

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

Ex Parte No. 740

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

**COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

ENTERED
Office of Proceedings
August 31, 2017
Part of

The National Industrial Transportation League ("NITL" or "League") hereby files these comments with the Surface Transportation Board ("STB") in response to the Petition of the Western Coal Traffic League ("WCTL") to Terminate the Regulatory Freeze in Four Pending Proceedings ("Petition") dated August 11, 2017.

I. IDENTITY AND INTEREST OF THE LEAGUE

Founded in 1907, the League is one of the oldest organizations representing its members on transportation policy issues involving all the major modes of transportation. League members range from some of the largest purchasers of transportation services to smaller companies engaged in the shipment and receipt of goods. The League's rail shippers are from a multitude of industries, including chemicals, petroleum, agricultural, and forest products and paper, among others. The League routinely participates in Board proceedings representing the voice of the shipper community.

II. NITL COMMENTS

The four proceedings that are the subject of the Petition include EP 661 (Sub-No. 2), *Rail Fuel Surcharges*, EP 722, *Railroad Revenue Adequacy*, EP 736 *InterVISTAS Study*, and EP 711

(Sub. No. 1), *Reciprocal Switching*. In its Petition, WCTL notes that it is an active party in the identified proceedings and expresses its concern with the Board's decision to suspend the schedules for Board action in those proceedings to allow for transition following the 2016 Presidential election and "until such time as the Board has a 'full complement' of five Board members." Petition at 1.

Pursuant to the STB Reauthorization Act adopted in December 2015 ("Reauthorization Act"),¹ the Board publishes quarterly reports regarding the status of its pending proceedings which include the anticipated timeline for Board action. With respect to the proceedings identified in the Petition (and others, such as EP 704 (Sub-No. 1)—*Review of Commodity, Boxcar, and TOFC/COFC Exemptions*), the schedules for Board action were changed after the 2016 Presidential election from a specific date in 2017 to a date that is "to be determined" in the future to allow for transition at the Board and possible changes to its membership. For example, in its January 3, 2017 Report on Pending Proceedings, the Board explained its suspension of the January 2017 scheduled date for action in EP 704 as follows: "The next action target date has been modified given that the Board is in a time of transition, with potential changes to the Board's membership due to the changeover in administration."² Similar statements were made with respect to the other pending proceedings named in the Petition.³

The League appreciates the Board's desire to temporarily suspend its decisions and actions in certain proceedings while it makes internal adjustments during a transition, including

¹ Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, 129 Stat. 2228 (Dec. 18, 2015), <https://www.congress.gov/114/plaws/publ110/PLAW-114publ110.pdf>.

² SURFACE TRANSP. BD., REPORT ON PENDING STB REGULATORY PROCEEDINGS at 7 (Jan. 3, 2017), <https://www.stb.gov/stb/docs/Reauthorization/Quarterly%20Reports/Report%20on%20Unfinished%20Regulatory%20Proceedings,%20Fourth%20Quarter,%20January%203,%202017.pdf>.

³ *Id.* at 3.

leadership and staffing changes that typically occur at federal agencies following a change in administration. This temporary delay in agency activity in this circumstance is understandable and acceptable. However, it is also reasonable for stakeholders who are engaged in the Board's proceedings to anticipate that normal operations would be reinstated and the important work of the agency would continue after a reasonable post-election transition period takes place.

Leadership and staffing changes at the Board have since occurred and been in place for a number of months.⁴ By all appearances, during the nine months since the election (and seven months since the inauguration), a successful internal transition has taken place at the Board and the changes have been implemented efficiently. The League commends the Board for this smooth transition. Additionally, the Board has recently undertaken new actions that are aligned with the policies of the new administration.⁵

In light of these developments, the League respectfully asks the Board to lift the suspension of scheduled actions for its most significant proceedings, including its rulemaking on reciprocal switching in EP 711 (Sub-No. 1).⁶ The Board is well aware of the importance of the EP 711 proceeding to League members and other companies who lack competitive rail service. The EP 711 rulemaking has been in the making for over six years. Although the rulemaking was

