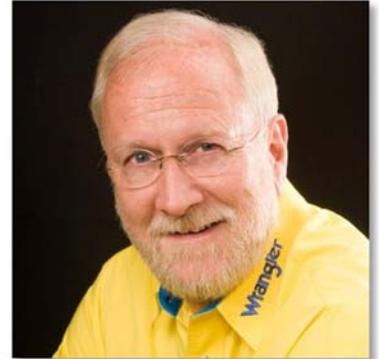


TRANSPORTATION REPORT

From: Terry Whiteside

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THE HOUSE TRANSPORTATION, HOUSING AND URBAN DEVELOPMENT (THUD) SUBCOMMITTEE INCLUDED \$37 MILLION FOR STB APPROPRIATIONS IN THE DRAFT BILL RELEASED LATE YESTERDAY (MAY 17, 2016) – THIS IS GOOD NEWS

The House and Senate began work on their respective FY 2017 THUD bills in February, 2016. The Rail Customer Coalition (RCC) of which the Alliance for Rail Competition is a founding member, met extensively with both the House and Senate to show support for additional funding for the Surface Transportation Board (STB or Board) in the appropriations process to help ensure that the Board has adequate resources to meet its statutory mission.

The good news that the House THUD Subcommittee included \$37 million for STB appropriations in the draft bill released yesterday (May 17, 2016), matching the Senate and exceeding the authorized level. Given that the House and Senate have agreed, and without declaring final victory yet, we feel very confident that the final appropriations bill will include this amount—which we believe is the largest single increase the STB has ever received (\$4.625m).

The STB is responsible for the economic oversight of the entire freight rail industry, which involves not only large and resource-intensive rate cases, but hundreds of smaller decisions and actions. The STB was reauthorized by Congress last year for the first time in 20 years, when Public Law 114-110, *The Surface Transportation Board Reauthorization Act of 2015*, was signed into law on December 19, 2015. This law recognized the need for the STB to become a more efficient and effective body. Chairman Shuster noted that the reforms were included to “allow the STB to run more efficiently... it is going to get these rate [cases] to the STB faster and get us through that process quicker. That is extremely important.”

At a House Transportation and Infrastructure Committee hearing last year, STB Board Member Deb Miller highlighted an issue that has long concerned many members of the Rail Customer Coalition (RCC). The STB computer system is antiquated to the point where the system engineers can no longer provide many services. The STB website is also inadequate, largely due to constraints presented by outdated computer networks. We support additional funding to support upgrades that would enhance the efficiency of the agency. The STB must have adequate staff and resources to meet its statutory mission.

STB OPENS THE FIRST OF SEVERAL NPRM (NOTICE OF PROPOSED RULE MAKING) PROCEEDINGS - EX PARTE NO. 731 – RULES RELATING TO BOARD-INITIATED INVESTIGATIONS

STB has issued proposed rules to establish procedures for investigations conducted on the Board’s own initiative pursuant to Surface Transportation Board Reauthorization Act. The STB’s decision is available [here](#).

To implement this statutory framework for investigations, the Board is proposing a three stage process, consisting of (1) Preliminary Fact-Finding, (2) Board-Initiated Investigations, and (3) Formal Board Proceedings. All Board-Initiated Investigations must be completed within 1 year of initiation, unless the Board decides to open a proceeding

based upon the finding in the investigation. The goal of the Board-Initiated Investigation would be for the Investigating Officer(s) to decide whether to recommend to the Board that it dismiss the investigation or open a proceeding to determine if a violation of 49 U.S.C. Subtitle IV, Part A occurred.

STB OPENS A NPRM (NOTICE OF PROPOSED RULE MAKING) ON REVISIONS TO THEIR ARBITRATION PROCEDURES TO CONFORM WITH THE REQUIREMENTS IN THE NEWLY PASSED SURFACE TRANSPORTATION BOARD REAUTHORIZATION ACT OF 2015. THE NPRM IS LINKED TO [HERE](#). EX PARTE NO. 730, REVISIONS TO ARBITRATION PROCEDURES

Under Section 13 of the STB Reauthorization Act (codified at 49 U.S.C. § 11708), the Board must “promulgate regulations to establish a voluntary and binding arbitration process to resolve rail rate and practice complaints” that are subject to the Board’s jurisdiction. Section 11708 sets forth specific requirements and procedures for the Board’s arbitration process.

