

Article

Judicial Review of Surface Transportation Board Decisions: An Empirical Analysis

Matthew J. Warren¹

*It is a capital mistake to theorize before one has data.*²

Any lawyer who practices for very long will soon confront the client question: “Am I going to win?” Some clients may ask about “the odds” of success, the “percentage” likelihood of victory, or how many times a particular kind of case has had a successful outcome. While most practitioners are wise enough to avoid making definitive guarantees about the result of any particular case, whether or not a particular action is likely to succeed is an eminently reasonable business question from a client’s perspective.

Likelihood of success can be a question of great concern to parties who are considering an appeal from an action by an administrative agency. Before authorizing what may be an expensive appeal, parties often want to know what their lawyer thinks of their chances of convincing a reviewing court to reverse an agency decision, particularly in light of the deference to agency decisions implied by leading cases like *Chevron*,³ *State Farm*,⁴ and *Skidmore*.⁵

1. Partner, Sidley Austin LLP. The views expressed in this Article are the personal views of the author and do not necessarily reflect those of Sidley Austin LLP or of any other organization or group.

2. ARTHUR CONAN DOYLE, *A Scandal in Bohemia*, in THE ORIGINAL ILLUSTRATED ‘STRAND’ SHERLOCK HOLMES 119 (1996).

3. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

4. *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34 (1983).

Many practitioners, the author included, may instinctively respond to such questions with analysis of applicable doctrines and the specific case at hand, tempered perhaps by some experience with the agency and court in question. But this traditional qualitative analysis often leaves out important lessons that could be learned from an empirical data analysis.

While it might not be a “capital mistake” to theorize about likelihood of success based solely on legal doctrine, Sherlock Holmes’s demand for “data” above all is one that practitioners would be wise to heed.⁶ Quantitative analyses of how courts decide challenges to agency actions are not a replacement for doctrinal analysis, but they are valuable data to both scholars and practitioners seeking to understand how judicial review works in practice. As Richard Pierce observed, “empirical studies can provide additional insights into administrative and judicial practices that can help all of us gain a better understanding of the roles that agencies and reviewing courts play in the administrative state.”⁷

This article presents the results of a study of judicial review for a small federal agency that nonetheless has great importance to the railroad industry—the Surface Transportation Board (“STB”). Successor to the Interstate Commerce Commission, the STB has exclusive jurisdiction over the economic regulation of U.S. railroads, and its decisions and policies have a broad impact on railroads, rail shippers, and other parties affected by the rail industry. The STB was created in 1996, and over the past two decades STB orders have been the subject of well over a hundred federal circuit court appeals brought in different circuits by different types of parties from different types of agency decisions.⁸ An analysis of these circuit court appeals is relevant both to the entities affected by STB regulations and to the broader literature studying judicial review of administrative agency actions.

Section I of this Article reviews several previous empirical studies of judicial review of agency action and the conclusions of those studies. Section II introduces the Surface Transportation Board and some significant features of its jurisdiction that are relevant to an empirical analysis of the judicial review of STB decisions. Section III explains the methodology of the study and the results of the analyses, including the affirmance rate for STB decisions as a whole and affirmance rates by circuit, type of peti-

5. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

6. ARTHUR CONAN DOYLE, *A Scandal in Bohemia*, in THE ORIGINAL ILLUSTRATED ‘STRAND’ SHERLOCK HOLMES 119; see also ARTHUR CONAN DOYLE, *The Adventure of the Copper Beeches*, in THE ORIGINAL ILLUSTRATED ‘STRAND’ SHERLOCK HOLMES 277 (“‘Data! Data! Data!’ he cried impatiently.”).

7. See Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 98 (2011).

8. See *infra* Appendix A.

2018] Judicial Review of Surface Transportation Board Decisions 3

tioner, type of case, and time period. Section IV presents some hypotheses to explain observations in the data and the potential implications of those hypotheses for both transportation practitioners and the general understanding of judicial review of agency action.

Five significant observations can be made from the data. *First*, STB decisions tend to be affirmed at a higher rate than average circuit court decisions.⁹ This Article's study found an affirmance rate for STB decisions that was 82%—12% higher than the average affirmance rate found in several general studies of agency affirmance rates. *Second*, the D.C. Circuit affirms STB decisions at a rate somewhat lower than the average of other circuits.¹⁰ *Third*, railroad petitioners succeed in appeals of STB decisions at a higher rate than any other class of petitioner.¹¹ This may be because railroads are repeat players before the STB and thus may be more judicious in choosing which cases merit an appeal. *Fourth*, by a significant margin the STB's affirmance rate is lower for rulemaking decisions than for any other category of decision.¹² *Fifth*, a significant number of the "reversals" identified in this study were on technical or procedural grounds that provided a clear path for the agency to cure the problem that led to a reversal, and in many instances the STB has followed that path to achieve the same substantive result as its initially "reversed" decision.¹³ Thus the STB's actual success rate in ultimately withstanding judicial review of its orders is even higher than the 82% figure identified in the study.

PREVIOUS EMPIRICAL STUDIES OF JUDICIAL REVIEW OF AGENCY ACTIONS

Several empirical studies of judicial review of agency action have been conducted in recent years.¹⁴ Collectively these studies comprise thousands of observed cases and analyze patterns of judicial decision-making in multiple ways.¹⁵ The patterns and trends identified in those studies are instructive here, particularly to the extent that they diverge from patterns in the STB analysis conducted for this Article.

9. See *infra* pp. 25-26.

10. See *infra* pp. 26-28.

11. See *infra* pp. 28-29.

12. See *infra* p. 29.

13. See *infra* pp. 29-31.

14. For a helpful overview of a number of studies in this area and their findings, see Pierce Jr., *supra* note 7.

15. See David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 170 (2010) (noting that eleven prior studies of judicial review of agency action included 5081 observations).

STUDIES OF CHANGES IN RATES OF AFFIRMANCE OVER TIME.

Some studies have analyzed whether rates of affirmance changed in the wake of important developments in administrative law doctrine. For example, Peter Schuck and E. Donald Elliott studied data sets from different time periods to study how affirmance rates may have changed as the legal landscape for judicial review changed between the 1960s, the 1970s, and the 1980s.¹⁶ The usual story of this period is that of a swinging pendulum. Initially judicial review of agency decisions was relatively deferential, but it became increasingly less deferential in the 1970s with the expansion of the administrative state and the development of the “hard look” doctrine by the D.C. Circuit.¹⁷ Then the pendulum swung back in the 1980s in the wake of Supreme Court decisions limiting the scope of judicial review of agency action, such as *Vermont Yankee*¹⁸ and ultimately *Chevron*.¹⁹

Following this common narrative, one might have expected to see higher affirmance rates before the 1970s; lower affirmance rates during the height of the “hard look” era in the 1970s; and higher affirmance rates after *Vermont Yankee* and *Chevron*.²⁰ Somewhat counterintuitively, Schuck and Elliott found “increasing rates of affirmances by courts in administrative law cases, from 55.1% in 1965, to 60.6% in 1975, to 76.6% in 1984-85.”²¹ They hypothesized that one reason for this finding may have been that agencies improved their compliance to meet stricter standards for review.²² In other words, if the advent of hard look doctrine motivated agencies to take a harder look at issues, the stricter review standard may have had little effect on ultimate affirmance rates.

STUDIES OF POLITICAL INFLUENCE ON JUDICIAL REVIEW OF AGENCY ACTION.

Other studies have examined the role of politics, suggesting that the party identification of the judge (as measured by the president who nominated that judge to the bench) could be correlated in some way to affirm-

16. Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L. J. 984, 1007-20.

17. Matthew Warren, *Active Judging: Judicial Philosophy and the Development of the Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2601-03 (2002); Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1142 (1988).

18. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519 (1978).

19. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

20. Schuck & Elliott, *supra* note 16, at 1007.

21. *Id.* at 1007-08.

22. *Id.* at 1009-10 (“It is possible that today’s courts are much more demanding than their predecessors of the 1960s or 1970s, but that agencies have improved their performance even faster. Thus, agencies may be ‘out ahead of the curve’ of increasingly stringent judicial review.”).

2018] Judicial Review of Surface Transportation Board Decisions 5

ance rates.²³ Thomas Miles's and Cass Sunstein's studies of circuit court cases under the *Chevron* standard found that whether an agency order was issued by a Republican or a Democratic administration correlated with measurably different voting rates for Democratic-appointed judges and Republican-appointed judges.²⁴ It should be noted that the data set was limited to decisions of the EPA and the NLRB, agencies which the authors recognize "are known for producing politically contentious decisions."²⁵

STUDIES OF DOCTRINAL EFFECT ON JUDICIAL REVIEW
OF AGENCY ACTION.

Other studies have sought to measure the effect of particular doctrines on judicial review patterns. Orin Kerr studied applications of *Chevron* by appellate courts in 1995 and 1996 in order to analyze how well actual judicial decisions fit certain theories of how *Chevron* might affect judicial behavior.²⁶ Overall Kerr found that 73% of the 253 applications of the *Chevron* doctrine he identified resulted in a finding that the agency's interpretation of a statute was correct.²⁷ Another useful study focused on the *Skidmore* doctrine,²⁸ and particularly on the "modern" *Skidmore* standard as applied by courts of appeal after the Supreme Court's decisions in *Christensen v. Harris County*²⁹ and *United States v. Mead Corp.*³⁰ breathed life into the standard.³¹ Its review of 106 circuit court cases applying the standard found that in 60.4% of cases the court accepted the agency's interpretation.³²

Some studies have used empirical analysis to argue that doctrinal differences in standards of review have minimal practical relevance. In support of an argument that varying standards of review for administrative law decisions should be consolidated into a single "reasonableness" standard, David Zaring conducted a comparative review of affirmance rates under six different standards of review.³³ He found that "the win rates of

23. Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008).

24. *Id.* at 767-68; see also Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006).

25. Miles & Sunstein, *Do Judges Make Regulatory Policy*, *supra* note 24, at 848.

26. Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 6-17 (1998).

27. See *id.* at 30.

28. *Skidmore v. Swift & Co.*, *supra* note 5, at 140.

29. *Christensen v. Harris Cty.*, 529 U.S. 576 (2000).

30. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

31. Kristin Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235 (2007).

32. *Id.* at 1275.

