

SERVICE DATE – DECEMBER 30, 2019

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 661 (Sub-No. 2)

RAIL FUEL SURCHARGES (SAFE HARBOR)

Digest:<sup>1</sup> This decision denies a petition for reconsideration filed by the Western Coal Traffic League, American Public Power Association, Edison Electric Institute, Freight Rail Customer Alliance, and National Rural Electric Cooperative Association.

Decided: December 26, 2019

In May 2014, the Board issued an advance notice of proposed rulemaking seeking comments on whether the “safe harbor” provision of its rules governing rail fuel surcharges should be modified or removed. Rail Fuel Surcharges (Safe Harbor), EP 661 (Sub-No. 2), slip op. at 3 (STB served May 29, 2014). On August 29, 2019, the Board served a decision discontinuing this docket, explaining that “[s]ince the comment period closed in 2014, the Board has been unable to reach a majority decision on what additional Board action should be taken in response to the comments received. Because of the lack of a majority opinion and in the interest of administrative finality, the Board members agree that this docket should be discontinued.” Rail Fuel Surcharges (Safe Harbor), EP 661 (Sub-No. 2), slip op. at 3 (STB served Aug. 29, 2019). All three Board members submitted separate expressions explaining their preferred courses of action in the docket.

On September 18, 2019, the Western Coal Traffic League, American Public Power Association, Edison Electric Institute, Freight Rail Customer Alliance, and National Rural Electric Cooperative Association (collectively, the Allied Shippers) filed a petition for reconsideration of the Board’s August 29, 2019 decision.<sup>2</sup> The Allied Shippers allege four material errors: (1) the Board erroneously failed to enforce its decision in Rail Fuel Surcharges, EP 661 (STB served Jan. 26, 2007), prohibiting carriers from using fuel surcharges as “profit centers”; (2) the rationales given by certain Board members in their separate expressions had been rejected by the Board previously; (3) the Board erroneously failed to consider evidence that

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> On December 19, 2019, United States Senator Tammy Baldwin submitted a letter also requesting that the Board reconsider its August 29, 2019 decision and that the Board give careful consideration to Allied Shippers’ petition.

carriers continue to use fuel surcharges as profit centers; and (4) the Board erroneously failed to consider, and propose in a notice of proposed rulemaking, measures to stop or limit carriers from “profiteering” off of fuel surcharges. (Allied Shippers Pet. for Recons. at 5-6.)

A party may seek reconsideration of “an entire Board action” by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the prior decision; or (2) demonstrates material error in the prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3. In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Can. Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where the petitioner did not substantiate the claim of material error and the Board found none).

The Board will deny the request for reconsideration. The Allied Shippers’ petition rests on various claims of material error.<sup>3</sup> The Board, however, finds no such error, as the Allied Shippers have not challenged the Board’s rationale for discontinuing the proceeding, which was that the Board members could not reach a majority decision on what action to take in response to the comments received. Having failed to address the Board’s rationale, the Allied Shippers have not shown the Board committed material error. See Consumers Energy, Inc. v. CSX Transp., Inc., NOR 42142, slip op. at 18 (STB served Aug. 2, 2018) (“Given that its petition for reconsideration fails to address either point [relied on by the Board in its original decision], Consumers has not demonstrated material error.”). Moreover, the Board’s decision to close the proceeding “[b]ecause of the lack of a majority opinion and in the interest of administrative finality” was well within the discretion and judgment of the Board and is not material error. See, e.g., Pub. Serv. Comm’n v. Fed. Power Comm’n, 543 F.2d 757, 777 (D.C. Cir. 1974) (“Commissioners, no less than judges, may cast their votes solely to void an impasse, or otherwise to draw the administrative phase to a close.”).

Furthermore, although the Allied Shippers do allege material error in the separate expressions of certain individual Board members, this is not the same as challenging the Board’s rationale. The Board, as a body, has “reserve[d] to itself for consideration and disposition . . . [a]ll rulemaking and similar proceedings involving the promulgation of rules or the issuance of statements of general policy.” 49 C.F.R. § 1011.2(a)(1). The separate expressions of individual Board members do not constitute decisions of “the Board” or “Board action.” See 49 U.S.C. § 1306(b)(2) (providing that an individual participating in a Board decision “is entitled to express the views of that individual” when the decision is issued); cf. Pub. Serv. Comm’n, 543 F.2d at 776 (“The Commission is an entity apart from its members, and it is its institutional decisions—none other—that bear legal significance”). Accordingly, such individual separate expressions are not properly the subjects of a petition for reconsideration.

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<sup>3</sup> The Allied Shippers have not alleged new evidence or changed circumstances.

For these reasons, the petition for reconsideration will be denied.

It is ordered:

1. The Allied Shippers' petition for reconsideration is denied.
2. This decision is effective on the date of service.

By the Board, Board members Begeman, Fuchs, and Oberman.