

BLEAK HOUSE: THE STB'S ROLE UNDER NEPA*

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A United States Court of Appeals issued a decision in October 2003 that expands the task of the Surface Transportation Board under the *National Environmental Policy Act* (NEPA), 42 U.S.C. 4321 *et seq.*, far beyond anything previously contemplated by the agency or required by the courts.

The decision, *Mid States Coalition for Progress v. STB*, 345 F.3d 520 (8th Cir. 2003), involved an application to the STB by the Dakota, Minnesota & Eastern Railroad (DM&E) for authority to construct and operate a rail line that the DM&E intended to use to haul coal out of the Powder River Basin coal fields in Wyoming.

The court held NEPA requires the STB to consider more than the environmental effects of the actions by the railroad for which STB approval is required and being sought: namely, the effects on the surrounding environment from constructing and operating the line. The court held NEPA also requires the STB to consider the environmental effects on air quality that may be expected from the burning of the coal to be transported *by the railroad's customers*.

Citing the far-reaching implications of the decision, the STB sought rehearing, and its petition was supported by the United States, the Association of American Railroads, the Edison Electric Institute and the National Industrial Transportation League. The court, however, denied rehearing on Jan. 30, 2004, and no further review was sought.

The Eighth Circuit's decision in *Mid States* seems wrong to this writer, and its implications are troubling not only for the DM&E project involved in that case but also, and perhaps even more so, for future projects and transactions that may come before the board for approval, such as the construction of the rail line contemplated to transport nuclear wastes to the controversial Yucca Mountain disposal site in Nevada.

Yet the legal questions are not easy ones, because the STB's statutory mandates under NEPA as well as under the statutory provisions the agency is primarily charged to administer are very broadly phrased, and it's not easy to define precisely the scope of the issues the board may or must consider under those statutes.

Common sense, however, as well as several Supreme Court decisions, suggest that lines must be drawn somewhere if NEPA is not to be construed to impose an impossible task on the agency and thereby paralyze all decision-making.

This paper attempts to explain why, in this writer's opinion, the Eighth Circuit was wrong in *Mid-States* and to suggest a formulation for determining which issues are and are not proper matters for the STB to consider under NEPA. The discussion necessarily begins with a somewhat fuller description of the *Mid-States* case, the statutes involved and the court's decision.

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DM&E APPLICATION; STB DECISION

DM&E operates a 1,100-mile rail system located mainly in Minnesota and South Dakota. In 1998, it filed an application with the STB for authority to construct and operate 280 miles of new rail line to extend its system to serve 11 coal mines in the Powder River Basin in northeastern Wyoming.

This area contains large quantities of desirable low-sulfur coal and is a very profitable source of rail traffic, which to date has been served only by two other railroads -- Burlington Northern Santa Fe and the Union Pacific.

Federal law, in 49 U.S.C. 10901(a), provides that a railroad may construct and operate an extension of its railroad lines only if the STB "issues a certificate authorizing such activity under subsection (c)." Subsection (c) of section 10901 establishes a presumption in favor of granting such certificates; it provides, in pertinent part: "The board shall issue a certificate . . . unless the board finds that such activities are inconsistent with the public interest." Subsection (c), however, also gives the STB broad authority to modify applications and to impose conditions on them, by providing: "Such certificates may approve the application as filed, or with modifications, and may require compliance with conditions (other than labor protective conditions) the board finds necessary in the public interest."

In addition, NEPA requires the STB, like all federal agencies, to "include in every recommendation or report on proposals for legislation and other federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action . . ." 42 U.S.C. 4332.

The basic purpose of NEPA is to require federal agencies to focus on the likely environmental consequences of actions they propose to take before they are taken in order to minimize or avoid adverse environmental consequences of those actions.

However, NEPA merely prescribes a process that must be followed; it does not mandate particular substantive results. So long as the environmental effects have been adequately identified and considered, the agency may conclude that other considerations warrant the action despite the environmental costs.¹

As required by NEPA, the Council on Environmental Quality (CEQ) has promulgated regulations governing how agencies are to implement the NEPA process.

