BEFORE THE
SURFACE TRANSPORTATION BOARD

Rail Fuel Surcharges (Safe Harbor)	)	Docket No. EP 661 (Sub-No. 2)

PETITION OF THE WESTERN COAL TRAFFIC LEAGUE, AMERICAN PUBLIC POWER ASSOCIATION, EDISON ELECTRIC INSTITUTE, FREIGHT RAIL CUSTOMER ALLIANCE AND NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION FOR RECONSIDERATION

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PETITION FOR RECONSIDERATION

The Western Coal Traffic League ("WCTL"), American Public Power Association ("APPA"), Edison Electric Institute ("EEI"), Freight Rail Customer Alliance ("FRCA") and National Rural Electric Cooperative Association ("NRECA") (collectively, "Allied Shippers") respectfully request that the Surface Transportation Board ("STB" or "Board") reconsider its decision served on August 29, 2019 ("Decision") to discontinue this proceeding.[1]

PREFACE AND SUMMARY

The Board's Decision abdicates its duties to the shipping public. Rail shippers look to the Board as the last line of defense to protect them from unreasonable railroad practices. In its Decision, the Board voted to not address and remedy a clearly unreasonable railroad practice – the carriers' deceptive use of their fuel surcharges as profit centers.

[1] Allied Shippers file this Petition for Reconsideration pursuant to 49 C.F.R. § 1115.3(a) ("[a] discretionary appeal of an entire Board action is permitted").

After an extensive investigation,[2] the Board ruled in its unanimous 2007 *Rail Fuel Surcharges III* decision that a railroad engaged in an unreasonable practice if it collected fuel surcharges that exceeded the carrier's actual incremental fuel cost increases.[3] The Board's reasoning was straightforward – if a carrier is using its fuel surcharges to collect more than its actual incremental fuel cost increases, it is deceptively using its fuel surcharge program as a profit center.[4] At that time, the Board also promised Congress it would "aggressively" act to prevent carrier fuel surcharge profiteering practices.[5]

In its 2013 decision in *Cargill*,[6] the Board found that BNSF Railway Company ("BNSF") had deceptively used its fuel surcharge program to collect $181 million in profits over a five-year period.[7] However, the Board reluctantly concluded this profiteering was permitted under the "safe harbor" provision the Board had adopted in *Rail Fuel Surcharges III*.[8] As construed by the Board in *Cargill*, if the higher retail "safe

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[2] *See Rail Fuel Surcharges*, Ex Parte No. 661 ("*Rail Fuel Surcharges*") (STB served Mar. 14, 2006) ("*Rail Fuel Surcharges I*"); *id*. (STB served Aug. 3, 2006) ("*Rail Fuel Surcharges II*"); *id*. (STB served Jan. 26, 2007) ("*Rail Fuel Surcharges III*").

[3] *Rail Fuel Surcharges III*, slip op. at 7.

[4] *Id*.

[5] *Rail Competition & Serv.: Hearing Before the H. Comm. on Transp. & Infrastructure*, 110th Cong. 23 (2007) (testimony of Hon. Charles D. Nottingham, Chairman, STB).

[6] *Cargill, Inc. v. BNSF Ry*., Docket No. NOR 42120 (STB served Aug. 12, 2013) ("*Cargill*").

[7] *Id*., slip op. at 14.

[8] *Id*. In *Rail Fuel Surcharges III*, the Board held that carriers could use the U.S. No. 2 Diesel Retail Sales by All Sellers (Cents per Gallon) retail On-Highway Diesel

harbor" HDF fuel prices BNSF did not actually pay for its fuel were substituted in to the Board's incremental fuel cost analysis for the lower wholesale prices BNSF actually paid for its locomotive diesel fuel, there was no fuel surcharge profit.[9]

The Board observed in *Cargill* that BNSF knew it was using the Board's fuel surcharge safe harbor as a profit center, and the Board stated it would institute a rulemaking proceeding to address carrier "abuse" of the safe harbor provision.[10] In its ensuing advance notice of proposed rulemaking served in this proceeding on May 29, 2014 ("ANPRM"), the Board sought comments on whether the safe harbor profiteering in *Cargill* was an "aberration" and, if it was not, what changes the Board should consider making to its fuel surcharge rules to eliminate (or reduce) carrier fuel surcharge profiteering.[11]

