

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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| Petition By The Western Coal Traffic League To Terminate The Regulatory Freeze In Four Pending Proceedings |))))) | Docket No. EP 740 EP 740 EP 661 (Sub-No. 2) EP 722 |
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EP 736
EP 711 (Sub-No. 1)
EP 704 (Sub-No. 1)

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

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

The Western Coal Traffic League (“WCTL”) respectfully requests that the Surface Transportation Board (“STB” or “Board”) terminate its regulatory freeze in four pending proceedings in which WCTL is an active party.

SUMMARY

WCTL is an active party in *Rail Fuel Surcharges (Safe Harbor)*, EP 661 (Sub-No. 2) (“*Rail Fuel Surcharges*”), *Railroad Revenue Adequacy*, EP 722 (“*Railroad Revenue Adequacy*”), *InterVISTAS Study*, EP 736 (“*InterVISTAS Study*”), and *Reciprocal Switching*, EP 711 (Sub-No. 1) (“*Reciprocal Switching*”) (collectively “*Pending Proceedings*”).

Following last year’s Presidential election, the STB appears to have made an internal decision to not take any further substantive actions in the *Pending Proceedings* until such time as the Board has a “full complement” of five Board

members.¹ The Board’s regulatory freeze – which is publicly memorialized in the Board’s pending proceedings reports (and accompanying cover letters) to Congress – is now in its ninth month. WCTL respectfully requests that the Board end the freeze immediately.

The Board’s self-imposed freeze is fundamentally unfair to shippers. The *Pending Proceedings* are already several years old and they involve proposed changes to the Board’s rules that shippers have been advocating for years, and, in some cases, decades, to address fundamental inequities in the Board’s current regulation of railroads. These inequities include Board rules that permit carriers to use their fuel surcharges as profit centers (at issue in *Rail Fuel Surcharges*); that arbitrarily preclude shippers from obtaining reciprocal switching relief (at issue in *Reciprocal Switching*); that provide no guidance to shippers on how to properly apply the Board’s revenue adequacy constraint (at issue in *Railroad Revenue Adequacy*); and that provide no meaningful maximum rate protections for many shippers (at issue in *InterVISTAS Study*). The Board’s consideration of the *Pending Proceedings* should be expedited, not delayed.

Moreover, as Senators Baldwin, Franken, and Klobuchar recently emphasized in their July 31, 2017 joint letter to the Board (“Baldwin/Franken/Klobuchar

¹ See STB Status Letter to U.S. Senate Committee on Commerce, Science and Transportation at 2 (July 3, 2017) (“STB July 2017 Status Letter”), available at <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>.

Letter”),² the freeze is contrary to Congressional directives in the STB Reauthorization Act of 2015 (“STB Reauthorization Act” or “Act”).³ In the Act, Congress directed that the Board speed-up, not slow-down, its consideration of pending proceedings, and Congress certainly did not contemplate or sanction the Board’s reliance on the Act’s provision authorizing an increase in the size of the Board’s membership from three to five members – a provision Congress added to address quorum problems with the three member Board – as a justification to freeze the Board’s consideration of the already long-delayed *Pending Proceedings*.

The freeze is also not a proper policy for an independent agency to pursue. The freeze appears to be driven by an interest on the Board’s part to defer action in the *Pending Proceedings* until President Trump appoints, and the Senate confirms, two new Board members. The selection and confirmation of new Board members is a partisan, political process for the President and the Senate to undertake. This process should not influence how the independent, non-partisan Board processes or decides pending matters.

Regardless of whether the Board agrees with WCTL on the lack of merit in the freeze when the Board first adopted it, the Board should re-evaluate the freeze, and terminate it, because of changed circumstances – *i.e.*, the longstanding, and on-going, delay in obtaining a “full complement” of Board members. The freeze has gone on for nine months now, with no end in sight, because the President has not nominated any

² Available at https://www.stb.gov/stb/docs/Legislative_Correspondence/2017/Letter_to_STB_re_Rule_making_7.31.17.pdf.

³ Pub. L. No. 114-110, 129 Stat. 2228 (Dec. 18, 2015).

candidates to fill the two open Board Member seats, and because, once nominated, confirmation of Presidential nominees usually takes a considerable amount of additional time.

