

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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RAILROAD REVENUE ADEQUACY)	Ex Parte No. 722
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**PETITION FOR ADMINISTRATIVE ACTION BY
THE WESTERN COAL TRAFFIC LEAGUE**

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The Western Coal Traffic League (“WCTL”) submits this petition for administrative action and in support hereof states as follows:

SUMMARY

The Surface Transportation Board (“STB” or “Board”) instituted this rulemaking proceeding in 2014 to address, *inter alia*, how it should apply its “revenue adequacy constraint” in complaint cases brought by shippers challenging the reasonableness of rates charged on market dominant rail traffic.

This proceeding is now in its ninth year; remains in the “pre-rule” stage; and the Board has set no date to advance it to the notice of proposed rulemaking stage. WCTL respectfully requests that the Board take administrative action now by proposing new rules that implement the revenue adequacy constraint in a manner that will permit shippers to obtain meaningful, cost-effective relief in complaint cases.

The time is ripe for the Board to issue proposed rules because it has a full record before it; there continues to be a pressing need for the Board to adopt standards

that implement the revenue adequacy constraint; and further delays not only hurt captive shippers, they also contravene the Board's Congressional directives to complete proceedings in an expeditious manner. Simply stated, the time for the Board to act is now.

IDENTITY AND INTEREST

WCTL is a voluntary association whose regular membership consists of utility shippers of coal mined west of the Mississippi River. WCTL's involvement with revenue adequacy goes all the way back to 1976, the year Congress first enacted statutory revenue adequacy standards.¹ Since that time, WCTL has been actively engaged in the instant proceeding ("EP 722") and all other proceedings before the STB, and its predecessor the Interstate Commerce Commission ("ICC"), concerning the application and implementation of the statutory revenue adequacy standard.²

A partial listing of these other proceedings includes:

- Ex Parte No. 338, *Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels*
- Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines, Nationwide*
- Ex Parte No. 353, *Adequacy of Railroad Revenue (1978 Determination)*
- Ex Parte No. 393, *Standards for Railroad Revenue Adequacy* (and subsequent sub-dockets)

¹ See *Railroad Revitalization and Regulatory Reform Act of 1976* ("4-R Act"), Pub. L. No. 94-210, § 205, 90 Stat. 31, 41 (1976).

² The STB and ICC are referred to collectively herein as the "Agency."

- Ex Parte No. 552, *Railroad Revenue Adequacy* (and subsequent sub-dockets)
- Ex Parte No. 664, *Methodology to be Employed in Determining the Railroad Industry Cost of Capital* (and subsequent sub-dockets)
- Ex Parte No. 740, *Petition by the Western Coal Traffic League to Terminate the Regulatory Freeze in Four Pending Proceedings*
- Ex Parte No. 766, *Joint Petition for Rulemaking – Annual Revenue Adequacy Determinations*

WCTL also has been an active participant in all of the post-4-R Act Congressional deliberations concerning railroad revenue adequacy, including those preceding the Staggers Rail Act of 1980,³ the ICC Termination Act of 1995,⁴ and the Surface Transportation Board Reauthorization Act of 2015.⁵ In addition, WCTL has presented its views on revenue adequacy issues to the Board’s Rail Rate Reform Task Force (“RRTF”).

BACKGROUND

1. Section 205 of the 4-R Act directed the ICC to promulgate standards and procedures for establishing railroad revenue adequacy. *Id.*⁶ The ICC responded by adopting a multi-factor approach to determine railroad revenue adequacy. This approach

³ Pub. L. No. 96-448, 94 Stat. 1895 (“Staggers Act”).

⁴ Pub. L. No. 104-88, 109 Stat. 803 (1995).

⁵ Pub. L. No. 114-110, 129 Stat. 2228 (2015) (“STB Reauthorization Act”).