33. See David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135 (2010).

agencies are surprisingly consistent across standards of review. For *Chevron* review, *Skidmore* review, and arbitrary and capricious review, the studies suggest that, at least as the judiciary is currently comprised, agencies win between 60 and 70% of their appeals with few exceptions.”³⁴ Zaring’s study of judicial review of agency factfinding revealed a similar affirmance rate: “[i]n substantial evidence cases, the agency was affirmed in 71.2% of . . . cases, a figure slightly higher than, but not dramatically different from, the agency’s overall win rates in *Chevron* and *State Farm* cases before the appellate courts.”³⁵

SUPREME COURT REVIEW OF AGENCY ACTION

While both this Article and most published studies focus on circuit court affirmance rates, some studies have examined the Supreme Court’s affirmance rates. A 2008 study examined all 1014 Supreme Court cases involving the agency interpretation of a statute that were decided between 1984 and 2005 –roughly the first two decades of the *Chevron* era.³⁶ The authors found an overall affirmance rate of 68%.³⁷ Categorizing cases by the doctrine applied produced some variation around the average affirmance rate; 91% for *Auer*³⁸; 76% for *Chevron*; 74% for *Skidmore*; and 66% for de novo review.³⁹ Another study of Supreme Court decisions exclusively studied *Chevron* decisions between 1989 and 2005.⁴⁰ It found an affirmance rate of 67%.⁴¹

CONCLUSIONS OF PRIOR EMPIRICAL STUDIES

These academic studies suggest several preliminary conclusions. As one “study of studies” observed, “[c]ourts at all levels of the federal judiciary uphold agency actions in about 70% of cases.”⁴² The general convergence of affirmance rates around this 70% number suggests that studies finding affirmance rates significantly above or below this standard

34. *See id.* at 169.

35. *Id.* at 178.

36. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1094 (2008).

37. *Id.*

38. *Auer v. Robbins*, 519 U.S. 452 (1997).

39. *See Eskridge & Baer, supra* note 36, at 1142.

40. *See Miles & Sunstein, Do Judges Make Regulatory Policy, supra* note 24.

41. *Id.* at 849. The difference between the 67% *Chevron* affirmance rate found by Miles and Sunstein and the 76% *Chevron* affirmance rate found by Eskridge and Baer may result from the fact that the Miles/Sunstein study covered a period five years shorter than the Eskridge/Baer study.

42. Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 515 (2011).

2018] Judicial Review of Surface Transportation Board Decisions 7

warrant further investigation.⁴³

Moreover, the choice of legal doctrines does not appear to have a significant effect on outcomes. Richard J. Pierce’s survey found that “[t]he ranges of affirmance rates by doctrine are as follows: *Chevron*, 60% to 81.3%; *Skidmore*, 55.1% to 73.5%; *State Farm*, 64%; substantial evidence, 64% to 71.2%; and *de novo*, 66%. All of the ranges of finding overlap, and doctrinally-based differences in outcome are barely detectable.”⁴⁴ Pierce noted that Supreme Court cases applying the *Auer* doctrine of deference to an agency’s interpretations of its own rules do not fit this pattern, but such cases have not been studied at the circuit court level.⁴⁵ Studies have also found a somewhat lower rate of affirmance from the D.C. Circuit.⁴⁶ One study found that the D.C. Circuit affirms at a rate 12% lower than other circuits,⁴⁷ and another found that it affirms at a 11% lower rate.⁴⁸

The lessons from these general studies provide a helpful foundation for the STB study presented below and help to illustrate some of the ways in which the STB data diverges from data that has been gathered from broader studies of federal agencies.

THE SURFACE TRANSPORTATION BOARD

OVERVIEW OF THE STB AND ITS JURISDICTION

The STB is an independent federal agency that has general authority over the economic regulation of railroads.⁴⁹ The STB was created by the ICC Termination Act of 1995 (“ICCTA”),⁵⁰ and it is the heir to the Interstate Commerce Commission (“ICC”)—or at least to those ICC functions that survived Congress’s gradual deregulation of the rail industry in the Railroad Revitalization and Regulatory Reform Act of 1976,⁵¹ the Stag-

43. Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, *supra* note 7, at 86 (“Any study that finds an affirmance rate that varies significantly from that [70%] norm in some context suggests the need for detailed study of the decision-making context to identify and to address the causes of the variation from the norm.”).

44. *Id.* at 85.

45. *Id.* at 85, n.53 (citing one study of the Supreme Court’s application of *Auer* deference that produced a 91% affirmance rate).

46. *See id.* at 90, n.78.

47. Schuck & Elliott, *supra* note 16, at 1041-42.

48. *See* Miles & Sunstein, *The Real World of Arbitrariness Review*, *supra* note 23, at 795.

49. The STB was administratively aligned with the U.S. Department of Transportation for the first two decades of its existence after its creation in 1996. The STB Reauthorization Act of 2015 established the STB as a wholly independent federal agency. Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, § 3 (2015).

50. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

51. An Act to Improve the Quality of Rail Services in the United States Through Regulatory Reform Coordination of Rail Services and Facilities, and Rehabilitation and Improvement Financing, and for Other Purposes, Pub. L. No. 94-210, 90 Stat. 31 (1976).

gers Rail Act of 1980,⁵² and the ICC Termination Act.⁵³ It is currently one of the smallest federal agencies, with a staff of 130 full-time employees as of 2017.⁵⁴

Most matters before the STB involve the economic regulation of freight railroads, such as disputes over rates and service; mergers, line sales, or other transactions; abandonments and discontinuances of service; and preemption questions.⁵⁵ The STB also has jurisdiction over interstate passenger railroads (*i.e.*, passenger railroads that cross state lines)⁵⁶ or over intrastate passenger railroads that link to the national rail network.⁵⁷ The STB has limited jurisdiction over some motor carriers⁵⁸ and over certain pipelines not regulated by the Federal Energy Regulatory Commission.⁵⁹ It does not have jurisdiction to regulate local transit systems.⁶⁰

CATEGORIES OF STB DECISIONS THAT COMMONLY ARE REVIEWED BY COURTS OF APPEAL.

Some background on the kinds of matters that the STB decides and the kinds of parties who participate in those proceedings will be helpful to understanding the empirical analysis in section III. The major categories of matters that the STB decides include rate reasonableness cases; abandonments and discontinuances of service; transactions; and preemption questions.

Rate Reasonableness Cases. Railroads have the authority to establish rail transportation rates in the first instance.⁶¹ With some broad exceptions,⁶² shippers have the ability to bring a complaint to the STB to chal-

52. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

53. See generally S. Rep. 104-176, at 2-6 (1995) (Senate report on ICCTA, outlining history of deregulatory regulation and ICCTA's proposal to sunset the ICC and "transfer [its] essential functions to a successor").

54. Surface Transportation Board Budget Request FY 2019 at 26 (February 2018), <https://www.stb.gov/stb/docs/Budget/STB%20FY%202019%20Budget.pdf>.

55. Other agencies regulate other aspects of rail transportation. For example, rail safety is generally regulated by the Federal Railroad Administration, and the transportation of hazardous materials is generally regulated by the Pipeline and Hazardous Safety Materials Administration.

56. See Petition for Declaratory Order—DesertXpress Enterprises, LLC, 2010 WL 1822102 (2010) (No. 34914).

57. See California High-Speed Rail Authority, Exemption, 2013 WL 3053064 (2013) (No. 35724).

58. Specifically, the agency has jurisdiction over certain trucking company, moving van, and non-contiguous ocean shipping company rate matters and certain intercity passenger bus company structure, financial, and operational matters. See 49 U.S.C. Subtitle IV Part B.

59. See 49 U.S.C. Subtitle IV Part C.

60. See 49 U.S.C. § 10102(5).

61. *Ariz. Pub. Serv. Co. v. BNSF Ry. Co.*, 7 S.T.B. 76, 81 (2003) ("railroads have the right to set their own rates at levels of their own choosing").

62. The STB has no jurisdiction to decide the reasonableness of rates in a rail transportation

2018] Judicial Review of Surface Transportation Board Decisions 9

lunge whether the rates established by a railroad are reasonable.⁶³ The STB has established several methodologies for rate challenges. The most commonly used is the Stand Alone Cost (“SAC”) methodology, which “seeks to determine whether a complainant is bearing the cost of any inefficiencies or the cost of any facilities or services from which it derives no benefit.”⁶⁴ SAC does this “by simulating the competitive rate that would exist in a ‘contestable market,’ *i.e.*, a market that is free from barriers to entry. Under the SAC constraint, the rate at issue cannot be higher than what the SARR would need to charge to serve the complaining shipper while fully covering all of its costs and earning a reasonable ROI. This analysis produces a simulated competitive rate against which the challenged rate is judged.”⁶⁵

While the STB has stated that SAC is “the most accurate procedure available for determining the reasonableness of rail rates where there is an absence of effective competition,”⁶⁶ it is a complex methodology that requires a SAC complainant to model a hypothetical “stand-alone railroad” and make a series of evidentiary assumptions about the operations, expenses, and revenues attributable to such a railroad.⁶⁷ The nature of SAC evidence led to concerns about SAC’s feasibility for smaller rate disputes, and Congress has required the STB to develop a simplified methodology for cases where a full SAC presentation is too costly given the value of the case.⁶⁸ The STB has promulgated several rules to develop and refine simplified standards for use in smaller cases⁶⁹ and to refine the SAC test.⁷⁰

As demonstrated below, rate reasonableness cases are the source of a significant portion of petitions to review STB orders, which are typically

contract (*see* 49 U.S.C. § 10709); rates that have a revenue-to-variable-cost ratio of less than 180% under the STB’s model for measuring variable costs (*see* 49 U.S.C. § 10707(d)(1)); or rates for transportation that is subject to effective competition from other rail or non-rail methods of transportation (*see* 49 U.S.C. § 10707(a)). The STB also has exempted certain categories of traffic from rate regulation, but those exemptions can be revoked by the agency. *See* 49 U.S.C. § 10502 (granting agency authority to grant exemptions from regulation); 49 C.F.R. §§ 1039.10, 1039.11, 1039.14 & 1090 (exempting certain commodities and classes of traffic from regulation, including boxcar traffic, intermodal traffic, and automotive traffic).

63. *See* 49 U.S.C. § 10704(b).