WCTL respectfully requests that the Board enter an order in this proceeding terminating the freeze in the *Pending Proceedings*. Alternatively, the Board could moot the need to decide WCTL's Petition by making an internal decision to terminate the freeze, a decision the Board could announce in a supplemental pending proceeding report to Congress.

BACKGROUND

A. The STB Reauthorization Act

The STB Reauthorization Act responded to stakeholder concerns about the STB's administration of its statutory authority over rail rates and rail practices. Several of its provisions are particularly pertinent here.

First, shippers expressed concerns about what the now-Acting STB Chairman aptly characterized as the "sometimes glacial pace" at which the STB processed major regulatory proceedings.⁴ Similarly, Senate Commerce, Science, and Transportation Committee Chairman Thune observed that "[o]versight efforts have

⁴ Field Hearing Before the Senate Commerce, Science and Transportation 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>.

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.”⁵

Congress addressed these concerns in the Act by, among other things, requiring the STB to provide quarterly reports to the Senate Committee on Commerce, Science, and Transportation 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 STB Reauthorization Act, Chairman Thune requested that the STB include in its § 15(b) quarterly pending proceeding reports “specific target dates for future actions, including completion.”⁶ 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.”⁷

Similarly, then-Board Vice Chairman Deb Miller observed that Congress’ “vision to create a [quarterly pending case] reporting requirement was extremely

⁵ 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>.

⁶ Letter from 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>.

⁷ Field Hearing, Statement of Hon. Ann D. Begeman at 3.

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.”⁸

Second, stakeholders expressed concerns that federal sunshine laws prohibited a quorum of the STB (then, any two members of the three-member Board) from discussing pending matters with each other except in public meetings. Congress responded by enacting Sections 4 and 5 of the Act. Section 4 “expand[ed] membership of the STB from three members to five in order to address inefficient quorum requirements,”⁹ and Section 5 “allow[s] for limited instances in which a majority of Board members can communicate without requiring a full public meeting.”¹⁰ Section 5 “appl[ies] for any number of STB board members, with or without the expansion to five members.”¹¹

Third, Congress expressly retained a provision in prior law stating that “[a] vacancy in the membership of the Board does not impair the right of the remaining members to exercise all of the powers of the Board.”¹² Retention of this provision was

⁸ 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.

⁹ *Surface Transportation Board Reauthorization Act of 2015, Report of the Comm. on Commerce, Science, and Transp. on S. 808*, S. Rep. No. 114-52 at 11 (May 21, 2015) (“Senate Commerce Committee Report”).

¹⁰ *Id.*

¹¹ *Id.*

¹² 49 U.S.C. § 1301(b)(6) (previously codified at 49 U.S.C. § 701(b)(7)).

quite important because, at the time the Act was passed, the STB had only three members.

B. The *Pending Proceedings*: Pre-Freeze

The *Pending Proceedings* all involve issues of great consequence to rail shippers and are ones where the STB has indicated it might take actions to address the inherent unfairness to shippers embodied in some of the Board’s current rules and decisions. The *Pending Proceedings* were also among those longstanding STB proceedings stuck in what Commissioner Miller aptly characterized as “regulatory limbo” prior to enactment of the STB Reauthorization Act.

Congress’s enactment of the new quarterly pending proceeding report requirement initially appeared to incent the STB to advance these long-delayed proceedings, until the freeze took effect. The pre-freeze status of the *Pending Proceedings* is outlined below:

- *Rail Fuel Surcharges*. The Board served an advance notice of proposed rulemaking (“ANPRM”) in this proceeding on May 19, 2014.¹³ In its notice, the Board asked for public comment on whether the Board should modify its current fuel surcharge rules to preclude carriers from exploiting loopholes in the rules that allow rail carriers to collect fuel surcharge payments from their customers that substantially exceed the carriers’ actual incremental fuel cost increases.¹⁴

¹³ *Rail Fuel Surcharges* (STB served May 29, 2014).

