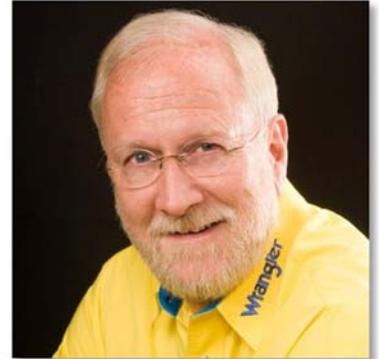


TRANSPORTATION REPORT

From: Terry Whiteside

Date: Friday September 12, 2014



SENATOR ROCKEFELLER AND SENATOR THUNE – INTRODUCE S. 2777 - SURFACE TRANSPORTATION BOARD REAUTHORIZATION ACT OF 2014

This bill was introduced last week and hearings were held on September 10th. It is expected that the bill will be marked up by the Senator Commerce Committee next week.

The bill focuses on several concepts:

- Increase the STB's investigative authority, so it can launch its own investigations before a complaint is filed.
- Improve rate review timelines to make it easier for board members to communicate, and improve alternative dispute resolution practices.
- Advance STB proceedings, including the review of revenue adequacy determinations, examining mandatory competitive switching, and determining whether contract bundling has had an adverse impact on the ability of shippers to bring rate cases.
- Allows STB Commissioners to communicate with each other without violating a quorum call – by increasing the Board membership to 5 Commissioners from the current 3 Commissioners.

The American Chemistry Council, headed by former Rep. Cal Dooley, D-Calif., said, "Today's freight rail policies are more than 30 years old and have not kept pace with the massive

changes in how the freight rail industry operates, which is having a serious impact on shippers,”

“According to an analysis of railroad data, freight rail rates have soared more than 93 percent — nearly three times the rate of inflation — since 2001,” the group said.

“We believe it is time to pursue reforms at the STB that would give shippers better access to more competitive and reliable freight rail service.”

Rockefeller and Thune’s offices said last Friday their bill would “increase the STB’s investigative authority so it can launch its own investigations before a complaint is filed.”

The lawmakers added that the measure would speed up the railway panel’s timelines for process reviews of freight rail performance and “advance important STB proceedings” that have been stalled thus far.

A Section by Section Analysis:

Surface Transportation Board Reauthorization Act Section by Section

Section 1. Short Title.

The bill is titled the Surface Transportation Board (STB) Reauthorization Act of 2014.

Section 2. References to Title 49, United States Code.

Changes made in this bill, except where expressly provided otherwise, are made to Title 49 of the U.S. Code.

Section 3. Establishment of Surface Transportation Board as an Independent Establishment.

Amends administrative provisions to clarify STB’s role as an independent body and specifies that submissions or transmissions of budgetary or legislative matters be submitted concurrently to the President/Office of Management and Budget and the U.S. Senate Commerce, Science, and Transportation Committee and the House Transportation and Infrastructure Committee. Also, repeals a section requiring the Department of Transportation to provide administrative support, which should save the STB approximately \$300,000 annually.

Section 4. Surface Transportation Board Membership.

Expands membership of the STB board from three members to five in order to address inefficient quorum requirements. Also, eliminates the one-year holdover limitation for continuing service by a board member when a successor is not immediately appointed.

Section 5. Nonpublic Collaborative Discussions.

Provides for limited instances where a majority of Board members can communicate without requiring a full public meeting, similar to that what the Federal Communication Commission enjoys. Such instances require that no vote be taken, the general counsel’s presence, and can include only board members or staff. Also requires disclosure of meeting topics and participants within two business days

of the meeting, unless the discussion relates to an ongoing proceeding, in which case the disclosure must be made on the date of the final Board decision.

Section 6. Investigative Authority.

Allows the STB to initiate investigations; current policy only allows investigations upon complaint. New authority is prohibited for rate proceedings, which still require a complaint.

Section 7. Procedures for Rate Cases.

Codifies work STB has already been doing to streamline its processes for rate cases and ensures that the simplified reviews are accompanied by expedited handling.

Section 8. Rate Review Timelines.

Codifies timelines for stand-alone cost rate challenges, including discovery (150 days), development of evidentiary record (155 days), closing brief (60 days), and final Board decision (180 days) while providing an option for a Board-granted extension upon request or in the interest of due process. The timelines are currently set through regulation.

