No. 19-1080

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re WESTERN COAL TRAFFIC LEAGUE,	)
Petitioner.	)

REPLY OF THE WESTERN COAL TRAFFIC LEAGUE
IN SUPPORT OF ITS PETITION FOR A WRIT OF MANDAMUS

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GLOSSARY

ANPRM	Advance Notice of Proposed Rulemaking
APA	Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*
BNSF	BNSF Railway Company
Board	Surface Transportation Board
EP	Ex Parte
HDF	Highway Diesel Fuel
ICC	Interstate Commerce Commission
NPRM	Notice of Proposed Rulemaking
STB	Surface Transportation Board
WCTL	Western Coal Traffic League

INTRODUCTION

The Surface Transportation Board's ("STB" or "Board") Response in Opposition ("Response") to the Western Coal Traffic League's ("WCTL") Petition for a Writ of Mandamus ("Petition") underscores the need for the Court to issue a writ of mandamus. In its Response, the Board acknowledges its over four and one-half year delay in deciding what to do next in *Rail Fuel Surcharges (Safe Harbor)*, EP 661 (Sub-No. 2) ("*Safe Harbor*"), and informs the Court that its inaction is likely to continue indefinitely because *Safe Harbor* is not a "regulatory priority," despite the enormous continuing irreparable injury to rail shippers caused by the Board's inaction. The Board's Response raises a smorgasbord of asserted legal excuses for its ongoing inaction. None have merit.

I. THE COURT HAS JURISDICTION TO ISSUE THE WRIT

The STB argues that the Court does not have "authority" under the All Writs Act, 28 U.S.C. § 1651(a), to issue the requested writ because any action the Board could take in response to the writ "would [not] be judicially reviewable under the Hobbs Act [28 U.S.C. § 2342(5)]." Resp. at 12.

WCTL's Petition asks this Court to address the Board's inaction in *Safe Harbor* by issuing a writ directing the STB to take action within ninety (90) days by either (i) publishing a Notice of Proposed Rulemaking ("NPRM") and completing the ensuing rulemaking proceeding within one year (or such other time

the Court determines to be reasonable) or (ii) issuing a decision terminating the proceeding. Pet. at 4. Either action, if taken by the Board, would result in a final decision subject to judicial review under the Hobbs Act.

(i) NPRM Proceeding

The STB argues that if it issues an NPRM, the Court would lack jurisdiction to review the NPRM under the Hobbs Act because an NPRM is not a final rule. Resp. at 12. This argument is one of misdirection. WCTL's relief request asks that the Board be required to issue *and* complete an NPRM proceeding within one year (or other reasonable period), if the Board elects not to terminate the proceeding.

To comply with this relief option, the Board would need to publish an NPRM, receive and review comments, and then serve a final decision adopting (or not adopting) new rules modifying its current fuel surcharge rules. *See* 5 U.S.C. § 553. That final decision, of course, is subject to judicial review in this Court. *See, e.g.*, *BNSF Ry. v. STB*, 526 F.3d 770, 774 (D.C. Cir. 2008) (review of agency decision to modify current rules); *Montana v. Clark*, 749 F.2d 740, 744 (D.C. Cir. 1984) (review of agency decision not to modify current rules).

(ii) Termination Decision

The Board asserts that any decision terminating *Safe Harbor* would not be a judicially reviewable "final order" under the Hobbs Act because "it would change

nothing." Resp. at 12. However, the Court's jurisdiction under the Hobbs Act does not turn on whether an agency's order "changes" current law.

An STB order is subject to review under the Hobbs Act if it is not "'tentative' or 'interlocutory' in nature" and involves agency action "from which 'legal consequences will flow.'" *Union Pac. R.R. v. STB*, 358 F.3d 31, 34 (D.C. Cir. 2004) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

An STB order terminating *Safe Harbor* would not be tentative or interlocutory, rather it would "complete" the proceeding. *Id*. The STB's assertion that a decision terminating *Safe Harbor* would "impose[] no legal consequences" (Resp. at 14) is wrong. If the Board terminates *Safe Harbor* without issuing corrective rules, rail shippers will continue to be irreparably injured by carrier collection of hundreds of millions of dollars in fuel surcharge profits.

