August Legislative and Regulatory Report

LEGISLATIVE

Senate Passes Infrastructure Bill, House Sets Deadline for Final Vote

The Senate passed the bipartisan Infrastructure Investment and Jobs Act on August 10 by a vote of 69-30, with 19 Republicans joining all 50 members of the Democratic Caucus in support of the bill. The IIJA passed the Senate as a substitute amendment, replacing the House reauthorization proposal – the INVEST in America Act – which passed the House earlier this year by a party-line vote.

The five-year package incorporates a complete surface transportation reauthorization and provides $550 billion in new spending above baseline levels, including: $66 billion for passenger and freight rail, including $5 billion for the CRISI grant program and $3 billion for grade crossing safety improvements; $17 billion for ports and waterways, including $2.25 billion for PIDP grants and $400 million for a new program to reduce truck emissions at ports. The IIJA also provides funding for key programs with multimodal freight eligibility, allocating $7.15 billion in freight formula funding, $8 billion for the INFRA discretionary grant program, and $7.5 billion for RAISE/TIGER/BUILD. Additionally, the legislation creates a new National Infrastructure Project Assistance grant program focused on transportation megaprojects and establishes a new Office of Multimodal Freight and Infrastructure Policy within USDOT to oversee national and state freight policy and administer multimodal funding programs.

On August 24, the House adopted a special rule by a party-line 220-212 vote, establishing September 27 as the deadline for a final House vote on the bill. This deadline is just days before the current FAST Act extension expires on September 30. Nonetheless, progressive Democrats have indicated they will only support the IIJA after the passage of a broader $3.5 trillion reconciliation bill containing investments in childcare, education, health care, and climate change mitigation. Rep. Jayapal (D-WA), leader of the progressive caucus, said in a statement that the two pieces of legislation are “integrally tied together.”

Speaker Pelosi is currently working with Senate leaders to craft the “human infrastructure” reconciliation bill and has stated that all committees will hold mark ups by September 15.

Shipping Reform Legislation Introduced in the House

On August 10, Reps. Garamendi (D-CA) and Johnson (R-SD) introduced the Ocean Shipping Reform Act of 2021. The legislation represents the first major update to the Federal Maritime Commission's authority to regulate the global ocean shipping industry since Congress passed the Ocean Shipping Reform Act of 1998.

The bill seeks to establish reciprocal trade opportunities to promote U.S. exports and help reduce the trade imbalance with China and other countries. The legislation also requires ocean carriers to adhere to minimum service standards, as determined by FMC. Moreover, common carriers, marine terminal operators, and ocean transportation intermediaries would be prohibited from retaliating against a shipper, shipper's agent, or motor carrier by refusing (or threatening to refuse) cargo space accommodations when available because the shipper patronized another carrier, filed a complaint, or for any other reason.

In addition, the Ocean Shipping Reform Act of 2021 would direct FMC to initiate a rulemaking to prohibit common carriers and marine terminal operators from adopting and applying unreasonable demurrage and detention rules and practices. This rulemaking would establish that demurrage and detention rules are not independent revenue sources, but rather are intended to incentivize efficiencies in the ocean transportation network. It would also prohibit the consumption of free time or collection of charges when obstacles to the cargo retrieval or return of equipment are beyond the control of the invoiced party, marine terminal appointments are not available during the free time period, or the marine terminal required for return is not open or available. Furthermore, the legislation instructs FMC to initiate a separate rulemaking to prohibit ocean carriers from declining opportunities for U.S. exports unreasonably; require ocean common carriers to report quarterly to FMC on total import/export tonnage; and authorize FMC to self-initiate investigations of ocean common carriers' business practices and apply the necessary enforcement measures. The legislation would require ocean carriers or marine terminal operators to certify that any detention and demurrage fees comply with federal regulations and shifts the burden of proof for reasonableness of detention and demurrage charges to ocean carriers or marine terminal operators. Finally, the bill permits FMC to order refunds in addition to, or in lieu of, civil penalties.

The legislation has been endorsed by the American Trucking Associations and its Intermodal Motor Carrier Conference affiliate as well as several national agricultural trade associations. As expected, the World Shipping Council voiced their opposition to the proposal, stating that the bill's approach of singling out regulations for ocean carriers "will not improve supply chain performance, and it risks undermining the regulatory and market structure that has served the nation's international trade well for many decades."

The Ocean Shipping Reform Act of 2021 has nine bipartisan cosponsors and was referred to the House Committee on Transportation and Infrastructure.

REGULATORY

STB Rejects Use of Voting Trust in CN/KCS Merger

After Kansas City Southern terminated its merger agreement with Canadian Pacific Railway in favor of combining with Canadian National Railway Company, CP announced it still intends to prepare an application to acquire KCS and filed a petition for expedited declaratory relief on May 28. CP requested that the Surface Transportation Board affirm that KCS has a continuing obligation to provide CP with the information needed to prepare, file, and defend its forthcoming application and CP has a continuing right to access the information KCS provided to CP under the protective order established between the parties in April.

