summary of Supplemental Comments

AFS strongly supports the Board’s efforts to establish policies which will encourage a reasonable solution to the current unreasonable practice used by the railroads to assess fuel surcharges on shippers. AFS supports the Board’s findings in its Decision; however, AFS respectfully asserts that the Board’s next decision must go further to provide additional transparency and accountability regarding fuel surcharges. The Board correctly applied its authority under 49 U.S.C. § 10702. The Board should affirm that its unreasonable practices

² However, AFS does address the problems with the mileage based fuel surcharge program used by the BNSF in response to the Board’s Linkage Requirement proposal.

findings apply to all fuel surcharge practices by the railroads.³ With respect to the specific proposals offered by the Board, AFS supports the proposals with the caveat that some still outstanding, but significant, concerns permeate the proposals. Thus, AFS' recommendations include:

1. Railroads must be required to separate out the current fuel and non-fuel components within any rate for all future rate quotes and provide such data for past rates. If a carrier is unwilling or unable to provide the rate as separate fuel and non-fuel components, then the carrier cannot charge a separate fuel surcharge and must use RCAF. Alternatively, if a railroad does not provide such a break down of both the fuel and non-fuel components within a rate, then the Board would establish a rebuttable presumption that the railroad's fuel costs, determined by applying URCS cost factors contemporaneous with the rate quote, is presumptively the fuel component in the base rate.
2. If a non-RCAF escalator is permitted such that an index is needed to escalate the fuel portion of the rate, then the railroads must be required to base the index used, such as the Energy Information Administration No. 2 Diesel Retail Sales Index ("EIA Index"), to the timeframe that corresponds to the time of the rate.
3. Any fuel surcharge applied must operate in both a positive and negative fashion, in order to protect shippers from carriers being overcompensated when fuel costs decrease.

III. Supplemental Comments

A. The Board Correctly Applied 49 U.S.C. § 10702(2)

Under 49 U.S.C. §§ 10702 and 10704(a)(1), the Board has authority over railroad practices. If a railroad practice is found to be unreasonable, the Board can order the railroad to cease engaging in it or the Board can prescribe the "practice to be followed." 49 U.S.C.

³ As noted in a recent filing in the Kansas City Power & Light rate complaint case, STB Docket No. 42095, the contents of a tariff or contract are often very similar, so the current fuel surcharge methodology should be an unreasonable practice regardless of whether it is offered for a common or contract rate. See Union Pacific's Brief in Response to Order to Show Cause, filed September 25, 2006.

§ 10704(a)(1). The Board correctly applied these principles in reviewing the railroad's fuel surcharge practices.⁴

B. Comments on Specific Findings and Proposals

The Board has put forth four proposals in the Decision to address the unreasonableness of the current methodology used by the railroads to assess fuel surcharges. AFS' Supplemental Comments address each of the proposals separately below. The Board's proposals include: (1) the "linkage" issue and proposal that fuel surcharges must not be tied to the base rate but must be limited to the incremental changes in costs for a particular movement; (2) the finding that "double dipping" is an unreasonable practice and the Board proposal to prohibit the use of a fuel surcharge in cases where the same costs are recovered in a base rate escalator; (3) the proposal that railroads would be required to use one index for measuring fuel cost increases, the EIA Index; and (4) the proposal that each Class I railroad submit monthly data which will include a "railroad's actual total fuel costs, total fuel consumption and total fuel surcharge revenues, as well as how much of its total fuel surcharge revenues were shared with its shortline connections".

