

Surface Transportation Board Update



By Thomas Wilcox,
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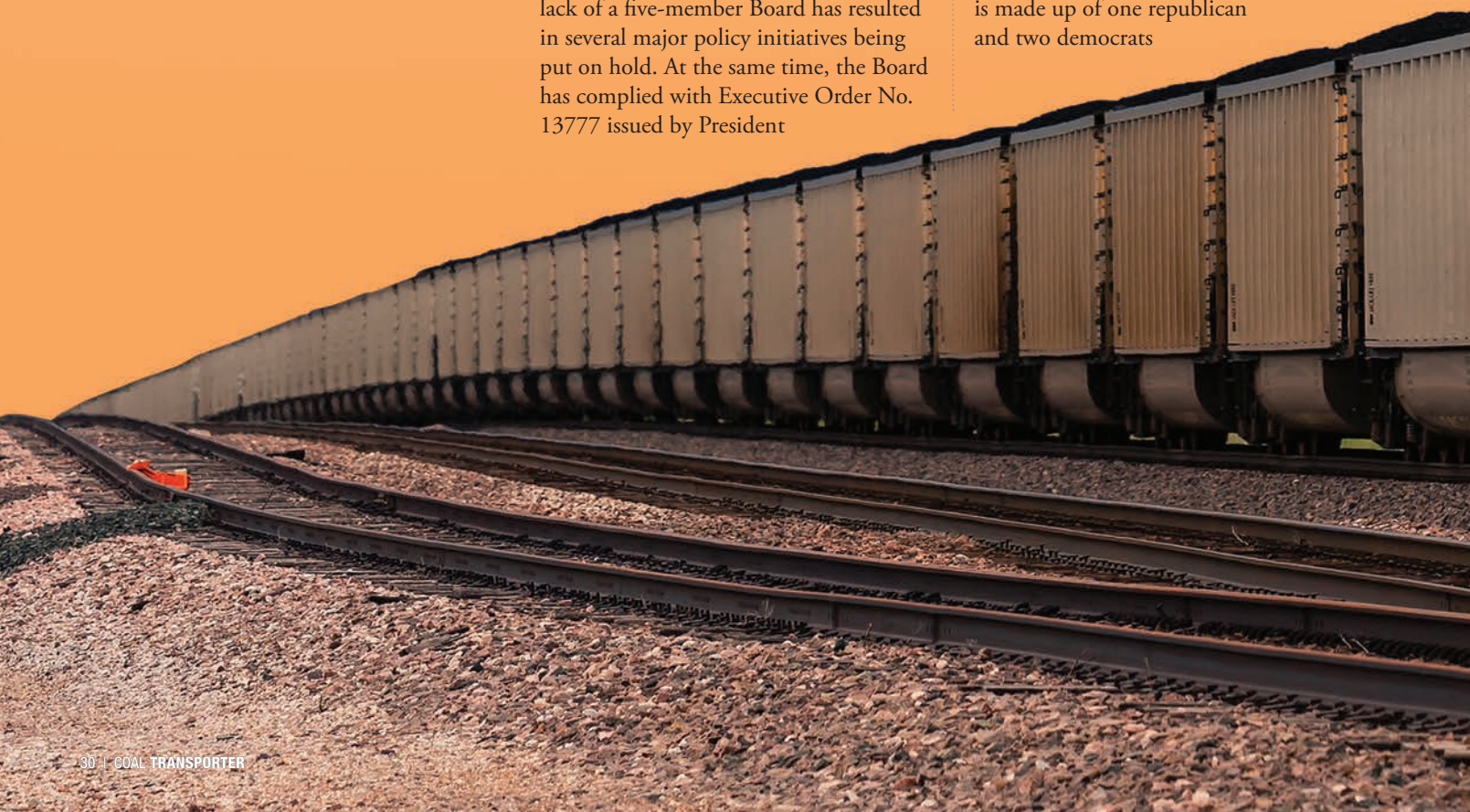
The Surface Transportation Board, like many federal agencies in Washington, D.C. in 2017, has functioned at a less-than-optimal level through the first half of the year due to the slow pace by which high level appointments are being made by the Trump Administration and confirmed by the Senate. Prior to August 3, 2017, the Senate had received 242 nominations but confirmed only 50. On that date, coinciding with the collapse of the Senate's consideration of reforming the Affordable Care

Act, the Senate approved 66 nominees. In the STB's case, there are two vacancies due to Section 4 of the Surface Transportation Board Reauthorization Act of 2015 (P.L. 114-110), which expanded the Board from three members to five. For now, all three of the Board members in place when Donald Trump became president remain on the Board, and the only republican - Ann Begeman - was named Acting Chairman by the President soon after he took office. The lack of a five-member Board has resulted in several major policy initiatives being put on hold. At the same time, the Board has complied with Executive Order No. 13777 issued by President

Trump on February 24, 2017. That EO directed all federal agencies to establish a Regulatory Reform Task Force (RRTF) charged with recommending regulations for repeal, replacement, or modification on a somewhat aggressive timetable.