¹⁴ *Id.*, slip op. at 2-3 (observing that the Board’s current “safe harbor” fuel surcharge rules, as interpreted by the Board, permitted one carrier to collect fuel

The Board requested interested parties to file comments in response to its ANPRM. WCTL, and numerous other shippers, filed comments asking the Board to take responsive actions that would preclude carriers from continuing to use their fuel surcharges as profit centers.¹⁵ The comment period closed on October 15, 2014.

Following the close of the record, the *Rail Fuel Surcharges* proceeding went into “regulatory limbo,” with no follow-up action on the Board’s part. However, following passage of the Act, the STB stated in one of its last pre-freeze quarterly reports that it intended to take responsive action in *Rail Fuel Surcharges* in January, 2017.¹⁶

- *Railroad Revenue Adequacy*. The Board served a notice in this proceeding on April 2, 2014 asking for public comment on, among other issues, how the Board should apply its revenue adequacy constraint in maximum rate cases.¹⁷ This issue has taken on great importance in recent years as all large railroads are “revenue adequate”

surcharge revenues that exceeded the carrier’s actual incremental fuel costs by “\$181 million” and asking for public comment on whether these rules “should be modified or removed”).

¹⁵ See, e.g., *Rail Fuel Surcharges*, Comments of the Western Coal Traffic League *et al.* (August 4, 2014); *id.*, Reply Comments of the Western Coal Traffic League *et al.* (Oct. 15, 2014).

¹⁶ See *Report on Pending STB Regulatory Proceedings – October 3, 2016* at 5 (“*STB Oct. 2016 Pending Proceedings Report*”), available at <https://www.stb.gov/stb/docs/Reauthorization/Quarterly%20Reports/Report%20on%20Unfinished%20STB%20Regulatory%20Proceedings%2C%20Third%20Quarter%2C%20October%203%2C%202016.pdf>.

¹⁷ See *Railroad Revenue Adequacy*, slip op. at 4 (STB served April 2, 2014) (“The Board has not yet had the opportunity to address how the revenue adequacy constraint would work in practice in large rail rate cases.”).

under any rational measure of carrier revenue adequacy.¹⁸ WCTL, and other shippers, filed extensive opening and reply comments in this proceeding (on September 5, 2014 and November 4, 2014), and actively participated in the Board’s two-day hearing on July 22 and July 23, 2015.

Like the *Rail Fuel Surcharges* proceeding, the *Railroad Revenue Adequacy* proceeding went into “regulatory limbo” following the July 22-23, 2015 hearing. But, as with the *Rail Fuel Surcharges* proceeding, the Act appeared to spur the STB into action. The STB stated in one of its last pre-freeze quarterly pending proceeding reports that it planned on issuing a responsive decision in *Railroad Revenue Adequacy* in June, 2017.¹⁹

- *InterVISTAS Study.* Over the past two decades, many shippers have expressed concerns to the STB, and to Congress, that they cannot obtain any meaningful rate relief under the Board’s current maximum rate reasonableness standards. Congress responded to these concerns in the Act by directing the STB to submit a report to Congress addressing the development of alternative maximum rate standards.²⁰ The STB retained a contractor – InterVISTAS Consulting Inc. (“InterVISTAS”) – to prepare the responsive report.

¹⁸ See, e.g., *Railroad Revenue Adequacy*, Joint Opening Comments of the Western Coal Traffic League *et al.* at 2 (Sept 5, 2014); *id.*, Statement of Senator John D. Rockefeller, IV, Chairman, Senate Committee on Commerce, Science and Transportation at 1-3 (Sept. 5, 2014).

¹⁹ *STB Oct. 2016 Pending Proceedings Report* at 13.

²⁰ Act, § 15(a).

