

STATEMENT OF MR. WAYNE JOHNSON

on behalf of

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
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before the

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
UNITED STATES HOUSE OF REPRESENTATIVES

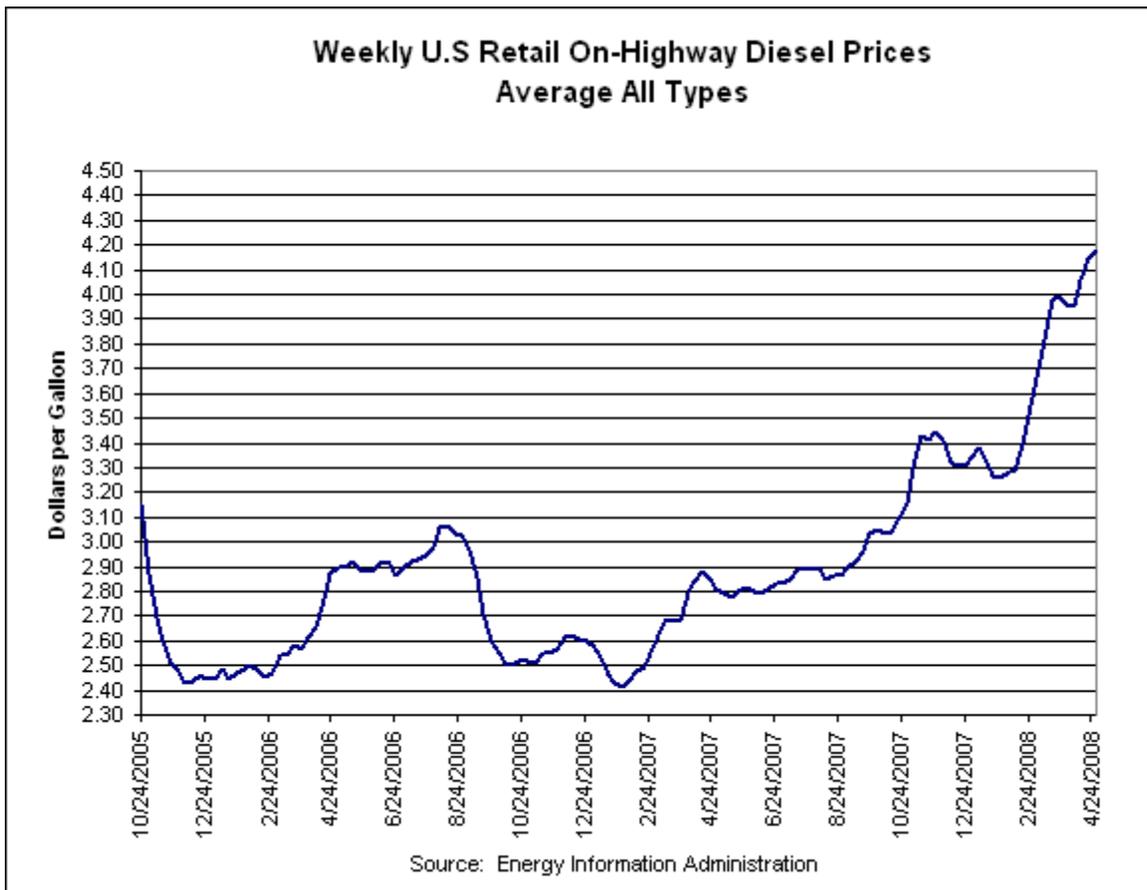
on

"RISING DIESEL FUEL COSTS IN THE TRUCKING INDUSTRY"

May 6, 2008

Chairman DeFazio, and members of the subcommittee, I am Wayne Johnson, the Director of Logistics of American Gypsum Company, located in Dallas, Texas. In that capacity, I am responsible for over \$150 million in transportation of the products of American Gypsum Company across the United States. I am here today representing The National Industrial Transportation League. The League is the nation's oldest and largest association of companies interested in transportation. The League's more than 600 members range from some of the largest companies in the nation to much smaller enterprises. The League's members are primarily companies that move their products through our country's transportation network and are engaged in the movement of goods both domestically and internationally. League members ship their products via all modes of transportation, including motor carriers. I am the Chairman of the League's Highway Transportation Committee, which is composed of League members concerned with transportation via motor carriage on our nation's highways.

The League is pleased to have been invited to present testimony on recent diesel fuel price increases in the motor carrier industry and possible regulation with respect to such matters. League members are obviously very well aware of the fact that diesel prices have increased dramatically in the past year. Last week, the League reported to its members that, according to the Energy Information Administration, the national average price for diesel fuel was \$4.14 per gallon, ranging from a high of \$4.37 per gallon in the Central Atlantic states, to \$4.07 on the Gulf Coast. Just one year ago, the average price of diesel fuel in the United States was \$2.81 per gallon. In the last two months, the average price of diesel fuel in the United States has increased by more than 62 cents. The chart below shows the change in the price of diesel fuel over the past two and a half years.



Obviously, this rapid increase in diesel fuel prices presents a challenge to all sectors of the freight transportation community. Of course, it must be remembered that rising diesel fuel are a part of a larger problem, namely, increasing energy costs in general.

Fortunately, the transportation industry has the tools to meet that challenge. Over twenty-five years ago, in 1980, the Congress deregulated the motor carrier industry in order to free the industry from outdated and unnecessary government regulation. That policy, which has been followed consistently by every administration since then, has been a spectacular success, providing for a strong, innovative, efficient, and highly responsive motor carrier industry.