Allied Shippers presented detailed expert evidence in response to the Board's ANPRM demonstrating that safe harbor profiteering, along with other forms of fuel surcharge profiteering, was rampant in the rail industry.[12] Allied Shippers, along

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Fuel ("HDF") prices published by the U.S. Department of Energy in their fuel surcharge tables and further held that if a carrier did use HDF prices in its fuel surcharge tables, use of the HDF prices "provides a 'safe harbor' upon which carriers can rely for an index." *Fuel Surcharges III*, slip op. at 11. The Board adopted the safe harbor based on its belief at the time that changes in retail HDF prices (basically, the retail diesel fuel prices paid at the highway pump by truckers) were a good surrogate for changes in the wholesale diesel fuel prices rail carriers actually paid for their locomotive fuel. *Id*.

[9] *Cargill*, slip op. at 13.

[10] *Id*. at 17-18.

[11] ANPRM, slip op. at 3.

[12] *See* Allied Shippers (WCTL, *et al*.) Comments (Aug. 4, 2014) ("Allied Shippers Comments"); *see also* Allied Shippers (WCTL, *et al.*) Reply Comments (Oct. 15, 2014).

with other rail shippers, presented the Board with a host of proposed reform measures to end this deceptive profiteering. Following the receipt of reply comments, the Board took no action in response to the ANPRM for several years and then, in its Decision, discontinued this proceeding without addressing the very question it had itself raised – was the carrier profiteering in *Cargill* an "aberration" – or the reform proposals submitted by Allied Shippers and others.

Each Board Member offered a different explanation for the Board's non-action:

- Chairman Begeman acknowledged that the safe harbor unreasonably "permit[s] a carrier to recover substantially more than its incremental fuel costs" and concluded that carrier profiteering should be addressed by "eliminat[ing]" the safe harbor provision, but, since no other Board Member agreed, she reluctantly voted to discontinue the proceeding.[13]

- Board Member Oberman found that BNSF's fuel surcharge profiteering in *Cargill* was a "jarring," but permissible, rail practice because, under his understanding of *Union Pac. R.R. v ICC*, 867 F.2d 646 (D.C. Cir. 1989) ("*Union Pacific*"), a shipper's only remedy for fuel surcharge profiteering was a maximum rate case.[14] Member Oberman advocated "revers[ing]" the Board's *Rail Fuel Surcharges III* decision, but voted to discontinue this proceeding because no other Board Member agreed with his proposal.[15]

- Vice Chairman Fuchs observed that under the Board's *Rail Fuel Surcharges III* decision, the Board could find

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Allied Shippers Comments and Reply Comments in 2014 were filed on behalf of, *inter alia*, WCTL, APPA, EEI and NRECA.

[13] Decision at 4 (Chairman Begeman, commenting).

[14] *Id*. at 6 (Member Oberman, commenting).

[15] *Id*.

> that a carrier's rail fuel surcharge profiteering was an unreasonable practice, even if the carrier's overall price (adjusted base rate plus fuel surcharge) was not deemed unreasonable under the Board's maximum rate standards, a result he characterized as creating a "tension" between the Board's unreasonable practice and unreasonable rate jurisdictions – a "tension" he did not want to "exacerbat[e] . . . by modifying or removing the safe harbor" (as Chairman Begeman advocated), but also one he did not want to address further by reversing *Rail Fuel Surcharges III* (as Member Oberman advocated) because of industry "reliance" on the safe harbor.[16] Instead, Vice Chairman Fuchs voted to discontinue the proceeding so the Board could focus on reforming its maximum rate review process.[17]

The Board should reconsider its Decision because the Board got it right in *Rail Fuel Surcharges III* – carrier fuel surcharge profiteering is an unreasonable practice – and the record in this case clearly demonstrates that carrier use of fuel surcharges as profit centers is no aberration. The Board's statutory responsibility is to regulate and eliminate unreasonable carrier practices, not to arbitrarily brush them aside.[18] On reconsideration, the Board should vacate its Decision and publish a notice of proposed rulemaking ("NPRM") proposing remedial rules to stop (or reduce) carriers' ongoing fuel surcharge profiteering.

