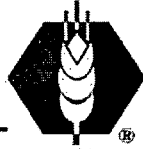


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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**EX PARTE NO. 661
RAIL FUEL SURCHARGES**

**Comments of
National Grain and Feed Association
In Response to August 3, 2006 STB Decision
September 29, 2006**

National Grain and Feed Association (NGFA) is comprised of some 900 member companies involved in grain storage, grain shipping, commodity and specialty grain merchandising, feed milling, integrated livestock feeding operations, grain processing and exporting. Rail transportation is an integral part of the grain and processed products marketplace. Our industry continues to be highly dependent on rail in many markets, in particular those markets where locations of production and consumption are separated by long distances.

The NGFA, along with several other shipper groups, in the last two years have raised several concerns with the STB and the major class I carriers regarding the surcharge formulas and their application for assessing rail fuel surcharges on rail customers. Those concerns were detailed again in our submission to the STB at the May 11, 2006 hearing. The major surcharge issues we noted included: 1) many fuel surcharges are inequitable, in particular those applied as a percentage to the base rail rate, because rates are not necessarily closely related to costs involved in a given movement; 2) Over time, the fuel surcharges become more distorted, particularly at higher fuel and oil price levels, as ever higher surcharges are applied to higher rail rates, escalating the over-charging for actual fuel cost increases; and 3) Lack of transparency in the application of fuel surcharges which makes it impossible for a rail customer to evaluate whether the surcharge applied to individual shipments is equitable and in line with actual fuel usage and fuel cost increases from the base fuel cost level assumed in the carrier's surcharge formula.

We commend the STB on its August 3 Decision (the "Decision"). It is clear from the Decision the STB fully understands the growing frustration of rail customers that have been paying inequitable surcharges for some time, and understands that, as the surcharges have grown with the increasing price of oil and diesel, the inequities likewise have grown. But because of lack of transparency in the data reported by railroads, the full impact of the inequities cannot be accurately measured by rail customers. Further, it is clear that the STB acknowledges that fuel surcharges have become a huge factor in the

overall cost of freight on some carriers' movements, and that, in many cases, the full cost of the surcharge on individual shippers cannot be justified.

The Decision reaches several conclusions that NGFA heartily endorses.

First is the legal question of whether the STB has authority to regulate fuel surcharges as an unreasonable practice: In our view, the STB is on solid legal footing in finding that “fuel surcharges” are appropriately regulated as a “practice”, separate and distinct from the rail rate. In essence, the Decision finds (p. 4) that it is an unreasonable practice to label something a “fuel surcharge” that is not strictly related to actual “fuel costs that are ... reflected in the base rate.” NGFA fully agrees with that analysis. Given that the STB has also found that, at least in some cases, railroads have not limited fuel surcharges to recouping merely actual increases in fuel costs, but have used the formula to assess excessive charges on some customers, it is entirely appropriate that the STB take corrective action to preclude the practice of misrepresenting that fuel surcharges only cover unanticipated increases in fuel costs.

Second is the recognition that fuel surcharges should apply only to “the cost of fuel for an individual rail movement.” (Decision, p. 4). The Decision concludes correctly that each “base rate” contains a fuel cost, other operating costs, and profit, and that it is appropriate to apply a fuel surcharge only to recover those “fuel costs that are not reflected in the base rate”; in other words, increases in the cost of fuel that have occurred since the base rate was published. The Board finds expressly that:

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 the incremental changes in that particular cost for the movements to which the surcharge is applied.

Decision, p. 4. The Decision proceeds to “admonish carriers to reexamine their method of calculating fuel surcharges.” Decision, p. 5.

NGFA takes the Decision’s “admonition” to the carriers as meaning that no fuel surcharge should be applied except to recover increases in the cost of fuel over and above the fuel cost implicit in the base rate. That means that, if a carrier elects to apply “fuel surcharges,” it will have to quantify and identify the fuel cost component of a base rate and develop a surcharge mechanism that applies the carrier’s selected surcharge methodology to that fuel cost component only. The Board should clarify that that indeed is a correct interpretation of the Decision.

Third is the Board’s finding that “it is an unreasonable practice to compute fuel charges as a percentage of existing rates.” (Decision, p. 4). We applaud the STB’s conclusion that a surcharge should be established on the basis of “attributes of a movement that directly affect the amount of fuel consumed.” (Decision, p. 5). The Decision identifies two potential methodologies to meet that purpose: either “mileage or ton-miles.” Clearly, weight and distance have a bearing on fuel usage, but we would further urge the STB to use its authority to push the railroad industry toward more uniformity in surcharges. If the STB would establish an “official base fuel price” for all carriers, it

would assist in minimizing differences in surcharge methodologies across carriers.

About one-third of all shipments move over two or more carriers, which is a large enough segment of total rail business to warrant uniformity.

The base fuel price should not be set at a level that is so high that future fuel or oil prices are likely to decline below the base, so as to avoid necessitating an additional (downward) reduction within a short time frame. But by establishing a base fuel price that is considerably higher than typical base rates used today, the differences in surcharge assessments---whether based upon car miles, ton-miles or other measures---should contain fewer distortions and inequities than the existing surcharge systems for the typical carrier. A higher base price than presently used by most carriers¹ also will go far toward bringing about surcharges more “directly tied to ... the incremental changes in that particular cost for the movements to which the surcharge is applied” by minimizing the assessment of fuel surcharges on recently established freight rates that already include current fuel costs significantly higher than those in effect under outdated base rates. If fuel prices decline below the base fuel price, rail customers would fully expect the STB to make a timely downward adjustment to avoid system-wide overcharges. Recognizing that carriers should make some concurrent reductions in rate structure to avoid windfalls, it would be helpful for the STB to establish a reasonable time frame for the railroads to make the necessary administrative adjustments.

