March 15, 2011

Legislation

SAFETEA-LU extended through September 30. Congress has extended the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) through September 30 – the end of the 2011 fiscal year. SAFETEA-LU – commonly referred to as the "Highway Bill" – provides direction on the amount of investment for the nation's surface transportation system and establishes the source of revenue for that investment.

Congress is obligated to pass a surface transportation bill every six years. The original expiration date of the current law (SAFETEA-LU) was September 30, 2009. Since a replacement bill has not been approved by Congress, policymakers have passed a series of short term extensions of the current law. The expiration date for the previous extension was March 4.

"This legislation will provide some stability for transportation departments in every state and allow DOTs to continue planning and constructing transportation projects through the summer construction season," said U.S. Rep. John Mica (R-FL), chairman of the House Transportation and Infrastructure Committee, in a prepared statement. "This extension of transportation programs will allow more time for the Transportation and Infrastructure Committee to develop a fiscally responsible, long-term reauthorization of transportation programs to create jobs and build our nation's infrastructure."

House considers next continuing resolution. The House of Representatives today considers the next Continuing Resolution (CR) – the temporary spending bill that will fund the federal government through Friday, April 8. The current CR is scheduled to expire on Friday, March 18. A longer term CR – funding the government through September 30, 2011 – was passed weeks ago by the House but rejected by the Senate. The longer term CR proposes $61 billion in budget cuts.

Senate committee passes rail antitrust legislation. On March 3rd, the Senate Judiciary Committee passed the Railroad Antitrust Enforcement Act of 2011 (S.49) – an effort to abolish the limited antitrust exemptions provided to the rail industry. The bill was introduced by Senator Herb Kohl (D-WI) and is co-sponsored by Sens. Patrick Leahy (D-VT), Orrin Hatch (R-UT), Charles Schumer (D-NY), Amy Klobuchar (D-MN), Jon Tester (D-MT), David Vitter (R-LA), and Al Franken (D-MN). The committee passed the measure by a 14 to 1 vote.

Currently, railroads are not under the same antitrust laws as most other industries. Rather than be subject to court challenges during economic disputes, the Surface Transportation Board provides oversight of such issues – rate disputes, mergers and acquisitions, etc.

Kohl argues that the antitrust exemptions unfairly insulate railroads from competition and lead to railroad shippers paying higher prices for degraded service. These higher prices are, in turn, passed on to consumers in the form of higher electricity rates, higher food prices, and higher prices for manufactured goods.

The rail industry counters that Kohl's antitrust bill would result in a costly regulatory system since they would face legal challenges in district courts, the Federal Trade Commission, in addition to the Surface Transportation Board. Railroads contend that this would inhibit their ability to invest in their infrastructure.

Scalise, Costello soliciting support for Mississippi River dredging. Congressmen Steve Scalise (R-LA) and Jerry Costello (D-IL) are encouraging fellow members of Congress to sign onto a letter to President Obama requesting that the Army Corps of Engineers properly dredge and maintain the lower Mississippi River.

The Army Corps of Engineers may not be able to maintain a 45 foot depth for the deep-draft shipping channel from the Gulf of Mexico to Baton Rouge, Louisiana, due to insufficient funding. The corps has allocated $63 million for dredging the river south of Baton Rouge for fiscal year 2011. However, the average annual cost over the past five years for dredging this stretch of river has been between $85 million and $127 million.

Once large ocean vessels reach Baton Rouge, cargo must be transferred to barges, railcars, or trucks due to less water depth further north.

House bill would extend short-line tax credit . Last month, Congresswoman Lynn Jenkins (R-KS) introduced the Short Line Railroad Rehabilitation and Investment Act of 2011 (H.R. 721), which would extend the Section 45G short line tax credit through December 31, 2017. The bill is co-sponsored by Reps. Earl Blumenauer (D-OR), Jim Costa (D-CA), Jerry Costello (D-IL), and Bill Shuster (R-PA). The legislation would apply to new short line and regional railroads established after January 1, 2005, and before January 1, 2011.

In December, the passage of the Middle Class Tax Relief Act of 2010 extended the short line tax credit through the end of 2011. Originally enacted in January 2005, the law allows short line and regional railroads to access a 50 percent tax credit for infrastructure improvements, up to a maximum of $3,500 per mile of owned or leased track.

Administration

FRA agrees to scale back PTC mandate for railroads. In a recent settlement, the Federal Railroad Administration (FRA) agreed to scale back the amount of track upon which the nation's railroads must deploy Positive Train Control (PTC). Passed by Congress in 2008, PTC is a system of monitoring and controlling train movements in order to promote safety. PTC requires a railroad to develop a system that allows remote control of automatic braking of a train in case of a major safety concern. The nation's four largest railroads are expected to spend $1 billion on PTC compliance.

The FRA proposes to amend the mandate by not requiring PTC to be installed on tracks that do not carry toxic inhalation hazards (TIH), such as ammonia for fertilizer, as of December 31, 2015. The FRA also must stipulate the processes for handling PTC failures and allowing other train traffic when failures occur. Both proposed rule changes would be subject to change following a public comment period.

Surface Transportation Board

STB to reduce fees for shipper complaints. Last month, the Surface Transportation Board moved to significantly reduce filing fees for shipper complaints to $350. Currently, shippers are charged as much as $20,600 to file a complaint.

The proposed rulemaking would implement a new fee schedule that would charge shippers $350 to file a rate or unreasonable practice complaint. The fee to file an expedited small rate case would remain $150.