64. *Consumers Energy Co. v. CSX Transp., Inc.*, at 22, STB Docket No. NOR 42142 (Jan. 11, 2018) (citing Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 542 (1985)).

65. *Id.*

66. Simplified Standards for Rail Rate Cases, STB Ex Parte No. 646 (Sub-No. 1), at 13 (Sept. 4, 2007).

67. Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 542-46 (1985).

68. 49 U.S.C. § 10701(d)(3).

69. *See* Simplified Standards for Rail Rate Cases, *supra* note 66; Rate Guidelines – Non-Coal Proceedings, 1 S.T.B. 1004 (1996).

70. Rate Regulation Reforms, STB Ex Parte No. 715 (July 18, 2013); Major Issues in Rail Rate Cases, STB Ex Parte No. 657 (Sub-No. 1) (Oct. 30, 2006).

filed by the unsuccessful railroad or shipper litigant.⁷¹ Rulemakings related to rate reasonableness methodologies are another significant source of STB appeals. Five of the STB rulemaking appeals listed in Appendix A are for rules creating or modifying rate reasonableness methodologies.⁷²

Abandonments and Discontinuances of Service. The Interstate Commerce Act gives the STB authority to regulate a railroad's abandonment of a rail line or discontinuance of service over a rail line.⁷³ In general, the STB has the authority to allow for abandonment and discontinuance of service if "the present or future public convenience and necessity require or permit" the proposed abandonment or discontinuance.⁷⁴ Railroads can file applications for abandonment authority of any line.⁷⁵ Because that application process is fairly rigorous, most abandonment requests are made pursuant to a class exemption that the agency has established for "out-of-service" lines.⁷⁶ Under that exemption, lines that have not originated or terminated any traffic for two years and that do not carry overhead traffic that cannot be rerouted to other lines may be abandoned 30 days after the notice of such an exemption is published in the Federal Register.⁷⁷

The Interstate Commerce Act also includes several statutory provisions designed to preserve rail service or the potential for rail service. In many proceedings these provisions create opportunities for third parties to participate in the proceeding (and occasionally to appeal the final STB order). For example, 49 U.S.C. § 10904 creates a process allowing qualified entities to forestall the proposed abandonment of a line by making an "Offer of Financial Assistance" ("OFA"), either by subsidizing the cost of continued service by the carrier seeking abandonment or by purchasing the line from the railroad at its net liquidation value for the purpose of continuing rail service.⁷⁸ Another avenue for third party participation is the Rails-to-Trails Act, which allows potential trail sponsors to acquire rail corridors proposed for abandonment for interim use as a trail.⁷⁹ Finally, 49 U.S.C. § 10907 establishes a "feeder line" process al-

71. See *infra* pp. 21-22.

72. See *CSX Transp., Inc. v. STB*, 754 F.3d 1056 (D.C. Cir. 2014); *CSX Transp., Inc. v. STB*, 584 F.3d 1076 (D.C. Cir. 2009); *BNSF Ry. Co. v. STB*, 526 F.3d 770 (D.C. Cir. 2008); *Ass'n of Am. R.Rs. v. STB*, 306 F.3d 1108 (D.C. Cir. 2002); *Ass'n of Am. R.Rs. v. STB*, 237 F.3d 676 (D.C. Cir. 2001).

73. 49 U.S.C. § 10903.

74. 49 U.S.C. § 10903(d).

75. 49 C.F.R. § 1152.22 sets forth requirements for such applications.

76. 49 C.F.R. § 1152.50.

77. *Id.* at § 1152.50(d)(3).

78. 49 U.S.C. § 10904; 49 C.F.R. § 1152.27.

79. 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29.

2018] Judicial Review of Surface Transportation Board Decisions 11

lowing interested purchasers to force the sale of a line.⁸⁰ Such forced sales are rare and possible only for lines that either have been designated by the railroad as a candidate for abandonment or that the STB determines have received inadequate service that the railroad refuses to remedy.⁸¹

Transactions. STB approval is required to construct a new line of railroad, to acquire an existing line of railroad, to merge with an existing railroad, or to enter into a joint use or trackage rights agreement with an existing railroad.⁸² The STB's approval standard for a transaction differs based on the acquiring entity and the nature of the transaction.⁸³ For present purposes, what is most important for understanding judicial review of STB orders relating to transactions is that the STB has broad discretion to place conditions upon the approval of transactions "that the Board finds necessary in the public interest."⁸⁴ This conditioning authority often leads to participation in transaction proceedings by a hodgepodge of parties who argue that the transaction could affect their interests and therefore that a condition is appropriate. Participation is common by other railroads or commuter agencies who believe their interests could be affected⁸⁵; by shippers seeking relief for asserted anticompetitive effects⁸⁶; by localities concerned about traffic impacts⁸⁷; by environmental advocacy groups concerned about adverse environmental effects⁸⁸; or by labor unions arguing about the appropriate level of labor protective conditions.⁸⁹ While sometimes these entities will oppose the transaction itself, more commonly they seek conditions to alleviate the asserted negative effect of the transaction. Such conditions are often the subject of appeals of STB decisions.

Preemption: Under the ICC Termination Act, the STB's jurisdiction over rail transportation is exclusive and expressly preempts other remedies under Federal and state law.⁹⁰ The scope of § 10501(b) preemption—

80. 49 U.S.C. § 10907; 49 C.F.R. § 1151.

81. See *id.* at § 10907(b)(1)(A).

82. 49 U.S.C. §§ 10901, 10902, 11323.

83. For example, acquisitions by noncarriers (who become carriers after the transaction) are governed by § 10901; acquisitions by Class I railroads are governed by § 11323, and acquisitions by Class II or III carriers can be brought under either 49 U.S.C. 10902 or 11323 (Class I railroads have annual operating revenues over \$250 million, Class II railroads have annual operating revenues between \$20 million and \$250 million, and Class III railroads have annual operating revenues below \$20 million, all in 1991 dollars. See 49 C.F.R. 1201, General Instruction I-1).

84. See 49 U.S.C. § 10901(c); 10902(c); 11324(c).

85. See, e.g., *Commuter Rail Div. v. STB*, 608 F.3d 24 (D.C. Cir. 2010).

86. See, e.g., *Erie-Niagara Rail Steering Comm. v. STB*, 247 F.3d 437 (2d Cir. 2001).

87. See, e.g., *Vill. of Barrington v. STB*, 758 F.3d 326 (D.C. Cir. 2014).

88. See, e.g., *Medina Cty. Env't Action Comm. v. STB*, 602 F.3d 687 (5th Cir. 2010).

89. See, e.g., *Bhd. of Signalmen v. STB*, 638 F.3d 807 (D.C. Cir. 2011).

90. 49 U.S.C. § 10501(b).

sometimes known as “ICCTA preemption”—can be a point of dispute between railroads and state or local authorities seeking to regulate rail transportation.⁹¹ Preemption questions can also arise in the context of state law actions against railroads, which can fall within the scope of ICCTA preemption. On occasion the STB is asked to interpret the scope of ICCTA preemption, typically through a petition for declaratory order.⁹² Such petitions can be filed by railroads, localities, or by parties to state law cases.

STATISTICAL ANALYSIS OF JUDICIAL REVIEW OF STB DECISIONS METHODOLOGY

The study group consisted of federal circuit court decisions reviewing Surface Transportation Board actions decided between the creation of the STB on January 1, 1996 and March 31, 2018.⁹³ In the interest of transparency and replicability, a chart of the cases and classifications is attached as Appendix A, and this section sets forth the basic methodology of the study.

The study group was limited to decisions in cases adjudicating petitions for review of STB orders and did not include other appeals in which the STB was a party (such as appeals from federal district court decisions involving the STB). Both published and unpublished decisions were included, including summary affirmances⁹⁴ and cases in which a petition was dismissed for lack of jurisdiction.⁹⁵ Cases in which a petitioner moved for dismissal of its own petition or otherwise voluntarily withdrew its petition for review were not included.⁹⁶ In short, the goal was to capture all instances where a court of appeals ruled on a contested case.

This Article uses the shorthand of “affirmed” for cases where the agency prevailed and “reversal” where the agency decision was reversed, vacated, or otherwise not upheld in all respects. Cases where the STB prevailed on some issues but not others are categorized as reversals. The methodology results in understatement of the STB’s ultimate success rate, because a number of the identified “reversals” are in consolidated

91. See, e.g., *City of Auburn v. STB*, 154 F.3d 1025 (9th Cir. 1998).

92. 5 U.S.C. § 554(e). The STB has discretion to issue a declaratory order “to terminate a controversy or remove uncertainty.”

93. Cases were identified through a Westlaw search for circuit court cases with “Surface Transportation Board” as a party, and then narrowed using the criteria detailed below.

94. See, e.g., *Riffin v. STB*, 2016 WL 6915552 (D.C. Cir. Oct. 16, 2016) (denying petition for review on motion for summary affirmance); *Strohmeier v. STB*, 550 F. App’x 8 (D.C. Cir. 2013) (petition denied on briefs in per curiam order).

95. See, e.g., *Riffin v. STB*, 331 F. App’x 751 (D.C. Cir. 2009) (petitioner’s filing of petition to reopen at agency rendered decision nonfinal and required dismissal of petition for review).

96. See, e.g., *BNSF Ry. Co. v. STB*, 2009 WL 604345 (D.C. Cir. Feb. 24, 2009) (granting petitioner motion to voluntarily dismiss its petition for review).

2018] Judicial Review of Surface Transportation Board Decisions 13

cases where the STB prevailed against a number of parties, but the decision was remanded on just one issue.⁹⁷

Where the initial panel decision in a case was overturned on rehearing, the decision was only included once (and it is categorized by the outcome after rehearing).⁹⁸ The same is true when a petition for rehearing is denied in a published decision—the case is only counted once.⁹⁹ If an agency decision was remanded to the agency only to eventually return to the circuit court on a separate petition for review, those petitions were treated as separate cases. For example, the Association of American Railroads' initial petition to review the STB's decision to stop considering product and geographic competition in rate reasonableness cases resulted in a remand,¹⁰⁰ which was followed by a subsequent petition to review the STB's revised decision.¹⁰¹ These are counted as two separate court of appeals decisions.

Several petitions to review ICC orders were pending before courts of appeal at the time that the STB was created, and the STB stepped into the ICC's shoes in those appeals. Because such cases involved appeals from ICC decisions and not STB decisions, they were not included in the study group.¹⁰²

OVERALL AFFIRMANCE RATE FOR STB DECISIONS.