⁶ 90 Stat. 41.

considered funds flow analysis and a variety of financial ratios, including return on income, return on equity, operating ratio, and fixed charge coverage.⁷

2. In one of its first applications of the multi-factor approach, the ICC found that during the 1975-77 time period, 13 of the then-36 Class I railroads had earned adequate revenues.⁸ This result did not sit well with railroads. They wanted revenue adequacy to be measured by a single factor – whether a carrier had earned a rate of return on its net asset investment base (“ROI”) at least equal to its current cost of capital (“COC”), for short: “ROI=COC.”⁹ The railroads knew at the time that no major carrier was anywhere close to being found “revenue adequate” under this test.

3. The railroads proceeded to lobby Congress to amend the 4-R Act to direct the ICC to apply its ROI=COC standard as the sole test for determining revenue adequacy.¹⁰ That campaign failed. In its next major piece of rail legislation – the Staggers Act – Congress retained the 4-R Act revenue adequacy standards. The only change of consequence in the new law was to direct the ICC to make annual revenue adequacy determinations for Class I railroads.¹¹

⁷ See *Standards and Procedures for the Establishment of Adequate Railroad Revenue Levels*, 358 I.C.C. 844 (1978), modified by *Standards for Railroad Revenue Adequacy*, 364 I.C.C. 803 (1981).

⁸ See *Adequacy of Railroad Revenue (1978 Determination)*, 362 I.C.C. 199, 256-57 (1979).

⁹ *Id.* at 217.

¹⁰ See, e.g., 126 Cong. Rec. at 29203 (Oct. 15, 1980) (remarks of Representative Bob Eckhardt).

¹¹ See Staggers Act § 205(b)(2), 94 Stat. 1906.

4. While they struck out on Capitol Hill, the railroads succeeded shortly thereafter at the ICC. In 1981, the ICC did an about-face and adopted an ROI=COC standard as the exclusive measure for determining revenue adequacy.¹² And, just as night follows day, the ICC proceeded for many years thereafter to find that most major railroads were “revenue inadequate” under the ROI=COC standard.¹³

5. At the same time the ICC was addressing how to measure revenue adequacy, it was also addressing how to set maximum rates on market dominant rail traffic. In its seminal 1985 decision *Coal Rate Guidelines, Nationwide*, the ICC adopted four “constraints” on rail pricing of market dominant rail traffic.¹⁴ These four constraints included a “revenue adequacy constraint.” *Id.* at 534.

6. As the ICC explained in *Coal Rate Guidelines*, “the logical first constraint on a carrier’s pricing is that its rates not be designed to earn greater revenues than needed to achieve and maintain . . . ‘revenue adequacy’ In other words, captive shippers should not be required to continue to pay differentially higher rates than other shippers

¹² See *Standards for Railroad Revenue Adequacy*, 364 I.C.C. 803 (1981), *aff’d sub nom. Bessemer & Lake Erie R.R. v. ICC*, 691 F.2d 1104 (3d Cir. 1982), *as modified in Standards for Railroad Revenue Adequacy*, 3 I.C.C.2d 261 (1986), *aff’d sub nom. Consol. Rail Corp. v. United States*, 855 F.2d 78 (3d Cir. 1988); *Supplemental Reporting of Consol. Info. for Revenue Adequacy Purposes*, 5 I.C.C.2d 65 (1988).

¹³ See, e.g., Attachment 1 (showing that the STB found no major carriers revenue adequate in years 2000, 2001, 2002, or 2003). Attachment 1 is a copy of a table the STB publishes and is available at <https://www.stb.gov/reports-data/economic-data/>.

¹⁴ *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985) (“*Coal Rate Guidelines*”), *aff’d sub nom. Consol. Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987).

when some or all of that differential is no longer necessary to ensure a financially sound carrier” *Id.* at 535-36.

7. Following its promulgation, the revenue adequacy constraint proved to be of no practical use to captive rail shippers because they could not meet the threshold showing needed to invoke the constraint – the defendant carrier was “revenue adequate.”¹⁵ However, as time marched on, the major railroads began to earn so much money that the STB started to find most of them revenue adequate under the ROI=COC standard.¹⁶

8. The shift from carrier revenue inadequacy to carrier revenue adequacy under the ROI=COC standard posed a new problem for captive rail shippers. The *Coal Rate Guidelines* did not spell out in any detail how a shipper could quantify a request for relief under the revenue adequacy constraint in a rate complaint case, nor did any of the ICC or Board decisions that followed.

