



**SOUTHWEST ASSOCIATION OF RAIL SHIPPERS
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Rail Regulatory Update

KARYN A. BOOTH
Karyn.Booth@ThompsonHine.com

PRESENTATION TOPICS

- STB Reauthorization Bill (S. 808)
- Positive Train Control
- STB EP 711: Competitive Switching Rules
- STB EP 722: Revenue Adequacy
- PHMSA Tank Car Rule

S. 808

**STB REAUTHORIZATION
BILL**

STB REAUTHORIZATION BILL

- S. 808: Bi-partisan bill introduced on March 19 by Sen. Commerce Committee Chairman Thune (R-ND) and Ranking Member Nelson (D-FL)
 - bill would reauthorize STB and reform its structure and operations; includes some modest regulatory changes
- Senate Commerce Committee completed a “mark-up” of S. 808 on March 25
- Senate passed the bill on June 18 under “Unanimous Consent”
- No companion legislation in the House

STB REAUTHORIZATION BILL

- Expands the Board from 3 to 5 members
- Removes STB from the auspices of DOT
- Allows Board members to engage in private discussions, subject to certain disclosure requirements
- Allows STB to initiate investigations of national or regional matters, subject to *de novo* review by the courts
- Requires the STB to submit routine reports on the status of pending cases
- Directs the STB to maintain a database of complaints and to publish quarterly summary reports

STB REAUTHORIZATION BILL

- **ARBITRATION**
- Directs the STB to establish a voluntary arbitration process for rate and practice complaints
 - all parties must agree to arbitrate
 - for rate proceedings, market dominance must be established first
 - Relief capped at \$2 million for practice disputes and \$25 million for rate disputes
 - Limited rights for STB review of arbitration decisions

STB REAUTHORIZATION BILL

- **RATE ISSUES**
- Specifies deadlines for adjudication of stand-alone cost (SAC) rate cases
- STB to report on effectiveness of large rate case standards
- Requires GAO to study of rate bundling by railroads in contracts

STB REAUTHORIZATION BILL

- **REVENUE ADEQUACY**: STB to consider infrastructure and investment needs to meet present and future rail service demands when establishing standards for railroad revenue adequacy
 - concern by shippers over possible introduction of replacement costs in revenue adequacy determinations
- **Senate Report**: “emphasizes infrastructure needs for present & future service demands” **BUT** “would not require changes to revenue adequacy determinations...”
- Allows RRs to argue for change and shippers to argue for status quo; **the STB will need to decide**

POSITIVE TRAIN CONTROL

POSITIVE TRAIN CONTROL

- In the Rail Safety Improvement Act of 2008, Congress mandated that Class I railroads install PTC by December 31, 2015 on all mainlines that handle:
 - passenger traffic; or
 - toxic inhalation hazard (TIH) materials
- No Class I railroad will meet this deadline

POSITIVE TRAIN CONTROL

- What does missing the deadline mean for rail transportation as of January 1st?
 - All railroads will be in violation of the statute regardless of what traffic they transport
 - Disagreement over whether the PTC statute prohibits TIH transportation
 - Railroads may be subject to greater liability risk for accidents that could have been prevented by PTC, as a consequence of being in violation of the law

POSITIVE TRAIN CONTROL

- How are **railroads** reacting to the deadline?
 - Lobbying Congress to extend deadline
 - BNSF may shut down its entire railroad
 - UP and CSX will embargo TIH traffic as of December 1st
 - Other railroads have been less specific, but are expected to follow the lead of UP and CSX
- How are **shippers** reacting to the deadline?
 - Lobbying Congress to extend deadline
 - Asking a federal court to enjoin railroads from refusing traffic as a violation of their common carrier obligation

POSITIVE TRAIN CONTROL

- How is **Congress** reacting to the deadline?
 - The Senate passed legislation to extend deadline by 3 years
 - T&I Committee leadership recently introduced legislation to extend the deadline by 3 years
 - Need for Conference between Senate and House
- How is **FRA** reacting to the deadline?
 - Testified to Congress that it will aggressively enforce penalties against railroads
 - Made vague statements about adopting supplemental rules by which railroad could operate safely without PTC

POSITIVE TRAIN CONTROL

- What are the **legal issues**?
 - Does the common carrier obligation take precedence over the PTC statute?
 - Whether a request for TIH transportation over lines without PTC is unreasonable, and thus would not violate the common carrier obligation, because it would require a railroad to violate federal law?
 - Whether PTC statute prohibits TIH transportation or just requires PTC implementation?

POSITIVE TRAIN CONTROL

- What is the **likely timetable** for action?
 - Congress unlikely to act before November
 - Unthinkable that Congress would not extend deadline
 - But this Congress has allowed the unthinkable to occur before
 - Passenger train impact most likely to spur Congress to act
 - Federal court unlikely to decide on injunction motion before November
 - Will want to give Congress a chance to act
 - Must issue injunction before December 1 embargo of TIH traffic

STB PROCEEDINGS

- EP 711: Competitive Switching
- EP 722: Railroad Revenue Adequacy

COMPETITIVE SWITCHING TIMELINE

- In July 2011, NITL petitioned STB for new competitive switching rules (“CSP”)
- In July 2012, STB opened a proceeding to examine the impacts of the CSP
- In 2013, STB received substantial evidence and studies on the CSP from interested parties
- 2-day hearing held in March 2014
- Timing for STB decision (?)

COMPETITIVE SWITCHING

- NITL asked STB to adopt new rules allowing a captive rail shipper to “switch” its traffic to another rail carrier
 - shipper must meet certain conditions of captivity; lack of inter/intra-modal competition; reasonable distance to an interchange (30 miles)
 - carrier could avoid switching if unsafe, infeasible or harmful to existing service
- Current law permits competitive switching where “practicable or in the public interest”
- But, no shipper has ever been granted switching access under STB rules adopted in 1985

COMPETITIVE SWITCHING

- NITL study shows shippers would save \$1.4 billion (2.6% of the Big Four RR gross revenue) across multiple commodities
- NITL estimated 1.4 million carloads would be impacted (or only 4.6% of all traffic); and most cars would not “switch” based on mandated switching exp. in Canada
- Railroads claim CSP would impact 7.5 million cars and cause severe congestion and service disruptions
- Railroads assert that Canadian network is different and not a good model for comparison

COMPETITIVE SWITCHING

- Recent railroad service problems may have caused further delays in STB decision-making
- Commissioner Miller has raised the question as to whether the STB should jointly address several major policy issues in a reforms “package”
- Stay tuned....

REVENUE ADEQUACY

- The concept of **revenue adequacy as a rate constraint**
 - STB determines whether each Class I railroad is revenue adequate annually based on whether the railroad is earning the STB-calculated industry cost-of-capital
 - A revenue adequate railroad should not be allowed to charge differentially higher rates to captive shippers when that differential no longer is needed for the railroad to achieve and maintain revenue adequacy

REVENUE ADEQUACY

- Revenue adequacy has been a theoretical alternative to SAC for 30 years
 - No use to shippers because no railroads were revenue adequate
 - No concrete standards existed to apply it
- **STB initiated Dkt. EP 722** to consider a revenue adequacy rate standard
 - The growing cost, time, and complexity of SAC cases have increased calls for a more efficient and effective rate remedy
 - SAC relief has been especially elusive for carload shippers
 - As more railroads have achieved revenue adequacy, more opportunities to use as a rate standard

RECENT STB REVENUE ADEQUACY DETERMINATIONS

	RR cost of capital	CSXT	NS	BNSF	UP	KCS	CN (U.S. part)	CP (U.S. part)
2014	10.65%	10.18%	11.69%	12.88%	17.35%	8.18%	11.30%	-0.42%
2013	11.32%	10.00%	12.07%	14.01%	15.39%	8.67%	11.84%	12.03%
2012	11.12%	10.81%	11.48%	13.47%	14.69%	9.54%	10.19%	5.15%
2011	11.57%	11.54%	12.87%	12.39%	13.11%	10.76%	8.74%	7.13%
2010	11.03%	10.85%	10.96%	10.28%	11.54%	9.77%	9.21%	8.01%
2009	10.43%	7.30%	7.69%	8.67%	8.62%	6.51%	6.04%	6.28%
2008	11.75%	9.34%	13.75%	10.51%	10.46%	7.72%	9.89%	9.29%
2007	11.33%	7.61%	13.55%	9.97%	8.90%	9.37%	10.11%	15.25%

REVENUE ADEQUACY

- Issues in EP 722 rulemaking
 - How should the STB measure revenue adequacy and over what time period?
 - Book value, replacement costs, financial markets
 - Changes could bring RRs closer to, or further from, revenue adequacy
 - Is revenue adequacy an economically justifiable standard for regulating rates?
 - How can/should the STB apply a revenue adequacy constraint?
 - Rate increase limits
 - Benchmark comparisons to competitive rates
 - Reduce rates by refunding excess revenues to captive shippers

RAILROAD REVENUE ADEQUACY

- Next Steps
 - record in the proceeding is now closed
 - no time limit imposed for STB decision
 - STB exploring synergies between the major policy issues
 - competitive switching and revenue adequacy and rail service

PHMSA TANK CAR RULE

PHMSA TANK CAR RULE

- Final rule on new tank car design standards and operational controls for high-hazard flammable trains (HHFT) issued on May 1, 2015
- HHFT: continuous block of 20 or more tank cars or 35 or more tank cars loaded with a flammable liquid (Class 3)
- After Oct. 1, 2015, new tank car construction must meet enhanced DOT 117 specifications
- Risk-based retrofit of existing cars
- Enhanced braking

PHMSA TANK CAR RULE

- Reduced operating speeds—50 mph for HHFT or 40 mph in HTUA if train includes non-compliant cars
- Sampling and testing of crude for classification accuracy
- Rail routing risk assessments
- **Appeals**: 5 administrative appeals filed with PHMSA concerning rule scope, braking, retrofit, and other issues
 - PHMSA Notice in FR on Aug. 10 indicating a substantial delay in deciding the appeals due to complexity of issues
- Consolidated appeals in the DC Circuit also pending

Thank You!

Karyn A. Booth

Karyn.Booth@ThompsonHine.com

202.263.4108