Between 1996 and March 31, 2018, circuit courts decided 135 petitions to review STB actions, and the STB prevailed in 111 of those cases.¹⁰³ This results in an overall affirmance rate of 82%. The STB's overall affirmance rate is therefore higher than that found in other published studies of agency success rates on appeal. A 2010 study reviewing scholarship on agency appellate success rates reported that eleven prior studies had found agency success rates ranging between 54% and 77%.¹⁰⁴ Pooling the 5081 observations resulted in an average success rate of

97. See, e.g., *CSX Transp., Inc. v. STB*, 568 F.3d 236 (D.C. Cir. 2009), *vacated in part on reh'g*, 584 F.3d 1076 (D.C. Cir. 2009).

98. The one instance of this is *CSX Transp., Inc. v. STB*, 568 F.3d 236 (D.C. Cir. 2009), *vacated in part on reh'g*, 584 F.3d 1076 (D.C. Cir. 2009), which is treated herein as a single decision finding against the agency.

99. So, *Grosso v. STB*, 804 F.3d 110 (1st Cir. 2015), *reh'g denied*, 811 F.3d 83 (1st Cir. 2016), is counted just once.

100. *Ass'n of Am. R.Rs. v. STB*, 237 F.3d 676 (D.C. Cir. 2001).

101. *Ass'n of Am. R.Rs. v. STB*, 306 F.3d 1108 (D.C. Cir. 2002).

102. These cases included all 1996 circuit court decisions in which the STB was a party, as well as several 1997 decisions. See, e.g., *Wis. Cent. Ltd. v. STB*, 112 F.3d 881 (7th Cir. 1997); *Grainbelt Corp. v. STB*, 109 F.3d 794 (D.C. Cir. 1997); *W. Res., Inc. v. STB*, 109 F.3d 782 (D.C. Cir. 1997); *United Transp. Union v. STB*, 108 F.3d 1425 (D.C. Cir. 1997).

103. See *infra* Appendix A.

104. See David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 170 (2010).

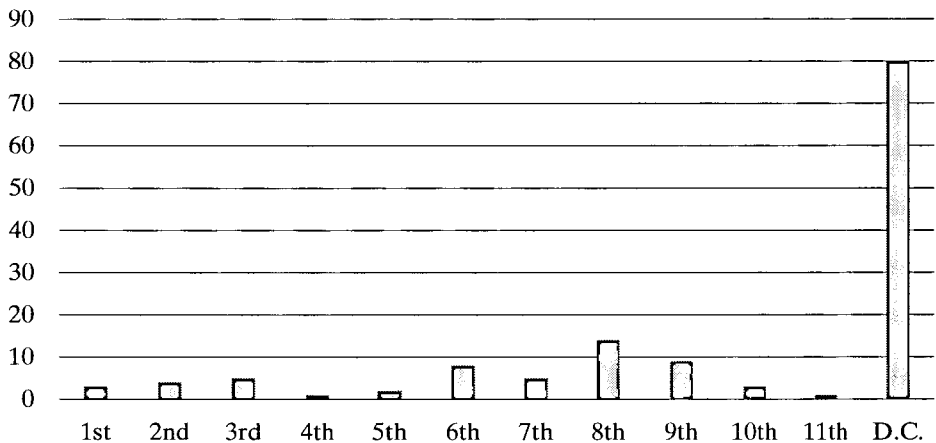
69%.¹⁰⁵ Other studies have found similar success rates in the range of 70%.¹⁰⁶

AFFIRMANCE RATE FOR STB DECISIONS BY JUDICIAL CIRCUIT

Parties who choose to challenge STB actions have the option to bring the petition for review in the D.C. Circuit or in the circuit in which the party resides.¹⁰⁷ Historically many parties have chosen to file petitions to review STB orders in the D.C. Circuit, possibly because much of the STB bar is located in D.C., and possibly because of a common belief that the D.C. Circuit’s relative familiarity with the STB might make it more inclined to reverse agency actions. In any event, 59% of the decisions in the study (80 of 135) are D.C. Circuit decisions.

While the D.C. Circuit is the most common forum for STB appeals, the observations in the study included decisions on appeals from STB orders in every circuit but the Federal Circuit. As Figure 1 illustrates, in most circuits appeals from STB decisions are rare. Eight circuits have decided five STB appeals or fewer.

FIGURE 1: TOTAL STB DECISIONS BY COURTS OF APPEAL: 1997-2018



Cases decided by the D.C. Circuit had a somewhat lower rate of reversal than cases decided by other circuits, as Table 1 demonstrates. The D.C. Circuit’s rate of affirmance was 79%, or 8% lower than that of other circuits during the study period.

105. *Id.*

106. See Pierce Jr. & Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, *supra* note 42, at 515.

107. See 28 U.S.C. § 2343 (venue for petitions to review STB decision is either in D.C. Circuit or “in the judicial circuit in which the petitioner resides or has its principal office”).

2018] Judicial Review of Surface Transportation Board Decisions 15

TABLE 1: STB AFFIRMANCE PERCENTAGE: 1997-2018

	Affirmances	Reversals	Percentage Affirmed
D.C. Circuit	63	17	79%
Other Circuits	48	7	87%
Total	111	24	82%

A. AFFIRMANCE RATE FOR STB DECISIONS BY PETITIONER

Figure 2 categorizes decisions by types of petitioner.¹⁰⁸ Petitioners were grouped into several categories. The largest group is railroads, who were petitioners in thirty-six of the studied cases.¹⁰⁹ Railroad shippers were the next most frequent petitioner (twenty-seven cases), followed by labor unions (twenty-two cases). The “locality” category covers eighteen petitions filed by state governments, municipalities, or other local government interests. “OFA Purchaser” (fourteen cases) refers to petitioners who have asserted rights to acquire a railroad line through the “Offer of Financial Assistance” process.¹¹⁰ “Property Owner” (eleven cases) covers petitioners whose interest in the STB proceeding flows from their ownership of property crossed or otherwise affected by a railroad line. “Environmental” (nine cases) covers environmental advocacy groups, and the catchall “other” category covers eight other entities, which range from rail salvagers¹¹¹ to water freight forwarders¹¹² to pipelines.¹¹³

108. Some decisions involve multiple petitioners. For example, *BNSF Ry. v. STB*, 526 F.3d 770 (D.C. Cir. 2008), involved petitions to review an STB rulemaking filed by both railroads and shippers, and *City of Ottumwa v. STB*, 153 F.3d 879 (8th Cir. 1998), involved challenges to a transaction filed by both labor interests and localities. Such multiple-petitioner decisions are counted in each relevant category.

109. The “railroad” category includes appeals brought by railroad trade associations like the Association of American Railroads.

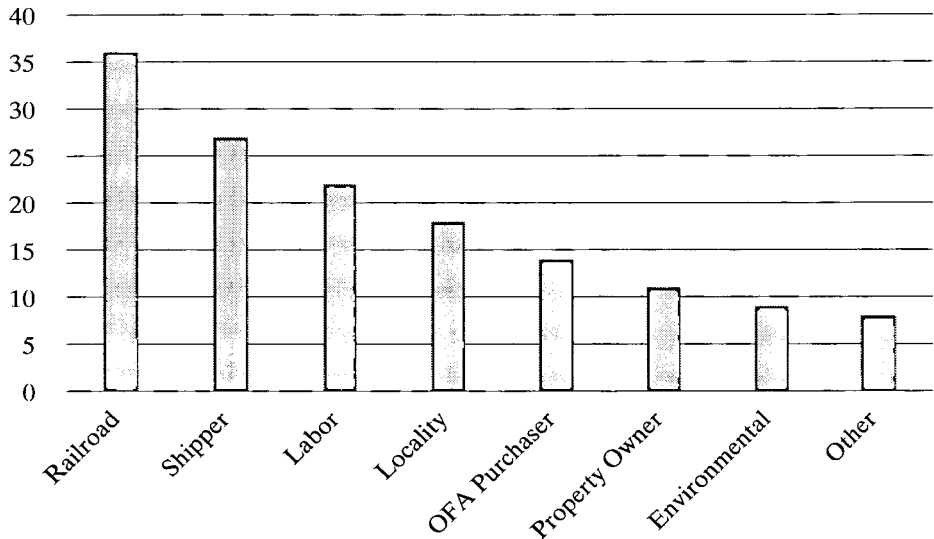
110. See *supra*, p. 13; 49 C.F.R. § 1152.27.

111. See *R.R. Salvage & Restoration, Inc. v. STB*, 648 F.3d 915 (8th Cir. 2011).

112. See *Caribbean Shippers Ass’n v. STB*, 145 F.3d 1362 (D.C. Cir. 1998).

113. See *CF Indus. v. STB*, 255 F.3d 816 (D.C. Cir. 2001).

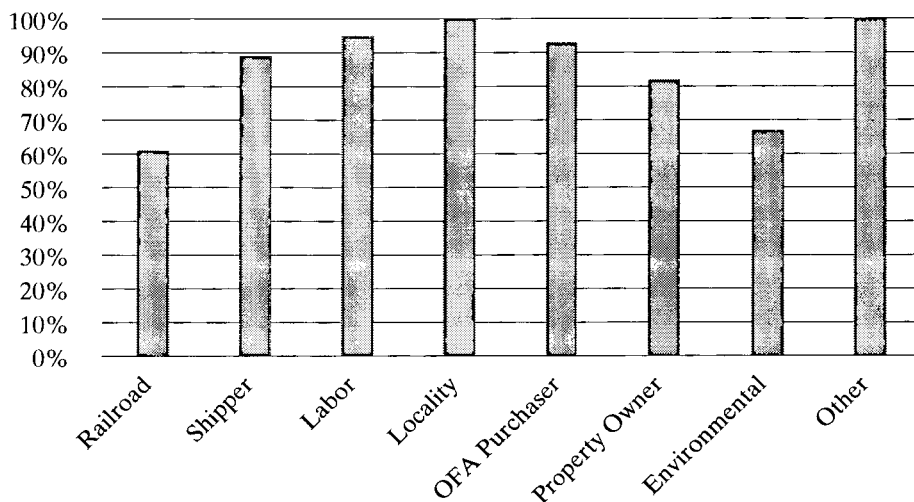
FIGURE 2: TOTAL STB DECISIONS BY COURTS OF APPEAL
BY PETITIONER



Significantly, railroads were petitioners in fourteen out of the twenty-four cases in which the STB was not affirmed, and railroads had a notable higher success rate than any other category of petitioner: 39%. Put differently, while railroads were petitioners in just 27% of STB appeals, they account for 58% of the appeals in which the STB was reversed. Environmental groups represented the next-best winning percentage, with a 33% affirmance rate (admittedly from a small sample of just 9 petitions). On the other end of the spectrum, localities (0%); OFA purchasers (7%), labor unions (5%), and other petitioners (0%) all had success percentages over 10 percentage points worse than the average petitioner.

