

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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REGULATORY REFORM TASK FORCE

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Docket No. EP 738

**COMMENTS OF
THE WESTERN COAL TRAFFIC LEAGUE**

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Dated: July 25, 2017

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The Western Coal Traffic League (“WCTL”) submits these Comments in response to the Surface Transportation Board’s (“STB” or “Board”) notice served in this proceeding on June 20, 2017 (“EP 738 Notice”).

SUMMARY

WCTL appreciates the opportunity to present its views to the STB’s Regulatory Reform Task Force (“Task Force” or “RRTF”). WCTL urges the Task Force to (i) recommend that the Board immediately end its regulatory hold on pending rulemaking proceedings of major consequence to rail shippers; (ii) reject the Association of American Railroad’s (“AAR”) request that the Board terminate these rulemaking proceedings; (iii) reject the AAR’s request that the Board scrap its recently enacted rail service performance reporting rules; and (iv) pursue the proposals the Task Force outlined in its 90-Day Status Report.¹

¹ See STB Interoffice Memorandum at 1-2 (May 25, 2017) (“90-Day Status Report”), available at <https://www.stb.gov/stb/about/RRTF.html>.

IDENTITY AND INTEREST

WCTL is a voluntary association whose membership is comprised exclusively of organizations that purchase and ship coal from origins west of the Mississippi River. WCTL members collectively consume more than 125 million tons of coal annually that is moved by rail. Its members include investor-owned electric utilities, electric cooperatives, state power authorities, municipalities, and a non-profit fuel supply cooperative.

WCTL was formed in 1977 and, since that time, has actively participated in all major proceedings before the Interstate Commerce Commission (“ICC”) and the STB involving the ICC’s, and the STB’s, regulation of western coal transportation rates and service.

BACKGROUND

On February 24, 2017, President Trump issued Executive Order 13777 (“EO 13777”), entitled “Enforcing the Regulatory Reform Agenda.”² EO 13777 directed specified non-independent federal agencies³ to establish “Regulatory Reform Task Force[s]”⁴ and directed that these task forces “evaluate existing regulations . . . and make

² 82 Fed. Reg. at 12285.

³ *Id.*; Office of Management and Budget (“OMB”) Memorandum M-17-23 at 2 (“independent regulatory agencies are not subject to EO 13777”), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-23.pdf>.

⁴ 82 Fed. Reg. at 12285.

recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law.”⁵

EO 13777 also states that “[a]t a minimum, each Regulatory Task Force shall attempt to identify regulations that, among other things, (i) eliminate jobs, or inhibit job creation; (ii) are outdated, unnecessary, or ineffective; (iii) impose costs that exceed benefits; [and] (iv) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies[.]”⁶

EO 13777 further directed that “[w]ithin 90 days of the date of this order . . . each Regulatory Reform Task Force shall provide a report to the agency head detailing the agency’s progress toward the following goals: (i) improving implementation of regulatory reform initiatives and policies [in accordance with specified executive orders];” and (ii) identifying regulations for repeal, replacement, or modification.”⁷

Following the issuance of the EO 13777, the Board, which is an independent agency, decided to “comply with the spirit” of the order.⁸ To that end, the Board appointed the Task Force, which is comprised of six STB staff members.⁹ On May 18, 2017, the AAR submitted a letter providing its views on how the Task Force

⁵ *Id.* at 12286.

⁶ *Id.*

⁷ *Id.*

⁸ EP 738 Notice, slip op. at 1.

⁹ *See* 90 Day Status Report at 1.

should implement EO 13777.¹⁰ In its letter, the AAR urged, among other things, that the Task Force recommend the Board “withdraw[]”¹¹ proposed regulations in the *Review of Commodity, Boxcar, and TOFC/COFC Exemptions* (“*Commodity Exemptions*”),¹² and *Reciprocal Switching*,¹³ proceedings, and that the Task Force recommend that the Board “repeal[]”¹⁴ the revenue adequacy maximum rate constraint, a constraint that was initially set forth in the ICC’s 1985 decision *Coal Rate Guideline, Nationwide*,¹⁵ and whose implementation is currently being addressed in the Board’s pending *Railroad Revenue Adequacy* (“*Revenue Adequacy*”) proceeding.¹⁶ The AAR also urged the Task Force to recommend that the Board scrap its recently promulgated service performance rules¹⁷ and requested that the Board take no action in pending “major regulatory actions . . . until a full complement of Board members is seated.”¹⁸

The Task Force issued its 90-Day Status Report on May 25, 2017. In that Report, the Task Force stated that it had met on May 11, 2017 to discuss its “initial

¹⁰ This letter (“AAR Letter”) was included in the STB’s EP 738 docket on June 29, 2017.