Section 9. Effect of Rate Bundling. Requires the STB to initiate a proceeding on whether contract bundling has had an adverse impact on the ability of shippers, especially captive shippers, to bring rate cases.

Section 10. Report on Rate Case Methodology.

Requires a report, within one year, analyzing the sufficiency of current methodologies for large rate cases and discussion possible alternative methodologies.

Section 11. Arbitration of Certain Rail Rates, Practices, and Common Carrier Service Expectation Disputes.

Continues work the STB has already begun in encouraging and providing arbitration and mediation for dispute resolution. Requires the STB to promulgate regulations establishing a binding arbitration process for rate, practice, and common carrier complaints. Either party could trigger the binding arbitration process after a complaint has been filed or after the conclusion of any informal dispute resolution process provided by the STB.

Arbitration for rate disputes is available only if the rail carrier has market dominance. Arbitration would not apply to license disputes, industry-wide regulation disputes, or disputes solely between rail carriers.

Sets forth terms that require any arbitration decision to be in writing, contain findings of fact and conclusions, and bind the parties. In addition, the statute specifies timelines for arbitrator selection (14 days after initiation), evidentiary process (90 days), and decision (30 days after evidentiary record closes), subject to discretionary extensions.

Relief is capped at \$2 million for service and practice disputes and \$25 million for rate dispute damages. Any rate prescription from arbitration will be limited to not longer than five years from the date of the decision. The Board can only review an arbitration decision if it does not comply with statute or the relief award cap discussed above.

Section 12. Compilation of Complaints at Surface Transportation Board.

Requires STB to establish a database of the formal and informal service complaints it receives. The database must include the type, geographic origin, and resolution of each complaint. The STB is also required to begin providing quarterly reports to the Senate Commerce Committee and House Transportation and Infrastructure Committees within 60 days of this Act's enactment. The report will then be posted on the Board's website, but identifying information of a complainant may only be included if written consent is obtained.

Section 13. Quarterly Reports.

STB is also required to begin providing quarterly reports to the Senate Commerce Committee and House Transportation and Infrastructure Committees within 60 days of this Act's enactment regarding the Board's progress toward addressing unfinished regulatory proceedings.

Section 14. Sense of Congress.

It is the sense of Congress that the STB should: consider the costs and benefits of revenue adequacy determinations for Class I railroads; review the methodology for determinations of revenue adequacy; determine the need for a proceeding on mandatory competitive switching; and determine whether a timely rulemaking for competitive switching is needed. This section is limited to a Sense of Congress, because the STB already has ongoing proceeding regarding these matters and any new statutory mandates could require the STB to begin their work anew.

Section 15. Repeal of Expired and Obsolete Provisions.

Allow for a rail carriers' agent to be located outside of Washington, DC.

Section 16. Construction.

Makes clear that nothing in the bill affects any cases being considered by the STB at the time of enactment.

The Railroads in the hearing (AAR) predictably came out against the arbitration provision – especially in resolving service issues. The railroads would much rather force shippers to accept railroad service standards or become involved in a protracted and expensive STB adjudicated case each time. What the shippers continue to seek is remedies that can be hammered out through procedures such as arbitration so private negotiated settlements can be attained.

Editor's Note:

This is one of the most concise bills that has been produced over the last 7 years.

Congratulations to the Rail Customer Coalition in DC and the Commerce Committee staffers that have worked tirelessly for the past year, hammering together the details in this bill. It is focused on the STB and its workings. In the last 1 ½ years, the STB has been doing very extensive work engaging both the railroads and rail customers in a number of rulemaking and ground breaking proceedings. We commend the STB for their work in the last 1 ½ years. They have taken a leadership role in the service meltdown and the effects on shippers especially the farm community. One of the most perplexing practices at the STB has been addressed in this bill – namely the fact that federal agencies with 3 members cannot talk to each other without calling a formal meeting – because if two or three of them were to meet – it would constitute a Quorum. To many of us this is silly but this bill seeks to remedy that by expanding the members of the Board to 5 members. Another way would be to legislate that this Board can meet informally (without taking action or decision making) to discuss agency work. All in all, this bill is a good one – and we will see how it progress in the next few weeks.

