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April 27, 2006

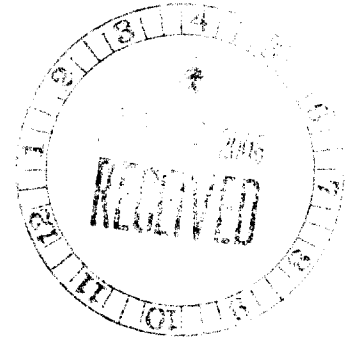
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VIA HAND DELIVERY

The Honorable Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Room 711
Washington, DC 20423



Re: Ex Parte No. 661, Rail Fuel Surcharges

Dear Secretary Williams:

Enclosed for filing in the referenced proceeding, please find an original and ten copies of the Statement of the Western Coal Traffic League, along with a computer disc which contains the filing. Please note that this filing contains several pages in color (in the Exhibits). Their locations are marked with tape flags on the unbound originals.

An additional copy of the Statement also is enclosed. Kindly indicate receipt and filing by time-stamping this copy and returning it to the bearer of this letter.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Peter A. Pfohl".

Peter A. Pfohl
An Attorney for the
Western Coal Traffic League

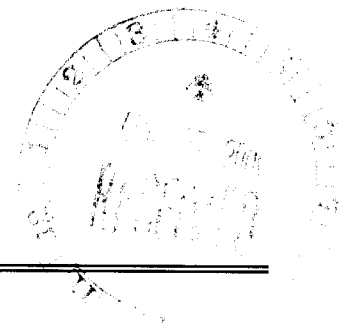
Enclosures



Ex Parte No. 661

Attorneys & Practitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



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RAIL FUEL SURCHARGES)

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Ex Parte No. 661

**STATEMENT OF
THE WESTERN COAL TRAFFIC LEAGUE**

In accordance with the Notice served by the Surface Transportation Board ("STB" or "Board") in the above-captioned proceeding on March 14, 2005, the Western Coal Traffic League ("WCTL" or "League") submits this Statement to express its views on the subject of fuel surcharges being collected by railroads.

IDENTITY AND INTEREST

WCTL is an association whose membership is composed of organizations that purchase and transport coal mined west of the Mississippi.¹ WCTL members transport over 140 million tons of coal annually, nearly all of which moves by rail. WCTL has actively participated for many years before the Board, and its predecessor, the

¹ WCTL members include the following 18 entities: Ameren Energy Fuels and Services; Arizona Electric Power Cooperative, Inc.; Arizona Public Service; CLECO Corporation; City of Austin, Texas; CPS Energy; Kansas City Power & Light Company; Lower Colorado River Authority; MidAmerican Energy Company; Minnesota Power; Nebraska Public Power District; Omaha Public Power District; Texas Genco, LP; Texas Municipal Power Agency; Western Farmers Electric Cooperative; Western Fuels Association, Inc.; Wisconsin Public Service Corporation; and Xcel Energy.

Interstate Commerce Commission (“ICC” or “Commission”), in proceedings addressing railroad issues of general transportation importance, including in proceedings addressing substantive and procedural rules governing railroad regulatory and cost reporting requirements, and on initiatives designed to prevent railroad practices or conduct that contravenes the law. Because WCTL members must pay the significant fuel cost demands of the railroads as part of, or a supplement to, their rates, it has a direct and substantial interest in the subject matter of this proceeding.

SUMMARY

Each of the major Class I western carriers that WCTL members relies on for rail transportation service, the Union Pacific Railroad Company (“UP”) and the BNSF Railway Company (“BNSF”) has implemented fuel surcharge programs on coal movements. As applied to coal, neither of these programs is designed or established to recover the increased cost of fuel for a particular movement to which the surcharge is applied. Instead of using actual, carrier-specific diesel fuel costs, these programs use inapplicable national average retail on-highway diesel fuel price data from the U.S. Department of Energy (“DOE”) as a surrogate for railroad fuel costs and cost changes. The retail On-Highway Diesel Fuel Price employed by the western carriers does not reflect the prices actually paid by the carriers for fuel (or their changes in fuel costs) because they buy in bulk and pay considerably less than retail on-highway diesel fuel prices, and they engage in hedging and other activities designed to reduce costs and the

impact of market fluctuations.

In sum, the carriers' fuel surcharge programs do not accurately reflect either the cost or the change in the carriers' own fuel expenses for the individual movements to which the surcharge applies. As implemented and applied today, these programs are not reasonably targeted to cover sudden and unexpected incremental increases in fuel for the carriers' movements to individual customers. Instead, they are being used by carriers as a mechanism to collect billions of dollars in revenues.

The carriers are now attempting to set up their fuel surcharge programs as a permanent fixture, with the goal of implementing the programs on all coal and other customers. Historically, fuel surcharge programs were allowed to be implemented carefully and infrequently, and only as reasonably necessary in response to emergency situations involving precipitous fuel price increases threatening the continuity of commerce. In contrast, there has been no showing by the carriers today that their programs are reasonably directed at recovering the increased costs of fuel for a particular movement to which the surcharge is applied. Additionally, for coal and other freight commodities, the carriers have had ample time to adjust their rates involving line-haul freight to reflect the sustained fuel market price increases that have occurred over the past year and a half, and they have done so. Also, the carriers are already made whole for their fuel costs utilizing industry standard price adjustment mechanisms.

Given these facts, and the fact that the carriers are reaping billions of dollars of revenues from consumers from these programs that are not cost-justified, the Board has an obligation to further investigate this matter, and take necessary actions to proscribe the carriers from continuing any fuel surcharge programs that are not cost-justified and do not reflect the increased costs of fuel for a particular movement to which the surcharge is applied.

I.

BACKGROUND

A. UP and BNSF's Fuel Surcharge Programs

UP's fuel surcharge program as applied to coal (and other commodities) is based on the DOE's Retail On-Highway Diesel Fuel ("HDF") price. UP's surcharge program is contained in UP Circular 6603, General Rule Item 690. This tariff, in turn, is implemented in UP's Circular 111, UP's pricing mechanism that applies to certain coal shipped from the Wyoming Powder River Basin ("PRB") coal mines, as well as in other UP pricing instruments. The rules governing UP's fuel surcharge program are as follows:

In the event the average price of Retail On-Highway Diesel Fuel . . . ("HDF Average Price") calculated monthly based on prices reported on the U.S. Department of Energy Website (eia.doe.gov) equals or exceeds \$1.35 per gallon, UP will apply a fuel surcharge to linehaul freight charges referencing or subject to this authority. The fuel surcharge shall be applied to the linehaul freight charge for each shipment

The HDF Average Price for a given calendar month will be determined by adding the weekly Retail On-Highway Diesel Fuel prices reported on the U.S. Department of Energy Website (eia.doe.gov) and dividing the result by the number of weeks so reported. The result will be rounded to the nearest cent. . . . The following schedule reflects the applicable fuel surcharges within the HDF Average Price ranges noted below.