ARGUMENT

The Board's Decision is flawed by four material errors: (i) the Board erroneously failed to enforce its correctly decided *Rail Fuel Surcharges III* ruling

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[16] *Id*. at 5 (Vice Chairman Fuchs, commenting).

[17] *Id*. at 5-6.

[18] *See* 49 U.S.C. § 10702(2) (carriers "shall establish reasonable . . . rules and practices").

prohibiting carriers from using fuel surcharges as profit centers; (ii) the rationale given by two Board Members for the Board's failure to enforce *Rail Fuel Surcharges III* – shippers should pursue maximum rate relief to address fuel surcharge profiteering – is a discredited carrier-sponsored contention that the Board correctly rejected in *Rail Fuel Surcharges III* and in subsequent Board decisions; (iii) the Board erroneously failed to consider the extensive record evidence demonstrating that carriers continue to use their fuel surcharges as profit centers; and (iv) the Board erroneously failed to consider, and propose in an NPRM, one or more of the remedial actions recommended by shippers to stop (or lessen) carrier fuel surcharge profiteering.

I. The Board Erred by Failing to Enforce Its Correct *Rail Fuel Surcharges III* Ruling That Carrier Use of Fuel Surcharges as Profit Centers Is an Unreasonable Practice

Prior to the OPEC Oil Embargo in 1973-74 ("Embargo"), carriers seldom published fuel surcharges.[19] Surcharges were disfavored because "it is not a sound and orderly ratemaking practice to isolate a single operating tax from all other operating expenses, and maintain a surcharge based thereon."[20]

Following the Embargo, the Board's predecessor, the Interstate Commerce Commission ("ICC"), permitted carriers to collect system-wide fuel surcharges, but only if the carriers first sought approval from the ICC to collect the fuel surcharges; the ICC

[19] *See* Allied Shippers Comments at 10-11.

[20] *Id*. (quoting *Surcharges, New York State*, 62 M.C.C. 117, 133 (1953)).

found that the surcharges were cost-justified; and the surcharges applied only for limited time-periods.[21]

In the Staggers Rail Act of 1980,[22] Congress directed the ICC to develop a quarterly index of railroad cost changes (including actual carrier fuel cost changes) that could be used by carriers to adjust their base prices for changes in their operating costs, including their actual fuel cost changes.[23] In response, the ICC developed the Rail Cost Adjustment Factor ("RCAF") indices.[24] The ICC concluded that with the RCAF procedures in place, there was no need for carriers to publish fuel surcharge tariffs[25] and the ICC was right. For the next 20+ years, few fuel surcharge tariffs were published, and even fewer were applied.[26]

Things changed dramatically circa 2003. At that time, all of the major railroads began publishing (or applying) permanent fuel surcharge tariffs.[27] These tariffs contained very high fuel surcharges, and the carriers began to impose these high fuel

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[21] *Id*. at 11-12.

[22] Pub. L. No. 96-448, 94 Stat. 1895 (1980).

[23] *See* Allied Shippers Comments at 12-13.

[24] *Id*. at 13-14.

[25] *Id*. at 13 (citing *Rail Cost Recovery Procedures*, 364 I.C.C. 841, 852 (1981) ("[m]aintaining a separate surcharge mechanism for fuel would, in our view, serve no useful purpose once these [RCAF] rules are in place")).

[26] *Id*. at 14-15.

