

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 661

RAIL FUEL SURCHARGES

Decided: January 25, 2007

The Board instituted this proceeding to inquire into rail carrier practices related to fuel surcharges. A fuel surcharge is a separately identified component of the total rate that is charged for the transportation involved, purportedly to recoup increases in the carrier's fuel costs. The Board first held a hearing in May 2006, and in August 2006 it sought comments on several proposed measures to address the Board's concerns about these practices. After considering all of the comments received, we conclude that computing rail fuel surcharges as a percentage of a base rate is an unreasonable practice, and we direct carriers to change this practice. We also conclude that the practice of "double dipping," i.e., applying to the same traffic both a fuel surcharge and a rate increase that is based on a cost index that includes a fuel cost component, such as the Railroad Cost Adjustment Factor (RCAF), is an unreasonable practice, and we direct carriers to change this practice as well. We will proceed with a proposal to impose mandatory reporting requirements for all Class I railroads regarding their fuel surcharges, in STB Ex Parte No. 661 (Sub-No. 1). We will not, however, prescribe the index to be used for measuring increases in fuel costs, nor will we partially revoke existing class exemptions to apply the measures set forth here to currently exempted traffic.

BACKGROUND

At the Board hearing conducted May 11, 2006, the shipper community expressed deep dissatisfaction with the railroad industry's methods of assessing fuel surcharges. Shippers acknowledged that railroads are entitled to recover the increased costs they incur from the rising price of fuel. But because rail rates are not cost based – railroads price their services differentially (e.g., based on the differing elasticities of demand for rail transportation of different shippers) – shippers argued that calculating a fuel surcharge as a percent of the base rate results in collecting from captive shippers more than the increased fuel costs associated with their particular traffic. Many shippers also alleged that railroads are double dipping. Shippers argued nearly unanimously that transparency is needed for rail fuel surcharges and asked us to require the railroads to regularly report their fuel costs and revenue from fuel surcharges.

The railroads largely concede that their fuel surcharges are not tied to the fuel consumption associated with the individual movements to which they are applied. However, they claim that, because they cannot apply fuel surcharges to every customer, especially those

whose rates are fixed by contract, they do not recover their full increased cost of fuel.¹ The railroads defended their methods of calculating fuel surcharges as fair, equitable, and easy to administer.

In a decision served August 3, 2006, the Board proposed to adopt several measures to address rail fuel surcharge practices. First, carriers would be required to develop a means of computing the surcharge that is more closely linked to the portion of its fuel costs attributable to the movement involved. Second, “double dipping” would be prohibited. Third, railroads would be required to use a single, uniform index for measuring increases in their fuel costs – the “U.S. No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon)” published by the Energy Information Agency, an independent arm of the Department of Energy (EIA Index). Fourth, class exemptions would be partially revoked to apply these measures to exempted traffic as well. Finally, each Class I railroad would be required to submit a monthly report to the Board showing its actual total fuel costs, total fuel consumption and total fuel surcharge revenues, as well as how much of its total fuel surcharge revenues are shared with its shortline connections.

We received 73 comments on these proposals. Some fully support these proposals without any additional suggestions.² Others either object to one or more of the proposed measures or suggest additional or alternative measures, as summarized below.

Linkage.

Shippers generally support a requirement that fuel surcharges be linked to attributes of a movement that directly affect the amount of fuel consumed, such as mileage or weight. Some further suggest that fuel surcharges be limited to the changes in fuel prices from a defined starting point (such as when a new rate is negotiated), and that shippers be able to separately challenge surcharges that exceed the change in fuel costs for their particular movement.³ Many shippers also suggest that the base fuel price to which a surcharge may be applied should be limited (to the fuel price component incorporated into the last increase in the base rate or the fuel

¹ At least one railroad, Union Pacific Railroad Company (UP), concedes that some customers may pay more than the actual incremental cost of fuel used to handle their particular movement, due to long-term transportation contracts with other shippers. UP Comments filed April 27, 2006 at 15-16.