HDF Average Price (Per Gallon)	Fuel Surcharge (Percentage)
\$0.00 to \$1.349	0.00%
\$1.35 to \$1.399	1.50%
\$1.40 to \$1.449	2.00%
\$1.45 to \$1.499	2.50%
\$1.50 to \$1.549	3.00%
\$1.55 to \$1.599	3.50%
\$1.60 to \$1.649	4.25%
\$1.65 to \$1.699	5.00%
\$1.70 to \$1.749	5.75%
\$1.75 to \$1.799	6.50%
\$1.80 to \$1.849	7.25%
\$1.85 to \$1.899	8.00%
\$1.90 to \$1.949	8.75%
\$1.95 to \$1.999	9.50%
\$2.00 to \$2.049	10.25%
Each \$0.05 per gallon increase thereafter	Additional 0.75%

BNSF's fuel surcharge program as applied on western coal movements uses the same index as that utilized by UP: the DOE's HDF index. BNSF's surcharge program is set forth in BNSF Rules Book 6100-A, Items 3380A and 3381. These common carrier tariff items, in turn, are implemented in BNSF's Common Carrier pricing Authority BNSF 90068, applying on Montana and Wyoming PRB Coal movements, as well as in other BNSF pricing instruments. The rules governing BNSF's fuel surcharge program, under Item 3380A are as follows:

[BNSF's] fuel surcharge will be applicable when the U.S. Average Price of Retail On-Highway Diesel Fuel (HDF) for the month of (Time Period) equals or exceeds \$1.24 per gallon. The applicable fuel surcharge will be applied to the total freight charges for each shipment The source for the price of HDF will be the U.S. Department of Energy's (EIA) Retail On-Highway Diesel Prices Report, whose weekly average price is available on their WebPages at: <http://www.eia.doe.gov>.

BNSF's applicable coal fuel surcharge table is as follows:

<u>Time Period's Average Price of HDF Between</u>	<u>Applicable Fuel Surcharge Rate (CFSR)</u>	<u>Time Period's Average Price of HDF Between</u>	<u>Applicable Fuel Surcharge Rate (CFSR)</u>
\$0.00 to \$1.239	0.0%	\$2.00 TO \$2.039	10.0%
\$1.24 to \$1.279	0.5%	\$2.04 TO \$2.079	10.5%
\$1.28 to \$1.319	1.0%	\$2.08 TO \$2.119	11.0%
\$1.32 to \$1.359	1.5%	\$2.12 TO \$2.159	11.5%
\$1.36 to \$1.399	2.0%	\$2.16 TO \$2.199	12.0%
\$1.40 to \$1.439	2.5%	\$2.20 TO \$2.239	12.5%
\$1.44 to \$1.479	3.0%	\$2.24 TO \$2.279	13.0%
\$1.48 to \$1.519	3.5%	\$2.28 TO \$2.319	13.5%
\$1.52 to \$1.559	4.0%	\$2.32 TO \$2.359	14.0%
\$1.56 to \$1.599	4.5%	\$2.36 TO \$2.399	14.5%
\$1.60 to \$1.639	5.0%	\$2.40 TO \$2.439	15.0%
\$1.64 to \$1.679	5.5%	\$2.44 TO \$2.479	15.5%
\$1.68 to \$1.719	6.0%	\$2.48 TO \$2.519	16.0%
\$1.72 to \$1.759	6.5%	\$2.52 TO \$2.559	16.5%
\$1.76 to \$1.799	7.0%	\$2.56 TO \$2.599	17.0%
\$1.80 to \$1.839	7.5%	\$2.60 TO \$2.639	17.5%
\$1.84 to \$1.879	8.0%	\$2.64 TO \$2.679	18.0%
\$1.88 to \$1.919	8.5%	\$2.68 TO \$2.719	18.5%
\$1.92 to \$1.959	9.0%	\$2.72 TO \$2.759	19.0%
\$1.96 to \$1.999	9.5%	\$2.76 TO \$2.799	19.5%

Additionally, under BNSF's new mileage-based system implemented January 1, 2006 (Item 3381), BNSF utilizes the same DOE HDF index as a basis for applying a fuel surcharge, and for coal, applies the surcharge on the BNSF rail mileage applicable to individual coal generating stations. BNSF's mileage-based coal fuel surcharge table is as follows:

Fuel Surcharge Table			
Time Periods Average Price of HDF Between	Fuel Surcharge Cents per Mile	Time Periods Average Price of HDF Between	Fuel Surcharge Cents per Mile
\$0.00 to \$1.249	0.00	\$2.15 to \$2.209	0.16
\$1.25 to \$1.309	0.01	\$2.21 to \$2.269	0.17
\$1.31 to \$1.369	0.02	\$2.27 to \$2.329	0.18
\$1.37 to \$1.429	0.03	\$2.33 to \$2.389	0.19
\$1.43 to \$1.489	0.04	\$2.39 to \$2.449	0.20
\$1.49 to \$1.549	0.05	\$2.45 to \$2.509	0.21
\$1.55 to \$1.609	0.06	\$2.51 to \$2.569	0.22
\$1.61 to \$1.669	0.07	\$2.57 to \$2.629	0.23
\$1.67 to \$1.729	0.08	\$2.63 to \$2.689	0.24
\$1.73 to \$1.789	0.09	\$2.69 to \$2.749	0.25
\$1.79 to \$1.849	0.10	\$2.75 to \$2.809	0.26
\$1.85 to \$1.909	0.11	\$2.81 to \$2.869	0.27
\$1.91 to \$1.969	0.12	\$2.87 to \$2.929	0.28
\$1.97 to \$2.029	0.13	\$2.93 to \$2.989	0.29
\$2.03 to \$2.089	0.14	\$2.99 to \$3.049	0.30
\$2.09 to \$2.149	0.15	\$3.05 to \$3.109	0.31

Each \$0.06 per gallon increase thereafter, apply an additional \$0.01 per mile.

Example:

If May's average monthly price of HDF is \$1.856 Per Gallon then the CMBFS applied in July would be \$0.11 per mile. Thus, for a shipment traveling 1,000 BNSF railway miles a Fuel Surcharge of \$110.00 would apply.

UP and BNSF's programs have similar characteristics. As referenced, each utilizes DOE's HDF On-Highway Diesel Fuel price for applying surcharges. Each program's fuel surcharge percentage changes as the utilized DOE reported HDF prices change. Each program bases fuel surcharges on a percentage of line-haul revenue, and BNSF also has a separate mileage-based program. Also, each fuel surcharge program employs a two-month "lag" in applying surcharges derived from the basis month from which the surcharges are applied (e.g., the fuel surcharge to be applied by UP and BNSF in May 2006 will utilize a basis month of March 2006 for determining the applicable fuel surcharge for May).

Since implementing its price-based coal fuel surcharge program, UP's surcharge has ranged from 2.0% to 22.25% of the line-haul rate per ton of coal. For May, 2006, UP's fuel surcharge is established at 18.5% of the line-haul rate. Applying this fuel

surcharge to a unit coal train rate of \$11.00 per ton for the month of May 2006, would result in a fuel surcharge of \$2.04 per ton ($\$11.00 \times .185 = \2.04). If this movement involved a typical 135-car unit coal train with a total net weight of 16,200 tons (based on 120 tons per car), applicable fuel surcharges would be \$33,048.00 ($16,200 \times \$2.04 = \$33,048.00$) per train.