[27] *Id*. at 15 (citing *In re Rail Freight Surcharge Antitrust Litig. – MDL No. 1869*, 725 F.3d 244, 248 (D.C. Cir. 2013) ("by the mid-2000s . . . fuel surcharge provisions became ubiquitous")).

surcharges on all of their traffic.[28] Carriers claimed that the surcharges were needed to collect their increased fuel costs, but shippers, and their elected representatives, believed that the carriers were in fact collectively imposing fuel surcharges as deceptive new profit centers.[29] They asked the STB to investigate, and the STB did so.[30]

Following extensive hearings, and receipt of multiple rounds of comments, the Board concluded in its unanimous *Rail Fuel Surcharges III* decision that carrier use of fuel surcharges as profit centers was a deceptive, unreasonable practice:

> [C]ongress, 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, 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.

Rail Fuel Surcharges III, slip op. at 7 (footnote omitted).

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[28] *Id*. at 15-19.

[29] *Id*. at 19.

[30] *See Rail Fuel Surcharges I*, slip op. at 1 ("the rail shipper community has voiced concerns that recent fuel surcharges collected by railroads are designed to recover amounts over and above increased fuel costs").

In subsequent decisions, the Board consistently adhered to its 2007 *Rail Fuel Surcharges III* ruling that carrier use of their fuel surcharges as profit centers was an unreasonable practice. *See*, *e.g.*, *Dairyland Power Coop. v. Union Pac. R.R.*, Docket No. 42105, slip op at 2 (STB served July 29, 2008) ("*Dairyland*") ("if there is no real correlation between the surcharge and the increase in fuel costs for the particular movement to which the surcharge is applied, then it is a misleading and ultimately unreasonable practice") (internal quotation marks omitted); *Cargill*, slip op. at 5 (STB served Jan. 4, 2011) (carrier use of a fuel surcharge "to extract substantial profits over and above its incremental fuel costs" is an unreasonable practice); ANPRM, slip op. at 2 (unreasonable practice for carriers to use fuel surcharges as a "'Profit Center'").

The Board's 2007 *Rail Fuel Surcharges III* decision was correct and comports with common sense. No regulated entity should be allowed to lie to its customers, and no regulatory authority should permit a regulated entity to do so. This is particularly true here because Congress has expressly directed the Board to enforce the national rail transportation policy, which calls for carriers to act in an "honest" manner.[31] The Board's Decision improperly fails to enforce *Rail Fuel Surcharges III*. Allied Shippers respectfully request that the Board correct this error on reconsideration.

[31] 49 U.S.C. § 10101(9).

II. Two Board Members Erred by Adopting the Long-Discredited Carrier Contention That Deceptive Fuel Surcharge Profiteering Can (or Should) Only Be Addressed in Maximum Rate Cases

In *Rail Fuel Surcharges*, the railroad industry argued that the Board lacked jurisdiction to regulate rail carriers' fuel surcharge profiteering as an unreasonable practice. According to the railroads, a shipper's only remedy for carrier fuel surcharge profiteering was to file a rate reasonableness case. *See, e.g.*, Ass'n of Am. R.Rs. Comments at 3 (Oct. 2, 2006) (citing *Union Pacific*, 867 F.2d at 649).

In their *Rail Fuel Surcharges* filings, WCTL argued that the Board clearly had the authority to address and remedy carrier fuel surcharge profiteering as an unreasonable practice because it was based on a misrepresentation of fact – the carriers claimed their fuel surcharges were limited to recovering incremental fuel cost increases, when that simply was not the case.[32]

Shippers also demonstrated that *Union Pacific* was not controlling. In that case, the ICC found that the sum of the base rates on radioactive material moves plus the cost of carrier "additives" to the base rates was an unreasonable practice because the resulting prices (base rates plus additives) were unreasonably high. The ICC remedied the unreasonable practice by prescribing lower maximum rates and reparations.[33] The Court ruled that the Board could not use its unreasonable practice authority to prescribe maximum reasonable rates.[34] In contrast, shippers in *Rail Fuel Surcharges* were not

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[32] *See, e.g.*, WCTL Comments at 17-19 (Oct. 2, 2006).

[33] *Union Pacific*, 867 F.2d at 647-48.