⁴ SURFACE TRANSP. BD., NO. 17-1, PRESIDENT TRUMP DESIGNATES ANN BEGEMAN ACTING CHAIRMAN OF SURFACE TRANSP. BD. (Jan. 25, 2017); SURFACE TRANSP. BD., NO. 17-3, DANIEL R. ELLIOTT III DESIGNATED VICE CHAIRMAN OF SURFACE TRANSP. BD. (Feb. 1, 2017); SURFACE TRANSP. BD., NO. 17-6, SURFACE TRANSP. BD. ANNOUNCES REGULATORY REFORM OFFICER (Apr. 25, 2017).

⁵ STB Notice, *Regulatory Reform Task Force*, Docket No. EP 738 (served Jun. 20, 2017); SURFACE TRANSP. BD., NO. 17-7, STB TO HOLD JULY 25 PUBLIC LISTENING SESSION FOR ITS REGULATORY REFORM TASK FORCE (Jun. 20, 2017); SURFACE TRANSP. BD., NO. 17-6, SURFACE TRANSP. BD. ANNOUNCES REGULATORY REFORM OFFICER (Apr. 25, 2017). *See generally*, STB REGULATORY REFORM TASK FORCE, <https://www.stb.gov/stb/about/RRTF.html> (last visited Aug. 30, 2017).

⁶ The League applauds the Board for continuing to hold ex parte meetings in this proceeding during the suspension period but is concerned about the lack of any target dates for completion.

opened in July 2016, that proceeding was borne from a Petition submitted by the League to the Board in July 2011, which asked the Board to revise its reciprocal switching rules to enhance rail competition.⁷ Currently, the record in EP 711 is complete, except for completion of ex parte meetings between Board members and interested parties.⁸ The ex parte meetings were initially scheduled to be completed by February 17, 2017. However, on December 23, 2016, the Board suspended this deadline based on the election and the possible changes in the complement of Board members:⁹

Given that the Board is in a time of transition, with potential changes to the Board's membership due to the changeover in the administration, the Board finds it appropriate to make adjustments to the procedural schedule outlined above. Accordingly, the Board will extend 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. Although meetings may commence beginning January 30, 2017 (in accordance with the September 1 decision), new deadlines concerning the closure of the ex parte meeting period will be established in a future Board order.

At present, no future Board order has been issued and, thus, the relative timeframe for conclusion of this matter remains open-ended.

As noted, the League fully understands the Board's desire to temporarily delay its proceedings during a post-election transition period. However, a reasonable transition period to allow for necessary internal changes at the Board has occurred during the nine months post-election. Accordingly, the League respectfully requests that the Board resume its normal process

⁷ Also, the League's Petition was filed in response to a request from the Board, specifically then-Chairman Dan Elliott, for parties to propose specific solutions to address the concerns of captive shippers over the lack of sufficient rail competition. STB Public Hearing, *Competition in the Railroad Industry*, Docket No. EP 705 (Jun. 23, 2011).

⁸ See, *supra* note 6.

⁹ STB Decision, *Reciprocal Switching*, Docket No. EP 711 (Sub-No. 1) (served Dec. 27, 2016).

for rulemaking proceedings, including scheduling target dates for action in its currently suspended proceedings. Taking steps to complete proceedings that have lingered for years would be consistent with the National Transportation Policy which calls for the Board “to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under [the statute].”¹⁰

The other reason the Board has suspended action in EP 711 and other proceedings is due to “potential changes to the Board’s membership due to the changeover in the administration.” Under the Reauthorization Act, the Board’s membership was expanded from three to five members.¹¹ Despite this expansion, staffing at the Board has remained constant at three members due to a lack of Presidential nominations and Senate confirmations of additional Board members. The process for obtaining two additional Board members is obviously highly political, unpredictable, and beyond the Board’s control. Seven months after the inauguration *no* additional Board members have been nominated, let alone confirmed. It seems reasonable to conclude that confirmation of even *one* new Board member is still months away; yet the current regulatory suspensions are apparently tied to achievement of *a full complement of Board members, i.e.* the nomination and confirmation of two new members. Recently, the Board submitted its quarterly report to the leadership of the Senate Commerce Committee and the Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety. In that report, the Board provided updates on its recent activities but specifically stated that “it remains appropriate for the Board’s larger regulatory proceedings to be considered by a full complement

¹⁰ 49 U.S.C. § 10101(15).