BNSF's mileage-based fuel surcharge has ranged from \$0.20 per loaded car-mile to \$0.23 per loaded car-mile, per car for coal unit trains. For May 2006, BNSF's fuel surcharge is established at \$0.22 per loaded car-mile. Applying BNSF's mileage-based fuel surcharge for a 135-car unit coal train moving 1,000 miles in May 2006, applicable fuel surcharges would be \$29,700.00 ($1,000 \times \$0.22 \times 135 = \$29,700.00$).²

Both UP and BNSF are aggressively implementing their fuel surcharge programs and they have been very successful in collecting fuel surcharges. UP's fuel surcharge revenues increased from \$112 million in 2003 to over \$1 billion in 2005. See UP Form 10K Annual Report Pursuant to Section 13 or 15(d) of the Security Exchange Act of 1934 for the Fiscal Year Ended Dec. 31, 2005 at 17 ("UP 2005 10K"). Likewise, BNSF fuel surcharge revenues increased from \$350 million to approximately \$1.1 billion

² Under BNSF's percentage-based fuel surcharge program, BNSF's fuel surcharge is established at 16.5% per ton of coal for May 2006. Applying this fuel surcharge to a unit coal train rate of \$11.00 per ton for the month of May 2006 would result in a fuel surcharge of \$1.82 per ton ($\$11.00 \times .165 = \1.82). If this movement involved a typical 135-car unit coal train with a total net weight of 16,200 tons (based on 120 tons per car), applicable fuel surcharges would be \$29,484.00 ($16,200 \times \$1.82 = \$29,484.00$) per train.

in 2005. See BNSF

Form 10K Annual Report Pursuant to Section 13 or 15(d) of the Security Exchange Act of 1934 for the Fiscal Year Ended Dec. 31, 2005 at 13 (“BNSF 2005 10K”).

II.

DISCUSSION

A. Railroad Fuel Surcharges do not Address the Increased Cost of Fuel for the Particular Movement to which the Surcharge is Applied

1. The Carriers Fuel Surcharge Programs do not Use Actual, Carrier-Specific Diesel Fuel Price Data

As explained above, UP and BNSF utilize the change in the DOE's HDF prices as a basis for calculating fuel surcharges. DOE's program is based upon a survey it conducts on a weekly basis that collects the retail per gallon prices for motor vehicle diesel fuel. See Form EIA-888, On-Highway Diesel Fuel Price Survey (OMB No. 1905-0174). But railroads do not use motor vehicle diesel fuels. They use No. 2 Diesel Fuel that is specifically designed to be used in high-speed diesel locomotive engines. See BNSF Fuel Surcharges – Frequently Asked Questions (at www.bnsf.com/tools/prices/fuelsurcharge/faqs.html) (“BNSF Frequently Asked Questions”).

Even if the railroads did use standard motor vehicle diesel fuel, they do not pay for diesel fuel at retail gasoline outlets that sell on-highway motor vehicle diesel fuel. Railroads buy in bulk (UP and BNSF combined purchased 2.78 billion gallons of fuel in 2005), and they do not pay retail. The following are the average quarterly prices of fuel

for the fourth quarter of 2005 ("4Q05") as publicly reported by UP and BNSF, and as reported by DOE (under its On-Highway Diesel Fuel Price Survey):

Average Price Per Gallon Cost of Fuel (4Q05)	
BNSF	\$ 1.69
UP	\$ 2.08
DOE	\$ 2.70

As shown in the tabulation above, BNSF and UP pay significantly less per gallon than the HDF price calculated by DOE. In 4Q05, the BNSF average price per gallon was 63 percent of the DOE price while the UP's average price per gallon was 77 percent of the DOE price.

Additionally, railroads aggressively engage in strategies to minimize their fuel price volatility. Both UP and BNSF engage in a variety of activities and programs to mitigate their fuel price changes, including using swaps, collars, futures and forward contracts. See, e.g., UP's 2005 10K at 20 (describing the various instruments used by UP "as a means of mitigating the impact of adverse fuel price changes"). In 2005 BNSF reported fuel hedge benefits amounting to \$535 million. BNSF 2005 10K at 28.

2. The Utilized Fuel Price Data does not Accurately Reflect the
Changes in Prices Actually Paid by Railroads for Fuel

BNSF states that its fuel surcharge program is designed "to recover the incremental cost of high fuel prices." See BNSF Frequently Asked Questions. However,

neither BNSF nor UP has provided to date any analysis to demonstrate that its fuel surcharge practice is reasonable. In order to determine whether UP's and BNSF's fuel surcharge programs reasonably relate to their incremental fuel service costs, the economic consulting firm of L.E. Peabody and Associates, Inc. has conducted an analysis for WCTL for an average UP and BNSF coal movement. The analysis is designed to show the difference between the per ton fuel surcharges applied by BNSF and UP and each carrier's actual change in fuel costs as reported for the time in which the fuel surcharge programs have been in effect. This analysis is presented in Exhibit No. 1.

Exhibit No. 1 shows that, for each carrier, there is a substantial difference between the amount of fuel surcharge charged and the increase in each carrier's fuel costs. Applied on an average move, BNSF's fuel surcharge per ton under its mileage-based fuel surcharge program is \$1.48 per ton. However, BNSF's actual fuel cost increase from the base year (2004) is only \$0.53 per ton. The difference between the fuel surcharge and the change in BNSF's fuel costs in 2005 is \$0.95 per ton.³ Meanwhile Exhibit No. 1 also shows that for UP, the difference between UP's fuel surcharge and the change in UP fuel costs is \$0.56 per ton.

In sum, the Exhibit No. 1 analysis shows significant fuel surcharge over-recoveries for each of the western carriers. Thus, in answer to the Board's principal

³ As shown in Exhibit No. 1, if this analysis were based on BNSF's percentage fuel surcharge, the difference between the fuel surcharge and the increase in costs equals \$0.77 per ton.

question posed in this proceeding, Exhibit 1 demonstrates that both UP and BNSF's programs are "[over-]recover[ing] the incremental cost of high fuel prices" [emphasis added] as applied on an average western coal movement.

B. Carriers Are Already Made Whole for Their Fuel Costs
Utilizing Industry Standard Price Adjustment Mechanisms

1. Board Adoption of RCAF as Preferred
Railroad Cost Index Methodology

In 1981, the ICC adopted a cost recovery index, intended as a mechanism to enable railroads to adjust their rates to cover changes in their costs of providing service, the Rail Cost Adjustment Factor ("RCAF"). See Railroad Cost Recovery Procedures, 364 I.C.C. 841 (1981). The RCAF measures the rate of inflation in railroad inputs such as fuel. The RCAF consists of seven component indexes. One of these indexes is fuel, which represents the forecasted change in the average price per gallon of No. 2 diesel fuel that will actually be paid by the Class 1 railroads, including federal excise taxes, transportation, and handling charges.

These forecasts of the average diesel fuel price are calculated by the Association of American Railroads ("AAR") and reflect current market conditions. The forecasts, submitted to the STB the month prior to the beginning of the quarter, are then corrected for the actual railroad fuel prices two quarters later as part of the forecast error applied to the RCAF. By law, the STB is directed to continue to publish the RCAF on at least a quarterly basis. See 49 U.S.C. § 10708.

