

RAILROAD WEEK IN REVIEW

July 12, 2024

“Even assuming that FRA applied the correct legal standard, the reconsidered decision is still arbitrary and capricious. The FRA correctly frames the two worlds to be compared: (1) a world with automated inspections and a full load of visual inspections and (2) a world with automated inspections but reduced visual inspections. Since BNSF can use automated inspections even without a waiver, the question is whether a reduction in visual inspections ‘is in the public interest and consistent with railroad safety.’” The FRA says it is not. — United States Court of Appeals for the Fifth Circuit, June 21, 2024

“Both sides of Wall Street anticipate big things from the upcoming second quarter earnings season, which commences in earnest later this week with reports from the likes of JPMorgan, Citi and Wells Fargo. Analysts collectively pencil in nearly 9% annual earnings growth across the S&P 500, data compiled by FactSet show, which would mark the fastest clip since the opening three months of 2022.” — Almost Daily Grant’s, July 8

The FRA denial of BNSF’s waiver request cited here last week needs some further explanation. By way of background, in June, 2021, BNSF had petitioned the FRA to expand an existing waiver of compliance by adding two new ATI territories. The authority for relief is in 49CFR §211.51 (a)(2): “Relief as may be necessary to facilitate the conduct of the test program.”

The BNSF request was “to expand an existing waiver of certain requirements of 49 CFR §213.233 to permit BNSF to broaden its implementation of automated track inspection technologies.” The request for relief was denied. The FRA wrote that the existing waiver “allows BNSF, under specific circumstances, to partially replace the visual track inspections required under that section with inspections using autonomous geometry inspection systems.”

FRA notes that the waiver applied to two territories dissimilar to the territories for which BNSF seeks relief. “The existing waiver applies to two territories: BNSF’s Powder River Territory and the Southern Transcon Territory. BNSF seeks to expand the ATI waiver to include the Northern Transcon route as a new ATI territory and to add the Orin Subdivision to the existing Powder River Territory.”

Moreover, writes FRA, “BNSF asserts that the ‘new paradigm’ its waiver establishes improved safety and efficiency in several ways (i.e., by reducing track occupancy time

needed for inspections and unplanned maintenance, preventing service interruptions and rail equipment incidents caused by undiscovered defects, and significantly reducing hazards workers face while conducting ‘unnecessary rail and/or walking inspections).”

Three reasons for denying the request were cited:

- that “[t]he public interest and railroad safety favor addressing these issues through the RSAC process,” June 2023 Letter at 5,
- that “BNSF has not shown that an expanded waiver would improve railroad safety,” Id. at 7,
- and that “BNSF’s implementation of the current waiver does not warrant an expanded waiver at this time.’

BNSF was seriously displeased and wrote the Fifth Circuit Court of Appeals, “BNSF seeks relief on the grounds that FRA’s action is arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, all in violation of the Administrative Procedure Act, 5 U.S.C. §706. BNSF requests that this Court hold unlawful, vacate, and set aside the Order; direct FRA to grant the waiver; and grant such additional relief as may be necessary and appropriate.”

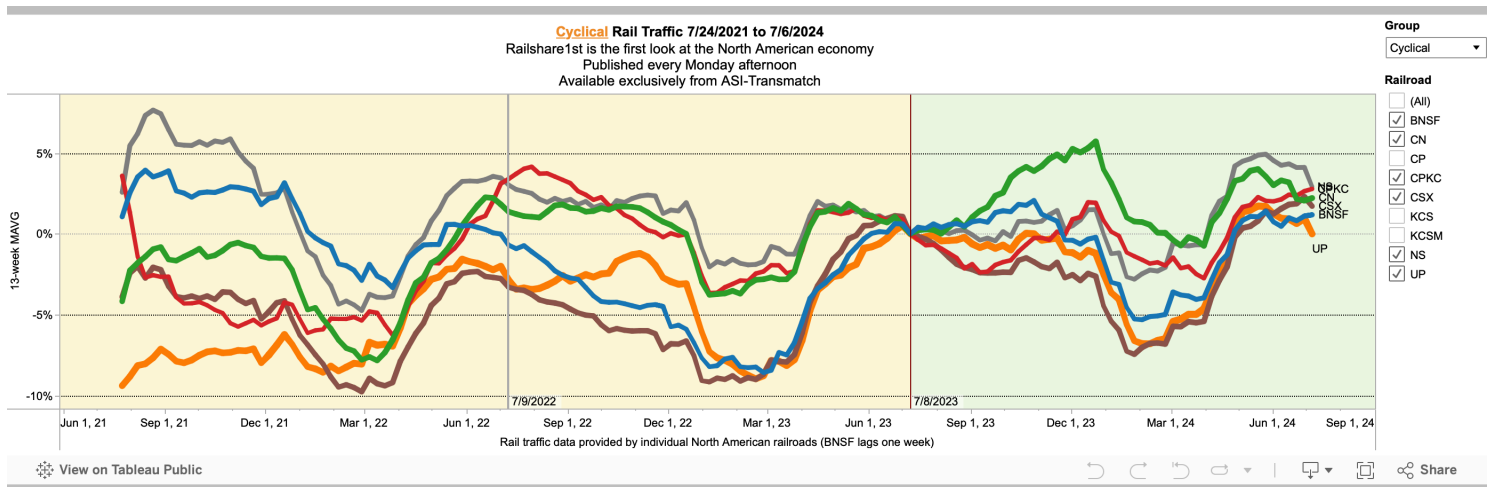
The Court concurred. “As BNSF points out, the proper legal standard for granting a waiver is not whether it would ‘improve railroad safety’ but, instead, whether the waiver ‘is in the public interest and consistent with railroad safety.’ BNSF has the better of this argument. The statutory text is clear. Applying the wrong statutory standard renders the FRA’s rationale arbitrary and capricious.”

The suit specifically names Amit Bose, FRA Administrator, as counterparty. This is an important distinction, and is my reason for seeking to shed more light on what I wrote last week. It was suggested that the decision may have been politically motivated. Seems reasonable. After all, the FRA website tells us the FRA Administrator “is nominated by the President and confirmed by the Senate.” Bose got senate confirmation Jan 2022.

In times past, FRA Administrators generally followed the recommendations of those who wrote the regulations and waivers for implementation. It appears that Bose is breaking the mold on behalf of the Oval Office’s pro-labor inclinations by directing FRA career staff to cherry-pick and reword the regs and waivers to get the desired result for self-serving stakeholders within organized labor.

The way I see it, Big Labor says “jump” to Bose and he says “how high?” It appears that he is overriding the recommendations of the FRA’s career staff of subject matter experts, the professional rail track inspection staff. Same applies to crew size rule. In sum, this is no way to run a railroad.

Railroad revenue unit counts have been essentially unchanged for three years. This chart summarizes rail traffic for all North American railroads by key commodity groups for Week 27. The cyclicals include economically-sensitive commodities such as steel and lumber; baseline carloads include commodities such as coal and grain, which are less affected by the economy.



I think it’s safe to say that the relatively poor showing of the western roads can be attributed chiefly to the vagaries of international intermodal boxes. Industry-wide, total units are slightly ahead YOY. BNSF hit bottom in 2Q2023, down 17 percent YOY vs UP down four percent in the same period;

Happily, the trends have turned up. Intermodal units for the western roads through Week 26 are up 17 percent at BNSF and four percent at UP, ergo the downward UP tail, above. Norfolk’s Q2 intermodal was up eight percent in 2Q2024 vs. down nine percent a year ago. Makes one question the wisdom of NS trimming its intermodal sails at this point.

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