This Court has repeatedly held that agency decisions to terminate agency-initiated rulemaking proceedings, prior to issuing proposed rules, are final agency actions subject to judicial review. *See, e.g.*, *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1039 (D.C. Cir.), *modified on other grounds on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *Consumer Fed'n of Am. v. Consumer Prod. Safety Comm'n*, 990 F.2d 1298, 1305 (D.C. Cir. 1993); *Ctr. for Auto Safety v. Nat'l Highway*

Traffic Safety Admin., 710 F.2d 842, 846 (D.C. Cir. 1983);[1] *Prof'l Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1221 (D.C. Cir. 1983). The same holds true here.

(iii) Other Contentions

The Board claims the Court's exercise of jurisdiction is not permissible under the "reopening doctrine" (Resp. at 12) or the "'committed to agency discretion'" exception to review. *Id*. at 19 (citing 5 U.S.C. § 701(a)(2) and *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). Neither claim is correct.

The reopening doctrine addresses revival of "stale" claims. *Id*. It has no application here because the Board in *Safe Harbor* is addressing new claims based on new evidence – carrier gaming of its safe harbor rules discovered in *Cargill, Inc. v. BNSF Ry.*, NOR 42120 (STB served Aug. 12, 2013) (A-29 to -46) – not stale claims that could have been raised when the Board promulgated its fuel surcharge rules in *Rail Fuel Surcharges*, EP 661 (STB served Jan. 26, 2007) (A-14 to -28).

The "committed to agency discretion" exception of judicial review applies when a court has no "meaningful standard against which to judge the agency's

[1] The Board cites *Ctr. for Auto Safety* but claims it is distinguishable because it was not a Hobbs Act review case (even though the review statute there was very similar to the Hobbs Act) (Resp. at 13 n.8), but does not mention *Fox Television Stations*, a case that reached the same result under the Hobbs Act.

exercise of discretion." *Heckler*, 470 U.S. at 830. This exception is inapplicable here because the Court would have a "meaningful standard" to review either final action the Board chooses to take in response to the Court's writ: was the STB's decision to modify (or not modify) its fuel surcharge rules, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *Accord Fox Television Stations*, 280 F.3d at 1040; *BNSF*, 526 F.3d at 774; *Clark*, 749 F.2d at 742.[2]

II. THE STB HAS A CLEAR DUTY TO ACT

Despite requesting and receiving extensive comments on one of the most financially consequential proceedings ever presented to it, the Board now justifies its over four and one-half year delay in *Safe Harbor* by claiming the law imposes no duty on it to act, much less a duty to act in a reasonable time frame. The Board's various contentions in support of this position are wrong.

(i) 5 U.S.C. § 555(b)

The Administrative Procedure Act ("APA") requires that an agency "proceed to conclude any matter presented to it . . . within a reasonable time."

[2] The Board also complains that if its decisions to terminate ANPRM proceedings are judicially reviewable, there could be an "infinite regress of judicially reviewable 'final orders.'" Resp. at 15. The Board is free to initiate "pre-rule informational and hearing docket[s]" that are not subject to the legal standards governing agency rulemaking proceedings instituted by ANPRMs. *See Railroad Revenue Adequacy*, EP 722, slip op. at 1 (STB served Mar. 28, 2018).

5 U.S.C. § 555(b). The Board claims that this provision is not applicable here because "the Board presented the [advance notice of proposed rulemaking ("ANPRM") in *Safe Harbor*] *to the public*." Resp. at 20 (emphasis in original).

The Board's response is just word play. *Safe Harbor* is a "matter presented to" the Board. The fact that the Board initiated the proceeding itself, as opposed to initiating it after receiving a request to do so, does not mean it is not a "matter presented to" the Board. *See Cutler v. Hayes*, 818 F.2d 879, 885-87 (D.C. Cir. 1987) (applying 5 U.S.C § 555(b) standards to agency-initiated rulemaking proceeding).