2018] Judicial Review of Surface Transportation Board Decisions 17

FIGURE 3: STB AFFIRMANCE PERCENTAGE BY PETITIONER

**B. AFFIRMANCE RATE FOR STB DECISIONS BY CASE TYPE.**

Another potentially useful metric is the type of STB decision being reviewed. Thirty-eight of the decisions related to STB approval of transactions. The vast majority of these related to requests for conditions on the approved transaction. Thirty-three of the decisions studied were appeals from abandonments or feeder line cases. While some of these were challenges to the abandonment decision itself,¹¹⁴ more common were appeals by putative OFA purchasers.¹¹⁵ Twenty cases involved rate reasonableness challenges brought by railroad or shipper parties to those cases.¹¹⁶ Fourteen were rulemakings, and eight were preemption decisions. Ten appeals were brought from decisions about whether or not the STB had jurisdiction over a party, such as whether a rail service supplier qualified as a “railroad”¹¹⁷ or whether tracks are within the STB’s jurisdiction so as to require regulatory authorization to transfer them.¹¹⁸ Another eight were too unique to fit into a category, ranging from crossing disputes¹¹⁹ to cost of capital calculations¹²⁰ to unreasonable practice complaints.¹²¹

114. See, e.g., *N.Y. Cross Harbor R.R. v. STB*, 374 F.3d 1177 (D.C. Cir. 2004).

115. See, e.g., *Riffin v. STB*, 2016 WL 6915552 (D.C. Cir. 2016).

116. This category only includes adjudications of rate reasonableness complaints. Rulemakings related to rate reasonableness standards are categorized as “rulemakings.”

117. See *Rail-Term Corp. v. STB*, 654 F. App’x 1 (D.C. Cir. 2015).

118. See *Allied Erecting & Dismantling v. STB*, 835 F.3d 548 (6th Cir 2016).

119. See *Holrail, LLC v. STB*, 515 F.3d 1313 (D.C. Cir. 2008).

120. See *W. Coal Traffic League v. STB*, 264 F. App’x 7 (D.C. Cir. 2008).

121. See *R.R. Salvage & Restoration, Inc. v. STB*, 648 F.3d 915 (8th Cir. 2011).

FIGURE 4: TOTAL STB DECISIONS BY CASE TYPE

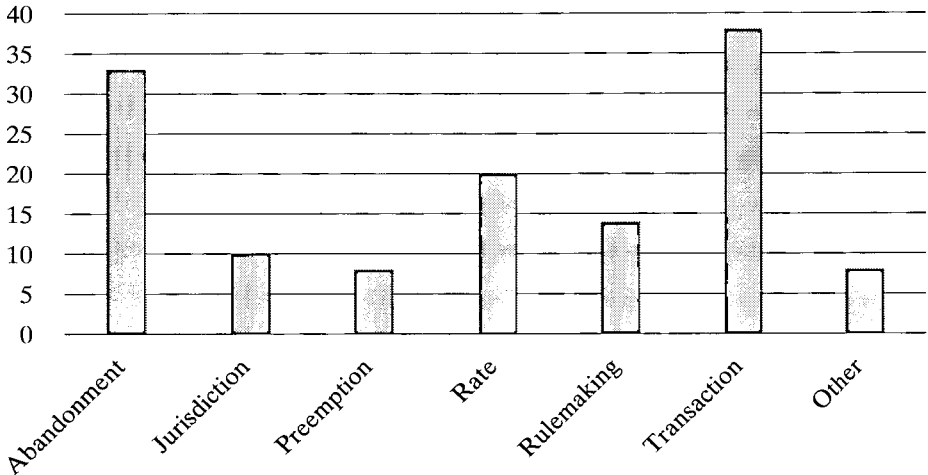
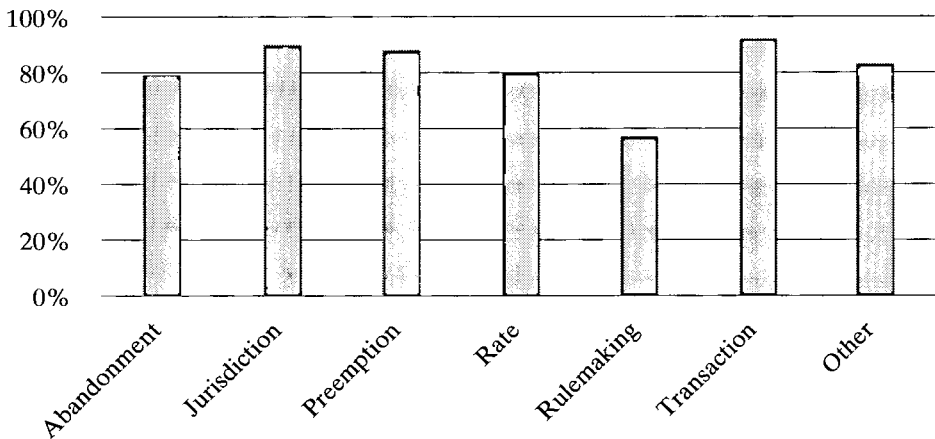


Figure 5 illustrates that the STB’s lowest rates of affirmance are in cases reviewing rulemakings (57%). This finding is notable—the affirmance rate for rulemakings is nearly 20% lower than any other case category. Indeed, if rulemakings were removed from the overall study totals, the STB’s affirmance rate would exceed 85%.¹²²

FIGURE 5: STB AFFIRMANCE PERCENTAGE BY CASE TYPE



122. Removing the eight rulemaking affirmances and six rulemaking reversals from the totals detailed above results in 103 affirmances and 18 reversals in non-rulemaking cases: an affirmance rate of over 85%.

2018] Judicial Review of Surface Transportation Board Decisions 19**C. OVERALL AFFIRMANCE RATE FOR STB DECISIONS
BY TIME PERIOD**

Data was also analyzed by time period in order to study whether there have been any trends in STB affirmance rates over time. The time period analysis was performed for decisions between 1998 and 2017, divided into four-year blocks.¹²³ As Figure 6 illustrates, significantly more cases were brought in the initial 1998-2001 period than in later periods. This may have been a result of parties testing the decisions of a new agency. Later periods show total cases ranging between 26 and 15 appeals in a four-year period.

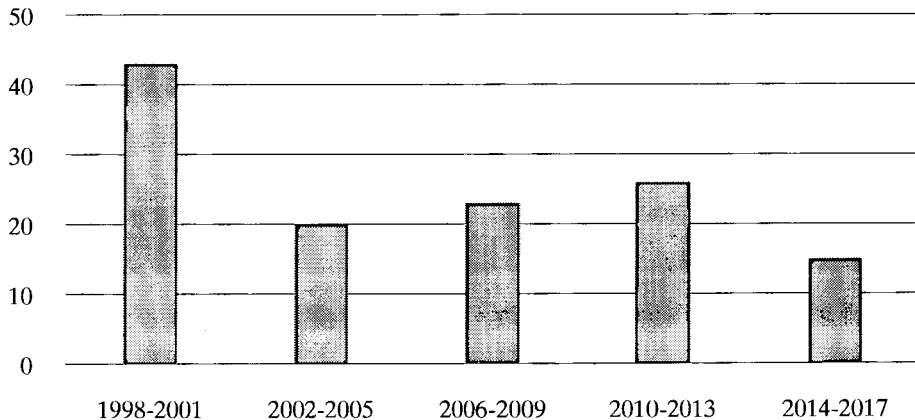
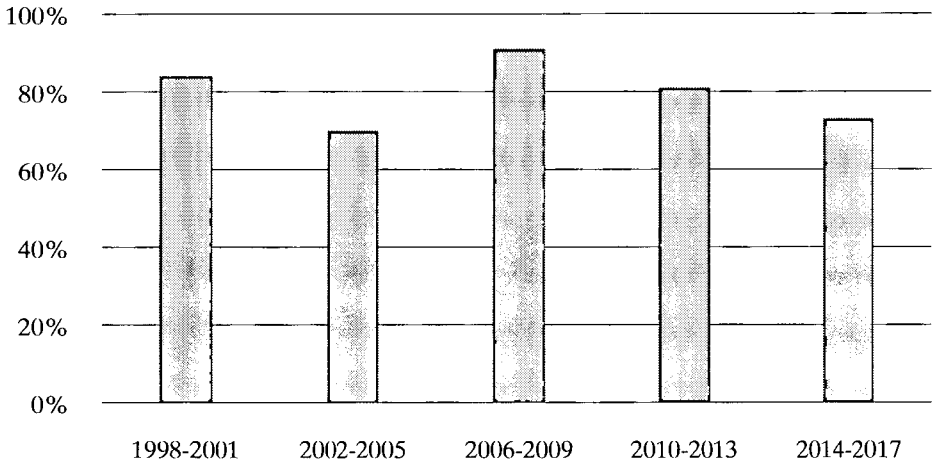
FIGURE 6: TOTAL STB DECISIONS BY TIME PERIOD

Figure 7 shows no clear trend in affirmance rates over the study period. While affirmance rates fluctuate between a low of 70% in 2002-2005 and a high of 91% in 2006-2009, there is no obvious hypothesis that would explain these fluctuations.

123. All 1996 decisions in which the Surface Transportation Board was a named party and several such 1997 decisions actually involved petitions to review ICC decisions. 1998 was thus selected as the beginning year because it was the first full year in which all appellate decisions to which the STB was a party were based on STB orders. 2018 was excluded as a partial year.