1. Linkage of Surcharge to Actual Incremental Increase in Fuel Costs for Particular Movement

In its Decision the Board rightfully determined that it is an unreasonable practice under 49 U.S.C. § 10702(2) to compute fuel surcharges as a percentage of existing rates. Decision at 4. Rather, to the extent a fuel surcharge can be assessed, it must be "directly tied to and limited to the incremental changes in that particular cost for the movements to which the surcharge is applied." Under this standard virtually all of the current Class I railroad tariff "fuel surcharges"

⁴ Additional support of the Board's authority under 49 U.S.C. § 10702 can be found in the AFS Comments filed with the Board on April 27. AFS agrees with the Board's conclusion that it has the requisite authority as shown in the Board's August 3 Decision.

violate §10702(2) by computing and assessing fuel surcharges as a percentage of the entire rate. Accordingly, the Board admonished the railroads to “reexamine their method of calculating fuel surcharges.” The Board proposed that a fuel surcharge that could pass muster under § 10702(2) would “be tied not to the level of the base rate but to those attributes of the movement that directly affect the amount of fuel consumed: either mileage alone, or preferably weight and mileage. Railroads would have discretion to devise an alternative methodology, so long as it would have a reasonable nexus to the fuel consumption for the movement involved.” *Id.*

AFS supports the requirement that a fuel surcharge, or any surcharge for that matter, must have a direct correlation to the incremental changes in the movement-specific costs for which the surcharge is being assessed. Furthermore, the determination of the point at which the relevant movement-specific cost changes are to be measured is a critical issue. The “reasonable nexus” must be to cost increases in fuel consumption that are not already captured by either the base rate or a rate adjustment formula. Most importantly, any fuel surcharge methodology must operate in both a positive and negative manner to accurately reflect the linkage to actual costs.

A fundamental principle for the “reasonable nexus” is the requirement that the railroads must provide data on the fuel and non-fuel portions of the rate. Thus, the Board should require each Class I railroad to report the current fuel and the non-fuel components of each rate to a shipper to facilitate an accurate measurement of fuel costs and appropriate fuel surcharge. If a shipper does not know the current fuel and non-fuel costs in the base rate, then there is no way to make a true assessment that the fuel surcharge is only being applied to the incremental changes in the particular fuel cost for the movements. Furthermore, without this additional data requirement for railroads there will be no transparency on fuel surcharges.

If this data is not required, then it must be assumed that the railroad acted prudently and established rates at a level to cover all of the operating costs of the movement as well as provide a profit component at the time the rate was quoted. The Board should adopt a rebuttable presumption that the railroad's cost of fuel for any rate quote is reflected in the base transportation rates for the time period of the rate quote by applying URCS cost factors contemporaneous with rate quote. Then a valid fuel surcharge can only be applied to the fuel costs portion, calculated using the URCS cost factors, and only to the incremental changes in such costs to the extent they are not recouped in a rate adjustment formula. This presumption would assist the Board to enforce that fuel surcharges have a direct correlation to the increases in the movement-specific costs for which the surcharge is being assessed.

As AFS discussed in its April 27 Comments, the BNSF mileage program does not provide an accurate measure of the actual fuel consumed for a movement. AFS Comments at 12-13. While distance may be a better proxy for the amount of fuel used in a movement than the transportation rate, it still is unnecessarily imprecise. The use of distance ignores a variety of factors that affect fuel usage, such as topography, train weight, train speed, frequency of stops, and the time required for the movement.

2. "Double Dipping" Prohibition and the Use of RCAF Generally

AFS applauds the Board for recognizing the abuse caused by double dipping. As the Board stated in its Decision "[i]t is possible that some carriers have been charging twice for the same fuel cost increases, by both escalating the base rate using such an index (without first subtracting out the fuel cost component) and applying a fuel surcharge." The Board continued that "engaging in such 'double dipping' would also be an unreasonable practice, and we propose 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.