9. The Board recognized this problem in its notice, served on April 2, 2014, instituting the instant proceeding. *Id.* at 4 (“The Board has not yet had the opportunity to address how the revenue adequacy constraint would work in practice in large rate

¹⁵ See, e.g., *Ark. Power & Light Co. v. Burlington N. R.R.*, 3 I.C.C.2d 757, 765 (1987); *Bituminous Coal – Hiawatha, Utah, to Moapa, Nevada*, 6 I.C.C.2d 1, 9 (1989).

¹⁶ See Attachment 1. This change was also facilitated by the Board’s decision to adopt standards that more accurately estimate the railroad industry’s annual cost of capital. See *Use of a Multi-Stage Discounted Cash Flow Model in Determining the Railroad Industry’s Cost of Capital*, EP 664 (Sub-No. 1), at 1-2, 15 (STB served Jan. 28, 2009).

cases.”). The Board asked for comments, *inter alia*, on how it should “apply the revenue adequacy constraint in regulating rates” *Id.*¹⁷

10. The Board proceeded to obtain detailed opening and reply comments. In these filings, WCTL and other shippers proposed specific approaches to implement the Board’s revenue adequacy constraint.¹⁸ The comment period closed on November 4, 2014 and the Board conducted a two-day hearing in EP 722 on July 22-23, 2015.

11. According to its Quarterly Reports on Unfinished Regulatory Proceedings,¹⁹ the Board initially planned to issue a merits decision in this proceeding in

¹⁷ The Board also asked for comments on whether it should modify its current procedures for determining revenue adequacy (*id.* at 4) and grant a separate petition, filed by WCTL, asking the Board to make changes in the way it calculated the industry cost of equity capital. *Id.* at 4-5. The Board later denied this petition. *See Petition of the Western Coal Traffic League to Institute a Rulemaking Proceeding to Abolish the Use of the Multi-Stage Discounted Cash Flow Model in Determining the Railroad Industry’s Cost of Equity Capital*, EP 664 (Sub-No. 2), at 2, 7 (STB served Sept. 28, 2018).

¹⁸ *See, e.g.*, Joint Opening Comments of the Western Coal Traffic League *et al.* at 26-33 (Sept. 5, 2014) (“WCTL Comments”); Comments Submitted By Concerned Shipper Associations at 8-14 (Sept. 5, 2014) (“CSA Comments”); Opening Comments of Alliance for Rail Competition *et al.* at 19-33 (Sept. 5, 2014) (“ARC Opening Comments”); Comments Submitted by Olin Corp. at 7-9 (Sept. 5, 2014) (“Olin Comments”); Opening Comments of Arkansas Electric Cooperative Corp. at 20-25 (Sept. 5, 2014); Reply Comments of National Grain & Feed Association at 8-9 (Nov. 4, 2014) (“NFGA Reply Comments”); Reply Comments Submitted by Concerned Shipper Associations at 32-36 & Verified Statement of Kevin Caves and Hal Singer at 16-24 (Nov. 4, 2014).

¹⁹ The STB Reauthorization Act of 2015 directed the STB to provide quarterly reports to Congress on the status of unfinished regulatory proceedings. *See id.* at § 15. The Board began publishing responsive quarterly reports starting in the first quarter of 2016. Copies of these reports are available at <https://www.stb.gov/about-stb/agency-materials/stb-reauthorization-reports> and will hereinafter be cited by applicable quarter and year.

June 2017,²⁰ but, as that date approached, the Board changed the targeted decision date to an unknown “To Be Determined” decision date,²¹ where it remains today.²² The Board has cited various reasons for its failure to advance this proceeding beyond the “pre-rule” stage.²³

12. Initially, the Board stated that it felt uncomfortable taking action “in recognition of a new Administration and expected changes to the Board’s membership.”²⁴ That election occurred six years ago and the Board’s “composition” has subsequently changed.²⁵

13. Later, the Board stated it was not taking any action because “[t]he subject matter of this proceeding is also under review by the Board’s Rate Reform Task Force.”²⁶

²⁰ See 3Q16 Report at 13; 4Q16 Report at 10.

