

EP 740
EP 661 (Sub-No. 2)
EP 722
EP 736
EP 711 (Sub-No. 1)
EP 704 (Sub-No. 1)

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 740

PETITION BY THE WESTERN COAL TRAFFIC LEAGUE
TO TERMINATE THE REGULATORY FREEZE
IN FOUR PENDING PROCEEDINGS

REPLY OF THE
ASSOCIATION OF AMERICAN RAILROADS

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Dissatisfied by the current posture of four proceedings in which it has filed comments – *Reciprocal Switching*, EP 711 (Sub-No. 1); *Railroad Revenue Adequacy*, EP 722; *InterVISTAS Study*, EP 736; and *Rail Fuel Surcharges (Safe Harbor)*, EP 661 (Sub-No. 2) – the Western Coal Traffic League (“WCTL”) filed the instant petition demanding that the Board state that it will advance consideration of those proceedings in “a timely manner” or, alternatively, will provide WCTL specific new dates for next actions in each proceeding.¹

WCTL has mischaracterized the status of each proceeding, the nature of the Board as an independent agency, and the direction of the STB Reauthorization Act of 2015 (“Reauthorization Act”).² Rather than being “frozen” since the change in Presidential Administration, the Board has continued to adjudicate cases and progress its docket, including closing regulatory proceedings and issuing final rules. The Board also has voluntarily aligned its actions regarding regulatory reform with the direction of the new Administration. But it is entirely appropriate that serious policy decisions that can have far-reaching and long-term impacts on the structure of the

¹ WCTL also filed comments in *Review of the General Purpose Costing System*, EP 431 (Sub-No. 4), but has elected not to include that proceeding in its petition.

² Pub. L. No. 114-110, 129 Stat. 2228 (Dec. 18, 2015).

railroad industry and the national economy be made with a full Board. For these reasons, WCTL's petition should be denied.

I. WCTL Has Mischaracterized the Status of the Board's Docket.

A. The Board Has Been Active Since the Change in Administration.

It is wholly inaccurate to suggest that the Board has been "frozen" since the end of 2016. To the contrary, the Board has continued to issue decisions in adjudications and licensing matters.³ The Board has also continued its work to eliminate a backlog of unfinished regulatory proceedings.⁴ In the first quarterly report sent to Congress on February 16, 2016 pursuant to the Reauthorization Act, the Board reported on the status of 21 open proceedings. In the last quarterly report sent on July 3, 2017, the Board reported on just ten open proceedings, two of which the Board reported as closed by the issuance of final rules in the preceding quarter. In *Offers of Financial Assistance*, EP 729, the Board issued final rules updating its procedures for the forced sale of lines in abandonment proceedings and in *Publication of Requirements for Agricultural Products*, EP 528 (Sub-No. 1), the Board modernized its rules regarding the publication of rate and service terms. The Board also reported that it continued to consider the record in *Expediting Rate Cases*, EP 733, though "consensus was not reached" to allow a decision to be issued.

The Board has also acted in the area of regulatory reform. The Board promptly named a Regulatory Reform Officer and formed a Regulatory Reform Task Force consistent with Executive Order No. 13777. The Board instituted a proceeding in *Regulatory Reform Task*

³ See, e.g., *Consolidated Rail Corp. – Abandonment Exemption – in Hudson County, NJ*, AB 167 (Sub-No. 1189) (STB served Aug. 21, 2017).

⁴ See, e.g., *Petition of the Western Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model in Determine the Railroad Industry's Cost of Capital*, EP 664 (Sub-No. 2) (STB served Aug. 14, 2017).

Force, EP 738 to build a record and, on July 25, 2017, the Task Force held an informal listening session to hear stakeholders' views on streamlining the agency's regulations.

B. The Proceedings Highlighted by WCTL Are in Substantially Different Procedural Postures.

Though WCTL characterizes all four proceedings it included in its petition as “frozen,” each in fact is in a different procedural posture. First, the Board is continuing to supplement the record in EP 711 (Sub-No. 1). The original procedural schedule contemplated opening comments, reply comments, and *ex parte* meetings to be followed by a comment period on the summaries of the *ex parte* meetings.⁵ On September 1, 2016, the Board extended the procedural schedule and created a short three-week window for *ex parte* meetings to occur between January 30 and February 17, 2017. On December 27, 2016, the Board extended the deadlines both for the *ex parte* meeting requests and the meetings, “thus allowing interested stakeholders more time to prepare for and participate in such meetings.” Since meetings commenced on January 30, 2017, Board member offices have held 27 meetings with stakeholders to discuss the implications of its proposed rules.