The STB publicly released the InterVISTAS Report in September, 2016.²¹

The Board subsequently initiated the *InterVISTAS Study* proceeding in a notice served on October 12, 2016.²² In that notice, the Board stated that it planned on holding an invited-expert-only round-table discussion on the InterVISTAS Report,²³ and did so on October 25, 2016. Separately, the Board stated that it planned on holding a public hearing in *InterVISTAS Study* in April 2017,²⁴ a hearing the Board had previously emphasized would allow “all stakeholders and interested parties to participate in this important discourse.”²⁵

Following the release of the InterVISTAS Report, WCTL filed a request in the *InterVISTAS Study* proceeding on October 19, 2016 asking the Board to provide specified InterVISTAS Report workpapers and supporting data.²⁶ As WCTL explained in its request, release of these workpapers and data would facilitate WCTL’s review of

²¹ See InterVISTAS, *An Examination of the STB’s Approach to Freight Rail Rate Regulation and Options for Simplification* (Sept. 14, 2016) (“InterVISTAS Report”), available at <https://www.stb.gov/stb/docs/IndependentStudy/Final/STB%20Rate%20Regulation%20Final%20Report.pdf>.

²² *InterVISTAS Study* (STB served Oct. 12, 2016).

²³ *Id.*, slip op. at 1.

²⁴ STB Status Letter to U.S. Senate Committee on Commerce, Science, and Transportation at 2 (Jan. 3, 2017) (“STB Jan. 2017 Status Letter”), available at <https://www.stb.gov/stb/docs/Reauthorization/Monthly%20Implementation%20Reports/STB%20Status%20Letter%20to%20U.S.%20Senate%20Committee%20on%20Commerce,%20Science%20and%20Transportation,%20January%203,%202017.pdf>.

²⁵ *InterVISTAS Study*, slip op. at 2 (STB served Oct. 12, 2016).

²⁶ See *InterVISTAS Study*, Letter from WCTL Counsel to STB (Oct. 19, 2016).

several of the technical analyses set forth in the InterVISTAS Report.²⁷ The Board did not respond to this request prior to imposing its regulatory freeze.

- *Reciprocal Switching*. The Board’s current reciprocal switching rules effectively preclude shippers from obtaining any reciprocal switching relief.²⁸ On July 7, 2011, a shipper trade association filed a petition asking the Board to modify its rules to permit shippers to obtain reciprocal switching relief in the manner Congress intended.²⁹ In a decision and notice of proposed rulemaking (“NPRM”) served on July 27, 2016, the Board granted the association’s petition in part and proposed new reciprocal switching rules.³⁰

Numerous shippers, including WCTL, filed responsive written comments addressing the Board’s proposed new rules.³¹ The NPRM written comment period closed on January 13, 2017. The Board’s last pre-freeze procedural schedule in *Reciprocal Switching* also permitted parties to meet with STB members, and their staffs, on an ex parte basis, between January 30 and February 17, 2017.³²

²⁷ *Id.* at 1-2.

²⁸ *See Reciprocal Switching*, slip op. at 8 (STB served July 27, 2016) (STB’s reciprocal switching rules have “proven, over time, to set an unrealistically high bar for shippers to obtain reciprocal switching”).

²⁹ *Id.*, slip op. at 2.

³⁰ *Id.*, slip op. at 1.

³¹ *See, e.g.*, Joint Comments of Western Coal Traffic League and Minnesota Power (Oct. 26, 2016); Joint Reply Comments of Western Coal Traffic League and Minnesota Power (Jan. 13, 2017).

³² *Reciprocal Switching*, slip op. at 2 (STB served Sept. 1, 2016).

The pre-freeze status of the *Pending Proceedings* is summarized in the following chart:

| Proceeding | Pre-Freeze Status |
|----------------------------------|---|
| <i>Rail Fuel Surcharges</i> | ANPRM served May 29, 2014; comment period closed Oct. 15, 2014; Board decision due Jan. 2017. |
| <i>Railroad Revenue Adequacy</i> | Notice served April 2, 2014; record period closed July 23, 2015; Board decision due June 2017. |
| <i>InterVISTAS Study</i> | Notice served Oct. 12, 2016; public hearings in April 2017; WCTL workpaper request pending. |
| <i>Reciprocal Switching</i> | Petition filed July 7, 2011; NPRM served July 27, 2016; NPRM comment period closed Jan. 13, 2017; ex parte meeting period closes Feb. 17, 2017. |

C. The Regulatory Freeze

Following the Presidential election in November 2016, the Board appears to have made a decision (or decisions) to freeze further action in the *Pending Proceedings* until such time as the Board has a “full complement” of Board members. The Board publicly announced these actions in a series of quarterly reports (and one decision), roughly issued in the following order:

- December 27, 2016. The Board extends the deadline for completion of ex parte meetings in *Reciprocal Switching* from February 17, 2017 to a date to be “established in a future Board order.”³³ The Board states it is taking this action because

³³ *Reciprocal Switching*, slip op. at 1 (STB served Dec. 27, 2016).

