

Rail Competition and Antitrust Enforcement

Summary

Electric utilities rely on rail transportation to move the vast majority of coal from mine mouths to power plants. Many coal-burning electric utilities have no choice but to receive coal shipments from only one rail carrier, and thus are subject to monopolistic behavior. As a result, these rail customers are unable to negotiate the terms of their rail transportation in an open and competitive market. These “captive” rail customers are charged higher rail rates while customers with more than one viable transportation option pay lower, competitively priced rates. Over the past several years, rail customers also have experienced numerous service and reliability problems, with no relief.

The American Public Power Association (APPA or Association) and its members have been active in proceedings at the Surface Transportation Board (STB or Board) on issues important to captive shippers. While these proceedings could result in some regulatory improvements, legislative remedies are still required to enhance competitive transportation and improve rail customer protection mechanisms and enforcement implemented by the STB. Absent congressional action, electric utilities and the communities they serve will continue to be subject to unnecessarily higher rates and poorer service for coal transportation. In recent Congresses, APPA has supported bills that would have placed the railroads under antitrust law and reformed the STB. The Association continues to support such efforts.

Background

Just under thirty percent of the nation’s electricity is generated from coal, the vast majority of which is transported by rail. A substantial amount of that coal has only one option for railroad transportation for at least a portion of its shipment. Thus, a large amount of the coal used to generate electricity in the U.S. is “captive” to a single railroad for transportation. The transportation costs for shipping that coal reflect the monopoly power of the carrier and are therefore frequently unreasonably high. While public power’s interests relate to the movement of coal, this issue is by no means restricted to coal shippers. A variety

of shippers, from farmers to chemical manufacturers to defense contractors, have experienced these same problems.

The monopoly power of the railroads over captive shippers has grown dramatically in the last 36 years. Since 1980, the industry has been reduced from 42 major carriers to five, with 95 percent of the market share dominated by four carriers. In 1995, Congress abolished the Interstate Commerce Commission and gave the newly created STB authority over the rail industry for mergers, rate and service disputes, and construction, operation, and/or abandonment of railroad lines. Since its creation, the STB has failed to use the legal and regulatory mechanisms at its disposal to protect rail customers from monopolistic practices by railroads. As a result, many rail customers have simply foregone filing rate cases at the STB due to the low probability of success, as well as the high costs of filing and litigation. These problems can be resolved by reforms to the STB process and by subjecting railroads to the major provisions of two major federal antitrust laws, the Sherman Act and Clayton Act. Railroads are uniquely exempt from the nation’s antitrust laws for mergers, consolidations, acquisitions, and pooling arrangements approved by the STB. These exemptions give railroads immunity from lawsuits filed by state attorneys general, the Department of Justice, and private citizens. These exemptions have allowed for a wide range of anticompetitive rail industry practices.

Congressional Action

On December 18, 2015, President Obama signed into law S. 808, the Surface Transportation Reauthorization Act of 2015 (PL 114-110). This was the first time that the STB had been reauthorized since 1998. APPA, along with the Freight Rail Customers Alliance (FRCA), of which the Association is a member, was heavily involved in the bill’s development and passage. The law set timelines for rate reviews to ensure the STB decides on relief cases in a timelier fashion; expanded voluntary arbitration procedures addressing rate and service disputes; authorized the STB to initiate investigations on matters other than rate cases; and improved the STB’s structure and decision-making

processes by expanding the board membership from three to five—which allows board members to talk with one another without prior public hearing notice.

To the shipper community's disappointment, implementation of S. 808 has been very slow. Chairman Ann Begeman has said repeatedly in multiple forums that the Board was postponing action on important rulemaking decisions until there are five Board members. In response, Congress included language in the fiscal year 2018 omnibus appropriations bill that became law in March 2018 expressing concerns over STB delays in pending proceedings and encouraging a full complement of Board members to be expeditiously nominated and confirmed. It also encouraged the STB to provide a timely, efficient, and decisive regulatory process.

Progress on staffing the STB was finally made on January 2, 2019, when the Senate confirmed Patrick Fuchs (R) and Marty Oberman (D) to serve as members. Unfortunately, Vice Chairman Deb Miller's (D) term expired on December 31, 2017, but rules allowed her to continue serving for another year. Her extended term expired on January 1, 2019, and she has since decided to withdraw from consideration for renomination to another term. Michelle Schultz (R) was nominated by President Trump to serve on the STB last March, but the Senate did not take up her nomination. Schultz has yet to be renominated in the 116th Congress and it is unknown when a new Democratic nominee to replace Miller will be named.

On May 26, 2017, Senator Baldwin introduced S. 1233, the Rail Shipper Fairness Act of 2017. The legislation built upon the reforms to the STB made by Congress when it reauthorized the Board in 2015 and was similar to legislation Senator Baldwin introduced in the 114th Congress. The bill would have improved the STB's existing processes when determining rate reasonableness, recognized that a carrier still has market dominance under a duopoly, and allowed competitive switching within 100 miles. It would have also required fuel surcharges imposed by the rail carrier to be directly accounted for by changes to the carrier's actual fuel prices, removed the statutory revenue adequacy test,¹ and capped the railroad cost of equity for regulatory costing purposes at a reasonable level. APPA and FRCA supported S. 1233. Unfortunately, the bill did not get a hearing. It is unknown whether Senator Baldwin will reintroduce this legislation in the 116th Congress.

¹ STB's determination of revenue adequacy is based on its calculation of the average cost of capital to the freight rail industry, compared to an individual carrier's rate of return on net investment. It is used to determine whether a railroad has achieved a rate of return on investments used to provide railroad service that is at least equal to the average cost of that capital investment. The current revenue adequacy test uses book value, or the actual amount in invested assets, including improvements and minus depreciation.

Regulatory Action

The Association makes its voice heard on regulatory issues at the STB via its membership in FRCA. Through FRCA, APPA is participating in several pending rulemakings, including:²

- Docket No. EP 704, Commodity Exemption Review
- Docket No. EP 711, Competitive Switching (Access)
- Docket No. EP 722, Railroad Revenue Adequacy
- Docket No. EP 733, Expediting Rate Cases

American Public Power Association Position

APPA supports continued congressional oversight of the STB, particularly its implementation of the important reforms enacted as part of the STB Reauthorization Act (PL 114-10). The Association also supports removing antitrust exemptions for the railroad industry and encourages the STB to take actions using its existing authorities that will assist rail-dependent shippers. Finally, APPA and FRCA encourage the President and Senate to fully staff the STB with five board members by nominating and confirming two commissioners.

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² It is unknown when the STB will take additional actions on these matters.

The American Public Power Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. Our association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.