²¹ 1Q17 Report at 7.

²² 2Q22 Report at 5.

²³ The Board’s Quarterly Reports all contain an entry for “Stage” and they have consistently referred to EP 722 as being in the “Pre-Rule” stage.” See, e.g., 1Q16 Report at 16; 2Q22 Report at 5.

²⁴ 1Q17 Report at 7; 2Q17 Report at 7; 3Q17 Report at 7; 4Q17 Report at 7; 1Q18 Report at 7; 2Q18 Report at 7; 3Q18 Report at 7; 4Q18 Report at 7; 1Q19 Report at 7.

²⁵ WCTL filed a petition in August of 2017 asking the Board to stay out of the politics associated with the change-over in Administrations and to promptly issue merits decisions in this and several other long-delayed rulemaking proceedings. The Board denied WCTL’s petition, but, as Board Member Miller observed, “the lost time hangs heavy.” *Petition by the Western Coal Traffic League Regarding Four Regulatory Dockets*, EP 740, at 2 (STB served May 17, 2018) (Board Member Miller commenting).

²⁶ 4Q18 Report at 7; 2Q19 Report at 7; 3Q19 Report at 6; 4Q19 Report at 5; 1Q20 Report at 5; 2Q20 Report at 5; 3Q20 Report at 5; 4Q20 Report at 5; 1Q21 Report at 5; 2Q21 Report at 5; 3Q21 Report at 5; 4Q21 Report at 5; 1Q22 Report at 5; 2Q22 Report at 5.

The RRTF issued its report in April 2019.²⁷ In that report, the RRTF agreed that the revenue adequacy constraint was an important one and proposed a methodology to implement it.²⁸ The Board held a two-day public hearing on the revenue adequacy issues addressed in the RRTF’s report.²⁹ The public hearing record closed on February 13, 2020.³⁰

14. Finally, the Board has most recently attributed its inaction to its consideration of a petition for rulemaking filed by three major railroads on September 1, 2020 “regarding the Board’s annual revenue adequacy determinations.”³¹ Taking a page out of the railroads’ historical playbook, the railroads’ petition asks the Board to drastically alter its current revenue adequacy standards.³² Not surprisingly, no rail carrier would be deemed “revenue adequate” under the railroads’ proposals.³³ The Board

²⁷ RRTF, *Report to the Surface Transportation Board* (April 25, 2019), available at <https://www.stb.gov/news-communications/agency-task-forces/>.

²⁸ *Id.* at 3-4, 12-13, 32-39.

²⁹ See *Railroad Revenue Adequacy*, EP 722 (STB served Sept. 12, 2019 and Nov. 22, 2019).

³⁰ *Id.* (STB served Dec. 17, 2019).

³¹ 3Q20 Report at 5; 4Q20 Report at 5; 1Q21 Report at 5; 2Q21 Report at 5; 3Q21 Report at 5; 4Q21 Report at 5; 1Q22 Report at 5; 2Q22 Report at 5.

³² See *Joint Petition for Rulemaking – Annual Revenue Adequacy Determinations*, EP 766, at 1-2 (STB served Dec. 30, 2020).

³³ See *id.*, Reply of the Western Coal Traffic League in Opposition to Petition at 3-5 (Sept. 21, 2020).

instituted a proceeding in response to the railroads' petition – EP 766; has received extensive comments; and the record closed on August 16, 2021.³⁴

ARGUMENT

The Board instituted this proceeding in 2014. Some eight years later, this proceeding remains mired in the “pre-rule” stage, with no date set for any decision on the merits. WCTL requests that that the Board advance this proceeding to the notice of proposed rulemaking stage – and propose reasonable rules implementing the revenue adequacy constraint – for four interrelated reasons.