Moreover, even if a request from WCTL was necessary to trigger the application of § 555(b) (which it is not), WCTL satisfied any such requirement by asking the Board in its *Safe Harbor* comments to issue an NPRM (A-136 to -37), and, in the absence of Board action, filed a second request (in the form of a petition) in August 2017 asking the Board to decide *Safe Harbor* (A-138 to -151).[3]

[3] The Board also argues that it has no obligation under 5 U.S.C. § 555(e) to issue a written decision terminating an ANPRM proceeding because ANPRM proceedings are not "rulemaking" proceedings. Resp. at 21. The Board failed to review its own rules of practice before making this incorrect assertion. *See* 49 C.F.R. § 1110.3(b) ("[g]eneral [STB] *rulemaking proceedings* will be opened by the issuance of [*inter alia*] . . . an *advance notice of proposed rulemaking* . . . .") (emphasis added).

(ii) 49 U.S.C. § 10702(2)

The Interstate Commerce Act, as amended, authorizes the Board to determine reasonable rail practices. *See* 49 U.S.C. § 10702(2). The Board exercised its authority under § 10702(2) when it issued the *Safe Harbor* ANPRM seeking public comment on whether it should amend its safe harbor rules to stop carrier gaming and profiteering.

The Board argues that it has "wide latitude in how to enforce" 49 U.S.C. § 10702(2) (Resp. at 23), but that "wide latitude" does not encompass starting a major regulatory proceeding to address the gaming of its safe harbor rules, receiving extensive public comments, and then doing nothing in response. *See, e.g.*, 49 U.S.C. § 10101(15) (requiring the Board "to provide for the expeditious handling and resolution of all proceedings . . . brought under [the Interstate Commerce Act, as amended]); 5 U.S.C. § 555(b) (requiring an agency to complete rulemaking proceedings in a timely manner).

(iii) 5 U.S.C. § 706(1)

The APA authorizes reviewing courts to "compel agency action" that has been "unreasonably delayed." 5 U.S.C. § 706(1). The STB argues § 706 does not apply (Resp. at 21 n.11), but, again, the STB is mistaken. "Agency action," as defined in § 706, includes the "failure to act" in rulemaking proceedings. *See* 5 U.S.C. § 551(13). *Safe Harbor* is an agency action, so this Court clearly has

authority under the APA to compel the Board to take action in *Safe Harbor* if it finds the STB has "unreasonably delayed" doing so. *See Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) ("*TRAC*").

III. THE STB HAS FAILED TO DISCHARGE ITS DUTY TO ACT IN A TIMELY MANNER

The STB's failure to advance *Safe Harbor* beyond the ANPRM stage in over four and one-half years clearly constitutes unreasonable delay under the factors this Court promulgated in *TRAC*. *Id*. at 79-80.

A. The STB's Delay is Excessive

The Board's principal justification for delay is a legal one – its incorrect claim that it has no legal obligation to "move forward" in ANPRM proceedings. Resp. at 27. The Board's misunderstanding of governing law provides no reasonable excuse for its excessive delay in advancing *Safe Harbor*.

The Board also claims its delays in *Safe Harbor* are reasonable because the comments it received in *Safe Harbor* "yielded no consensus." Resp. at 24. It is unreasonable for the Board to take no action in pending proceedings because the interested parties present different views on the correct outcome. If that standard applied, the Board would have *carte blanche* to avoid deciding its most important cases.

Moreover, there was a general consensus along shipper/railroad lines in *Safe Harbor*. All shippers participating in *Safe Harbor* asserted the railroads were using their fuel surcharges as profit centers and urged the Board to take actions to stop carrier fuel surcharge pricing abuses. A-134 to -35. All railroads participating in *Safe Harbor* claimed they were not using their fuel surcharges as profit centers and urged the Board to take no action. A-132. The Board's over four and one-half years of inaction mean the railroads have unreasonably prevailed to date (by default).

Finally, the Board contends that its delays are reasonable because its Members could not reach "consensus" on how to proceed. Resp. at 25. If the "we can't agree" standard applied, nothing would ever get done in proceedings where Board Members have differing views. Congress has charged the Board with deciding matters expeditiously, which should incent Board Members to reach consensus.

In any event, the Board's over four and one-half year delay in *Safe Harbor* cannot be brushed aside as reasonable due to internal Member squabbling, particularly in a case the Board itself initiated to address its own concerns that carriers could be gaming its regulations to the substantial detriment of rail shippers.