¹¹ Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, § 4, 129 Stat. 2228 (Dec. 18, 2015), <https://www.congress.gov/114/plaws/publ110/PLAW-114publ110.pdf>.

of members before taking major action (the Board is currently comprised of two Democrats and one Republican, and there are two vacancies). . . .”¹²

To the extent that the current vacancies have precluded the Board from completing EP 711 and other pending proceedings is concerning absent any indication that the nomination of new members is imminent more than seven months after the inauguration. When Congress passed the Reauthorization Act, it retained in the law the provision stating that “[a] vacancy in the membership of the Board does not impair the right of remaining members to exercise all of the powers of the Board.”¹³ Thus, prolonging the current suspension of action in a number of longstanding Board proceedings in light of the two member vacancies appears contrary to Congressional intent. Imposing such delays seem particularly unnecessary when both a majority and quorum of Board members exists, as is the current case with three members.

Moreover, Board member vacancies have occurred frequently in the past and can be expected to occur again in the future. Notwithstanding past vacancies, the Board (and its predecessor, the Interstate Commerce Commission) continued to decide important and controversial proceedings.¹⁴ Even if the Board is fortunate enough to achieve a full complement of five members at some point in the near future (although this possibility remains highly

¹² SURFACE TRANSP. BD., STB STATUS LETTER TO U.S. SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION (Jul. 3, 2017), <https://www.stb.gov/stb/docs/Reauthorization/Monthly%20Implementation%20Reports/STB%20Status%20Letter%20to%20U.S.%20Senate%20Committee%20on%20Commerce,%20Science%20and%20Transportation%20July%203,%202017.pdf>.

¹³ 49 U.S.C. § 1301(b)(6).

¹⁴ See, e.g., STB Decision, *Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology*, Docket No. EP 638, (decided Apr. 3, 2003) (Chairman Nober and Commissioner Morgan only); STB Decisions, *Review of Rail Access and Competition Issues*, Docket No. EP 575 (decided Apr. 16, 1998 and May 4, 1998) (Chairman Morgan and Vice Chairman Owen only); STB Decision, *Market Dominance Determinations--Product and Geographic Competition*, Docket No. EP 627 (decided Dec. 10, 1998) (Chairman Morgan and Vice Chairman Owen only).

uncertain), such achievement may be short-lived, due to the staggered terms of existing members.¹⁵ After the passage of a reasonable transition period, suspending certain large proceedings each time a vacancy occurs would be inconsistent with the statute, which encourages action by less than a full-complement of members, and with the interests of the Board's stakeholders who have participated in its proceedings.

III. CONCLUSION

For the foregoing reasons, to the extent that the Board's internal post-election transition is complete, the League respectfully requests the Board to resume activity in its EP 711 rulemaking and other pending proceedings whose schedules have been suspended since the Presidential election.

Respectfully submitted,

The National Industrial Transportation League

By its attorney:

A handwritten signature in dark ink, appearing to read "Karyn A. Booth", is written over a horizontal line.

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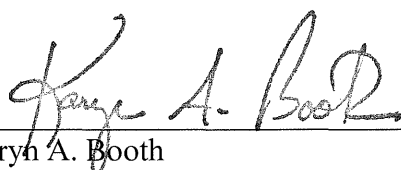
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¹⁵ STB BOARD MEMBERS, <https://www.stb.gov/stb/about/board.html> (last visited Aug. 30, 2017).

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August 2017, I served a copy of the foregoing
Comments upon the following via U.S. first-class mail, postage prepaid:

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Karyn A. Booth