Many parties filed comments supporting and opposing DM&E's application, including landowners, shippers, environmental groups and other railroads. Soon after the application was filed, the STB announced it would consider the transportation aspects of the proposal before considering the environmental aspects, as is its practice in rail construction cases. In December 1998, the STB issued a decision making a preliminary finding that the projects would have substantial transportation benefits and other public benefits. The decision said it would not ultimately decide whether to authorize the project until the board had fully considered the environmental impacts.

Meanwhile, the agency's Section of Environmental Analysis (SEA) had commenced what eventually became a monumental environmental review process. After issuing a notice of its intent to prepare a full-blown environmental impact statement (EIS), SEA held 14 public meetings in South Dakota and

¹ See, e.g., *Robertson v. Methow*, 490 U.S. 332, 348-350 (1989).

Minnesota concerning the scope of environmental issues to be considered. SEA issued a draft scope in June 1998 and a final scope in March 1999. Eighteen months later, in September 2000, SEA, in coordination with five other federal agencies, issued a nearly 5,000-page draft EIS. This prompted some 8,600 comments from the public. In November 2001, SEA issued a 7,500 page final EIS addressing a myriad of potential environmental impacts not only from DM&E's proposal, but also from four hypothetical alternatives to DM&E's proposal, including a no-action alternative.

The final EIS identified and assessed environmental impacts not only from the construction and operation of the new rail lines (for which STB authority was required), but also from the upgrading of DM&E's existing lines required to handle the anticipated new coal traffic and the impact of the additional rail traffic on those lines, even though STB authority for upgrading and operating existing lines is not required.

In addition to identifying and assessing the environmental impacts from the construction, upgrading and operation of the new and existing lines, the final EIS recommended that the STB impose numerous environmental mitigation conditions on its approval, and also that the board approve an alternative, more environmentally benign, route for the new lines than the one initially proposed by DM&E.²

In January 2002, the STB issued a final decision approving DM&E's application subject to the mitigation conditions recommended by SEA and subject to the adoption of the alternative route recommended by SEA. The decision assessed the various environmental impacts of the proposed project and found that, even with the mitigation conditions and the alternative route, the project would have certain adverse environmental impacts that could not feasibly be eliminated, but that those impacts did not outweigh the very substantial transportation benefits from the project.

EIGHTH CIRCUIT'S DECISION IN MID STATES

A number of parties sought judicial review of the board's final decision in the U.S. Court of Appeals for the Eighth Circuit. Almost all of the issues raised were environmental issues.

A three-judge panel of the court issued its decision Oct. 2, 2003. In a lengthy opinion, the court rejected most of the petitioners' environmental arguments, including arguments by the City of Rochester, Minn., and the Mayo Clinic that the board did not give adequate consideration to the noise and other adverse impacts on those parties of the increased rail operations through Rochester anticipated from the project.

The court, however, accepted the argument of one petitioner, the Sierra Club, that SEA and the board failed adequately "to consider the effects on air quality that an increase in the supply of low-sulfur coal to power plants would produce."³

² The enormous environmental review entailed in this 280-mile construction project makes one wonder whether the transcontinental railroad would ever have been built had today's environmental statutes and regulations been in place in the 1860s.

³ *Mid States*, 345 F.3d at 548.

The court, therefore, remanded the case to the STB to consider this issue, expressing confidence that the board would do so quickly.⁴ It is this aspect of the court's decision that is far reaching and troubling.

The STB had not separately addressed this issue in its final decision, and SEA's treatment of it was certainly vulnerable to challenge. When SEA initially defined the anticipated scope of the EIS, it said it would "[e]valuate the potential air quality impacts associated with the increased availability and utilization of Powder River Basin Coal."⁵ In the final EIS, however, SEA merely said that the *Clean Air Act* amendments of 1990 "mandate reductions in pollutant emissions," and therefore, "an assumption of SEA's analysis was that emissions will definitely fall to the mandated levels, producing whatever effect the emissions will have on global warming."

In other words, SEA seemed to say, the DM&E project cannot result in higher emissions, because the 1990 act amendments will require a nationwide reduction in emissions from present levels. As the court pointed out, this analysis is flawed because the 1990 *Clean Air Act* amendments only cap sulfur dioxide emissions, and increased reliance on low-sulfur PRB coal may increase emissions of other pollutants.