Most current fuel surcharge practices mirror exactly what the Board intends to prohibit. The base freight rate a shipper pays is adjusted by an index which escalates the entire base rate including the fuel costs already included in the base rate. Thus, the Board must require the railroads to separate out the fuel and non-fuel components and require railroads to provide this information to shippers in their rate quotes for both common and contract rate quotes to prevent double dipping. Alternatively, the Board must establish a presumption that any rate quote provided to a shipper includes the current cost of fuel as determined by URCS cost factors for the time period in which the rate quote was provided to the shipper. Without this requirement there is no transparency and future double dipping may be possible.

a. The Prohibition on Double Dipping Can Be Best Enforced by Favoring the Use of RCAF to Recover Fuel Costs

As evidenced in previous comments, double dipping is occurring based on the use of the RCAF and the use of a fuel surcharge factored as a percentage of the entire rate. The RCAF was specifically designed and implemented by the Interstate Commerce Commission to recover fuel cost increases without the need for a separate fuel surcharge. *See* AFS Comments at 6; *citing Ex Parte* No. 290 (Sub No. 2), *Railroad Cost Recovery Procedures*, 45 Fed. Reg. 81217 (Dec. 10, 1980)(“the procedures proposed in this notice will permit railroads to recover fuel cost increases along with other cost increases on a quarterly basis...We thus propose that our current *Ex Parte* 311 fuel surcharge mechanism be discontinued.”) *See also, id., citing* *Ex Parte* No. 290 (Sub-No. 2), *Railroad Cost Recovery Procedures*, 364 ICC 841, 852 (1981) (“adoption of [the RCAF] “permit[s] railroads to recover fuel cost increases along with other cost increases on a quarterly basis . . .” and “[m]aintaining a separate surcharge mechanism for fuel would, in our view, serve

no useful purpose once these rules are in place, and would, in fact, only complicate the operation of the new system.”).

While railroads may not be happy with the timing of their fuel cost recoupment under RCAF, no railroad in this proceeding has disputed that the changes in a railroad’s fuel costs for a particular movement would eventually be recovered under the RCAF with a fuel cost component. As the Board noted in its Decision, the primary reason advanced why an additional or separate “surcharge” is needed is the claim that the RCAF does not recover costs fast enough when the price of fuel “spikes.” Decision at 6.

However, the quarterly filings by the AAR that provide the inputs for the RCAF reveal that the RCAF methodology takes into account the fluctuation of railroad diesel prices caused by events in the world oil markets. For example, the filing made on December 5, 2005 by the AAR described the damage done by hurricanes Katrina and Rita as largely responsible for the rise in the fuel component of the RCAF. Ex Parte No. 290 (Sub-No. 5) (2006-1), *Quarterly Rail Cost Adjustment Factor*, AAR forecast, Appendix B (page 1) (filed Dec. 5, 2005). These are exactly the same reasons now cited by the railroads in justifying the use of their privately developed fuel surcharges. Furthermore, the most recent adjustment to the RCAF again shows a huge increase based on fuel costs over and above the large increase cited above. Rail Business reports that “on a percentage increase basis, fuel costs are expected to rise roughly 43 pct” between the 3rd and 4th quarters of 2006. Rail Business, Sept 11, 2006, p. 6, “Fuel costs become larger part of RCAF.”

The railroads have made no showing in this proceeding that fuel prices have spiked so dramatically in the past several years that they justify an accelerated recovery of fuel costs above the RCAF. To the extent that the railroads believe the RCAF is not allowing them to recover

their fuel costs in a timely fashion, they should seek appropriate relief from the Board.⁵ *Railroad Cost Recovery Procedures*, 1 ICC 2d at 218 (In adopting the methodology for calculating the RCAF, the ICC stated that “significant problems in the accuracy of fuel data” could warrant a change in the fuel component of the RCAF index). Thus, the Board’s prohibition on “double dipping” can be enforced by simply using the RCAF as the rate adjustment methodology.

b. A Non-RCAF Index Should be Allowed Only if the Railroad Applies the Index to the Non-Fuel Component of the Rate