[34] *Id*. at 649.

asking for the Board to address maximum reasonable rates (*i.e.*, to address, and remedy, the reasonableness of the sum of adjusted base rates plus fuel surcharges), but to simply remedy carrier misrepresentations concerning a component part of their charges – *i.e.*, carrier misrepresentations that their fuel surcharges were not profit centers.

In *Rail Fuel Surcharges*, the Board agreed with shippers that it did have the authority to regulate fuel surcharge profiteering under its unreasonable practice jurisdiction, and that its exercise of that authority was permissible under *Union Pacific*:

> Some railroad interests have claimed that the Board does not have authority to regulate fuel surcharges, absent a finding of market dominance, because fuel surcharges are part of the total rate charged and thus cannot be considered as a practice. They cite *Union Pacific R.R. v. ICC*, 867 F.2d 646, 649 (D.C. Cir. 1989), where the Board's predecessor, the Interstate Commerce Commission (ICC), had concluded that certain railroads engaged in an unreasonable practice by attempting to avoid their common carrier duty to transport radioactive waste through increased rates designed to recover cost additives that the ICC regarded as unwarranted. 867 F.2d at 648. The reviewing court recognized that there can be a "conceptual overlap between railroads' 'practices' and their 'rates.'" 867 F.2d at 649. The court nonetheless struck down the ICC's action because the "so-called 'practice' [was] manifested *exclusively* in the level of rates," the ICC's analysis had "all the earmarks of a rate proceeding," and the ICC's remedies consisted of rate relief (prescribed rates and refunds). *Id*. (emphasis in original).
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> Here, however, we are not proposing to limit the total amount that a carrier can charge, through a combination of base rates and surcharges, for providing rail transportation. Rather, we are only addressing what we believe is an unreasonable practice of applying what the railroads label a fuel surcharge in a manner that is not limited to recouping increased fuel costs that are not reflected in the base rate. The measures we are proposing are designed to preclude such an unreasonable practice.

Rail Fuel Surcharges II, slip op. at 3-4 (footnote omitted); *accord Rail Fuel Surcharges III*, slip op. at 7-8. The Board subsequently adhered to, and reaffirmed, its correct interpretation of *Union Pacific* in *Dairyland*, *Cargill*, and the ANPRM.[35]

Board Member Oberman claims *Union Pacific* bars the Board from addressing the reasonableness of carrier fuel surcharge practices.[36] Similarly, Vice Chairman Fuchs appears to take the position that a carrier's fuel surcharge profiteering is a perfectly reasonable railroad practice – despite the national rail transportation policy requiring carrier practices to be "honest" – so long as the shipper's rate does not exceed a reasonable maximum.[37] Both Board Members do not acknowledge, much less distinguish, the long line of unanimous (and correct) STB decisions to the contrary. Allied Shippers urge the Board to reconsider and correct these errors.

III. The Board Erred by Failing to Consider Clear Record Evidence Demonstrating That Carriers Continue to Use Fuel Surcharges as Deceptive Profit Centers

The Board notes that several shippers did not directly address the question of whether the safe harbor-based profiteering the Board found in *Cargill* was an "aberration."[38] This is not surprising because pinpointing that form of profiteering

[35] *See Dairyland*, slip op. at 5; *Cargill*, slip op. at 2 (STB served Jan. 4, 2011); ANPRM, slip op. at 2-3.

[36] Decision, slip op. at 6 (Member Oberman, commenting).

[37] *Id*. at 5 (Vice Chairman Fuchs, commenting).

[38] *Id*. at 2.

requires the use of rail economic experts who are well-versed in carrier fuel surcharges. For many shippers, the cost of developing such evidence is prohibitive.

Allied Shippers did present detailed economic expert testimony on the safe harbor profiteering issue – the economic experts used were the same ones that uncovered the $181 million safe harbor-based profiteering in *Cargill*, and Allied Shippers' counsel included the same counsel that represented the complainant shipper in *Cargill*. Allied Shippers' evidence clearly showed that the safe harbor profiteering that the Board identified in *Cargill* was no aberration.

