

III. Procedural Matters

A. Ex Parte Presentations

14. This proceeding has been designated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules. 47 CFR 1.1200 *et seq.* Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with § 1.1206(b). In proceedings governed by § 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

B. Comment Filing Procedures

15. Interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Interested parties may file comments using: (1) The Commission’s Electronic Comment Filing System (ECFS), or (2) by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998). Commenters should refer to docket number 09–19 when filing comments.

16. Electronic Filers: Interested parties may file comments electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs2>.

17. Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

18. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

19. All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th Street SW., Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

20. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

21. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington DC 20554.

22. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

23. Interested parties may view documents filed in this proceeding on the Commission’s Electronic Comment Filing System (ECFS) using the following steps: (1) Access ECFS at <http://apps.fcc.gov/ecfs>. (2) In the introductory screen, click on “Search for Filings.” (3) In the “Proceeding Number” box, enter the numerals in the docket number. (4) Click on the box marked “Search for Comments.” A link to each document is provided in the document list. The public may inspect and copy filings and comments during regular business hours at the FCC Reference Information Center, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The public may also purchase filings and comments from the Commission’s duplicating contractor, Best Copy and Printing, Inc.,

Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160, or via email to fcc@bcpiweb.com. The public may also download this Public Notice from the Commission’s Web site at <http://www.fcc.gov/>.

Federal Communications Commission.

Zenji Nakazawa,

Deputy Division Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau.

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DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Chapter X

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

Rail Fuel Surcharges (Safe Harbor)

AGENCY: Surface Transportation Board (Board or STB), DOT.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Board is instituting this advance notice of proposed rulemaking proceeding to give shippers, rail carriers, and other interested persons the opportunity to comment on whether the safe harbor provision of the Board’s current fuel surcharge rules should be modified or removed.

DATES: Comments are due by July 14, 2014. Reply comments are due by August 12, 2014.

ADDRESSES: Comments and replies may be submitted either via the Board’s e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board’s Web site, at <http://www.stb.dot.gov>. Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: EP 661 (Sub-No. 2), 395 E Street SW., Washington, DC 20423–0001. Copies of written comments and replies will be available for viewing and self-copying at the Board’s Public Docket Room, Room 131, and will be posted to the Board’s Web site.

FOR FURTHER INFORMATION CONTACT: Marc Lerner at 202–245–0390.

Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: In *Rail Fuel Surcharges (Fuel Surcharges)*, EP

661 (STB served Jan. 26, 2007), the Board inquired into and made findings regarding rail carrier practices related to fuel surcharges, i.e., a separately identified component of the total rate that is charged for the transportation involved and is designed to recoup increases in the carrier's fuel costs. The Board prohibited rate-based fuel surcharges as an unreasonable practice and, as to the matter at issue here, established as a "safe harbor" an index upon which carriers could rely to measure changes in fuel costs for purposes of a fuel surcharge program. *Id.*, slip op. at 11. That index was the Energy Information Administration's (EIA) ¹ U.S. No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon), which was and continues to be referred to as the Highway Diesel Fuel Index (HDF Index).² *Id.* Although the HDF Index tracks retail fuel prices, which include taxes not paid by wholesale buyers like the Class I railroads, the Board was persuaded that the HDF Index "accurately reflects changes in fuel costs in the rail industry." *Id.* (emphasis added). The Board noted that alternative indexes could be used but that they could be challenged as unreasonable on a case-by-case basis.³

The changes in a rail carrier's fuel costs are reflected in its "incremental fuel costs" by which we mean those fuel costs, not embedded in the base rate, that the rail carrier seeks to recover through a fuel surcharge mechanism. A critical issue that arose in a complaint brought against BNSF Railway Company (BNSF) by Cargill, Incorporated (Cargill), a major shipper of agricultural products, was "how to measure BNSF's incremental fuel costs." *Cargill, Inc. v. BNSF Ry. (Cargill)*, NOR 42120, slip op. at 7 (STB served Aug. 12, 2013.) Cargill argued that BNSF's mileage-based fuel surcharge program constituted an unreasonable practice, asserting that it extracted substantial profits on the traffic to which it applied. Cargill sought to show that BNSF's fuel surcharge revenues exceeded BNSF's incremental fuel costs by comparing BNSF's fuel surcharge revenue to its internal fuel costs.