In its Decision the Board stated that “[r]ailroads could continue to collect a fuel surcharge if they remove the fuel cost component from the RCAF (or other index) used to escalate the base rate. That approach would have the benefit of avoiding the longer time lag for recovery that is associated with the quarterly RCAF, in favor of a fuel surcharge that is adjusted more rapidly.” Decision at 6. AFS believes that if the Board or any railroad is concerned with the speed at which fuel costs can be recovered under the RCAF, then application of a non-RCAF Index may be acceptable if the railroad separates the fuel from the non-fuel components in its rate and the fuel surcharge is only applied to the fuel component and the non-fuel index is applied to the remainder of the base rate. In addition, any alternative index must be brought under the direct oversight of the Board. This is the only transparent way for the shipper and the Board to be able to fully assess the extent of any double dipping or over recovery of fuel costs.

3. Use of the EIA No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon) Index

If a fuel surcharge index is going to be used, then requiring the railroads to use a universal index for all rail fuel surcharges is a good idea for consistency and timeliness. The

⁵ AFS would support a modification to RCAF that would account for differences in unit train costs such that there would be an RCAF mechanism for unit trains and an RCAF difference for carload movements. AFS recognizes that any modification to the RCAF entails additional work for the understaffed Board. Unfortunately, these actions are necessary to ensure transparency and to provide needed verification because of the unreasonable practices that have been employed by the railroads.

proposed EIA Index is updated every month, which would allow the railroads to recover incremental changes in fuel costs in a timely manner. Of course, a separate fuel cost index would not be necessary if the Board just required the use of the RCAF to adjust for all changes in costs, including fuel, and then modify RCAF as needed. Nevertheless, if other escalators are going to be permitted, a much larger issue with respect to any index used is that the timeframe for the index must match the timeframe used for the fuel component embedded in the base rate so that over recovery is not permitted. For example, if the base rates are set in September 2006 then the fuel used by the railroads must use the corresponding August 2006 fuel prices in order to capture only the incremental increase in prices (while recognizing that a 30 day lag will be necessary for accounting purposes). The STB must establish the rebuttable presumption discussed above to ensure such transparency.

In addition, the Board must establish a presumption that the current cost of fuel is used for current rate quotes. If the railroads are permitted to claim a different timeframe for current rate quotes or not required to provide this information at all, the transparency sought by the Board could be circumvented. For example, under the railroads' current methodology of using a fuel surcharge threshold upon the price of fuel in 2002, AFS would pay approximately \$83 Million in fuel surcharges in 2007 if the current average price of fuel remained at the April 15, 2006 level of \$2.70 per gallon. Under the current fuel surcharge practice, the \$83 Million in fuel surcharges would be arrived at because 2002 fuel costs were used even though the rates were established after 2002 and even though the price of fuel under the EIA index has on average been below \$2.70 per gallon (averaged \$2.67) for the first half of 2006. If the current price of fuel was in fact embedded when the rates were established, the fuel surcharge formula produces an

\$83 million windfall for the railroads. It is highly unlikely that a prudent company would establish rates that did not cover all of the current costs associated with the service provided.

Finally, the use of any index to recover incremental changes in fuel costs for the railroads must provide for both positive and negative adjustments. This is especially true as the railroads new base rates are established that may include higher fuel costs components. If the index shows a decrease in fuel costs, the Board should find that it would be an unreasonable practice for the corresponding fuel surcharge to not incorporate that same decrease.

4. Reporting Requirements

AFS supports all of the reporting requirements the Board proposed in its August 3 Decision, including the requirement that “each Class I railroad should report, on a monthly basis, its total expenditures for fuel, the total gallons of fuel it consumed, the increase or decrease in its cost of the fuel from the previous month, its revenue tons for the month, and its revenue tons to which the fuel surcharge was applied.” Decision at 1.