² U.S. Clay Producers Traffic Association, Inc.; UPS; North Dakota Department of Agriculture; The Canadian Wheat Board; Degussa Corporation; National Corn Growers Association; E.I. du Pont de Nemours and Company (DuPont); and Agricultural Retailers Association (ARA).

³ Corn Products International, Inc.; Huntsman LLC; Afton Chemical Corporation; Reagent Chemical & Research, Inc.; Compass Minerals; San Joaquin Refining Co., Inc.; Stora Enso North America Corp.; Goodyear Tire & Rubber Company; CRI/Criterion; Barilla America, Inc.; Illinois Brick Company; and Highroad Consulting, Ltd.

price not more than 1 year prior),⁴ and that refunds or credits be required to be issued if fuel prices drop below that base level.⁵ Additionally, certain shippers ask us to require railroads to separately identify the fuel cost component in their base rates, or adopt a presumption that the prevailing cost of fuel is fully reflected in any newly-established base rates.⁶

A few shippers argue that fuel surcharges should be based on mileage alone, and not the weight of a movement, so as not to unduly complicate the calculation.⁷ And several shippers further suggest that a mileage-based surcharge should be based on the shortest possible mileage, because the actual miles can be circuitous.⁸

While a few railroads offered some positive comments about requiring fuel surcharges to be more closely linked to fuel costs,⁹ most oppose such a requirement, which they claim would be unduly costly and difficult to implement. Some argue that a mileage-based fuel surcharge would not be more precise than the present surcharge calculation.¹⁰ The Association of American Railroads (AAR) asserts that a mileage-based approach would not be workable. Several railroads suggest that, if we require a mileage-based calculation, we compile a master rail mileage database containing mileage data for all origin and destination pairs in North America, to facilitate compliance with such a rule.¹¹

⁴ Cargill Incorporated (Cargill); American Chemistry Council (ACC); Electric Power Supply Association; the Dow Chemical Company (Dow Chemical); The Fertilizer Institute (TFI); Potlatch Forest Products Corporation (Potlatch); Occidental Chemical Corporation (OCC); Shell Chemical LP (Shell Chemical); Idaho Power Company (Idaho Power); Sierra Pacific Power Company (Sierra Power); Nevada Power Company (Nevada Power); CEMEX, Inc. (CEMEX); Concerned Captive Coal Shippers (Concerned Coal Shippers); AES Corporation (AES); Kennecott Utah Copper Corporation (Kennecott); and Western Coal Traffic League (WCTL).

⁵ Cargill; ACC; Bayer MaterialScience LLC (Bayer); Dow Chemical; TFI; ASHTA Chemicals Inc. (ASHTA); National Grain and Feed Association (NGFA); Potlatch; Ag Processing Inc. (Ag Processing); Ameren Energy Fuels & Services (Ameren); Entergy Corporation (Entergy); Idaho Power; Sierra Power; Nevada Power; CEMEX; AES; Concerned Coal Shippers; OCC; National Industrial Transportation League (NITL); and WCTL.

⁶ Entergy; Ameren; Idaho Power; Sierra Power; Nevada Power; CEMEX; South Carolina Electric; NGFA; and AES.

⁷ ACC; Bayer; NDGDA; NITL; OCC; TFI; and AAM.

⁸ Cargill; NITL; AECC; and TFI.

⁹ CSX Transportation, Inc. (CSXT); Kansas City Southern Railway Company (KCSR); and BNSF Railway Company (BNSF).

¹⁰ UP; Canadian National Railway (CN); and Canadian Pacific Railway Company (CP).

¹¹ CSXT; KCSR; UP; and CP.

The U.S. Department of Transportation (DOT) notes that many factors other than mileage influence fuel consumption. DOT argues that carriers should be free to take other factors into account, as long as their overall approach is reasonable.

The American Short Line and Regional Railroad Association (ASLRRA) asserts that a mileage-based system would adversely affect Class II and Class III railroads, whose proportion of the route miles on a movement is not as large as their proportion of the revenues for the move.

Double Dipping.