FIGURE 7: STB AFFIRMANCE PERCENTAGE BY TIME PERIOD



II. INTERPRETING THE DATA

This data on affirmance rates for STB decisions leads to a few observations and some potential hypotheses to explain those observations. While this data may not always lend itself to clear answers, “[a]ny truth is better than indefinite doubt.”¹²⁴

A. OBSERVATION 1: STB DECISIONS ARE AFFIRMED AT A HIGHER RATE THAN MOST ADMINISTRATIVE AGENCIES.

It appears fairly clear that STB decisions are affirmed at a higher rate than the “norm” of 70% that prior studies have observed.¹²⁵ The STB is affirmed 82% of the time—12% more than the typical rate for other agencies.¹²⁶ The 12% difference between the STB’s affirmance rate and the affirmance rate of other agencies is a fairly significant one. To illustrate, imagine that STB orders were affirmed at a 70% rate, similar to the average agency affirmance rate observed in other studies. If that were the case, the STB would have lost 41 of the 135 cases decided by the courts of appeal—nearly twice the 24 cases that it actually lost.

Some explanation therefore might be in order “to identify and to address the causes of the variation from the norm.”¹²⁷ One theory for the STB’s greater success rate is that there is something different about the STB’s governing statute that limits opportunities for successful appeals.

124. ARTHUR CONAN DOYLE, *The Adventure of the Yellow Face*, in *THE ORIGINAL ILLUSTRATED STRAND SHERLOCK HOLMES* 328 (1996).

125. See Pierce Jr., *supra* note 7, at 86.

126. See *supra* pp. 8-9.

127. See Pierce Jr., *supra* note 7, at 86.

2018] Judicial Review of Surface Transportation Board Decisions 21

While it is true that the Interstate Commerce Act gives the STB broad discretion in some areas—e.g., the STB may place conditions on transactions that it “finds necessary in the public interest”¹²⁸—it is not clear that the limits Congress has placed on the STB’s authority are substantially laxer than those placed on other agencies.

A more likely possibility is that the higher affirmance rates for STB decisions on appeal could be a result of courts’ relative lack of familiarity with the STB. Other studies have suggested that courts are more likely to reverse agencies that appear before them often.¹²⁹ In most circuits, STB cases are exceedingly rare, averaging less than one per year. And even the D.C. Circuit averages less than four STB appeals per year, far less frequent than many other agencies. The relative obscurity of the STB’s responsibilities and governing laws may be an obstacle to judicial reversal of the agency’s decisions.

B. OBSERVATION 2: THE D.C. CIRCUIT HAS BEEN MORE LIKELY TO REVERSE THAN OTHER CIRCUITS

The data also shows a noticeably lower affirmance rate for petitions to review STB decisions brought in the D.C. Circuit (79%) than for petitions brought in other circuits (87%). On the surface, this accords with the finding of other studies that the D.C. Circuit may be a less hospitable forum for administrative agencies than other courts, and it also dovetails with a hypothesis that the D.C. Circuit’s relatively higher familiarity with the STB might result in more exacting judicial review.

It should be noted that the observed 8% difference between the D.C. Circuit’s affirmance rate and that for other circuits is smaller than that observed by other studies. Schuck and Elliott’s study of multiple periods between 1965 and 1988 found that “affirmance rates remained almost 15% lower in the D.C. Circuit than the average for other circuits.”¹³⁰ Other studies found D.C. Circuit rates of 11% and 12% lower than other circuits.¹³¹

A reasonable observer might think the D.C. Circuit’s lower affirmance rate could in part be a result of its mix of cases. In particular, 14 of the 16 rulemaking appeals in the study group were brought in the D.C. Circuit. While it is certainly true that rulemaking appeals have a much lower affirmance rate than other types of cases, the gap between the affirmance rates of the D.C. Circuit and other circuits persists when

128. 49 U.S.C. § 11324(c).

129. See Pierce Jr., *supra* note 7, at 88, 90.

130. Schuck & Elliott, *supra* note 16, at 1042.

131. *Id.* at 1041-42; Miles & Sunstein, *The Real World of Arbitrariness Review*, *supra* note 23, at 795.

rulemakings are removed from the analysis. Consider the below chart, which replicates Table 1 above but breaks out rulemaking appeals.

TABLE 2: STB AFFIRMANCE PERCENTAGE: 1997-2018

	Affirmances	Reversals	Percentage Affirmed
Rulemakings			
D.C. Circuit	7	5	58%
Other Circuits	1	1	50%
Other Cases			
D.C. Circuit	56	12	82%
Other Circuits	47	6	89%
Overall	111	24	

It therefore may well be that the D.C. Circuit's relative familiarity with STB appeals makes it more comfortable issuing decisions that may second-guess the agency's judgment. But the data shows that the gap between the D.C. Circuit and other circuits may not be a large one.

C. OBSERVATION 3: RAILROADS HAVE A HIGHER RATE OF SUCCESSFULLY APPEALING STB DECISIONS.

A third trend that clearly jumps out from the data is that railroad petitioners have significantly more success than other types of petitioners. Railroads prevail 39% of the time—a rate markedly higher than that of any other petitioner.

One potential hypothesis for this difference is that railroads who are directly regulated by the STB and regularly appear before the agency may have a stronger incentive to not bring “long-shot” challenges to STB decisions than other parties who are not regular participants in the agency's proceedings. In contrast, one-time participants like localities or property owners may feel they have little to lose from a long-shot appeal. It may also be that railroads are better able to assess the likelihood of success, perhaps because of their familiarity with the regulatory scheme.

D. OBSERVATION 4: STB RULEMAKINGS HAVE MUCH LOWER AFFIRMANCE RATE THAN OTHER CLASSES OF DECISION.

Another observation that can be made from the data is that the STB's success rare in rulemakings is markedly lower than it is in other

2018] Judicial Review of Surface Transportation Board Decisions 23

proceedings. The STB's affirmance rate for rulemakings is just 57%—over 20% lower than any other case type. This result is in line with other studies, which have suggested that agencies tend to have a lower appellate success rate in rulemakings than in adjudications and have hypothesized that this is so because “agencies may be less likely to be affirmed in cases that involve broad policy questions and multiple parties.”¹³²

It may also be that rulemakings present more opportunities for procedural error than other cases. For example, several STB rulemakings have been vacated for failure to provide factual support for a proposal¹³³ or failure to give notice of a change in a final rule.¹³⁴ While this sort of procedural error certainly presents litigants with appellate opportunities, such errors often are curable, as discussed in the final observation below.

E. OBSERVATION 5: EVEN REVERSALS OF STB DECISIONS ARE
OFTEN CURABLE BY THE AGENCY.

A final qualitative observation can be made by considering the relatively rare cases in which a court of appeals reversed or vacated STB decisions. Thirteen of the twenty-four decisions that failed to affirm STB decisions were decided in a way that provided the agency with a clear path toward reaching the same substantive result. In other words, in thirteen decisions the STB decision was vacated because of failure to provide notice, failure to give an appropriate explanation of its decision, or some other procedural ground that conceivably could be cured by the STB. For example, several STB rulemakings have been vacated for failure to provide factual support for a proposal¹³⁵ or failure to give notice of a change in a final rule,¹³⁶ and adjudications have been reversed for failure to respond meaningfully to a party's argument.¹³⁷ The STB also has occasion-

132. Schuck & Elliott, *supra* note 16, at 1022-23.

133. See *CSX Transp., Inc. v. STB*, 754 F.3d 1056 (D.C. Cir. 2014) (remanding for STB to explain double-counting of certain costs in its calculation of a relief cap).

134. See, e.g., *CSX Transp., Inc. v. STB*, 584 F.3d 1076 (D.C. Cir. 2009) (vacating rule where STB failed to give adequate notice of change to time frame for data samples used in new simplified rate methodology).

135. See *CSX Transp. Inc. v. STB*, 754 F.3d 1056 (D.C. Cir. 2014) (remanding for STB to explain double-counting of certain costs in its calculation of a relief cap).

136. See, e.g., *CSX Transp., Inc. v. STB*, 584 F.3d 1076 (D.C. Cir. 2009) (vacating rule where STB failed to give adequate notice of change to time frame for data samples used in new simplified rate methodology).

137. See, e.g., *BNSF Ry. Co. v. STB*, 741 F.3d 163 (D.C. Cir. 2014) (vacating and remanding STB decision in rate case for failure to address railroad's proportionality objection to new revenue allocation methodology); *AEP Tex. N. Co. v. STB*, 609 F.3d 432 (D.C. Cir. 2010) (vacating and remanding STB decision for failure to consider shipper concerns raised about its 2005 cost of equity calculation); *BNSF Ry. Co. v. STB*, 604 F.3d 602 (D.C. Cir. 2010) (vacating and remanding STB decision in rate case for failure to address railroad's double-counting objection to new revenue allocation methodology); *Riffin v. STB*, 592 F.3d 195 (D.C. Cir. 2010) (vacating and

ally run afoul of the *State Farm* rule that agencies may not depart from past positions without adequate justification,¹³⁸ and of NEPA requirements to take a “hard look” at the environmental effects of proposed agency actions.¹³⁹ In at least two-thirds of the instances where the STB failed to prevail before the court of appeals, therefore, the court’s decision rested on a ground that was potentially curable by the agency. And in fact, the STB reached the same substantive result after remand in several of the cases that it initially lost before the court of appeals.¹⁴⁰

On the other hand, some decisions rest on more definitive holdings that an STB action is inconsistent with the law in way that cannot be so easily cured. For example, the Eighth Circuit’s recent decision in *Union Pac. R.R. Co. v. STB*, 863 F.3d 816 (2017), concluded that the STB had exceeded its authority by promulgating a rule defining a term in a statute for which Congress had expressly delegated rulemaking authority to a different agency.¹⁴¹ In other instances, STB decisions are vacated because a court finds that the substantive rationale for an STB decision is arbitrary and capricious.¹⁴²

All this is to say that all the reversals identified in this Article’s study are not created alike. The STB’s actual success rate in ultimately withstanding judicial review of its orders is even higher than the 82% figure identified in the study, if one considers that many “losses” at first glance

remanding STB decision for failing to adequately explain why proposed maintenance activities would not be within STB’s jurisdiction).

138. See, e.g., *Mfrs. Ry. Co. v. STB*, 676 F.3d 1094 (D.C. Cir. 2012) (vacating STB decision where STB failed to adequately explain its departure from “entire-system exception” that exempts railroads that are ceasing all operations from the obligation to pay labor protections).