THERE ARE THREE MAJOR EX PARTE (NON-ADVERSARIAL) PROCEEDINGS THAT ARE GOING ON AT THE STB RIGHT NOW:

- 1. EX PARTE 665 – RAIL TRANSPORTATION OF GRAIN, RATE REGULATION REVIEW**
- 2. EX PARTE 664 SUB 2 - USE OF A MULTI-STAGE DISCOUNTED CASH FLOW MODEL IN DETERMINING THE RAILROAD INDUSTRY'S COST OF CAPITAL**
- 3. EX PARTE 722 – RAILROAD REVENUE ADEQUACY**

Confused? This newsletter will attempt to provide clarity of each of these proceedings and the importance of them to rail customers and shippers. We realize that Ex Parte 664 Sub 2 and Ex Parte 722 are complex but they are important for all captive shippers – ARC shippers including grain, coal, glass producers, manufacturing and chemicals. We have put together a top notch team to develop transportation thoughts on this – John Cutler, esq. Washington DC, Gerald W. Fauth III Alexandria, VA and Terry Whiteside Billings Montana.

Ex Parte 665 – This is a proceeding wherein the STB wants to explore new ideas to develop more responsive regulatory procedures for Grain. The Opening Comments were filed June 29, 2014. The reply comments were filed on August 25, 2014.

ARC et al¹, The National Grain and Feed Association (“NGFA”) and the U.S. Department of Agriculture (USDA), in their opening comments, addressed shortcomings in current STB grain rate regulation, and offered constructive suggestions for improving the effectiveness of rail regulation. The Railroad parties, including Association of American Railroads (“AAR”) and the four major US Class I railroads, did not make any constructive suggestions, preferring to emphasize situations in which regulation may not be needed, as if this justifies maintaining the status quo with no changes. In their reply statements the railroads predictably criticized ARC et al, NGFA and USDA approaches and postured to the STB to continue the status quo with no change because the reason for lack of complaints by agriculture producers/shippers is postulated to be there are no rates and/or service that shippers want to complain about. We expect that STB will ultimately call for oral hearing in this matter.

Ex Parte 664 Sub 2 - Alliance for Rail competition (“ARC”) files these comments for two reasons. The first is to express support for replacement of the Board’s current hybrid

¹ National Corn Growers Association (“NCGA”), Colorado Wheat Administrative Committee, Idaho Barley Commission, Idaho Grain Producers Association, Idaho Wheat Commission, Minnesota Corn Growers Association, Minnesota Farmers Union, Montana Farmers Union, Montana Wheat & Barley Committee, Nebraska Corn Growers Association, Nebraska Wheat Board, North Dakota Corn Growers Association, North Dakota Farmers Union, Oklahoma Wheat Commission, Oregon Wheat Commission, South Dakota Corn Growers Association, South Dakota Farmers Union, South Dakota Wheat Commission, Texas Wheat Producer Board, Washington Grain Commission, Wisconsin Farmers Union, Wyoming Wheat Marketing Commission and U.S. Dry Pea & Lentil Council.

approach to cost of capital determinations for Class I railroads with the more accurate Capital Asset Pricing Model (CAPM) approach. The Board's use since 2009 of a hybrid approach combining CAPM with a multi-stage discounted cash flow (MSDCF) approach has led to erroneous results that consistently favor the major railroads. Consistent error is still error, and errors that consistently favor market dominant railroads are even more objectionable.

Given the active involvement of ARC and its consultants in three other pending proceedings², ARC relies on and generally supports the more detailed and technical analysis of the issues presented that is being filed in the opening comments in this proceeding of Western Coal Traffic League.

The second reason for ARC's decision to file these comments is that the Board has not resolved the issue of how to treat BNSF data in making its cost of capital calculations, and the lack of a resolution of this issue should not continue indefinitely. In its decision served October 3, 2011 in Docket No. EP 558 (Sub-No.14), Railroad Cost of Capital – 2010, at pages 7-8, the Board declined to include BNSF in the composite group and also held that any:

future requests to change the assumptions that form the elements of our CAPM model must be brought (in the form of a petition for rulemaking) in a 664 proceeding.