“the Board is in a time of transition, with potential changes to the Board’s membership due to the changeover in the administration.”³⁴

- January 3, 2017. The Board changes the next action date in *Rail Fuel Surcharges* from January, 2017 to an unspecified “to be determined” (“TBD”) date.³⁵ The Board states that it is taking this action because “the Board is in a time of transition, with potential changes to the Board’s membership due to the changeover in administration.”³⁶ The Board also states that “once we are farther along in our transition efforts, we will be able to provide target dates once again.”³⁷

- April 3, 2017. The Board changes the next action date in *Railroad Revenue Adequacy* from June, 2017 to an unspecified “TBD” date.³⁸ The Board states that it is doing so “[b]ecause the Board remains in a period of transition.”³⁹ The

³⁴ *Id.*

³⁵ See *Report on Pending STB Regulatory Proceedings – January 3, 2017* at 3 (“*STB Jan. 2017 Pending Proceedings Report*”), available at <https://www.stb.gov/stb/docs/Reauthorization/Quarterly%20Reports/Report%20on%20Unfinished%20Regulatory%20Proceedings,%20Fourth%20Quarter,%20January%203,%202017.pdf>.

³⁶ *Id.*

³⁷ STB Jan. 2017 Status Letter at 2.

³⁸ *Report on Pending STB Regulatory Proceedings – April 3, 2017* at 7 (“*STB April 2017 Pending Proceedings Report*”), available at <https://www.stb.gov/stb/docs/Reauthorization/Quarterly%20Reports/Report%20on%20Unfinished%20Regulatory%20Proceedings,%20First%20Quarter,%20April%203,%202017.pdf>.

³⁹ STB Status Letter to U.S. Senate Committee on Commerce, Science and Transportation at 2 (April 3, 2017) (“*STB April 2017 Status Letter*”), 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>.

Board also changes the public hearing date in the *InterVISTAS Study* proceeding from April, 2017 to an unspecified later date to be set after the Board has “a full complement of Members.”⁴⁰

- July 3, 2017. The Board states that “[w]hile it remains appropriate for the Board’s larger regulatory proceedings to be considered by a full complement of members before taking major action (the Board is currently comprised of two Democrats and one Republican, and there are two vacancies), stakeholders and members are nevertheless continuing to hold ex parte meetings [in *Reciprocal Switching*].”⁴¹

The impact of the Board’s regulatory freeze order is illustrated in the chart below:

| Proceeding | Pre-Freeze Status |
|----------------------------------|---|
| <i>Rail Fuel Surcharges</i> | ANPRM served May 29, 2014; comment period closed Oct. 15, 2014; Board decision due Jan. 2017. ANPR served May 29, 2014; comment period closed Oct. 15, 2014; Board decision due Jan. 2017. |
| <i>Railroad Revenue Adequacy</i> | Notice served April 2, 2014 record period closed July 23, 2015; Board decision due June 2017. |
| <i>InterVISTAS Study</i> | Notice served Oct. 12, 2016; public hearings in April 2017 ; WCTL Oct. 19, 2016 workpaper request pending. |
| <i>Reciprocal Switching</i> | Petition filed July 7, 2011; NPRM served July 27, 2016; comment period closed Jan. 13, 2017; ex parte meeting period closes Feb. 17, 2017. |

⁴⁰ *Id.* at 1.

⁴¹ STB July 2017 Status Letter at 2.