¹¹ AAR Letter at 3.

¹² EP 704 (Sub-No. 1) (STB served Mar. 23, 2016).

¹³ EP 711 (Sub-No. 1) (STB served July 27, 2016).

¹⁴ AAR Letter at 4.

¹⁵ 1 I.C.C.2d 520 (1985).

¹⁶ EP 722 (STB served April 2, 2014).

¹⁷ AAR Letter at 6, citing *United States Rail Service Issues – Performance Data Reporting*, EP 724 (Sub-No. 4) (STB served Nov. 30, 2016) (“*Performance Data Reporting*”).

¹⁸ AAR Letter at 10.

thoughts regarding: (1) identifying burdensome, outdated, or cumbersome regulations; (2) proposals for stakeholder engagement; and (3) implementation of regulatory reform initiatives.”¹⁹ The Task Force identified a number of potential responsive proposals, including proposals to repeal the requirement that water carriers file paper tariffs with the Board; proposals to revise the Board’s environmental rules; and proposals to replace outdated Board procedural and filing rules.²⁰

On June 20, 2017, the Board served its EP 738 Notice. In this Notice, the Board states that “[t]he RRTF’s mission is to identify rules and practices that are burdensome, unnecessary, or outdated, and to recommend how they should be addressed;”²¹ that the RRTF’s First Status Report “identified some initial actions to pursue;”²² and that the “RRTF believes that reviewing [the Board’s] regulations is best conducted with input from its stakeholders.”²³ Finally, the EP 738 Notice invites interested members of the public to submit written comments or attend an RRTF listening session.²⁴

COMMENTS

WCTL submits the following suggestions for consideration by the Task Force and the Board.

¹⁹ First Status Report at 1.

²⁰ *Id.* at 1-2.

²¹ EP 738 Notice, slip op. at 1.

²² *Id.*, slip op. at 2.

²³ *Id.*

²⁴ *Id.*

A. The Task Force Should Recommend that the Board Immediately End Its Regulatory Freeze In Major Rulemaking Proceedings

One of the Task Force’s principal objectives is the proper “implementation of regulatory reform initiatives.”²⁵ The Task Force is not operating in a vacuum here. Congress enacted comprehensive legislation in 2015 – the STB Reauthorization Act (“Act” or “Reauthorization Act”)²⁶ – that provided the Board with specific legislative directions on how the STB should reform its regulatory processes.

During the Congressional deliberations that resulted in the Act, shippers expressed concerns about what the now-Acting STB Chairman aptly characterized as the “sometimes glacial pace” that the STB processed major regulatory proceedings.²⁷ Similarly, Senate Commerce, Science, and Transportation Committee (“Commerce Committee”) Chairman Thune observed that “[o]versight efforts have identified causes of wasteful and unnecessary delays in adjudicating cases [at the STB] that harm rail shippers, freight operators, and ultimately consumers who pay higher costs.”²⁸

²⁵ First Status Report at 1.

²⁶ Pub. L. No. 114-110, 129 Stat. 2228 (Dec. 18, 2015).

²⁷ Field Hearing Before the Senate Commerce Committee, *Freight Rail Reform, Implementation of the Surface Transportation Board Reauthorization Act of 2015* (“Field Hearing”), Statement by Hon. Ann D. Begeman at 1 (Aug. 11, 2016), available at https://www.commerce.senate.gov/public/_cache/files/1a86e006-cc82-4e42-8186-1a623071b1e7/2EBF63B858E9D6F708C3297CC78656A4.begeman-stb-hearing-8.11.16.pdf.

²⁸ Press Release, *Thune and Nelson Introduce Bipartisan Freight Rail Reform Bill* at 1 (March 19, 2015), available at <https://www.thune.senate.gov/public/index.cfm/2015/3/thune-and-nelson-introduce-bipartisan-freight-rail-reform-bill>.

Congress addressed these concerns in the Reauthorization Act by, among other things, requiring the STB to provide quarterly reports to the Senate Commerce Committee, and to the House Committee on Transportation and Infrastructure, that “describe[] the [STB’s] progress toward addressing the issues raised in each unfinished regulatory proceeding.” Act, § 15(b).