Shippers generally support the prohibition against double dipping.¹² Some argue that only the RCAF should be used to adjust for changes in costs, including fuel, and that the RCAF should be modified as needed to address the carriers' time lag concern (which arises from the fact that the RCAF is adjusted only quarterly).¹³ DOT fully supports the proposal to prohibit double dipping. No railroad expressed opposition to a prohibition against double dipping. However, Norfolk Southern Railway Company (NS) suggests that having escalation clauses in a tariff that also includes a fuel surcharge should not be considered double dipping.

Uniform Fuel Cost Index.

Shippers have argued that use of a uniform fuel index would ensure accuracy, transparency and accountability.¹⁴ While most parties agree that the EIA index accurately reflects changes in fuel costs in the railroad industry, some parties propose alternate indices,¹⁵ and some parties object to the imposition of a uniform index.¹⁶ For example, DOT argues that an individual carrier should be allowed to use any index that closely correlates with its own fuel costs.

¹² AES; Edison Electric Institute (Edison Electric); Ameren; Entergy; CEMEX; South Carolina Electric and Gas Co. (South Carolina Electric); WCTL; Concerned Coal Shippers; NITL; Arkansas Electric Cooperative Corporation (AECC); NGFA; Potlatch; Idaho Power; Sierra Power; and Nevada Power.

¹³ WCTL; Entergy; Ameren; Nevada Power; and AES.

¹⁴ ARA; TFI; DuPont; ACC; Cargill; NGFA; Kennecott; NITL; Steel Manufacturers Association; and ASHTA.

¹⁵ Cargill; NDGDA; NITL; AECC; Argus Media Inc. (Argus); Ag Processing; Kennecott; and NGFA.

¹⁶ BNSF; KCSR; Small Railroad Business Owners of America/Minnesota Commercial Railway Company (SRBOA); and DOT.

Revocation of Exemptions.

Railroads vigorously object to the proposal in the August decision that the Board partially revoke the existing class exemptions at 49 CFR part 1039 so as to extend any measures adopted here to the various categories of rail traffic for which the agency has previously found regulation to be unnecessary. They argue that there is no record here for taking such action,¹⁷ and that partially revoking the exemption for intermodal traffic in particular would upset the competitive balance between railroads and trucks in that marketplace.¹⁸ DOT also opposes partial revocation of existing exemptions.

Reporting.

Shippers generally support the proposal for monthly fuel surcharge reports, as does DOT. Many shippers would have us expand the monthly report to include industry- or commodity-specific information or to reflect costs for individual movements,¹⁹ and they would have us require reports from Class II and Class III carriers as well.²⁰ Some shippers also suggest that we change the reporting requirement for the Waybill Sample to add data fields to monitor fuel surcharge revenues.²¹

Railroads generally oppose additional reporting requirements and anticipate difficulties in complying with them. Most state that their information systems are not presently capable of capturing all of the information necessary and that they would need to develop new information technology systems to produce the proposed report.²² Additionally, some suggest that any new report should be quarterly, rather than monthly.²³

In response to the Board's request for immediate voluntary reporting of fuel surcharges, only NS, CP, and KCSR submitted an initial report. CP and KCSR submitted data regarding fuel costs and consumption, but not revenues. BNSF, CSXT, CN, and UP did not submit any data.

¹⁷ BNSF; NS; CSXT; UP; CP; and AAR.

¹⁸ NS; CSXT; UP; and CP. J.B. Hunt Transport, Inc. and Hub Group, Inc. also submitted comments opposing revocation of the intermodal exemption.

¹⁹ North Dakota Grain Dealers Association (NDGDA); NGFA; Westlake Chemical Corporation (Westlake); Potlatch; NITL; and Entergy.

²⁰ NITL; Westlake; and Ag Processing.

²¹ NITL; Freight Resources Network, LLC; Wheat & Barley Commissions; Potlatch; and CEMEX.

²² KCSR; CSXT; CP; and UP.

²³ BNSF; CSXT; UP; and CP.

Implementation.

Railroads ask that they be provided ample time to implement new surcharge systems to comply with any requirements that we adopt.²⁴ They also ask us to confirm that the requirements would apply only prospectively and only to common carrier traffic, not to contract traffic.