D. The Baldwin/Franken/Klobuchar Letter

Senators Baldwin, Franken, and Klobuchar wrote a joint letter to the Board dated July 31, 2017. In this letter, the three Senators informed the Board that the Board's regulatory freeze undermines Congressional directives to expedite, not delay, the Board's consideration of the *Pending Proceedings*, and they strongly urged the Board to end the freeze immediately:

The delays initiated by the Board [in the *Pending Proceedings*] . . . are uncalled for and inconsistent with Congress's intent to eliminate unnecessary delays and increased costs to consumers through the [STB Reauthorization Act]. That bipartisan legislation acknowledged wasteful and unnecessary delays at the STB harm rail shippers, freight operators and consumers who pay higher costs. For those reasons, the reauthorization included a number of provisions that both encouraged and directed the STB to expedite proceedings.

. . . . [W]e remain concerned these delays are holding up much needed reforms of great importance to freight rail shippers. Delaying action on these reforms are not in the best interest of shippers in manufacturing, agriculture, energy and other industries that have dedicated time and resources to participate in these proceedings, and they are not in the best interest of consumers.

The Administration has not yet nominated individuals to serve as Members on the STB. In the interim, we encourage the STB to provide a timely and decisive regulatory process and urge you to return [the *Pending Proceedings*] – many of which already have been pending for years – to the docket for active consideration by the Board.

Baldwin/Franken/Klobuchar Letter at 1.

ARGUMENT

WCTL respectfully requests that the Board end its regulatory freeze in the *Pending Proceedings* because (1) the freeze is unfair to rail shippers; (2) the freeze undermines Congressional directives in the STB Reauthorization Act; (3) the freeze is not an appropriate action for an independent agency; and (4) the freeze has gone on now for nine months, with no end in sight.

The Board can end its freeze either by granting WCTL's Petition or by taking other appropriate administrative action, for example, by sending Congress a supplemental pending proceedings report that includes new, timely next-action dates in the *Pending Proceedings*.

I. THE FREEZE IS UNFAIR TO RAIL SHIPPERS

The Board should end the freeze because it is unfair to rail shippers. The proceedings subject to the freeze are all ones where the Board has given some indications that it may change its current rules to provide a fairer regulatory balance for rail shippers.

In *Rail Fuel Surcharges*, the Board is addressing whether to end abusive carrier fuel surcharge practices; in *Railroad Revenue Adequacy*, the Board is addressing how to implement its revenue adequacy constraint; in *InterVISTAS Study*, the Board is seeking shipper input on how to improve its maximum rate reasonable standards; and in *Reciprocal Switching*, the Board is considering changes to its current reciprocal switching rules to make the remedy actually work in the manner Congress intended.

The *Pending Proceedings* are also among the oldest on the STB docket. *Reciprocal Switching* dates back to 2011; *Rail Fuel Surcharges* was instituted in

2014 (and remains in the ANPRM stage); *Railroad Revenue Adequacy* was also instituted in 2014 (and remains in a pre-notice hearing stage); and *InterVISTAS Study* addresses decades-old complaints by many shippers directed at the unavailability to them of any meaningful maximum rate remedies at the STB.

In effect, the Board has decided to freeze the proceedings of most importance to rail shippers, and the ones that are already far behind schedule. These delays, as Senators Baldwin, Franken, and Klobuchar correctly emphasize, “hold[] up much needed reforms of great importance to freight rail shippers,”⁴² an outcome that “harm[s] rail shippers . . . and consumers who pay higher costs.”⁴³ The Board should expedite, not further delay, its consideration of the *Pending Proceedings*.

II. THE FREEZE UNDERMINES CONGRESSIONAL DIRECTIVES

The STB Reauthorization Act directed the STB to speed-up, not slow-down, its consideration of important regulatory proceedings, by, among other things, requiring the Board to provide quarterly progress reports on pending rulemaking proceedings.

Prior to implementing the freeze, the Board itself extolled the virtue of these reports, as they incited the Board to advance long-delayed proceedings, many of which had been stuck in “regulatory limbo” for years.⁴⁴ Indeed, following the enactment

⁴² Baldwin/Franken/Klobuchar Letter at 1.

⁴³ *Id.*

⁴⁴ *See* Field Hearing, Testimony of Hon. Deb Miller at 3; *id.*, Statement of Hon. Ann D. Begeman at 3.

of the STB Reauthorization Act, and prior to the freeze, the quarterly reporting requirement had its intended effect in the *Pending Proceedings*.