On August 2, STB granted in part and denied in part CP's petition for declaratory relief. STB noted in its decision that the agency generally leaves the enforcement of private contracts to the courts, and therefore did not provide an opinion on the parties' agreement. STB's decision states that because materials KCS previously provided to CP are not governed by the protective order, there is no basis for declaratory relief. Additionally, STB asserted the protective order is generally intended to protect KCS, does not require the production of information, and does not preclude the possibility that CP be required to return voluntarily exchanged materials. STB also points to mechanisms CP could use to submit a merger application without KCS' cooperation. STB granted CP's petition to the extent that CP may obtain information from KCS through STB's discovery process and denied the remainder of the petition.

CP subsequently submitted a revised offer for a "superior proposal" to acquire KCS on August 10 in a stock and cash transaction valued at an estimated $31 billion. In response, KCS announced that its Board of Directors unanimously determined CP's new proposal was not a "Company Superior Proposal" and urged shareholders to vote in favor of the merger with CN.

In a unanimous decision on August 30, STB rejected the use of a voting trust agreement for the proposed merger between CN and KCS, determining the use of the proposed voting trust would not be consistent with the public interest. The decision asserts CN and KCS failed to establish that the use of a voting trust would have public benefits and STB expressed concerns that the use of a voting trust in this transaction could have negative impacts on the public interest relating to competition and divestiture.

STB also noted in its decision that current merger rules have more stringent requirements than the previous regulations and now require applicants to "affirmatively demonstrate" that a voting trust agreement would be consistent with the public interest. Due to the small number of remaining Class I railroads, current STB rules take a "more cautious approach" to voting trusts. Furthermore, STB stated the new regulations were specifically designed to address the potential impacts of a combination involving overlapping routes and existing direct competition.

In their motion for approval of the voting trust, CN and KCS contended the proposed voting trust would yield substantial public benefits without risk of harm to the public interest under the standards established by the current merger rules. Nonetheless, STB found neither claim persuasive. STB concluded the risk of reduced incentives to compete in the proposed transaction are significant due to the overlap of CN's and KCS's networks. If the voting trust were approved, approximately 70 miles of track between Baton Rouge and New Orleans would be under common ownership during the control proceeding, which would dampen competitive incentives. Moreover, STB expressed concern that a CN/KCS merger could trigger downstream effects and further railroad consolidations, which would create additional risks and uncertainties during the voting trust period. STB therefore denied the motion to approve the use of a voting trust in the merger.

KCS plans to cancel its scheduled shareholder vote on the proposed CN/KCS merger agreement and is currently evaluating the "options available." Following STB's determination, CP reaffirmed its August 10 updated offer to acquire KCS and set a deadline of September 12 for KCS to respond to this proposal.

CTA Petitions Supreme Court for Ruling on AB 5 Enforcement

On August 9, the California Trucking Association formally filed a petition with the United States Supreme Court requesting a review of its case challenging the California state legislature's Assembly Bill 5, which codifies the ABC test for worker classification into state law. CTA's lawsuit, filed in 2019, objects to AB 5's enforcement for motor carriers. CTA asserts that the state law is preempted by the Federal Aviation Administration Authorization Act, which prohibits states from imposing laws on motor carrier prices, routes, and services.

In response to CTA's lawsuit, the U.S. Southern District Court of California granted a preliminary injunction in January 2020, temporarily exempting motor carriers from AB 5 enforcement. The state of California and the International Brotherhood of Teamsters subsequently appealed the decision to the U.S. Court of Appeals for the Ninth Circuit, where a three-judge panel ruled that AB 5 is not preempted by federal law and reversed the preliminary injunction. CTA then filed a petition for an en banc hearing before a larger

panel of judges, which was denied by the Ninth Circuit. However, the Ninth Circuit granted CTA's request for a stay of the preliminary injunction while CTA petitions the Supreme Court.

CTA's appeal argues lower courts have issued inconsistent rulings on whether the FAAAA preempts state worker classification laws. CTA notes that while the Ninth Circuit upheld AB 5 as it applies to motor carriers, the First Circuit and the Massachusetts Supreme Judicial Court both held an identical Massachusetts statute to be preempted by the FAAAA and the Ninth Circuit did not follow these holdings. Additionally, CTA points out that while the Ninth Circuit ruled the FAAAA preempts only state worker classification laws that bind a carrier to particular rates, routes, or services, other courts have rejected this narrow approach in favor of a broader, more flexible interpretation of the law.

Furthermore, CTA asserts a Supreme Court review is necessary because the Ninth Circuit misapplied the FAAA. CTA argues the intent of the law is to create uniform regulation of motor carriers across states, and AB 5 cannot be reconciled with this purpose because it "creates the very 'diversity' of state regulatory schemes that Congress understood to pose a huge problem for national and regional carriers attempting to conduct a standard way of doing business."

Finally, CTA states that applying AB 5 to motor carriers will cause disruption of motor carrier operations and force significant changes to the U.S. trucking industry. CTA notes a substantial portion of the services provided by motor carriers nationwide — particularly in California — are offered through owner-operators, and a significant number of carriers provide services in California only through owner-operators. CTA also argues enforcement of AB 5 could have broader legal consequences, impacting the interpretation of federal statutes that use preemptive language similar to that of the FAAAA. Due to these far-reaching implications, CTA concludes the Supreme Court, not the Ninth Circuit, should make the final decision regarding enforcement of AB 5.

The Supreme Court typically determines whether it will hear a case within six weeks. If the Supreme Court chooses not to hear the case, the injunction would be lifted immediately and AB 5 will be applied to motor carriers in the state of California.