As the Board is well aware, the RCAF, or similar cost recovery mechanisms, have been widely incorporated into the carriers' private contracts and common carrier pricing authorities, and use of the RCAF is a preferred method of recovering carrier costs of service. As stated by the Board:

The . . . RCAF[] was established in the Staggers Act to track quarterly changes in railroad costs. While its initial purpose was to protect from challenge on rate reasonableness grounds rail tariff rate increases that reflected no more than increased costs, it has come to be used by many railroads and shippers as an aide in setting contractual terms.

STB Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements -- Conrail Inc. and Consolidated Rail Corporation, (Decision No. 89 served July 23, 1998) at 56 n.85. In fact, even outside the rate reasonableness context, the Board has ordered the implementation of the RCAF as an effective means of protecting railroads' and shippers' interests. See id. at 56 (Board orders carriers to maintain rates, specifically tied to RCAF adjustments, as a reasonable means of protecting the parties against the loss of single-line service resulting from the consolidation of railroads).

For example, the Board's predecessor, the Interstate Commerce Commission ("ICC"), when addressing a similar issue presented in this proceeding in the motor carrier context involving a request for the implementation of a general fuel surcharge to recover fuel cost increases, rejected the request. See Ex Parte No. MC-215,

Petition of the American Trucking Associations to Provide Motor Carriers Relief from Increased Federal Fuel Taxes and other Federally Mandated Fuel Price Increases, (ICC served Sept. 20, 1993), 1993 WL 366900. The Board's reasoning in rejecting the fuel surcharge was based on the fact that the use of standard industry adjustment clauses is the preferred method for addressing carrier fuel cost increases. As stated by the ICC:

As a matter of general business practice, the vast majority of transportation contracts currently used in the industry contain rate adjustment clauses in anticipation of just such circumstances as escalations in fuel costs. To the limited extent that certain contract carriers may not have provided for such contingencies in their agreements with shippers, the corrective measures urged by petitioner to alter commercial realities and adjust the competitive balance would appear to contravene our determination in other contexts that contract carriers and shippers alike prefer flexibility over any form of protectionism the commission may be in a position to offer.

Id., 1993 WL 366900 at *4.

Also, the modern preference is to use individual, rather than general rate initiatives, such as what the railroads are doing with their across-the-board fuel surcharge programs, to recover carriers' costs. See, e.g., Increased Freight Rates and Charges, Nationwide – 1979, 362 ICC 153, 154-55 (1979). See also 49 U.S.C. § 10101(10) (it is a national policy goal to “require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability”).

2. The RCAF Fuel Component has Kept the
Carriers Whole for Increases in Their Fuel Costs

As shown above, for an average western coal haul, the fuel surcharge programs employed by UP and BNSF have not closely correlated to the increase in the carriers' fuel costs. However, use of the RCAF does very closely track carrier per gallon prices. L.E. Peabody and Associates, Inc. also conducted an analysis on this subject for WCTL, which is reflected in Exhibit No. 2. The analysis presented in Exhibit No. 2 shows that, for UP and BNSF, the RCAF's fuel index has very closely tracked the carrier's price per gallon costs, and in fact, has modestly overcompensated each carrier for the incurred fuel costs.⁴

While the RCAF has provided a proven, fair, and effective method for the carriers and customers to adjust for changes in carrier fuel service costs, the carriers apparently have decided to move away from the RCAF (at least insofar as incorporating the RCAF's fuel index) by implementing their generally applicable fuel surcharge programs. Instead, the carriers have elected to pursue more lucrative fuel surcharge mechanisms that, as shown above in Exhibit 1, overcompensate the carriers for their incurred fuel costs.

⁴ This analysis relies on the change in the actual RCAF fuel in order to eliminate the error in the AAR's forecast.

C. The Board has the Authority to Proscribe Unreasonable Practices

Title 49 gives authority to the STB to evaluate and prescribe railroad practices. Specifically, under 49 U.S.C. § 10702, rail carriers are required to “establish reasonable . . . rules and practices on matters related to . . . transportation.” Under 49 U.S.C. § 10704(a)(1), the STB has jurisdiction to prescribe the rules and practices that a carrier must follow if the Board determines that the carrier’s existing rules and/or practices are unreasonable. In a 1994 study regarding its regulatory responsibilities, the Board’s predecessor commented as follows with respect to unreasonable practices generally:

Not only must a carrier’s rates be reasonable, but so must its practices. . . .

This statutory requirement derives from the common law common carrier obligation. It is intended to protect against unreasonable carrier actions that impede interstate commerce. In evaluating carrier practices, ‘[t]he question is not whether the [questioned practice] can be described as ‘rational’ from the railroads’ perspective, but instead whether the practice . . . is reasonable when viewed from the public perspective of the Commission, which must reconcile a multitude of factors in exercising its expert judgment on tariff issues, including economy, efficiency, fair wages and working conditions, and safety, in addition to the financial conditions of the carriers’[] . . .

Rail practices that the Commission has been asked to evaluate in recent years include collection of storage charges on empty rail cars awaiting loading,[] limiting the use of private cars,[] attempting to limit carrier liability and place responsibility on a shipper to make a “reasonable” inspection of grain cars,[] refusal to compensate a shipper for the use of

its cars,[] and adoption of minimum weight rates where rail cars were incapable of being loaded to the minimum weight.[] Other rail practices found unreasonable by the Commission have included a carrier's retroactive disavowal of a rate it had repeatedly quoted,[] and conditions making favorable rates dependent on a notation requirement.[] The Commission has also barred carriers from refusing to carry hazardous materials that have been certified as safe for transport.[]

. . . Market forces may not always be strong enough to protect shippers against unreasonable railroad practices. Unreasonable practices can result in abusive treatment of shippers. Federal oversight of railroad practices is therefore necessary and should be retained in order to protect the public interest. If injured shippers could not seek independent review and redress – from an regulatory body that is familiar with the rail industry and is capable of addressing industry practices in a consistent manner throughout the nation and with a view toward balancing varying interests – their ability to compete in domestic and/or international markets could be seriously jeopardized. Such results would contravene the goals of our national transportation policy.

See “Study of Interstate Commerce Commission Regulatory Responsibility Pursuant to Section 210(A) of the Trucking Industry Regulatory Reform Act of 1994,” 1994 WL 639996 (October 25, 1994) at *20-*21 (footnotes omitted) (“ICC 1994 Study”)

Governing precedent clearly allows unlawful adjustment procedures to be challenged as an unreasonable practice. For example, the ICC has found the implementation of an unreasonable escalation clause as unlawful and unreasonable practice. See Incentive Rate on Coal – Cordero, Wyo., to Smithers Lake, Tex., 358 I.C.C. 537, 561 (1977) (finding proposed tariff escalation provision “an unlawful and unreasonable practice”). The agency has also rejected the application of fuel surcharges

on unit coal train hauls where, after investigation, it determined that the application of the surcharge was unlawful. See, e.g., Temporary Fuel Shortfall Recovery Surcharge, Apr. 11, 1980, 365 I.C.C. 299 (1981); Coal, Colstrip, Kuehn and Decker, MT to Superior, WI, 364 I.C.C. 152 (1980).