Shippers ask that we set a clear deadline for when railroads would be required to implement new fuel surcharge systems.²⁵ Some ask that we apply our unreasonable practice findings retroactively and provide for an across-the-board remedy for past overcharges.²⁶ Finally, some shippers suggest that we establish a compliance process that would encourage dispute resolution between railroads and shippers.²⁷

DISCUSSION AND CONCLUSIONS

Linkage.

After considering all of the comments, we affirm the preliminary conclusion in the August decision that it is an unreasonable practice to compute fuel surcharges as a percentage of the base rates. Because railroads rely on differential pricing, under which rates are dependent on factors other than costs, a surcharge that is tied to the level of the base rate, rather than to fuel consumption for the movement to which the surcharge is applied, cannot fairly be described as merely a cost recovery mechanism. Rather, a fuel surcharge program that increases all rates by a set percentage stands virtually no prospect of reflecting the actual increase in fuel costs for handling the particular traffic to which the surcharge is applied. Two shippers may have traffic with identical fuel costs, but if one starts out with a higher base rate (because, for example, it has fewer transportation alternatives), it will pay dramatically more in fuel surcharges.

Alone among the railroads, CSXT maintains that its fuel surcharge program does not constitute mislabeling. CSXT contends that its fuel surcharge program “is designed to recoup CSXT’s increased overall fuel expenses to ensure adequate revenues. Moreover, CSXT’s program is fully explained on its website and its tariffs, and has been clearly understood in the market.”²⁸

²⁴ NS; KCSR; CSXT; UP; CN; and CP.

²⁵ Shell Chemical; Ag Processing Inc.; and Concerned Coal Shippers.

²⁶ Dow Chemical and Total Petrochemicals, USA, Inc.

²⁷ Dow Chemical and Shell Chemical.

²⁸ CSXT Comment at 18.

However, the term “fuel surcharge” most naturally suggests a charge to recover increased fuel costs associated with the movement to which it is applied. If it is used instead as a broader revenue enhancement measure, it is mislabeled. This sort of mislabeling appears designed to avoid the type of response a carrier would likely receive if it were to honestly inform a shipper that a higher rate was being imposed to recover not only the increased fuel cost of serving that shipper, but also the increased cost of fuel for another shipper’s traffic – which is what would often occur under rate-based fuel surcharges. But the fact that a railroad may not be able to recover its increased fuel costs from some of its traffic (for example, traffic covered by a contract lacking a provision to pass through such costs) does not provide a reasonable basis for shifting those costs onto other traffic in this manner. We believe that imposing rate increases in this manner, when there is no real correlation between the rate increase and the increase in fuel costs for that particular movement to which the surcharge is applied, is a misleading and ultimately unreasonable practice.

Several railroads challenge our authority to regulate fuel surcharge programs as an unreasonable practice. They argue that, because a fuel surcharge is a component of the total rate, it cannot be subjected to Board regulation except where we first find that the carrier has market dominance over the particular movement involved. We disagree. As explained in the August decision, we are not limiting the total amount that a rail carrier can charge for providing rail transportation through some combination of base rates and surcharges. Rather, we are only addressing the manner in which railroads apply what they label a fuel surcharge.

BNSF argues that Congress could not have intended for us to regulate an individual component of a rate based solely upon the label given to it by the railroad as a fuel surcharge.²⁹ But Congress, in the rail transportation policy at 49 U.S.C. 10101(9), explicitly stated that it is the policy of the United States Government “to encourage honest and efficient management of railroads.” Moreover, Congress exempted the rail carriers from the consumer protection requirements of the Federal Trade Commission Act,³⁰ presumably not because Congress intended to permit carriers to mislead their customers, but because our authority to proscribe unreasonable practices embraces misrepresentations or misleading conduct by the carriers. And the record in this proceeding provides extensive testimony by shippers who have expressed concern about carriers raising their rates on the pretext of recovering increased fuel costs. If the railroads wish to raise their rates they may do so, subject to the rate reasonableness requirement of the statute, but they may not impose those increases on their customers on the basis of a misrepresentation.