In its pre-freeze quarterly pending proceeding reports, the Board set specific decision dates for action in the long-delayed *Rail Fuel Surcharges* and *Railroad Revenue Adequacy* proceedings.⁴⁵ The Board also jump-started the moribund *Reciprocal Switching* proceeding by issuing proposed new rules⁴⁶ and set a hearing date for public comment in the *InterVISTAS Study* proceeding.⁴⁷

Unfortunately, all of the Board's positive efforts to move the *Pending Proceedings* along were undercut by the freeze. The freeze substitutes unnecessary regulatory delay – which the STB Reauthorization Act sought to eliminate – for timely regulatory action – which the STB Reauthorization Act sought to promote. The freeze is, as Senators Baldwin, Franken, and Klobuchar have informed the Board, “uncalled for and inconsistent with Congress's intent to eliminate unnecessary delays and increased costs to consumers.”⁴⁸

The Board relies on the STB Reauthorization Act as the basis for the freeze, specifically citing the Act's authorization of the increase in the number of Board Members from three to five as its justification for its freeze. The Board's position simply finds no support in the text or legislative history of the Act.

⁴⁵ See, e.g., *STB Oct. 2016 Pending Proceedings Report* at 5 (*Rail Fuel Surcharges*); *id.* at 13 (*Railroad Revenue Adequacy*).

⁴⁶ *Reciprocal Switching* (STB served July 27, 2016).

⁴⁷ STB Jan. 2017 Status Letter at 2.

⁴⁸ Baldwin/Franken/Klobuchar Letter at 1.

In the STB Reauthorization Act, Congress retained the text of the provision in prior law that authorizes the STB to decide all cases without a “full complement” of Board members. *See* 49 U.S.C. § 1301(b)(6) (“A vacancy in the membership of the Board does not impair the right of the remaining members to exercise all of the powers of the Board”). Had Congress wanted to require the Board to refrain from advancing the *Pending Proceedings* until it had a “full complement” of Board members, it could have changed the law to direct this result. It obviously chose not to do so.⁴⁹

In addition, the legislative history of the STB Reauthorization Act clearly states that Congress decided to increase the size of the Board from three members to five members “to address inefficient quorum requirements” that applied to the three member Board.⁵⁰ There is nothing in legislative history of the Act that even remotely supports using the Congressional authorization of a five member Board as a basis to freeze ongoing STB proceedings.

The Board has in effect taken provisions in the Act designed to benefit shippers – the directives to speed-up case processing and the authorization to increase the Board to five members – and combined them to hurt shippers by delaying the Board’s prompt resolution of the *Pending Proceedings*. The Board’s freeze directly undermines the STB Reauthorization Act.

⁴⁹ Congress also did not change the national rail transportation policy that calls upon the Board “to provide for the expeditious handling and resolution of *all proceedings* required or permitted to be brought [before the Board].” 49 U.S.C. § 10101(15) (emphasis added).

⁵⁰ Senate Commerce Committee Report at 11.

III. THE FREEZE IS NOT AN APPROPRIATE INDEPENDENT AGENCY ACTION

The STB is an independent agency. The hallmark of an independent agency is to implement Congressional directives in an even-handed, non-partisan manner.⁵¹ Among other things, “resolution [of railroad issues] by an independent agency is more likely to result in a consistent approach from one administration to the next, fostering long-term transportation stability.”⁵²

Recently, the Board drew specific attention to the party affiliation of the current Board members as supporting the need to freeze the *Pending Proceedings* until the Board has a “full complement” of members:

it remains appropriate for the Board’s larger regulatory proceedings to be considered by a full complement of members before taking major action (*the Board is currently comprised of two Democrats and one Republican, and there are two vacancies*)⁵³

Significantly, prior to the 2016 Presidential election, the Board did not take the position that the *Pending Proceedings* had to be frozen because the STB lacked “a

⁵¹ See, e.g., *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 625 (1935) (independent agencies “should not be open to suspicion of partisan direction”); *A. Kush & Assocs., LTD – Pet. For Decl. Order*, ICC Docket No. 40623, 1992 WL 6511 at *6 (ICC decided Jan. 3, 1992) (“The Commission is responsible for administering the Interstate Commerce Act and related statutes. As an independent agency, neither part of the executive nor legislative branches, the Commission is expected to undertake its duties objectively. Commissioners are charged with implementing the statutes enacted by Congress, without regard to personal philosophies.”).