This is a "664 proceeding", and ARC believes the issue is important. This is a separate issue from the issue raised by WCTL, and the issue of whether to replace the hybrid approach with a CAPM approach is likely to be the main, if not the only, focus of most parties' comments in this proceeding. Accordingly, ARC does

² EP 665 (Sub-No. 1), Rail Transportation of Grain, Rate Regulation Review; EP 722, Railroad Revenue Adequacy; and EP 724, United States Rail Service Issues

not suggest that resolution of the BNSF issue should hold up a decision on whether to use CAPM instead of a hybrid analysis.

However, the Board is also considering the implications of revenue adequacy in parallel proceedings in EP 722, and the major railroads' cost of capital is a component of revenue adequacy.

Ex Parte 722: Alliance for Rail Competition (“ARC”) and the agricultural shipper and producer interests identified on the cover of these Opening Comments³ (collectively “ARC, et al.”) commend the STB for initiating this proceeding. For decades, the goal of railroad revenue adequacy has guided ICC and STB regulation of railroads. Achievement of that milestone is now upon us, and the time has come to consider how past regulatory policies adopted when railroads were found revenue inadequate should change for railroads that attain or exceed revenue adequacy.

ARC, et al. have recently filed comments addressing, among other issues, revenue adequacy in the context of grain rate regulation in EP 665 (Sub-No. 1), Rail Transportation of Grain, Rate Regulation Review. The Board’s attention is respectfully directed to those comments, and to comments filed in that proceeding by The National Grain and Feed Association (“NGFA”), and the U.S. Department of Transportation (“USDA”), for a fuller

³ Colorado Wheat Administrative Committee, Idaho Barley Association, Idaho Grain Producers Association, Idaho Wheat Commission, Montana Farmers Union, Montana Wheat and Barley Committee, Nebraska Wheat Board, North Dakota Grain Dealers Association, Oklahoma Wheat Commission, Oregon Wheat Commission, South Dakota Wheat Commission, Texas Wheat Producer Board, Washington Grain Commission, Wyoming Wheat Marketing Commission, and USA Dry Pea and Lentil Council

discussion of grain rate regulation for railroads that have achieved revenue adequacy (and for railroads not yet found revenue adequate).

In our comments in this proceeding, filed on behalf not just of shippers and producers of agricultural commodities but also for ARC members shipping coal, sand (including sand for fracking), glass, chemicals and other commodities, ARC, et al. will focus on revenue adequate railroads, and some of the points made in EP 665 (Sub-No. 1) will be reiterated here. Unfortunately, the Railroad parties in EP 665 (Sub-No. 1) elected to ignore revenue adequacy in that proceeding, leaving the Board to consider sketchy Railroad comments as to regulation of the grain rates of revenue adequate railroads.

The Railroad parties in EP 665 (Sub-No. 1) also took the position that the status quo as to grain rate regulation should not change. Deficiencies cited by ARC, et al., NGFA and USDA were brushed aside, and the railroads went to great lengths to claim that many grain shippers do not pay excessive rates, and do not need improved regulatory remedies. No one claims that all rail customers are captive, or that all captive customers pay unlawfully high rates. Such arguments by Railroads therefore failed to address the issues presented, which concerned the challenges faced by rail customers who are poorly served by the regulatory status quo, in violation of statutory requirements.

The Railroads demand federal intervention to ensure that they earn adequate revenues, but oppose STB intervention needed to protect captive shippers from excessive rates or other abuses of railroad market power. The Interstate Commerce Act and the STB do not exist for the protection of shippers who enjoy effective competition, low rates and good service. At issue here are shippers for whom regulation offers little or no protection, and who are now paying high rates and charges (or may do so anytime a market dominant railroad decides to charge more) and enduring poor service.

Metrics Reporting Update

The Average Speed (taken from the AAR – Association of American Railroads) while improved slightly for the week of July 13th on wheat, continues to be drift on or around the year-long downward trend line. See next page. Meanwhile the BNSF system Average Train Speed continues to hover at yearlong lows. It is now September, the wheat harvest in the Southern Great Plains is all but ended, the winter wheat harvest in the northern plains is concluding, and yet the BNSF's system wide average speed is languishing at the lowest levels in past 1 ½ years.