Before the court, the board's attorneys argued that there was no factual basis for the Sierra Club's assertion that this project will increase consumption of PRB coal. They argued that, in fact, it would not result in greater consumption of PRB coal, but merely more railroads transporting that coal. The court, however, rejected this claim and concluded, based apparently on the comments of the Sierra Club and others, that the lower transportation costs likely to result from the DM&E project "will most assuredly affect the nation's long term demand for coal" *Mid States*, 345 F.3d at 549.

The court gave more credence to DM&E's argument that the board was not required to consider this issue because the extent and air quality effects of increased consumption of PRB coal are too speculative. The court, however, ultimately rejected this argument.

It first held that NEPA, as implemented by regulations promulgated by CEQ, requires agencies to evaluate all environmental effects -- even indirect ones -- that are "reasonably foreseeable" consequences of the action being considered. See, 40 C.F.R. 1508.8. While the court acknowledged that the extent of the increased consumption of PRB coal and its effect on air quality might not be reasonably foreseeable, the "nature" of the effect is foreseeable. The court said: "[W]hen the *nature* of the effect is reasonably foreseeable but its *extent* is not, we think that the agency may not simply ignore the effect."⁶

As noted earlier, the STB, supported by the United States, the Association of American Railroads, the Edison Electric Institute and the National Industrial Transportation League, petitioned the panel for rehearing, which the panel denied on Jan. 30, 2004. The STB did not seek *en banc* or Supreme Court review and has not yet issued a decision following the court's remand.

⁴ *Id.* At 556. As of August 2004), the board has issued no further decision on this issue.

⁵ See, *Mid States*, 345 F.3d at 550.

⁶ *Mid States*, 345 F.3d at 549. The court's decision on this issue also seems to have been influenced by the fact that SEA initial scoping decision stated the EIS would evaluate the "increased availability and utilization of Powder River Basin Coal." The court said it found this statement "significant." *Mid States*, 345 F.3d at 550. Whether or not SEA said it was going to assess the issue, however, should be irrelevant under the court's decision, which requires the agency to consider the issue whether or not it said it was going to at the outset.

IMPLICATIONS OF MID STATES DECISION

The Eighth Circuit's decision in *Mid States* is the first to this writer's knowledge in which a court has held that the STB, or its predecessor, the Interstate Commerce Commission, is required by NEPA to consider the environmental effects of foreseeable actions by persons other than the applicants or their agents when the agency is considering whether to approve a railroad transaction requiring its approval.

The far-reaching implications of such a requirement are readily apparent. As the Association of American Railroads and the Edison Electric Institute pointed out in supporting the STB's petition for rehearing, the logic of the court's decision would suggest that if a new rail line were to be proposed to serve an automobile assembly plant, NEPA would require the STB to consider the air quality impacts of the cars the plant expected to produce. Or, if a line intended to serve a chemical plant manufacturing pesticides or herbicides, the agency would have to consider the potential effects on ground water from agricultural run-off and the health and safety risks associated with the application and use of those products.

The implications are not limited to rail construction projects, but would logically apply to any action requiring STB authorization, including rail abandonments and rail mergers and consolidations. In those cases also, environmental issues in recent years have received substantial -- and often the predominant -- attention, time, effort and expense of the parties and the agency. To expand those issues in the way suggested by the Eighth Circuit risks imposing costs in time and money that may overwhelm the process and deter transactions that offer substantial benefits from both environmental and transportation standpoints.

Indeed, the Eighth Circuit's ruling seems already to have affected the handling of projects under STB review. In one pending case, an applicant is proposing to construct a seven-mile rail line in rural Texas to serve a proposed limestone quarry. The line would connect the new quarry with a nearby Union Pacific rail line, which would enable the quarry to ship its product out by rail rather than by far more expensive (and probably more environmentally harmful) truck operations. Although the project appears to be of fairly limited scope, SEA has determined that it requires a full-blown EIS (as opposed to a more limited "Environmental Assessment").⁷

Opponents of the project appear to object primarily to the development of the new quarry rather than the rail line itself. The SEA's recent scoping notice indicates that the EIS will assess not only the impacts of the rail line construction and operation, but also the effects of the development of the quarry itself.⁸

The Eighth Circuit's ruling has even greater potential consequences for the construction and operation of a proposed 100-mile rail line that would be used to haul nuclear wastes to the national nuclear waste repository to be built under Yucca Mountain in Nevada. It is uncertain whether this line will require STB

⁷ STB Finance Docket No. 34284, *Southwest Gulf Railroad Co. - Construction and Operation Exemption, Medina County, TX*, SEA Notice (served Jan. 28, 2004).