BNSF also argues that the Board cannot declare an action an unreasonable practice unless it is acting on a specific complaint.³¹ This argument overstates our action here. We are not

²⁹ BNSF Comment at 11.

³⁰ See 15 U.S.C. 45(a)(2); FTC v. Miller, 549 F.2d 452 (7th Cir. 1977).

³¹ BNSF Comment at 8-10.

addressing any individual railroad's fuel surcharge program, and we are not awarding any remedies for rate-based fuel surcharges that may have been used in the past. We are instead making a finding that promulgating rate-based fuel surcharges is an unreasonable practice. This finding could be used to support future complaints challenging individual rate-based surcharges, but we are not adjudicating a specific complaint here.

We recognize that our authority to determine whether any particular fuel surcharge applied by a specific railroad is an unreasonable practice, and to award damages on that basis, is limited to proceedings begun on complaint.³² 49 U.S.C. 10704(b), 11701(a). But as the Board stated in the August decision, we 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. *Cf. Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 128-29 (3d Cir. 1993) (citing with approval ICC rules governing carrier processing of claims for loss or damage to cargo, even though such claims could only be resolved in another forum).

The railroads question the practicality of alternatives to rate-based fuel surcharge programs. Many assert that a fuel surcharge based on mileage would be difficult, time consuming, and expensive to implement and administer. But these assertions are largely unsupported. The record shows that BNSF was able to successfully implement a mileage-based fuel surcharge (for coal and agricultural movements) in a matter of months. Moreover, several railroads have expressed some willingness to develop a fuel surcharge program linked to mileage, which further indicates that such a task is feasible.³³ There will, of course, be costs incurred in changing from one method to another (for example, costs associated with reprogramming information systems, retraining personnel, and coordinating with other carriers on interline movements). But we do not believe that converting to a new fuel surcharge methodology would impose an unreasonable burden on carriers. Moreover, the railroads have not asserted, much less demonstrated, that – once having made the change – it would cost more to maintain fuel surcharge programs that are tailored to fuel costs for the movement involved.

Some carriers question the benefits to be gained by moving away from rate-based fuel surcharges. CP and CN argue that a mileage-based (or a weight-and-mileage-based) fuel surcharge would not be any more precise or fair in allocating fuel costs among shippers than a rate-based fuel surcharge. They point out that there are many other factors in addition to mileage and weight that can affect fuel costs, including speed, intensity of local switching, empty return ratio, track conditions, geography, grade, curvature, drag and resistance, weather conditions, and overall operating conditions.

³² We note that the Board received numerous informal complaints from shippers about the freight rail industry's fuel surcharge practices and heard many shippers complain at the Board's May 2006 hearing.

³³ CSXT, KCSR, and BNSF.

We are not persuaded by these arguments. First, even a mileage-based fuel surcharge, although not perfect, more closely tracks changes in fuel costs for an individual shipment than does a rate-based fuel surcharge. Mileage is one of the primary factors that affects fuel consumption. In contrast, the base rate often does not closely correlate with fuel consumption, as it routinely reflects demand (and to the extent it reflects costs, fuel costs are less than 20% of a railroad's operating costs). Second, we are not precluding railroads from incorporating as many factors that affect fuel consumption as they wish in calculating fuel surcharges. Nor are we requiring them to incorporate every conceivable such factor, as we agree that would be impracticable. But if a carrier chooses to use a fuel surcharge program, it must be based upon attributes of a movement that directly affect the amount of fuel consumed. In other words, there must be a reasonable nexus to fuel consumption.

A fuel surcharge program keyed to the base rate has one primary benefit – ease of application.³⁴ Although clearly easy to implement, a fuel surcharge program keyed to the base rate almost guarantees that some shippers will be forced to pay the increased fuel costs of other shippers. For carriers to continue to apply fuel surcharge programs that are calculated as a percentage of the base rate – when practical alternatives are available – would permit them to continue to mislead their customers and would be unfair.