⁵² Interstate Commerce Commission, *Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 210(A) of the Trucking Industry Regulation Reform Act of 1994*, 1994 WL 639996 at *76 (Oct. 25, 1994).

⁵³ STB July 2017 Status Letter at 2 (emphasis added).

full complement” of five members, even though the Board only had three members at that time – two Democrats and one Republican. Instead, the Board proceeded ahead in the *Pending Proceedings* as a three member Board.

Thus, the Board’s post-election freeze does not appear to be based on concerns that the Board needs a “full complement” of five members *per se*. If that had been the case, the Board would have implemented the freeze immediately after the STB Reauthorization Act was enacted since the Board lacked a “full complement” of five members at that time.

Instead, the Board’s current “full complement” concerns appear to be directed at an interest in filling-out the Board with two Trump Administration nominees (which if they are Republicans would result in a Board comprised of three Republicans and two Democrats). Certainly, the President has the prerogative of appointing two new Board Members (subject to Senate confirmation), but those political choices, and their timing, rest with the President and the Senate, not with the independent-agency Board. Nor should these partisan political matters influence how the non-partisan Board processes and decides pending proceedings.

WCTL does not know if or when the President will nominate two new STB Board members, or what party affiliation the nominees will have, or if, or when, the Senate will confirm the President’s selections. In the interim, WCTL respectfully submits that the Board’s duty, as an independent agency, is to advance its docket in a non-partisan manner by ending the regulatory freeze in the *Pending Proceedings* immediately.

IV. THERE IS NO END IN SIGHT FOR THE FREEZE

Even if the Board believes it was reasonable to initiate the freeze, the Board can and should reconsider the freeze in light of changed circumstances – specifically the failure of the President to appoint, and the Senate to confirm, two new Board members in a timely manner.

The freeze is now in its ninth month, and there is no end in sight to it because the President has not yet nominated any candidates to fill the two open Board member seats and, as has been widely reported in the press, Senate confirmation of the President’s nominees has been very slow.⁵⁴

The Board has given the President, and the Senate, a reasonable amount of time to fill-out the Board with a “full complement” of Board members. The *Pending Proceedings* should not continue to be the prisoner of the on-going political delay in nominating and confirming two new Board members. The time has come for the Board to end the freeze and to re-active its consideration of the *Pending Proceedings* in the timely manner Congress intended.

V. THE BOARD SHOULD TERMINATE THE FREEZE IMMEDIATELY

The Board’s freeze is in a unique administrative posture. The freeze impacts the *Pending Proceedings*, but the Board has entered no orders in those

⁵⁴ See, e.g., Carl Hulse, *Democrats Perfect Art of Delay While Republicans Fume Over Trump Nominees*, N.Y. Times, July 17, 2017 (“Republicans calculate that at the current rate, it will take 11 years and four months to fill all possible Trump Administration spots”), available at <https://www.nytimes.com/2017/07/17/us/politics/senate-democrats-art-of-delay-trump-nominees.html>.

proceedings adopting the freeze. Nor has the Board formally issued a policy statement adopting the freeze. Instead, the Board has chosen to inform the public of the freeze in its quarterly pending proceeding reports and letters to Congress.

One way for the Board to end the freeze is to issue an order granting WCTL's Petition. That order could simply state that upon consideration of WCTL's Petition, the Board has decided to lift the freeze and advance its consideration of the *Pending Proceedings* in a timely manner.

Alternatively, the Board could moot the need to decide this Petition by submitting a supplemental pending proceeding report to Congress that states the Board has decided to return each of the *Pending Proceedings* to its active docket, and provide specific new dates for next actions in each proceeding. There may be other internal approaches available to the Board, as well. The important thing is that the Board terminate the freeze, and do so immediately.

CONCLUSION

For the reasons set forth above, WCTL respectfully requests that the Board terminate its regulatory freeze in the *Pending Proceedings*.

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