⁸ STB Finance Docket No. 34284, *Southwest Gulf Railroad Co. - Construction and Operation Exemption, Medina County, TX*, SEA Notice at 4 (served May 7, 2004). In this notice, SEA acknowledged the developer of the quarry will be required to obtain various permits from the Texas Commission on Environmental Quality and will also have to comply with various federal, state and local regulations.

approval;⁹ but, if it does, the Eighth Circuit's decision would require the STB to consider the environmental impacts not only of the construction and operation of the rail line, but also the effects of the Yucca Mountain repository itself on the operation and likely future development of nuclear power plants in the United States and the effects of those effects on air quality, nuclear proliferation and so forth.

In short, the Eight Circuit's *Mid States* decision has far reaching implications for many other cases, and it presents the broader question of the STB's proper role under NEPA and in accommodating NEPA to the mandates of its own organic statutes.

STB'S PROPER ROLE UNDER NEPA

In general, NEPA requires the STB (and all other federal agencies) to consider the environmental effects of all "federal actions significantly affecting the quality of the human environment," before undertaking or approving such actions. The fact is, however, that *every* action has the potential to trigger causal chains of effects stretching to infinity, and these include environmental effects. The fundamental question is: what is the extent of the STB's obligation (and its authority) under Title 49 and under NEPA to consider those potential effects in deciding whether to approve projects requiring its approval under Title 49, and what conditions to impose on such approval? Neither Title 49 nor NEPA provides a ready answer to this question.

Title 49 usually instructs the STB to approve a transaction requiring its approval if it determines that "the public interest" or the "public convenience and necessity" warrants the approval, and it usually has broad authority to impose such conditions as it finds "necessary in the public interest." See, e.g. 49 U.S.C. 10901(c).

NEPA requires the STB (and all other federal agencies) to consider and identify the significant environmental effects of any major federal action to be undertaken or authorized by the agency, and presumably authorizes the agencies to consider those effects as factors in its substantive decision making, but it does not mandate any particular outcome.

The literal language of both statutes could be construed to give the STB virtually unbounded authority -- and correspondingly to impose a virtually limitless obligation -- to consider all the reasonably foreseeable environmental effects of a proposed action that the agency (or the reviewing court) could reasonably regard as "significant," and to base its decisions on those effects.

Arguably, the agency could deny any rail construction project, however important or beneficial from a transportation or economic development standpoint, on the basis of any environmental effects that a majority of its members deem undesirable.

So long as the effects could be said to be reasonably foreseeable and "significant", the agency arguably could reject such a project even if the environmental effects were indirect, uncertain in magnitude and of a nature that most people would regard as unimportant in comparison with the benefits of the project. And if the agency could deny an application based upon such effects, then NEPA would appear to require it to identify and consider all such effects before granting the application.

⁹ *Traffic World*, May 10, 2004, at 30.

Implementing regulations promulgated by CEQ provide no meaningful constraints on the seemingly expansive obligation of agencies imposed by NEPA to consider the potential environmental impacts of their actions or on their authority to base their substantive decisions on such effects. In fact, the Eighth Circuit in *Mid States* relied upon the fact that CEQ's regulations require agencies to consider indirect as well as direct effects of their actions.

