January Legislative and Regulatory Report

LEGISLATIVE

Federal Government Reopens

After a 35-day partial government shutdown, the longest in history, President Trump and Congress reached an agreement to reopen all closed federal agencies on January 25, 2019. Around 10:00 PM that same night, the President signed the Further Additional Continuing Appropriations Act, 2019 into law. The bill included a continuing resolution providing funding at fiscal year 2018 levels through February 15, 2019 for the affected agencies.

Approximately 25 percent of the government was shut down when the previous CR expired at midnight on December 21, 2018. Among the affected agencies were portions of the U.S. Department of Transportation. Because both the Federal Highway Administration and the Federal Motor Carrier Safety Administration are funded through multi-year appropriations, indefinite appropriations, or contract authority, they remained open. One fourth to three fourths of employees in the Federal Railroad Administration, the USDOT Office of the Secretary and the Maritime Administration were furloughed, while both the Surface Transportation Board and the Federal Maritime Commission completely suspended all activities.

The most recent CR succeeded in reopening the affected federal agencies but it is only a stopgap measure - Congress will now have to pass a new appropriations bill or CR prior to the February 15 midnight deadline to prevent another partial shutdown. While legislators and the administration work to pass such legislation, both the Senate and the House of Representatives have also introduced bills that would provide for automatic CRs should Congress fail to reach an agreement prior to the start of a new fiscal year. There have been many variations of this proposal – including differing timelines and funding consequences (i.e., funding cuts at 1 percent 60 days after the start of the new fiscal year, with a similar cut every 60 days thereafter). It does not seem likely any of these automatic CR bills will pass.

Rep. Calvert introduces REBUILD Act

Representative Ken Calvert (R-CA) introduced the Reducing Environmental Barriers to Unified Infrastructure and Land Development Act. The bill aims to streamline infrastructure permitting by allowing states to review a potential project’s National Environmental Policy Act compliance instead of federal agencies.
The process is modeled after a pilot program created under the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users. SAFETEA-LU allowed five states to assume NEPA compliance responsibilities for projects under the Federal Highway Administration. According to a press release by Rep. Calvert's office, in participating states “the length of time to complete a project review was reduced by an average of 17 months while also ensuring the goals of the NEPA process were not compromised.”

The REBUILD Act would extend those authorities to all states and to projects under any agency that has NEPA environmental review responsibilities. H.R. 363 does not have any cosponsors and has been referred to the House Natural Resources Committee.

REGULATORY

Positive Train Control Deadline Passes; All Railroads in Compliance

The Rail Safety Improvement Act of 2008 required railroads to fully implement Positive Train Control automatic breaking technology by December 31, 2015. In late 2015, Congress extended that deadline by three years with the option for certain eligible railroads to receive an additional two-year extension.

Following the recent December 31, 2018 deadline, the Federal Railroad Administration provided a progress report on PTC implementation. FRA indicated that all 41 railroads statutorily required to implement PTC systems have reported that they have either fully implemented PTC or properly requested an extension. Four railroads self-reported full implementation on their main lines: the Port Authority Trans-Hudson, North County Transit District, Portland & Western Railroad, and the Southern California Regional Rail Authority (Metrolink). The remaining 37 railroads have requested the additional extension until December 31, 2020.

Based on data submitted by railroads, the FRA reported that the percentage of track segments completed for freight railroads increased from 20 percent in the third quarter of 2016, to 94 percent as of the third quarter of 2018.

Independent Contractor Classification Discussed

The U.S. Supreme Court issued its decision in the case of New Prime Inc. v. Oliveira, ruling that legal disputes between carriers and independent contractors may be resolved through lawsuits instead of arbitration.

In 2015, Dominic Oliveira sued New Prime Inc. for allegedly misclassifying him and other drivers as owner-operator independent contractors rather than employees. Prime
however argued Oliveira did not have the right to sue because his contract with the company contained an arbitration clause. The 1925 Federal Arbitration Act requires interstate commerce disputes be settled by arbitration, unless a “contract of employment” is in place. The Owner-Operator Independent Drivers Association, Teamsters, as well as several states filed amicus briefs in support of Oliveira, while the Chamber of Commerce and American Trucking Associations filed amicus briefs in support of New Prime.

The Supreme Court, in a unanimous decision, affirmed earlier rulings by lower courts that under the FAA the term “contract of employment” refers to any agreement to perform work, therefore including independent contractors. This particular decision did not rule on the matter of employee misclassification addressed in the original lawsuit. Instead, it ruled that truck drivers, whether employees or independent contractors, have the ability to settle disputes through lawsuits rather than arbitration.

Classification disputes have become increasingly prevalent in the trucking industry. Last year a California Supreme Court ruling in the Dynamex Operations West vs. Superior Court case established new and more stringent criteria for a classification test. These new test criteria made it harder for carriers to classify their drivers as independent contractors in the state. The Western States Trucking Association filed suit against this decision in a case that is currently ongoing. In a separate lawsuit, Alvarex vs. XPO Logistics, a California federal judge ruled that federal law preempts that state employee/contractor test. However, this ruling does not set precedent against the test altogether. This would only be the case should the lawsuit, or a similar one, be decided on after reaching the appeals stage.

In January 2019, the National Labor Relations Board issued a new classification standard for determining if a driver is an independent contractor or an employee of the company. NLRB, an independent federal agency, established the ruling in a case involving a dispute between an airport shuttle-van service and its drivers but the standard applies across all workers, including truck drivers. NLRB ruled that the franchisee drivers were independent contractors, not employees. Additionally, the decision stated that NLRB will consider “entrepreneurial opportunity” as one of the key criteria in determining workers’ classification. Some industry experts report that this ruling could make it easier for fleets to classify their drivers as independent contractors instead of employees.