"Charging a small business more than $20,000 to bring a complaint is not right,'' said STB Chairman Daniel R. Elliott III. "I am afraid that some meritorious cases were discouraged by the high filing fees."

Elliott said that while the new fee structure would make it easier to file formal cases at the STB, he hopes that shippers would first avail themselves of the agency's free informal mediation service, called the Rail Customer and Public Assistance Program. The STB also offers a program of formal mediation.

Nottingham to resign March 18. Surface Transportation Board (STB) Vice Chairman Charles ("Chip") Nottingham announced on March 1 he will resign March 18.

Nottingham, the lone Republican on the three-member Board, was appointed Chairman by President George W. Bush and joined the Board in August 2006 following his Senate confirmation. He served as STB Chairman until March 12, 2009.

"I am deeply honored and grateful to have been appointed by President Bush and to have served in his administration," Nottingham said. "It has also been an honor to serve in President Obama's administration. I owe a debt of gratitude to my colleagues on the Board, Chairman Dan Elliott and Commissioner Frank Mulvey, as well as to the Board's exemplary career staff. Working together in a bipartisan manner, I believe that we achieved outstanding results overseeing the freight railroad industry and the other transportation industry sectors under our jurisdiction."

In October 2010 Nottingham announced that he would not seek a second term on the STB when his current term expired at the end of 2010. In an effort to facilitate an orderly transition and in order to participate in the resolution of several significant pending proceedings, Nottingham has continued his tenure at the STB into 2011 – consistent with the STB's governing statute which permits a commissioner to continue serving for up to one year after the end of his or her term, until a successor is named and confirmed.

“It was a pleasure working with Chip and I appreciate everything he has done for both me and the Board,’’ said STB Chairman Daniel R. Elliott III. “We all wish him the best.”

STB Commissioner Francis P. Mulvey said: “It has been my great pleasure to work for the past five years with Chip Nottingham. He brought to the Board knowledge of the transportation industries, which he did nothing but expand through his dedicated effort and attention to detail. These characteristics were readily demonstrated at STB hearings and oral arguments where his questioning of witnesses always testified to his thoughtful presentation. I will miss him greatly as a colleague and as a friend. I wish him all the best in his new pursuits.”

Nominee Begeman promises to enhance shipper access to STB. Ann Begeman, President Obama’s nominee to the Surface Transportation Board (STB) promised senators during her confirmation hearing that she will work to ensure the STB is a balanced playing field between the interests of railroads and rail customers.

“I believe it (STB) should be accessible and affordable to all the stakeholders,” Begeman explained to members of the Senate Commerce, Science, and Transportation Committee. Begeman further pledged to “listen without bias to all the stakeholders and strive to be fair.”

Originally from Humboldt, South Dakota, Begeman has been a Republican staff member for the Senate Commerce, Science, and Transportation Committee for 12 years, the last two years at Republican staff director. If approved by the Senate, Begeman would replace Charles Nottingham as the single Republican on the three member STB. Other current commissioners are Chairman Daniel Elliott and Francis Mulvey. The STB is comprised of at least one Republican, one Democrat, and the third member from the current President’s political party. Therefore, the current make up of the STB is two Democrats and one Republican.

STB denies BNSF’s motion to dismiss in unreasonable practice case. In a February 14 decision, the Surface Transportation Board rejected BNSF Railway’s motion to dismiss the unreasonable practice complaint filed by the State of Montana.

In its complaint filed in July 2010, Montana contends that BNSF’s practice of replacing a 52 car tariff for wheat from Montana to the Pacific Northwest with a 48 car tariff is unreasonable. Montana argues that, for a number of years, BNSF encouraged grain elevators to invest in their rail loading capacity to permit the loading of more efficient 52 car trains. To promote this investment, BNSF accepted tenders of 52 cars at published tariff rates.

In February of 2009, BNSF adjusted its public tariffs to eliminate rates for 52 car trains and replace them with rates for 48 cars. As a result of this adjustment, Montana alleges that most grain elevators desirous and capable of loading 52 cars now ship wheat in less efficient 48 car trains.

Montana contends that the primary motivation for BNSF to make the pricing adjustment was to affect the revenue to variable cost ratios associated with those movements. Under the STB’s Uniform Rail Costing System (URCS), trains of 49 cars or less are subject to the “make-whole adjustment”, which assigns higher variable costs to those movements. The make-whole adjustment is not applicable to trains of 50 cars or more due to the cost efficiencies of longer trains.

Revenue to Variable Cost Ratios (R/VC) are used by the STB to evaluate and measure the profitability and reasonableness associated with railroad freight charges. For example, if a railroad's freight charges are $2,000 per carload and the variable costs for that movement are $1,000 per carload, the R/VC would be 200 percent. In order for a rate to be regarded as potentially excessive, and subject to STB jurisdiction, the R/VC ratio must be equal to or greater than 180 percent.

Montana claims that BNSF made the rate change in order to take advantage of the make-whole adjustment whereby the STB's estimation of the variable costs of the rail movement would be increased. This, in turn, would lower the revenue to variable cost ratio so that many rail movements in the state would no longer be subject to STB jurisdiction and the potential rate relief available to shippers. Montana therefore requests that the STB find BNSF's rate adjustment to be an unreasonable practice and order the company to cease and desist from that practice and once again allow 52 car trains at 52 car rates.

BNSF requested that the STB dismiss Montana's complaint arguing that there are no reasonable grounds for such an investigation. The STB ruled that such grounds do exist and established a procedural schedule to examine further the dispute. Final arguments are scheduled to be submitted in mid-September.