

SERVICE DATE – MAY 13, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 665

RAIL TRANSPORTATION OF GRAIN

Decided: May 12, 2008

On November 2, 2006, the Board held a hearing in this proceeding as a forum for interested persons to provide views and information about grain transportation markets. This hearing was prompted by concerns regarding rates and service issues related to the movement of grain raised by Members of Congress, grain producers and other stakeholders and a June 21, 2006, United States Government Accountability Office (GAO) preliminary report, *Freight Railroads: Preliminary Observations on Rates, Competition, and Capacity Issues*. GAO issued a final report on October 6, 2006, *Freight Railroads: Industry Health Has Improved, but Concerns about Competition and Capacity Should Be Addressed* (GAO report).¹ In a decision served on January 14, 2008, the Board discussed the steps taken as a result of the information gathered at the hearing and discontinued the proceeding (January decision).

By a petition filed on January 24, 2008, Mr. Stephen J. Thompson (Mr. Thompson) filed a petition for reconsideration of the January 14 decision. Mr. Thompson argues that it was material error for the Board to issue its decision without discussing the three pleadings he filed in this proceeding.

BACKGROUND

As noted in the January decision, the purpose of this proceeding was to explore in depth the many concerns that have been raised regarding rates and service issues by gathering information on the movement of grain by rail from different perspectives: shippers, carriers and other interests. The decision noted that the GAO report's findings — that grain rates have diverged from the industry trend toward lower rates and that the amount of grain rates with relatively high R/VC ratios has increased markedly — are troubling because it is the producer, not the ultimate consumer, that bears that cost (at least initially). Consequently, we took steps that address some of the pertinent issues identified by GAO and by the parties in this proceeding.

¹ On August 15, 2007, GAO issued a follow-up report that updated its findings with 2005 data and found that “[d]ata for 2005 confirm the trends and findings we reported and support the recommendations we made in October 2006.” *Freight Railroads: Updated Information on Rates and Competition Issues* at 9.

The decision noted that, in September 2007, the Board completed an extensive rulemaking proceeding in Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1) (STB served Sept. 5, 2007) that overhauled the rate complaint process for those disputes where the potential relief does not justify litigating a full stand-alone cost case. That decision makes the rate reasonableness process available to shippers regardless of the size of the dispute. The Board also awarded a contract to Christensen Associates to conduct an independent study that will assess the current state of competition in the freight railroad industry in the United States. The study will focus on providing a comprehensive analysis of a wide range of issues relevant to grain transportation including competition, capacity, and the interplay between the two. The study will also include an examination of various regulatory policy alternatives and could lead to changes in our regulatory approach if appropriate.

Mr. Thompson filed three rounds of wide-ranging comments in this proceeding. In his opening comments, Mr. Thompson noted that a witness from GAO at the November 2 hearing recommended a study of conditions in the rail industry that would refine the finding of the recently concluded GAO study. He also called for increased competition in the rail industry and noted that Canadian law allows customers who are located within 18 miles of a second rail carrier to have access to the service of the second rail carrier. Mr. Thompson also suggested that the Board may consider asking Congress to allow a rail carrier, in his words, “to have a fresh economic relationship with its employees (including work rules and compensation).”

Mr. Thompson’s reply comments cautioned about use of a Federal Railroad Administration study, *Railroad Cost Conditions—Implications for Policy* (June 2000). He suggests that the Board consider the rail industry from the perspective of a government regulated cartel, rather than a monopoly. With regard to cost and revenue measurement, Mr. Thompson suggested that the Board consider engineering studies and cost accounting methods. Finally, he suggested that, although the Board does not have authority over the Railroad Retirement program or the Federal Employers Liability Act (FELA), the Board should nevertheless suggest to Congress that railroad employees be permitted to opt out of these programs.

Mr. Thompson’s third pleading called on the Board to make greater use of the exemption power of 49 U.S.C. 10502, the authority to order a crossing of a rail line by another carrier under 49 U.S.C. 10901(d), and the terminal access provision of 49 U.S.C. 11102. He also suggested that, to enhance competition, the Board could consider setting aside some agreements between Class I carriers and shortlines that include so-called “paper barriers.” Finally, Mr. Thompson suggested that the agency should seek authority from Congress to allow rail carriers to conduct their labor relations under the National Labor Relations Act rather than the Railway Labor Act (RLA).

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 722(c) and 49 CFR 1115.3, a petition for reconsideration will be granted only upon a showing that the prior decision will be affected materially because of new evidence or changed circumstances, or involved material error. For the reasons discussed below, the petition will be denied.

A regulatory agency is not required to catalogue and address every argument it receives and comment on them, but rather must consider the record as a whole. Thompson v. Clark, 741 F.2d 401, 408 (D.C. Cir. 1984). An agency must state the main reasons for its decision and indicate that it has considered significant objections or comments. See, e.g., Home Box Office v. FCC, 567 F.2d 9, 36 (D.C. Cir. 1977) (comments requiring agency response are those that raise relevant issues and would require a change in the agency's decision if adopted).

Mr. Thompson's comments were examined in the context of the broader record and were considered in formulating our decision. Many of his overarching comments, such as the desire for increased rail competition, were similar to the concerns expressed by grain shippers and were discussed by the Board in that context. Other suggestions, such as the recommendation of a competitive study, were addressed by the Board in the discussion of our recent activities regarding competition in the rail industry. Other recommendations were addressed to some degree in other proceedings, such as our consideration of paper barriers in Review of Rail Access and Competition Issues—Renewed Petition of the Western Coal Traffic League, STB Ex Parte No. 575 et al. (STB served Oct. 30, 2007). By his own admission, many of the comments Mr. Thompson provided (especially those concerning railroad retirement, FELA, and RLA) ranged beyond the scope of this proceeding and even beyond the jurisdiction of this agency.

Under these circumstances, and given the limited scope of the proceeding, the fact that the January decision did not explicitly address Mr. Thompson's comments was not a material error. The proceeding was intended to provide a forum for ideas and concerns about grain transportation. The Board discussed the general views of the commenters and described its own actions to address some of the concerns. While we appreciate the effort behind and the thoughtfulness of the comments, no specific discussion of Mr. Thompson's comments was required. Therefore, the petition for reconsideration will be denied.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for reconsideration is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary