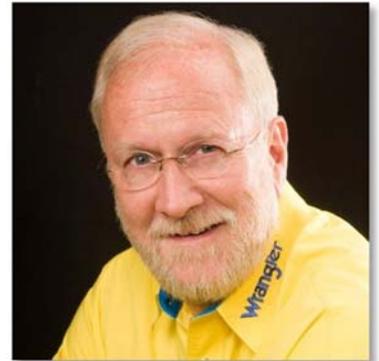


# TRANSPORTATION UPDATE

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## S 808 - A BILL TO ESTABLISH THE SURFACE TRANSPORTATION BOARD AS AN INDEPENDENT ESTABLISHMENT, AND FOR OTHER PURPOSES

The bill now has a name and number – S 808. The following is a summary of how the substantive provisions in the rail regulatory reform legislation co-sponsored by Senators Thune and Nelson will impact shippers:

**Sections 1 and 2.** Non-substantive.

**Section 3.** This section establishes the Surface Transportation Board (“STB”) as an independent agency, thereby removing it from under the Department of Transportation, where it has been since its creation in 1995. This will give the STB the same level of independence as its predecessor agency, the Interstate Commerce Commission (“ICC”).

**Section 4.** This section expands the STB from three members to five. It should improve the efficiency of the agency, as well as reduce the need for members to rely upon staff to communicate with one another. Currently, no two members may meet to discuss matters before the agency because they would constitute a quorum and thus would be required to conduct any such discussion as a public meeting. Consequently, the members may

communicate with each other only through their staffs. This expansion of the agency will enable two members to discuss matters among themselves without violating the Sunshine laws.

**Section 5.** This section improves communication among Board members by enabling even a majority of members to discuss official agency business without a public meeting provided that no vote or other official agency actions is taken, only Board members and employees are present, the Board's General Counsel is present, and a summary of attendees and matters discussed is made available to the public within specified time periods after the meeting. This section will improve Board efficiency while still preserving transparency and openness in the decision-making process.

**Section 6.** This section imposes certain reporting requirements upon the STB that should facilitate timelier agency actions. There is a new quarterly reporting requirement for rail rate cases designed to track compliance with the new rate case deadlines in Section 11. In addition, the agency must maintain a database of complaints that it receives and submit a quarterly report with basic information about the date, type, geographic region, and resolution of each complaint. By tracking and reporting the foregoing information publically, there should be a greater level of scrutiny and accountability of the STB.

**Sections 7-10.** Non-substantive or no impact on shippers.

**Section 11.** This section is designed to expedite rate cases, which currently average three years for the most complex cases, in three ways. First, it requires the STB to maintain a minimum of one simplified rate case process for use when a full stand-alone cost process is too costly, given the value of the case. Although the STB has simplified procedures in place currently, there is no statutory requirement for it to do so and there has been some debate over whether there can be more than one simplified process. Second, this section imposes a timeline on full stand-alone cost (i.e., large) rate cases that would shorten the process to just 18 months from complaint to decision, subject to extensions if requested by the parties. Third, this section requires the STB to initiate a proceeding to assess whether any of the procedures used to expedite judicial litigation could be applied effectively to expedite rate cases.

**Section 12.** This section restores the STB's authority to initiate investigations on its own initiative. Currently, the STB can only exercise its

authority upon receiving a formal complaint, which many shippers are reluctant to initiate. This new authority must be conducted within specified parameters and time periods; is limited to issues of regional or national significance, as opposed to matters specific to individual shippers; and would be subject to *de novo* judicial review, instead of the more deferential arbitrary and capricious standard for investigations initiated by a formal shipper complaint.

**Section 13.** This section codifies much of the STB's recently-adopted arbitration procedures but with several minor and two significant changes. The most significant change is the expansion of arbitration to rate cases. The STB must first decide whether market dominance exists and the arbitrators must consider the STB's methodologies for determining reasonable rates. The second significant change increases the relief caps for non-rate case arbitrations from \$200,000 to \$2,000,000, and adopts a rate case relief cap of \$25,000,000 over 5 years. The STB may review arbitration decisions to determine if they comply with the statute and the relief caps, or are based upon sound economic principles.

**Section 14.** This section requires the Comptroller General to commence a study of rate bundling, which many shippers complain precludes them from challenging just those rates that they deem unreasonable. This is a first step in finding a solution for this issue.

**Section 15.** This section requires the STB to submit two different types of reports. First, the STB must report within one year on rate case methodologies. This report must address the sufficiency, complexity and cost effectiveness of the current large case methodology, and indicate whether alternative methodologies exist or could be developed to address the foregoing issues, provided that such alternatives are consistent with sound economic principles. This reporting requirement will help to keep the search for rate case alternatives at the forefront of the STB's agenda, instead of allowing the issue to languish in unfinished STB proceedings.

Second, the STB must submit quarterly reports to describe the progress it has made in all unfinished regulatory proceedings. The STB has allowed past public inquiries and regulatory proceedings to languish in obscurity without taking any definitive action. This section will reduce that risk as to future proceedings by requiring regular status reports.

**Section 16.** This section adds clarifying language to the statutory determination of revenue adequacy, but without any intent to change how the STB determines revenue adequacy. Additionally, the Committee has indicated a willingness to include report language to reinforce this interpretation.

**Section 17.** This section clarifies that the provisions of this legislation do not affect pending STB proceedings.