Major STB Policy Initiatives Put on Hold

Historically, the selection and appointment of new Board members has not enjoyed the priority and attention that other agencies have garnered. Fortunately, the Board does not require its full statutory compliment to function, and indeed it briefly consisted of a single Board member between 2003 and 2004. It is therefore not uncommon for vacancies to remain unfilled for periods of time, but for the Board to nevertheless continue to function on both policy matters and individual adjudications. The Reauthorization Act's expansion of the Board to five members changed that dynamic, however. Currently, the Board is made up of one republican and two democrats



(former Chairman Daniel Elliott and Deb Miller). The appointment of two new republican members by the current administration will result in a republican majority. Also, none of the current members were chosen by President Trump to implement his administration's goals and policies regarding rail transportation regulation, whatever they are eventually revealed to be. The position of Chairman is also not settled, as Ms. Begeman is serving as Acting Chairman until the full five-member Board is in place.

In any event, the lack of a five-member Board after the 2016 Presidential election resulted in the agency putting on hold its active consideration and completion of several significant rule-makings and policy efforts that are relevant rail shippers of coal and other commodities. In the words of Acting Chairman Begeman in her July 3, 2017 quarterly status report letters to certain Congressional committees, "it remains appropriate for the Board's larger regulatory proceedings to

be considered by a full complement of members before taking major action." This decision was not strenuously objected to by shippers early in 2017 (railroad stakeholders advocated for the delay in any action on pending policy matters until all five members are seated) due to a general belief/hope that the two STB vacancies would be filled within the first six months of the year. However, the extremely slow pace of filling presidential appointments generally, and the fact that the current administration has made no moves to fill the two STB vacancies well into 2017, resulted in some shipper groups recently voicing their concerns to Congress and the Administration over (1) the lack of any apparent effort to nominate new STB members; and (2) the STB's decision to continue to refrain from taking action in any large policy proceedings until all five members are seated.

At the current slow pace of confirming presidential appointments in general it may well be the end of 2017 before a full five member Board is seated. In any event, the major policy proceedings currently on hold include the following:

EP 711, Reciprocal Switching

This proceeding began in 2011 with a petition for rulemaking submitted to the STB by the National Industrial Transportation League. The official comment period on proposed new rules governing reciprocal switching closed on January 13, 2017, and an extremely voluminous record dating back to 2011 has been compiled. In the Board's original Notice of Proposed Rulemaking it also established dates by which interested parties could request ex parte meetings with Board members and staff to discuss the proposed rule, and the dates for such meetings to be held. On December 27, 2016, however,



the Director of the Office of Proceedings issued a decision that extended the dates for requesting and holding ex parte meetings due to the fact that “the Board is in a time of transition, with potential changes to the Board’s membership given the changeover in the administration.” Although ex parte meetings commenced on January 30, 2017, the December decision stated the Board would establish new deadlines concerning the closure of the ex parte meeting period “in a future Board order.” No such order has issued, however, and in the meantime numerous stakeholders have met with Board members and staff to discuss the proposed rules and the reciprocal switching issue in general. Summaries of the meetings are available on the Board’s website.

EP 722, Revenue Adequacy

The Board’s review of its procedures for determining railroad “revenue adequacy” and its rules for factoring the revenue adequate status of a Class I railroad into rail rate reasonableness

determinations remains a key policy area for coal shippers. This is because under the Staggers Rail Act of 1980, once a railroad becomes “revenue adequate” (very generally defined as its revenues exceed its cost of capital) there is arguably less need to permit the railroad to differentially price its services to its shippers that don’t have transportation alternatives, since a primary legislative purpose of enabling railroads to differentially price their rates was to help them become revenue adequate. Among other things, a determination that achieving revenue adequate status results in a limit on a railroad’s ability to raise rates would mean the Board’s existing Stand Alone Cost (SAC), Simplified Stand Alone Cost, and/or Three Benchmark Methodology rate testing methods could be replaced with a rate reasonableness standard based on the defendant’s revenue adequate status. For coal shippers, whose rail rate cases have almost exclusively utilized the SAC rate rules, such a standard might

permit rate reasonableness determinations to be made more quickly and at a cost that is significantly lower than pursuing a SAC case. However, Class I railroads and shippers have extremely divergent views on the meaning, timing and significance of a railroad achieving “revenue adequacy” and how (or even whether) this status affects rate reasonableness determinations. In any event, the administrative record closed in EP 722 on August 18, 2015, and there has been no further action in the proceeding since.

