LEGISLATIVE

Senate Approves FY20 THUD Bill; President Signs CR Through Nov. 21

On September 17, 2019, the Senate Appropriations Committee approved its fiscal year 2020 Transportation Housing and Urban Development funding bill, which includes annual funding for the U.S. Department of Transportation. The appropriations bill allocates $86.6 billion in total budgetary resources for USDOT, a $167 million increase from fiscal year 2019 enacted levels.

Similar to the House bill passed earlier in June, the Senate designated $1 billion for the Better Utilizing Investments to Leverage Development grant program. The Senate version, however, stipulates that at least thirty percent of total BUILD funding go towards rural projects while the FY19 appropriations law as well as the House bill require an even split of exactly fifty percent between rural and urban projects. Additionally, the Consolidated Rail Infrastructure and Safety Improvement program acquired $225 million in funding through the Senate bill. Though this is the same amount provided for CRISI in FY19, it is lower than the $350 million proposed by the House. Another notable difference in grants between the two legislative chambers is the budget for the Port Infrastructure Development Programs. In a reduction from last year, the Senate version authorized $91.6 million in total funding versus $225 million provided in the House bill.

To prevent a government shutdown due to funding disagreements for the 2020 fiscal year, which begins October 1, 2019, Congress introduced the “Continuing Appropriations Act, 2020, and Health Extenders Act of 2019.” The continuing resolution extends FY19 enacted funding levels through November 21, 2019. Following its passage in the House and Senate, the CR was signed into law by President Trump on September 26. Lawmakers now have a few additional weeks to pass a full-year appropriations package or another CR.

REGULATORY

OIG Assesses FMCSA CSA Program Implementation

On September 25, 2019, the U.S. Department of Transportation’s Office of Inspector General released a report analyzing FMCSA’s “corrective action plan” to implement new safety standards in its Compliance, Safety, Accountability Program. As required by the FAST Act, the National Academy of Sciences conducted a study in 2017 and made six recommendations to improve the agency’s CSA Program. Following these recommendations, FMCSA issued the corrective action plan in June 2018, incorporating updates to its carrier prioritization methodology, data accuracy, and transparency. Over the last year, OIG evaluated the plan’s ability inclusion of the issues outlined by NAS and
made further recommendations to implement its proposed changes to the FMCSA carrier safety system.

The OIG’s audit, also mandated by the FAST Act, reported that FMCSA’s plan addresses safety interventions, but lacks details on NAS’ recommendations regarding the assessment and transparency of safety measurement system carrier safety rankings, as well as proposals to provide more user-friendly online datasets. FMCSA has been testing a new statistical model to possibly replace the SMS ranking method. The agency stated it would complete its new item response theory modeling by September 30, 2019, and after a full review, decide whether to adopt IRT for the CSA program. OIG concluded its report by recommending FMCSA revise its plan to provide cost estimates and identify benchmarks to further address NAS’ recommendations, as well as continue to build on improvements to its ranking systems and database accessibility.

FMC Publishes Interpretive Rule on Demurrage and Detention Practices

In December 2016, the Coalition for Fair Port Practices filed a petition with the Federal Maritime Commission to examine the fairness of demurrage and detention practices, which led to a public hearing in early 2018. Following the two-day hearing, FMC launched an investigation to further examine the claims relating to these charges. Led by Commissioner Rebecca Dye, the “Fact Finding 28” investigation collected information about how these practices affected the shipping industry.

As part of the investigation, Dye spoke with industry representatives and conducted field interviews at several major ports. The final phase included the formation of the Supply Chain Innovation Team, which aimed to address chassis availability. Concluding the 18-month investigation, Commissioner Dye submitted her final recommendations to FMC. The recommendations included publishing an interpretive rule clarifying the application of detention and demurrage charges, establishing a Shipper Advisory Board to oversee the implementation of these practices, and providing continued support for the Supply Chain Innovation Team.

On September 17, 2019, FMC issued an interpretive rule to provide guidance on their procedures in evaluating the reasonableness of demurrage and detention policies in the shipping industry. In its assessment FMC will consider if these charges, as originally intended, serve as financial incentives to efficiently move cargo. Specifically, FMC discusses applications of the incentive principle related to cargo availability, empty container return, notice of cargo availability, and government inspections. For example, if a carrier is unable to retrieve cargo from a marine terminal because of unsafe weather conditions, port or terminal closures, the container is in a closed area, or government inspections of the cargo, demurrage would not serve as an effective incentive for cargo retrieval. Overall, FMC stated that situations in which the charges are “incapable of serving their purpose,” will likely be considered unjust.

The interpretive rule clarifies that it defines “detention and demurrage” as all charges assessed by ocean carriers, marine terminal operators, or ocean transportation
intermediaries related to the use of marine terminal space or shipping containers. The rule does not apply to charges associated with other equipment, such as chassis. FMC also addressed dispute resolution policies and will consider the existence and accessibility of such policies in their reasonableness analysis. Lastly, FMC discusses the need for well-defined and transparent terminology within demurrage and detention policies. Specifically, they discourage the use of terms like “storage” and “per diem” in order to maintain consistency with international practices.

Comments on the proposed rulemaking are due October 31, 2019.

NLRB Issues Rulings in Misclassification and Unionized Workers Cases

The National Labor Relations Board held that the misclassification of workers as independent contractors, by itself, does not violate the National Labor Relations Act. The Board’s ruling was based on a 2018 case involving Velox Express Inc., a medical courier service and its drivers. The Board applied its recent January 2019 standard, which incorporates “entrepreneurial opportunity” as a key factor in deciding worker classification. It found that the company’s drivers were employees, not independent contractors, and therefore protected under NLRA provisions. Because of this, the Board ruled that the employer violated the NLRA when it fired one of its employees for bringing complaints about the treatment of workers to management’s attention. Three of the Board’s four members held, however, that Velox’s misclassification of its employees as independent contractors did not constitute a separate violation. They stated that “an employer’s communication to its workers of its opinion that they are independent contractors does not, standing alone, violate the NLRA if that opinion turns out to be mistaken.”

In a separate ruling on September 10, 2019, the Board adopted the “contract coverage” standard. The standard provides guidance on whether a unionized employer’s unilateral change to terms or conditions of employment is considered a violation of the NLRA. The Board previously followed the “clear and unmistakable waiver” standard, which has been rejected by numerous federal courts of appeals. Though the ruling relates to a transit union case, transportation policy experts ascertain it will also apply to key carriers contracted under the Teamsters Union. The decision would simplify the process for companies to implement certain unilateral changes to employment policies within the scope of the parties’ collective-bargaining agreement.