Allied Shippers did not have the benefit of any discovery, but, using publicly available data, their experts concluded that over a three-year period (2011 to 2013), the two carriers that transport most of the group members' traffic – BNSF and Union Pacific Railroad Company – collected a combined total of $846 million in safe harbor "spread" profits (*i.e.*, profits collected by the carriers' use of HDF price changes to measure the carriers' fuel cost changes, as opposed to using the carriers' actual fuel price changes).[39]

Allied Shippers also presented detailed evidence showing that carriers were engaging in many other unreasonable fuel surcharge profiteering practices, including failing to revise their fuel surcharge calculations to incorporate the carriers' substantially improved locomotive fuel cost consumption – despite their repeated promises to the

[39] *See* Allied Shippers Comments at 3, 40-43; *id*., Opening Verified Statement ("VS") of Thomas D. Crowley & Robert D. Mulholland ("Crowley/Mulholland VS") at 5-7, Exhibit__(C/M-3).

Board in 2006 that they would do so,[40] and misleadingly double recovering the same incremental fuel cost increases by applying a fuel surcharge to a movement base rate *and* applying a rate adjustment procedure that increases the fuel component in the base rate.[41] Allied Shippers did not have the data to quantify the impact of these other unreasonable practices, but it is likely that these additional unreasonable practices are adding hundreds of millions of additional fuel surcharge profits to the hundreds of millions of spread-created profits.

Allied Shippers were not alone in expressing concerns, and providing evidence, regarding carrier fuel surcharge profiteering. All shippers responding to the ANPRM filed comments expressing their shared concerns that carriers were using their fuel surcharges as profit centers, and all joined Allied Shippers in asking the Board to take action to stop the profiteering.[42] The Board's decision not to address this compelling evidence was material error, and Allied Shippers respectfully request that the Board reconsider and correct this error on reconsideration.

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[40] *See* Allied Shippers Comments at 63-74; *id*., VS of Thomas E. Johnson at 4-11; Crowley/Mulholland VS at 24-27.

[41] *See* Allied Shippers Comments at 52-59; Crowley/Mulholland VS at 27-29.

[42] *See, e.g.*, U.S. Dep't of Agric. Comments at 2-7 (Aug 4. 2014) ("USDA Comments"); Ark. Elec. Coop. Corp. Comments at 8-19 (Aug. 4, 2014) ("AECC Comments"); Colo. Springs Utils. Comments at 6-11 (Aug. 4, 2014) ("CSU Comments"); Consumers United For Rail Equity Comments at 2-15 (Aug. 4, 2014) ("CURE Comments"); Dow Chemical Co. Comments at 4-18 (Aug. 4, 2014) ("Dow Comments"); Nat'l Indus. Transp. League Comments at 6-10 (Aug. 4, 2014) ("NITL Comments"); Nat'l Coal Transp. Ass'n Comments at 1 (Aug. 4, 2014); Nat'l Grain & Feed Ass'n Comments at 5-9 (Aug. 4, 2014) ("NGFA Comments").

IV. The Board Erred by Failing to Issue an NPRM Proposing Remedial Actions to Stop (or Limit) Carrier Fuel Surcharge Profiteering

Allied Shippers proposed a number of remedial measures for the Board's consideration to address the rampant carrier use of fuel surcharges as profit centers. These remedies included:

- Removing the safe harbor;[43]
- Requiring carriers to use their actual cost changes in their fuel surcharge tables;[44]
- Requiring carriers to provide annual certifications to the Board, with supporting evidence for the Board to review, demonstrating that they were not using their fuel surcharges as profit centers;[45]
- Requiring carriers to phase-out fuel surcharges if the Board decides not to provide a meaningful mechanism to ensure that fuel surcharges are not used as deceptive profit centers.[46]

Other shippers proposed similar forms of remedial relief to stop fuel surcharge profiteering.[47]

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[43] *See* Allied Shippers Comments at 50.

[44] *Id*. at 43-50, 75.

[45] *Id*. at 75-78.

[46] *Id*. at 78-81.