Allowing completion of the *ex parte* meeting process to allow Board members, both existing and new, to have the benefit of direct stakeholder input is a responsible action. The *ex parte* meetings in EP 711 (Sub-No.1) will be especially crucial for new members of the Board to get further up to speed on the proceeding and to understand and probe the parties' positions. Members of the Board nominated by an Administration focused on deregulation and incentivizing infrastructure investment can be expected to have many questions regarding this proposal to broaden – not narrow – the Board's regulatory reach.

⁵ *Reciprocal Switching*, EP 711 (Sub-No. 1) (STB served July 27, 2016), slip op. at 29-30.

Second, no further Board action is required in EP 722, *Railroad Revenue Adequacy*. The Board instituted that proceeding to gather information, and did so by conducting a legislative-style hearing “to discuss the Board’s methodology in fulfilling its statutory mandate to determine railroad revenue adequacy, as well as the revenue adequacy component of the Board’s standard for judging the reasonableness of rail freight rates, with a view to what, if any, changes the Board can and should consider.”⁶ The Board held a two-day hearing on July 22 and 23, 2015. The record is now closed.⁷

Likewise, no further Board action is required in EP 736, *InterVISTAS Study*. In that proceeding, the Board commissioned an independent consultant, InterVISTAS, to report on the Board’s rate reasonableness methodology.⁸ The report was clear in its findings, confirming the validity of the Stand Alone Cost (“SAC”) test, and that shippers have sufficient simplified options to bring smaller rate disputes to the Board.⁹ The Board made the report public and has held a public roundtable discussion with independent and government academics to promote

⁶ *Railroad Revenue Adequacy*, EP 722 (STB served Apr. 2, 2014), slip op. at 2.

⁷ The Board has said that proceedings such as EP 722 “will be deemed automatically discontinued once the record closes, unless the Board announces otherwise prior to the close of the record.” *Review of the Surface Transportation Board’s General Purpose Costing System*, EP 431 (Sub-No. 3) *et al.* (STB served Jan. 19, 2010). That does not mean the Board cannot take further action. As the Board has also stated, “[a]ny party that urges the Board to take a specific action may file a petition for rulemaking, petition for a declaratory order, or a formal complaint. This does not mean that the agency has ceased its analysis and consideration of the often important issues presented in these proceedings. Should the Board conclude that it is appropriate to begin a rulemaking in light of information uncovered in these proceedings, it will do so.” *Id.*

⁸ InterVISTAS, *Surface Transportation Board, An Examination of the STB’s Approach to Freight Rail Rate Regulation and Options for Simplification*, Project FY 14-SB-157 (Sept. 14, 2016) (“InterVISTAS Report”).

⁹ InterVISTAS Report at 127-28. In particular, the InterVISTAS Report concluded that the Three Benchmark test is a cost-effective means for shippers with small claims to challenge the reasonableness of their rates. *Id.* at 128-29.

discourse.¹⁰ In light of the conclusions of the report, which support the current methodology, no further action is required or appropriate.

Finally, the record is now closed and no further action is required of the Board in *Rail Fuel Surcharges (Safe Harbor)*, EP 661 (Sub-No. 2). The Board published an Advance Notice of Proposed Rulemaking (“ANPRM”) to solicit comments on whether the regulatory safe harbor that the Board created in *Rail Fuel Surcharges*, EP 661 should be modified, abandoned or left unchanged.¹¹ Comments were filed, and in fact most shipper comments in that proceeding supported continuing to utilize a publicly-available fuel cost index, and no consensus identified a superior index to the Highway Diesel Fuel index currently in use.¹² Publishing an ANPRM does not create an obligation to propose a new rule where no new rule is needed or appropriate.

II. It Is Neither Inappropriate Nor Surprising That the Timing of Significant Policy Decisions Has Been Impacted by the Change in Administration.

It is wholly appropriate for issues of industry-wide significance to be decided by a Board that reflects both the administrative structure devised by Congress and the policy preferences of the current Administration. In the Reauthorization Act, Congress expanded the Board from three to five members. New members ensure that Board decisions will be informed by a full and robust set of views and opinions, in keeping with existing law that Board members should reflect experience in the private sector.¹³

WCTL makes much of a letter sent to the Board by three Senators to express their opinion that the Reauthorization Act supports WCTL’s preference for expedited action on their

¹⁰ *InterVISTAS Study*, EP 736 (STB served Oct. 12, 2016).