1. The Revenue Adequacy Constraint is Vitally Important to Captive Rail Shippers

The Board instituted this proceeding in 2014 because it recognized that carriers were then becoming revenue adequate under the Board's ROI=COC standard and that shippers needed guidance from the Board on how to implement the revenue adequacy constraint in individual complaint cases.

The need for this guidance remains as important today as it was in 2014, and perhaps even more so. As the Board knows, rail shippers are 0 for the last 37 years in obtaining any relief under the revenue adequacy constraint. That is most likely to remain the case unless the Board issues rules in this proceeding that implement the revenue adequacy constraint in a way that provides meaningful, and easy-to-apply, relief for captive shippers.

³⁴ *See id.* (STB Office of Proc. served July 7, 2021).

Additionally, as the Board is aware, the only “constraint” that large shippers have been able to obtain any rate relief under is the “stand-alone cost” (“SAC”) constraint. The cost of developing a SAC case is beyond the means of most shippers (even large ones), and SAC litigation has become so costly, complex, and convoluted that many shippers do not view it as providing any meaningful rate relief at all for their traffic.³⁵

The Board has the opportunity now to implement the revenue adequacy constraint in a meaningful manner that will provide a viable alternative to SAC. However, for the Board to do so, it must take action in this proceeding.

2. The Board Has an Extensive Record Before it

The record in this proceeding initially closed in July 2015. This record included extensive submissions by parties addressing revenue adequacy issues and included proposals on how to implement the revenue adequacy constraint. WCTL submits that the record was sufficient – seven years ago – for the Board to proceed to advance this proceeding from the pre-rule stage to the rulemaking stage.

That of course did not happen. The Board subsequently reopened the proceeding to hold a hearing, and receive post-hearing comments, addressing the RRTF’s report on revenue adequacy. The Board has also received comments in EP 766 as well. The Board’s failure to act when the record initially closed in 2015 is water-over-the-dam

³⁵ See, e.g., ARC Opening Comments at 13; CSA Comments at 3; Olin Comments at 5-7; NFGA Reply Comments at 8.

at this point, but the current augmented record today is complete and the proceeding is ripe for decision.

3. Decisional Delays Undermine the Administrative Process

Congress has repeatedly expressed its concerns about what the Board itself has acknowledged as its “sometimes glacial pace” in advancing major rulemaking proceedings.³⁶ The resulting “wasteful and unnecessary delays . . . harm rail shippers, freight operators, and ultimately consumers who pay higher costs.”³⁷

WCTL respectfully submits that this proceeding – now in its ninth year – (unfortunately) is a paradigm example of one that has moved at a “glacial pace” and one that has resulted in “unnecessary delays” that not only “harm rail shippers,” but also contravene the express Congressional directive that the Board advance all proceedings in an “expeditious” manner.³⁸ While the Board cannot rewrite history, it can end its delay by promptly proposing new rules that implement the revenue adequacy constraint.

³⁶ Field Hearing Before the Senate Commerce, Science and Transportation Committee, *Freight Rail Reform, Implementation of the Surface Transportation Board Reauthorization Act of 2015*, Statement by Hon. Ann D. Begeman at 1 (Aug. 11, 2016), available at https://www.commerce.senate.gov/public/_cache/files/1a86e006-cc82-4e42-8186-1a623071b1e7/2EBF63B858E9D6F708C3297CC78656A4.begeman-stb-hearing-8.11.16.pdf.

³⁷ Press Release, *Thune and Nelson Introduce Bipartisan Freight Rail Reform Bill* at 1 (March 19, 2015), available at <https://www.commerce.senate.gov/index.php/2015/3/thune-and-nelson-introduce-bipartisan-freight-rail-reform-bill>.

³⁸ 49 U.S.C. § 10101(15).