ASLRRRA argues that a mileage-based fuel surcharge system would adversely affect Class II and Class III railroads, which often receive a portion of the connecting Class I carrier's fuel surcharges. However, the revenue decisions are based on negotiated agreements between the carriers involved,³⁵ and indeed such agreements often provide for a fixed per-car handling fee.³⁶ Carriers may continue to agree to divide revenues on through movements in any reasonable manner.

Of course, when a shortline railroad itself establishes a fuel surcharge (rather than merely sharing in the revenues of a fuel surcharge established by a Class I railroad), it must comport with the findings and requirements of this decision. If mileage is not the best indicator of the fuel consumption associated with the movements a shortline handles, it may choose to base its fuel surcharges on other factors that are better correlated to the amount of fuel consumed. But

³⁴ Several carriers introduced evidence that many of their customers favor the continued use of a fuel surcharge program that is tied to the base rate. Given that such a program shifts greater responsibility for fuel recovery to shippers with higher rates, it is not surprising that a subset of customers (presumably those with lower base rates) favor retaining a percentage-of-the-base-rate approach. We note that such shippers are free to enter into contractual arrangements with carriers that incorporate into those contracts any escalation provision for fuel cost recovery that the parties wish.

³⁵ ASLRRRA Comment at 4, 6.

³⁶ Id. at 6, 8.

even for shortlines, we doubt that the level of the base rates would be an appropriate indicator of the fuel costs associated with individual movements.

Numerous shippers have asked us to make our findings here retroactive, so as to allow them to obtain a remedy for what they perceive to be past overcharges. In contrast, railroads have asked us to clarify that our findings here apply prospectively only. In view of the long history of rate-based fuel surcharges in the rail industry, we do not believe that railroads can be faulted for assuming that fuel surcharges calculated as a percentage of the base rate were permissible. Indeed, in the mid-1970s, the ICC specifically declined to require carriers to tie their fuel surcharges to mileage.³⁷ Although conditions have changed since the mid-1970s, railroads may have reasonably relied on that precedent in formulating their fuel surcharge programs. (That history underscores the need for, and propriety of, this proceeding to address, on an industry-wide basis, whether this well-established practice continues to be a reasonable practice going into the future.)

Railroads will have a 90-day transition period to adjust their fuel surcharge programs. Should an individual railroad need additional time to change its fuel surcharge system, it should request an extension from the Board and be prepared to demonstrate why it is necessary.

We do not believe that it is necessary or appropriate at this time to adopt any of the other linkage suggestions made by the commenters, as summarized above, such as requiring railroads to separately identify the fuel cost component in their base rates. We seek to minimize the degree of Federal regulatory control here, *see* 49 U.S.C. 10101(2), and to afford individual carriers the flexibility to devise fuel surcharge practices that work best for them, within the limits described herein. Once carriers have had an opportunity to adjust their fuel surcharge programs, should any shipper have concerns that any particular revised fuel surcharge program is being administered in a manner that constitutes an unreasonable practice, it may file a complaint with the Board. Additional rules of general applicability do not appear needed at this time.

Double Dipping.

Nearly every commenter supports a prohibition against “double dipping,” i.e., double recovery for the same fuel cost increase. This can occur when a carrier both escalates a base rate using an index (such as the RCAF) that includes changes in the cost of fuel and applies a fuel surcharge to the same movement covering the same time period.

NS suggests that use of a widely accepted index as a rate escalator should not constitute “double dipping” if included in a common carrier tariff that also includes a fuel surcharge. However, the only circumstance in which the use of both a fuel surcharge along with a rate escalator would not constitute “double dipping” is when the fuel component has been subtracted

³⁷ See Expedited Procedures for the Recovery of Fuel Costs, 350 I.C.C. 563, 570-71 (1975).

out of the index. Absent such an adjustment, we find that application of both an index that includes a fuel component and a fuel surcharge for the same movement to cover the same time period is an unreasonable practice.

Fuel Index.