The system depends upon a complex set of individually-negotiated, market-driven confidential contracts for the provision of transportation services. Under this system, a shipper will enter into a confidential agreement directly with a motor carrier to pay for services to be provided by the carrier. In some cases, instead of entering into a transportation contract directly with a motor carrier, the shipper will instead enter into a confidential contract with a broker, under which the broker arranges for the transportation and often provides a variety of other services to the shipper, such as tracking and tracing, load management, and others. In situations involving a broker, the broker will enter into a confidential contract with a motor carrier for the actual transportation to be performed for the shipper.

These two sets of confidential agreements encompass all expenses and compensation required by the parties to each agreement, on the basis of the nature of the work to be performed and the entire package of services to be provided. It is a system that is flexible, efficient, and – because these agreements are negotiated in a highly competitive and dynamic environment and

are often of short duration – amazingly responsive to changes in market conditions, including the price of fuel.

In fact, as this Committee well knows, since 1980 the country has experienced numerous ups and downs in the price of fuel. Though it is difficult or even impossible to predict when and how much the price of fuel might increase or decrease, the entire industry knows that rapid increases or decreases can occur. In fact, the chart above shows that a little more than two years ago, there was a rapid spike in the price of diesel fuel, and six months later, an equally precipitous decline.

This well-known rise and fall in the price of diesel fuel led shippers years ago to create fuel surcharge programs within their confidential agreements with their carriers. While there are similarities in these privately-administered programs, there are important differences too, reflecting the differing conditions under which each shipper operates, including the nature of services required, the materials to be moved, the markets served, the ability to administer simpler or complex fuel surcharge programs, the weight of the goods, and a variety of other competitive factors.

Many shippers have a specific fuel surcharge provision in their agreements, often based on nationally-published indices such as the Energy Information Agency diesel price figures noted above, applied to an agreed-to base trigger point. However, some shippers prefer, either periodically or as a matter of course, to roll changes in fuel prices into the line haul charge in their agreements with their carriers or brokers, so that they pay a flat "all-inclusive" rate. Thus, there is no single "right answer" to the question of what a fuel surcharge should be, or even whether a separate fuel surcharge should be included. Shippers pay carriers and brokers for fuel

both directly through a fuel surcharge and/or indirectly through their rates and other charges. Confidential contracts provide for a total compensation package to the carrier and broker, which includes many factors besides the cost of fuel, such as labor, equipment costs, maintenance, and insurance.

In the case of many shipments, fuel costs are the responsibility of the trucking company, and thus the trucking company is protected by the fuel surcharge mechanisms that it negotiates with shippers. There are also instances when a trucking company employs the services of an independent operator. In those cases, the independent operator typically is responsible for the cost of fuel. That independent operator negotiates its compensation with the trucking company just as shippers negotiate their service and rates with the trucking company. Independent operators have the same opportunity and responsibility to negotiate fair compensation from the trucking companies with which they do business.

This is a competitive system. Shippers, brokers and carriers can enter and exit this market freely, and they participate in the market on terms that they can negotiate in light of the conditions of the market. Competition is facilitated – in fact, it is really made possible – by the fact that these agreements are confidential, and that no party is forced to disclose its economic interest to another. Thus, industry participants can protect (and have in the past protected) themselves from increases and decreases in the costs of fuel through these privately-negotiated, confidential agreements that take into account the specific competitive circumstances of the shipper, carrier, broker or forwarder.

In this connection, I would note that legislation (S. 2910 and H.R. 5934) has been introduced in Congress that would require that confidential fuel surcharges collected by a motor

carrier, broker, or freight forwarder be passed through to the person responsible for bearing the cost of fuel. The League is strongly opposed to this proposed legislation.

The proposed legislation would require a motor carrier, broker or freight forwarder using fuel for which it does not bear the cost, to provide to the person who does bear the cost a "payment in the amount equal to the charges invoiced or otherwise presented to the person directly responsible to the motor carrier, broker, or freight forwarder" which "relate to the cost of fuel." That person would also have to provide a "written list" that specifically identifies any "freight charge, brokerage fee or commission, fuel surcharge or adjustment," and "any other charges invoiced or otherwise presented" to that person. Finally, the proposed legislation would forbid a person to cause a motor carrier, broker, or freight forwarder to present "false or misleading" information in an "oral representation" about a rate, charge or allowance.

This proposed legislation would substantially undermine the competitive system upon which our efficient system of motor carriage relies, by forcing one party to reveal to another its confidential business information. This would be an unprecedented, unnecessary and unwarranted intrusion into the workings of the competitive market, and would likely harm competition.

The proposed legislation is also likely to spawn substantial litigation. Under Section 10704(a)(2) of the current law, a carrier or broker is liable for damages sustained by a person as a result of an act or omission in violation of the statute. Under S. 2910 and H.R. 5934, substantial litigation would arise as one party tries to prove whether another caused what was alleged to be "false or misleading" information in an "oral representation." This type of "he said – she said" litigation would be almost impossible to resolve, and would do nothing more than

provide a windfall to the litigation bar. Finally, since there are many motor carrier contracts which roll compensation for fuel into an overall price, what is the charge that "relates to" the cost of fuel?

At bottom, this proposed legislation would undo the highly successful competitive market that the Congress successfully created in the motor carrier industry.

In sum, the League is strongly opposed to S. 2910 and H.R. 5934 and believes that the current system of confidential contracts appropriately provides for the needs of all sectors of the transportation marketplace.

I would be pleased to answer any questions that you may have.