B. The STB's Delay Contravenes Congressional Directives

Congress has had longstanding concerns about delays in STB proceedings.

In 1995, Congress responded to these concerns by directing the Board to decide "all proceedings" in an "expeditious manner." 49 U.S.C. § 10101(15). In 2015, Congress remained concerned about delays in STB regulatory proceedings and directed the Board to provide quarterly reports on next action dates in major pending proceedings (STB Reauthorization Act of 2015, § 15(b) (codified at 49 U.S.C. § 1304 note)), a requirement Board Members described at the time as a "game-changer" (A-161) that would incent the Board to advance long-delayed proceedings out of "regulatory limbo" (A-165). *See* Pet. at 20-22.

The STB cavalierly brushes aside these Congressional directives. According to the Board, Congress's directive to decide "all proceedings" expeditiously does not apply to Board ANPRM proceedings. Similarly, the Board downgrades the "game changing" Congressional directives in the Reauthorization Act to mere "reporting obligations" that do not require the Board to "take any action beyond reporting." Resp. at 28 n.15.

Under the Board's views, taking no action in 5 years, 10 years or 100 years in *Safe Harbor* is perfectly consistent with its Congressional directives to decide "all proceedings expeditiously" and to remove long-delayed proceedings from "regulatory limbo." The Board's inaction in *Safe Harbor* stands in sharp contrast to its Congressional directives.

C. The STB's Delay is Unreasonable in the Sphere of Economic Regulation

Under the *TRAC* factor analysis, "[e]conomic harm is clearly an important consideration and will, in some cases, justify court intervention." *Cutler*, 818 F.2d at 898. The Board acknowledges that mandamus orders can be issued to address economic harms but claims that the Court has only done so in cases far different from the instant case. Resp. at 28-29.

In fact, the Court has taken action to remedy unreasonable agency delays in cases where important consumer economic interests were at stake, which is exactly what is at stake in *Safe Harbor*. *See, e.g.*, *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026 (D.C. Cir. 1983) (consumer interest in reasonable rail rates); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980) (consumer interest in reasonable telephone rates); *Nader v. FCC,* 520 F.2d 182 (D.C. Cir. 1975) (same).

D. The STB's Delay Cannot Be Excused By Competing Agency Priorities

In October 2016, the Board publicly stated it planned to take action in *Safe Harbor* in January 2017. A-170. Then, following the 2016 Presidential election, the Board's Chairman publicly stated the Board would not take action in *Safe Harbor* until it had a "full complement" of Members. A-174.

In its Response, the Board announces for the first time that it "is no longer" waiting to obtain a full complement of Members before deciding *Safe Harbor*.

Resp. at 30. Instead, the Board now says it intends to take no immediate action in *Safe Harbor* for a new reason – the proceeding "is not a regulatory priority" – and cites other proceedings that it asserts have a higher priority. *Id*.

Safe Harbor is now the oldest pending ANPRM rulemaking proceeding at the Board (by far).[4] The other matters the Board cites should not preclude it from advancing *Safe Harbor* in a timely manner, as they involve the routine mix of proceedings the Board customarily considers. None justify the Board's continuing inaction in *Safe Harbor* – one of the most financially consequential proceedings ever before the Board and one that goes to the heart of its regulatory mission: protecting shippers from abusive rail practices.

E. The STB's Delay is Irreparably Injuring Shippers

The *TRAC* factor analysis provides that the Court should "take into account the nature and extent of the interests prejudiced by delay." *Id*., 750 F.2d at 79. The Board's inaction in *Safe Harbor* irreparably injures shippers because while the Board fails to close the safe harbor loophole, shippers continue to pay hundreds of millions in fuel surcharge profits to carriers, payments that in many instances are

[4] The four matters the Board cites as having a higher priority include (i) a hearing the Board conducted on its detention rules in *May 2019*; (ii) the Board's review of a staff report on the Board's maximum rate standards issued in *April 2019*; (iii) a proceeding involving rail exemptions that has already advanced from the ANPRM to NPRM stage, and the *NPRM* record closed in *August 2016*; and (iv) a *terminated* proceeding involving rail costing. Resp. at 30-31.

included as charges in the electric bills paid by residential and business customers. Pet. at 25.