Following the enactment of the Reauthorization Act, Commerce Committee Chairman Thune requested that the STB include in its § 15(b) quarterly pending proceedings reports “specific target dates for future actions, including completion.”²⁹ In a subsequent field hearing, Acting Chairman Begeman referred to these required reports and deadlines as a “game-changer” because members of the Board, and the public, “know that deadlines exist and the target dates for Board action.”³⁰ Similarly, then-Board Vice-Chairman Deb Miller observed that Congress’ “vision to create a [quarterly pending case] reporting requirement was extremely pragmatic. Absent the reporting requirements of the Act, I strongly suspect that many of these [pending] proceedings would still be in a state of regulatory limbo.”³¹

²⁹ Letter from Commerce Committee Chairman Thune to STB Board Members at 1 (March 31, 2016), available at <https://www.stb.gov/stb/docs/Reauthorization/Monthly%20Implementation%20Reports/U.S.%20Senate%20Committee%20on%20Commerce,%20Science%20and%20Transportation,%20March%2031,%202016.pdf>.

³⁰ Field Hearing, Statement of Hon. Ann D. Begeman at 3.

³¹ Field Hearing, Testimony of Hon. Deb Miller at 3, available at https://www.commerce.senate.gov/public/_cache/files/0c7fb74c-723d-4885-8c4b-a2c01f3fb29c/4020E8C43EF3039D99B9AA52C383FCA8.miller-stb-hearing-8.11.16.pdf.

Despite Congress' concern about regulatory delays, and the Board's initial positive response to ending its longstanding practice of placing major proceedings "in a state of regulatory limbo," the Board subsequently decided – evidently at the urging of the AAR³² – to place many of its most shipper-consequential rulemakings on hold until such time as the Board has a "full complement of Members."³³ The proceedings the Board has decided to place in this regulatory deep-freeze include:

- *Rail Fuel Surcharges (Safe Harbor)* ("Fuel Surcharges").³⁴ In this proceeding, the STB is addressing whether it should continue to permit rail carriers to use their rail fuel surcharges to over-recover the carriers' actual incremental fuel cost increases.
- *Revenue Adequacy*.³⁵ In this proceeding, the STB is addressing, among other things, how to properly apply its revenue adequacy constraint in maximum rate reasonableness cases now that all major railroads are "revenue adequate" under any proper application of that standard.

³² See, e.g., AAR Press Release "AAR President and CEO Calls on U.S. Surface Transportation Board to Halt All Major Rulemakings Until New Administration Installs Full Five-Member Board" (Nov. 17, 2016), available at <https://www.aar.org/newsandevents/Press-Releases/Pages/AAR-President-and-CEO-Calls-On-US-Surface-Transportation-Board-To-Halt-All-Major-Rulemakings-Until-New-Administration-Insta.aspx>; AAR Letter at 10.

³³ See STB Status Letter to the Senate Commerce Committee at 2 (April 3, 2017), available at <https://www.stb.gov/stb/docs/Reauthorization/Quarterly%20Correspondence/STB%20Status%20Letter%20to%20U.S.%20Senate%20Committee%20on%20Commerce%20Science%20and%20Transportation%20April%203%202017.pdf>; STB Report on Unfinished Regulatory Proceedings, First Quarter, April 3, 2017 at 2, 4, 5, 6 and 7, available at <https://www.stb.gov/stb/docs/Reauthorization/Quarterly%20Reports/Report%20on%20Unfinished%20Regulatory%20Proceedings,%20First%20Quarter,%20April%203,%202017.pdf>; *Reciprocal Switching*, EP 711 (Sub-No. 1), slip op. at 1 (STB served Dec. 27, 2016).

³⁴ EP 661 (Sub-No. 2) (STB served May 29, 2014).

³⁵ EP 722 (STB served April 12, 2014).

- *Reciprocal Switching*.³⁶ In this proceeding, the STB is addressing how to modify its current reciprocal switching rules so that these rules can provide meaningful relief in the manner Congress intended.

- *InterVISTAS Study*.³⁷ In this proceeding, the Board has stated it will seek public comment on its contractor's study addressing the need for alternatives to the Board's current maximum rate standards.

- *Commodity Exemptions*.³⁸ In this proceeding, the Board proposed to revoke class exemptions on specified commodities because the class exemptions were no longer in the public interest.

There is nothing in the text or legislative history of the Reauthorization Act suggesting that Congress intended or envisioned the STB placing its major rulemaking proceedings on hold pending the Board's obtaining a "full complement" of Board members. Had Congress wanted to manifest this intent, it could have expressed it in the law or in the legislative history. It did not.