D. The Board Has the Obligation to Proscribe the Carriers
 from Maintaining Their Fuel Surcharge Programs

1. Fuel Surcharges Historically have been Authorized Only
 in Limited Circumstances for a Temporary Duration

Historically, in extraordinary situations, railroad fuel surcharges have been authorized to be implemented by carriers as a means to address unexpected and precipitous increases in costs. Surcharge programs were authorized as necessary to meet the immediate needs of the industry, but only upon a showing that the surcharges were necessary to offset actual increases in carrier-specific fuel costs, and that normal recovery mechanisms were not adequate to cover. See e.g., Effect of Modifying Proclamation No. 3279 and Other Anticipated Energy Conservation Measures on the Operation of Carriers Subject to the Interstate Commerce Act, 350 I.C.C. 563 (1975) (fuel surcharge procedures adopted in emergency situation to provide an expedited method for carriers to recover increased fuel costs) (“Energy Conservation Measures”). These surcharge programs have been sparingly authorized in order to assist carriers from unexpectedly having to “absorb operating losses for any extended period” and to “be able to provide adequate service to the public.” Temporary Fuel Shortfall Recovery Surcharge, Apr. 11,

1980, 364 I.C.C. 336, 338-39 (1980).

However, these programs were not allowed to continue in perpetuity. See Increases in Freight Rates and Charges to Offset Retirement Tax Increases – 1973, 350 I.C.C. 673, 712 (1975) (“[i]t is true that the Commission has from time to time permitted the maintenance of surcharges, but only in instances where there was a compelling reason therefor and in no case as a permanent form of publication”); accord Energy Conservation Measures, 350 I.C.C. at 572 (surcharges appropriate in “unusual situations” and where of “temporary duration”); Increased Freight Rates, 1951, 281 I.C.C. 557, 638 (1951) (same). Typically, fuel surcharge programs have been limited to one-year in duration. See Energy Conservation Measures, 350 I.C.C. at 581.

For example, in the wake of the dramatic and unanticipated increases in fuel prices associated with the OPEC oil embargo of the early 1970s, the ICC authorized carriers to collect fuel surcharges on an expedited basis. See Energy Conservation Measures, 350 I.C.C. at 580. Those procedures were allowed to be implemented in order to avoid a “severe impact on the Nation’s commerce” that such precipitous fuel cost increases would have on carriers. Id. at 568.

However, in order to implement authorized fuel surcharges, individual carriers first had to justify their cost increases by submitting verified data demonstrating a need for the fuel surcharge based upon actual fuel cost increases. Carriers were specifically prohibited from recouping any amounts above their incurred costs. Id. at

575-79. Also, in order to ensure that the surcharges were not unnecessarily extended, the increases were authorized for a limited time, and could not be extended except upon specific authorization of the ICC. Id. at 581.

2. As Applied, the Carriers' Fuel Surcharge Programs are Unlawful

As stated in the STB's Notice, the purpose of this hearing is to examine "whether railroad fuel surcharges are being set in such a manner as to insure that they are used only to recover the increased cost of fuel for the particular movements to which the surcharge is applied." WCTL submits that this is a proper standard for the Board to utilize in determining whether the carriers' existing fuel surcharge programs constitute an unreasonable practice. This standard is also consistent with the above precedent where temporary fuel surcharge programs were authorized to be implemented only in limited instances upon a showing that they were deemed necessary under the circumstances of precipitous fuel increases, and were limited to providing carrier recoupment of its verified, actual increases in fuel costs.

As demonstrated above and in Exhibit 1, the UP and BNSF fuel surcharge programs applied on an average haul bear no reasonable relationship to their involved service costs to individual customers. Also, as demonstrated above and in Exhibit No. 2, the surcharges are unnecessary as the RCAF contains a carrier fuel adjustment mechanism that fully protects carriers against precipitous and unexpected increases in fuel costs. Thus, the carriers' implementation of supplemental fuel surcharge programs (or

fuel surcharge programs that supplant the RCAF inclusive of fuel) has not been shown to be either reasonable or necessary.

Additionally, UP's and BNSF's fuel surcharge programs appear to be anything but temporary, and instead appear to be attempts to implement an ongoing cost reimbursement plan. For example, for coal, UP reports that its "fuel surcharge will be included on all repriced business" and that all of its newly negotiated "long-term contracts" will include UP's "standard fuel surcharge." UP 2005 Analyst Fact Book, at 11, 20.⁵ UP's public pricing Circular 111, which also contains UP's coal fuel surcharge program, is typically in effect for at least one to three years in duration. Thus, the programs have been, and are designed to be, in effect for far longer than a temporary period for which fuel surcharge programs have been previously authorized. See, e.g., Central Forwarding, Inc. v. I.C.C., 698 F.2d 1226, 1271 (5th Cir. 1983) (carrier attempts to utilize fuel surcharge program as means of "regulat[ing] [carrier] compensation on a permanent basis" is strictly proscribed as an unlawful "ongoing reimbursement plan").

Additionally, by now, carriers have had more than enough time to adjust to any precipitous fuel price increases that have occurred over the past year and a half as part of their rate structures. Indeed, by all accounts, the carriers have been enormously

⁵ In fact, the carriers themselves are touting high fuel prices as creating a competitive advantage for them for their business that competes with trucks. See UP 2005 Annual Report at 2 ("[L]onger-term, high fuel prices create a competitive advantage for us, as rail transportation is three times more fuel efficient than trucking").

successful in increasing their rates to cover all their expenses (including fuel) and increase profitability. In all of UP's and BNSF's recent reports to shareholders, they have highlighted their record earnings and revenues across all commodities (including coal), their ability to pay all their obligations, and their overall financial well-being.⁶ Also, Wall Street has extolled the carriers' pricing achievements, labeling their successes in dramatically increasing rates to improve their bottom lines as a "secular pricing story." See, e.g., Morgan Stanley, Air Freight, and Surface Transportation, "Secular Pricing Leaves 50% to 100% More Upside Potential in Railroad Stocks," (Jan. 23, 2006).

Additionally, the carriers recently achieved a fuel savings coup through the repeal by Congress of the 4.3 cent diesel fuel tax imposed on railroads, which the industry estimated would "restore more than \$170 million per year to freight railroads."⁷ Neither UP nor BNSF appears to have attempted to pass-along to customers, or reflect in their fuel surcharge programs, any of these fuel tax savings. Nor, apparently, have the railroads attempted to reflect in their surcharge programs the impacts of any of their improved fuel consumption efficiencies experienced in recent years. See, e.g., UP's 2005

⁶ See, e.g., UP's 2005 Annual Report at 1 (UP reports "record revenue, yield gains and improved financial results"); UP's 1st Quarter 2006 Investors' Report (Apr. 20, 2006) (UP reports "the best first quarter earnings ever posted by the company"); BNSF's 2005 Annual Report at 1 (BNSF "post[s] a record of nearly \$13 billion in revenue . . . coupled with solid expense control"); BNSF's 1st Quarter 2006 Investors' Report (Apr. 25, 2006) (BNSF reports "record" earnings and freight revenues, and "double-digit revenue increases" in coal and its other business groups).