¹¹ *Rail Fuel Surcharges*, EP 661 (STB served Jan. 26, 2007). *See Cargill v. BNSF Rwy.*, NOR 42120 (STB served Aug. 12, 2013).

¹² *See Union Pacific Reply*, EP 661 (Sub-No. 2) (filed Oct. 15, 2014) at 3-6.

¹³ *See* 49 U.S.C. § 1301(b) requiring Board membership to reflect experience in transportation regulation, economic regulation, and the private sector.

chosen proceedings. Yet that letter, like WCTL’s petition, can point to no provision of the Reauthorization Act that supports the notion that Congress directed the agency to move forward on changes to its long-standing rules on switching or the other actions WCTL seeks to compel from the Board. And the cited letter is not reflective of the views of the entire Senate. On December 16, 2016, five Senators serving on the Committee on Commerce, Science and Transportation wrote to the Board to express their view that “[t]he STB should defer further consideration of its pending rules until such time as President-elect Trump has nominated, and the United States Senate has confirmed, suitable new candidates for [the vacant Board seats], in addition to gathering sufficient economic data.”¹⁴

The Board’s judicious approach is entirely consistent with the Board’s status as an “independent” agency. Such independent agencies appropriately reflect the policies of Presidential Administrations through the appointment of members and the designation of a Chairman. Contrary to WCTL’s assertion that the Board is a nonpartisan regulatory body immune from democratic oversight, the Board is in fact independent and *bipartisan*, not “non-partisan.” Indeed the legislative history of the Reauthorization Act states specifically describes the Board as “bipartisan.”¹⁵ The Board’s activities on significant policy issues should reflect the leadership of the Chairman, designated by the President.¹⁶ But in order to move policy forward in a bipartisan body like the Board, a Chairman must obtain a majority of votes and cannot take action unilaterally. For these reasons, it would be improper for this Board as currently

¹⁴ See letter from Senators Blunt, Danes, Moran, Rubio, and Sullivan to the STB (Dec. 13, 2016), *available at* https://www.stb.gov/stb/docs/Legislative_Correspondence/2016/Senate_STB_Transition_Letter_12.13.16_signed.pdf.

¹⁵ Surface Transportation Board Reauthorization Act of 2015, Report of the Comm. on Commerce, Science, and Transp. on S. 808, S. Rep. No. 114-52 at 11 (May 21, 2015). *See also* Surface Transportation Board, FY 2016 Annual Report at 2.

¹⁶ *See* 49 U.S.C. § 1301(c)(2).

constituted to issue decisions potentially redesigning long-standing cornerstones of regulatory policy.

III. The One Area Where AAR and WCTL Agree Is That There Are Substantial Policy Decisions Currently Before the Board.

As the Board is aware, the railroad industry believes that certain proposals advanced by the Board and favored by WCTL prior to the election would substantially expand the Board's regulatory reach and undo the balanced scheme of regulation that has allowed the railroad industry to spend over \$600 billion on equipment and infrastructure since 1980. The industry is concerned that recent Board proposals have turned away from the sound economic framework for regulation created by the Staggers Act and continued by ICCTA, and the STB Reauthorization Act. For example, the proposal to revoke commodity exemptions was based almost entirely upon a superficial review of changes to revenue to variable cost ratios that do not reflect true market conditions.¹⁷ Commodity exemptions enable railroads to respond more quickly to market conditions, and generally position them to more effectively compete with other transportation modes. The Board has not made the legally required findings to support the wholesale reregulation of these commodity groups, which cover a large and diverse number of individual commodities. The proposal is a reversal of a successful deregulatory initiative.

Similarly, Congress minimized the federal government's role in intervening in rail transportation markets in the Staggers Act. As explained in the comments filed by AAR in EP 711 (Sub-No.1), Congress directed the agency to intervene in the private marketplace only to remedy competitive abuses, not to direct the structure of the industry. The STB's proposal to subvert Congress' intent would create artificial "competition" and undermine the existing rate

¹⁷ *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, EP 704 (Sub-No. 1) (STB served March 23, 2016).

reasonableness regime. It would also harm the efficiency of the rail network, increasing the risk of service failures. And it would create perverse incentives for maintenance and capital improvements, causing rail service to deteriorate and capacity to be lost. It is wholly appropriate to allow new members of the Board to weigh in on this and other important issues.

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For the foregoing reasons, the Board should deny the petition filed by WCTL.

Respectfully submitted,



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