Strong support has been expressed in the record for the proposal that railroads apply a single, uniform index to measure changes in fuel prices. Shippers argue that it would better ensure accuracy, transparency and accountability, and thereby enhance the credibility of fuel surcharges in the eyes of those who pay them. Moreover, there is general agreement — even among those carriers that object to Board imposition of a uniform index — that the EIA Index accurately reflects changes in fuel costs in the rail industry. Indeed, the EIA Index closely correlates with other fuel cost indices, including the indices currently used by most carriers. Moreover, the AAR has developed an index for carriers that is virtually identical to the EIA Index.

Because the EIA Index has been the subject of notice and comment and has withstood scrutiny on this record as discussed above, we conclude that it is a reasonable index to apply to measure changes in fuel costs for purposes of a fuel surcharge program. Thus, it provides a “safe harbor” upon which carriers can rely for an index. Use of an alternative index may be subject to challenge.

While we encourage carriers to use the EIA Index, we will not mandate its use. We are concerned that we not hinder the Board’s ability to respond nimbly should a superior index be identified. Indeed, some parties have advanced arguments here for the selection of a different index in place of the EIA Index proposed by the Board.³⁸ And DOT has argued that the fact that carriers buy fuel at different times and places supports the use of different indices. On the record that is before us here, we cannot strike down these alternative indices as unreasonable, nor can we find that it is an unreasonable practice for carriers to use different indices to measure changes in fuel costs. However, any alternative index used may be challenged as unreasonable on a case-by-case basis, and should meet or exceed the standards of accuracy, transparency, availability, and neutrality of the EIA Index, should closely correlate with other indices, and should reflect fuel price changes quickly.

³⁸ NITL and Kennecott suggest use of the EIA’s U.S. Diesel Fuel Industrial Price by All Sellers (Cents Per Gallon). NITL Comment at 9, Kennecott Comment at 5. NGFA and AECC recommend use of the wholesale, rather than retail, price of diesel. NGFA Comment at 7, AECC Comment at 11. Argus recommends its own bulk spot market price for Off-Road diesel, and Cargill suggests use of a third party index such as Argus’ index. Argus Comment at 2, Cargill Comment at 4-5.

Reporting.

We continue to believe that obtaining a monthly report from each Class I railroad regarding its fuel expenditures and consumption will enable the Board to better monitor the industry's fuel surcharge practices. However, to minimize the regulatory burden, we will narrow the information to be included in the report. In August, the Board proposed including ton-mile revenue information, but because we will not mandate that railroads use a fuel surcharge mechanism based on ton-miles, we conclude that we do not need to collect that information. Likewise, the Board proposed in August to require revenue sharing information based on concerns about the amount of fuel surcharge revenues shared with Class II and Class III railroads. But because the comments make clear that railroads are free to divide fuel surcharge revenues according to negotiated agreements, we conclude that it is not necessary to collect this information either.

Before adopting the proposed reporting requirement (as narrowed here), we need to first obtain additional comments on the costs and burdens of the proposed report to comport with the Paperwork Reduction Act. We will do that in a separate proceeding, STB Ex Parte No. 661 (Sub-No. 1), Rail Fuel Surcharges, which we are instituting by a separate decision also served today.

Exempted Traffic.

Under 49 U.S.C. 10502(a), the Board (like the ICC before it) has been directed to exempt entire categories of traffic from the regulatory provisions of the Interstate Commerce Act, to the maximum extent consistent with the Act. That authority has been used to exempt various broad categories of traffic from such regulation. See 49 CFR part 1039. The Board can revoke an exemption to the extent it finds necessary to achieve the regulatory objectives of the statute. 49 U.S.C. 10502(d). In considering whether to revoke an exemption:

[T]he first thing we look at . . . is whether the carrier possesses substantial market power. If it does not, then there is generally no basis for revoking an exemption. If it does, then we focus on whether regulation is necessary to protect against carrier abuse of shippers as a result of such market power. Finally, in assessing whether regulation is necessary or appropriate, we address whether regulation or exemption would, on balance, better advance the objectives of the [RTP and the interest of the shipping public overall.

Rail Exemption Misc. Agricultural Commodities, 8 I.C.C.2d 674, 682 (1992).