The text and legislative history of the Reauthorization Act make clear that Congress intended that the Board expeditiously process its docket in an efficient and timely matter. Congress' decision to increase the number of Board members from three

³⁶ EP 711 (Sub-No.1) (STB served July 27, 2016). In this proceeding, the Board continues to hold "ex parte" meetings with stakeholders, but, in a decision served on December 27, 2016, the Board removed a previously set deadline for the conclusion of these meetings (Feb. 17, 2017) because "the Board is in a time of transition, with potential changes to the Board's membership due to the changeover in the administration." *Id.* at 1 (STB served Dec. 27, 2016). The Board then stated that "new deadlines concerning the closure of the ex parte meeting period will be established in a future Board order," (*id.*), but no such order has been issued to date.

³⁷ EP 736 (STB served Oct. 12, 2016).

³⁸ EP 704 (Sub-No. 1) (STB served March 23, 2016).

to five was intended to allow the Board to process its proceedings more expeditiously by mooting inefficient quorum requirements that limited interaction between individual Board members.³⁹ It was not intended to give the Board an excuse to delay advancing pending rulemaking proceedings.

Indeed, following the enactment of the Reauthorization Act in December 2015, the Board did not take the position that it should defer action in any pending proceedings until the Board contained its “full complement” of five members. The “full complement” regulatory freeze came only after President Trump was elected in November 2016.

Now that there has been a change in Administrations, President Trump is free to appoint two new Board Members, subject to the advice and consent of the Senate, in the same fashion that was available to President Obama. President Trump could appoint, and the Senate could confirm, two new Board members at any time: *e.g.*, next month, a year from now, or never.

In any event, the change in Administrations, and the timing of the selection of new Board members, cannot and should not be used to override Congress’ clear intent in the Reauthorization Act that the STB efficiently and promptly decide all proceedings on its docket, including pending rulemaking proceedings. This is particularly true

³⁹ See *Surface Transp. Board Reauthorization Act of 2015*, S. Rep. No. 114-52 at 11 (May 21, 2015) (Section 4 of the Act “expand[ed] membership of the STB from three members to five in order to address inefficient quorum requirements”). In addition, Section 5 of the Act “allow[s] for limited instances in which a majority of Board members can communicate without requiring a full public meeting.” *Id.* Section 5 “appl[ies] for any number of STB board members, with or without the expansion to five members.” *Id.*

because the STB is an independent federal regulatory agency charged by Congress to administer federal transportation laws in a timely and even-handed manner.

The Board's self-imposed delays are particularly unfair to shippers. The proceedings the Board has decided to put on indefinite hold are the most consequential ones to shippers, as they address bottom line issues involving how much shippers should reasonably pay for railroad transportation. They are also already amongst the oldest ones pending on the STB's docket. The Board should expedite, not delay, its consideration of these consequential, already much-delayed proceedings.

B. The Task Force Should Reject AAR's Requests To Terminate Consequential Pending Rulemaking Proceedings

The AAR urges the Task Force to recommend that the Board "withdraw" its proposed rules in the *Reciprocal Switching* and *Commodity Exemption* rulemaking proceedings.⁴⁰ The AAR also urges the Board to discontinue its consideration of the application of the revenue adequacy constraint in the pending *Revenue Adequacy* proceeding, and to "repeal" the revenue adequacy constraint altogether.⁴¹

The AAR's requests exceed the scope of EO 13777. EO 13777 directs non-independent federal agencies to "evaluate existing regulations."⁴² It does not encompass non-independent agencies' review of the merits of proposed regulations. A similar issue arose in 2011. In 2011, President Obama issued executive orders directing federal agencies to review existing regulations; the STB instituted a responsive proceeding, and

⁴⁰ AAR Letter at 3-4.

⁴¹ AAR Letter at 4.

⁴² EO 13777, 82 Fed. Reg. at 12285.

the issue arose whether the STB should consider the merits of proposed regulations as part of its review.⁴³ The STB properly concluded that its focus should be “on Board regulations that, in light of sufficient experience, have proven to be outmoded, ineffective, insufficient, or excessively burdensome.”⁴⁴ The same holds true in this proceeding.

Moreover, the AAR’s letter filing in this proceeding simply repeats arguments that it, and its member railroads, have previously made in pending rulemaking proceedings. WCTL, and other shipper/shipper organizations, have responded in detail to these arguments in the pending proceedings and WCTL incorporates those arguments by reference here. The Board should act – and act promptly – to decide the issues raised in these pending proceedings by issuing decisions in these proceedings based on the extensive records developed in those proceedings, not by issuing merits decisions based on truncated records in this proceeding.