Eligible Matters. Under § 11708(b), rate disputes (i.e., disputes involving the reasonableness of a rail carrier’s rates) are eligible for arbitration. Accordingly, rate disputes would now be added to the list of matters that are eligible for arbitration under the arbitration program, which currently includes disputes relating to demurrage; accessorial charges; misrouting or mishandling of rail cars; and disputes involving a carrier’s published rules and practices as applied to particular rail transportation.

Most interesting in this decision is the raising of the limits of awards for all groups of disputes, a point made in all Alliance for Rail Competition and Wheat and Barley growers pleadings for over 5 years.

Monetary Relief Available. In accordance with § 11708(g), the maximum amount of relief that could be awarded under the arbitration program, which is currently capped at \$200,000,

would be raised to \$25,000,000 in rate disputes and \$2,000,000 in practice disputes (i.e., disputes involving demurrage; accessorial charges; misrouting or mishandling of rail cars; and disputes involving a carrier's published rules and practices as applied to particular rail transportation). The \$2,000,000 monetary award cap would also apply to other disputes that parties seek to arbitrate under § 1180.4(e) that are not specifically listed as arbitration-eligible matters (yet also not expressly prohibited). The proposed rules would allow parties to mutually agree to a lower monetary award cap.

There are several other provisions outlined in the proposed rules including the right to review by the STB for compliance with current regulatory standards for rate reasonableness. One sticky issue that remains is whether the STB needs to make a finding of 'market dominance' before an arbitration can begin which can be a lengthy process.

Editor's Note: Shippers must be mindful, that these rules by the Board (and in the Reauthorization Act) do not compel the parties to enter into arbitration. Some shipper representatives view this as a major weakness. The railroads wanting to 'spend out' a shipper may refuse to arbitrate. However, the STB and Congress want to develop workable arbitration procedures and if the carriers and/or shippers stonewall this process, look for Congress to take another hard look at the process in the next year or two.

From the STB order in Ex Parte 730, "The Board's current regulations are consistent with § 11708(c), which makes the arbitration process available only after the Board receives written consent to arbitrate from all relevant parties and after the filing of a written complaint¹. Under the statute, in lieu of a written complaint, the arbitration process also may be made available "through other procedures adopted by the Board in a rulemaking proceeding." § 11708(c)(1)(B)(ii)(II). To encourage greater use of arbitration

¹ Under 49 C.F.R. § 1108.5, arbitration commences with a written complaint that contains a statement that the relevant parties are participants in the Board's arbitration program, or that the complainant is willing to arbitrate the dispute pursuant to the Board's arbitration procedures. The respondent's answer to the written complaint must then indicate the respondent's participation in the Board's arbitration program or its willingness to arbitrate the dispute at hand pursuant to the Board's arbitration procedures.

to resolve disputes, the Board proposes here that, as an alternative to filing a written complaint, parties may submit a joint notice to the Board, indicating the consent of both parties to submit an issue in dispute to the Board's arbitration program.²"

These rulemakings are in addition to the ongoing work the Board is doing on rail service metrics, a report on simplified rate case procedures, commodity exemptions review, Grain Rate Regulatory review and the anticipated release of a proposed rule on competitive switching. Look for a host of NPRM proceedings this summer and into the fall covering virtually all of these on-going proceedings as well the many requirements handed down by Congress in STB Reauthorization Act (codified at 49 U.S.C. § 11708). Most of the provisions that require rulemaking have a December 31, 2016 deadline attached to them.

² These proposed rules seek to expand, not replace, the current rules set forth at 49 C.F.R. § 1180.3 that govern the Board's arbitration program, under which shippers and carriers may voluntarily agree in advance to arbitrate certain disputes