Here, while several shippers have expressed support for partially revoking the class exemption to apply the measures adopted here, that proposal is uniformly opposed by the railroad community. J.B. Hunt Transport, Inc., Hub Group, Inc., and SRBOA also submitted

separate comments opposing the revocation of the exemption for intermodal traffic in particular. And DOT “strongly opposes” the partial revocation of previously granted exemptions from regulation.³⁹

We are persuaded by the comments that we should not implement this aspect of the August proposal. The exemptions are based on prior findings that there is a sufficiently competitive market for the transportation involved that regulatory protections are not needed. The exemptions permit the traffic involved (including intermodal traffic) to benefit from a competitive marketplace free of regulatory interference. Under the exemption, trucks and railroads compete on an equal footing for intermodal traffic, for example, with each competitor capable of adapting readily to changes in the marketplace. If we revoke the exemption, even partially, the railroads would be restricted in how they can respond to changes, while trucking companies would not. This kind of imbalance could have unintended consequences and upset the competitive balance between railroads and trucks.

Although in August we noted that certain of the regulatory objectives of the statute supported the extension of our decision to exempted traffic, we are reminded that another regulatory objective is “to minimize the need for Federal regulatory control over the rail transportation system.” 49 U.S.C. 10101(2). The record developed in this proceeding offers no evidence that the marketplace has materially changed for any of the exempted categories of traffic since the findings were made to exempt that traffic from regulation. Without such evidence, we have no basis to reimpose regulation over traffic that has been exempted from regulation for almost two decades. Accordingly, we will not move forward with the proposal to apply these measures to exempted traffic. Although we decline to revoke the class exemptions across-the-board here, shippers are not precluded from filing individual petitions to revoke an exemption where there is no longer adequate competition.

Contract Traffic.

Many shippers argue that these rules should apply to traffic handled under transportation contracts. Under 49 U.S.C. 10709, we have no authority to regulate rail rates and services that are governed by a contract. Therefore, our findings and actions here apply only to regulated common carrier traffic. We do note, however, that if a railroad enters into a contract that ignores the potential for significant increases in fuel costs, it cannot remedy that situation by engaging in an unreasonable practice as to other traffic over which we do have regulatory authority. Railroads would be well-advised to focus on improving their contracts to clearly allocate the costs of contingencies such as fluctuating fuel costs, rather than attempting to pass on the costs of ineffective contract drafting to non-contract customers.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

³⁹ DOT Comment at 4.

It is ordered:

1. Railroads are directed to conform their practices to the findings contained in this decision.
2. This decision is effective on its service date.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey. Commissioner Buttrey concurred in part and dissented in part with a separate expression.

Vernon A. Williams
Secretary

VICE CHAIRMAN BUTTREY, concurring in part and dissenting in part:

I respectfully dissent from the portion of this decision pertaining to fuel indices, while concurring with the other aspects of the decision.

In the notice served August 3, 2006, in this proceeding, the Board proposed to require all Class I railroads to use a single index to measure increases in fuel costs, and suggested a particular EIA highway diesel price index as best-suited for that purpose. However, the majority's decision here, while encouraging railroads to adopt the EIA index, stops short of mandating its use.

I believe that mandating a single, well-recognized index that carriers must use in calculation of their fuel surcharges would make rail fuel surcharges more transparent to the shipping community, to the public, and to this Board; and is essential to insure comparability between the surcharges of different carriers. Indeed, it seems to me that to impose reporting requirements without mandating a specific index, as the majority's decision does here, seriously undercuts the effectiveness of that reporting. I believe that the record compiled in this proceeding demonstrates widespread support for a specific index, and convinces me that use of different indices will detract from the credibility of fuel surcharge programs in the eyes of the shipping public. The record also demonstrates the legitimacy of the EIA index, which correlates closely to other fuel indices including those currently in use by some carriers. I believe that the Board has the statutory power to mandate use of a specific fuel index, both as part of its broad unreasonable practice jurisdiction, and as part of its power to require meaningful reporting by

carriers as needed to carry out its regulatory responsibilities. Therefore, I dissent from the fuel index outcome, while fully supporting the other aspects of this decision.