The courts, however, have fashioned a few limiting doctrines. For example, the Supreme Court has held that inherent in NEPA and the implementing regulations is a "rule of reason" under which agencies are not required to prepare EISs or consider particular environmental impacts where doing so would provide no useful information to the agency's decision making process or would serve no purpose in terms of NEPA's scheme and policies.¹⁰ The Supreme Court has also held that agencies are not required to consider all environmental impacts that might be considered "effects" of the agency's action in a strictly "but for" sense of causation. Instead, the Court has held that NEPA requires "a reasonably close causal relationship" between the alleged environmental effect and the challenged agency action – a causal relationship the Court analogized to the "familiar doctrine of proximate cause from tort law."¹¹

The Court applied these limiting doctrines most recently, in June 2004, to hold that NEPA did not require the Transportation Department's Federal Motor Carrier Safety Administration (FMCSA) to prepare an EIS to consider the impacts on air quality that might result from the operation of Mexican trucks in the United States before promulgating regulations governing the procedures by which Mexican motor carriers obtain authority to operate in the United States and establishing a safety inspection regime for such carriers.¹²

Although Congress by statute had made the promulgation of these regulations a necessary condition for the issuance of operating authority to Mexican carriers, once the regulations were in place and the president decided to lift a "moratorium" on Mexican trucks that had long been in place (as he did in November 2002), FMCSA is required by law to issue such authority to any applicant who is willing and able to comply with DOT's safety and financial responsibility requirements.

Even though the issuance of the FMCSA regulations could be said to be a "cause" of the entry of allegedly air-polluting Mexican trucks into the United States in a "but for" causal sense, a unanimous Supreme Court held that the regulations were not a relevant cause of the potential air pollution impacts for purposes of NEPA because FMCSA cannot refuse to issue operating authority to Mexican applicants based on its concerns about air quality impacts.

The Court said: "It would not . . . satisfy NEPA's 'rule of reason' to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform. Put another way, the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the president in lifting the moratorium and those of Congress in granting the president this authority while simultaneously limiting FMCSA's discretion." In sum, the Court held that "where an agency has no ability to prevent a certain

¹⁰ *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-374 (1989); *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 325 (1975).

¹¹ *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

¹² *Department of Transportation v. Public Citizen*, ___ U.S. ___ (June 7, 2004).

effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant “cause” of the effect.”

The Supreme Court’s decision in *Public Citizen* provides a useful basis for assessing the correctness of the Eighth Circuit’s *Mid States* decision and, more broadly, for defining in general terms a reasonable boundary to the STB’s obligations under NEPA.

It is true that *Public Citizen* is arguably distinguishable from *Mid States* because, under its statutes, the FMCSA has no discretion to deny Mexican carriers operating authority based upon any concern the FMCSA might have over the impacts on air quality, whereas the STB has broad discretion under its statutes to grant or deny a rail construction application based upon the STB’s assessment of many factors relevant to the “public interest,” including potential environmental impacts.

Nevertheless, when the potential impacts are ones that would be proximately caused not by the railroad applicant itself or by any activities over which the STB has regulatory jurisdiction, such as the construction and operation of rail lines, but instead would be the direct result of actions by other parties over which the STB has no regulatory jurisdiction, the *Public Citizen* decision would certainly support the conclusion that those are impacts the STB is not required to consider.

It may be reasonably foreseeable that constructing a new railroad line into a region would increase the nationwide burning of coal and thereby increase the amount of certain air pollutants to some (probably unknowable) degree. And those effects would probably have further effects on the consumption of other fuels, on general industrial development, and so on *ad infinitum*. But none of those effects are the direct result of activities over which the STB has any regulatory authority.

Furthermore, other governmental agencies *do* have regulatory jurisdiction over those activities. There is simply not a “reasonably close causal relationship”¹³ between those effects and the rail construction project the STB is being asked to approve. To use the words of the *Public Citizen* decision, “where an agency [the STB] has no ability to prevent a certain effect [increased air pollution] due to its limited statutory authority over the relevant actions [the increased consumption of coal], the agency[’s action approving the rail construction project] cannot be considered a legally relevant “cause” of the effect.”

In sum, a general statement of the STB’s role under NEPA that seems reasonable, workable and consistent with Supreme Court decisions is offered as follows: With respect to any action for which STB approval is required, NEPA requires the STB to consider all potential environmental impacts (both direct and indirect impacts) of the action that (1) are reasonably foreseeable, (2) would have a significant affect on the quality of the human environment *and* (3) would be the proximate result of actions over which the STB has regulatory jurisdiction.