C. The Board Should Reject AAR’s Request To Repeal Its Service Performance Data Reporting Requirements

Starting in late 2013, rail service in the western United States melted-down. When WCTL and other shippers asked the STB to intervene, the agency found it lacked reliable data on rail service. The Board proceeded to adopt a series of interim reporting

⁴³ See *Improving Regulation and Regulatory Review*, EP 712 (STB served Dec. 21, 2011) (“*Improving Regulation*”).

⁴⁴ *Id.*, slip op. at 2. The STB’s final decision in *Improving Regulation* addressed changes to existing regulations. See *id.* (STB served Feb. 18, 2016).

measures and, after receiving extensive public comment, issued final service reporting rules in November, 2016.⁴⁵

The AAR argues that the Board should discard its current rules and rely on service data that has “long been made publicly available by the AAR.”⁴⁶ The Task Force should reject the AAR’s recommendation. The service data that has “long been made publicly available by the AAR” is the same data the Board found during the western rail service melt-down was woefully insufficient.

The Board also fully considered and rejected AAR’s “rely on our data” contentions in its November, 2016 decision adopting final service reporting rules.⁴⁷ The Board correctly concluded, less than one year ago, that “the long term utility of the data collection in this final rule outweighs the additional burden placed on the rail industry.”⁴⁸ The Task Force should not recommend discarding the Board’s service data reporting rules simply because the AAR wants to turn the clock back to the days when neither the Board, nor rail shippers, had reasonable public access to this important information.

⁴⁵ See *United States Rail Service Issues – Performance Data Reporting*, EP 724 (Sub-No. 4) (STB served Nov. 30, 2016) (“*Performance Data Reporting*”).

⁴⁶ AAR Letter at 6.

⁴⁷ *Performance Data Reporting*, slip op. at 5-6

⁴⁸ *Id.*, slip op. at 6.

D. The Task Force's Initial Proposals Appear To Be Reasonable

The STB recently completed an extensive review of its existing regulations and issued a final order that “remove[d] obsolete regulations.”⁴⁹ The Task Force’s First Status Report identifies several additional proposals that WCTL agrees could properly be the subject of additional Board action:

- The Task Force suggests that the Board’s environmental rules could be “streamlin[ed].”⁵⁰ The Task Force also states that “[t]he Board has been working on a proposal to update its environmental rules.”⁵¹ While WCTL will not take a position on any Board-sponsored changes to its environmental rules until such time as the Board makes specific proposals, WCTL agrees with the Task Force that this is one area where appropriate streamlining may be in order.

- The Task Force suggests that that “numerous procedural rules are in need of modernization,” including “[p]ermitting payment of filing fees and other payments due the Board through www.pay.gov[:] [p]ermitting all filings to be made through the Board’s website[:; and] “[r]epealing the requirement that paper copies be filed with the Board.”⁵² WCTL believes that appropriate modernization of the Board’s procedural rules is also a proper subject for the Task Force, and the Board, to pursue.

⁴⁹ *Improving Regulation*, slip op at 2.

⁵⁰ First Status Report at 2.

⁵¹ *Id.*

⁵² *Id.*

- The Task Force proposes to move water carrier tariff filing requirements from a paper-based system “to an email filing system.”⁵³ While WCTL defers to water carrier shippers on matters involving water tariff filing requirements, this proposal also appears to be one that is proper for the Task Force, and the Board, to examine.

- The Task Force states that it plans on reviewing the comments the Board received in the *Improving Regulation* proceeding “to determine if any ideas submitted there would be responsive to this EO.”⁵⁴ Shipper comments in *Improving Regulation* asked the STB to address and resolve longstanding inequities in the Board’s rules governing rail fuel surcharges, revenue adequacy, reciprocal switching, maximum rate reasonableness, and commodity exemptions.⁵⁵ At a minimum, these comments support the immediate termination of the Board’s regulatory freeze in the *Fuel Surcharges, Revenue Adequacy, Reciprocal Switching, InterVISTAS Study*, and *Commodity Exemption* proceedings.

CONCLUSION

WCTL requests that the Task Force make recommendations to the Board that are consistent with its Comments.

⁵³ *Id.* at 1.

⁵⁴ *Id.* at 2.

⁵⁵ See, e.g., *Improving Regulation*, Comments of the National Industrial Traffic League at 2, 4-13, and 15-17 (Jan. 10, 2012); Comments of Alliance for Rail Competition *et al.* at 4-10 (Jan 10, 2012); Comments of Consumers United For Rail Equity and Manufacture Alabama at 4-10, and 14-17 (Jan. 10, 2012); Arkansas Electric Cooperative Corporation’s Exhibit 1 Comments and Suggestions at 1-5, and 6-7 (Jan. 12, 2010).

Respectfully submitted,

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