

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 661 (Sub-No. 2)

RAIL FUEL SURCHARGES (SAFE HARBOR)

Digest:<sup>1</sup> The Board is discontinuing this docket, in which it sought comment on whether the “safe harbor” provision of its current fuel surcharge rules should be modified or removed.

Decided: August 28, 2019

In 2006 and 2007, the Board inquired into and made findings regarding rail carrier practices related to fuel surcharges in Rail Fuel Surcharges, Docket No. EP 661. A fuel surcharge is a separately identified component of the total rate that is charged for the involved transportation and that is designed to recoup increases in the carrier’s fuel costs. Rail shippers had voiced concerns to the Board that these fuel surcharges, because they were typically calculated as a percentage of the base rate<sup>2</sup> for the transportation, recovered amounts over and above the carriers’ actual increased fuel costs. See Hr’g Tr. at 38-40, 44-45, 47-49, 52, 61-62, May 11, 2006, Rail Fuel Surcharges, EP 661. In response, the Board stated that the term “most naturally suggests a charge to recover increased fuel costs associated with the movement to which it is applied,” and if a fuel surcharge is used as “a broader revenue enhancement measure, it is mislabeled.” Rail Fuel Surcharges, EP 661, slip op. at 7. The Board concluded that a rate increase resulting from a rate-based fuel surcharge, where “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.” Id. As such, the Board prohibited fuel surcharges expressed as a percentage of the base rate. Id. at 1, 6-8. The Board directed that any fuel surcharge program applied to regulated traffic must be based on attributes of a movement (such as mileage) that directly affect the amount of fuel consumed. Id. at 9.

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> The Board has referred to fuel surcharges that are calculated as a percentage of base rate as “rate-based fuel surcharges.” See, e.g., Rail Fuel Surcharges, EP 661, slip op. at 6-7 (STB served Jan. 26, 2007).

The Board also, however, established as a “safe harbor” an index<sup>3</sup> upon which carriers could rely to measure changes in fuel costs for purposes of a fuel surcharge program. The Board stated that a carrier’s use of that index would not be subject to a reasonableness challenge because the index had already been subject to notice and comment scrutiny. Id. at 11.

In 2013, the Board dismissed a complaint by Cargill, Incorporated, challenging fuel surcharges imposed by BNSF Railway Company (BNSF) over a five-year period under a fuel surcharge program applicable to agricultural and industrial products. Cargill, Inc. v. BNSF Ry., NOR 42120, slip op. at 1, 7 (STB served Aug. 12, 2013). In its decision, the Board observed that, if measured by its “internal” fuel costs (the amounts BNSF actually paid for fuel) instead of the safe harbor HDF Index, BNSF’s fuel surcharge revenues exceeded its incremental fuel costs (i.e., those additional fuel costs caused by a rise in fuel prices above a certain level) by \$181 million. Id. at 14. Nevertheless, the Board noted that, under the safe harbor provision adopted in Rail Fuel Surcharges, Docket No. EP 661, carriers are “entitled to rely on the HDF Index as a proxy to measure changes in their internal fuel costs”<sup>4</sup> and concluded that, using the HDF Index as the measure, BNSF had not over-recovered its incremental fuel costs over the five-year period covered by the complaint. Id. at 14. At the same time, however, the Board also gave notice that it would be issuing an Advance Notice of Proposed Rulemaking (ANPRM) to give shippers, rail carriers, and other interested parties the opportunity to comment on the safe harbor provision, including whether it should be modified or removed. Id. at 17-18.

In May 2014, the Board issued an ANPRM to gain a better understanding of whether the sort of growing spread between HDF-based costs and actual costs seen in Cargill was unique to BNSF during a period of particularly high price volatility (or instead a widespread phenomenon in the rail industry) and to determine whether to modify or remove the safe harbor provision. Rail Fuel Surcharges (Safe Harbor), EP 661 (Sub-No. 2), slip op. at 2-3 (STB served May 29, 2014). In the ANPRM, the Board asked whether the growing-spread phenomenon observed in Cargill was aberrational; whether there are problems associated with the Board’s use of the HDF Index as a safe harbor in judging the reasonableness of fuel surcharge programs; whether any problems with the safe harbor could be addressed through a modification of it; and whether any problems with the safe harbor are outweighed by its benefits. Id. at 3.

The 15 comments and 10 replies received in response to the ANPRM were varied, and many did not directly address the Board’s question about whether the “growing-spread” phenomenon seen in Cargill was an aberration.<sup>5</sup> A few commenters supported the repeal of the

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<sup>3</sup> That index was the Energy Information Administration’s former “U.S. No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon),” now known as the Highway Diesel Fuel Index (HDF Index).

<sup>4</sup> As the Board put it, “what the safe harbor means is that if a rail carrier uses the HDF Index [in its fuel surcharge program] to measure changes in its fuel costs, then that is how the Board will measure these changes as well, rather than by looking at evidence of changes in the rail carrier’s internal fuel costs.” Cargill, NOR 42120, slip op. at 9.