[47] *See, e.g.*, USDA Comments at 4-5, 7 (recommending the Board eliminate safe harbor immunities); NGFA Comments at 8 (same); USDA Comments at 6-7 (recommending procedures where the Board would monitor and approve rail fuel surcharge programs to ensure they were not being used as profit centers); AECC Comments at 8-9, 18-19 (same); CSU Comments at 10 (same); Dow Comments at 16-17 (same); NITL Comments at 10 (same); CURE Comments at 15 (emphasizing that the RCAF is a superior approach to calculating fuel cost increases than profit maximizing fuel surcharges).

In the Board's Decision, Chairman Begeman stated she supported removal of the safe harbor provision.[48] While this is a step in the right direction, Allied Shippers emphasized in their Comments that few shippers have the resources to pursue an unreasonable fuel surcharge profiteering case, particularly in light of the Board's decisions in *Dairyland* and *Cargill.*[49] These decisions require that a shipper bringing an unreasonable fuel surcharge profiteering case demonstrate that the defendant carrier is collecting fuel surcharge profits over an extended period of time on all traffic subject to the fuel surcharge.[50] In *Cargill*, that evidentiary burden itself required the complainant shipper to develop costs for over 5.6 million shipments; the liability portion of the *Cargill* case took nearly three and one-half years; and, even then, the case had still not reached the damages phase (since the Board found that there was no liability if HDF safe harbor prices were used in its incremental fuel cost analysis).[51]

Vice Chairman Fuchs and Board Member Oberman suggest that shippers challenge rail fuel surcharges in maximum rate cases. Under that approach, a carrier is free to misrepresent its fuel surcharges at will, so long as the carrier's overall prices (base rates, as adjusted, plus fuel surcharges) are reasonable. Allied Shippers' members are large rail shippers, and the cost of bringing a large rate case these days under the Board's stand-alone cost constraint is at least $5 million. Suggesting that a large shipper pursue a

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[48] Decision, slip op. at 4 (Chairman Begeman, commenting).

[49] *See* Allied Shippers Comments at 59-63.

[50] *Id*. at 59-60.

[51] *Id*. at 60-63.

rate case to address fuel surcharge profiteering is an obvious non-starter and, as a practical matter, would allow deceptive fuel surcharge profiteering to continue unabated.

The Board also appears to miss the larger picture here. As discussed above, prior to 1981, carriers could only use fuel surcharges if they were temporary and approved by the ICC as cost-justified. After 1981, the ICC's (and now, the Board's) quarterly publication of the RCAF indices mooted the need for carriers to utilize separate fuel surcharges. Carriers' use of the Board-approved RCAF adjustment mechanisms worked well for over two decades until the railroad industry collectively decided to jettison cost-based rate adjustments in favor of profit-maximizing fuel surcharges.

If the Board were to order carriers to phase-out fuel surcharges, carriers could no longer use the surcharges as profit centers. The carriers would not be without options, however. They could, if they elected to do so, substitute STB-approved RCAF adjustments to capture their incremental fuel cost changes, subject to any limits imposed on the carriers' pricing freedom by the Board's maximum rate standards. With a phase-out, the Board could kill two birds with one stone: it could eliminate the noxious practice of carriers using their fuel surcharges as profit centers, while retaining the carriers' right to charge honestly adjusted rates, up to a reasonable maximum on regulated shipments.

The Board's failure to consider the phase-out, or any of the other reform measures proposed by Allied Shippers (and other rail shippers), and its failure to propose one or more of these remedial measures for public comment in an NPRM, is a material error that the Board should reconsider and correct on reconsideration.

CONCLUSION

Allied Shippers request that the Board grant this Petition for the reasons set forth above, and on reconsideration, vacate its Decision and publish an NPRM proposing remedial rules to stop (or reduce) carriers' ongoing fuel surcharge profiteering.

Respectfully submitted,

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Dated: September 18, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September 2019, I have caused true and accurate copies of the foregoing Petition for Reconsideration to be served upon all known parties of record to this docket (EP 661 (Sub-No. 2)) by prepaid first-class mail, or by more expeditious means of delivery.

/s/ A. Rebecca Williams___