To address Cargill's "Profit Center" claim, the Board had to decide how to

¹ The EIA is an independent arm of the U.S. Department of Energy.

² In the notice of proposed rulemaking issued in *Fuel Surcharges*, the Board had proposed to mandate use of the HDF Index to measure incremental fuel costs.

³ In a separate proceeding, the Board amended its regulations at 49 CFR 1243.3 to require Class I rail carriers to report on a quarterly basis certain data concerning fuel costs and fuel surcharges billed. See *Rail Fuel Surcharges*, EP 661 (Sub-No. 1) (STB served Aug. 14, 2007).

calculate BNSF's incremental fuel costs. The Board determined that the "safe harbor" language in *Fuel Surcharges* dictated the answer. Specifically, the Board found, in part, that if rail carriers use the HDF Index to measure changes in their fuel costs for purposes of a fuel surcharge program then, under the safe harbor provision adopted in *Fuel Surcharges*, they "are entitled to rely on the HDF Index as a proxy to measure changes in their internal fuel costs." *Id.* at 14. Having created the safe harbor "to encourage use of the HDF Index" to measure changes in rail carrier fuel costs, *id.* at 9, the Board concluded that because BNSF had used the HDF Index in the fuel surcharge program at issue, the Board had to use that index as well to calculate BNSF's incremental fuel costs. *Id.* ("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").⁴

Performing its own examination of BNSF's month-to-month incremental fuel costs over a five-year period, the Board determined that, as measured by the HDF Index, BNSF's total incremental fuel costs for the traffic subject to the challenged fuel surcharge program only narrowly exceeded the fuel surcharge revenues BNSF collected on that traffic. The Board observed, however, that if BNSF's incremental fuel costs were instead measured by the rail carrier's internal fuel costs, BNSF's fuel surcharge revenues would have exceeded its incremental fuel costs by \$181 million. *Id.* at 14. This occurred because changes in the HDF Index did not precisely reflect changes in BNSF's internal fuel costs. In particular, the "spread"—i.e., the difference between the average retail price per gallon as reflected in the HDF Index and the lower wholesale price per gallon actually paid by BNSF—increased overall significantly more than it decreased over the five-year analysis period.

This result concerned the Board. Pointing out that it had not rejected Cargill's Profit Center claim lightly, the Board noted that in *Fuel Surcharges* neither it nor any commenting party had foreseen a situation where the spread between a rail carrier's internal fuel costs and the HDF Index would diverge as it had in *Cargill* and that it was

⁴ The Board also rejected Cargill's claim that the general formula used to calculate the fuel surcharges bore no reasonable nexus to, and overstated, fuel consumption for the BNSF system traffic to which the surcharge was applied.

unclear if this recovery was a unique situation affecting BNSF during a period of high fuel price volatility or if it was, or was likely to have been, a more widespread phenomenon that could undermine the usefulness of the safe harbor provision. The Board expressed concern that the safe harbor provision could give rail carriers an unintended advantage: if a rail carrier's internal fuel costs rise relative to HDF Index prices, the rail carrier could revise its fuel surcharge level upward to ensure that it fully recovers its incremental fuel costs; on the other hand, if a rail carrier's internal fuel costs declined relative to HDF Index prices (as happened to BNSF), the rail carrier could leave its fuel surcharge level in place, creating a spread and excessive revenues. *Id.* at 17. This could allow a rail carrier to recover substantially more than its incremental internal fuel costs yet still be permissible under the safe harbor.

The Board found no evidence to suggest that BNSF had intentionally taken advantage of this aspect of the safe harbor. Nevertheless, because of the possibility of future abuse, the Board stated that it would give shippers, rail carriers, and other interested persons the opportunity to file comments on the issue.

We are seeking comments from the public on whether the safe harbor provision of *Fuel Surcharges* should be modified or removed. In particular, we seek comments on: whether or not the phenomenon that we observed in *Cargill* (a growing spread between a rail carrier's internal fuel costs and the HDF Index) was likely an aberration; 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. Parties are also encouraged to comment on any other matter that they believe bears on whether the safe harbor should be modified or removed.

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

Authority: 49 U.S.C. 721(a) and 10702.

Decided: May 22, 2014.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.

Jeffrey Herzog,
Clearance Clerk.

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