Even though a uniform base fuel price will minimize distortions, NGFA would urge the STB to require carriers to justify substantial differences in surcharge assessments

¹ The majority of carriers still use a base price tied to the cost of fuel in 2001.

applicable to various movements. For example, at the May hearings, we commended the BNSF for adopting its mileage-based surcharge system for agricultural commodities and coal that clearly is more cost-based than the rate-based surcharge it had previously employed. But in NGFA's written testimony, we also asked that the BNSF explain the large difference in the fuel surcharges per mile of grain cars vs. coal cars. We would urge a similar level of transparency from other carriers.

Fourth is the prohibition against carriers assessing a fuel surcharge on the same traffic to which an RCAF (or similar index) is applied, which also contains an assessment for higher fuel costs. While we certainly agree with the STB prohibition on this form of "double-dipping," it is not apparent to us how the STB would police the carriers to ensure that this practice is discontinued. We note the absence of any reporting requirement for the carriers regarding this aspect of the Decision and would encourage the STB to mandate that carriers submit acceptable evidence of compliance to the agency and the public.

Fifth, the Decision mandates that all carriers use the EIA-DOE's price series, "U.S. No. 2 Diesel, Retail Sales by All Sellers (cents per gallon)." While we commend the STB for proposing to establish a uniform price series, we would urge that the STB reconsider its series selection. This particular fuel price series, while widely available, is unlikely to be the most accurate reflection of what carriers are actually paying for diesel. Railroads do not pay diesel fuel taxes, which are included in retail sales tables such as the one proposed by the Board, so that such a price series overstates railroad fuel costs.

Railroads also do not have to burn low-sulfur diesel (which is the basis for the retail highway price), and the retail highway price will vary as state and federal highway taxes may be adjusted. A different diesel price series could provide improved accuracy.

We urge the STB to consider using the wholesale price of diesel (without taxes) paid by institutional customers as the standardized fuel price for indexing. (While we have not made a detailed evaluation of the proposed retail diesel price series, we would note that simply comparing the proposed price series with EIA's wholesale price for diesel for the first five months of this year, January 2006 to May 2006, indicates an average spread difference of 66 cents per gallon, generally reflecting the tax difference and marketing gross margins. The variation in the difference on a monthly basis ranged from 61 cents to 71 cents per gallon of diesel.) Whatever price series is established, NGFA would urge the STB to evaluate the proposed surcharge formula of rail carriers in the use of this price series to ensure that surcharges over a wide range of fuel prices will accurately reflect the increases in cost of diesel for the carrier in comparison to the established base period.

Sixth, the Board imposed reporting requirements for carriers. As noted in our earlier submissions, the lack of transparency in the calculation and application of rail fuel surcharges has been an ongoing problem among rail customers, and we commend the STB for issuing a specific set of reporting requirements. As we perceive the STB's proposed reporting requirements, the additional data would: 1) provide considerable transparency to the fuel surcharge relationships and surcharge revenue divisions between Class I and Class II and III carriers; 2) provide concrete carrier information regarding the

proportion of customers paying surcharges and those that are not; and 3) offer monthly tracking data on all fuel expenditures, fuel gallons consumed, and actual revenue collected from surcharges.

While all these data are helpful to make the surcharge assessments more transparent, we would recommend the STB seriously consider expanding the reporting requirements as follows: (A) request that all carriers report their base fuel cost in a manner (such as monthly fuel costs) that will enable shippers and the Board to associate an identifiable fuel cost with the rate structures to which the surcharge applies (without this number, it will be impossible for shippers to assess whether the surcharge revenue collected overall is compensatory with the unanticipated fuel cost increases); (B) if the railroad assesses mileage and/or ton-mile based surcharges that vary by product sector (coal, grain, intermodal, etc.), the railroad should submit data to demonstrate that the differences being assessed are justifiable based upon physical evidence and parameters; and (C) demonstrable evidence should be required confirming that the rail carriers are not “double-dipping” when applying fuel surcharges and an RCAF index that includes fuel to the same shipments.

Additional issues that should be addressed in this proceeding: Assuming that the STB’s proposal to utilize a specific price series that is different from all current series used by the carriers and the other fundamental facets of this proposal remain largely intact at the close of this proceeding, and that the STB would seriously consider establishing a uniform base fuel rate as we propose in these recommendations, we would expect that rail carriers would make some rate adjustments to account for the new, higher base. To

make a smooth transition that minimizes disruption to rail customers, NGFA urges the STB to offer further guidance to the carriers as follows: Adjustments in base fuel price and concomitant rate adjustments should only be done with reasonable notice from the carrier. Very possibly, the optimal approach would be for the STB to choose an acceptable transition period, during which carriers could adjust their accounting systems and rail customers could make any necessary adjustments in their internal systems or customer contracting. Anything less than reasonable notice, which we submit should be at least several months, would likely result in considerable and unnecessary economic damage for one of the parties to a given transaction that involves rail transportation.

Whatever fuel surcharge guidance the STB gives to the rail carriers, we would urge that part of that guidance be that the base fuel rate must be adjusted downward in a timely manner, following any decline in fuel prices that reduces market fuel prices below the base rate. Carriers should be given a reasonable amount of time to make necessary rate reductions that should parallel a reduction in the base surcharge rate, such that carriers should not be permitted to reap windfalls over a long period of time from fuel price declines.

We appreciate the progress that the STB has made on this important issue, and thank the members of the Board for this opportunity to again offer our views in response to the proposal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 29th day of September 2006, served a copy of the foregoing Comments of National Grain and Feed Association on all parties of record, by first class mail, postage prepaid.

Andrew P. Goldstein