139. *N. Plains Res. Council v. STB*, 668 F.3d 1067 (9th Cir. 2012) (holding that STB failed to comply with NEPA in environmental review where agency failed to address impacts of several mines, failed to gather relevant data, and relied upon certain outdated information).

140. For example, the STB promulgated subsequent rulemakings that eventually adopted the same substantive rules that were vacated in *CSX Transp. Inc. v. STB*, 754 F.3d 1056 (D.C. Cir. 2014) and *CSX Transp., Inc. v. STB*, 584 F.3d 1076 (D.C. Cir. 2009). See *Rate Regulation Reforms*, STB Ex Parte No. 715 (Mar. 13, 2015) (re-adopting relief cap that was vacated in *CSX Transp. Inc. v. STB*, 754 F.3d 1056 (D.C. Cir. 2014)); *Waybill Data Released in Three-Benchmark Rail Rate Proceedings*, STB Ex Parte No. 646 (Sub-No. 3) (Mar. 12, 2012) (after notice and comment, adopting proposal for data time frame in simplified rate proceedings identical to that vacated in *CSX Transp., Inc. v. STB*, 584 F.3d 1076 (D.C. Cir. 2009)).

141. See also *Consol. Rail Corp. v. STB*, 571 F.3d 13 (D.C. Cir. 2009) (holding that STB lacked jurisdiction over petition asking it to rule on status of trackage because petition raised questions about interpretation of the Conrail Final System Plan that were within exclusive jurisdiction of the Conrail Special Court).

142. See, e.g., *Grosso v. STB*, 804 F.3d 110 (1st Cir. 2015), *reh’g denied*, 811 F.3d 83 (1st Cir. 2016) (holding that STB’s definition of “transportation” in preemption decision was inconsistent with statutory meaning of term); *BNSF Ry. Co. v. STB*, 403 F.3d 771 (D.C. Cir. 2005) (vacating and remanding STB decision setting forth different standards for railroads and shippers to seek vacation of rate prescriptions on grounds that STB’s rationale for setting different standards was arbitrary and capricious).

2018] *Judicial Review of Surface Transportation Board Decisions* 25

can be—and are—remedied by the agency with a final decision that reaches a substantive result identical to the agency’s initial decision.

III. CONCLUSION

The data cannot, of course, provide a definitive answer to the opening question of this paper: the perennial client question about how likely it is that a particular petition for review will prevail. But the recent results of petitions to review STB decisions do shed some light on the general way that courts have treated appeals from STB decisions and this data can give practitioners a better sense of what cases and forums are more likely to result in successful challenges to STB decisions. To quote Holmes one last time, “You can . . . never foretell what any one man will do, but you can say with precision what an average number will be up to.”¹⁴³

This article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and the receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers. The content therein does not reflect the views of the firm.

143. ARTHUR CONAN DOYLE, *The Sign of Four*, in THE ORIGINAL ILLUSTRATED STRAND SHERLOCK HOLMES 98 (1996).

IV. APPENDIX A: TABLE OF CASES INCLUDED IN EMPIRICAL
ANALYSIS

Case name	Citation	Circuit	Year	STB Aff'd?	Petitioner	Case Type
Sunbelt Chlor Alkali P'ship v. STB	2018 WL 566318	11th	2018	Aff'd	Shipper	Rate
Union Pac. R.R. v. STB	863 F.3d 816	8th	2017	Rev'd	Railroad	Rulemaking
Delaware v. STB	859 F.3d 16	DC	2017	Aff'd	Locality	Preemption
G3 Enterprises v. STB	678 F. App'x 562	9th	2017	Aff'd	Shipper	Transaction
Kings Cty. v. STB	2017 WL 3278918	9th	2017	Aff'd	Locality	Preemption
Allied Erecting & Dismantling v. STB	835 F.3d 548	6th	2016	Aff'd	Property Owner	STB Jurisdiction
Tubbs v. STB	812 F.3d 1141	8th	2016	Aff'd	Property Owner	Preemption
Grosso v. STB	804 F.3d 110, reh'g denied, 811 F.3d 83	1st	2016	Rev'd	Property Owner	Preemption
Riffin v. STB	2016 WL 6915552	DC	2016	Aff'd	OFA Purchaser	Abandonment
Padgett v. STB	804 F.3d 103	1st	2015	Aff'd	Locality	Preemption
Rail-Term Corp. v. STB	654 F. App'x 1	DC	2015	Aff'd	Rail Service Supplier	STB Jurisdiction
CSX Transp. v. STB	774 F.3d 25	DC	2014	Aff'd	Railroad	Rate
Vill. of Barrington v. STB	758 F.3d 326	DC	2014	Aff'd	Locality/ Railroad	Transaction
CSX v. STB	754 F.3d 1056	DC	2014	Rev'd	Railroad	Rulemaking
BNSF Ry. Co. v. STB	748 F.3d 1295	DC	2014	Aff'd	Railroad/ Shipper	Rate
BNSF Ry. Co. v. STB	741 F.3d 163	DC	2014	Rev'd	Railroad	Rate
Riffin v. STB	733 F.3d 340	DC	2013	Aff'd	OFA Purchaser	Transaction

2018] Judicial Review of Surface Transportation Board Decisions 27

Case name	Citation	Circuit	Year	STB Aff'd?	Petitioner	Case Type
Alaska Survival v. STB	705 F.3d 1073	9th	2013	Aff'd	Environmental	Transaction
Strohmeier v. STB	550 F. App'x 8	DC	2013	Aff'd	OFA Purchaser	Transaction
Lowe v. STB	546 F. App'x 6	DC	2013	Aff'd	OFA Purchaser	Abandonment
Riffin v. STB	2013 WL 6801160	DC	2013	Aff'd	OFA Purchaser	Abandonment
Md. Transit Admin. v. STB	700 F.3d 139	4th	2012	Aff'd	Locality	Abandonment
Mfrs. Ry. v. STB	676 F.3d 1094	DC	2012	Rev'd	Railroad	Abandonment
N. Plains Res. Council v. STB	668 F.3d 1067	9th	2011	Rev'd	Environmental	Transaction
R.R. Salvage & Restoration Inc. v. STB	648 F.3d 915	8th	2011	Aff'd	Rail Salvager	Unreasonable practice
Bhd. of Signalman v. STB	638 F.3d 807	DC	2011	Aff'd	Labor	Transaction
Kessler v. STB	637 F.3d 369	DC	2011	Aff'd	Shipper	STB Jurisdiction
Vill. of Barrington v. STB	636 F.3d 650	DC	2011	Aff'd	Locality	Transaction
N.Y. & Atl. Ry. Co. v. STB	635 F.3d 66	2d	2011	Aff'd	Railroad	Preemption
Kessler v. STB	635 F.3d 1	DC	2011	Aff'd	OFA Purchaser	Abandonment
Riffin v. STB	423 F. App'x 1	DC	2011	Aff'd	OFA Purchaser	Abandonment
Union Pac. R.R. v. STB	628 F.3d 597	DC	2010	Aff'd	Railroad	Rate
AEP Tex. N. v. STB	609 F.3d 432	DC	2010	Rev'd	Shipper	Rate
Commuter Rail Div. v. STB	608 F.3d 24	DC	2010	Aff'd	Environmental/Commuter	Transaction
BNSF v. STB	604 F.3d 602	DC	2010	Rev'd	Railroad	Rate
Medina Cty. Env't Action Comm. v. STB	602 F.3d 687	5th	2010	Aff'd	Environmental	Transaction
Riffin v. STB	592 F.3d 195	DC	2010	Rev'd	OFA Purchaser	STB Jurisdiction

Case name	Citation	Circuit	Year	STB Aff'd?	Petitioner	Case Type
Riffin v. STB	402 F. App'x 532	DC	2010	Aff'd	OFA Purchaser	STB Jurisdiction
Wheeler v. Material Recovery of Erie	398 F. App'x 786	3d	2010	Aff'd	Property Owner	Abandonment
Kemp v. STB	387 F. App'x 703	9th	2010	Aff'd	OFA Purchaser	Abandonment
Fox v. STB	379 F. App'x 767	10th	2010	Aff'd	Property Owner	STB Jurisdiction
Riffin v. STB	364 F. App'x 650	DC	2010	Aff'd	OFA Purchaser	Transaction
CSX Transp., Inc. v. STB	568, F.3d 236, vacated in part on rehearing by 584 F.3d 1076	DC	2009	Rev'd	Railroad	Rulemaking
Consolidated Rail Corp. v. STB	571 F.3d 13	DC	2009	Rev'd	Railroad	Abandonment
City of South Bend v. STB	566 F.3d 1166	DC	2009	Aff'd	Locality	Abandonment
Riffin v. STB	331 F. App'x 751	DC	2009	Aff'd	OFA Purchaser	Abandonment
Bd. of Comm'rs of Allegheny Cty. v. STB	321 F. App'x 6	DC	2009	Aff'd	Locality	STB Jurisdiction
N. Am. Freight Car. Ass'n v. STB	529 F.3d 1166	DC	2008	Aff'd	Shipper	Unreasonable practice
BNSF Ry. Co. v. STB	526 F.3d 770	DC	2008	Aff'd	Railroad/ Shipper	Rulemaking
Holrail, LLC v. STB	515 F.3d 1313	DC	2008	Aff'd	Railroad	Crossing
Caddo Valley R.R. Co. v. STB	512 F.3d 1021	8th	2008	Aff'd	Railroad	Feeder Line
S. Plains Switching Ltd. Co. v. STB	271 F. App'x 465	5th	2008	Aff'd	Railroad	Feeder Line
W. Coal Traffic League v. STB	264 F. App'x 7	DC	2008	Aff'd	Shipper	Cost of capital