4. The Board Needs to Propose Reasonable Rules

WCTL emphasizes that not only is prompt action needed in this proceeding, that action must come in a form of *reasonable* proposed rules. WCTL has proposed a rule, which, if adopted, would provide meaningful relief to captive shippers under the revenue adequacy constraint.³⁹ Other shippers, and the RRTF, have also proposed implementing rules. The Board needs to act, but action itself will do little good unless the Board proposes new rules that will fairly implement the revenue adequacy constraint in a manner that will provide shippers meaningful, cost-effective relief in complaint cases.⁴⁰

CONCLUSION

Nearly forty years ago, the Agency ruled that rail carriers with adequate revenues needed pricing restraint. Between then and now, Agency orders enabled the creation of a handful of Class I carriers which enjoy super-adequate revenues, operate as essentially unregulated monopolies, and are endeared by prudent investors.

For the foregoing undisputable facts, the time has come for the Agency to promulgate rules restraining the rates of revenue adequate railroads. WCTL respectfully requests that the Board grant this Petition and take immediate action in this proceeding by

³⁹ See WCTL Comments at 23-33.

⁴⁰ See Statement of the Western Coal Traffic League, EP 722, at 4 (Nov. 26, 2019).

issuing a merits decision in the form of proposed rules that fairly implement the revenue adequacy constraint.

Respectfully submitted,

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Docket No. Ex Parte 552 - Railroad Revenue Adequacy								
Year	Industry Cost of Capital	BNSF Railway	CSX Transp. Inc.	Grand Trunk Corp. (CN)	KCS Railway	NS Railway	Soo Line Railroad (CP)	Union Pacific
<i>Based on Individual Railroad's Return on Investment</i>								
2020	7.89%	11.60%	11.35%	7.20%	8.06%	7.52%	10.68%	14.44%
2019	9.34%	12.04%	12.84%	7.47%	6.20%	11.59%	11.34%	15.55%
2018	12.22%	11.89%	13.18%	7.69%	8.03%	11.63%	13.49%	15.80%
2017	10.04%	10.70%	8.84%	7.69%	7.09%	10.05%	10.71%	14.08%
2016	8.88%	10.11%	8.62%	8.60%	6.23%	9.20%	9.58%	13.39%
2015	9.61%	12.82%	9.00%	10.77%	7.20%	9.03%	14.50%	15.54%
2014	10.65%	12.88%	10.18%	11.30%	8.18%	11.69%	† -.42%	17.35%
2013	11.32%	14.01%	10.00%	11.84%	8.67%	12.07%	12.03%	15.39%
2012	11.12%	*13.47%	10.81%	10.19%	9.54%	11.48%	5.15%	14.69%
2011	11.57%	*12.39%	11.54%	8.74%	10.76%	12.87%	7.13%	13.11%
2010	11.03%	*10.28%	10.85%	9.21%	9.77%	10.96%	8.01%	11.54%
2009	10.43%	8.67%	7.30%	6.04%	6.51%	7.69%	6.28%	8.62%
2008	11.75%	10.51%	9.34%	9.89%	7.72%	13.75%	9.29%	10.46%
2007	11.33%	9.97%	7.61%	10.11%	9.37%	13.55%	15.25%	8.90%
2006	9.94%	11.43%	8.15%	9.47%	9.31%	14.36%	11.60%	8.21%
2005	12.19%	**9.76%	6.23%	8.07%	5.89%	13.21%	8.89%	6.34%
2004	10.11%	5.84%	4.43%	5.95%	8.30%	11.64%	3.28%	4.54%
2003	9.40%	6.2%	4.0%	4.5%	3.7%	9.1%	0.9%	7.3%
2002	9.75%	6.4%	5.2%	3.1%	6.5%	9.1%	5.7%	8.6%
2001	10.19%	7.1%	4.6%	4.9%	7.0%	8.3%	5.9%	7.6%
2000	11.03%	8.8%	3.6%	5.9%	6.3%	5.5%	5.6%	6.9%

Colored cells indicates year in which railroad was Revenue Adequate

* indicates that figure was revised from original calculation, based on decision in FD-35506 (July 25, 2013)

** Indicates that figure was corrected from original calculation, based on notice in EP 552 Sub No. 10 (October 26, 2006)

† The negative ROI of the Soo Line Corp. is attributable, in part, to the sale of the Dakota, Minnesota & Eastern lines, to Rapid City, Pierre & Eastern Railroad. The sale resulted in a one-time loss.