⁷ See BNSF Railway Magazine, (July/August 2004) at 6.

Annual Report, at 2 (as a result of UP's fuel conservation programs, its "consumption rate improved by 2 percent, saving 35 million gallons of fuel" in 2005).

Further, the manner in which the carriers' fuel surcharge programs are established is suspect in light of the fact that they include initial "strike" rates for the implementation of surcharges that reflect fuel costs from several years ago. Thus, the programs have not been readjusted to reflect the current market reality of sustained higher fuel prices.

In evaluating the carriers' fuel surcharge programs, the STB must remain mindful of the goals Congress seeks to achieve in regulating the railroad industry. As explained above, one of those goals is to "require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability." 49 U.S.C. § 10101(10). Another policy goal is to "encourage honest and efficient management of railroads." *Id.* at § 10101(9). Despite the deregulation of large sectors of the railroad industry, the close scrutiny of industry practices of this nature is essential for achieving the goals of Congress – especially in light of the carriers' renewed interest in moving their business under public pricing instruments. *See, e.g.*, UP's 2005 Analysts Report at 20 ("UP will use Circular 111, the SPRB pricing mechanism introduced in 2004, in place of expiring contracts" and it anticipates that 20 percent of its coal business will be moving under such pricing mechanisms in 2006). As explained above, these pricing instruments permanently

implement the carriers' fuel surcharge programs.

In evaluating the railroads' fuel surcharge programs for unreasonableness, "the question is not whether the decision to [implement programs] can be described as 'rational' from the railroads' perspective, but instead whether the practice . . . is reasonable when viewed from the public perspective of the [Board]." See Consolidated Rail Corp. v. ICC, 646 F.2d 642, 647-48 (D.C. Cir. 1981). WCTL submits that, upon closer scrutiny of the above law and facts, the Board will determine that it is unquestionable that the carriers' ongoing fuel surcharge programs, as currently applied, are not reasonable or necessary and should be proscribed.

WCTL calls upon the STB to act in this instance to redress the situation as it is the single "regulatory body that is that is familiar with the rail industry and is capable of addressing industry practices in a consistent manner throughout the nation and with a view toward balancing varying interests." ICC 1994 Study, 1994 WL 639996 at *20-*21. Without such enforcement and protections by the Board "[s]hippers ability to compete in domestic . . . markets could be seriously jeopardized." Id.

III.

RAILROAD REPORTING REQUIREMENTS

WCTL submits that the western railroads should not be authorized to continue to collect fuel surcharges on unit coal train movements as currently applied, for the above stated reasons, and should instead be required to rely upon the RCAF as the

preferred cost index methodology for recouping fuel cost increases. If the railroads are allowed to continue to collect fuel surcharges for any specified period of time, which WCTL submits should not be allowed, then the Board has an obligation to require that each carrier accurately report meaningful fuel cost and revenue data in a manner that allows the public to see whether, and the extent to which, fuel surcharges accurately reflect a carrier's increased cost of fuel for particular movements to which the surcharge is applied.

At a minimum, on a monthly basis, each railroad should be required to identify the traffic (including tons, carloads, ton-miles, etc.) that is subject to the fuel surcharge by the principal business groups, including energy, that are regularly reported by the carriers to the financial community. For each group, the railroad should also report: (i) the fuel surcharge revenues associated with the traffic, (ii) the change in fuel costs from the prior month, and (iii) the difference between the fuel surcharge revenues and the change in fuel costs.

IV.

CONCLUSION

Clearly, the answer to the Board's question of "whether railroad fuel surcharges are being set in such a manner as to insure that they are used only to recover the increased cost of fuel for the particular movements to which the surcharge is applied" is no. Rail carrier fuel surcharge collection programs have been sparingly permitted to

address unexpected and precipitous increases in fuel prices as necessary to meet the immediate needs of the industry. They must be based upon carrier-specific cost information, and they are not allowed to be continued in perpetuity. The carriers' fuel surcharge programs fail to meet the above tests, and thus, should be proscribed.

Respectfully submitted,

THE WESTERN COAL TRAFFIC LEAGUE

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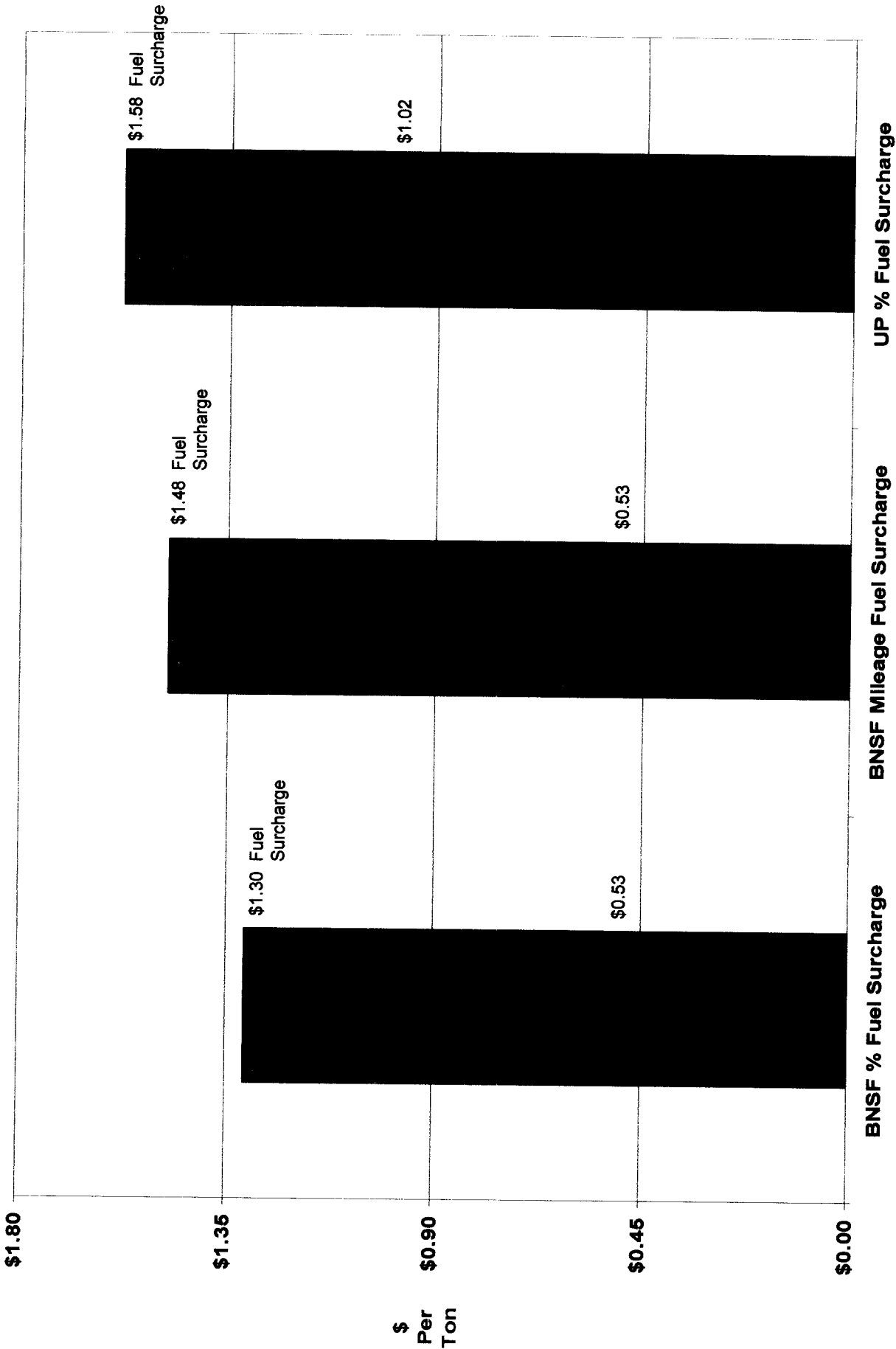
By:

William L. Slover
Peter A. Pfohl 
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Dated: April 27, 2006

Attorneys & Practitioners

Summary of Differences Between Fuel Surcharges and Increases in Fuel Costs for Coal – 2005
BNSF and UP



Summary of Differences between Fuel Surcharges and Increases in Variable Fuel Costs for Coal -- 2005
(BNSF and UP)

Item (1)	Source (2)	Amount Per Ton			
		BNSF		UP	
		Percent Fuel Surcharge (3)	Mileage Fuel Surcharge (4)	Percent Fuel Surcharge (5)	
1. Average Rate per Ton without Fuel Surcharge - 2005	1/	\$9.45	\$9.45		\$10.69
2. Rate plus Fuel Surcharge - 2005	2/	<u>10.75</u>	<u>10.93</u>		<u>12.27</u>
3. Amount of Fuel Surcharge per Ton	Line 2 - Line 1	\$1.30	\$1.48		\$1.58
4. Variable Fuel Costs:					
a. Base Year	3/	\$1.28	\$1.28		\$1.15
b. 2005	4/	<u>1.81</u>	<u>1.81</u>		<u>2.17</u>
c. Increase in Fuel Costs	Line 4b - Line 4a	\$0.53	\$0.53		\$1.02
5. Difference between Fuel Surcharge and Increase in Fuel Costs	Line 3 - Line 4c	\$0.77	\$0.95		\$0.56

1/ BNSF: Rate of \$8.88 per ton as of 1Q04 based on BNSF's 2004 average coal haul of 922 miles and BNSF's average coal rate of 9.63 mills.
UP: Rate of \$9.84 per ton as of 1Q03 based on UP's 2003 average coal haul of 957 miles and UP's average coal rate of 10.28 mills.

2/ BNSF (percentage): Average Fuel Surcharge for coal for 2005 (simple average of all months) of 13.9 percent x average rate on Line 1.
BNSF (mileage): Average Fuel Surcharge per mile for coal for 2005 of 18.5 cents x 922 miles.
UP: Average Fuel Surcharge for coal for 2005 (simple average of all months) of 14.8 percent x average rate on Line 1.

3/ BNSF: Variable costs based on BNSF 2004 URCS unit costs for fuel and average traffic and operating factors (115 ton load, 25 ton tare, 922 loaded miles, 100% empty return ratio, 3 locomotives, and 115 cars per train).
UP: Variable costs based on UP 2003 URCS unit costs for fuel and average traffic and operating factors (114 ton load, 25 ton tare, 957 loaded miles, 100% empty return ratio, 3 locomotives, and 115 cars per train).

4/ BNSF and UP: Variable costs based on BNSF and UP 2005 URCS unit costs for fuel and average traffic and operating factors used to develop Line 4a variable fuel costs.

Comparison of Changes in RCAF Fuel Index to BNSF and UP Price per Gallon

<u>Quarter</u> (1)	<u>RCAF Fuel Index</u>		<u>Fuel Price per Gallon In Fuel Surcharge Period 1/</u>	
	<u>Forecast Index</u> (2)	<u>Actual Index</u> (3)	<u>BNSF</u> (4)	<u>UP</u> (5)
1Q03	100.7	113.8	xxx	\$1.00
2Q03	130.4	111.0	xxx	\$0.88
3Q03	106.3	108.0	xxx	\$0.90
4Q03	113.3	111.2	xxx	\$0.89
1Q04	110.8	122.2	\$0.85	\$1.02
2Q04	120.8	133.8	\$0.97	\$1.16
3Q04	137.7	144.7	\$0.99	\$1.25
4Q04	148.3	189.7	\$1.14	\$1.46
1Q05	171.5	161.8	\$1.13	\$1.45
2Q05	186.9	204.2	\$1.33	\$1.67
3Q05	193.6	212.3	\$1.43	\$1.88
4Q05	276.2	283.4	\$1.69	\$2.08

Cumulative Change Between:

1Q03 and 4Q05	174.3%	149.0%	xxx	108.0%
1Q04 and 4Q05	149.3%	131.9%	98.7%	103.9%

1/ Average quarterly price per quarter as reported by BNSF and UP in the Annual Investors' Report. BNSF surcharge for coal began in the 2nd quarter of 2004 and the UP surcharge for coal began in the 2nd quarter of 2003.