<sup>5</sup> The following parties submitted comments and/or replies in response to the ANPRM: The U.S. Department of Agriculture; Arkansas Electric Cooperative Corporation (AECC);

(continued . . . )

safe harbor provision,<sup>6</sup> while others supported retaining the safe harbor provision either outright or in some modified form.<sup>7</sup> Some commenters claimed the Cargill outcome was an aberration,<sup>8</sup> while another said there was insufficient evidence to answer the question of whether the phenomenon seen in Cargill was an aberration.<sup>9</sup> Finally, some commenters urged more study of that particular question or of fuel surcharge programs generally.<sup>10</sup>

The Board recognizes and appreciates that commenters devoted substantial time and effort to responding to the ANPRM. Since the comment period closed in 2014, the Board has been unable to reach a majority decision on what additional Board action should be taken in response to the comments received. Because of the lack of a majority opinion and in the interest of administrative finality, the Board Members agree that this docket should be discontinued.

It is ordered:

1. This docket is discontinued.
2. Notice of the Board's action will be published in the Federal Register.
3. This decision is effective on the date of service.

By the Board, Board Members Begeman, Fuchs, and Oberman. Board Members Begeman, Fuchs, and Oberman commented with separate expressions.

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Colorado Springs Utilities; Consumer United for Rail Equity (CURE); DOW Chemical Company (DOW Chemical), Highroad Consulting, Ltd (Highroad Consulting); Mercury Group; National Coal Transportation Association; National Industrial Transportation League (NITL); National Grain and Feed Association; Allied Shippers (Western Coal Traffic League, American Public Power Association, Edison Electric Institute, National Rural Electric Cooperative Association, South Mississippi Electric Power Association and Consumers Energy Company); BNSF; Canadian National Railway Company; CSX Transportation, Inc.; and Union Pacific Railroad Company (UP).

<sup>6</sup> (E.g., Allied Shippers Comments 3, Aug. 4, 2014.)

<sup>7</sup> (E.g., BNSF Comments 1, Aug. 4, 2014; AECC Comments 2-3, Aug. 4, 2014; UP Comments 7-11, Aug. 4, 2014; NITL Comments 8-9, Aug. 4, 2014; Highroad Consulting Reply 8, 10, Oct. 15, 2014.)

<sup>8</sup> (E.g., BNSF Comments 9-11, Aug. 4, 2014; CURE Comments 2, 9-10, Aug. 4, 2014; UP Comments 8, Aug. 4, 2014.)

<sup>9</sup> (Dow Chemical Comments 7-8, Aug. 4, 2014.)

<sup>10</sup> (E.g., NITL Comments 8-11, Aug. 4, 2014; Dow Chemical Reply 6-8, Aug. 15, 2014.)

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BOARD MEMBER BEGEMAN, commenting:

Since casting—reluctantly—my vote in Cargill, Inc. v. BNSF Railway, it has been my position that the “safe harbor” provision should be eliminated. In Cargill, BNSF recovered through fuel surcharges far more than its actual incremental fuel costs. See Cargill, Inc. v. BNSF Ry., NOR 42120, slip op. at 14. Yet the Board found that Cargill had failed to prove that the carrier had engaged in an unreasonable practice, “in large measure” because, since 2007, rail carriers have been entitled to rely on a Board-endorsed fuel index—the HDF Index—as a proxy to measure changes in their fuel costs for purposes of their fuel surcharge programs. Id. at 1, 9.

Cargill led me to question why the Board adopted rules in 2007 that would permit a carrier to recover substantially more than its incremental fuel costs, simply because the carrier uses a particular index in its fuel surcharge formula.<sup>1</sup> I believe it is especially misguided that, since Cargill, the safe harbor provision has been retained despite the Board’s recognition that the safe harbor gives carriers an “unintended advantage”—the ability to over-recover incremental fuel costs for as long as conditions permit but then to revise their fuel surcharge programs when new conditions would lead to an under-recovery. See id. at 17.

The overarching principle of the 2007 decision is not currently before the Board. Rather, the question before the Board is how we can best implement the principle that a rail fuel surcharge program should accurately reflect the cost of fuel. The Board’s 2014 ANPRM sought comments “on whether the safe harbor provision . . . should be modified or removed.” Rail Fuel Surcharges (Safe Harbor), EP 661 (Sub-No. 2), slip op. at 3. The comments received in response to the ANPRM have not allayed my concerns about the impacts of the safe harbor provision.

Since the ANPRM comments were filed five years ago, there hasn’t been a majority to coalesce around any approach (mine or any other one) for a next action in this proceeding. Therefore, I will again reluctantly vote—this time, to close the proceeding rather than wait for a full complement of Board members in hopes that a majority view would be reached to repeal the safe harbor provision.

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<sup>1</sup> “[W]hat the safe harbor means is that if a rail carrier uses the HDF Index [in its fuel surcharge program] to measure changes in its fuel costs, then that is how the Board will measure these changes as well, rather than by looking at evidence of changes in the rail carrier’s internal fuel costs.” Cargill, Inc. v. BNSF Ry., NOR 42120, slip op. at 9.

