

SERVICE DATE – MAY 17, 2018

SURFACE TRANSPORTATION BOARD

Docket No. EP 740

PETITION BY THE WESTERN COAL TRAFFIC LEAGUE
REGARDING FOUR REGULATORY DOCKETS

Digest:¹ This decision denies a request to conduct a separate proceeding to discuss the status of four other dockets. Instead, the decision enters the petition and responsive comments as pleadings in the referenced dockets.

Decided: May 16, 2018

On August 11, 2017, the Western Coal Traffic League (WCTL) submitted a request concerning four specific dockets: Rail Fuel Surcharges (Safe Harbor), Docket No. EP 661 (Sub-No. 2); Railroad Revenue Adequacy, Docket No. EP 722; InterVISTAS Study, Docket No. EP 736; and Reciprocal Switching, Docket No. EP 711 (Sub-No. 1).

On August 31, 2017, the American Forest & Paper Association filed a comment making a similar request as to Review of Commodity, Boxcar, & TOFC/COFC Exemptions, Docket No. EP 704 (Sub-No. 1), and the National Industrial Transportation League filed a comment in support of WCTL's petition. Also, on August 31, 2017, the Association of American Railroads and Norfolk Southern Railway Company filed comments opposing the petition.

Through its petition, WCTL asks the Board to conduct a separate proceeding to discuss the status of the four other dockets or, alternatively, for the Board to announce action in those dockets. Initiating a new proceeding for WCTL's purpose would not be a good administrative practice or an efficient use of resources.

The Board is aware of the interest in its pending dockets, including those not addressed in WCTL's petition, and has taken action to allow for greater stakeholder communications with the Board in several of its pending dockets. For example, with respect to Reciprocal Switching, Docket No. EP 711 (Sub-No. 1), meetings between Board Members and stakeholders continue to be permitted. Regarding rail rate methodology reform initiatives, the Board has waived its prohibition on ex parte communications in Expanding Access to Rate Relief, Docket No. EP 665 (Sub-No. 2), in an effort to help the Board obtain a more thorough understanding of

¹ 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. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

stakeholders' concerns and allow freer discussion among stakeholders and the Board's Rate Reform Task Force, which was established in January. The Board has also clarified that a prohibition on ex parte communications in Railroad Revenue Adequacy, Docket No. EP 722, does not apply because the proceeding has not reached a rulemaking stage.

The Board is aware of the parties' positions and can consider them in the respective dockets. Therefore, the petition and responsive comments will be entered as pleadings in the listed dockets, and this proceeding will be closed.

It is ordered:

1. WCTL's petition and the responsive comments are entered as pleadings in Docket Nos. EP 661 (Sub-No. 2), EP 722, EP 736, EP 711 (Sub-No. 1), and EP 704 (Sub-No. 1).
2. This proceeding is closed.
3. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller. Board Member Miller commented with a separate expression.

BOARD MEMBER MILLER, commenting:

I agree with the outcome here, as there is no legal basis for granting the relief sought by WCTL. Nonetheless, after years waiting for action in some of these proceedings, WCTL, National Industrial Transportation League, American Forest & Paper Association, and their member companies deserve a response to their concern over the status.

There is no doubt that the Chairman has been placed in a difficult situation, including having served as an Acting Chair with no way of knowing how soon new members would be appointed or who would be named the permanent chair. It is understandable that there would be a reluctance to take action on issues that have a significant policy impact. Any decision on a major change in policy needs to be made through a credible process and in this case, credibility requires more Board Members.

I applaud the actions that have been taken while we await new Board Members, such as the creation of the rate reform task force and waiving the prohibition on ex parte prohibition in Railroad Revenue Adequacy, Docket No. EP 722, and Expanding Access to Rate Relief, Docket No. EP 665 (Sub-No. 2), but more could be done. It has now been 16 months since the change in administration and it may still be several months before new Members are confirmed. The lost time hangs heavy. I believe that there are steps that the agency could take, short of reaching a formal decision on the merits, that would better prepare the agency to act once new Board Members arrive.

The Board has now received extensive comments in response to the proposal in Reciprocal Switching, Docket No. EP 711 (Sub-No. 1), Review of Commodity, Boxcar, & TOFC/COFC Exemptions, Docket No. EP 704 (Sub-No. 1), and Railroad Revenue Adequacy. The commenters have raised many issues that are worth analyzing and significant staff work could be conducted that will be useful regardless of the outcome. There is no need to wait until new Board Members arrive to begin this work. In addition, the agency has yet to conduct the formal hearing that it committed to holding in InterVISTAS Study, Docket No. EP 736, to obtain stakeholder feedback on both the report and the economic roundtable that was held in October 2016. I think such a hearing, properly structured, would help refine our thinking on how to improve the rate reasonableness process without interfering with the work being done by the task force.

With five Board Members, there will frequently be periods in the future where there are vacancies on the Board, and if the agency always waits until there is a full complement, very little will get accomplished. I also appreciate the concern that, given our limited resources, it would be inefficient to direct our staff to engage in work that may ultimately be unnecessary. But that is not the situation here. These analyses will need to be done eventually and I think that the results would help inform the new Members as they get up to speed on these issues. It is my hope that the Board will consider undertaking additional actions while we wait for new Board Members to be confirmed, but whatever happens, I look forward to continuing to engage with stakeholders and my colleagues on the important policy considerations in these proceedings.