Comparison of Changes in RCAF Fuel Index to BNSF and UP Price per Gallon

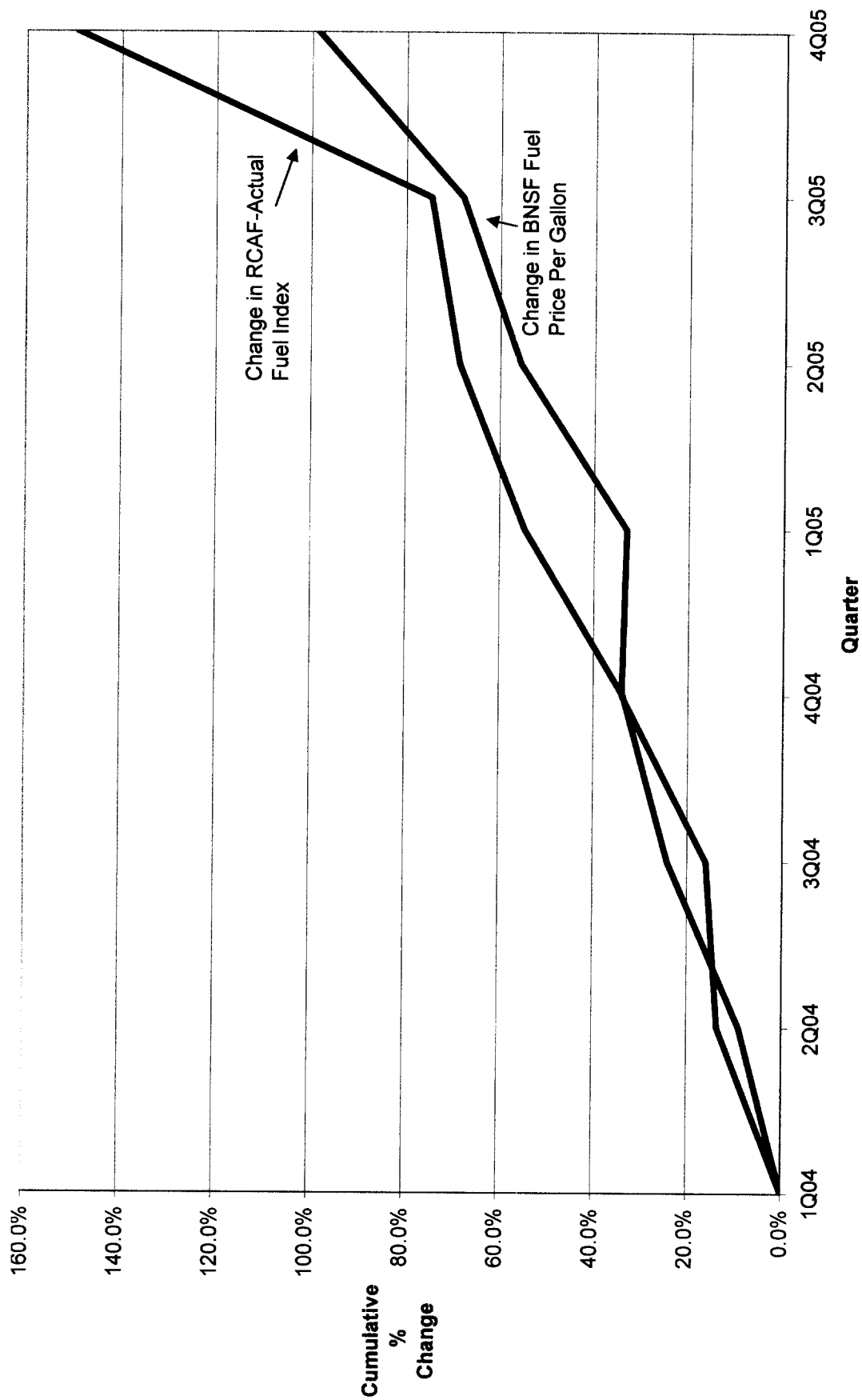
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Cumulative Change Between:

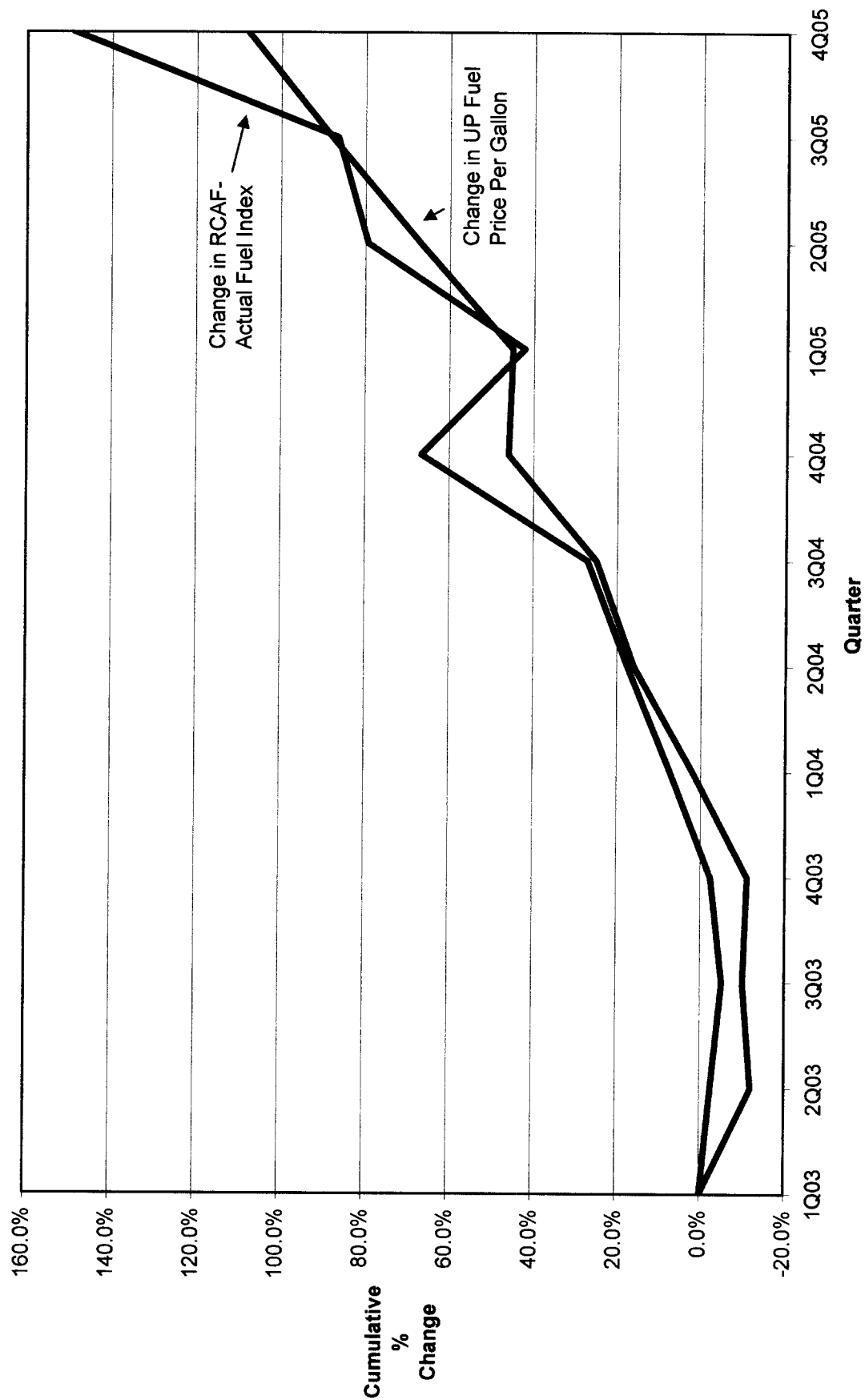
1Q03 and 4Q05	174.3%	149.0%	xxx	108.0%
1Q04 and 4Q05	149.3%	131.9%	98.7%	103.9%

1/ Average quarterly price per quarter as reported by BNSF and UP in the Annual Investors' Report. BNSF surcharge for coal began in the 2nd quarter of 2004 and the UP surcharge for coal began in the 2nd quarter of 2003.

Comparison of Changes in RCAF Fuel Index to BNSF Price per Gallon

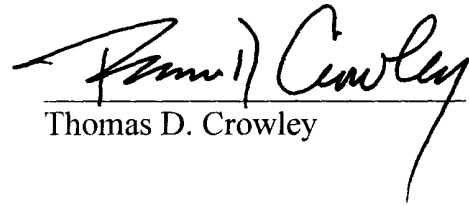


Comparison of Changes in RCAF Fuel Index to UP Price per Gallon



VERIFICATION

I, Thomas D. Crowley, verify under penalty of perjury that I have prepared Exhibit No. 1 and Exhibit No. 2 to the Statement of The Western Coal Traffic League in this proceeding, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.


Thomas D. Crowley

Executed on April 26, 2006