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BOARD MEMBER FUCHS, commenting:

The Board has recognized that a fuel surcharge is part of the overall rate for rail transportation. When the Board determines market dominance and rate reasonableness, the challenged rate has included both the base rate and any fuel surcharge.<sup>1</sup> In Rail Fuel Surcharges, the Board set a framework for a complainant to pursue relief on its fuel surcharge separate from the processes available for relief on its overall rate.

Some public comments on the ANPRM ask the Board now to remove or modify the safe harbor provision in Rail Fuel Surcharges to make it easier, in effect, for a complainant to receive relief on its fuel surcharge. Such a change could exacerbate a tension that exists under the Rail Fuel Surcharges framework: the standard by which the Board is to review part of the rate (the fuel surcharge) is completely different from the standard by which it is to review the overall rate. In reviewing the reasonableness of the overall rate under 49 U.S.C. §§ 10701(d)(1) and 10702, the Board allows for the differentiation of prices based on demand.<sup>2</sup> In reviewing the fuel surcharge, however, the Board is to consider part of the rate (the fuel surcharge) by essentially ignoring such demand-based differential pricing.<sup>3</sup> Because of the inconsistency in review standards, the Board might award relief on part of the rate (the fuel surcharge) even if it could not award relief on the overall rate. In effect, Rail Fuel Surcharges could be read as permitting the Board to award a form of rate relief to a complainant whose rate may be reasonable.<sup>4</sup> Whether or not the two approaches could be reconciled, I would not risk exacerbating this tension by modifying or removing the safe harbor provision.

At the same time, I also would not propose reversing Rail Fuel Surcharges here. Carriers have changed their fuel surcharge programs as a result of the decision, and the record suggests that those carriers and many customers have come to rely upon it. If the Board were to propose reversing Rail Fuel Surcharges, it could disrupt that reliance. I do not favor embarking on such a potentially disruptive course when no public commenter has made compelling case to reverse the decision and when the record suggests rail customers have continued concerns with their overall rates—both base rates and the fuel surcharges. Rather than focusing on Rail Fuel Surcharges at

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<sup>1</sup> See, e.g., Consumers Opening II-8, Nov. 2, 2015, Consumers Energy Co. v. CSX Transp., Inc., NOR 42142 (chart showing base rate plus fuel surcharge equals rate).

<sup>2</sup> See Rail Fuel Surcharges, slip op. at 6, 8. See, e.g., Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1), slip op. at 7-11 (STB served Sept. 5, 2007).

<sup>3</sup> This statement takes no position on the extent to which the labeling of a rate-based fee as a fuel surcharge affects rail customers' understanding of their rates and therefore affects their transportation decisions. I do note, however, that a tariff explains the calculation of a fuel surcharge and that a rate-based calculation is relatively simple.

<sup>4</sup> The view expressed here is not inconsistent with the way the Board addresses demurrage charges, which are distinct from rates under the statute and as a practical matter. See, e.g., 49 U.S.C. §§ 10746, 11708(b)(1)(A).

this time, the Board should address these concerns, as appropriate, by advancing reforms to its rate review processes, which apply to the overall rate.

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BOARD MEMBER OBERMAN, commenting:

I agree that this docket should be discontinued. To be clear, I find the outcome in Cargill jarring because the carrier was permitted to collect sums far in excess of its true incremental fuel costs. Nevertheless, in my view that outcome was consistent with, if not mandated by, the safe harbor provision incorporated into the Board's fuel surcharge rules.

Railroads have the initiative to set rates under 49 U.S.C. § 10701(c), and a regulated railroad rate can be set aside as unreasonable only if the Board finds market dominance. 49 U.S.C. §§ 10701(d), 10707(c). Railroad practices can be found unlawful under 49 U.S.C. § 10702 without a finding of market dominance, but it is well settled that the Board may not evade the limits on its rate review process by treating a rate matter as an unreasonable practice case. Union Pacific R.R. v. ICC, 867 F.2d 646 (D.C. Cir. 1989). Although there can be a “conceptual overlap between railroads’ ‘practices’ and their ‘rates,’” id. at 649, when a practice is “manifested exclusively in the level of rates that customers are charged,” id., a challenge to such a practice is in reality a challenge to the rate and may only be brought under the Board's rate reasonableness procedures. See id.

To me, the fuel surcharges that the Board is addressing are clearly components of the overall rates charged for the underlying transportation. To be sure, the “truth-in-advertising” aspect of the Rail Fuel Surcharges decision comes a bit closer to the “practices” arena, but the relief sought in Cargill, and that the Allied Shippers urge here, is still, at base, rate relief.

For all of these reasons, in my view, the Board should not have issued the Rail Fuel Surcharges decision in 2007, which created the fuel surcharges rules and their safe harbor provision. Today, I would take steps to reverse that decision in its entirety. However, no majority exists for such action.