Rate Reasonableness Rules and Procedures

Over the past several years the Board has started several proceedings to review its rate reasonableness rules and procedures in response to rail shipper complaints that they are costly, time consuming, and in general not accessible to them to test the reasonableness of railroad rates. There has also been a vigorous ongoing debate



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between railroad and shipper stakeholders over the substantive standards applied by the Board, and whether they should be modified or in some cases scrapped altogether and replaced with new standards. Proceedings in which the Board has sought public input on its rate rules and procedures include the aforementioned EP, 722, Revenue Adequacy; EP 665 (Sub- No.1), Rail Transportation of Grain – Rate Regulatory Review; EP 665 (Sub-No.2) Expanding Access to Rate Relief, and EP 733, Expediting Rate Cases. The Board also commissioned a study of its rate reasonableness methodologies by InterVISTAS, a consulting firm that issued its final report in September, 2016, on which no further action has been taken. These proceedings and others have so far resulted in (1) a proposal by the Board to consider adopting changes to its substantive rate rules to facilitate undefined “very small” rate cases (EP 665 (Sub-No. 2)); and (2) numerous proposals to change STB procedures, discovery rules, and evidentiary rules

aimed at expediting and reducing the cost of rail rate cases. However, further debate and discussion of any substantive changes to rate reasonableness rules has also been placed on hold pending a full five-member Board.

The STB’s Regulatory Reform Task Force

Finally, on April 25, 2017 the STB named Rachel Campbell, Director of the Office of Proceedings, to be the STB’s “Regulatory Reform Officer” in response to the aforementioned Executive Order No. 13777. As stated above, that EO directed all agencies to establish a RRTF charged with recommending regulations for repeal, replacement, or modification, and for the task force to provide an initial report by May 25, 2017. The term “regulation” is construed broadly in the EO to include any “agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or

to describe the procedure or practice requirements of an agency.”

The appointment of Ms. Campbell was followed by lengthy letter submitted to the Board by the Association of American Railroads on May 18, 2017 identifying “several proposed regulations for withdrawal and existing regulations for repeal, replacement, or modification.” These include the following requests relevant to coal shippers: withdrawal of EP 711, Reciprocal Switching, formal rejection of the “revenue adequacy constraint” contained in Coal Rate Guidelines- Nationwide, the 1985 decision that provides the theoretical basis for the Board’s rules it applies in rate reasonableness cases, and which constraint is being considered in EP 722, Revenue Adequacy; and the rules recently adopted by the Board in EP 724 (Sub-No. 4), United States Rail Service Issues – Performance Data Reporting (served November 30, 2016).

On May 25, 2017, the Board’s RRTF submitted its initial status report in accordance with the EO, and

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announced the five other members of its RRTF1. It also identified several potential proposals for regulatory reform, including (1) revising and updating the Board's environmental rules; (2) updating its procedural and filing rules; and (3) reviewing comments in EP 712, Improving Regulation and Regulatory Review, a proceeding commenced in 2011 taking comments on proposed improvements to the Board's rules. The RRTF also expressed a keen interest in hearing the views of industry stakeholders, and the RRTF Members subsequently held a public "listening session" on July 25, 2017 in Washington, D.C. Seventeen parties provided written comments, and numerous stakeholders made oral presentations on the views expressed by the AAR in its May 18 letter, counter views of shipper stakeholders, and areas where both sides see room for improvement. In addition, shipper interests and Members of Congress have urged the Board to lift its current "freeze" on completing major policy initiatives and rule-makings, both in the "listening

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session" and in other correspondence to Board members.

In conclusion, the Board continues to process individual cases and adjudications, but it has also continued to place on hold its consideration of several major rule-makings and policy issues until a full five-member STB is in place. At the current slow pace of appointments and confirmations, however, this might not occur until the end of 2017. It remains to be seen whether further delay in rounding out the Board to five members will eventually prompt the Acting Chairman to alter this course, given that some of these important proceedings have been pending for several years. In the meantime, the Board has begun a review of its existing rules and procedures, and the

debate has already begun on whether some of the pending major policy initiatives and existing rules that are relevant to the railroad transportation of coal should be withdrawn or repealed, respectively. ▲

Thomas W. Wilcox is a principal of GKG Law, P.C., located in Washington, D.C. who has represented rail shippers of coal and other commodities for over 25 years on rail transportation matters. The views expressed in this article are those of the author.

¹The other five members of the STB's RRTF are: Cynthia Brown, Section Chief, Office of Proceedings; Danielle Gosselin, Attorney Advisor, Office of Environmental Analysis; Craig Keats, General Counsel, Office of General Counsel; Lucille Marvin, Director, Office of Governmental Affairs, Public Assistance, and Compliance; and Francis O'Connor, Section Chief, Office of Economics.



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