

Rail Competition and Antitrust Enforcement

Summary

Electric utilities rely on rail transportation to move 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), through its membership in the Freight Rail Customer Alliance (FRCA), and public power utilities 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 previous Congresses, APPA supported bills that would have placed the railroads under antitrust law and reformed the STB. The association continues to support such efforts.

Background

In 2018, 27.5 percent of the nation’s electricity was 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, have experienced these same problems.

The monopoly power of the railroads over captive shippers has grown dramatically in the last 40 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 FRCA, 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 was reluctant to act on important rulemaking decisions until there were five Board members. Some 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 extended term expired on January 1, 2019. Michelle Schultz (R) was nominated by President Trump to serve on the STB in March 2018, but the Senate did not take up her nomination before the end of the 115th Congress. Schultz was re-nominated to the position in the 116th Congress and approved by the Senate Commerce Committee, but full Senate consideration of her nomination has yet to be scheduled.

Congress has urged the STB to move forward on rulemakings in a "timely and decisive" fashion in reports accompanying recent appropriations bills and in individual letters. In a July 25, 2019, letter, Senators Tammy Baldwin (D-WI) and John Kennedy (R-LA) expressed support for the STB's release of the Rate Reform Task Force Report and Oversight Hearing on Demurrage and Accessorial Charges and encouraged them to "move expeditiously on next steps to support a competitive and reliable rail system for all stakeholders, including freight rail shippers." Senator Baldwin on December 18, 2019, sent another letter to the STB asking it to reconsider its decision to terminate Docket No. EP 661 (Sub-No. 2), Fuel Surcharges (Safe Harbor) proceeding. Shippers had the opportunity to voice their grievances with current railroad practices, and STB's lack of action, at a July 25, 2019, "shipper's roundtable" hosted by the House Transportation & Infrastructure Committee's Subcommittee on Railroads, Pipelines, and Hazardous Materials. Shippers, including a representative from FRCA, expressed frustration with a power imbalance with Class I railroads and offered numerous examples of unfair and inconsistent application of fees and substandard service.

Regulatory Action

APPA makes its voice heard on regulatory issues at the STB via its membership in FRCA. Through FRCA, APPA has participated in numerous rulemakings, including:

- Notice of Proposed Rulemaking (NPRM), Docket No. 704, Review of Commodity, Boxcar, and TOFC/COFC Exemptions.
- Notice of Proposed Rulemaking (NPRM), Docket No. EP 711, Competitive Switching (Access)
- Pre-Rule, Docket No. EP 722, Railroad Revenue Adequacy; Docket No. EP 761, Hearing on Revenue Adequacy.

- Final Rule (FR), Docket No. EP 733, Rate Reasonableness Standards and Expediting Rate Cases.
- Notice of Proposed Rulemaking (NPRM), Docket No. EP 755, Final Offer Rate Review.
- Notice of Proposed Rulemaking (NPRM), Docket No. EP 756, Market Dominance Streamlined Approach.
- Petition for Declaratory Order, Finance Docket #36369, (Clean Water Act Exemption for Rail Cars in Transit).
- Final Statement of Board Policy, Docket No. EP 757, Policy Statement on Demurrage and Accessorial Rules and Charges.
- Final Rule, Docket No. EP 759, Demurrage Billing Requirements.
- Final Rule, Docket No. EP-760, Exclusion of Demurrage Regulation from Certain Class Exemptions.

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.

American Public Power Association Contact

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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.