The Board contends that WCTL's claims of irreparable harm are "speculative," citing criticisms made by railroads of the fuel surcharge profitability analyses WCTL's experts presented in *Safe Harbor*. Resp. at 31-32. The railroads are far from disinterested parties. Their self-serving criticisms should be rejected by the Board (if and when the Board ever gets around to addressing them), particularly since WCTL's conclusions are consistent with the Board's on-the-record findings in *Cargill*. *See* A-86 to -88.

The Board cites some shipper comments in its discussion of irreparable injury. Resp. at 31-32. All shippers participating in *Safe Harbor* filed comments with the Board asserting that carriers were using their fuel surcharges as profit centers. *See* Pet. at 10-12; A-134 to -35. All urged the Board to take action to stop the profiteering. *Id*. None asked the Board to do nothing, which is exactly what the Board has done.[5]

[5] The Board's discussion of shipper comments at page 32 of its Response contains many additional errors. As examples, the Board states WCTL is "the only party to seek the immediate resolution" of *Safe Harbor*, a statement that ignores the fact that two large shipper trade associations supported WCTL's end-the-freeze petition. A-152. The Board states that one shipper asserted in its *Safe Harbor* comments that the HDF Index "was not the cause" of carrier fuel surcharge profiteering, when in fact, the shipper said that HDF-based overcharging was *one of many* causes of carrier fuel surcharge profiteering. A-57. The Board cites

F. The STB's Delay is Improper

The Board's Response provides additional proof that the Board's delay in this case is improper. The Board's position is that it has no legal duty of any sort to act in *Safe Harbor*, much less any duty to do so expeditiously, nor, it appears, will the Board be taking any action now in *Safe Harbor* because it "is not a regulatory priority." Resp. at 30. The result is that shippers, and their customers, continue to be irreparably injured.

The Board's non-action to date in *Safe Harbor*, and its statements indicating this non-action will continue indefinitely, constitute an unfortunate example of an "agency . . . shirk[ing] its statutory duty by refusing to regulate." *Prof'l Drivers Council*, 706 F.2d at 1221.

IV. WCTL HAS NO ADEQUATE ALTERNATIVE REMEDY

The Board argues that WCTL has an alternative remedy – it can petition the STB to institute a rulemaking proceeding to address *Safe Harbor*. Resp. at 17. This assertion is irresponsible. The STB has already instituted a proceeding to address carrier fuel surcharge profiteering – *Safe Harbor* – and WCTL, along with

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another shipper's comments as saying "further study" is needed but ignores the context of the shipper's statement: "[t]he evidence . . . strongly suggests that the phenomenon in Cargill . . . is not an aberration." SA-57. The Board also states the fuel surcharge profiteering may have been due to "high fuel price volatility" (Resp. at 31), an argument WCTL debunked in its *Safe Harbor* comments. A-88.

other parties, have already requested – in *Safe Harbor* – that the Board promulgate new rules to remedy carrier fuel surcharge profiteering.

Requiring WCTL, and other shippers, to start all over again is not an "adequate remedy." It is simply an excuse for the STB to ignore the requests made by WCTL, and all other shippers participating in *Safe Harbor*, to take action – requests that the STB has unreasonably ignored for over four and one-half years (and counting). In the meantime, railroads continue to collect hundreds of millions of dollars in fuel surcharge profits under the deceptive guise of changes in their fuel costs.

CONCLUSION

WCTL respectfully requests that the Court grant its Petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 21(d) and 32(a), I hereby certify that:

The foregoing Reply complies with the type-volume limitation of Rule 21(d) of the Federal Rules of Appellate Procedure. This Reply contains 3,881 words, excluding the parts of the Reply exempted by Rules 21(d) and 32(f) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(1).

The foregoing Reply complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This Reply has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Times New Roman font.

Respectfully submitted this 1st day of July 2019.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on this 1st day of July 2019, I electronically filed the foregoing Reply in Support of Petition for a Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. As Circuit Rule 21(c) requires, four paper copies of the foregoing Reply will be hand delivered to the Court.

In addition, I caused true and correct copies of the foregoing Reply to be served by first class mail, postage prepaid, on counsel for Respondent Surface Transportation Board, as listed below.

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