2018] Judicial Review of Surface Transportation Board Decisions 29

Case name	Citation	Circuit	Year	STB Aff'd?	Petitioner	Case Type
DHX, Inc. v. STB	501 F.3d 1080	9th	2007	Aff'd	Water Freight Forwarder	Rate
Otter Tail Power Co. v. STB	484 F.3d 959	8th	2007	Aff'd	Shipper	Rate
Am. Orient Express Ry. Co. v. STB	484 F.3d 554	DC	2007	Aff'd	Rail car operator	STB Jurisdiction
Black v. STB	476 F.3d 409	6th	2007	Aff'd	Labor	Transaction
Mayo Found. v. STB	472 F.3d 545	8th	2006	Aff'd	Environmental	Construction
Toledo, Peoria & W. Ry. v. STB	462 F.3d 734	7th	2006	Aff'd	Railroad	Abandonment
BLEW v. STB	457 F.3d 24	DC	2006	Aff'd	Labor	Transaction
Ariz. Elec. Power Coop. v. STB	454 F.3d 359	DC	2006	Aff'd	Shipper	Rate
BNSF Ry. Co. v. STB	453 F.3d 473	DC	2006	Aff'd	Railroad	Rate
PPL Mont., LLC v. STB	437 F.3d 1240	DC	2006	Aff'd	Shipper	Rate
Bhd. of Maint. of Way Employees v. STB	200 F. App'x 1	DC	2006	Aff'd	Labor	Transaction
Terminal Warehouse, Inc. v. CSXT	175 F. App'x 715	6th	2006	Aff'd	Shipper	Abandonment
Granite State Concrete Co. v. STB	417 F.3d 85	1st	2005	Aff'd	Shipper	Unreasonable practice
City of Lincoln v. STB	414 F.3d 858	8th	2005	Aff'd	Locality	Preemption
Town of Springfield v. STB	412 F.3d 187	DC	2005	Aff'd	Locality	Transaction
BNSF Ry. Co. v. STB	403 F.3d 771	DC	2005	Rev'd	Railroad	Rate
City of Riverview v. STB	398 F.3d 434	6th	2005	Aff'd	Locality	Transaction
Pennsylvania v. STB	2005 WL 3626905	DC	2005	Aff'd	Locality	Transaction

Case name	Citation	Circuit	Year	STB Aff'd?	Petitioner	Case Type
N.Y. Cross Harbor R.R. v. STB	374 F.3d 1177	DC	2004	Rev'd	Railroad	Abandonment
Boston and Maine Corp. v. STB	364 F.3d 318	DC	2004	Aff'd	Railroad	STB Jurisdiction
United Transp. Union-General Comm. of Adjustment (GO-386) v. STB	363 F.3d 465	DC	2004	Rev'd	Labor	Rulemaking
Union Pac. R.R. Co. v. STB	358 F.3d 31	DC	2004	Rev'd	Railroad	Transaction
R.R. Ventures, Inc. v. STB	70 F. App'x 239	6th	2003	Aff'd	Railroad	Feeder Line
Union Pac. R.R. Co and Wis. Power & Light v. STB	62 F. App'x 354	DC	2003	Aff'd	Shipper	Rate
Mid States Coal. for Progress v. STB	345 F.3d 520	8th	2003	Rev'd	Environmental	Construction
Borough of Columbia v. STB	342 F.3d 222	3d	2003	Aff'd	Locality	Abandonment
Montezuma Grain Co. v. STB	339 F.3d 535	7th	2003	Aff'd	Shipper	Abandonment
B. Willis, CPA v. STB	51 Fed. App'x 321	DC	2002	Aff'd	Property Owner	STB Jurisdiction
Decatur Cty. Comm'rs v. STB	308 F.3d 710	7th	2002	Aff'd	Locality/ Shippers	Unreasonable practice
Ass'n of American R.Rs. v. STB	306 F.3d 1108	DC	2002	Aff'd	Railroads	Rulemaking
R.R. Ventures, Inc. v. STB	299 F.3d 523	6th	2002	Aff'd	Railroad	Abandonment
Keokuk Junction Ry. Co. v. STB	292 F.3d 884	DC	2002	Rev'd	Railroad	Crossing

2018] Judicial Review of Surface Transportation Board Decisions 31

Case name	Citation	Circuit	Year	STB Aff'd?	Petitioner	Case Type
United Transp. Union-General Comm. of Adjustment (GO-386) v. STB	9 F. App'x 21	DC	2001	Aff'd	Labor	Construction
Fox River Neighborhood Ass'n v. STB	5 F. App'x 1	DC	2001	Aff'd	Property Owner	Abandonment
Commonwealth of Pa. v. STB	290 F.3d 522	3d	2001	Aff'd	Labor/Locality	Transaction
Citizens Against Rails to Trails v. STB	267 F.3d 1144	DC	2001	Aff'd	Property Owner	Abandonment
Swonger v. STB	265 F.3d 1135	10th	2001	Aff'd	Labor	Transaction
GS Roofing Prods. Co. v. STB	262 F.3d 767	8th	2001	Rev'd	Shipper	Feeder Line
CF Indus., Inc. v. STB	255 F.3d 816	DC	2001	Aff'd	Pipeline	Rate
Friends of the Atglen-Susquehanna Trail, Inc. v. STB	252 F.3d 246	3d	2001	Rev'd	Environmental	Abandonment
Erie-Niagara Rail Steering Comm. v. STB	247 F.3d 437	2d	2001	Aff'd	Labor/Shipper/Railroad	Transaction
Union R.R. Co. v. United Steelworkers of Am. v. STB	242 F.3d 458	3d	2001	Aff'd	Labor	Transaction
Ass'n of American R.Rs. v. STB	237 F.3d 676	DC	2001	Rev'd	Railroads	Rulemaking
Kulmer v. STB	236 F.3d 1255	10th	2001	Aff'd	OFA Purchaser	Abandonment
Indianapolis Power & Light Co. v. STB	2001 WL 936364	DC	2001	Aff'd	Shipper	Transaction
Augustus v. STB	238 F.3d 419	6th	2000	Aff'd	Labor	Transaction
Lee's Summit v. STB	231 F.3d 39	DC	2000	Aff'd	Locality	Transaction

Case name	Citation	Circuit	Year	STB Aff'd?	Petitioner	Case Type
Mo. Friends of the Wabash Trace Nature Trail v. STB	230 F.3d 1363	8th	2000	Aff'd	Environmental	Abandonment
Redmond-Issaquah R.R. Preservation Ass'n v. STB	223 F.3d 1057	9th	2000	Aff'd	OFA Purchaser	Abandonment
W. Coal Traffic League v. STB	216 F.3d 1168	DC	2000	Aff'd	Railroad/ Shipper	Transaction
Union Pac. R.R. Co. v. STB	202 F.3d 337	DC	2000	Aff'd	Railroad	Rate
Canadian Pac. Ry. Co. v. STB	197 F.3d 1165	DC	1999	Rev'd	Railroad	Transaction
Jost v. STB	194 F.3d 79	DC	1999	Rev'd	Property Owner	Abandonment
Buffalo Crushed Stone, Inc. v. STB	194 F.3d 125	DC	1999	Aff'd	Shipper	Abandonment
United Transp. Union-Ill. Legislative Bd. v. STB	183 F.3d 606	7th	1999	Aff'd	Labor	Transaction
United Transp. Union-Ill. Legislative Bd. v. STB	175 F.3d 163	DC	1999	Aff'd	Labor	Transaction
Huron Valley Steel Corp. v. STB	172 F.3d 919	DC	1999	Aff'd	Shipper	Rate
W. Coal Traffic League v. STB	169 F.3d 775	DC	1999	Aff'd	Shipper	Transaction
United Transp. Union-Ill. Legislative Bd. v. STB	169 F.3d 474	7th	1999	Aff'd	Labor	Transaction
Midamerican Energy Co. v. STB	169 F.3d 1099	8th	1999	Aff'd	Shipper	Rate
RLTD Ry. Corp. v. STB	166 F.3d 808	6th	1999	Aff'd	Railroad	Abandonment
Int'l Bhd. of Locomotive Eng'rs v. STB	172 F.3d 919	DC	1998	Aff'd	Labor	Transaction

2018] Judicial Review of Surface Transportation Board Decisions 33

Case name	Citation	Circuit	Year	STB Aff'd?	Petitioner	Case Type
Ass'n of Am. R.Rs. v. STB	162 F.3d 101	DC	1998	Rev'd	Railroad	Rulemaking
Ass'n of Am. R.Rs. v. STB	161 F.3d 58	DC	1998	Aff'd	Railroad	Rulemaking
G&T Terminal Packaging Co., Inc. v. STB	159 F.3d 1346	2d	1998	Aff'd	Shipper	Unreasonable practice
Nat'l Ass'n of Reversionary Prop. Owners v. STB	158 F.3d 135	DC	1998	Aff'd	Property Owner	Rulemaking
McCarty Farms, Inc. v. STB	158 F.3d 1294	DC	1998	Aff'd	Shipper	Rate
City of Auburn v. STB	154 F.3d 1025	9th	1998	Aff'd	Locality	Preemption
City of Ottumwa v. STB	153 F.3d 879	8th	1998	Aff'd	Locality/Labor	Transaction
Zatz v. STB	149 F.3d 144	2d	1998	Aff'd	Other	Transaction
Ass'n of Am. R.Rs. v. STB	146 F.3d 942	DC	1998	Aff'd	Railroads	Rulemaking
Caribbean Shippers Ass'n v. STB	145 F.3d 1362	DC	1998	Aff'd	Water Freight Forwarder	Unreasonable practice
GS Roofing Prods. Co. v. STB	143 F.3d 387	8th	1998	Rev'd	Shipper	Feeder Line
Tu v. STB	141 F.3d 1179	9th	1998	Aff'd	Labor	Transaction
United Transp. Union-III. Legislative Bd. v. STB	132 F.3d 71	DC	1998	Aff'd	Labor	Rulemaking
Becker v. STB	132 F.3d 60	DC	1997	Aff'd	Property Owner	Abandonment
United Transp. Union-III. Legislative Bd. v. STB	132 F.3d 1483	DC	1997	Aff'd	Labor	Rulemaking
United Transp. Union-III. Legislative Bd. v. STB	132 F.3d 1482	DC	1997	Aff'd	Labor	Transaction

Case name	Citation	Circuit	Year	STB Aff'd?	Petitioner	Case Type
Neb. Trails Council v. STB	120 F.3d 901	8th	1997	Aff'd	Environmental	Rulemaking
Burlington N. R.R. Co. v. STB	114 F.3d 206	DC	1997	Aff'd	Railroad	Rate
United Transp. Union v. STB	114 F.3d 1242	DC	1997	Aff'd	Labor	Transaction
United Transp. Union v. STB	114 F.3d 1190	DC	1997	Aff'd	Labor	Transaction