These could include impacts that are the “indirect” result of the action for which STB approval is sought, so long as they are the proximate result of actions over which the STB has jurisdiction. Thus, in considering a rail construction application, the STB would be required to consider not only the environmental impacts of the construction activity, but also the noise and other environmental impacts of the anticipated rail operations over the line. But NEPA

¹³ *Metropolitan Edison Co.*, 460 U.S. at 774.

does *not* require the STB to consider environmental impacts that are the proximate result of activities over which the STB has no regulatory jurisdiction, even if those impacts might be reasonably foreseeable and might be the result of the STB's action in a "but for" sense.

Environmentalists might argue that the foregoing statement of the STB's role is too narrow and would permit the agency to turn a blind eye to significant adverse environmental impacts that would be the reasonably foreseeable consequences of its action. That is true. It might, in some cases. But, as the *Mid States* decision shows, the agency's obligations under NEPA demand workable limits if the agency's other statutory responsibilities are not to be completely smothered by what has already become a gargantuan environmental review process. Attempts to define those limits by the use of amorphous concepts like "unduly speculative" is not satisfactory, as the *Mid States* case again illustrates.

Whether the likely effect of the DM&E's new line on national coal consumption and air pollution, and the magnitude of that effect, are or are not "too speculative" is a sterile argument because it is largely subjective and cannot be resolved by meaningful or workable criteria. Whether the air pollution effects of any increased coal consumption are or are not the proximate result of actions over which the STB has jurisdiction, however, can be resolved by meaningful criteria and provides at least a workable definition for the limits of the agency's obligations.

Furthermore, the definition proposed here would help in providing a more reasonable allocation of regulatory responsibilities among the many government agencies with jurisdiction over the relevant activities.

The operations of coal-burning industries are regulated by a number of federal and state agencies, and the emission of pollutants is regulated primarily by the Environmental Protection Agency pursuant to the *Clean Air Act* and, to a lesser degree, by state agencies. Any concern that the definition of the STB's NEPA responsibilities offered here would permit that agency to ignore some adverse consequences of its actions should be mitigated by the fact that the proximate causes of those consequences will almost certainly be subject to oversight and regulation by agencies with more direct responsibility over, as well as greater expertise with, those activities.

In fact, it is not at all apparent how the nation's environmental policies are furthered by adding an additional level of STB review of activities over which it has no direct responsibility or special expertise.¹⁴

¹⁴ Indeed, as many practitioners before the STB recognize, environmental issues are often raised in STB proceedings not because of genuine environmental concerns, but because they provide the best prospects of defeating or delaying an application to parties who oppose the application for commercial or other reasons, but who have no substantial non-environmental grounds for opposing it. This fact often elevates environmental issues to a practical importance and attention out of all proportion to their true environmental significance. The resulting environmental review imposes an enormous cost to all parties involved in the regulatory process. These costs include not only the very substantial costs of the lawyers and environmental consultants involved, but also, and even more significantly, the costs of regulatory delay. In 1998, DM&E estimated the total cost of the project to be approximately \$1.4 billion, not including the costs of any environmental mitigation required by the Board. Because the application presented no substantial non-environmental issues, the board issued a decision resolving those issues 10 months after the application was filed. The board's final decision after all environmental review was not issued until four years after the application, and the first round of judicial review, which involved only environmental issues, was not completed for another four years. The case is now back before the agency on remand from the court, and any subsequent decision may be appealed again to the courts.

CONCLUSION

To summarize, in *Mid States*, the Eighth Circuit held that NEPA requires the STB to consider the potential environmental impacts of actions by the customers of railroads not otherwise subject to STB jurisdiction if those actions are the foreseeable consequence of transactions for which STB approval is required and sought.

That holding is unprecedented, has far-reaching implications, and seems to this writer to be at odds with Supreme Court decisions construing NEPA, including the Court's recent decision in *Public Citizen* involving Mexican trucks.

A more reasonable and workable view of the STB's role under NEPA is one that would require the STB to consider all the potential environmental impacts of actions requiring its approval that are the proximate result of activities subject to the STB's jurisdiction, but would not require the STB to consider impacts that are the proximate result of activities that are not subject to the STB's jurisdiction.