Most importantly, the railroads hold the data that the Board needs to fully evaluate the manner in which fuel surcharges are calculated and what correlation, if any, those calculations have to the railroads’ actual costs. This is why transparency and STB oversight, as discussed throughout this proceeding, is so important. However, AFS feels that the Board’s Decision fell short by not requiring railroads to report vital pieces of data that will protect shippers from double-dipping by the railroads’ fuel surcharge methodology.

AFS supports the following additional reporting requirements. First, the Board’s recommended reporting requirements presented in its Decision should be implemented immediately. Second, as discussed throughout these Comments, the Class I railroads should be required to separate out the fuel and non-fuel components of the base rates that are quoted to

shippers to demonstrate that fuel is not accounted for twice as the rate is escalated. Requiring fuel and non-fuel components to be quoted separately is absolutely necessary in the light of the unreasonable practices employed by the railroads and in order to have a transparent way to evaluate the accuracy of the fuel surcharges assessed upon any movement.

Finally, the Board should also require each Class I railroad to provide sufficient historical data regarding their fuel surcharges and the fuel and non-fuel components of the railroad rates so that an accurate assessment can be made of the actual fuel costs. Since the railroads fuel surcharge programs have been based upon fuel costs set in the 2002 time period any effort to change the fuel surcharge program now without reviewing the historical data will facilitate the railroads' ability to achieve the same record profits from fuel surcharges but just under a new methodology not addressed by the Board, such as rebasing the base rates without removing the fuel cost. *See Rail Business*, Sept. 11, 2006 p. 5. "STB fuel surcharge plan has one major weakness" by Escalation Consultants ("Retroactivity in railroads' fuel reporting requirements is necessary to ensure that railroads charges for fuel more accurately reflect their change in cost of fuel.")

As AFS previous stated, the STB has clear authority to obtain the data it needs under 49 U.S.C. § 721(B).⁶ Thus, AFS believes the Board has the requisite power to use existing or add regulations to require any reporting needed to assure that over recovery is not occurring on a permanent basis from fuel surcharges.

⁶ 49 U.S.C. § 721 (b) (2006). Railroads already provide certain fuel cost data to the STB on a quarterly basis through the RCAF process. 49 U.S.C. § 10708. In addition, the Board also requires railroads to submit certain cost and revenue data under 49 CFR Parts 1200 through 1300. Furthermore, railroads are required to report certain information regarding carrier rates and service terms pursuant to 49 CFR Parts 1300 through 1332.

IV. CONCLUSION

AFS supports the Board's proposed action on fuel surcharges. The Board must be proactive and take quick steps to expand and implement the proposals regarding fuel surcharges. The Board must not back down from its August 3 Decision. AFS supports all four of the Board's proposals with the inclusion of AFS' additional recommendations including:

1. Railroads must be required to separate out the current fuel and non-fuel components within any rate for all future rate quotes and provide such data for past rates. If a carrier is unwilling or unable to provide the rate as separate fuel and non-fuel components, then the carrier cannot charge a separate fuel surcharge and must use RCAF. Alternatively, if a railroad does not provide such a break down of both the fuel and non-fuel components within a rate, then the Board would establish a rebuttable presumption that the railroad's fuel costs, determined by applying URCS cost factors contemporaneous with the rate quote, is presumptively the fuel component in the base rate.
2. If a non-RCAF escalator is permitted such that an index is needed to escalate the fuel portion of the rate, then the railroads must be required to base the index used, such as the EIA Index, to the timeframe that corresponds to the time of the rate.
3. Any fuel surcharge applied must operate in both a positive and negative fashion, in order to protect shippers from carriers being overcompensated when fuel costs decrease.

Most importantly, the Board must require additional reporting by the Class I railroads that would require the fuel and non-fuel costs be provided to shippers for all future and past rate quotes. This is vital to evaluating the fundamental principles of the Board's Decision, most notably that the fuel surcharge must be limited to the incremental changes in the particular costs for the movements. AFS respectfully requests the Board to take swift action and implement the additional fuel surcharge principles as modified herein.

Respectfully submitted,

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